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The Constitution as a Continuing Principle in Government

An address delivered by

Ethelbert Warfield, Esq.

at

The College of William and Mary
Williamsburg, Virginia
November 21, 1935

EIGHTH LECTURE UNDER THE
JAMES GOOLD CUTLER TRUST

Williamsburg, Virginia
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College of William and Mary in Virginia, November 21, 1935

ETHELBERT WARFIELD

Names and events, which are only the literary and historical companions of most Americans and to all too many mere vague spectres of things once learned in school, are to you in this place haunted with memories of three hundred years, living people and stirring drama. American history lives here as it cannot hope to live in more than one or two favored spots. While other people speak vaguely of the American Revolution and our great Civil War, to you these events have almost their original freshness, and the Indian wars and Bacon's Rebellion are better known to you than are anything except the names of Yorktown and Petersburg to the great mass of American people wrapped up in the limited but furious pace of modern life.

It would seem a simple thing for me to convince you to whom Patrick Henry and Thomas Jefferson are fellow townsmen, who see each day your hall designed by Christopher Wren, and the beautiful, reconconstructed capital of Colonial Virginia, that all that comes from that era of change and revolution must be accepted by all good Americans as their rule of life and as the one loyalty to which they could not be false. But to talk in such a way would be to insult your intelligence and to fail to appraise the true value of historical approach to any subject. We cannot accept as good that which we would like to think is good for our own ease of mind. We cannot say that because a

thing is old it is good; that even because it has survived it is good. In fact, Shakespeare can make Mark Anthony say without fear of contradiction:

> "The evil men do lives after them,
> The good is oft interred with their bones."

Rather with the wealth of historical knowledge which is your heritage, it makes it impossible for me to speak of the value of that which is old without distinguishing the good from the bad, and you must have presented to you reasons free from passion and able to withstand not only the arguments which are uppermost in men's minds today, but all those which have successfully torn away the pet theories of sincere patriots and demagogs who have sought to impose their theories of government upon free people.

If the Constitution of the United States is only good because it was adopted in a difficult period of our country by great men tempered by years of political oppression and war, then its place is in the lecture room and in the library of the historian and the philosopher. The greatness of its authors and the patriotism that made it possible for them to labor through the arduous days of the Convention will not justify us in upholding it as the fundamental law of the land in this year nineteen hundred and thirty-five.

Only to the extent that it meets the needs of the people in these times can we maintain it as the "first law of the land".

Chief Justice Marshall said:

> "We must never forget that it is a Constitution we are expounding * * * a Constitution intended to endure for ages to come, and consequently, to be adapted to various crises of human affairs."

As we can defend only its application to the problems of the world in which we live, so also there is but one defense against any proposed amendment advocated by the majority of the people, and that of course is that the amendment does not fit the needs of a free people under conditions existing in the world in which we live. Whatever the greatness of the document may be, however much we are indebted to the drafters for the solution of the problem of two governments operating together with clearly defined powers, however much we may believe that the creation of a federal judiciary operating as a check on the legislative and executive branches is the sublimest achievement of free government, still no clause of the Constitution is more important than the provision for amendment of it. The Constitution was given by the people and the people may take it back. The life of the Constitution is the will of the people that it be maintained. To destroy the people's right to amend it as they please is to destroy the whole reason for a written constitution.

The political partisan and the demagog have no interest in studying the Constitution except to find in it language which can be turned to the arguments of the moment. This is good, or that is bad, but they would not have you read too closely, for to do so might wreck their arguments and drive them from the public stage. For our purposes, however, the more we know of the Constitution the better able will we be to answer the real question before us. Shall it continue to be the law by which we are willing to be governed?

That the Constitution is a great document no one will deny. Whatever form of government we may believe in, the time has long since passed when any thinking man would care to put himself in the foolish position of suggesting that the Constitution was inherently

devoid of greatness. But the Constitution as drawn in 1793 and the Constitution as it exists today is not free from flaws. When the Constitutional Convention convened there were present in it delegates of widely differing personalities, many of them not only opposed to the delegates of other states, but bitterly hostile to the other delegates from their own states. Many of them came to the Convention with fixed ideas which they had publicly stated they would not recede from. Of course there were those with personal political ambitions, and those who were not fitted to grapple with the great problem that was presented to the Convention. Sectional jealousies and personal hatreds influenced the Convention almost from the first day. Several of the ablest men in the Convention refused to put their names to the completed document and fought the adoption of the Constitution in their home states. Provisions were written into the Constitution which have been the cause of political debate and civil war. Local demands in outstanding cases forced compromises which have not resulted in good to the country. On the other hand, other compromises infused into the instrument the life which makes it today the oldest written constitution still in force. When the document finally was presented to the country by the Convention it was not only its enemies who believed that there was little chance of its solving the many problems that beset the nation still in its swaddling clothes. Some of its best friends wondered whether the work they had done would even bridge the gap between the chaos of the weak confederation and some future plan that would justify the years of war and anguish through which the country had passed.

Among the provisions that were inserted into the Constitution because of the fear by one group that

another group would dominate it, was the provision that upon the election of the president, the individual receiving the next largest number of votes should be vice-president. This provision was dictated by the fear of certain of the small states that the large states would band together to elect the president, and that if the president and vice-president were elected separately the small states would have no word in the government. The fallacy of this reasoning is now history, and those who insisted upon it were blind to the chaos that might have been caused in the country by the jealousy of a vice-president who received his office only because he was defeated by the president. It is safe to say that no other element in the Constitution was more calculated to cause internal dissension than this. It is a tribute to the common sense of the nation that this provision was so quickly amended. The whole history of the provision of the Constitution in regard to slavery indicates how definitely the drafters were subject to the same trials and tribulations which beset any group, however patriotic, in attempting to "form a more perfect union".

Just as the Constitution itself was not all good or all bad, so the amendments which have been written into the Constitution have in some cases helped the country to prosper, and in some cases have definitely been a hindrance. The first ten amendments, constituting what is generally known as the "Bill of Rights", were adopted in conformity with a promise that if the Constitution were ratified by the States, these amendments would be promptly included in it. These ten amendments contain the chart of liberties without which no free people can hope to remain free. On the other hand, the amendments adopted at the close of the Civil War were, more by the effect of their enforce-

ment than by their actual form, a contributing cause in retarding the recovery of the South at a time when a helping hand would have done much to have cured the scars and bitterness of factional strife.

But if there was much in the Constitution that might well subject its draftsmen to the criticism that they were not wholly and completely honest in their determination to draft a document free from all sectional conflicts, yet there is in it a great rule of government that has made it possible for this nation to develop from a small group of colonial districts into the greatest industrial democracy of all times. The Convention when it assembled had little hope other than that it might be able to patch up the absolutely useless provisions of the Articles of Confederation. It is doubtful whether a quorum could have been obtained if it had been announced beforehand that from this Convention would come a revolution little less far-reaching than that which resulted from the breaking off from England. Actually, the result of the Convention was to contribute to political civilization a principle of government new in form, and one which required that the people who should be governed under it would be both intelligent enough to understand the structure of their government and interested enough in its functions to maintain the duties which were imposed upon them.

De Tocqueville calls it "The most perfect federal constitution that ever existed", and says that in examining it "one is startled at the variety of information and the amount of discernment which it presupposes in the people whom it is meant to govern".

At the time the Constitution was written many of the people in the Convention, and most European observers, believed that the people could not possibly take

the responsibilities that were imposed upon them by the Constitution, and that the result would be that the power would be seized by an individual who would drive the country into some form of absolute monarchy. During the course of the debates there were many delegates who were strongly of the opinion that the rank and file of the people were not prepared to pass upon matters affecting the national government. Many argued that wealth should be the criterion for the exercise of the franchise; others that the lower house, as was later the case with the Senate, should be elected by the state legislatures. There were some who believed that the Senate should be appointed for life, and others that the Senate should be appointed by the executive. Out of this debate came one of the great compromises of the Convention which gave the strength and character to the Constitution which finally caused even the most strongly dissenting states to accept it.

Following the English tradition, the Constitution as drawn, both in its finest clauses and in its weakest points, was the result of a series of compromises. Madison's great conception of federal and state governments operating on the same individuals at the same time but each sovereign within its own sphere, was the cardinal point in the "Virginia Plan" as presented to the Convention. The second great feature of this Plan was the provision for a coordinated system of legislative and executive and judicial branches. Due to the compromise under which the lower house was to be elected by popular suffrage, and the Senate to be chosen by the state legislatures, and other concessions made to various groups, the Virginia Plan developed into a much more liberal Plan than its creators had imagined possible. The Constitution as finally adopted did not follow the Virginia Plan as presented, but it is safe to

say that had this bold Plan not been presented to the Convention, the form of government under which we have been operating for nearly one hundred and fifty years could not possibly have been adopted by the Convention.

Under the Constitution the powers of government are distributed between the legislative, the executive and the judiciary. In each case the distinguishing feature of these branches of government is that their powers are limited powers. In all other forms of government existing prior to our Constitution, one or more of the branches of government held the supreme power. To the extent that the Constitution grants powers to the branches of the government, these powers are subject again to certain general checks. These checks are made necessary by reason of the fact that under the Constitution the power that is given, is given for a definite period of time, so that unless these checks exist it is possible for one branch or another of the government to obtain complete control and so change the organic law as to perpetuate itself in power. This is the great difference between our form of government and the governments which hold office at the pleasure of the legislative branch or the people. Under the English form of government the Prime Minister maintains his power only so long as he has the confidence of Parliament. Parliament in turn is subject to election from time to time and if the people lose confidence in the government, they may elect a new Parliament. If they have confidence in Parliament but not in the executive, they may send back the same group to Parliament who have power to overthrow the executive branch by a vote of lack of confidence. Those who are opposed to our Constitution point to the great power that is given to the judiciary, and use as an

illustration the lack of this power in governments such as France and England. Such an argument is special pleading and ignores the differences between the two systems of government. If our president held office only so long as he was able to hold the confidence of Congress and were forced to resign upon receiving a vote of no confidence, then the need of a veto power over the executive and legislative branches would not be so important. But under our form of government the only restraint that is placed upon the combination of the executive and legislative control is the testing of the acts of these branches by the Supreme Court. This arrangement, it is true, has worked out differently than most of the framers of the Constitution understood that it would, but as we have become a larger and more complex nation, this single provision of the Constitution has done more to permit the country to keep up with changing conditions than any other one; in addition the presentation of the acts of the executive and legislative branch to the Supreme Court has given an opportunity for the country to study in a detached way these acts and thus is provided the healthiest plan for the operation of a government of widely differing peoples that is yet known to man.

We have heard a great deal in recent months about the Constitution being a document of the "horse and buggy" era, made at a time when the country was loosely knit, useful only for people knowing nothing of this complex and industrial civilization in which we live today. An examination of the facts would, as a matter of fact, point in exactly the opposite direction. Had the states continued to be loosely knit, had the jealousies of commercial exchange which were fostered by the weak government of the confederation not been in large part eliminated by the railroad and the tele-

graph, it is almost certain that the federal government under the Constitution would have had little more success than its ill-fated predecessor. The opening of the West and the development of modern conveniences tended to tie the states closer together, to make more prominent the problems that were common and to place in the background the controversies that had previously seemed impossible of solution because of differences so fundamental as to be unyielding. It is then one of the phenomena of our development that many parts of our Constitution fitted the government as it developed better than its framers believed it could possibly fit the problems they had set out to solve.

Woodrow Wilson, in his "Constitutional Government", says:

> "When the Constitution was framed there were no railways, there was no telegraph, there was no telephone. The Supreme Court has read the power of Congress to establish post-offices and post-roads and to regulate commerce with foreign nations and among the several states to mean that it has jurisdiction over practically every matter connected with intercourse between the states. Railways are highways; telegraph and telephone lines are new forms of the post.
>
> "The Constitution was not meant to hold the Government back to the time of horses and wagons, the time when post-boys carried every communication that passed from merchant to merchant, when trade had few long routes within the

nation and did not venture in bulk beyond neighborhood transactions.

"The United States have clearly from generation to generation been taking on more and more of the characteristics of a community; more and more have their economic interests come to seem common interests; and the courts have rightly endeavored to make the Constitution a suitable instrument of the national life, extending to the things that are now common the rules that it established for similar things that were common at the beginning."

Mr. Wilson continues:

"The real difficulty has been to draw the line where this process of expansion and adaptation ceases to be legitimate and becomes a mere act of will on the part of the government, served by the courts. The temptation to overstep the proper boundaries has been particularly great in interpreting the meaning of the words 'commerce among the several states.'

"Manifestly, in a commercial nation almost every item of life directly or indirectly affects commerce, and our commerce is almost all of it on the grand scale. There is a vast deal of buying and selling, of course, within the boundaries of each state, but even the buying and selling which is done within a single state constitutes in our day but a part

of that great movement of merchandise along lines of railway and water course which runs without limit and without regard to political jurisdiction.

"State commerce seems almost impossible to distinguish from interstate commerce. It has all come to seem part of what Congress may unquestionably regulate, though the makers of the Constitution may never have dreamed of anything like it and the tremendous interests which it affects. Which part of the complex thing may Congress regulate?

"Clearly, any part of the actual movement of merchandise and persons from state to state. May it also regulate the conditions under which the merchandise is produced which is presently to become the subject matter of interstate commerce? May it regulate the conditions of labor in field and factory? Clearly not, I should say; and I should think that any thoughtful lawyer who felt himself at liberty to be frank would agree with me."

This problem which Wilson raises is one which every generation has had before it and which every generation must answer, and whatever I have said about the importance of the document fitting the needs of today, as to this one question of how far we want government to go, we have in addition to the responsibility of our own period, the responsibility of what we will pass on to another generation,—for prosperity achieved, liberty attained, dictatorship withheld, are

things that are paid for with a great price. If having gained these things we surrender them, we are placing on later generations not only a government which may not be to their liking, but are leaving to them a condition under which they cannot attain their desires by orderly legislative process, but which will require them to resort to war and years of loss of property if they care to win back what we will have squandered.

The great danger of our form of government is that we will be temporarily influenced by a man of great mental achievement or personal attraction, and that we will give to him power which we would never dream of giving to any other man, and which in the giving we would expect to give in a limited measure by restricting it only to the good which we believe his genius could accomplish. But unfortunately, every power that has ever been granted to a government has been used by it, and once the power has been placed in the hands of government, such power has never been allowed to lapse. No man who has ever become a dictator would in his earlier years have himself believed that he would ever take some of the powers which were eventually claimed by him to be his God-given right.

James Madison says in "The Federalist":

> "The accumulation of all powers Legislative, Executive and Judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

And so, if we approach the question of amending the Constitution at all to strengthen the federal government, our first concern must be whether in doing so we are giving powers we will later want to withdraw, and second, whether our form of government lends itself to successful operation if greater powers are bestowed on the federal government. My own personal view is that the Constitution as written contains in it such elasticity as to permit a fair administration, not solely interested in its own perpetuation, to administer the duties confided to it, and that to increase these powers would be to lead us into at least the temptation of having all of our affairs administered from Washington without regard for the welfare of individual localities.

If, on the other hand, it should appear either as a matter of economics or political opinion, that the federal government needs strengthening, then we should weigh the problem as to whether there is not some way in which in giving additional power to the federal government, we cannot also impose additional checks on the executive and legislative branches. This is a phase of the question that those who seek federal control shy away from because they believe that a fundamental change in our form of government, with some such arrangement as the British, would not be popular. They know that the history of the French government has been particularly unsatisfactory because of the constant changes of ministry. They also know that the people have before them the recent experiences of Germany and Italy under which a dictator was able to use forms of parliamentary procedure to seize power under circumstances which are impossible under our form of government.

But I submit that the strength of our Constitution is in the limited powers and the checks set up for those powers, and we cannot hope to keep the control of our government in the people if we extend the power of their rulers. If we are to have two sets of government—which surely have proven themselves of great efficiency in our period of expansion—we must zealously guard our limited instructions to the government in Washington. There are many who dismiss the writings of John Fiske on the ground that he himself is out of date. But he did not have before him the experiences of Germany and Italy when he wrote:

> "If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the states shall have been so far lost as that of the departments of France, or even so far as that of the counties of England,—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."

If we are to consider changes in our form of government, we must make up our minds what general ideal we are reaching for. Certainly we are not so shallow in our reasoning, so irresponsible as to destroy the heritage paid for at such great price—to throw over the system under which we have gone so

far without knowing what we will have when it is gone.

Our Constitution created a new approach to an old subject, but it did not establish a new system of government.

Former Governor Lowden has recently said:

> "The Communist and the Fascist type of government have this in common, that they both depend upon unlimited power in the head of the State. It was against this kind of government the Declaration of Independence was aimed. They called it then the monarchial principle. In effect, it did not differ from the present Soviet regime in Russia, the Fascist rule in Italy or the Nazi government in Germany.
>
> "There are only two forms of govment, the democratic and the autocratic. No new nomenclature, no new juggling of words, can disguise this fact."

I for one cannot and do not believe the American people will champion any form of government not based on the democratic principle, for I believe with De Tocqueville that:

> "The progress of democracy seems irresistible, because it is the most uniform, most ancient, and the most permanent tendency which is to be found in history."

John Dewey says:

> "Regarded as an idea, democracy is not an alternative to other principles of

associated life. It is the idea of a community itself."

Representative democracy, as we know it in this country, has gone through a series of phases. Our governmental institutions, while molded in part on the British system, were so new as to make it necessary for them to develop as new work was given them to perform. So far in our country we have without hesitation rearranged the powers of these agencies as the needs of the country required. Largely this has been done in the first instance by the executive or the legislature and approved by the Supreme Court. Where the people wished it the changes have come through amendment. There are always those who clamor for quick change and argue that the provisions for amendment do not allow action to be taken speedily. James Russell Lowell was once asked whether these provisions did not sometimes defeat the will of the people. "No," he replied, "never the *will* of the people—only the *whim*."

Abraham Lincoln once reminded the country that if speedy change were thought necessary by the proponents of change perhaps it was because the proponents realized that taking time for counsel would lead to the defeat of the changes they espoused.

I have quoted above Woodrow Wilson's creed of the manner in which progress has been accomplished without doing abuse to our form of government or our national life. Actually, this has been accomplished so far as the judiciary was concerned without any well-founded criticism of interference with the forward movement of the country. If, however, it may ever be shown that the Supreme Court has for partisan purposes overstepped its duties or subjected itself to unconstitutional aims of the executive, then de-

mocracy, as we know it, will require a change in our form of government if democracy is to continue. If a change is not made we will have begun the transition away from democracy. In the various phases of our country there have been conflicting ideas between various forms of democracy. What is generally known as a political democracy—that is, a democracy of form in the election of officers, whether or not these officers operate to maintain a democratic government—has often been in conflict with what is known as a social democracy—that is, the application of democratic principles, however the executive is chosen. There will always be those who believe that social democracy is being destroyed by the observers of the forms of political democracy, and that changes must be made to assure to the people true democratic government. We must always be prepared to meet this criticism, and if the control of the government in one party or group defeats the guarantee of a democratic government to the people, then correction must be made in our fundamental rule of government if such a group or party cannot be eliminated by the machinery set up in our present Constitution. But has there ever been a time in our history when for any appreciable time the machinery set up by the Constitution has not been sufficient to guarantee the rights which we believe are the rights of every free man? If we were to make changes in our government, would we want to destroy any of the rights which accrue to our people under our present form of government? This is the final test that must be made, whether the government be that which we now have, or a government based upon the English, French or any other system. What parts of the rights which we now have would we want to give up? What ones could we add

that are not now guaranteed to us? Some of the rights which have been fought for and which are guaranteed by the Constitution seem to us now to be so much a matter of our fundamental right as not to be worthy of serious consideration. For instance, what politician would dare to suggest giving up the complete freedom of our courts, and yet, the struggle for a free court was one of the most important issues up to the adoption of the Constitution. Certainly we believe that there are times when the rights of property must be temporarily made subservient to the rights of individuals, but would we be prepared to give up the rights which we now hold under the Bill of Rights, which constitute the first ten amendments to the Constitution? Free press, freedom of speech, peaceable assembly, the right of the states to raise militia, the right of people to be secure in their persons, homes and effects, the right to a jury trial in criminal cases, the right of a person charged with a crime to be informed of the nature and cause of the accusation. As we will contend that these rights cannot be taken away from us, so we must ask ourselves whether under any other form of government that we might adopt we could be assured these same rights. Surely we cannot close our eyes to the fact that these things are more definitely assured to us so long as those who rule us are strictly limited in power and so accountable to the very people for whom these clauses were inserted in the Constitution, and that our only guarantee that these rights will not be destroyed is to be found in the control which the people maintain over their own government. Hand in hand with these individual rights goes the distinction between federal and state governments. Without destroying the necessary powers to permit the federal government to exist, we have chosen to limit

the central power and to leave in smaller local units the power over the normal affairs of our daily life.

Franklin D. Roosevelt, in a speech made in March, 1930, has stated this principle of the rights of the states as ably as anyone in the whole history of our country when he said:

> "On this sure foundation of the protection of the weak against the strong, stone by stone, our entire edifice of government has been erected. As the individual is protected from possible oppression by his neighbors, so the smallest political unit, the town, is, in theory at least, allowed to manage its own affairs, secure from undue interference by the larger unit of the county, which in turn is protected from mischievous meddling by the state.
>
> "This is what we call the doctrine of 'home rule,' and the whole spirit and intent of the Constitution is to carry this great principle into the relations between the national government and the government of the states.
>
> "Let us remember that from the very beginning differences in climate, soil conditions, habits and mode of living in states separated by thousands of miles rendered it necessary to give the fullest individual latitude to the individual states. Remembering that the mining states of the Rockies, the fertile savannahs of the South, the prairies of the West and the rocky soil of the New Eng-

land states created many problems, introduced many factors in each locality which have no existence in others, it is obvious that almost every new or old problem of government must be solved, if it is to be solved to the satisfaction of the people of the whole country, by each state in its own way."

Lecky, the historian, writing in 1896, said:

"To divide and restrict power; to secure property; to check the appetite for organic change; to guard individual liberty against the tyranny of the multitude, as well as against the tyranny of an individual or a class; to infuse into American political life a spirit of continuity and of sober and moderate freedom, were the ends which the great American statesmen set before them, and which they in a large measure attained."

If the Constitution still accomplishes these things; if it provides moderate freedom while restricting the power of our rulers; if in fact the three branches of the government can find sufficient authority to meet the needs of the modern world—and be it remembered that in no case has chaos or even a great crisis resulted from the limitations imposed—are we prepared to throw our system out of balance by increasing the power of those who rule us? Are we now to forget the warnings of every statesman from Washington and Jefferson down to our own times, and chance the loss of all we have won by experimenting with the known danger involved in entrusting our liberties to a single individual or group however disinterested they may appear?

What is there in any other form of government we would willingly try that more nearly gives us the rounded government we seek? Reforms come with no greater speed and are assimilated no more easily in England, France or Canada than in the United States. True indeed a dictatorship, if the dictator is benevolent, can more quickly enforce reform than a democracy, but what possible assurance, what single precedent does history give us that a dictatorship will bring good, let alone only good?

Walter Lippman, in discussing a decision of the United States Supreme Court, said:

> "A constitution which is flexible enough to enable governments to deal with a crisis and yet strong enough to withstand temptation to scrap essential parts of it in moments of excitement is likely to weather many storms."

The Constitution of the United States has done this time and time again. It has done so in the difficult period we have just lived through. It is and so long as the people are "competent to understand the structure of their government and their own functions and duties as ultimately sovereign in it, interested as valuing those functions, and alive to the responsibility of those duties", will continue to be a complete and continuing principle of government for this country.

If then there are those who would revise our form of government let them first search their hearts and decide whether they are willing to approach the matter with as great (but no greater) devotion to the public interest as was shown by the Convention which adopted the present Constitution. Let them consider whether they are sufficiently single-minded in their

purpose to go into a new convention agreeing as did the framers of our Constitution to withhold the debates from the knowledge of the people not only until the work was presented to the people but until the people had accepted or rejected their work. Let them decide whether they can adopt as their principle in approaching their problem the words of Washington delivered at the opening of the Federal Convention:

> "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 hand of God."

Any changes approached on this basis, if containing the same percentage of good as the Constitution drafted in 1793, might well receive the approval of the people. Unless we are approaching the end of our history as a free nation no changes originating from any other background will be acceptable to the great majority of American citizens as a substitute for the present Constitution of the United States.

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A Comparison of Executive and Judicial Powers Under the Constitutions of Argentina and the United States

AN ADDRESS DELIVERED BY

ALEXANDER W. WEDDELL
Ambassador to the Argentine Republic

AT

THE COLLEGE OF WILLIAM AND MARY
WILLIAMSBURG, VIRGINIA
APRIL 23, 1937

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BY

ALEXANDER W. WEDDELL
Ambassador to the Argentine Republic

An Address
Before the President, Faculty, Students and Guests of the College of William and Mary
Williamsburg, Virginia
April 23, 1937

Mr. President, Members of the Faculty, Ladies and Gentlemen:

My presence in Williamsburg today is in obedience to a command from the President and Faculty of this venerable and venerated Institution to assemble with them to receive a high honor. And since I can find no words with which to adequately express to them my gratitude for the distinction conferred on me this morning, I can only utter, in my solemn pride, a heartfelt "thank you,"—a thanks which I beg you to believe is "deeper than the lip."

In asking me to address you this evening the President and Faculty do me further honor, if at the same time they lay upon me a heavy burden. For in no place which I have ever known are the atmosphere and surroundings heavier with the memory,—the presence, I should say,—of great ones who have gone

before, than here. Who those great ones are, what names they bore, I have no need to remind you. Therefore, in grasping this second proffered honor, I do so, like the poet's schoolboy, with a "fearful joy," yet in the soothing consciousness that where true learning prevails, indulgence and charity are her handmaidens.

Rudyard Kipling reminds us somewhere that "the sole revenge that maturity can take upon youth for the sin of being young, is to preach at it." I hasten, therefore, to assure my young friends here this evening that I shall have nothing didactic or comminatory to address to them.

I hesitated a long time in selecting a topic for this talk. As I drew nearer to the homeland, with each revolution of the screw of my steamer the name "Virginia! Virginia!" sounded like a drum tap in heart and brain, provoking memories subconscious and ancestral; and I planned an address in which the dear syllables would be repeated with a happy iteration; "Virginia,"—with no pedantic or geographical implications, but as a word symbolizing an attitude toward life,—an attempt to see life clearly and see it whole.

But much in my mind also was the great nation to the south of us in which during the past four years I have labored as the diplomatic representative of our government. And so, in the weeks of travel preceding my landing, realizing that vital constitutional questions are now to the fore in our country, I nursed the idea that a comparison of the Constitution of the Argentine nation with that of the United States, on which the former is based, might not be without interest to you.

And just here, in support of my assertion that Argentine statesmen in drafting their Constitution chose that of the United States as a model, I quote the following declaration of the Chairman of the Committee on Constitutional Amendments to the Buenos Aires Convention of 1860; he said:

> "The committee has been guided in its recommendations by the provisions of a similar constitution, recognized as the most perfect, viz., that of the United States.
>
> "The provisions of this Constitution are most readily applicable to Argentine conditions, having served as the basis for the formation of the Argentine Confederation . . . The democratic government of the United States represents the last word of human logic, for the Constitution of the United States is the only one that has been made for and by the people . . ."

Thirty-four years later we find the Argentine Supreme Court declaring that:

> "The system of government under which we are living was not of our creation. We found it in operation, tested by the experience of many years, and adopted it for our system."

However, such a discussion as the one I had meditated to be adequate should be at least an attempt to show in what ways, with the passage of the years,

the Argentine nation has worked out the problem of the relation between constitutional form and constitutional practice,—in a word, the operation of constitutional provisions almost identical in form with our own under very different conditions.

And in this undertaking it would be also necessary to show that leaving aside the physical environment and economic conditions of the Argentine and the United States, which present certain points of similarity, the political antecedents and traditions of the two countries are fundamentally different.

But no one better than yourselves can appreciate why I shrank before the magnitude of such a task. There came to mind Taine's remark about the critic and Shakespeare. The critic, you will remember, he tells us, is *lost* in Shakespeare as a traveler in the streets of a great city; he is shown a few buildings and told to imagine the rest!

Therefore, before this mental *impasse*,—this gulf separating inclination from capacity,—I decided I might best fulfill the flattering mandate of President Bryan and the Faculty if I limited my remarks to suggesting certain analogies and differences between those clauses of the respective constitutions which relate to the powers of the executive and the powers of the judiciary, in the hope that my words might stimulate some of you to independent study of the whole field. Such a study is well worth your while, for, apart from its intrinsic value as an outstanding work of legislation, the Argentine Constitution provides the best example to be found of the application of English law under Hispanic administration, of the

grafting of a shoot from Anglo-Saxon genius on a stock whose roots grew in Latin soil.

By way of baldest background, I would recall to you the Declaration of Independence given to the world by the United Provinces of La Plata on July 9, 1816. But these United Provinces, despite their name, were sadly torn asunder for many years. Various governing juntas gave way under stress of circumstances to a triumvirate, to be displaced by a supreme director.

Finally, in 1829, there appears on the stage of Argentine history a sanguinary figure,—Juan Manuel Rosas. Becoming Governor of Buenos Aires, he inaugurated a period of personal rule known in Argentine history as "The Tyranny," which lasted until 1852, when, following the defeat of his army, he fled the country, never to return.

In 1853, the year succeeding the flight of Rosas, there met in the city of Santa Fe a group of outstanding men charged with the duty of drafting a constitution for the Argentine nation. The result of their labors, based on our great charter, remains today, with amendments made in 1860, 1866, and 1898, the palladium of the people's rights.

These delegates were not representatives of united states or provinces, but of the Argentine nation.—"We, the representatives of the people of the Argentine nation," reads the preamble.

Let us now consider the clauses of the Argentine Constitution referring to the executive and judicial power—to which I have alluded as being the subject of my remarks.

In any consideration of the position of the ex-

ecutive under the Argentine Constitution as compared with our own, it should be borne in mind that, as a political philosopher once observed, the Anglo-Saxon mind is essentially legislative, and the Latin mind essentially executive. Argentina inherited from Spain traditions of a vigorous executive, accustomed to act without consulting any other authority, and dominating the legislative authority whenever brought into conflict therewith. The idea of an executive subordinated to the legislature was completely foreign to Spanish ideas of the eighteenth century, and through the past hundred years in Argentine history the supremacy of the executive over the legislative authority has been characteristic of the political development of the country, both in provincial and federal governments.

The Argentine Constitution declares that "the executive power of the nation shall be exercised by a citizen with the title of 'President of the Argentine Nation.' " The remaining clauses under this head in general follow those of the United States, but go beyond them, for it was the desire and the intent of the framers of the Argentine Constitution to grant far greater power to the executive than is granted under our own, to the end that he should be able to maintain national unity. On the other hand, at the time of the adoption of the Argentine Constitution the country was still staggering under the shock of the Rosas dictatorship; and since this could not be quite forgotten, the result was a grant of great power, coupled with numerous provisions intended to prevent its abuse.

Some of the clauses which depart from the Ameri-

can model may be appositely cited: The President may not leave the country, or even the capital, without the consent of Congress; should he do so, the Vice-President becomes President *pro-tempore*. Again, an Argentine President must be a member of the Roman Catholic Church, with all the conservative implications of such allegiance. He must have an income of approximately two thousand dollars. He must be a native citizen, or, if born abroad, the son of a native citizen. (The inclusion of sons of native Argentinians born in foreign lands as presidentially eligible was deemed advisable primarily because of the great number of patriots who had been driven from the country under "The Tyranny," and whose sons, in consequence, had been born abroad.) The moderate income requirement inserted in this article serves to illustrate the conservatism of the men of 1853 who dominated the Santa Fe convention.

A fierce parliamentary debate was waged over the provision that the President and Vice-President be members of the Roman Catholic communion. Some pointed out that it was contrary to the liberal spirit of the day; others maintained that the proviso was unnecessary, since the overwhelming majority of the inhabitants of the nation were, as they are today, Roman Catholics, and would naturally elect a member of their own faith to the highest office of the nation. Still others argued vehemently that the very fact of Roman Catholic numerical superiority in Argentina made it necessary for the welfare of the country to guard against the possibility of any but a Roman Catholic becoming President; and, as is seen, this latter view ultimately prevailed.

The period of office of the President and Vice-President of Argentina is six years, and they can not be re-elected without the interval of one term. In this provision we again see uneasiness over the possibility of a dictatorship. (And just here I may mention that in Argentine legal and journalistic circles the proposition recently advanced looking to extending the term of the President of the United States to six years, without the right of immediate re-election, is being followed with great interest; there seems to be a consensus of opinion in Argentina that the six-year term presents many advantages over quadrennial periods).

As in our country, the President and Vice-President are elected by presidential electors from each province chosen by direct votes of the people.

A noteworthy deviation of the Argentine Constitution from its American model is in the provision that the President shall take part in the framing of laws, in addition to approving and promulgating them. Hence the President, who is, or should be, in a better position than any one else to know the needs of the country, is permitted to frame and to introduce into Congress such measures as he may deem advisable, instead of making mere suggestions and recommendations, leaving it to friendly Congressmen to prepare measures which may only in part meet his wishes. Since the Argentine viewpoint is a flat recognition that good government implies sympathy and good-will between the executive and the legislature, it is unreasonable from this viewpoint to expect adequate enforcement of laws by a branch of the government which had no hand in their making and which may be out of sym-

pathy with them. The authority thus conferred on the President to initiate legislation would seem to possess certain obvious advantages over our limitation of his powers to making and sending messages on the state of the Union!

You will recall that the President of the United States, with the consent of the Senate, names all officers whose appointment is not otherwise provided for by the Constitution. No such limitation exists in the case of the President of Argentina. He can thus exercise a tremendous power, and is enabled to resist attempts of the legislative authority to encroach upon executive prerogative. And if critics have pointed out that from time to time there has been abuse of this exclusive appointing power, the question arises whether the requirement of senatorial approval would mean much more than that a greater number of politicians would share in the distribution of offices among faithful henchmen.

Again, the Argentine President has power by himself alone to appoint as well as to remove the members of his cabinet. This seems an entirely reasonable and logical provision, when the intimate nature of their official relationship to the executive is considered.

(This power of removal of members of the cabinet was also granted to the President under the Constitution of the Confederate States.)

An essential point in the Argentine Constitution of 1853 is found in provisions requiring that all Acts and Orders of the President be countersigned by a member of his cabinet. This reflects an uneasiness on the part of Argentine political leaders, to be remarked from the earliest period, lest the executive

escape a measure of responsibility unless responsible ministers joined in his acts. Here we see an extraneous inflow, for a similar safeguard appears in the French Constitution of 1791.

It is thus to be remarked that under the Argentine political system cabinet ministers occupy a distinct constitutional position, whereas, as is well known, our Constitution is silent on this point. It would seem from this constitutional provision relating to Argentine ministers of State,—that each "is responsible for the acts which he authorizes,"—that some attempt would have been made to bring them under the control of the congress, in order that responsibility might be fixed. However, Article Sixty-three of the Argentine Constitution, which authorizes each house to require the presence of the ministers of the executive power to receive from them "explanations and information which may be deemed necessary," can hardly be said to achieve this purpose, since on at least one important occasion the minister in question refused to be interpellated, and contented himself with a declaration of his policy! Yet this provision of the Constitution does give the President the opportunity to have present in the sessions of the Congress a member of the cabinet ready at any time to set forth his position. In practice, therefore, a bill initiated by the executive power need not be left to the hostility or indifference of the Congress, but may be defended on the floor of either house by a member of the cabinet. Just here you will recall the provision in the Constitution of the Confederate States authorizing Congress by specific law to grant "To the principal officer in each of the executive departments a seat upon the

floor of either, with the privilege of discussing any measures appertaining to his department."

From what has been said it is evident that the Argentine constitutional system is essentially presidential, and this is a completely logical flowering of national political genius, since the political ideas of the Argentine people, inherited from Spain, led them instinctively to support the executive as against the legislative authority. And it is to the executive that the people have always looked for great reforms. This is well illustrated by the action of President Roque Saenz Pena, who brought about the enactment of a new election law making voting obligatory and providing for the secrecy of the ballot. The result of this law was to bring into Congress new and independent forces which have shown their influence, and which have marked a new epoch in the political development of the Republic.

The Argentine people have never been afraid of conferring great powers on their chief executives; at the same time they have endeavored, as suggested, to provide safeguards against an excessive and arbitrary use of the powers thus granted. Political leaders and others in the United States would seem to have had a somewhat contrary view. And in this connection it seems apposite to quote from two great political philosophers concerning the position of the President of the United States.

Woodrow Wilson, a number of years before becoming President, wrote:

> "The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the

limit; and if the Congress be overborne by him it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him, and the Congress has not. He has no means of compelling Congress except through public opinion."

James Bryce, discussing the power of the executive, in his great work says:

"It used to be thought that hereditary monarchs were strong because they reigned by a right of their own, not derived from the people. A President is strong for the exactly opposite reason, because his rights come straight from the people. We shall have frequent occasion to observe that nowhere is the rule of public opinion so complete as in America, or so direct; that is to say, so independent of the ordinary machinery of government. Now the President is deemed to represent the people no less than do the members of the legislature. Public opinion governs by and through him no less than them, and makes him powerful even against a popularly elected Congress."

Bryce continues:

"Although few Presidents have shown any disposition to strain their authority, it has often been the fashion in America to be jealous of the President's action, and to warn citizens against what is called 'the one man power.' General Ulysses S. Grant was hardly the man to make himself a tyrant, yet the hostility to a third term of office which moved many people who had not been alienated by the faults of his administration, rested not merely on reverence for the example set by Washington, but also on the fear that a President repeatedly chosen would become dangerous to republican institutions. This particular alarm seems to a European groundless. I do not deny that a really great man might exert ampler authority from the presidential chair than most of its occupants have done . . ."

Concluding, this great authority says:

"But it is hard to imagine a President overthrowing the existing Constitution. He has no standing army, and he cannot create one. Congress can checkmate him by stopping supplies. There is no aristocracy to rally round him. Every State furnishes an independent centre of resistance. If he were

to attempt a *coup d'état* it could only be by appealing to the people against Congress, and Congress could hardly, considering that it is re-elected every two years, attempt to oppose the people. One must suppose a condition bordering on civil war, and the President putting the resources of the executive at the service of one of the intending belligerents, already strong and organized, in order to conceive a case in which he will be formidable to freedom."

Let us turn now to those clauses of the Argentine and United States Constitutions which refer to the judiciary:

With those of our own Constitution you are familiar in their general lines, while recent discussions of this subject in the press and elsewhere should have added to,—or clouded,—your knowledge of it.

The organization, jurisdiction, and powers of the federal judiciary of Argentina follow closely those outlined in the Constitution of the United States. Article ninety-four of the Argentine Constitution is similar to Section 1, Article 3, of our Constitution. It provides that

> "The judicial power of the nation shall be vested in a supreme court of justice and in such other inferior courts as Congress may establish in the national territory."

As was intimated in our examination of the executive authority,—that in earlier days the legislative power was largely subservient to it,—so, in considering the Argentine judicial system it must equally be borne in mind that neither in the historical background of Spanish tradition nor in the early political development of the country is there evidence of the existence of an independent judicial authority sufficiently strong to assert itself as against the executive. In fact, as has been indicated by an outstanding modern scholar, Dr. L. S. Rowe, to whom I am greatly indebted, the history of Spain during the eighteenth century both at home and in the colonies is a record of the complete subordination of the judiciary to executive control. It flows from this that the problem confronting the people of Argentina was totally different from that with which the people of the United States had to deal. The United States inherited a system in which the foundations for the development of an independent judiciary had been already laid. In Argentina, on the contrary, there was a long struggle between the executive and the judiciary, resulting in the ultimate freeing of the latter from a subservient position and the attainment of its present high independent character.

Examining now the Argentine Supreme Court, it may be pointed out that the number of justices is five. Retirement is voluntary. Any time between the ages of fifty-five to sixty-nine the justices may retire, provided they have completed thirty years in the federal service. (By this is meant any position in the civil service of the federal government; it would not include service in the Argentine Congress, army, or

navy.) On reaching seventy a justice may retire, provided he has served ten years in federal service. On retirement a justice receives a pension equivalent to that of his former salary. Justices hold office during good behavior but may be removed therefrom under conditions precisely the same as those affecting justices of the United States Supreme Court. While the Argentine Constitution of 1853 provided for nine justices, the present court, whose creation dates from 1863, is composed of five justices whose number has never been changed. The present Chief Justice is aged fifty-six; the aggregate age of the five justices is two hundred and ninety-seven years, an average of just over fifty-nine years.

The court chooses its own Chief Justices, and possesses the powers equivalent to those of the United States Supreme Court with regard to passing upon the constitutionality of any federal, provincial, or municipal law. No decision of the Argentine Supreme Court in this respect has ever been disputed. The court may on occasion declare a portion of a law unconstitutional, whereupon the executive may submit to Congress for enactment that portion which received the tacit approval of the Supreme Court.

The various influences at work in the attempt to erect a free government upon the ruins of an absolutism, which so long crushed the people of Spain and her subjects abroad, is plainly evident in the Argentine legal fabric. Furthermore, let us keep in mind that in countries accepting the Roman law the executive branch of government was the dominating element, while under the common law it was the legislative power. In other words, administrative control in

general characterized Roman law nations, while legislative control has characterized those having the common law. Centralization is therefore natural in Argentina, and its initial problem now, as formerly, is to democratize a government with centralized tendencies; in other words, to develop democracy from the top down, or the reverse of the process in the United States and England. And if one may dare to prophesy with regard to this great country, it would be that in Argentina, where there is familiarity with French political history and experience there will be evolved with the passage of the years, in orderly steps, a government of the French type,—a centralized democracy. And here, merely as illustrative of the influence of the Roman or French judicial concepts on Argentine law, it may be pointed out that under Clause 102 provision is made whereby the Congress may designate where offenders against the law may be tried for offences committed beyond the boundaries of the nation. Ordinarily, however, the trial of a criminal case is held in the province in which the act is alleged to have been committed.

The matter of procedure under Argentine law has been a frequent topic in my conversations with Argentine lawyers and jurists. These seem to be of one mind in considering that Argentina is still struggling under the burden of an unwieldy system, inherited from Spain, and that reform is necessary. Both in the federal and provincial courts procedure is exceedingly cumbersome compared with either American or European countries, and the courts are behind in their docket. One cause of this doubtless arises from the fact that there is practically no oral procedure;

everything must be reduced to writing, including the testimony of witnesses.

But when the high character and capacity of the judges of the Argentine Supreme Court and of the Buenos Aires bar is borne in mind, it can not but be anticipated that essential reforms will come with the passage of time.

In closing these unpretentious observations of a layman, there comes to mind a remark of an English statesman to the effect that public speeches have their use—or justification—"if they lead men to dwell on thoughts of service to their country and of help to one another." I confess that the motive inspiring my words today is the desire to provoke in your minds a "high curiosity" to know better the great country to the south of us,—now my temporary home. Such study would be a form of service to both countries.

After all, Argentina and the United States are set on the same course. Our goal is the same. Our methods of traveling may sometimes be different, but our paths run parallel. And the root of any differences which may occur at any time between the two peoples is the root of most of the trouble in the world—ignorance. And because it is an essential object of this great College to eradicate ignorance in all its protean forms—including that which sunders peoples who should be closest friends—I rejoice in its existence and its continuance (as I do, may I add, in the privilege of being within its gates tonight).

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The Crisis of the American Constitution

An address delivered by

WILLIAM YANDELL ELLIOTT

at

The College of William and Mary
in Virginia

TENTH LECTURE UNDER THE
JAMES GOOLD CUTLER TRUST

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The Crisis of the American Constitution

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THE CRISIS OF THE AMERICAN CONSTITUTION

Dr. William Yandell Elliott

President Bryan, Ladies and Gentlemen:

It is a very generous yet a difficult introduction that your President has given me. I come back with great pleasure to William and Mary, and yet I always face an introduction by President Bryan with a certain amount of trepidation—to say nothing of your camera flashlights! I am enough of a Southerner to recognize the real oratorical tradition when I hear it, and you have been just listening to it in your President's introduction. What he said to you about my remarks I can at least bear out in the analysis that he has made as to what I think the crisis of the Constitution is: It *is* fundamentally a crisis of American citizenship—a crisis of citizenship in a world which is very rapidly turning to those religions of the State that he has just described in such moving words.

After all, the crisis is not for us, as that of Rome is, the crisis of a dead culture. I am standing at the present moment in the middle of a College which contributed, I dare say, more than any other educational institution in the country to the formation and development of the Constitution of the United States. I don't have to recite to you the fact that no less than four of your own students took part in that convention; that the Virginia plan, which was the very basis of the whole document, proceeded from the hands of William and Mary men, notably Randolph and Wythe; nor that McClurg and Blair, through

that long session contributed a maturity of wisdom to all the discussions. The development of that document into a living Constitution at the hands of Wythe's student John Marshall is a great tribute to the tradition that William and Mary had built up even at that early time in our country. As a professor at Harvard I suppose I ought to feel some shame by the implied comparison of this record; but as a Southerner I rejoice in it. And, it is a peculiar pleasure to find that tradition is today still maintained under a leadership as inspiring as you have here in your Wythe School of Citizenship; and that Southerners in particular, and Virginians most especially, are concerned today with what is happening to the Nation and what is happening to its fundamental charter.

After all, the Constitution of the United States is a symbol of our own national life and being. We have not a king or a crown nor do we want them. George Washington might readily I think maintain that the Constitution is what he hoped it would be: "Let us raise a standard," he said to the convention over which he presided, "to which the wise and the just may repair. The event is in the hand of God." We know now from recently presented historical evidence that many members of that convention wished to make Washington a sort of uncrowned King—a strong man to restore unity to the distracted confederation. He might have turned the country in that Cromwellian direction. He put by the chance to become a Caesar, as he always put by temptations of that sort. He inaugurated a republic in the country that we now live in, dedicated to the principles that constitution stands for.

One of the great principles of the makers of our Constitution was a frequent recurrence to funda-

mentals. Let us to-day fearlessly follow their example. But first it is important in a time like this that we take some stock of our own situation in the world we live in. We are always talking about "times of crisis," but surely there was never a better justification for those words than at the present moment. I remember a toast that the French Ambassador to Washington, M. Claudel, who was a considerable poet among other things, proposed way back in the days—it seems way back, now!—in the days of the Hoover Moratorium,—when the French were hoping to get rid of the burden of the War Debt. He proposed a toast: "Here's to the little pause between the crisis and the catastrophe, for we live in it,"—and we do.

A Frenchman today must have that feeling in a sense that he has not had since the days of 1914, and he may have reason to feel that the present crisis is even more dangerous to the inner life of France than the shock and trial of the great War. An Englishman, sitting uneasily on about a fourth of the World's useful land surface,—a fifth of its total land surface perhaps, and in an empire that rules about a fourth of the World's population, that controls most of the great natural resources that lie outside the boundaries of the United States and Soviet Russia,—the lion's share as is well said,—an Englishman today, must have a deep feeling of insecurity for that empire. Perhaps that uneasiness penetrates even beneath the smug level that has been bred up by generations of mastership in the world, for he must know that his empire is being tested; and that whether or not it is to follow the courses of other empires of history will very largely depend on the decisions that are being made at this very time.

The democracies of the whole world are on the

defensive. The timing of the brutal and absolutely ruthless thrusts that are being made at one point or another by the unholy trinity of the dictatorships of the "have-not" powers is a matter that must give concern to anyone who views the future of the world and asks whether the principles to which we are dedicated as a nation can endure. Yet these are the principles for which our Constitution stands, which our daily life permits us to enjoy—*freedom of thought* in school, in university and college; that amiable kind of citizenship with its give and take, which lives and lets live, tolerating differences of opinion and arriving at settlements through political rather than violent means. It is that freedom which permits me to stand before this microphone and express sentiments that are absolutely uncensored by any one. I tell you those things are in danger in the world.

Nor is it simply that they are in danger abroad. The reason I say that they are in danger at home is this: in a time of world crisis, such as the one in which we are living, the very nature of Government undergoes a profound change, just as it does during a war, and to almost the same degree. The underlying sense of insecurity in which people exist breeds that change within every nation. We are readily accustomed to talking about recessions, depressions. We take more or less for granted the typical character of the recurrence of these periods in which want follows prosperity. It is an old story, in something of the fashion that Joseph saw in his interpretation of Pharaoh's dream, though Heaven knows we have not had the seven fat years yet! But, those things go very deep when hundreds of thousands, and hundreds of millions of people, taken over the world as a whole,

are feeling disturbed and at a loss to know how to make honest effort count.

The very nature of our industrial processes brings the necessity of organization on so large a scale as, I am convinced, we must have for the benefits of modern mass production. I don't believe we can go back,—break up at this time that large scale organization which we have built up in this country both for research and for marketing, and, for that matter, for the security of labor itself. The nostalgia for small scale business and for an agrarian simplicity is understandable. It has a romantic appeal. But it is a flight from reality in our present day world. It is frequently the case that large scale organizations have a better ability to plan and to forecast and to produce with the efficient division of labor. I don't mean that the existence of giant corporations in every branch of American industry is either essential or desirable. But I do mean that we are living in a super-industrial civilization which we can no more reject than King Canute could stop the tide from coming up. If we did reject it, we would be trampled down in the march of civilization by nations which were prepared to master that great beast, the machine, and go on.

I belonged in the years just before and after the World War to a group of youngsters who used to consider themselves poets, in the South, the Fugitive Group as they called themselves. Many of them have achieved national reputations to-day, well deserved. In later days they have been crusading against the machine in the interest of agrarianism. Books like "I'll Take My Stand" have been succeeded by "The Land of the Free," etc. I like farms—I support a farm myself—it doesn't support me; I support it. I suspect that most farming by those who prefer the agrarian

gospel today is like that. If you are able to afford it. I am convinced that farming, "gentlemanly" farming if possible, is the good way of life. But I don't believe we can reverse the hands of the clock and turn backward. We have got to learn how to master the kind of machine civilization we are living in. And that machine civilization, because it has taken away the tools of production from the individual, has created a profound sense of insecurity that can only be managed socially through social security, through collective effort, and I dare say, on a national scale.

Now that is the first thing: We face an irresistible demand, an internal demand for social security, and on a *national* scale. Where is our federalism, our indestructible union of indestructible states? The question is rhetorical but the answer is painfully plain: The states are in Washington, hat in hand, asking for more relief and getting it at the price of a more centralized, a more national system.

Yet the external aspects of this matter are even more threatening if you consider them honestly. What are the ultimate objectives of the dictatorial systems of the "have-nots" in this world? Can they be placated by concessions that will undo the Treaty of Versailles, which we are all glad to see go down the drain? Is Hitler to be satisfied, as so many of England's ruling class seem to think, with a slice, oh only a very tiny slice, of their Colonial empire? Will Mussolini, for example, remain quiet in the act of attempting to digest, rather like a boa constrictor, the somewhat huge bites of territory that he has taken to himself in Ethiopia and the ones that he undoubtedly contemplates taking in Spain and northern Africa,—whether by influence or directly so, is of little matter? Will Japan bog down in China, as many people think, and remain

bogged down and be rendered helpless? I doubt very much that this happy inertia of the sated will be the outcome, if the "have-nots" get their way. Wishful thinking would lead me to hope it, but I believe there is a profound inner cause of self destruction in these systems: Dictators who have promised their nations the moon, can never stop arming to get it. They are driven on by an inner compulsion, always farther and farther. Every concession that is given them merely whets the appetite for more, because the dictator must release the dissatisfactions that grow up under the tightening of the belt inside the nation. Instead of butter, he gives his people cannon—painful substitutes. Rearming comes out of the lowered power of consumption of his people. He must release their resentment by turning to outside enemies when he no longer has inside the scapegoat of Jews or something of that sort, and scapegoats don't last forever. In other words, the very nature of that planned system of totalitarianism leads on and on into a world of "living dangerously" in which there is no end to the road but war. Machiavelli put it and Mussolini today re-echoes it: "Expand or perish." I don't think the "or" is the proper conjunction. It should be "Expand *and* Perish" and that will mean the destruction of a great part of what we know as Western civilization in the holocaust.

Now, what is our situation in the United States, confronted by that kind of a picture? We see the weakening of all those barriers, which we have been inclined to take for granted, of our own ultimate security. That fact comes closer home every day in Latin America and in Central America and in Mexico. We are beginning to feel repercussions from the drive of these hungry powers in regions that lie well within the sphere we are accustomed to treating as being protected by the Monroe Doctrine.

And what is more than that, the contagion of the idea of dictatorships is abroad; and there *is* a contagion in ideas. When people feel profoundly insecure in their daily lives; when through inflation a middle class has been wiped out; when a nation has suffered humiliation, and wishes to forget it or to escape from it in dreams and delusions of grandeur; when it feels the futility of its own political institutions, that nation is ripe for a dictatorship. We do not believe—I do not believe, those conditions exist in the United States today. We are not leaderless in the United States; we have not gone through the wringer of inflation and I pray that we may be spared it—though one of the points I am trying to make today is that we must look into the fundamentals of our constitutional system in order to spare ourselves. Nor do I believe that we are humiliated,—on the contrary we are perhaps the cockiest people in the world—too much so I think. We agree on our superiority among ourselves and would like others to be able to see it, too. We don't know what it is to be licked in a war. If we were licked, we wouldn't know it, even then. It was only the fact that we didn't know we were licked in the War of 1812-1815 that enabled some of my own tribe to lug their long rifles down to New Orleans and lick the British after the Treaty of Peace had been signed. We don't suffer from the kind of an inferiority complex that is conditioning the action of Germany, Japan, Italy and many other nations.

And we haven't the feeling of futility about our political institutions. Perhaps when we begin to pay our bills we may feel otherwise.

But there are some aspects of these threats that come home to us from both fronts, the inner front and the outer front. When the world is re-arming,

as it is today all over the world, it means that ordinarily we get into a state of war psychosis where fear dominates every action. We haven't come to that point yet. But we are passing bills, and rightly passing bills in my judgment, in the billions of dollars, for naval defense and for armies. We are straining the resources of our system, though not yet to the point that the British and French are doing, to get ready for "the day." There is already an "M" Day Bill in Congress, a Mobilization Day Bill—rather wrongly called a bill "to take the profits out of war". This latter pious aim figures in the last part of the bill and only in terms of something "for future study." But that bill would set up something like a totalitarian state in this country. I think possibly it would have to, during a war. We did something of the same sort in a modest way during the last war. Am I wrong then in feeling that the shadow of war hangs very heavily over this nation today?

Mind you, I don't regard the Byrnes Bill for the administrative reorganization of our federal services, that has been so bitterly and, I daresay, maliciously, assailed, as in any way containing the possible threat of dictatorship. I want to put myself on record on that and come back to it. On the contrary, it is merely giving to the Executive of the United States those powers that under the Constitution he must have to execute faithfully the law, and which under the Articles of the Constitution governing the separation of powers, any President needs and must have. They are powers which President after President, as Mr. Hoover was honest enough to say the other day, has tried to get in vain from Congress, because of the nature of our pressure politics and spoils system. From Taft's time on, every President of the United States has been rebuffed.

I say I don't regard the Reorganization Bill as a threat, but I do point to you that the nations that are headed toward war are going to have to alter their forms of government in order to centralize power. A nation preparing for war, a war on poverty or a war against external enemies is like an army: there has to be staff work. The idea of a "general staff" inevitably begins to function in government under those conditions. Unless we can meet these demands under democratic, and Consititutional terms we may one day find ourselves meeting them under quite other terms. In other words, in my judgment, it is better to anticipate and to prevent this trend from getting out of hand, if we are to maintain the constitutional tradition that the men of this College attempted to establish when they put into effect in that final crisis that they were facing, the Virginia plan for *national* government that could *govern* and could *govern responsibly*.

Now, how is this to be done? What are the things that we face today in our constitutional system that are threatened—what remedies can we take?

I want to suggest that our system needs revision today first in respect to our federal units of government and second by bridging the gulf between President and Congress by means of a general election.

First of all, what is the American Constitution that I have been talking about here? Many of you may think that I mean only the document that came out of the Constitutional Convention. That document was ratified by conventions in the states after long and very brilliant and interesting debates and a rather bitter struggle, and it has been amended twenty-one times, and will be still further amended, I hope. No, I mean something more even than that. I mean the constitutional system of the United States

as it works. That is the true constitution of any country: the working system that has grown up about fundamental law.

There is nothing in the Constitution whatever that says the President shall be elected in the way that he is. The Electoral College has been gradually changed by usage into agents who are absolutely instructed—delegates and not men with individual discretion. You may regard that, and I do regard it, as perhaps a mistake. But it has happened. The usages of our Constitution, the practices, and there are many of them, determine what the system is and how it works.

One of the most important of those usages is the power of the judiciary in the system, which I think was intended by the men of the Constitutional Convention, to function as a protection of genuine fundamentals, but not in the extreme form of judicial censorship that it has become at times in our history. The power of judicial review was, in my judgment, and I have placed a good deal of study on that—deliberately intended, but I don't think it was ever intended that the judges should set themselves up as censors of all social policies. The early justices said that in the clearest language, in decisions of about 1795. Chase and Cushing put it very well, in terms about like this: We ought to remember that the right to declare a law unconstitutional, if it exists in our system [and it had not yet been exercised at that time] in respect to a Federal law should be exercised "only in a very clear case." That is an important self-denying ordinance which I recommend to the judiciary and which I think the judiciary is probably going to follow in times to come in this country. Subject to that reservation, I think that there is no

more important bulwark of our liberties than an independent judiciary. It is one of the things that is regularly attacked by every dictatorship in order to bring law under arbitrary control.

While I could sympathize with the distress that Mr. Roosevelt felt at the kind of decisions that the majority of the Supreme Court were giving him a year or two ago, I did not feel sympathy with the method by which he proposed to remedy them, and I think the same feeling of uneasiness about the use of a round-about method of what amounted to packing the Court, was a very sound indication of the attachment of Americans to their Constitutional system.

Now, the crisis has for the moment passed. It leaves behind it though certain questions which I should like to raise with you about the future of the judiciary. Our Constitutional System is not only what the judges say it is, but what the amending power can make it, and what usage will make it. Today I want to lay before you the suggestion that what we have to avoid is *changing our whole system just by usage—by usurpation, by the necessity of twisting a document into distortion.* We need, on the contrary, to bring to bear upon its orderly and constitutional amendment, in certain features, the best thought that this country can produce, and the same kind of effort that went into its creation a hundred and fifty years ago.

Of course there are still parts of this country that don't believe that this is a *nation* even today. Virginia, the Old Dominion, I think is no longer one of them. We have, I think throughout the South, generally speaking, accepted the fact that we are a nation. Not that the Civil War settled that for us. But our acceptance of national unity arose from a

growing conviction that has come about through our own contribution to the nation. If there is a part of the country today that is secessionist it is probably in New England, and most particularly in Vermont and Maine. (I trust they will not hear in Boston over these air waves the remarks I have just made!)

But this is a federal country in spite of being a nation, and the protection of the rights of the states and of the reality of those rights depends upon having in the working of the State governments the possibility of solving the problems that those state governments have before them. That is the first main point in the actual work of our constitutional system that I raise to discuss with you. Can we, through the existing mechanism of the states, hope to have areas adequate, politically and economically, to the burdens put upon them? Isn't it precisely the fact that those areas are *not* grouped in a way that is adequate to that purpose which is fatally transferring everything to Washington,—a tendency that I certainly feel is very dangerous. But I don't see any remedy for it as long as we are dealing with areas like the states in their present form. New England is a real area today, and it would be most useful there (I can say it here; I hope that my voice is not carried by this microphone back there), it would be most useful to have the city of Boston, for instance, dominated by a New England region rather than have the city of Boston politically dominating the politics of the Commonwealth of Massachusetts to the degree that it does. It will be most necessary, perhaps, in the future of our country to get the great metropolitan areas of this country balanced and perhaps overbalanced by back-country. But I daresay, from my backwoods Tennessee point of view, if you don't

mind, President Bryan, the great part of this country outside the few largest cities is sounder in American tradition than the metropolitan areas are ever likely to be, though New York seems to be on the up grade. In that respect, I am afraid that I share somewhat Jefferson's distrust of urbanization. I think the problem of dealing with urbanization is very largely a problem of balancing the political powers of this country in regional groups large enough to do the job. The problem isn't an acute one for you in Virginia. You have the oldest tradition of any state, perhaps, except Massachusetts, and there you will be rivaled. You have not the problems that Massachusetts has inherited because of the potato famine in Ireland almost a century ago and other things that I needn't go into.

But you are also Americans, as well as Virginians, and you recognize the fact that these problems exist, and that it may well be that the existing grouping of our Federal units is one of the large reasons why we are drifting to such a degree of centralization. Both because the cities have too much weight in the national political picture at the present time—because of a few great city machines,—and because the existing territorial areas of the states, as constituted at present, are not natural economic units, we need to consider a radical change in the basis of our federalism. Carter Glass, in drawing up the Federal Reserve System—a feat of great constitutional statesmanship that we must never forget, for which he ought to be eternally honored,—had some sort of picture like this before him—those twelve districts. This is an important matter for our study. I am not going to try here to lay down the criteria for settling the outlines of these new Federal Regions that seem necessary for a

sound federalism. The Federal Reserve Districts suggest to my mind, to a considerable degree, the need of areas that would transcend the barriers of the states sufficiently to have large enough grouping to play the role that once Massachusetts and Virginia played, and which no doubt Massachusetts and Virginia would to some degree still lead in any such regional group. We need political units comprised of regions homogeneous to some degree in culture and in their way of looking at things—that is essential in a federal country. The South, you see, splits itself up into units of this sort. You know as I do that there is a genuine difference of feeling between parts of the South that are just below the Mason-Dixon line and some that are very much below the Mason-Dixon line. I don't think I need to specify further than to say that Huey Long is a phenomenon which could not have happened in Virginia.

Now, let's take my second main point: the separation of powers in our system. We started off with a conviction about the separation of powers which was partly due to some misconception of the English system that we got through Blackstone and that he had inherited in some degree through Montesquieu,—that the English system really was one of separated powers. At the time they wrote, it was a far more genuine separation of powers than historical critics are prepared to admit. After all, George III did run a good deal of the executive power of England. In spite of what people said, in the light of later constitutional procedents, he was powerful. Our colonial experience also led us into accepting the reasoning that to separate the executive, legislative and judicial functions was to prevent them from falling into the hands of a single and therefore an arbitrary person. The presidency

was set up on an entirely separate basis from Congress. The two ends of the Avenue in Washington are significantly two *ends* of the Avenue—Pennsylvania Avenue. If you want to get them together today, how do you go about it? Well, I am afraid we must confess the fact that the separation of powers in this United States of America is bridged by "patronage" and "spending." Am I wrong about that? I don't think so. Sometimes there are presidents who do not feel inclined to bridge it in that way. They won't "play ball with the boys," and they don't get to the first base, politically, if I may express the plain fact in that way. Mr. Hoover had that difficulty, to a degree. He didn't have the technique that had been developed in Al Smith and in Franklin Roosevelt by dealing with state legislatures.

There is this significant fact about the history of our country which I want to call to your attention on the authority of the late Will Rogers, who was a very considerable critic of our institutions, as well as a great humorist. According to Will, there was no president after Jackson, at any rate, who managed to control his Congress throughout his entire term of office. He said the possible exception to that statement—and you may disagree with him, but you think about it pretty hard and I believe you will find Will was right—the possible exception to it, he said, was Calvin Coolidge: The reason was that if "Cal" did know what was on his own mind, he never told anybody; so Congress could not find out in order to block him.

Well, it *is* like that. Being president of the United States is like driving a balky mule. When Al Smith came up to dine with the Forty Harvard Thieves, as we were locally known—Ali Baba Smith

and the Forty Harvard Thieves—after his defeat in 1928, those of us who had signed a manifesto for him talked over with him this feature of our system that Will Rogers had commented on. I told him the story, at that time, of the negro and the ice wagon and the balky mule, which must be a classic down here—it certainly is in Tennessee—that I think profoundly illustrates the character of our political system in this respect: The separation of powers between the President and Congress. It is about Jim, who drives the ice-wagon for Mr. Hogan, the local ice-man. Jim resigns after the mule has balked in the public square in front of the court house. He calls up Mr. Hogan on the telephone to inform his boss. After a long conversation, in which Jim recounts the catastrophes which befell various helpful by-standers who thought that they could budge the mule, Jim finally gets to the point: "Yassuh, Mistah Hogan! I done tried that, too. Yassuh. I built a fiah under dat mule. Yassuh she moved, she sho moved. She moved just bout fifteen feet, Mr. Hogan, and burnt up de ice wagon!"

I want to put it to you that our experience with everything that we have tried in the way of the executive budget and the other devices for strengthening the hold of the executive on the legislature, and for getting mutual responsibility has so far resulted in that end: The legislature moves up about fifteen feet and burns up the ice wagon! I don't suggest that Governor Smith's only qualifications for the presidency were that he could drive the balky mule. Not at all. Diplomacy in getting along with the Legislature is essential under any conditions, and the Legislature has good reasons to criticize the executive and hold him to account—that is the essential part of parlia-

mentary government wherever it exists in a true form in the world today. But there must be a relationship between these two that is more organic in its responsibilities than any thing we have yet worked out if we are ever to get a civil service.

I have backed the Byrnes' Reorganization Bill and I think it is a good job. It blankets a lot of people in the civil service, and you will never get them there in any other way. I hope it will keep them in the civil service but I haven't very much confidence that it will. I don't believe that under our system any President with a change of party is ever going to forego the weapon of patronage that he has to use in order to hold his party in line. If there weren't a Mr. Farley in each party you would have to create one, Democratic or Republican. You know the nature of politics as well as I do in that respect. You can't make our administration work, under the present separation of powers, without patronage and spending.

How could you make it work? Well, I want to suggest to you at least a thought on that matter. I think, first of all, an item veto for the President is a very desirable thing. It strengthens his hands against "riders" that is, bills of an entirely different character that are attached to bills which he must accept. E. g., the Miller-Tydings Bill, which you may or may not support, but which will cost you money in preventing prices from being cut on trade-marked and copyrighted articles, was federal legislation allowing price-fixing of that sort to be sanctioned by the states which have passed such legislation. That bill was passed as a rider to the District of Columbia Appropriation Bill which Mr. Roosevelt had to sign or see the Government starve.

When we are talking about executive dictatorships, let's think a little bit about the other side of *responsibility*. What is it you are trying to get in your system? You hold the President responsible for doing things. What do you want him to do? What machinery do you equip him with to do it? Do you demand that he go to the radio and have a fireside chat and that the country react one way or another and that telegrams to Congress will register results? It is a very bad way of having a general election. Father Coughlin and others seem to use that technique to better advantage than the great and rather inarticulate masses of our people who vote only on election day. We don't—most of us—get around to sending telegrams to Congress, and it isn't, in any case, the way to settle issues of this sort. Yet today, it is the only way that we have and we have to try to work it. No doubt it is very nice for the telegraph companies. Pressure politics become characteristic of a system in which minorities really put the screws on our representatives. In that respect, ladies and gentlemen, I raise this serious question with you: Have not the institutions of our political systems developed into this type of pressure politics largely because of the separation of powers which prevents the responsibility of disciplined party control? The Senate, for instance, is a hotbed of minority and group and bloc action. It is not a majority organ or under party control. I raise the question as to whether or not that must be corrected if we are not to develop a distrust of our institutions, a feeling of futility, a sense that Congress has become a log-rolling body.

But there is the other side of the picture. You *must* protect Congress,—that's all there is to it.

As citizens you must protect Congress if it is to protect you. If you were in Congress (or I were there) you or I would have to make peace with this same kind of pressure. At the back of the trouble with our system lies the fact that we are subsidizing everybody. We are bringing to bear in government the kind of pressure that makes it impossible to have a balanced budget and a responsible system. I think that, in President Bryan's words, that's the failure of citizenship. It comes back to a fundamental that we don't think of government as a community interest, but as something like a grab-bag. How do you treat your repesesentative in Congress? You have a good tradition in Virginia and I can exempt you from the worst of our "pork-barrel" politics. But it is far too often in every part of the country, and I can speak with some knowledge, a matter of what the Congressman or the Senator has "done for the district" that determines whether he will stay in politics. *And above all he must make no enemies.*

Now I am an *American* and I am concerned with what happens through organized pressures of groups like labor and bankers and cotton growers, and other people who run our country to some degree in terms of response to pressures, without framing policy in the "public" interest. I want to point out to you that the *public* interest is the thing which the men who created the Constitution were concerned to protect. Now, it can be protected in several different methods. It can be protected by the Court, which will hold people to the settled rules of the game, and it ought to be protected by the Court as long as the court is *enforcing* those rules and not *making* them. And I think today that the Court is in a fair way to do that. I would like to suggest that if the Court had the power

of rendering advisory opinions or speeding up its opinions, we would get a great deal more speed as well as security in our law.

In the second place, the "public interest" can be protected by an executive who has an item veto, to some degree at least. So armed, he can delete "riders" and protect his own budget. But in my judgment, that executive sooner or later has to have the right to appeal to his country as a whole. If he had the right to call a general election, he wouldn't need patronage and spending to bribe his party into line. In England, the Cabinet doesn't have patronage. They do have a balanced budget. Why? Because the Prime Minister can say to the members of his party, either we go along together or we face the country and you ask them whether they back you or me. That's democracy. Sooner or later this country has got to find some way of dealing with our political questions in order to get the public interest registered by a genuine majority under constitutional restraint. In our system the President should have the right to call such an election once during his term. If he lost it, he should lose also his veto powers. If he resigned, his successor should be selected by Congress. I am convinced that the men who wrote the Constitution in the main viewed with alarm the equal powers of the long-term and small-state Senate over money bills, which has been one of the biggest opportunities for jobbery, for pressure politics and for throwing budgets out of balance and for that kind of thing. The Senate's powers over taxing and spending should be subordinated to those of the House.

I am presenting to you what, I believe, is not the usual analysis of the troubles of our constitutional system. But I ask you, in all honesty as Americans,

to consider whether these troubles, in times and under pressures such as we now see working from within and without, don't transcend parties or personalities—whether they don't coerce any President into a line of conduct that will make him ultimately do things that will be distressful to you and to me as American citizens; or alternatively, make him lose his hold. I ask you whether we haven't a real question in our Constitution to consider, as to the nature of our system of states, given the present drift toward handing everything over to Washington. Let us organize our system better; let the citizens support it better, and above all, let us see that the changes that are made in it be made lawfully and by constitutional methods, in order that we can hand down through these difficult times the priceless heritage that the Constitution of the Unites States is to the American people.

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The Prospects of Democratic Government

An address delivered by

HAROLD J. LASKI

at

The College of William and Mary
in Virginia

ELEVENTH LECTURE UNDER THE
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THE PROSPECTS OF DEMOCRATIC GOVERNMENT

Harold J. Laski

President Bryan, Ladies and Gentlemen:

No place is so fitting as the hall of a great university for the discussion of fundamental problems. Here we are removed from the dust of the arena outside. We have the leisure and opportunity to cut principles from the tangled mass of bewildering fact. We can seek to trace out the emerging pattern of a world in which nothing is certain save the perpetuity of change. Not least, we can seek, by the process of discussion, to establish those values that alone can give meaning to the process in which we are involved. No university can hope to remain aloof from the battle which rages in the world outside its walls. But a university can, as not the least significant of its functions, strive to make plain the strategy of the battle, and the purposes for which it is waged. It is not, it cannot be, an ivory tower in which scholars seek escape from the issues which impinge upon their fellows. Rather it should strive to be a lighthouse whose beam makes plain the direction of events. For most men, in this complicated world, are like sailors upon an uncharted sea. Only as they become aware of the direction of their course is there the prospect of a safe end to their journey.

We meet in the midst of momentous events; and nothing is gained by the denial that, all over the world, democratic societies are challenged to justify

their existence. What Mr. Wells has termed the "raucous voices" are lifted up to deny its premises. Those men conquer who take power as their end, and are careless of the means whereby their ends are attained. Already their victims are numbered by millions, and the end of this epoch of suffering is not even dimly discernible. At such a time, it becomes necessary to go back to foundations. We cannot fight the enemies in our midst unless we are clear both about that for which we are fighting and why it is worth while to fight. Sometimes, as it seems to me, both ends and means have been lost sight of in the dash of battle. I do not, therefore, offer any apology for calling your attention again to first principles. A victorious army must know for what it is fighting. It is the idea that gives strength to the soldiers in the field.

Democracy is not merely a form of government; it is also a way of life. It is an insistence upon the eminent and inherent worth of the common man. It is an attempt, therefore, to find the institutions through which that worth may attain its full expression. We cannot confine those institutions to the political field. It is no use giving to the common man the power to define his own destiny, and then to rule out portions of the field of life as inadmissible to his entrance. If democracy is valid in the political realm, then it is valid in social life and economic life. If the common man is to be free, then, throughout the pattern of existence, he must be guaranteed the necessary conditions of freedom. He cannot be free while he suffers from economic insecurity. He cannot be free if he lacks the intellectual weapons which will enable him to find his way about the world, to make

effectively articulate his experience of life, to be certain that his experience will count in the making of decisions. He cannot be free unless he can find either significance in his daily work, or, alternatively, enjoy a leisure which he is able to use for creative ends. He cannot, finally, be free unless he is certain that the rules under which he lives are shaped in terms of a genuine and continuous consideration of the demands he has to make upon the stock of common welfare. These are the values to the importance of which all history of which we are aware has borne testimony. These, too, are the values today so widely challenged. Our business is not merely their reaffirmation. Our business also is the statement of the conditions upon which they can be successfully reaffirmed.

I do not believe that democracy can be maintained in an unequal society. Men think differently who live differently; and in a society where men live as differently as with ourselves, there is an absence of that unity of thought about fundamentals which is fatal to the power of reason to maintain its empire over the minds of men. That inequality has led to a regime of privilege which divides the commonwealth into a small group of conquerors and a great mass of hewers of wood and drawers of water to whom life offers no prospect of rich fulfillment. Because they live so differently, they draw their notions of good and evil, right and wrong, from the way they live; and there is no bond of effective common understanding between them. In such a world, as Hobbes said, they stand in the posture of armed gladiators the one to the other. Neither group feels secure; neither group is capable of tolerance because it is insecure. They are afraid; and where men are afraid passions are

aroused which destroy their capacity to settle their argument by consent. It is only where men feel that they are granted an equal claim or, alternatively, that the differences in response to claim are capable of rational justification in terms of function, that they will maintain the foundations of an ordered society. No one can say of ours that, submitted to this criterion, it can hope successfully to pass the test.

No doubt men are satisfied with inequalities in a period of social expansion. Then, there are hope and patience, the prospect that legitimate expectations will be satisfied. But in a period of social contraction—and that is the period in which we live,—every irrational inequality is felt as a challenge to be maintained and resisted. In a period of crisis, in a word, a society as unequal as our own, means war both without and within. Democracy on the political plane then becomes a menace to the holders of power; for the masses seek to use it in order to redress a balance they feel to be unjust. And the holders of power recognising that, as Madison pointed out, the only durable source of faction is property, will prefer rather to overthrow democratic government than to suffer the abrogation of the privileges associated with property. That, in essence, is the history of Germany and Italy and Spain. It is significant that there the things the American ideal has always cherished, freedom of thought, freedom to choose one's own rulers, freedom of association and even of religious belief have all gone. With them, I beg to remind you, have gone also that freedom to bargain collectively which is the necessary concomitant of giant industry; for, as Mr. Justice Holmes once said, liberty of contract begins where equality of bargaining power

begins. Those who have challenged the democratic way of life, always in the interest of an unequal society, have deliberately denied all those values which, since the Reformation, men have been striving to make an established part of the common inheritance. The issue of our time is whether the denial is to be universal; or whether it is still possible to arrest the extension of its authority.

There is nothing new in either Nazi Germany or Fascist Italy; an old tyranny wears a new mask. It is democracy that is new; and I do not need to remind you of the immense part America has played in its making. It is new to urge that the fulfillment of personality is not something to be confined to a few. It is new to urge that the riches of civilization belong, as of right to the common man. It is still more new to insist upon the organization of institutions to make that right effective. We ought not to be surprised that such insistence provokes violent dissent. It disturbs wonted routines; and there are few things of which a privileged class is more afraid than the disturbance of a wonted routine. That class associates with its possession of authority all that makes life worth living for itself. It sees in the democratization of our economic and social structure a threat to its own way of life. It was prepared for a surrender of the outer breastwork of the fortress. It has never been prepared for the surrender of its inner citadel of power.

This phenomenon of fear is not new in history; it has accompanied all profound social changes, and has made most ages of social reconstruction ages of fear and of violence. Our problem is the grave one that violence in our own age makes the very survival of civilization a doubtful matter. We have had con-

flicts before for liberty. But this is the first time in history in which a conflict for liberty has been set in the context of equality. That is the inner and ultimate significance of the battle that is raging now. An economic system has passed its apogee. It is no longer capable of satisfying the established expectations of the masses. They therefore seek—it is wholly intelligible that they should seek—such a transformation of its foundations as shall make its potentialities available to themselves. They take the view that the power of the state should be invoked to mitigate the consequences of social and economic inequality. If they cannot achieve that by the normal means of a given constitutional organization, they will be driven to extra-constitutional means to attain it. They have begun to understand that contemporary civilization is disfigured at every point by needless suffering—in deprivation of health; in lack of economic security; in standards of life; in cultural opportunity. They cannot see that those who enjoy those things are those who are entitled to enjoy them by reason of the contribution they directly make to social well-being. What, therefore, they ask is simple in essence, even if it is momentous in consequence.

They ask that the democracy which has, with all its faults, proved so liberating an influence on the political plane should be extended to the economic plane also. They realize that, in a civilization like our own, the fulfillment of personality is impossible without that extension. Freedom without equality is, as they increasingly understand, a name of noble sound and squalid result. A society, in a word, which trusts its whole fortunes to the profit making motive must be enormously successful if it is to obtain the

allegience of its citizens. It must be able continuously to translate its success into the perceptible terms of their material welfare. It must give them, in the realm of the spirit, the sense that they share in the mastery of their own lives. In an increasing degree, our civilization is failing on both these counts. We have found that an unequal society is in its foundations an unjust society; and the grim contrasts it affords drive home increasingly the implications of that injustice. Put in a sentence, the fact is that the age of individualism is over; the mere conflict of private interests will not produce a well-ordered commonwealth. What occurs is a sequence in which cutthroat competition is succeeded by monopolistic combination; this cannot distribute the products its technological efficiency achieves. It then offers the paradox of poverty in the midst of potential plenty, and men use the instruments of political democracy to try and resolve the paradox. What becomes necessary at that stage is either the admission of the right of democracy to express its will, or the suppression of democracy in the interest of the owners of economic power in its present configuration.

When, in 1832, the House of Commons was debating that Reform Bill which turned the rule of the aristocracy in England, Macaulay used a phrase which seems to me of special significance at the present time. "Reform if you would preserve," he said, "is the watchword of great events." It is surely clear enough, on any showing, that we have reached one of those periods of history when immense adaptations are called for. We can meet them with magnanimous understanding; and there is no spirit more likely to secure the accomplishment of necessary change in terms of peace. For

measures of lenity are, as Burke said, always means of conciliation. Or we can meet them in that spirit of blind resistance to any adaptation which led to the English Civil Wars of the seventeenth century, the French Revolution in the eighteenth, the Russian Revolution in our own day. We all know what that implies. It will drive men to violence; violence will produce recrimination in the name of law and order. Civil liberties will be threatened here, and suspended there. The voice of moderate men will be stilled; the pace and direction of policy will be set by the more extreme elements on either side who are impatient of the solutions of reason. The procedures of right will give way to the procedures of might. There will be no room for the calm and dispassionate survey out of which settlements men recognize as just can be made. An acquisitive society which denies the principle of equality denies democracy and thereby denies the prospect of government by discussion. Its alternative is the concentration camp; and that alternative is incompatible with the dignity of the human spirit.

"Choose equality and flee greed"; so said Antiphon the sophist nearly twenty-five hundred years ago. That is still the vital formula of social justice. It is well for us to remember that the insight of Antiphon has been the insight of every major prophet in our history. I do not need to remind you that when Tocqueville surveyed the United States in the Jacksonian epoch he recognized that he had come across a new fact in civilization—the discovery that the essence of democracy is equality. And it was the achievement of that equality for the great mass of your citizens until the closing of the frontier that made America for so many million Europeans the land of limitless hope. The

American dream, if I may say so, cannot live by its past; it must be renewed in each generation by providing it with the institutional environment that is necessary to its fulfillment. You are a new world called into existence to redress the balance of the old. That is your inheritance and your obligation. You have to seek by your energy to be worthy of them.

Perhaps you will allow me, as a university teacher, to say something of the function of the universities in this regard. I do not share that view which would make of the scholar a detached spectator of a drama in which he has no part as an actor. To think significantly he must live significantly. To live significantly he must recognize that, as Plato said, true knowledge compels to action. His business is to cut truth from the raw material and, as best he can, to explain and to evaluate it. His highest duty lies there. The scholar is not less a soldier because his weapon is his mind and not the sword; and he must hazard his life, like the soldier, for the truths he believes himself to possess. He must, of course, fulfill the obligation to arrive at his truths in a spirit of critical enquiry and emotional independence. He must not speak until he has sought, as best he can, to verify the insights he attains. But he must recognize that he owes to the world the communication of his insight; the teacher is by vocation not less a citizen than the business man or the politician.

I know, I think, the risks of this attitude: at least I have the right to claim awareness of the penalties of nonconformity. But it has been my observation that, where the teacher is silenced, the machine guns come into action. It has been my observation, also that men seek to suppress ideas only because they are

afraid of their impact. It is, moreover, the glory of a democratic society that, alone of all institutional forms, it can afford that competition of ideas out of which men grope their way to the truths each generation requires. Enforced conformity with any given system of presuppositions is fatal to the end a university has in view. I do therefore plead here, with all the force I may, that this University maintain the amplitude of academic freedom with a fullness that recognizes no boundaries. A university in the uniform of some special creed ceases to be a university at all. The world lives by its power to experiment with thought. Nothing is so fatal as to proclaim that the attempt at experiment is subject to penalty if its consequence be recommended innovation. There is hardly a doctrine that is commonplace in our time that did not, to some earlier age, seem monstrous error. A university that is intellectually restrained is a university which cannot fulfill its function; for the restraint of thought is, in this sphere, the final sin against the light. I want the university teacher, therefore, to regard his mission as not less high than that of Heine when he proclaimed himself a soldier in the liberation war of humanity. I want him to insist, that, whatever the pressure of authority and interest, he shall have the unfettered right to seek for truth and to proclaim the truth he finds. For, in the end, that unfettered search is the only high-road to freedom.

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The Supreme Court and Disputes Between States

An Address Delivered by

CHARLES WARREN

at

The College of William and Mary
in Virginia

TWELFTH LECTURE UNDER THE
JAMES GOOLD CUTLER TRUST

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On Charter Day, February 8, 1940

at

The College of William and Mary
in Virginia

THE SUPREME COURT AND DISPUTES BETWEEN STATES

By Charles Warren

President Bryan, Members of the Faculty, Ladies and Gentlemen:

One hundred and forty years ago, the *Aurora,* a newspaper published in Philadelphia, wrote on June 30, 1800: "It must give pleasure to our readers to be informed that the students at William and Mary College at Virginia . . . constantly exhibit specimens of taste and talent, of erudition and patriotism, in publications in the cause of liberty and state which outnumber those of any other College and far exceed in merit."

Confident that the present students of this college are no less distinguished than their predecessors for taste, talents, erudition, and patriotism, in the cause of liberty and state, I have taken for my subject an American institution closely bound up with liberty—liberty of the individual and of the states—the Supreme Court of the United States. I wish to portray to you one of its little known, though vitally important, functions, and the part which it has played in our National life as an arbiter in disputes between the states of our Union, As the present is distinctly an era of international affairs, I hope that you will consider the bearing which the history of this phase of the Court has upon the possible future of a World Court in international disputes.

While it was at this college that the first American professorship of law came into existence, nevertheless, I realize that I am not speaking merely to students of law; hence, I shall hope to give to you all some idea of this phase of the

Court, in not too dry or technical language; for the Supreme Court is an American institution in which all citizens, and not merely those who may be called upon to study it, should have a keen interest.

There is an appropriateness in this subject at this time; for exactly one hundred and fifty years ago last Friday, on February 2, 1790, the Supreme Court appointed by President Washington, convened for the first time with a quorum (at its session on February 1, only three Judges were present). It met at one o'clock in the afternoon in a building known as the "Exchange," located across the foot of Broad Street at its junction with Water Street in New York City, and six blocks away from the Federal Hall at the corner of Broad and Wall Streets where Washington had been inaugurated and where the Congress was then sitting. In the second story of a hall, sixty feet long, in which the state legislature met in the mornings, there assembled on that day, Chief Justice John Jay of New York, and Justices William Cushing of Massachusetts, James Wilson of Pennsylvania, and, appropriately, John Blair of Virginia, a graduate of William and Mary College; there also was Edmund Randolph of Virginia, a graduate of William and Mary, and the first United States Attorney General. Writing to Randolph, Washington had said: "Impressed with a conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system." This statement was true then and has been true ever since; for it would be impossible to say by what other means than by this Court the Bill of Rights could be enforced for the protection of the citizen, or the relations between the nation and the states could be kept in balance for the preservation of the rights of each.

During the past few years, you have all heard much discussion, as well as diatribe, about decisions of the Court on

the subject of minimum wages, child labor, coal mining, labor, and other social and economic topics, under that part of the Constitution known as the Due Process Clause. You have equally heard much about interstate commerce and powers exercised by the Court under what is known as the Commerce Clause of the Constitution. From the recent millions of words and thousands of pages devoted to argument, statement, and misstatement on these subjects, you would very probably assume that the only decisions of the Court of importance in our national life and history were those which had restricted the nation and the states in dealing with labor and business and social relations. There is, however, a great lack of proportion in dwelling on this phase of the Court's functioning; for it is only within the last thirty years that Congress has exercised its powers under the Commerce Clause on any subject other than railroads, liquor, and monopolies (with regard to which the Court has always upheld the Congress); and it is only within the last forty years that the Court has dealt to any great extent under the Due Process Clause with state or national powers in economic and social fields. On the other hand, the really important decisions of the Court which influenced the development of the United States in its first one hundred years have been made in upholding the general sovereign authority of the nation and in guarding the contract rights and civil liberties of the citizens against either states or the nation, and in performing one more function—that to which I wish, this morning, to call your attention, for it is little known and little discussed. This function is the exercise of power to settle with finality serious disputes which have arisen or may arise between the states of the Union regarding their boundaries, their territory, their waters, their sanitation and protection, and their contract rights. You may be unaware of the existence of such state disputes, and it will probably surprise you, as well as most Americans, to know that in the past one hun-

dred years of our country's history there have been at least 77 reported suits brought by one state against another in the Supreme Court, requiring at least 124 reported decisions by the Court; and that at one time or another, every single state of the Union (with the exception of Maine) has been either a complainant or a defendant in such a suit in the Court—all except nine having been complainants and all except eleven defendants. In addition, there have been sixteen suits by the United States against a state; and there have been two suits by a foreign nation against a state.[1]

Now, how did the Court get the power to require sovereign states to appear before it and to settle their quarrels? It all came from a very simple provision in the Judiciary Article of the Constitution, giving to the Court jurisdiction over "controversies between two or more states," and requiring that such suits should be begun originally in the Supreme Court and not in any lower court.

Why was this gravely important function vested in the Court? Like most of the other provisions in our Federal Constitution, it was not evolved as a part of a logical plan or theory of government. It arose out of hard, previous experience of men in the colonies and in the states prior to 1787. It was the product of actual necessitous conditions; and as Sir Henry Maine said, fifty years ago in his *Popular Government*, it "was the fruit of signal sagacity and prescience applied to these necessities."

We are in the habit of regarding the American Colonies prior to the Revolution as having more or less common conditions, united in interests, and opposed only to Great Britain. The fact is that the colonies varied very greatly, both in racial composition, in economic and social habits and conditions, in religious views, and in some colonies even in difference of language. Each colony was more or less of a land-

[1] *Cuba* v. *North Carolina* (1917), 242 U. S. 665; *Monaco* v. *Mississippi*, (1934), 292 U. S. 313; see also *Ex parte Republic of Portugal* (1922), 264 U. S. 575.

grabber from other colonies; for their English charters and patents frequently overlapped in territory and displayed little knowledge of American geography. Hence, boundary disputes were frequent.[2] Differences as to commerce and matters other than boundaries also aroused much bitterness of feeling between the Middle Colonies and New York on the one side and New England on the other, and between New England and the South. When a declaration of independence was being discussed, in April, 1776, Carter Braxton of Virginia wrote that: "The Middle Colonies dread their being swallowed up," between the claims of Virginia "and of those from the East," and that he was convinced that before they declared their independence "all disputes must be healed and harmony prevail" by the appointment of a superintending power; and that if independence "was to be now asserted, the Continent would be torn in pieces by intestine wars and convulsions." Benjamin Franklin, as early as 1775, had suggested that a representative Congress should have power "of settling all disputes and differences between colony and colony about limits or any other cause if such should arise."

The American Colonies were familiar with the power possessed by the King's Privy Council in England to settle boundary controversies arising under charters granted by the King. Such disputes were heard in England by one of the Council's political or executive committees, termed the Lord Commissioners of Trade and Plantations, or by Commissioners in America specially appointed from the residents of colonies adjacent to the disputants. Upon petition filed, the tribunal proceeded in a semi-judicial manner to summon the opposing party; and if it failed to appear, the case could be heard *ex-parte* and decision rendered. Three decisions in

[2] *The Colonial Period of American History* (1936), by Charles M. Andrews, II, 53: "Men living along the border claimed by both colonies, were wholly at a loss to know in whose jurisdiction their lands lay and to whom they should pay their taxes. Quarrels ensued, reprisals occurred and individuals were arrested and jailed and the whole region was in an uproar."

such boundary cases had been made by the Privy Council and were widely known in the colonies prior to the year 1776—that of Rhode Island against Connecticut in 1727; that of Rhode Island against Massachusetts in 1746; and that of New Hampshire against Massachusetts in 1741. It was natural, therefore, that within eight days after the colonies declared their independence as sovereign states, John Dickinson, on July 12, 1776, in the Continental Congress should draft a plan for a procedure to be set up by the new states to settle their quarrels, similar to that before the King in Council; and his proposal resulted in a provision of the Articles of Confederation in 1781, authorizing the Congress, as "the last resort on appeal" for "all disputes and differences . . . between two or more states concerning boundary, jurisdiction, or any other cause whatever," to constitute a court for each case as it arose and to appoint "commissioners or judges" with power to proceed to final judgment, even if a defendant state refused to appear (Article IX).[3] Though such a provision resembled an arbitration more than a court, since new judges were appointed for each case and there was no permanent body, nevertheless, this was the first time in history in which a judicial tribunal came into existence with a com-

[3] If parties could not agree on the judges, the following singular mode of selection was provided: Congress should name 39 persons (3 from each State) from which list, each party should strike one alternatively until the number reached 13, and from that number 7 to 9 were drawn by lot who should be the judges, with power to five to act. John Franklin Jameson, in his "The Predecessor of the Supreme Court," in *Essays on the Constitutional History of the United States in the Formative Period, 1775-1789* (1889), says as to this method of choice of judges: "It seems obvious that we have here a reproduction of the machinery provided by Mr. Grenville's famous Act of 1770 for the trial of disputed elections to the House of Commons. Up to that time, disputed elections had for nearly a century been passed upon by the whole House. The natural result of such a procedure was a scandalous disregard of justice, those contestants who belonged to the majority party being uniformly admitted, their competitors as uniformly rejected. To remedy this abuse, Mr. Grenville's Act provided that 49 members should be chosen by ballot, and that from this list, the petitioner and the sitting member should strike out names alternatively until the number was reduced to 13—a process which later became known, in the slang of the House, as 'knocking out the brains of the

pulsory jurisdiction over independent, sovereign states. And Robert R. Livingston, then Secretary of Foreign Affairs for the United States, wrote to Lafayette, January 10, 1783, as to the one case then recently decided by such a tribunal:

> The great cause between Connecticut and Pennsylvania has been decided in favor of the latter. It is a singular event. There are few instances of independent states submitting their cause to a court of justice. The day will come, when all disputes in the great republic of Europe will be tried in the same way, and America will be quoted to exemplify the wisdom of the measure.

This was a remarkable prophecy, and one which was partially fulfilled when, 139 years later, the Permanent Court of International Justice met for the first time at The Hague in 1922.

For various reasons, only three courts were ever appointed under the Articles of the Confederation—one in a dispute between Massachusetts and New York (June 9, 1785), another in a dispute between South Carolina and Georgia (September 13, 1786)—these two being finally settled by compacts. The third involved a dispute between Connecticut and Pennsylvania, in which settlers from Connecticut claimed title under its charter to lands in Luzerne, Northumberland, and Northampton Counties in Pennsylvania. For many years, there had been a semi-warfare in that territory with attendant bloodshed, and the warfare would probably have been even more prolonged and serious if the settlers had known that the land in controversy was, many years later, to become the richest coal mining region of the country, including within its limits, the present cities of Easton, Scranton, Wilkesbarre, Wyoming, and Towanda.

committee.' . . . These 13 with an additional member nominated by each contestant constituted the authoritative tribunal. The act, celebrated at the time, was, of course, perfectly well known to lawyers in America, six years after its passage. It seems plain that, with the natural substitution of 39 for 49, we have, in this peculiar process established shortly before in England, the model on which Congress framed its scheme for constituting temporarily a judiciary body when one was required for land disputes."

It was, in fact, an American Sarre Basin. The court appointed in this case found in favor of Pennsylvania in 1782; but owing to the absence of any power in the court or in Congress to enforce its decree, hostilities were soon renewed and the situation continued troublesome and dangerous. James Madison deplored the lack in the Congress of "power of carrying into effect the judgment of their own courts."[4] Richard D. Spaight wrote to Governor Martin of North Carolina, October 16, 1784: "The disputes between Pennsylvania and Connecticut for the Wyoming lands, and New York and Vermonters, with the support and promises which the New England States have given the latter, have sown the seeds of dissention which I think will not end without a civil war."[5]

When the Federal Convention met in 1787 for the framing of the Constitution, serious interstate disputes over lands, boundaries, and river rights were pending, involving at least ten states, as well as Vermont which had declared its independence. It is little realized now to what a high degree the states of this country then regarded themselves as sovereign and independent, except so far as they might have surrendered certain rights of sovereignty to the United States under the Articles of Confederation. For instance, Connecticut, in its statute adopting a declaration of rights and privi-

[4] This lack of power of enforcement was referred to in the Federal Convention five years later, by James Madison (*Yates Notes,* June 19, 1787), who said: "Has not Congress been obliged to pass a conciliatory Act in support of a decision of this Federal court between Connecticut and Pennsylvania, instead of having the power of carrying into effect the judgment of their own court?" In his *Notes of Debates,* June 19, 1787, Madison reports his own speech as follows: "Have we not seen the public land dealt out to Connecticut to bribe her acquiescence in the decree constitutionally awarded against her claim on the territory of Pennsylvania, for no other possible motive can account for the policy of Congress in that measure?"

[5] *Letters of the Members of the Continental Congress,* VII. Richard Henry Lee, President of Congress, sending to John Rutledge, January 24, 1785, his appointment as judge in the Massachusetts-New York case, wrote: "The future concord and happiness of the United States depends eminently upon the wise and early settlement of such disputes."

leges, termed itself a "republic" which "shall forever be and remain a free, sovereign, and independent State." Massachusetts in its Constitution of 1780 (which is still in force) declared itself "a free, sovereign, and independent body politic or state by the name of the Commonwealth of Massachusetts." Pennsylvania, Virginia and other states used similar language. In the midst of the dispute between New York and Vermont in which armed forces were being used, John Hancock as Governor of Massachusetts, in 1784, issued a proclamation of neutrality calling upon her citizens to refrain from aiding either party, and using language in part practically the same as that used by President Washington in his neutrality proclamation in the war between France and England and by President Roosevelt in the present war. Experience, therefore, had shown to the members of the Federal Convention that there was a grave need for a more satisfactory method of adjusting these boundary and other interstate disputes, and that for their adjudication a permanent court with power to enforce its decrees was necessary. And it was out of such necessity that the convention finally decided to give to the new Supreme Court, which it was constituting, jurisdiction "in controversies between two or more states."[6]

[6] The course of action of the Federal Convention of 1787 was as follows: Following the Virginia Plan, which Edmund Randolph originally submitted, the framers at first provided (on July 18) that the jurisdiction of the National Judiciary should extend to "cases arising under the laws passed by the General Legislature and to such other questions as involve the National peace and harmony"—but it had been the intention of the Convention (as Madison later wrote) that this general language should later be made more specific by precise enumeration. In a draft submitted to the Committee on Detail, Randolph specified that: "The jurisdiction of the Supreme Tribunal shall extend . . . to such other cases as the National Legislature may assign as involving the National peace and harmony . . . in disputes between different States." When the Committee reported on August 6, 1787, they provided that the jurisdiction of the Court should extend specifically "to controversies between two or more States (except such as shall regard territory or jurisdiction)." Boundary and jurisdictional disputes between States, the Committee left to the Senate to decide through the appointment of a Special Court for each case, picked by the Senate in the same way as the similar tribunal picked by

The fundamental reason for this jurisdiction was that there are only three ways of settling a dispute—by force, by treaty or agreement, and by judicial decision. Now the Constitution, by express provision forbade the States of the Union to wage war or to make treaties or alliances, or to make compacts without the consent of Congress. Some method of settlement of disputes had to be provided, and the only method left was settlement by a court.

This being the basis of the Court's jurisdiction, it naturally follows that it has the power to determine any class of dispute (other than a purely political one); and as an illustration of how really international is its power, when Missouri in 1906 sued Illinois (200 U. S. 496) for seriously damaging the flow of the Mississippi River by sewage, Judge Holmes in his opinion pointed out that such a nuisance caused by a European nation bordering on the Danube as against a nation lower down on that river, might easily under some circumstances amount to a *casus belli.* In this country, he said, "if such a nuisance were created by a state upon the Missis-

the Congress under the Confederation. When the Senate Article came on for debate on August 24, 1787, John Rutledge said that "this provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established." Dr. Samuel W. Johnson and Roger Sherman of Connecticut, James Milson of Pennsylvania, and Jonathan Dayton of New Jersey concurred with him in moving to strike it out. Hugh Williamson of North Carolina thought it might be "a good provision in cases where the Judiciary were interested or too closely connected with the parties." Nathaniel Gorham of Massachusetts said: "The Judges might be connected with the States being parties." He was inclined to think the mode proposed in the clause would be more satisfactory than to refer such cases to the judiciary. The motion to strike out, however, prevailed, and the Court was left with the power over "controversies between two or more States" as now provided in Article III, Section 2, without any limitation or specification as to nature of the controversies, whether as to boundaries, jurisdiction, or other cause. And it is interesting to note that a prominent member of the Convention, Abraham Baldwin of Georgia, a Yale graduate, told President Stiles of Yale, only three months after the Federal Convention, that the delegates "had been unanimous in the expediency and necessity of a Supreme Judiciary Tribunal of universal jurisdiction in controversies of a legal nature between States. . . . " This was one of the very few subjects of importance on which unanimity prevailed.

sippi, the nuisance would be resolved by the more peaceful means of a suit in this Court."[7] As Chief Justice Taft said in 1921, when North Dakota sued Minnesota (256 U. S. 220) for flooding its farms by an improper drainage system, the jurisdiction of the Court "was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force."

For the first sixty years of our history, the only state disputes presented to the Court related to state boundaries, and even of this type of suit there were only three brought between 1789 and 1849—one by the State of New York against Connecticut as early as 1799, and the next two—*New Jersey* v. *New York* and *Rhode Island* v. *Massachusetts*—did not occur until the 1830's. The New Jersey case was settled by a compact after Chief Justice Marshall announced that the Court would proceed with the case *ex-parte*, in the event that New York refused to answer summons and file answer. The Rhode Island case was bitterly fought at every stage of the litigation for fourteen years, from 1832 to 1846. The importance of the question involved cannot be over-estimated, namely, whether a boundary dispute was a political matter and which a Court could not decide, or whether it was a legal matter and subject to the Court's power under the Constitution. The facts involved were also of grave import to the respective states, since a strip of land on the southern boundary of Massachusetts of about 150 square miles, and the political and taxable status of about 5,000 inhabitants would be affected by the decision. The question was settled forever and the power of the Court was upheld.

[7] Judge Shiras said in 1901 in this suit of Missouri against Illinois (180 U. S. 208): "If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy."

in a superb opinion by Judge Baldwin concurred in by all the justices except Chief Justice Taney.[8]

Since that decision in 1838 up to June, 1939, there have been at least twenty-nine cases involving state boundaries. And lest you may think that such cases are of minor importance, let me call your attention to the fact that in at least four of these boundary cases, the jurisdiction of the Court was invoked only after armed forces had been called into play by the conflicting states and after bloodshed had occurred. As an instance of the seriousness of a boundary dispute, let me cite the case involving the northern boundary of Missouri and the southern boundary of Iowa in 1849, which involved sovereignty over a valuable strip of territory of about 2,000 square miles—a tract about two-thirds the size of Alsace.[9] This controversy had been pending for twelve years; Missouri at one time had called out 1,500 troops and Iowa 1,100; to defend their respective alleged rights. The conflict of claims was the more serious, by reason of the fact that if Missouri prevailed, these 2,000 square miles would become additional slave territory; if Iowa won, they would be free. The Court finally decided in favor of Iowa. Thus, just at a time when the dire question of slavery was threatening the stability of the Union in every political direction, a decision of the Court settled its fate for 2,000 square miles of American territory. No wonder that Lewis Cass, Senator from Michigan rose in the Senate, in 1855, and said: "It is a great moral spectacle to see the decree of the judges of our Supreme Court on the most vital questions obeyed in such a country as this. They determine questions of boundaries between independent states, proud

[8] *New York* v. *Connecticut* (1799), 4 Dallas 1, 3, 6; *New Jersey* v. *New York* (1830), 3 Peters 461, (1831) 5 Peters 284; *Rhode Island* v. *Massachusetts* (1833), 7 Peters 651, (1837) 11 Peters 226, (1838) 12 Peters 657, 755, (1839) 13 Peters 23, (1840) 14 Peters 210, (1841) 15 Peters 233, (1846) 4 Howard 591.

[9] *Missouri v. Iowa* (1849), 7 Howard 660; (1850) 10 Howard 1; (1896) 160 U. S. 688; (1897) 165 U. S. 118.

of their character and position, and tenacious of their rights, but who yet submit. They have stopped armed men in our country. Iowa and Missouri had almost got to arms about their boundary line, but they were stopped by the intervention of the Court. In Europe, armies run lines and they run them with bayonets and cannon. They are marked with ruin and devastation. In our country, they are run by an order of the Court. They are run by an unarmed surveyor with his chain and his compass, and the monuments of devastation but peaceable ones."

In the case of *United States* v. *Texas,* decided in 1896, the ownership of Greer County in the then Indian Territory, involving 1,500,576 acres of 2,360 square miles, just the size of Delaware and twice that of Rhode Island and Connecticut plus half of Massachusetts, was claimed by Texas as against the United States. Texas settlers had intruded on the Government public lands. Men had been killed. The House Judiciary Committee in 1882 had reported: "It is manifest that some means should be taken to settle this dispute as soon as possible. . . . Conflicts are arising between the United States authorities and persons claiming to exercise rights on the disputed tract . . .; bloodshed and even death has resulted from this conflict." President Arthur in 1884 and President Cleveland in 1887, by proclamation, had warned that "the aid and assistance of the military forces of the United States will be invoked to remove all such intruders." In 1890, Congress directed that suit be brought against Texas; and in 1896, this serious and long standing controversy was settled by the Supreme Court in a decision which fixed the boundary in favor of the United States and thus transferred Greer County (now most valuable land) from Texas to Oklahoma.[10]

In 1906, another boundary case was decided which had involved bloodshed and had been brought by Louisiana

[10] *United States* v. *Texas* (1892), 143 U. S. 621; (1896) 162 U. S. 1.

against Mississippi (202 U. S. 1), to save to the former State very valuable oyster fisheries. The controversy had been pending for ten years; each State had appointed armed patrols, and by statutes and by force had sought to exclude fishermen of the other State. Finally, as was stated in the decision "in view of the danger of an armed conflict," the oyster commissions of the two States adopted a joint resolution establishing a neutral territory, pending a decision of the Supreme Court. The situation was precisely that of an economic conflict in mutually claimed territory, which, if occurring between nations of Europe or elsewhere, would be very probable cause of war. The Court held that the boundary line claimed by Louisiana was correct and had been too long in the past acquiesced in to be now revised.

In 1921, a contest between Oklahoma and Texas and the United States was decided, fixing their boundary involving immensely valuable oil rights. In this case, settlers from the two states had located on the same lands in and adjacent to the bed of the Red River, and the seriousness of the situation is shown by the statement of Justice Van Devanter in his decision that "possession of parts of the bed was being taken and held by intimidation and force; that in suits for injunction, the courts of both states were assuming jurisdiction over the same areas; that armed conflicts between rival aspirants for the oil and gas had been but narrowly averted and still were imminent; that the militia of Texas had been called to support the orders of its courts, and an effort was being made to have the militia called for a like purpose." On initiation of the suit, the Court appointed Frederic A. Delano as a receiver of the territory involved, viz., 43 miles of river bed, or about 200 square miles in ten counties of Oklahoma and eleven counties of Texas. The receiver, on taking possession ejected all settlers and appointed a force of 12 picked men to protect life and property; he was the ruler, for five years, of a tract of land larger than the

State of Rhode Island; and the value of the subject matter involved in the case may be judged from the fact that in his final report to the Court, the Receiver accounted for over $14,000,000 worth of oil developed by him in operating the properties from 1920 to 1925.[11]

Apart from averting force and bloodshed, boundary cases have often involved lands and questions of very great importance to the states. Thus, in the *Florida-Georgia* case in 1855, the ownership of 1,200,000 acres of land was at stake; in the *Virginia-West Virginia* case in 1871, two whole counties (Jefferson and Berkeley); in the *Iowa-Illinois* case in 1893, the valuable right to tax the numerous bridges across the Mississippi River from Keokuk to Dubuque; in the *Virginia-Tennessee* case in 1893, a strip of territory 118 miles in length by five in width; in the *Washington-Oregon* case, in 1908, valuable salmon fisheries; in the *New Mexico-Colorado* case in 1925, a long strip of Colorado's southern boundary, including a town, two villages and five post offices; in the *New Jersey-Delaware* case, in 1934, vary valuable oyster fisheries in Delaware Bay and River. In the *New Mexico-Texas* case in 1927, in which I acted as Special Master appointed by the Court, in deciding the boundary between the two States north of El Paso, the Court was obliged to decide where the boundary between the Republic of Mexico and the United States lay in the year 1850.[12]

During the past thirty-six years, however, as the economic relations between the states have become more complicated, with the advance of modern life, cases presenting facts and law of great difficulty and of even more vital importance to the states have been brought before the Court.

[11] *Oklahoma* v. *Texas* (1921), 256 U. S. 70; (1922) 258 U. S. 606; (1923) 260 U. S. 606.

[12] *Florida* v. *Georgia* (1850), 11 Howard 293; (1855) 17 Howard 478; *Virginia* v. *West Virginia* (1871), 11 Wallace 39, 67; *Iowa* v. *Illinois* (1893), 147 U. S. 1; *Washington* v. *Oregon* (1908), 211 U. S. 127; *Virginia* v. *Tennessee* (1893), 148 U. S. 509; *New Mexico* v. *Colorado* (1925), 267 U. S. 30, 582; *New Mexico* v. *Texas* (1927), 275 U. S. 279; *New Jersey* v. *Delaware* (1934), 291 U. S. 381.

In 1900, a novel and very grave source of dispute was presented in a suit by Louisiana against Texas (176 U. S. 1). The latter state by statute had given to her officials wide powers to enforce very drastic quarantine regulations and to detain vessels, persons, and property coming into Texas. In 1899, a health officer of Texas took advantage of a single case of yellow fever in New Orleans to lay an embargo on all commerce between that city and the State of Texas, and this embargo was enforced by armed guards posted at the frontier. Louisiana alleged that the yellow fever was a mere pretext, that the real motive was to divert commerce from New Orleans to the port of Galveston in Texas, and that this was shown by the fact that no embargo was maintained against commerce coming to Galveston from the seriously infected ports of Mexico. Accordingly, Louisiana sought an injunction against Texas and its officials. The vital issue was raised as to the extent to which a sovereign state may manipulate its own domestic laws for the purpose, or with the necessary result, of inflicting a direct injury on another state. The Court found that the action of the Texas health officer had not been the act of the state, and so dismissed the suit; but the language of Justice Brown (who filed a concurring opinion) is particularly significant as showing that the source of the dispute which thus came before the Court for adjudication was precisely such as, if arising between foreign nations, might occasion a war, and that if the facts had been sufficient, the Court might well have had jurisdiction; said Justice Brown:

> In view of the solicitude which, from time immemorial, states have manifested for the interest of their own citizens; of the fact that wars are frequently waged by states in vindication of individual rights of which the last war with England, the opium war of 1840 between Great Britain and China, and the war which is now being carried on in South Africa between Great Britain and the Transvaal Republic, are all notable examples. . . . It would seem a strange anomaly if a state of this Union, which is prohibited by the Constitution from levying war upon another state, could not invoke

the authority of this Court by suit, to raise an embargo which had been established by another state against its citizens and their property.

A year later, in 1901, the Court had before it another serious source of state controversy when Missouri filed against Illinois a bill in equity seeking to enjoin the latter state from diverting the sewage of Chicago from Lake Michigan into the Illinois River and eventually so polluting the waters of the Mississippi as to endanger through typhoid germs the health of the citizens of Missouri. There was thus presented the grave question as to how far one state could institute a public nuisance, to the detriment of another. The right of the Court to take jurisdiction over any such question was vigorously assailed by Illinois; but the Court sustained its power to act, and held that if the health and comfort of the inhabitants of a state are so threatened, the state itself is a proper party to represent them.[13] The Court, however, recognized that a decision on the question might determine the future use of the rivers in this country; and it refused to make a final disposition of the case until after fullest evidence had been taken. As Justice Holmes said:

> It is a question of first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the matter at one blow by an irrevocable fiat would be at least premature.

While the Court finally found the evidence to be insufficient and dismissed the case, its decision gave assurance that it would defend the right of a state against a nuisance created by another state. Two later cases have arisen presenting the fact of such a nuisance—one by New York against New Jersey to enjoin the Passaic Valley Sewage Commission from polluting the waters of the New York Upper Bay to the "grave injury to the health, property, and commercial wel-

[13] *Missouri* v. *Illinois* (1901), 180 U. S. 208; (1906) 200 U. S. 496, 598.

fare of the State of New York." (256 U. S. 296.) The Court, after thirteen years of hearings and argument finally held in 1921, that: "Considering all of this evidence . . . we must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewerage . . . would so corrupt the water of the Bay as to create a public nuisance . . . or that it would seriously add to the pollution of it." Recognizing, however, the importance of the ruling which it was making to the great population interested, it stated that it would dismiss the bill without prejudice to the right of New York to renew its application, if conditions should change in the future.

In *New Jersey* v. *New York*, in 1931, the dumping of garbage by the defendant to the injury and pollution of the plaintiff's waters and beaches was enjoined by the Court in a decree ordering New York City to construct incinerators for its garbage, and in case of failure to construct them within a fixed time to pay to New Jersey the sum of $5,000 a day in damages.[14]

Of recent years, the cases most vital to the prosperity of the states, and of greatest effect upon their future economic and historical development, have been those dealing with the rights to water. Men on the eastern seaboard do not fully realize the part that water plays in the arid regions of the southwest, and of the northwest, where water means life and property to millions of people. Without it, a state may stand still or wither away; its agriculture may decline, its inhabitants remove, its prosperity vanish. No more determined and vigorous conflicts have arisen since slavery days than those maintained in the assertion by states of their claims to the waters of interstate rivers, especially for irrigation purposes. And no decisions of more far-reaching or historical importance have been made by the Court than those establishing the respective rights of states on such rivers.

[14] *New Jersey* v. *New York* (1931), 283 U. S. 473; (1933) 290 U. S. 237.

The first great case arose in 1901 (finally decided in 1907), when Kansas attempted to enjoin Colorado from diverting the waters of the Arkansas River to irrigate very valuable lands in Colorado, to the injury of Kansas farms for 310 miles, theretofore irrigated, and of Kansas cattle grazers dependent on the waters of the river.[15] The Court laid down the principle that the dispute must be adjusted "upon the basis of equality of rights between states, so as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream." It held that upon the facts proved the result of appropriation of water by Colorado had been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diversion had been of perceptible injury to portions of the Arkansas Valley in Kansas, yet to the great body of the valley it had worked little, if any, detriment. The bill was dismissed, without prejudice, however, to the right of Kansas to institute new proceedings "whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas River by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river."[16] The principle of equitable division of river water was thus established, in a case where one state recognized the local law of prior appropriation, and the other state the old common law of riparian rights.

In 1922, a case was decided (after eleven years of hearings), in which the local law recognized in both states was

[15] A case of lesser importance was decided as early as 1876 between South Carolina and Georgia when the latter State was enjoined from obstructing navigation and the progress of interstate commerce in the Swanee River. *South Carolina* v. *Georgia* (1876), 93 U. S. 4.

[16] *Kansas* v. *Colorado* (1902), 185 U. S. 125; (1907) 206 U. S. 46.

that of prior appropriation. Wyoming sought to enjoin Colorado from diverting from the Laramie River a vast quantity of water which would deprive Wyoming farms of waters theretofore appropriated and used for irrigation. The Court decided that it would be equitable to determine the rights of the states as between themselves by the same doctrine of law which each state applied to individuals within the state. It held, therefore, that Wyoming, having made prior appropriations of one river, was entitled to prior rights in the waters; and it fixed the precise quantity of water which Colorado should be allowed to take.[17]

In 1931, Connecticut sought to enjoin Massachusetts from diverting for the water supply of the eastern part of the state, certain rivers tributary to the Connecticut River which otherwise would have flowed down into Connecticut. It alleged injury to its fisheries and to its bottom lands and enhanced pollution of its river. The Court found for Massachusetts on the facts, but permitted Connecticut to renew her suit whenever it should appear that her substantial interests "are being injured through a material increase of the amount of waters diverted." (282 U. S. 660.) In 1931, also the doctrine of equitable division of the waters of the Delaware River and its tributaries was enforced in a notable case in which New Jersey sought to enjoin New York from diverting waters into the Hudson River watershed for New York, diminishing the flow of the Delaware River in New Jersey, and injuring its shad fisheries and increasing harmfully its saline contents. An opinion by Justice Holmes stated the problem strikingly: "A river is more than an amenity, it is a treasure. It offers necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower states could not be

[17] *Wyoming* v. *Colorado* (1922), 259 U. S. 419, 496; see also *Wyoming* v. *Colorado* (1932), 286 U. S. 494; (1936) 298 U. S. 573.

tolerated. And, on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both states have real and substantial interests in the river that must be reconciled as best they may be." The Court reduced New York's diversion from 600,000,000 gallons daily to 400,000,000, thus cutting New York's water supply from a river located within its territory by one-third, with a future further reduction whenever the stage of the Delaware fell below a certain point (283 U. S. 336).

Between 1831 and 1936, the State of Arizona sought, in three suits brought against the six states parties to the Boulder Dam Compact, to have its rights to the waters of the Colorado River adjudicated. In 1937, the States of Texas and New Mexico sought to adjust by suit a heated contest over irrigation rights involving the water of the Rio Grande River for a distance of four hundred miles.[18] In this case, I served as Special Master appointed by the Court and heard testimony as to water rights dating back to the 16th and 17th Centuries, as well as to the effects of modern dams upon the amount and chemical content of the river water and alleged damages. On my recommendation, the States, together with the State of Colorado, settled the case by an inter-state compact.

Another phase of these vital rights to water arose in the great case brought by Wisconsin and five other states against Illinois in which six other states intervened as defendants. This was a suit to restrain Chicago from diverting into its sewage drainage canal excessive amounts of water, lowering the level of the Great Lakes by six inches and more, causing great loss of ship tonnage and damage to navigation and

[18] *Arizona* v. *California et al* (1931), 283 U. S. 423; *Arizona* v. *California et al* (1934), 292 U. S. 341; *Arizona* v. *California* (1936), 298 U. S. 558; *Nebraska v. Wyoming* (1935), 295 U. S. 40; *Texas* v. *New Mexico* (1939), 308 U. S. —; (1937) 300 U. S. 645, 302 U. S. 658; (1936) 297 U. S. 698, 298 U. S. 644; (1935) 296 U. S. 547.

riparian landowners. Charles E. Hughes, before he was Chief Justice, sat as Special Master; and the Court in 1930 entered a decree enjoining diversion in excess of specified amounts. To the objections raised by the City as to the cost entailed of a new method of sewage disposal, the Court said that as for years the defendants had been committing a wrong, "they must find a way out at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency, to the magnitude of which it seems not yet to have fully awakened. It can base no defenses upon difficulties that it has itself created." And now, note the extreme scope of the Court's power and jurisdiction; for, to an objection raised that the decree could not be complied with under the existing state constitution, the Court said: "If its constitution stands in the way of prompt action, it must amend or yield to an authority that is paramount to the state." In other words, the power of the Court to determine controversies between states under the Federal Constitution could not be impeded by a state constitution.[19] Still another phase of water problems was presented in a suit by North Dakota in 1923, seeking to enjoin Minnesota from flooding the former's farms by artificially caused drainage into an interstate river. (263 U. S. 365.)

In 1923, a situation which bade fair to produce disaster in many parts of Ohio and Pennsylvania was averted by a decision in suits brought by those states against West Virginia, involving not the flow of water but the flow of natural gas. For a long time, industries and homes in Ohio and Pennsylvania had been supplied in interstate commerce by gas coming from West Virginia. A statute of the latter state proposed to restrict the sale of gas to the needs of its own inhabitants. The case presented, as the Court said, "a direct issue between the two states as to whether one may

[19] *Wisconsin* v. *Illinois* (1929), 278 U. S. 367; (1930) 281 U. S. 170, 179.

withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other." The Court enjoined the operation of the statute; for, it said, "if one state had such a power, every state had it, and embargo might be retaliated by embargo, and all commerce might be halted at state lines." The importance of the decision to the welfare of our states cannot be over-emphasized. (262 U. S. 500.)

Other types of state controversies have been involved in suits which I will not take the time to narrate.[20]

Finally, the extent of the Court's power is seen in the great case of *Virginia* v. *West Virginia*, in which after many decisions over a period of twelve years, the Court determined that West Virginia must comply with its state constitution, and pay its proportion of the debt of its parent state to the amount of over twelve million dollars. This case, said the Court (220 U. S. 36) was "no ordinary commercial suit but . . . a quasi-international difference, referred to the Court in reliance upon the honor and constitutional obligations of the states concerned rather than upon ordinary remedies."[21]

I have thus tried to give you some idea of the magnitude of the questions presented in this phase of the Supreme Court's jurisdictional power, and of the vital part which its decisions have played in the history and development of the history of our states.

The Court's achievement in this direction has been due to the broad vision of the men who have sat on the bench. To settle such questions of far-reaching import requires large-minded men of long, mature, and varied experience. The spirit in which the Court has always approached these inter-

[20] For example, see *New Hampshire* v. *Louisiana* (1883), 108 U. S. 76; *South Dakota* v. *North Carolina* (1903), 192 U. S. 286; *Massachusetts* v. *New York* (1926), 271 U. S. 65; *Alabama* v. *Arizona* (1934), 291 U. S. 286.

[21] *Virginia* v. *West Virginia* (1907), 206 U. S. 290; (1908) 209 U. S. 514; (1911) 220 U. S. 1; (1911) 222 U. S. 17; (1913) 231 U. S. 89; (1914) 234 U. S. 117; (1915) 238 U. S. 202; (1916) 231 U. S. 531; (1918) 246 U. S. 565.

state cases has been finely stated by Justice Holmes in *Virginia* v. *West Virginia*, in 1911 (220 U. S. 1, 25) as follows: "This case is one that calls for forbearance upon both sides. Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end." And Chief Justice White said in the same case in 1914 (234 U. S. 117): "In acting in this case from first to last, the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states involving grave questions of public law determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that any thing but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case."

One important phase of all these suits is to be particularly noted, namely, that in many cases, the mere pendency of the suit in the Court for long periods of time has tended to allay interstate feelings and to bring about amicable settlement. Lapse of time is a great mollifier—that "old common arbitrator, Time," as Shakespeare termed it. A chance to cool off is the frequent solution of many differences arising from irritation, anger, and unreason. Time, moreover, gives opportunity to establish the facts involved, and to make clear the real cause of the disagreement as distinguished from the ostensible factors in the suit. Time absorbed in the

preparation and trial often develops the fact that parties are not so far apart as at the beginning they supposed. The Court has thoroughly realized this emollient influence; and, while not countenancing unnecessary delays, it has regarded suits between states as demanding grave circumspection in the taking of successive steps both by counsel in trial and argument and by the Court itself in its rulings.[22]

In 1861, John Stuart Mill, in his *Considerations of Representative Government*, said: "The Supreme Court . . . dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real International Tribunal." It took sixty-one years for the world to attempt to supply that want by the organization of the World Court. It may be admitted that the hopes of its founders are not yet fulfilled and that it is not yet certain that a world judicial tribunal can settle controversies between distinct sovereign nations. And yet, those who thus far lack confidence, may well study the gradual but increasing success of the Supreme Court of the United States in dealing with controversial subjects of an international character.

It has been urged against the possibility of the World Court that there is no established and accepted body of law for it to apply, and that we must wait until the nations agree upon such a body of law. This contention was vigorously urged by the late Senator Borah in the Senate in 1926. "In order to have a real Court," said he, "we must have a code of law which that Court is to construe. . . . You cannot set up

[22] It may be noted that the *Missouri-Kentucky* case, decided in 1871, had been pending 12 years; the *Missouri-Illinois* case, in 1906, for six years; the *Kansas-Colorado* case in 1907, for six years; the *Virginia-West Virginia* case, finally decided in 1918, had been pending 12 years; the *Maryland-West Virginia* case in 1910, for 19 years; the *Oklahoma-Texas* case, finally decided in 1926, for five years; the *New York-New Jersey* case in 1921, for 13 years; the *Wyoming-Colorado* case in 1922, for 11 years; the *Pennsylvania-West Virginia* case, argued three times and finally decided in 1923, had been pending four years; the *Wisconsin-Illinois* case in 1932, for six years.

a Court of justice and expect it to operate effectively unless it is founded upon the solid foundation of a code of international law accepted by the different nations of the earth as a guide for the determination of the principles which govern its international relationships." But precisely the same argument was used, and unsuccessfully, one hundred years earlier (in 1832) by the Attorney General of Massachusetts in the suit brought against that state by Rhode Island. Massachusetts, he contended, could not be called upon to submit its controversies to judicial decision until a law or code suitable to the decision of her case should be made. "The merits of any case depend on the conformity of a party's conduct to a previously prescribed rule of law; but if there is no such rule, there can be no test of such merits and no decision of them. . . . The Court having no law to expound cannot settle a judicial controversy depending, as all such controversies do, on the question whether the conduct complained of has, in the case presented, conformed to or departed from the obligations which are imposed by law." To this argument, however, the counsel for Rhode Island replied that the Supreme Court, like any competent court, in the absence of any statutory provision would govern itself "by the principles of justice, equity, and good conscience," and this reply was upheld by the Court. "The submission by the Sovereigns, or States," it said, "to a Court of law or equity of a controversy between them, without prescribing any rule of decision, gives power to decide *according to the appropriate law of the case.*"[23]

[23] See also *United States Supreme Court—The Prototype of a World Court,* by William H. Taft, before World Court Congress at Cleveland, Ohio, May 12, 1915, *Judicial Settlement of International Disputes,* No. 21 (May, 1915): "Most controversies between states are not covered by the Federal Constitution. That instrument does not for instance fix the boundary line between two states. It does not fix the correlative rights of two states in the water of a non-navigable stream. . . . It does not regulate the use which the state upstream may make of the water, either by diverting it for irrigation or by using it as a carrier of noxious sewage. Nor has Congress any power under the Constitution to lay down principles by

It is interesting to note that thus far, in the one hundred and fifty-one years of our Government, the Supreme Court has never met with any form of controversy, or any condition productive of conflict between the states of the Union, for which the Court has been unable to discover a formula for its solution by resort to some principle of law, international or otherwise, appropriate to afford just treatment to states entitled to an equality of right. If no actual precedent has existed, the Court has always found it possible to settle the case by equitable consideration of the needs and relations of human societies, and by logical extension of general principles of justice derived from established international, common, or civil law.

It is frequently said that the experience of the Supreme Court has no bearing upon the possibility of the success of a World Court—that the questions which arise between nations are so different from those arising between the states of our Union, that they are not susceptible of adjudication by a Court. Hence, scepticism and pessimism are prevalent as to judicial settlement of disputes between nations. Men point to the lack of substantial results in the fifteen years of the existence of the World Court. One must bear in mind, however, that world changes come about slowly. It takes time to mould or alter the sentiments and attitudes of the great groups of individuals termed nations. It takes time to persuade them that a surrender of certain powers of independent sovereignty may be wise or necessary to preserve their peace. It took many years to persuade the American states that a limited relinquishment of some of their rights and powers of state sovereignty was necessary to preserve the peace and union of the United States. Even after the adoption of the Constitution, the states did not at first trust

Federal law to govern such case. The Legislature of neither state can pass laws to regulate the right of the other state. In other words, there is nothing but international law to govern. There is no domestic law to settle this class of cases any more than there would be if a similar controversy were to arise between Canada and the United States."

the Supreme Court to decide their disputes. It took over fifty years to get them to accept its decisions on boundary questions; it was over eighty years before any other question of importance was submitted for its decision. Gradually, however, the Court obtained the confidence of the states; and now its competency to decide any non-political question is fully recognized. So it may be with a Court deciding between nations. As has been well said by a distinguished Englishman in recent years: "If the (World) Court by its practice justifies itself before the common judgment of civilized mankind, it is certain that the cases submitted to its decision will gradually increase in number and variety. . . . It can hardly be hoped that the Court will render perfect decisions in all cases, or that every decree will meet with a ready acceptance by the unsuccessful party. But every decision that is acknowledged to be just, and every instance of ready compliance, will help to make smooth the way toward the establishment of the ideal, which is nothing less than the rule of justice in international affairs. The immediate problem for the present day is to make a start in the right direction."

In these days of dismal and terrible international relations, it is doubtless hard to believe in the possibility of any method of settlement of disputes between nations other than by war. Many men of today say: "A World Court is futile; it cannot preserve peace; it is and always will be a political body; it will not last."

When we hear these pessimistic predictions, we should all recall that, one hundred years ago, great and wise men were saying that the Supreme Court was a failure and that the United States Constitution could not last. Thus, John Quincy Adams deliberately wrote in his *Diary* in 1832 that he gave the United States and the Constitution only twenty more years of life; and Chief Justice Marshall wrote: "I yield slowly and reluctantly to the conviction that the Con-

stitution cannot last"; and Joseph Story, Justice of the Supreme Court, said: "Everything is sinking into despotism under the disguise of a democratic government. The Supreme Court is sinking."

Well, in spite of these prophets of disaster, the Supreme Court has continued to exist for one hundred years—"the keystone of our National fabric," as Washington termed it in 1789—constantly and more fully exercising its functions for the settlement of interstate disputes and with increasing success. Need we despair over the possibility of a World Court achieving a similar success?

Men say that a World Court is an impractical dream. Well, statesmen one hundred years ago in the days of rigid state-rights views, would have said that it was a wild, a fantastic, dream, if it had been suggested to them that in later years the Supreme Court would take judicial action depriving a sovereign state of 2,400 square miles of its territory, or would deprive a sovereign state of 200 square miles of its oil resources, or would limit a sovereign state in diverting the waters of one of its own rivers, or would cut down by one-third the use by another sovereign state of its river waters, or would require another sovereign state to establish at great expense a new sewerage disposal system, or would deprive a sovereign state of the right to control its natural gas, or would force a sovereign state to pay many millions of dollars on account of a debt to another state. All these things would, in 1832, have been regarded as a wild dream. But the dream came true.

In answer to those who tell you that the advocates of a World Court are impractical dreamers, I commend to you the words of William Allen White: "The ashheap of the ages is covered with old tin cans of failures who once glistened as practical men. There they rest on history's dump, crushed, broken, and forgotten, with all their works. The names that stand out in the world are the names of men of

faith, the men of ideals, the men who snapped their fingers at the warnings of practical men, and went forward, following their visions into that far more exceeding weight of glory which comes to the man who gives his heart's cherished treasures to mankind."

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The Constitution and the Crisis State

An Address Delivered by

MAX LERNER

at

The College of William and Mary
in Virginia

THIRTEENTH LECTURE UNDER
THE JAMES GOOLD CUTLER TRUST

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THE CONSTITUTION AND THE CRISIS STATE

By Max Lerner

President Bryan, Ladies and Gentlemen:

Because American constitutional history has been crisis history the absence in the political and legal literature of any theory of constitutional crisis appears as striking as would the absence of a condemned man at his execution. One might speculate about what economics would be like without a crisis theory, or psychology without a body of material seeking to explain the growth and resolution of psychic tensions. To build such a theory in constitutional study is a perilous task: and where the Warrens, Corwins, Powells, and Boudins have feared to tread I do not propose to rush in. Yet I should like to set down in a tentative fashion some notes on the relation of constitutional crisis to the democratic state of today.

There have been three major types of constitutional crisis in our history. You get one type when there is a sharp discrepancy between the needs of effective government on the one hand and on the other the limits of tolerance imposed by the Supreme Court on the policy (generally economic policy) of the government. You can, if you wish, put it into somewhat Freudian terms: the *id*, or driving part of the governmental psyche, wants desperately to follow certain lines of action; the *superego*, or the censor in the shape of the Supreme Court, says No. If the cleavage between the two is acute enough, you get breakdown.

The second type of crisis, generally linked to the first, comes when there is a frontal attack (or counter-attack) on the judicial power, whether on the part of Congress or the

President, generally (although not necessarily) in order to make it more responsive to the popular consciousness of the time. In this sort of crisis the desire for a realignment of Supreme Court policy clashes with the sense of the need for retaining judicial independence of political change, and with the related sense of the Constitution as a basic protection of our liberties and of the Supreme Court as having a guardian-role toward the Constitution.

The third type comes when the Constitution, in emergencies, is actually stretched beyond its usual bounds, and where the unwonted stretching, necessary though it may be, raises questions of the breakdown of the whole constitutional fabric. This generally occurs in periods of military emergency, as during the Civil War, the World War, and the present one, and relates generally to the expansion of Presidential power.

In oversimplified terms, the first may be called an *economic* constitutional crisis, because its origin and occasion are economic change and economic policy. The second may be called a *judicial* constitutional crisis, because its origin and occasion are the expansion of judicial power and the threat to it. The third may be called a *war* constitutional crisis, because its origin and occasion are the demands that a war makes upon executive leadership, with all the dangers that it involves for civil liberties and political responsibility. All three are facets of the democratic crisis state.

I don't know whether it is subversive to use the term "crisis state" to apply to our democracy. I included it one summer in a catalogue description of a course I was to give at a university, and I received a polite little note saying that one of the university authorities questioned the wisdom of using that phrase. Wisdom or no wisdom, the reality of our crisis is a fact. It is not something that can be exorcised by verbal magic. We have on our hands a crisis democracy—one that must navigate through the shoals and scudding drifts dangerous to a democratic bark, one which seeks to use

every aid on its voyage but must cling to the difficult course of state power without state monopoly of thought or action, one which must contrive ever new strategies of economic control and create ever new administrative mechanisms, one which must somehow survive as a constitutional system while fighting its enemies without and within, one which must become a planned economy without destroying democratic responsibility and a military state without suppressing civil liberties. You can, if you will, refuse to use the term "crisis state." But our ancestors found they could not wipe out the fact of sex by calling a leg a limb.

We must start with the need for effective government. The greatness of the *Federalist* lies not so much, as has been thought, in the exposition of valid principles of political philosophy. It lies rather in the theme of a government effective enough to meet the problems it confronts. Many of the political attitudes of Hamilton, Madison, and Jay have been whittled down by time, and have been converted to the uses of minority rights rather than majority rule. But the *Federalist* remains one of the world's great books because, as in all great literature, its core theme is ever new. And that core theme is the need for adequate government.

Today a new *Federalist* could be written, recounting the changes and chances of our national life, and the new requirements of effective government. It has been remarked that the Supreme Court is an adjourned session of the Constitutional Convention. There is a sense in which this carries an ironic freightage. But the irony is not, as we have tended to suppose, merely in the reference to judicial law-making. There have been ample instances of a proper place for interpretative creativeness by the Court. "We must never forget," John Marshall said, "that it is a *Constitution* we are expounding." The irony lies in the fact that the Court has more often used its great power for sterilizing than for fertilizing the materials of American growth. And the irony lies

also in the fact that the Court has claimed for itself alone the creative potential. The fact is that in every crisis we must govern with the freshness of eye and the largeness of spirit of a Constitutional Convention. There are times when we must act like the Founding Fathers or commit national suicide.

If we really want to live, we'd better start at once to try;
If we don't, it doesn't matter, but we'd better start to die.[1]

Part of the problem of democratic survival is constitutional, much of it is political and economic. We cannot continue to draw the sharp boundaries between the two realms that we have drawn in the past. The fact is that in a constitutional democracy, whatever the reality of the forces involved in the struggle over direction, the rhetoric that the minority groups will use in opposing changes is always the rhetoric of constitutionalism. There is an interesting comparison to be drawn here between the situation a half-century ago, in the days of the triumph of Mr. Justice Field, and the situation today. The conservative Court majority at that time formed an idea of a rigid economic system that was best off left alone and that could not be violated; it alone was identified with constitutionalism. The enemy they were fighting was "socialism," and anything was socialism that did not fit into their accustomed economic scheme. The constitutional crisis of 1935-1938 was the final term in the proportional sequence of their reasoning. Today a similar group in the country has fetishized a rigid political system. To our amateur constitutional lawyers in Congress and out, that alone is constitutional. The enemy they are fighting is "dictatorship," and anything is dictatorship that does not come within their accustomed view of administrative function, presidential power, and the shaping of foreign policy. Fifty years ago this group stood for inaction in the sphere

[1] W. H. Auden, *Poems*, p. 42, New York, Random House, 1934.

of the government of industry. Today it adds inaction in the fashioning of foreign policy.

The issue is still the adaptability of our constitutional framework, its adequacy to meet the demands laid upon it. There are, however, differences between the two situations. Except in an indirect sense, the struggle today is not one over economic organization, although it is likely to become so when the question of the organization of a war economy reaches—as it may reach soon—a constitutional phase. Thus far the struggle is mainly over the limits of political action and the lines of the distribution of power. Another difference is that the force obstructing effective government is no longer the Supreme Court, which with its present personnel and in its current doctrinal phase is reasonably ready to give the green light to expansive programs for domestic and foreign policy. The obstructive force has come to be located mainly in Congress, and in areas of the press and particular interest groups.

But if the accidental factors have changed, the essential problem of effective government remains. And the aspects of constitutional crisis in which this problem has at various times been clothed are worth reviewing.

Some day the full and rounded story of the New Deal constitutional crisis may be written. To say that, may of course, be only a pious hope. For the full and rounded story even of the Jefferson-Marshall constitutional crisis has not been written, despite the zeal of many of our historians. We have had accounts of Jefferson's attack on the Court, and accounts of the Court's attack on Jefferson and states' rights. But we have had no detailed account of each attack in relation to the other, of both in relation to the economic factors of a developing industrialism, the political factors of a new federal structure, and the psychological factors of the clash between old and new symbols; and finally of all these factors in the context of an international climate of opinion

that had been created by the world's revolutions of the eighteenth century.

So too with the New Deal constitutional crisis. We have had in Alsop and Catledge's *The 168 Days*, an account of the legislative battle in a popular vein written from the bias of critics of President Roosevelt's Court proposal. And former Attorney General (now Mr. Justice) Jackson has given us, in his *Struggle for Judicial Supremacy*, a survey of the Court's behavior before and after the legislative fight. Justice Jackson's book reads a little like the testimonial of a man who is sure that the medicine made all the difference in the world between the feeling before and the feeling after, but is a little ashamed—being a doctor himself—of being beholden to what may have been, after all, a somewhat slickly concocted patent remedy. But we have not yet had, and it may be a long time before we get, a history of the crisis which sees it steadily and sees it whole—which relates it to economic changes, to the class-structure of our society, to the struggle for political power, to the world crisis, to the psychological roots of fear and insecurity.

What I set down here is no history: merely a sequence of reflections on the course and the meaning of a particular constitutional crisis. Before we can understand the New Deal crisis, we must understand that it followed on two developments. One was a revolutionary situation in the world at large, which produced and was produced by economic dislocation, and which put an enormous strain on our economic and political invention and our national will. The second was a felt need for decisive action in the economic realm, for a sort of legislative *Blitzkreig*, and the development of administrative strategies so considerable that the past decade may well go down in American history as most significantly that of our administrative revolution.

It was some dim knowledge of the revolutionary situation in the world at large, and of its bearing on American history, which impelled the Administration to make its rela-

tively vigorous attempt to seek a solution of the problem of production and employment by new economic strategies and administrative controls. It was the unwillingness of the Supreme Court majority to recognize the nature of world economics that led to their following the one tradition of seeing the Constitution as an inflexible verbal testament, rather than the other tradition of seeing it as a tool for effective government.[2] Out of this clash between the action of the Administration and the opposition of the Court, an irresistible force and an immovable object, came the constitutional crisis.

Or perhaps I should put it somewhat differently. We start with economic breakdown. The Administration makes a decisive attack on the problem in terms somewhat novel for America, economically and administratively. The Court answers not by an attack on the problem—insists, in fact, that it is quite unconcerned with that—but by an attack on the attackers. This course was taken, as is fairly clear now, not because of the inherent inelasticity of the Constitution, or the inevitability of the particular tradition of constitutional interpretation that was chosen, but primarily because of the inflexibility of the majority's social philosophy. The struggle was joined between effective government and judicial supremacy.

And yet again, in stating it thus, the truth is likely to prove elusive. It would be a mistake to view the Supreme Court's role wholly in terms of inertia. While the social philosophy of the majority was a quietist one, their judicial philosophy was decidedly activist. Their attack on the New Deal program of social legislation was vigorous in the extreme. (It is worth nothing, in contrast, that while the economic and social philosophy of the current Court majority is a dynamic one, its judicial philosophy is quietist—that of judicial tolerance of legislative action.) If we premise some sort of equilibrium in the attitude of the people, between

[2] For the terms used here I am indebted to B. H. Levy, *Our Constitution: Tool or Testament?* New York, Alfred A. Knopf, 1941.

their attraction to the idea of necessary legislative change and their clinging to the traditions of necessary judicial guardianship of individual rights, we may say that the violence of the Court's attack threw it off its keel, so far as the delicate balance of public opinion was concerned. The President, reinforced in public opinion by his election for a second term, sensed this and counter-attacked the Court with his proposal for reorganization. But the President too attacked more violently than he could afford to. He too was thrown off his keel. And he left himself vulnerable to an onslaught that, using the Court plan as the immediate target, went far beyond that target. The varied forces that had been generating opposition, for one reason or another, to the social philosophy or the political tactic of the Administration were polarized around this issue. Especially was this true of many of the liberals, who, while supporting the New Deal, had unquiet doubts about its seemingly erratic course and the crudity of its energies: they now had a chance to release those doubts of a general character under the guise of opposition to a specific break with tradition. And in the course of the turmoil, over the President's plan, his opponents—liberals, conservatives, and reactionaries alike—were able to reach deep to the basic fears of the people. For what finally defeated the President's plan was the sense of fear that we were breaking loose from our moorings in the Constitution and setting sail for shores unknown. The result is history

The course that the constitutional crisis ran is now fairly clear, and has been given some precision in Mr. Jackson's narrative. There were four phases. The first, in 1933 and 1934, was when the Court "hesitated between two worlds," upholding some of the state reform legislation but giving no clear indication of what it would do with the national program. The second was the "nullification" period in 1935 and 1936, in which the Court used its axe freely on national legislation. The third was the President's reorganization plan, the struggle over it, and its legislative defeat. And the

fourth was the new line of decisions by the Court, indicating a changed orientation, and eventually the formation of a new majority.

Certain questions arise. Could the crisis have been avoided? The answer must be clearly in the affirmative, unless we premise on inevitable and determinist relationship between capitalist economic crisis and a quietist social philosophy on the part of the Court majority which the later history of the Court does not bear out. Need the crisis have been as acute as it was? This is more difficult of answer. One thing is clear: once the Court acted with the extremism it did, and once the President's dramatic plan was announced, compromise became extremely difficult. Many who had been disquieted by the Court's decisions found it necessary now to suppress their doubts about the Court in their zeal for the defense of judicial independence. And many who were disquieted about the particular plan of the President found it necessary to suppress their doubts in their zeal for some sort of judicial reform. Once the battle was joined, the alternatives for both groups became absolute. For one group it became a question of either complete judicial supremacy or judicial subordination. For the other it became a question of either the President's plan or no judicial reform at all. In the clash of power politics the desirable direction was transformed into an ideological absolute which had either to be defeated as a whole or accepted as a whole. Everything intermediate was squeezed out.

I turn now to a crucial question. How was the constitutional crisis resolved? In answering it we must seek a different answer from what it would be were our question, How was the political struggle over the Court reorganization bill resolved, and who was the victor in the legislative battle? For the resolution of a constitutional crisis involves not the determination of victor and vanquished, but the clearing of the obstacles that stand in the way of effective government. Thus there was a shift in judicial philosophy on the Court

from one militantly opposed to the Administration to one tolerant of its efforts to resume its attack on the basic economic problems. And that change, as Mr. Jackson tells us, took place even before the active changes in the personnel of the Court through resignation and replacement. The change was made partly as a tactical matter, to help persuade Congress to vote against the Court bill.

Yet, it would be wrong to say, as Jackson does, that therefore the ultimate change in the Court's attitude was not due to a change in personnel. For without the actual changes in personnel that followed, the balance of power would have remained in the hands of Justice Hughes and Roberts, and the victory for the New Deal, represented by the Court's shift in orientation, could not have been consolidated. The first period of uncertainty and hesitation that opened the constitutional crisis might have been repeated. And it is significant that the recent Supreme Court policy indicates that what change there has been in the judicial philosophy of Justices Hughes and Roberts has not been so essential as to take them out of the category of frequent dissenters from the current Court majority on economic cases.

Thus the crisis was resolved in two stages: first, when the threat of Court reorganization resulted temporarily in a shift of judicial attitude in the balance-of-power group; and later, when the way was cleared for changes in the personnel of the Court. As a result of both there was a return to the more flexible of the Supreme Court traditions of constitutional interpretation.

There are several other observations that may be worth making, and I am the less disinclined to make them because I have not seen adequate emphasis on them in the literature. They have to do with the resolution of the crisis. But their emphasis is not with the legislative struggle or the court personnel or the doctrine or philosophy of the judges: rather with popular consciousness and class tensions in our society.

If the Court bill had been passed and we had in that way (through the forced substitution or addition of judges) achieved our present Court liberalism, it would have been difficult for the country to accept that liberalism with the lack of social tension that now characterizes our attitude toward the Court. The Big Industry groups would have felt it to be an unparalleled exercise of arbitrary power. Even the large majority mass would have found it difficult to accept the results, however these results might have comported with the effective government they wanted. For even the majority fears to get the right things in the wrong way. And enough of it had by that time become convinced that the Court plan was the wrong way.

As it happened, the Big Industry groups were stopped from the sort of vociferous and active resistance which they would have offered to the decisions of the new Court if, in their minds, judicial independence had been destroyed through the "packing" of the Court. So, in a deep sense, it was well that while the Administration got the brunt of popular attention in 1933-1935, and the Court's decisions got it in 1935, it was what happened between Congress and the President that got the brunt of attention in the 1938 days. The (at least outward) victory of Congress deflected attention from the actual resolution of the constitutional crisis through the play of power politics upon doctrine. The popular mind, which had been stirred to the depths by the events of the Court fight, and in which allegiance to effective government had been aligned against allegiance to judicial independence, was now allowed to go back to its traditional channels. The people could have their cake and eat it too. As for Big Industry, it could not eat its cake, but it also could scarcely protest: for it was *its* cake, was it not? It had won the fight against the Court plan. Even Mr. Willkie, in the campaign for his nomination, was not able, through his well known *Saturday Evening Post* article on the new Court orientation, to stir up

resentment against a too-liberal Court that had after all *not* been "packed."

Thus what might have meant a more or less serious impairment of the prestige of the Constitution and Court has been averted. And this has happened largely because the settlement was accomplished within the constitution rather than outside it. What a theme here for a Thurman Arnold on the way in which everything turns on the decorous observance of symbols—were not Mr. Arnold himself far too busily engaged these days in the decorous observance of symbols to write about them.

But perhaps because of the very fact of the observance of symbols, the central problem of judicial supremacy has been left unaffected. For if and when we again get a court which believes that social policy must be shaped by a process of litigation we shall run into another major judicial constitutional crisis.

I have spoken thus far of an episode in recent American history which presented an example of an interlocked constitutional crisis, which was in its first great phase economic and its second judicial. It is moreover an instance of a completed crisis cycle—one that has run its course, although it has left a residue of effects.

I turn now to a different type of crisis—what I have termed the war constitutional crisis. The democratic crisis state, after weathering pretty well its first (domestic) storm, is now facing its second (international) storm. It was inevitable, as we entered into the phase of severe international strain, that constitutional difficulties should arise. The need for extraordinary pace and decisiveness in action necessarily placed strains on the constitutional limits of the state. But it was also to be expected that those strains would apply not to the relations between the Administration and the Court, but between the Presidency and Congress, and that they would be fought out not in Court decisions but in Congressional debates and the channels of opinion formation.

That is happening now. I do not consider that we are at present in a state of serious constitutional crisis. I do think that we are in a state of constitutional expansion which has crisis elements and potentials. I shall speak later of the broadening by the present Court of the limits of tolerance for social legislation both of the federal government and the states. Yet while some of our constitutional troops are thus employed in consolidating their victory, the real spearhead of constitutional expansion must be sought elsewhere—in the Presidency in wartime.

You will undoubtedly have noted the important new Presidency books that have been published this year by Laski, Corwin, Herring.[3] This concentration on the Presidency represents a sound instinct, born of a dual outlook: first, a sense of the need for great leadership in America's hour of decision; and second, a sense of the difficulties that will be (and have already been) encountered in the reaching out for Presidential effectiveness.

I shall not present an analysis of the constitutional aspects of the Presidency. That has already been done with considerable sharpness and in great detail by Corwin. Again I want only to set down some reflections on aspects of our constitutional system in wartime.

One of the difficult but exciting things about the democratic crisis state is that it must carry on under democratic forms in a world that is abandoning them. And this paradox becomes particularly acute in wartime. Although I shall not discuss our foreign policy from the angle of its merits, it is important to note that we are today committed to full aid to the anti-Nazi nations. What does that mean in governmental terms? It means we must fulfill the conditions of modern warfare to survive, just as in the domestic crisis we

[3] Harold J. Laski, *The American Presidency,* New York, Harper, 1940; E. S. Corwin, *The President: Office and Powers,* New York University Press, 1940; E. P. Herring, *Presidential Leadership,* New York, Farrar & Rinehart, 1940.

had to fulfill the conditions of modern economic and administrative strategy to survive. War today is of a dual nature: it is a war of factories and a war of morale. To organize our armament power to aid Britain requires the delegation of vast powers to the Presidency. To mobilize our factory power will raise further questions of war-industries control. To deal with morale will raise problems of civil liberties. But the exacting thing about our situation is that everything we do in our defense effort is geared to the pace and scope of the efforts of the fascist powers. In effect—and here is the paradox—although not yet at war, we are having to operate as if we were fighting a war. Yet, since we have not declared it, our officials do not have either the legal or the psychological powers they would otherwise have.

The problem here, as in the crisis of 1935-1938, is again one of the dominant need of governmental effectiveness if we are to survive, as against an inflexibility of governmental doctrine and machinery. But the differences are important. The struggle is not primarily in the economic but in the political realm. The difficulties do not center in the Supreme Court but in the relation of the President to Congress and sections of public opinion. The ideological minus-symbols that are in use are not those of (economic) socialism but of (political) dictatorship; and the opposite plus-symbols are not judicial authority but civil liberties and political survival.

The institution of the American Presidency is confronting the severest test of its whole history. For no matter what happens in world affairs, the path ahead of us is likely for some time to be as difficult and stumbling as any we have taken. And the Presidency will have to bear the brunt of the burden. For while Congress will have its path cut out to subject the acts of the President and the administrative and military arms of the government to the pitiless test of discussion, and the Court will have to draw a perilous line between public need and private wrong, the great shaping and forma-

tive work must be the President's. That has always been true in times of crisis in America, but it will be particularly true in a war crisis of the world era of totalitarianism.

Have we a conception of the Presidency adequate to this need? Here too, as in the case of the scope of the judicial power, there are several alternative traditions we can draw upon. One starts with Jefferson but has generally been associated with the weaker Presidents and the laissez faire executive doctrines: that the President dots the i's and crosses the t's for Congress, and acts as a sort of *tabula rasa* on which "the laws of economics" are written. The other starts with Jackson and Lincoln and includes Cleveland, Theodore Roosevelt, Wilson, and Franklin Roosevelt. I should like to submit that a conception of Presidential leadership adequate to our needs would have to be based on a conception of a militant and affirmative democracy. It would draw upon the second list of names and examples I have mentioned, but it would set them in the international context of today.

What is that international context? It may seem a far cry from a discussion of world forces to the American Constitution: but the latter will not be either workable or intelligible from now on except in that context. It is a context of changing technologies of diplomacy and war. It is a context in which national isolation or neutrality are no longer possible. It is a context of the breakup of the international order we have known. It is a context in which only the strong and affirmative state can survive.

In the light of this the Presidency in the democratic crisis state is likely to extend its power in four areas—first, the military forces, over which the President is already commander-in-chief. Second, the organization of the war industrial structure. Third, the further extension and co-ordination of the administrative agencies. Fourth, the shaping of foreign policy.

Of these, the President's control of the military forces is the least likely to be called in question. Yet this is exactly

the point where Lincoln exceeded his powers by taking upon himself in the early stages, without Congress, the responsibility of getting the country ready to fight a civil war. That contingency is not likely to arise again unless a Nazi victory over England should align against each other the groups that want to bring our institutions into the orbit of Hitler and the groups that would fight such an eventuality to the bitter end. And yet the President, because of the anomaly of our being at war yet not at war, is today having friction with Congress in regard to the disposition of the armed forces. The difference is that what the President as Commander-in-chief could have done under a state of war now has to be done more laboriously as part of the shaping of foreign policy. Yet even here recent events have shown the President has broad enough range in negotiations to commit the nation step by step to a definite foreign policy.

In two of the other three areas there is likely to be a good deal less friction before a declaration of war and more after it. In the area of industrial organization, while the crucial problems will not immediately be constitutional, we have learned that questions of property have a way of converting themselves into questions of constitutional power. In the area of administrative control enough has been done in an experimental way during the New Deal (for example, the recent Acheson report) to attenuate the potential difficulties during the war years. But it is in the area of the shaping of foreign policy, that the great difficulties have already cropped up and will continue to do so.

There are already many who fear this expansion of power as dictatorship, and others who welcome it as a departure from the cumbersomeness of a leaderless democracy. But surely we need not accept either position. Our task is neither to whittle away the necessary power nor to submit blindly to arbitrary power. Rather is it to give the President the powers he needs, but encircle them with institutional safeguards, and build into them, in the fashioning and execution

of policy, those who represent various groups with a real stake in the fight against totalitarianism.

This will still leave knotty problems—of civil liberties, of labor's claim, of the competition of political ideas and political policies. Once more the Supreme Court will have to wrestle with the "clear and present danger" doctrine, in its application to untried situations.

I say, there will be knotty problems, for several basic reasons. For first, a war or defense emergency brings closer to each other the political and economic structures of a nation. The imperatives of production become political imperatives. The scope of labor choice and bargaining and organization become questions fraught with immense political importance. At what point labor is being asked, like any other group, to serve the nation's interest and at what point it is being victimized, under the guise of the national interest, by dollar-a-year men in the government and by army-men who sometimes have no sympathy for labor—those too may be tough and intricate questions. The safest general course is again to apply the rule of participation—to ask whether labor has had a hand in administering the machinery to which it is being subjected. Second, a war or defense emergency whittles away the line between utterance and action, between private right and public responsibility, between conscience and constraint. And third, a war or defense emergency brings various local communities together in common and more or less standardized sentiments; and while it infects them with a central tension, it has rarely the machinery for keeping their potential vigilantism in check. It is in these local areas, I think, rather than in the action of the national government, that most of the civil liberties cases will arise. And here too the only possible defense against them is the persistent attempt to spread a sense of the rule of law and the fabric of equality.

I have said above that these will be knotty problems for the Supreme Court to solve. I have relatively few fears about

the quality of their solution. It is not only that I consider our present Court a great and technically proficient one. It is also that through all the crises of the past decade—economic, political, constitutional, international—our democracy has retained the essential fabric of legality, the patient education of opinion by the government and the responsiveness of the government to opinion.

This deserves a word. For we have allowed our thinking about democracy and dictatorship to become thin, smug, and superficial. We judge them in quantitative terms, as if we were grocers weighing our potatoes. Dictatorship means great power, we say; democracy, little power. Dictatorship means concentrated power, democracy, safely dispersed and divided power. But to say and think that is to fall victim to the great tragic fallacy of our age. For it is not true that to survive a democracy must be weak. In any form of government, power must be adequate to the tasks placed on it. And in any form of government, power must be concentrated as far as may be necessary for survival.

The crux of the problem must be sought in legal, political, and economic responsiveness. The Nazi war-lords must by their very nature be lawless, because if they once admitted a system of law to which their power would be subject, by which it would be measured and its arbitrariness checked, their whole house of cards might fall. The only law they recognze is the law they declare, just as the only international order they recognize is the order they can enclose within their iron ring of coercion and terror. And what goes for legal responsiveness goes also for political and economic. So long as we can keep our leaders in office or turn them out at will, so long as jobs are not dependent on state or party, so long as we can keep open the channels for the competition of ideas, the democratic crisis state can be at once decisive and constitutional, strong without sacrificing the liberties of its people.

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The Constitution and the Guarantee of Freedom

An Address Delivered by

JAMES T. SHOTWELL

at

The College of William and Mary in Virginia

FOURTEENTH LECTURE UNDER
THE JAMES GOOLD CUTLER TRUST

WILLIAMSBURG, VIRGINIA
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The Constitution and the Guarantee of Freedom

JAMES GOOLD CUTLER LECTURE

By James T. Shotwell

Delivered at the College of William and Mary, February 9, 1942

In this, the greatest crisis in the history of civilization, it is a sound instinct which carries our minds back across the century and a half of history to that day when the work of the Founding Fathers of the Republic was completed and the great experiment was definitely launched of creating a Constitution that would both ensure effective government and safeguard the citizen against excess of power. Every new phase of the crisis draws us nearer in spirit to those pioneering thinkers who first set forth the fundamental principles upon which the institutions of our political life are based. It is not merely instinct, however, which causes us to refresh our minds by a rereading of history; for the stubborn logic of events forces us into a situation which is fundamentally similar to that confronting the country at its birth. The long enumeration of acts of tyranny in the indictment of George III is more than paralleled by our indictment of our enemies today. At a time when liberty is trampled upon by the oppressor in more than half the world, the reminder of our heritage of freedom is especially valid and important. The fundamental issue of the present war is not the maintenance of the independence of the peoples of Continental Europe, nor of the British Empire, nor even the vast significance of the mastery of Asia; it is whether freedom itself can survive in nations which have cherished it more than life itself, or whether those who have never lived securely under its benign régime will impose the contagion of their slavery upon the rest of the world. This is the issue of 1776 once more in a world-wide setting. The scene has shifted from the quiet precincts of historic Williamsburg to a world-wide debate

on the nature of government in which some of us think we can faintly discern the outlines of an international community of free nations looking forward with the same confidence in the triumph of the fundamental principle of justice among nations, which is the basis of civil government at home. The debate at this hour is chiefly on the lips of guns and in the thrust of torpedoes on all the seven seas, but it is also a moral and spiritual conflict in which all of us play a part. For, at the same time as we are meeting attacks from without, we need to provide defense at home against any possible confusion concerning the legitimacy of our institutions and our way of life.

It was in fulfillment of this purpose of domestic clarification that there was recently a nation-wide celebration of the 150th Anniversary of the adoption of the Bill of Rights in the Constitution. The exact terms of that celebration, however, left much to be desired from the standpoint of the historian, however appealing it may have seemed to those who conceived of it as an emotional rededication to a great and national ideal. Listening to the voices that came over the air from Hollywood, one might think that the guarantee of freedom was an invention of our own, that we succeeded where other peoples suffered and failed, that however much the ideals had been illumined by prophets and teachers in the past, it had never been focussed into reality until set forth in the immortal phrasing of the Founding Fathers. It should be our first thought today to protest against this falsification of history; for no one would have protested more than Mason or Jefferson against the idea that the fundamental principles upon which the New Republic rested its case before the public opinion of the world were new and solely and purely American. The principles of government, designed to protect freedom, were not a sudden birth, like a full-armed Minerva from the head of Jove. The antecedents of the American experiment in government go back across the whole history of the Western world to those pioneers in political thinking, Plato and Aristotle, and to the stoic and Christian thinkers who built upon their work. Roman law and the scholastic philosophers of the Middle Ages contributed to this heritage as well, and finally it was once more

brought out of the academic cloister by the writers of the period of the Renaissance and those following them to furnish the basis of the new State system of Europe in the seventeenth and eighteenth centuries.

So far, however, we have been speaking of only one stream of influence upon the thought of Colonial America. But before we turn to analyze the nature of that contribution of Continental Europe to political theory, we must place over against it another and different pattern of politics, that which was drawn from the history of England. However much the English of the Middle Ages profited from Greece and Rome, the evolution of their political institutions was a thing apart from that of the Continent. In place of the generalizations of philosophy, they tended always to think in the homely terms of real life, and to build up the safeguards of freedom through the obscure but august process which was registered in the common law.

The Founders of the American Republic were influenced by both these historic trends, the Continental and the English, as is clearly shown by an analysis of the Declaration of Independence itself. The title deeds of the new nation are those granted to it by "the Laws of Nature and of Nature's God," a phrase in the opening paragraph of the Declaration, the full import of which most readers fail to note. For, in contrast with these eternal and immutable laws, the main principles of which are summarized in the sentences which follow, there is traced a detailed picture of civil law which constitutes the picture of actual government under King George III. This series of political acts is clearly of a different character drawn from a different world of experience than the basic principles with which the misgovernment is contrasted. In short, the Declaration of Independence judges the government of England on principles drawn from a Continental source.

This is just the opposite of the procedure by which the English themselves set about redressing their own grievances against the Stuarts. James I, a Scottish king, brought up under French influences, was trained in the Roman law and justified his theory of government upon it. His great legal opponent, Sir Edward Coke, was, on the contrary, the pro-

tagonist of the common law, and drew his arsenal of argument from English experience. There was an advantage in the argument with the sovereign in his not being held down to a single set of principles like those which the king was fond of reciting from the Roman law in support of his claims of absolute kingship. In building thus upon the English past, Coke went so far as to strain historic truth in the support of freedom. Maitland's remark that Coke "invented Magna Charta" is but another way of saying that he used it to the full and for perhaps a little more than it was worth. For it was a mighty buttress for the glorification of the common law. Yet, while refusing to follow the lead of the Roman jurists, he fell back upon much the same method in his insistence upon a fundamental law superior to parliamentary statutes, an argument not without influence upon American revolutionary opinion.

Now it is a striking fact that the opposition to George III in the Declaration of Independence was not based upon any such reasoning as that of Coke, for Jefferson fell back upon the method of King James and challenged the existing government of England on the basis of its violation of certain abstract rights with which, according to the Declaration, all men are endowed by their Creator. This contrast of the initial statement of the American Revolution, with that which laid the groundwork for the Civil War and the Revolution of 1689 in England, seems to have escaped attention, so far as I know, and it is certainly an interesting conjecture as to why this should have been the case. I think the answer may perhaps lie in the fact that when the experience of the English Revolution came to be summed up after it was all over, the fundamental principles of the law of nature which were then adduced, were very different from the principles which King James drew from the Roman law. James could fall back upon the precepts of the late Imperial period of Roman history, which emphasized the power and sovereignty of a Divine ruler. By the time John Locke wrote his "Two Treatises on Civil Government," it was not to the late Roman period that the political philosophers were looking but to the period of the Republic and the Early Empire, in which the rights of man were the chief concern of both philosophers

and jurists, and there was a place for Freedom in the scheme of eternal things.

It is almost impossible for us today to realize how heavy was the weight of antique learning upon the thought of the sixteenth, seventeenth and eighteenth centuries. The formative period of modern history was dominated to a large extent by antique models. In its first phase this played into the hands of absolutism and the age of despots was the result. The theory of the Divine right of kings drew support, not merely from the precepts of the late Roman Empire, but even more from the Old Testament and that ceremony which amounted to almost an eighth sacrament, the anointing and the coronation of the King. Royalty was thus exalted until it claimed to be the whole body politic, "L'état, c'est moi." This conception, destroyed in England in the seventeenth century, and in France in the Revolution which followed our own, was acted upon by rulers as enlightened as Frederick the Great. How was it that the revolutionary theory which ultimately supplanted it, of the sovereignty of the people, won its way to victory? The answer to this question is that the opponents of absolute monarchy found an even richer arsenal in the classical authors than in the protagonists of kingship.

At the risk of repetition, let us trace this prehistory of the Bill of Rights a little more definitely. We begin with Richard Hooker, "the judicious Hooker," as Locke repeatedly refers to him. Hooker's "Ecclesiastical Polity," published in 1593, was designed as an argument against the Puritans and for the Church as established by Elizabeth, and the application of that argument to civil polity was only incidental. Nevertheless, falling back upon the concept of the law of nature as the embodiment of reason, he reached the conclusion that laws must harmonize with this fundamental test and be upheld so long as they are fitted to that end. In the effort to show the Puritans that they were wrong in their objection to what the majority desired, he argued that reason is subject to change with circumstances, and calls for adjustment to realities. The Puritans had fallen back upon Revelation, but that, said Hooker, is a matter of faith, whereas Reason is the guide for mankind in its secular activities. Society itself is a

product of the law of nature because, in the pursuit of happiness (the phrase had not yet acquired currency) the interplay of interests lead men to agree upon some form of government to harmonize their varying desires. There is nothing new in all of this, for it is the old debate familiar to Cicero, and to the scholastics. But it leads also to the fundamental thought which was crystallized by Rousseau, that of a social compact as the basis of society. The wording, however, is very unlike Rousseau. Let me quote one sentence:

> . . . By the natural law whereunto God hath made all subject, the lawful power of making laws to command whole politic societies of men belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth, to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose the laws, it is no better than mere tyranny.

Thus Hooker's contribution to English political thought leads to the conclusion that a test of the validity of laws is the consent of the governed. It is a paradox which was bound to be noticed, that in this way, while arguing for the support of the Tudor Queen in her ecclesiastical policy, Hooker enunciated a theory quite at variance with the earlier trend of Tudor despotism. His influence, however, was limited by the fact that he was writing a treatise against the Puritans, and they, in their struggle for power, found support in the more practical mind of Coke. The real battle against the Stuarts was to be fought out on more definitely English terms.

When the battle was over, John Locke summed up the consequences in his "Two Treatises of Government," published in August, 1689, some six months after the Declaration of Rights forced upon William and Mary on their accession to the throne. That document began by reciting Hooker's theory of a contractual basis for the Constitution of England. At this point, we may pause to remark that it is perhaps a fortunate thing for the English that they never codified their Constitution into a single written document, for they might

have found it difficult to include in it the contractual basis of the sovereignty of William and Mary along with the declaration of a King by the Grace of God. The advantage of not having codified their texts is that there can be a shifting emphasis upon those particular elements in the body of precedent and statute through which the British government works. In short, seventeenth century England actually worked out in its political history that harmony between the law of nature and civil law which Hooker had made the basis of his argument a century before.

This may seem an unduly long historical introduction to the guarantee of freedom in our Constitution, but we have only now reached the real bridge between English and American thought, for it was John Locke who was the mentor and George Mason the author of the Bill of Rights in the Constitution of Virginia, and we have not even touched as yet upon the contribution of Montesquieu, whose scheme of government would make government itself a check upon the undue extension of its powers. There would, of course, be a certain justification in analyzing Locke's political philosophy in some detail at this point because he was the man who most influenced American political thinking in the period of the Revolution. As this has often been done, however, we shall content ourselves with an attempt to answer the question why it was that the Whig philosophy of social contract which he elucidated triumphed so completely in the England of 1689 and in the thought of the Founding Fathers.

The answer to this is, I believe, to be chiefly found in the economic history of the sixteenth and seventeenth centuries which was the period of the Commercial Revolution. The treasure that was captured by the freebooters who plundered the galleons of Spain was not left in the hands of rulers to accumulate in hoards for the payment of soldiery or the extravagance of courts. The seamen of the northern nations were backed by businessmen who speedily learned how to use capital in productive enterprise. Merchant adventurers, they introduced into the economic life of northern Europe a different sense of property from that which concentrated upon territorial holdings. Fluid property to the extent of these new millions in gold and silver coins had never been

known in history before. It followed, therefore, that any social contract in the political framework of government which would be valid for England or the Netherlands, would have to provide safeguards for capitalistic property if the new merchant and moneyed class was to maintain its place within the state.

On the other hand, the King had a greater need for money than ever before because of the increased cost of administration due to the inflationary effect of the influx of gold and silver, which produced the first revolution in prices in the history of Europe. The issue between the Stuart Kings and the Commoners of England was thus largely conditioned by the Commercial Revolution; it was not only personal liberty but money. The control of the purse had become very definitely the test of political power. The argument, however, by which Royalty was met was based upon English precedent. James I, trained in Roman law, met the claims of the English jurists by reiterating the precepts of late Roman law in which the will of the monarch was recognized as supreme. Over against this basic citation in support of Divine Right, Coke, as McKechnie puts it, "read into Magna Carta the entire body of the common law of the seventeenth century, of which he was admittedly a master," and did it so effectively that it assumed substantially the character of a statement of natural law. Thus he and Hooker were approaching from opposite angles that theory of human rights which had played so large a part in the theory of the stoics. The law of nature could evidently be reached by the experimental processes of English justice as well as by the philosophic deductions of Aristotle.

Of these two streams of history, the English and the Continental, the latter runs with limpid current between banks that have been opened and made straight by the logic of legal engineering; while the former meanders obscurely and at times is almost lost to view as it sinks into the soil of English life. But the green meadows of the common law, which it refreshes, spreading out by village and countryside, are a more vital symbol of freedom than the prouder creations of the Roman jurists at the courts of rulers. Let us take two examples of this vitality. Our Bill of Rights of 1791 thunders

"nor shall any person be deprived of life, liberty or property without due process of law." These very words, clad in the quaint Norman French of 1354, were enacted by the Parliament of Westminster in the twenty-eighth year of Edward III, six years after the battle of Crecy.[1] The gap between the two texts is four hundred and thirty-seven years, but even an old equity draughtsman might well agree that this is the only gap there is. Another example is our constitutional right of the freedom of speech. This made no change whatever in the rights of free speech which Englishmen were then enjoying. It is the rights of free speech, as defined by the common law, which cannot be abridged.[2]

Let us turn now from legal to political history. Alongside the common law principle of *habeas corpus*, stood the demand that there should not be taxation without representation. The two were combined in that most signal exercise of the right of petition ever made, the Petition of Right of 1628, which, by the King's signature became law. England was saved from becoming a land where the King could imprison on *lettres de cachet* such as filled the Bastile, and from the levy of arbitrary taxes. In the subsequent Civil War the free rights of Englishmen to dispose of both person and property were sealed in blood; but, as the forces engaged in the conflict were ranged under banners of political faith, it was the protection of property which took precedence over personal liberty, as the very names of the opposing forces indicate. It was a war of Parliament against the King; not of law courts against despotism, although the two principles were united in their fundamental opposition to rule by Divine Right. The contrast with what happened in France is interesting at this point; for there it was the law courts which led in the civil

[1] The text of this statute reads as follows: "que nul home ne soit oste de terre ne de tenement ne pris nemprisone ne desherite ne mis a mort saunz estre mesne en response par dues proces de lei." Behind this of course lies the classic phrase in Article 39 of Magna Carta: "No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land."

[2] Those rights were limited as to treason, conspiracy, libel and slander; free speech was secured against those limitations by the privileged nature of communications made in the Confessional, to the physician, and between lawyer and client.

disturbances of the Fronde. In England in the seventeenth century, the propertied class went beyond juristic to political liberty as the fundamental principle of their Constitution.

When we come to think about it, there is nothing strange in the fact that the Revolution which brought the middle class to power should put the protection of property to the forefront. But it was a *tour de force* for the English philosophers of that period to read this fundamental interest of theirs into the law of nature so completely as to make the identification seem axiomatic. It is true that there was a hint of the possibilities in Greek and Roman literature, but those possibilities were not developed and applied to the conditions of the modern world until Locke wrote his famous Treatises on Civil Government. Perhaps the essence of his philosophy is best summed up in the following sentences: "The great and chief need of men uniting into commonwealths and putting themselves under government is the preservation of their property, to which in the state of nature there are many things wanting," and that the commonwealth must be so organized that "the supreme power cannot take from any man any part of his property without his own consent." This quotation, however, should not be left standing by itself, for by property Locke said that he meant "that property which men have in their persons as well as goods."

So far we have been dealing with the essential English situation with which Locke's Treatises were fundamentally concerned. Nevertheless, his Treatises on Civil Government were not argued on the basis of English precedent but were cast in the mold of natural law. It was perhaps chiefly owing to this fortunate circumstance that they became universal in application and influenced deeply not only the thought of Americans but the philosophers of France, thus furnishing inspiration for two great currents of revolution.

Before we leave the old world for the new, however, there is an interesting parallel to be drawn between the achievement of freedom in the political and economic spheres. The year 1776 was the date of the publication of Adam Smith's *Wealth of Nations,* also a document of freedom. In it, the new capitalism of the Commercial Revolution registered its protest against the rigidity of government control. Although the

movement of economic forces is often slower and less evident than that of politics, it is also a fundamental expression of human society. It was not until the middle of the nineteenth century that the doctrine of freer trade broke down the barriers of mercantilism throughout Europe. Had that liberating movement happened a century earlier, it would have produced an entirely different history of the modern world.

This hurried sketch of the European background of Colonial thinking on political matters, slight and imperfect as it is, should be kept in mind as we turn to the ways in which English experience and antique precept were fused into the permanent instruments of government of the New Republic. The first of these to be drawn up was that which took shape here in Williamsburg in June, 1776, the Constitution of the State of Virginia. As everyone knows, it preceded the Declaration of Independence, although by only a short space of time. As we read the text of the Bill of Rights drafted by George Mason, and inserted in this pioneer document of the liberties of America, we see at once how natural such a statement would be from so close a student of Locke. "All men are created equally free and independent and have certain inherent natural rights of which they cannot by any Compact deprive or divest their posterity; among which are the enjoyment of Life and Liberty, with the Means of acquiring and possessing property, and pursuing and obtaining happiness and safety." The second article continues the same theme in the same universal terms, "that all Power is by God and Nature,* vested, and consequently derived from the people; that magistrates are their Trustees and Servants and at all times amenable to them."

Bills of Rights, such as that to which these ringing sentences furnish the prelude, were incorporated in the constitutions of seven of the revolting colonies. This undoubtedly was not due to any tendency to copy the formulations of Virginia, but to a widespread trend in colonial thinking of the same ideas as those which emanated from Mason and his associates. Later on, when the substance of this Bill of Rights

*The phrase "by God and Nature" of Mason's draft was stricken out of the Virginia Declaration of Rights, which, it should be said, was not strictly a part of the Constitution.

was incorporated in the Federal Constitution, this action by the various States was lost sight of except to the eye of the researching historian.

Nevertheless, it is a peculiar fact that it was one of the influences of the American Revolution upon that of France which left a definite trace for the historian. The Convention which was drawing up the Constitution of the French Republic ordered a translation to be made of the Constitution of Virginia, thus having at hand for comparison with the Declaration of the Rights of Man and the Citizen the Virginian Bill of Rights of George Mason. It is of much greater interest to us, however, to compare that document with the Declaration of Independence drafted by a different hand but drawn from the same creative source whose fountain-head was the College of William and Mary.

Mason's enumeration of "inherent natural rights" is longer but more precise. The great phrase of the Declaration, "Life, Liberty and the Pursuit of Happiness," has become so much a part of American history that we seldom pause to think of the swift sweep of the trilogy as needing any further definition. Yet, the longer phrase of Mason's text is a more careful statement, if less effective, than the headlining which Jefferson gave to it. The inherent "natural Rights" which Mason enumerated, are enjoyment of Life and Liberty, not Life itself, nor even Liberty. And parallel with this is the opportunity for acquiring and possessing property, enabling the citizen to pursue and obtain happiness and safety. Here we have Locke's Treatise on Government paraphrased in a single clause, but with a significant accent upon a phrase lacking in the Treatise on Government, "the pursuit of happiness." Locke was no Puritan to whom this world was merely a stern school fitting the soul for the life to come by an austere denial of present enjoyments. On the contrary, he emphasized the right which men have "to enjoy their goods and possessions" as a fundamental condition of organized society. But this ideal of the good life suffered a sea-change when Mason and Jefferson gave it voice in the New World; it was not the possession but the pursuit of happiness which was set before the American people as the thing to be desired. Never was prevision more justified, for it is surely the peculiar qual-

ity of American life that it does find happiness in the pursuit of it. Forever following its star, it is forever stirred with a sense of aspiration and endeavor. Thus Jefferson, by the deft use of this single phrase, added a whole new province to the field of natural law, carrying it over from the static world of ancient times and the Middle Ages to that of the tumultous pressures of today.

One wonders just what the New England Puritans thought of this pursuit of happiness as an ideal for America. It must have sounded strange in the ears of those for whom life in this world was but a preparation for that in the world to come. It is certainly an added reason for rejoicing that the Declaration of Independence was turned over to be written by a Virginian, because otherwise it is doubtful if it would ever have cheered, as it has, the prospect of so many generations. Whether George Mason's Cavalier ancestry predisposed him toward the acceptance of this genial idea of pursuing happiness while acquiring and possessing property, or whether he was simply giving homely expression to the more sober thought of Aristotle that the ultimate end of society was the furtherance of the good life, is a point which can never be settled. It has been surmised that perhaps the influences of the Swiss writer Burlamaqui, an author exceedingly popular in America at that time, was responsible for the linking of the ideas of happiness with property. Although almost forgotten now, he was the most widely read of the political theorists of that time. His work was a textbook in the classes of William and Mary, and was used by George Wythe, who had so great an influence upon the intellectual development of Jefferson. The evidence of Jefferson's Commonplace Book, however, seems to point to James Wilson as the medium through which the influence of Burlamaqui's thought was transmitted. However this may be, the fact remains that Mason's reference to property disappeared from the Declaration of Independence.

We are now at last ready to turn to the announced subject of this lecture, "The Constitution of the United States and the Safeguards of Freedom Contained in It." The history of the formation of the Constitution is too well known for me to do more than point to one or two of the more significant

items in it. It was built on the shifting sands of discord and discouragement. For a time, the winning of independence seemed to have burnt out men's enthusiasms for the eternal verities. Divided north and south and in economic interests, it appeared to many who had stood foremost in the fight against the external enemy that the fruits of victory were turning to ashes in their mouths. This is, of course, the situation which is almost sure to arise after any war in which the underlying differences of allied communities or states have been overcome or forgotten during the period of fighting but which come to the fore after the war is over. The critical period of American history, that which lay between the close of the War of Independence and the framing of the Constitution, was repeated in a sense in the years which followed after the First World War when partisanship and, then later, indifference in the American body politic frustrated the possibilities which lay in that first sketch of a Constitution for the world, Woodrow Wilson's Covenant of the League of Nations. Future historians will undoubtedly regard the years which lay between the two world wars as at least equally fateful for the liberties of this country as that critical period at the beginning of its history. It is to be hoped that the close of the present world war will find us better prepared, as we shall be more, matured in political experience. And yet the problem of today is so much more difficult than that which confronted the Founding Fathers that we have at least no room for undue optimism at the present time.

There is nothing invidous in the fact, which Professor Beard was the first to emphasize, that it was primarily the concern for property rights which brought about the call for the Convention which met in Philadelphia in 1787. There was every reason for concern. Property was imperiled both by populist state legislation and the fear of widespread popular uprisings. But the only voice raised in the Convention in sincere concern for the rights of personal liberty was that of George Mason, who proposed that a bill enumerating the inalienable rights of the people, like that of his Virginia Declaration of Rights, should be inserted in the Constitution. When Gerry moved that a committee be appointed to draw up such a declaration, the Convention voted unanimously, ten to

nothing, against it. Jefferson, who was absent as Minister to France, showed his concern over this drift of affairs. When Madison sent him a copy of the Constitution, he wrote back that "a Bill of Rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences." The argument of the Federalists, on the other hand, was that a strong government would overcome the defect of a lack of specific guarantees of liberty by "that prompt and salutary execution of the laws which enters into the very definition of good government." It was not until the 84th number of the *Federalist*, however, that they came squarely upon the issue stating "that the Constitution is itself in every rational sense and to every useful purpose A Bill of Rights," in the same way as "the several bills of rights in Great Britain form its constitution." The heavy artillery of the Federalists, however, could not prevail against the deep feeling of the people that a formal guarantee was called for against the possible development of tyranny in the newly-formed government. This protest was not what Hamilton would have called "the voice of rabble." Its most powerful backer was still George Mason, to whom Jefferson in his old age paid tribute as one of the wisest among the statesmen of his time. Madison, apparently won over by the arguments of his Virginian friends, changed his Federalist standpoint for that of Mason, and finally on June 8, 1789, the Father of the Constitution rose in Congress to propose the first Ten Amendments to the great document which had been so largely his creation.

It is not my purpose to attempt to trace here the history of the Bill of Rights throughout the nineteenth century. That is a task for the specialist in the history of law. It is not a theme which has played any large part in American history as taught in the schools. Even in recent years the widely read volume on "The Rise of American Civilization," by Charles and Mary Beard, while giving a good account of the making of the Constitution itself, passes over the first Ten Amendments without any mention of the Bill of Rights contained in them. Indeed, the term "Bill of Rights" does not appear in the Index of that volume. The explanation for this is perhaps partly to be found in the fact that there was

another safeguard of freedom, both of person and of property, in the Constitution, provided in the independence of the judiciary. This opens an entirely different prospect from that which we have been looking at hitherto. The architect of that tripartite edifice of government which rests upon a separation of the Powers was not John Locke, but Montesquieu. The manual of the French jurist which was destined to play so great a part in our history, "The Spirit of Laws," was primarily drawn from a study of the way in which the Romans of the Republican period had broken up the universal powers of Kingship into the appropriate divisions of government with especial reference to the evolution of Roman law. Later on Montesquieu thought he discovered in the English Constitution a similar separation of the powers. This was not Locke's point of view because he regarded the legislature as supreme. Nevertheless, the principle of the independence of the English judiciary as a bulwark against the extension of royal prerogative was one of the decisive gains of the English Revolution. There was therefore both French and English precedent behind the creation of a supreme court, the members of which were appointed for life, although it was left for John Marshall, by a broad interpretation of the Constitution, to give that court the place which it has come to occupy, not only in juristic theory but in the public opinion of the country. The extent to which the court had become "a palladium of liberty" in popular opinion was shown in the complete overthrow of a recent Executive effort to weaken it.

It was upon this independence of the judiciary that the great teacher of American Constitutional Law of the nineteenth century, Professor Burgess, based his test of government. A soldier of the Northern army in the war between the states and then a student of those German political philosophers who, following Hegel, exalted the state as the embodiment of absolute sovereignty, he yet found it essential to place a limitation upon the sphere of government so that it should not curtail the sphere of liberty. Time and again he emphasized both in his writings and in his lectures the peculiar merit of the American Constitution in having set up a judiciary which, because it was capable of checking both the

other branches of government, exalted liberty above the processes of state action.

This explains why Professor Burgess never referred to the Bill of Rights by that name but always spoke of it as the First Ten Amendments to the Constitution. There was, however, another reason for this perspective. It was his extreme opposition to the doctrine of states' rights, an opposition which led him to interpret the middle period of American history, that preceding the War between the States, as a time when the fundamental principles of American unity, as they had been envisaged by Hamilton and applied even by Jefferson and Jackson, were lost sight of in the years following the Missouri Compromise. According to his theory of American history, the country recovered its title deeds only in the Fourteenth Amendment.

Through its application by the Supreme Court to limit the right of the States to engage in social experiments, this Amendment to the Constitution, originally conceived to embody the victory of the political theories of the north, became, by a strange turn in history something quite different from what it was designed to be. Historically, the Fourteenth Amendment fits in between the Thirteenth and Fifteenth, emphasizing as it does the supremacy of the union. But the guarantee which it offers to all citizens is linked so definitely with the Federal system as to carry over into that system the elements of the Bill of Rights which were originally linked with states' rights theory. The Fourteenth Amendment does not put the limitation upon Congress, as was the case in the First Amendment, but upon the legislatures of the states. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The advantage of this text was that it linked the principles of the Bill of Rights with the Federal judiciary and thus, at last, seemed to have united the two currents which began with Mason and Jefferson, on the one hand, and Hamilton and his Federalist associates on the other.

The shape in which problems appear to each new genera-

tion is ever changing. The fundamental principles by which those problems must be tested remain the same but need to be restated from age to age in terms of the present. As this country filled up and its last frontiers were reached, new questions of social justice arose to challenge the conscience of men. The Bill of Rights, which had been a revolutionary product, now showed, in its new formulation in the Fourteenth Amendment, that it had also a conservative aspect. The question which arose therefore and which even yet is by no means settled was whether it would be possible to retain those liberties for which our ancestors had mutually pledged their lives, their fortunes and their sacred honor, and at the same time to provide for the economically submerged third of our nation the material basis without which, as George Mason may have meant to show in linking it with property, the pursuit of happiness is but an illusion.

And now finally we come to the issue of freedom in the world today. This is the supreme challenge of the Second World War. Never in all history has there been such a revolutionary movement as that which finds its chief and strongest champion in the country from which Professor Burgess drew his theory of government over half a century ago, Germany. Fascist Italy nurtures no such fanaticism as the Germans have shown themselves capable of. The other Axis power, however, Japan, outdoes Germany in its rigidity of thought, if not in the cruelty of its suppression of opposition. It was but natural that the United States should find it hard to believe the thoroughgoing denial of freedom which the forces of the Axis are fighting to impose upon the world, but now we have at last learned the truth of Wilson's noble phrase, and have realized that there is no safety for our freedom unless we have a whole world safe for democracy.

It was therefore but natural that occasion should have been taken to reestablish the Bill of Rights in the public mind of this country. The more recent celebration of the 150th Anniversary of its adoption was referred to earlier. It is clear that this summary of the safeguards of freedom has now become more a political doctrine than a purely legal one. So far as its legal history is concerned, we know now how to apply it in our domestic life, conscious of the fact that eternal vigilance is

the price which we must pay for its maintenance and strengthening. But in the political field we have not only to defeat the enemy that threatens our institutions and our way of life, but we have to create new institutions and adjust our way of life to a world-wide scene. This is the greatest task that has ever confronted the intelligence of mankind, for the New Federalism, as it has been called, which is destined some day to include the whole civilized world, is as yet only a dream and an inspiration, for which even the most matured in political experience are ill prepared.

Happily, the making of the Constitution of the United States provides a clue as to the basic thought which must underlie the new law of nations, for no one has yet devised any adequate substitute for that political philosophy which springs from the pioneering thought of the Greek philosophers, and which was the inspiration of Locke, of Mason, and of Jefferson. Natural law, or better still, the law of nature, is the only sound basis upon which to build the structure of government between nations as well as within a nation. The safeguard of freedom lies in the erection of those institutions which ensure justice. And justice is not what each sovereign claims for itself, but what is sound and healthful practice for society. The only way to ensure peace is to create the substitutes for war, without which there can be no guarantee of freedom anywhere in the world.

This, I venture to say, is the way in which the ultimate issue of the Second World War will have to be faced. It is fundamentally the same as that which was first formulated for the New World by gentlemen of Virginia, only a few steps away from where I stand.

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Planned Society

JOHN DICKINSON

Fifteenth Lecture Under the
James Goold Cutler Trust

WILLIAMSBURG, VA.

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JAMES GOOLD CUTLER LECTURE

By JOHN DICKINSON

Delivered at the College of William and Mary, April 21, 1943

The last four years have brought us back with the impact of a sudden blow to the consciousness that we still live in history; that our generation is but one of a long sequence leading back to the beginning of human destiny. Only a few years ago most of us seemed to believe that history was a thing of the past, and that we had cut loose from it; that we lived in a brave new age wholly different from those which had gone before; that the new ways of life we had devised had created a new mind and new modes of thought and new attitudes which made us no longer amenable to the forces that had hitherto been at work in human affairs.

It was therefore with a good deal of a shock that we were rudely awakened to the realization that events were happening in our new age substantially like others that from time out of mind had repeated themselves through the centuries—things we had supposed would never happen again and for which we were mentally quite unprepared. From that shock many, perhaps most, of us have not yet recovered. Our thinking is still confused and we have yet to regain the fortitude and assurance which depend on understanding that we are only confronted with situations which men have faced in the past and will have to face again.

The war has already exhibited one fact of which historical generalization might have given us reasonable assurance. I refer to the magnificent self-defense of England during the whole year when she stood alone against the might of Hitler's power, and with spirit unbroken successfully resisted the most terrific attack in the records of warfare. From the time of Rome's resistance to Hannibal down through Napoleon's wars, it has become evident that successful self-defense in

warfare depends as much on national character as success in life depends on personal character. In speaking of national character I do not, of course, refer to unfounded theories about race and blood; I refer to mental attitudes, determinations, inhibitions, which characterize the preponderance of individuals who compose a nation. Of national character in this sense, a large part consists in tradition or inherited attitudes, for character is a thing of slow growth; it is not character if it is something that springs into existence overnight. Tradition is to national character what habits are to personal character; and as personal character is not formed in a day or a year, so national character is not formed in one or two or three generations. It is tradition which binds the generations together into the character that gives strength for the present and the possibility of growth for the future; for the nation that is always changing its ways of life and its views of life has nothing on which to build a future. It may have a blueprint, but it has no foundation.

It is especially appropriate to refer to this matter of national tradition at Williamsburg, because we stand here at the source and fountainhead of our American tradition. Here in the age of Anne, when this town was a new development, and the Capitol and Governor's palace were under construction and Colonel Byrd and Governor Spotswood walked these streets, there were first exhibited on American soil the large enterprise, the executive management, the confident building for the future, the opportunity to produce in two or three generations a breed fit for government and leadership, which have ever since been characteristic and fruitful traits of American national life.

As the efforts of scholars bring to light in increasing measure the records of the Virginia tidewater in the age of Anne, the great age of Williamsburg, it becomes apparent that a modern American would have been far more at home with Colonel Byrd or Robert Carter or Thomas Lee, would have understood them and recognized his own type of life in theirs to a far greater degree, than in the case of their New England contemporaries, or even their contemporaries of New York or Philadelphia. And here we also stand at the fountainhead

of our special American tradition of government through law; that tradition which, drawn from English sources and built on the teachings of Locke and Somers and Holt, was developed first by Wythe and afterward by his pupil, John Marshall, greatest of all lawyers ancient or modern, into the ultimate philosophy of free government.

It is well that Americans from all parts of the country come here to Williamsburg to admire the architecture and the interior decorations and the furniture. It should improve their taste and do something to prepare their minds for the attitudes and values and standards of judgment with which these external things are in conformity, and of which they were the outward expressions. But the thing of greatest value, if we would carry forward our national tradition and thereby strengthen the national character of which that tradition is at the heart, is the mental atmosphere which prevailed here, and which, spreading westward and northward and southward, came to constitute the quintessence of the American way of life as we have known it through the better part of two centuries.

I.

It may therefore be of interest as well as timely to inquire into a recent and now widely prevalent attitude toward an important phase of this American way of life. I refer to the phase of it which is represented by its sense of personal responsibility, the high value it set on industry and enterprise and on the willingness of individuals to take risks and abide by the results, and its emphasis on home, family life and the duty of founding a family of well equipped and enterprising descendants.

This view of life carried with it by necessary implication a philosophy of government. To that philosophy in its main outlines, all parties and factions among our people, however great their differences on other points, have staunchly adhered until very recently. The essence of that philosophy was that the function of government is to promote and foster in human individuals the attitudes and qualities I have just described, to create and protect free scope for the exercise

of those qualities, and otherwise limit itself to arbitrating differences between individuals and groups which have passed beyond a certain pitch of intensity. In short, the building of the nation was to be the work of countless individuals, striving, planning, toiling, competing and coöperating, and not the work or responsibility of government. This was thought to be democratic, because the energy, the initiative, the intelligence came from below, from anywhere and everywhere among the people at large, and not from above, from the limited circle of government officials.

Today this phase of our national tradition is being brought into question. It is pointed out that in many ways our mode of life has been revolutionized since Colonel Byrd and Governor Spotswood walked in Duke of Gloucester Street, or even since the covered wagons made their dusty way along the Santa Fe Trail only a hundred years ago. The frontier has disappeared, the country has filled up. We have the railroad, the telephone, the airplane, the wireless, annihilating space and bringing distant places together. The great inventions have resulted in mass production, and mass production has been made possible only by the growth of giant corporations which tower, it is said, over the life of the country, although in a relative point of view perhaps hardly so much as the great families of Virginia towered over Williamsburg in the age of Anne and the Georges.

Nevertheless it is pointed out truthfully that these modern developments have been fraught with possibilities of enormous economic disorder, that these possibilities have in recent years become actualities, that at times millions of people have been unable to find work, that the savings of other millions have been wiped out by failure of their investments. It is therefore suggested that the time is at hand for a large-scale revision of our traditional conception of the duties and responsibilities of government.

In the name of democracy and the common man it is urged that this revision should take the direction of what is called a planned society; a society where economic crises are avoided and individuals are guaranteed security against idleness, want, and fear by placing the nation's economy under government

planning. It is pointed out that many of our troubles under a regime of large-scale industry have proceeded from improperly directed and un-coördinated effort. Manufacturers have produced more of an article than they could find a market for, and in consequence have had to shut their plants and throw their employees out of work. Others by the use of borrowed capital have built plants for which there was no need, have therefore defaulted in paying their debts, and so have brought ruin to banks and investors. These maladjustments are due, it is said to defective coördination between the parts of our national economic machine, which can be cured and should be cured by proper planning; and necessarily such planning must be the task of the central government as the only agency having an over-all view of the life of our people as a whole.

This argument for coördination and planning carries a strong appeal to both reason and sentiment. It seems entirely rational that human effort should be productive and not self-defeating, that the wastes incidental to un-coördinated effort should be eliminated, and that there should be the same adjustment of tasks and resources in the national household which characterizes a well-ordered private household.

The appeal to sentiment and humanitarian feeling is even stronger. We have seen so much misery caused by no fault of the sufferer that we feel a sense of moral obligation to further any policy which promises alleviation. We feel that the problem is urgent, that it is one about which something must be done and done promptly. We find no comfort in the observation that, comparing the large-scale economy of our own time to the relatively smaller-scale economies of the past, maladjustments and resulting want are in fact not so great today as they once were under more primitive conditions. Such an answer fails to satisfy, because today the social conscience is keener, our sense of human obligation is more compelling; and for these reasons the argument for socialized planning carries a strong appeal.

There are other considerations which enhance the appeal. For one thing there is the appeal of novelty, always strong and especially so today. Planning is presented as something

called for, made necessary by, and especially adapted to, the new conditions of life of which we are today so acutely self-conscious. The achievements of chemistry and electricity have so thoroughly convinced most of us that we live in an entirely new world that it seems only appropriate to adopt a new conception of government, irrespective of other reasons.

Again there is the attitude with which, as a result of our participation in the war, we view our heroic allies, the Russian people. The magnificent stand they have made against the invaders of their homeland has evoked to the full the generous American spirit of admiration for resistance to oppression. But the Russians have lived for years under the nearest thing to a completely planned economy that has been known in the modern world; and it is only natural to infer that this must be largely, if not completely, responsible for the magnificent strength and prowess they have so unexpectedly displayed. There are doubtless many who cannot help feeling that the case for a planned economy has been proved on the battlefields of Stalingrad and Smolensk.

Finally it is obvious that to some extent and in some degree there has always and everywhere been a certain amount of governmental planning. The very idea of government carries with it a recognition of the need for centralized authoritative public action to introduce into human relations kinds of order and regularity and organization that would not exist otherwise.

The principle thus admitted, what valid ground, it is asked, can be put forward to limit its application? As regulation has in recent years extended step by step from one thing to another, this has usually been because the prior regulation could not accomplish its purpose unless additional matters were brought under government control. So much is already determined by governmental policy that it has come to be accepted that many private rights are no longer enjoyed save on government sufferance. To that extent what used to be called socialism is already with us. Government already has the responsibility for so much of the national life that it cannot successfully discharge that responsibility unless it is made completely responsible for the whole. This of course

entails the frank admission that the individual has no rights, legal or otherwise, against government, and so may be said actually to belong to the government; but this, it is said, need cause no fear because government will be democratic government, devoted to the public interest and the welfare of the common man.

The last argument which I have just outlined makes a planned economy seem inevitable as only the necessary further consequence of steps already taken and which cannot be retraced. The argument has the merit of bringing out that planned economy like everything else is a matter of degree, of more or less. Its fallacy lies in assuming that because we have a certain amount of a thing we ought necessarily to have more of it. Often the contrary may be true. A thing may be advantageous to a point and beyond that point deleterious. Most human decisions consist in finding some satisfactory middle point between extremes; and certainly a planned economy in the sense in which it is being urged is extreme because it contemplates total and complete subjection of all individuals within a state to whatever purposes and directions government as the planning agency may choose to give to any or all of their actions and resources. They must be ready to do or not do whatever government orders, since otherwise there would not be and could not be planning of the kind represented as necessary.

In view of the obvious variance between a planned society of this kind and our traditional American conception of government, it seems not inappropriate here at Williamsburg, at the fountainhead of that tradition, to indulge in a brief inquiry as to what, if anything, experience has to tell us concerning the workings and results of planned societies. Possibly there are blind irresistible forces at work which will transmute us into such a society whether we will or no; but the surest way to create such forces is to believe that they exist. It is worthwhile to reason about public affairs at all only on the supposition that the people have some choice about them; and to stop reasoning about them is an effective way of destroying that possibility of choice.

Assuming, then, that it is not yet too late for reason to have some share in determining whether we are to have a planned society, it should be of interest to become acquainted with the relevant information; and since we are once more aware of history, and that we are living and acting in history, it may be in point to remind ourselves that history is the only laboratory of political knowledge and the only source of experience to which men can turn for information about political affairs.

II.

Leaving trivial and relatively incomplete instances out of account, there are available for observation five major examples of what is today called a planned society—that is to say, one in which land and other natural resources, and the labor and activities of the population, are all disposed of in ways directed by the State. In view of the conception of socialized planning as something necessitated by our special modern conditions of large-scale technology, it is interesting to note that the first, and in some ways the most complete, example of a planned society is the earliest and oldest state known to history, Egypt of the Pharaohs. For more than three thousand years, from the dawn of recorded time with occasional lapses and interruptions, the disposition of all the land in the lower Nile Valley and the occupations of practically all its working inhabitants were dictated by government. We can only guess at the reasons for this, but they are tolerably clear. The rich lands of the valley could be made to produce their maximum yield only by a system of organized irrigation which called for highly centralized management. The product being at the disposal of government was stored in good years for consumption in lean years, as we are told in the story of Joseph.

Under this system surplus food and labor were available in such quantities that they could be employed for centuries in the gigantic public-works project of pyramid-building. Doubtless without the system many inhabitants of Egypt would have lacked the assurance of food and shelter which the system gave them, and which drew the children of Israel

to the proverbial Egyptian fleshpots. The inhabitants of Egypt had a security which contrasted favorably with the uncertain life of the desert Bedouins. But for this security they paid a price—subjection to the lash of the taskmaster; and the one fact about ancient Egyptian life which has burned itself most deeply into the consciousness of later generations is that God heard the bitter cry of sorrow which went up by reason of the taskmasters, and promised to deliver His people out of the hand of the Egyptians.

Ancient history offers one other outstanding example of a completely planned or managed society—that of Sparta. Certainly Sparta had no fleshpots, but her aim was nevertheless security, although of a different kind. In Sparta it was the poverty of the soil and not its richness which brought about the managed state. Population had to be kept down and there was compulsory exposure of infants. The tillers of the soil, the Helots, were slaves of the State subject to be worked, punished or liquidated as the discretion of the government determined.

The soldiers were the citizens, the ruling caste with a voice in government. They were permitted to own land, but could neither sell their lots nor buy others, and they were made to contribute their surplus produce to the public tables at which all male citizens were required to feed. No citizen was allowed to possess any precious metal or engage in any remunerative occupation. His entire time had to be spent in drilling, or in sports preparatory for war. No one was allowed to enter or leave the country without a permit. Food, dress, architecture, music were regulated and the knowledge of reading and writing was discouraged. Home life was rendered almost impossible. Children were reared in public barracks and domestic ties were negligible. In Plutarch's words, the Spartans were accustomed to regard themselves as bees, simply members and parts of one common whole, for which they lived rather than for themselves.[1]

The end to which this discipline and management were directed was to maintain a powerful army in a very poor

[1] Plutarch, *Lycurgus*, c. 25.

country with few natural resources. This objective was so successfully attained that for several centuries the military power of Sparta was able to overawe Greece. Her success converted some Greek thinkers who lived in freer and more prosperous countries to the superiority of a managed society, and Plato's Republic is still the most convincing textbook on social planning. The way of life at Sparta appealed to the speculative mind, but Greeks of a more practical cast of thought remarked that it was not surprising that the Spartans faced death so bravely in battle, since a way of life such as theirs was scarcely preferable to death.[2]

Obviously neither the Egyptian nor Spartan planned societies resulted in the kind of social order or individual lives that modern proponents of planning proclaim as their goal. Today planning is urged as a way to bring about a fuller and happier life for individuals, and a greater measure of security from want and fear. In a sense Egyptian and Spartan plans did accomplish just these results, but they did not do so in a way that specially appeals to the modern mind—to the minds of men accustomed to aspire to the enjoyment of material things and habituated to the vocabulary of freedom and personal self-expression. To find plans more congenial to our own mental climate we must come down to more recent planning experiments.

There have been many attempts at some kind or degree of planning in the last three or four centuries, but most of them have to be passed over in a brief survey like this as either confined to too small a local area, like the medieval rule of the guilds, or as not sufficiently totalitarian in the scope of their grasp on the nation's life. This is true, for example, of the so-called mercantilist economic philosophy, which guided the statecraft of most nations for a number of centuries and involved a good deal of government planning, but was primarily limited to the field of foreign-trade relations. Again the French experiment in building a completely planned colonial society under the old regime in Canada was on too small a scale to afford a basis for generalization. The first

[2] *Athenaeus* iv, 15.

large-scale modern experiment in total planning was an incident of the French Revolution.

In 1793 when the Jacobin faction came at last into power it undertook to extend earlier measures of State control into a widespread scheme of governmentally directed economy. More than half the land and moneyed capital in the nation was, or had already been, confiscated and brought under government ownership. Property of any and every kind was subjected to requisition by the government at whatever price it chose to pay. Banks and financial corporations were abolished. All prices were fixed at artificially low levels for the benefit of the poor. All incomes above very low minima were confiscated by taxation and the proceeds turned over to committees of philanthropy to improve the condition of the poor. Manufacturers and merchants were required under pain of death to continue in business at a loss until their funds were finally exhausted. A program of forced labor was introduced under which artisans, mechanics and farm laborers were forbidden to leave their occupations or were required to work at government direction.

The French revolutionary experiment in national planning did not have an opportunity to work itself out into a developed and settled national policy. It soon went to pieces when the faction which supported it lost control as a result of their excesses during the Reign of Terror. The experiment is important chiefly because of its proclaimed purpose of benefiting the poor, a purpose which underlies most of the modern appeal of planning, and also because it developed measures and techniques which have a striking affinity to some of those adopted in the two great planning experiments of our own time, the Russian and the German.

The Russian experiment antedates the German by more than a decade. In origin, in proclaimed purpose, in program and techniques the two regimes have displayed notable differences. One originated in an uprising of the working class, the other drew much of its original strength from a desire to resist the workers. The Russians professed to pursue only the welfare of the workers and to make war on the so-called "bourgeoisie"; Hitler professes to seek the general good of

the whole German people and to aim at establishing a people's community, a "Volksgemeinschaft." The Russians proceeded at once to confiscate all land and productive wealth; Hitler has not disturbed the title to private property, but has contented himself with complete control over its use. And there are other differences as well, in the motives to which the two governments have appealed, in the form which their propaganda has taken, and in the different scapegoats which they have selected to solidify their emotional hold on their subjects.

In spite of these differences, however, both the Russian and German experiments in planning have shown certain striking similarities in methods and results. Some of these may have been due to Hitler's deliberate imitation of the Russians. Others seem to reflect the normal and natural workings of a planned economy. If two movements, starting from such different points of origin, professing such different objectives, and resembling each other only in the one particular of total planning, eventuate in identical or similar results, it would seem to follow that there is something in the task and conditions of national planning which produces those results. This conclusion will be fortified if similar results are observed in the planned economies of the past.

III.

The first outstanding characteristic of all planned economies is that political authority or government is necessarily highly concentrated and centralized in a very few hands. In other words, not merely must the government have full and complete power to dispose of all persons and property so as to carry the plan into execution, not merely must all individuals therefore be without rights against the government, but the government itself must be so concentrated that it can formulate, and if necessary alter, its plan promptly, decisively and firmly, without delay, controversy or friction. The whole idea of a plan requires that it shall be consistent and continuous. This means that it cannot be made subject to daily fluctuations and differences of opinion

or purpose, or it would cease to have the advantages of a plan; it would become merely a succession of possibly inconsistent and contradictory governmental fiats. Accordingly in a planned community government cannot be a debating society and cannot even have in its controlling membership a large enough number of persons to develop conflicting views that might be difficult to reconcile. If such a condition develops, it therefore inevitably results in the expulsion of the dissenters through a purge or otherwise.

This characteristic of government in all planned societies has been especially apparent in the modern experiments, where there has been a greater tendency than in Egypt or Sparta for a variety of different views and opinions to obtrude themselves. These have necessarily been rigorously suppressed. Subordination to a unified purpose has been so emphasized as to be identified with the kind of liberty that the plan is supposed to promote. "We will make France a cemetery rather than not regenerate it in our own way," declared a spokesman for the Jacobins.[3]

The devices by which this concentration of power has been achieved have not been dissimilar. In revolutionary France the Jacobin clubs which constituted only a very small proportion of the adult population rigorously excluded all others by force from participating in the government. The Jacobin deputies who constituted only a minority of the members of the Convention prevented the rest from having a voice in its decisions. Gouverneur Morris, a contemporary observer, reported that "the present government is a despotism. The Convention consists of only a part of those who were chosen. These after putting under arrest their fellows claim all power and have delegated the greater part of it to a Committee of Safety."[4]

The similarities to the organization of the Russian government are obvious, with one important exception. In the first place even theoretical participation in government is denied in Russia to all save members of the Communist Party, which

[3] H. A. Taine, *French Revolution*, (Eng. tr.), Vol. III, p. 61.

[4] Morris to George Washington, October 18, 1793, in J. Sparks, *Life and Correspondence of Gouverneur Morris*, Vol. II, p. 369.

some years ago numbered less than two per cent of the adult population.[5] Secondly the function of the party members is limited to the election of an annual Congress which is a mere ratification meeting to approve decisions of the party central committee. At one meeting of this Congress an opposition attempted to make itself heard with the result that the dissenters were subsequently sent to Siberia.[6] All real power is in the hands of a subcommittee of the Party Central Committee, the so-called Polit-buro, consisting of nine members, and when there was an important difference in this Committee a number of years ago four of the leading members were expelled and subsequently purged and liquidated.

The one respect in which Russia has proceeded beyond the French Jacobins is to vest practically supreme power in the hands of a single individual, the Secretary-General of the Party, who is referred to as the *vozhd* or leader. The essential resemblance to the German form of organization is obvious. So essential is unity of purpose and control to the very idea of planning that any other form of organization would be unthinkable, and would defeat the whole purpose of a planned society in any intelligible sense. It is therefore only an evidence of confused thinking that so many humanitarian liberals who welcomed the advent of planning in Russia displayed shocked amazement when the government which emerged proved to be a centralized despotism. This was necessary and inevitable once the premise of a planned society is accepted.

A second necessary characteristic of a planned society is that the central government must have in its service a sufficiently large corps of loyal and devoted dependents scattered among the people to keep watch over their movements, report on their reactions and ensure by all possible means their obedience. This is essential to maintain the power which the government needs if it is to perform its function. Doubtless it would not be necessary if all human beings thought alike, if all were motivated by pure reason and if all the decisions of an absolute government were in conformity to reason.

[5] W. R. Batsell, *Soviet Rule in Russia*, p. 700.
[6] Batsell, *op. cit.*, pp. 725-6.

Needless to say this is not the case, and absolute governments whose decisions are certain to offend one or another element in the population are no less zealous than other governments to maintain themselves in power by whatever means are most effective for suppressing opposition. These means take various forms. One is to fill posts of influence and distinction with loyal party adherents who are dependent on government favor and bounty. Another is the more sinister institution of a secret police vested with power of summary punishment. This institution is found in a fully developed form in the Krypteia of ancient Sparta, whose task was to spy on the Helots, and which on one occasion is said to have executed two thousand of them in a single coup. Modern instances which need no elaboration are the Gestapo in Germany and the Ogpu in Russia.

The necessity of operating through an organization of political or party dependents leads to a third characteristic of planned societies which has an important consequence for the effectiveness of the planning itself and its execution. Today the case for planning rests largely on economic considerations. Modern well-being has come to be thought of so largely in terms of economic goods and as so ultimately dependent on production, distribution, employment and the like, that the economic conception of planning is paramount. Accordingly planning, in theory and as it is advocated, should give foremost consideration to purely economic efficiency. It is in fact one of the chief arguments for a planned society that such a society is able to do this more successfully than the crude politically operated governments to which we have become accustomed.

The strength of this argument is seriously weakened by the necessity to which I have just referred of maintaining loyal party dependents in posts of power. This results in the management of the managed economy falling largely into the hands of a political class who have no industrial experience or ability and who override the decisions of their technical subordinates for political purposes. This development has been noted by all commentators on Germany and Russia. In Germany it is reported that every factory is in charge of a so-

called "factory-leader" whose position is said to be a contradictory one. While he is in charge of production, he is at the same time a cog in the party machine and the party authorities interfere with his management while holding him responsible for filling his production program.

The same condition is reported in Russia. It is said that the position of technical industrialists and production managers is difficult because they are everywhere working under the orders of party men who know nothing about the enterprise they control, since their retention in their posts depends not on knowledge or capacity, but upon being politically reliable. When things go wrong these party representatives always throw the blame on the specialists who work under them, accusing the latter of being wreckers and counter-revolutionaries.[7] In at least one notable instance the technicians were tried and convicted of sabotage for adhering to production estimates which subsequently proved to be correct.

Obviously the condition just described seriously impairs the supposed effectiveness of planning to accomplish the results expected of it and which are urged in its justification. There is an even more fundamental factor working in the same direction. This arises from the necessity that in every planned society the central authority must answer the question, what shall the plan be? There must be a certain amount of concreteness in a plan, however broadly conceived, and if there is to be actual planning rather than a mere acceptance of the theory of planning, answers must sooner or later be found for such very specific questions as, who is to get what? Who is to give up what?

At this point difficulty begins. In a complex modern society with countless groups and interests making claims that cannot all be satisfied, and often shifting their claims from year to year, government, if it is to direct the economic process in accordance with a plan must assume responsibility for making a final and conclusive determination of all such claims. Doubtless this was not the case in such a simple society as Sparta, where effectiveness in war was the sole objective of the plan. Today it is inherent in the very economic situation

[7] F. Utley, *The Dream We Lost*, p. 227.

which is thought to create the need for planning. Usually an effort is made to shove the difficulty into the background by appealing to some general term like "public interest." Robespierre brushed the problem aside by proclaiming that "Our sublime principle supposes a preference for public interests over all private interests."[8] The Russians say that their objective is to abolish the exploitation of man by man and establish a classless society. The Nazis announce that their goal is the general good of the German people and the prevention of individuals from furthering their private interests at the expense of society.

But the problem will not down in this way. "Public interest" and "general good" are phrases which serve to conceal the competition of interests that goes on behind them. To talk of a classless society is futile so long as different human beings do different things which bring them into competition or controversy. There is always a question as to whose interest for the moment is in accord with the supposed general interest, and by what standard the general interest in specific cases is to be judged. Everything depends on the kind of considerations which are resorted to in giving an answer to these questions.

If national planning has the merit it is supposed to have, these fundamental questions must be answered, or at least an attempt made to answer them, in an impartial spirit and from the standpoint of a disinterested attempt to increase the national product or the national productive capacity. That this is by no means always the case is shown by what we hear from Germany. Old-fashioned political considerations of a familiar kind seem largely to govern. Thus we are told that "the small shopkeepers have the least political influence and make the easiest scapegoats when there is an unpopular rise in prices. The price commissar has granted innumerable price increases to manufacturers at the expense of retailers."[9] In other words, the processes of logrolling and pressure-politics so familiar in popularly elected assemblies do not disappear under a planned economy, but are merely driven back into

[8] Taine, *French Revolution* (Eng. tr.), III, 88.
[9] G. Reimann, *The Vampire Economy*, p. 83.

the secret cabinet of the planning authority. One of the very conditions which planning professes to remove is found to persist under it. "Plus ça change, plus c'est la même chose."

But there is an even graver difficulty in every planned society when the central authority is called on to decide what is to be the goal of the plan. Most of the discontented groups who welcome planning as a way of satisfying their desires answer at once that it is to raise their standard of living, make more economic goods immediately available to them, and decrease the productive effort required of them. To accede to these demands in full would be to sacrifice the future to the present. Private capital, saving, and investment having all been abolished, the maintenance and enlargement of the national plant must necessarily be at the expense of the present income of the workers. There must be compulsory saving through something akin to taxation, the proceeds to be invested in plant by the government. Accordingly one of the largest, if not the largest, economic issue facing the government of a planned society in modern times is to decide between the claims of the future and the present.

It is of interest that in making this decision both the Russian and German governments alike have strongly favored the future; that is to say, they have diverted effort from making consumers' goods, and have proportionately held down or reduced the present standard of living, for the purpose of building new plants and further increasing the supply of producers' goods. This emphasis on plant expansion has been the dominant feature of both the German and Russian economies. It is especially noteworthy because it represents on the part of these socialist plans an exaggeration of one of the very tendencies which advocates of planning have most severely criticized in capitalistic society—namely, the tendency to subtract too large an amount from the current comforts and pleasures of the present generation in the speculative hope of producing more in the future. What has been called "oversaving" was a leading charge in the indictment against the functioning of free enterprise during the nineteen-twenties; yet "oversaving" in the same sense has nowhere been

carried so far as in the planned economies during the last dozen years.

Indeed it was carried so far in Russia as practically to result in famine conditions and in Germany to lead to the strictest rationing of elementary comforts. The wisdom of such a plan from both the social and economic standpoints is open to question. Needless to say, it involves the risk of tremendous wastes of effort from possible miscalculations and erroneous predictions. In any event, to use a vivid phrase, the policy involves "putting a steel hoop around consumption";[10] and "whether the immediate interests of the living generation are unduly sacrificed to the hypothetical desires and needs of generations yet to come is arguable."[11] It is at least clear that under a planned economy operating on a program of this character, which rigorously thwarts present appetites and denies present satisfactions, there is an ever-present danger of grave popular discontents. The possibility of these discontents, the chance that large bodies of people may not like the government's plan or its results, is a thing with which all planned societies have to reckon; and especially so in an age like the present, when, even in Germany and Russia, public opinion is a factor which cannot be completely ignored.

Accordingly one of the common characteristics of planned societies has always been a strict control and regimentation of opinion. In part this has taken the form of creating an atmosphere and mental climate of fear through the unseen but ever-present power of such institutions as the Krypteia, the Ogpu and the Gestapo; in part there has been recognition that opinion cannot be effectively controlled through repressive measures alone, but that it has to be moulded through affirmative measures of suggestion, propaganda and mysticism.

This artificial moulding of a nation's mind to the requirements of the governmental plan through studied stimulation of motives, emotions and attitudes is accordingly an outstanding characteristic of all planned economies. In ancient Egypt it was accomplished largely through the dominance of

[10] E. Friedman, *Russia in Transition*, p. 93.

[11] L. E. Hubbard, *Soviet Trade and Distribution* (London, 1938), pp. 343-345.

a powerful state-religion whose priests and cults were at the disposal of the government. The French Revolutionary government sought to achieve the same result by civic festivals, fraternal banquets, "feasts of reason" and the so-called cult of the Supreme Being. Substantially similar devices in Nazi Germany are the Youth Movement, the marching parades, the cult of "Strength Through Joy" and the religion of race; while in Russia there have been introduced the deification of Lenin and what amounts to a mystic worship of dynamos, power-plants and tractors.

A darker aspect of this planned control over human attitudes is that it has been felt necessary by the governments of planned societies to solidify the loyalty of their subjects, and stimulate enthusiasm to the point of enduring the sacrifices which the plan entails, by selecting as a scapegoat some element of the population against which the hatred of the rest can be focused and concentrated. Antagonism and hatred shared in common against a common object are unfortunately among the most powerful and most readily available human motives to produce mass coöperation and divert attention from the inconveniences and suffering which such coöperation may require; and this has been soon learned and well learned in every planned society of which we have knowledge. Each and all have been built largely around the motive of punishing, persecuting and oppressing some hated group. At Sparta it was the Helots; during the French Revolution the aristocrats, émigrés, and capitalists; in Nazi Germany the Jews; and in Soviet Russia the bourgeois, the NEP men and the Kulaks.

The persistent persecution of these classes has not only given the rest of the population a sense of the necessity of holding together for a common task, but has also inspired them with a feeling of mastery and superiority which has caused them to overlook their privations and, what is perhaps even more effective, has stimulated in them a spirit of fanaticism and blind devotion to a cause or an "ideal" which has inoculated them against the influence of more rational considerations. The extent to which emphasis has been placed on motives of this kind is illustrated by the following report of

the Russian persecution of the Kulaks, or well-to-do small farmers. We are told that:

> "In villages where there was a dead level of poverty, the Soviets were nevertheless ordered to find Kulaks even where none existed. Some families must be designated as such even if there were no exploiters or usurers. Dr. Calvin B. Hoover relates how, in one village where he visited, the local chairman of the Committee of the Poor exhibited to him a family of Kulaks quite in the manner of showing one a family of lepers on whom the judgment of God had fallen . . . . When the query was put as to why the family was regarded as a Kulak one, he replied that someone had to be a Kulak, and that this family had many years before owned a village inn. They no longer did so, but there was apparently no hope of their ever losing their status as a Kulak family. If they did, there was no other family to take their place as Public Enemy, and for some reason unknown to anyone, the Soviet Government insisted that each village must produce at least one Kulak family to be oppressed."[12]

This characteristic of planned society in relying upon and stimulating mass-hatred against an oppressed group is especially repugnant to the humanitarian and philanthropic urge of our time from which so much of the demand for a planned society proceeds. It is an ugly fact which most of us would like to brush aside or stigmatise as peculiar to Germany. The same thing is true of the depressingly low standards of living, the starvation level of consumption, which have been necessitated by both the Russian and German plans and which an effort is made to explain away as only incidental to getting the plan into operation, as only a preliminary to the happy new day that is to come in the future. What right have we, asks an occasional disappointed liberal who expected much of

[12] Utley, *The Dream We Lost*, p. 53.

the planning experiments, to impose all this suffering on the generation of the living in the hope that our plan, or any plan conceived and executed by any group of planners, will compensate for the wreckage by the supposed benefits it will bestow on generations yet unborn?[13]

We are thus brought to the question of the extent to which planning, in the light of experience, has lived up to its promise of performing the major task expected of it by its proponents and urged as the principal reason for adopting it—the task, namely, of controlling the operation of economic forces under modern conditions of technology, avoiding and smoothing out maladjustments, and ensuring an orderly and rational relationship between production and use, supply and demand. If a planned economy is instituted, to what extent can it be expected that the national consumption will be accurately anticipated and evenly matched by production, so that so-called "crises" will be avoided? In approaching this problem a planned economy has one decided advantage. It has one of the variables under its control—it can absolutely dictate consumption by resorting, if necessary, to universal rationing. In effect the planned economies have done this, so that their only problem has been that of production, of compelling enough to be produced to meet the consumption program, high or low, which the government dictates without regard for the desires, tastes and preferences of the people.

There has already been a sufficient length of experience in the Soviet State to afford some basis for judgment as to its success or failure in this direction. The experience of Germany has been more brief and little information is available. In Russia, as might have been expected, there has all along been difficulty in meeting production schedules. Plants have been built in the wrong places with respect to raw materials or transportation facilities, resulting in delayed output. Others have been built too large or too small for maximum efficiency. Inefficient management or political management has slowed down production. Products composed of a number of parts supplied by different plants have been held up because

[13] Eugene Lyons, *Assignment in Utopia*, p. 203.

some of the parts could not be obtained in as large quantities as others. Some industries have not been able to obtain sufficient raw materials.

Of course these things occur under the system of private enterprise with which we are familiar. It is human to make mistakes and businessmen make them with a certain amount of damage, and often a very large amount of damage, to others. But it is now clear that planners, and those upon whom they depend to carry out their plans, also make them. The difference is in scale, in degree. Where there is a number of completely separate private enterprises some may make mistakes, while others do not, and a rough balance may be struck for a great deal of the time. If an error is made in one place it may be corrected somewhere else. A separate concern may repair its mistakes without involving a change of national policy. On the other hand where the industry of a whole nation is under central control and rigidly coördinated as planning requires, a mistake anywhere may result in dislocation everywhere and apparently this has happened frequently in Russia and doubtless also in Germany.

Reporting on Russia, an English economist concludes that planning has not eliminated economic crises, but has only caused them to appear under somewhat different forms from those to which we are accustomed. He says:

> "Neither has the Soviet Union escaped crises, different in form, but as expensive and disturbing as the crises which occur in the unplanned economics of capitalist states. Between 1928 and 1932 the total head of domestic livestock declined by roughly half; in the winter of 1932-1933 large agricultural regions were visited by famine which resulted in two million deaths. Some branches of national economy have over-fulfilled their plans, while others have failed by considerable margins to realize them . . . . In a capitalist system such circumstances would result in insolvencies and unemployment in the affected industries. Such external symptoms are suppressed in the Soviet Union by price fixing and

by budgetary grants to cover the unplanned losses of industrial enterprises, but the disease is manifested in other forms . . . . The ultimate result of planning errors was a reduction in the consumption of the population . . . .

"If an economic crisis be defined as an unpredicted disturbance in the orderly development of production and consumption, resulting either in a shortage of goods or a shortage of effective demand, then the economic history of the Soviet Union, since planning superseded the relatively free market of N. E. P. has been a succession of crises, for at practically no period during that time has there not been a shortage of something . . . . If planning is immune from some of the defects of capitalism, it seems to possess peculiar faults of its own."[14]

And another commentator concludes as follows:

"For years past there has been a far more general anarchy in Soviet national economy than has ever been the case in capitalist economy even at times of worst crisis."[15]

In any event, whatever may be thought of the effectiveness of planned societies in achieving economic efficiency and eliminating economic crises, there is one direction in which they have definitely proved their effectiveness, and for which they have always displayed a peculiar fitness. It is a kind of effectiveness and fitness which is far removed from the professions and supposed objectives of the humanitarian liberals who, in this country at least, are the leading proponents of government planning. It is effectiveness and fitness for war. All the planned societies, ancient Egypt, Sparta, revolutionary France, Soviet Russia, Nazi Germany, whatever their differences in other respects, have been powerful and effective military states. For this there are obvious reasons.

[14] L. E. Hubbard, *Soviet Trade and Distribution*, pp. 343-345.
[15] Utley, *The Dream We Lost*, p. 205.

The chief human characteristic of planned societies is the iron discipline to which their populations are and have to be subjected. Whatever the character of the plan and whatever the objectives it professes, the central directing authority understands from the outset that an attitude of complete unquestioning obedience by the people to the government must be created as a preliminary requirement, and that the principal effort of government must be devoted to creating this attitude and sustaining it. Experience shows that this can be done, and, if done effectively, the attitude persists no matter how far the plan falls short in actuality of realizing the promises and professions which constituted its original appeal. Not merely is this attitude of complete obedience highly valuable as an element of military effectiveness, but the devices which are generally used to create and maintain it have in themselves a military value. The parades, the festivals, the mystic attitude toward the state and its ruler, all tend to produce a condition of mind which is valuable in war, and this is especially true of the spirit of hate and fanaticism against enemies or supposed enemies of the regime which we have seen that the rulers of planned societies do so much to stimulate. An attitude compounded of loyalty to the state and mystic savage ferocity against other human beings, coupled with habituation to privation and sacrifice, produces a generation of soldiers who may be almost irresistible for a succession of campaigns.

It is therefore not remarkable that perhaps the fiercest and most intense war in history is being fought out today between the two great planned societies of modern Europe. The discipline, fanaticism and training in hardship which characterize the combatants on both sides made them from their very entry into the conflict foemen worthy of each other's steel. Democracies always require two or three years to organize themselves for battle; the discipline to which planned societies are inured makes them more effective from the outset. If a nation has an ambition to find its chief satisfaction in military achievement, the acceptance of a planned regime is a good way to begin.

IV.

In this brief review there have been summarized the common characteristics of planned societies so far as experience and information are available. They are, first of all, an absolute government unlimited in its powers, concentrated in a very few hands or in the hands of a single leader, and permitting no discussion or difference of opinion; secondly, the filling of all posts of importance, economic and technical as well as governmental, with loyal dependents of the party machine; thirdly, the subtraction from the consuming power of the people of enough of the total national product to enable the government to make the capital investments and experiments that it deems desirable, even though there may thereby be entailed, and has hitherto always been entailed, a serious depression of the standard of living; fourthly, a distribution of the consumable national income in part at least along political lines to maintain support for the government; fifthly, a rigid regimentation of opinion requiring resort to the use of a secret police; sixthly, the mass hypnotism of the people into a fanatical spirit of self-sacrifice, often stimulated by the deliberate persecution of some oppressed group; and finally, the development of an effective spirit and attitude of militarism.

In the light of experience these are some of the results that would most certainly be produced by transforming a nation into a planned society. Of course they are not the results that are desired and advocated by those among us who are toying with the idea of planning, and who would almost certainly be liquidated if the planned society which they propose came into being, just as most of the early Bolsheviks were liquidated in due course. It is not the hard realities of a planned society that appeal to the advocates of planning; it is the feeling that something must be done to alleviate economic depressions and give greater security and larger incomes to the mass of the people. The actual experience does not indicate that a regime of government planning will do these things; it certainly indicates that the planned regimes hitherto known have not done them; and it suggests that the very

conditions of planning, the human agencies through which it must operate and the special nature of the obstacles which it must encounter, will prevent it from doing so.

The great defect in the panacea of planning is that it conceals problems and difficulties rather than solves them. In a free economy, we are fully aware of the friction, the conflict, the waste, the maladjustments that characterize the economic and social relations between men and groups of men. They are patent and their results in alternating periods of prosperity and depression are patent. The advocates of planning assume that by concentrating all power in a centralized agency, the factors of maladjustment will be removed. They will not be —they will disappear from the surface, only to be transformed into pressures operating on the agency from within; and with the additional difficulty of imposing upon the agency a responsibility too vast for human executive ability and judgment. The central authority will inevitably seek to relieve itself of this strain by exerting its power to repress the active outside centers of initiative; and in doing so it will deaden the life and intelligence which are necessary for high productive effort and hence for a high standard of living. It substitutes a mechanical military kind of discipline for the organic spontaneous coöperation which is necessary for the works of peace.

But if planning will not solve the problem of our generation, where are we to turn? This is doubtless the question that the considerations here advanced will evoke from the thoughtful and earnest men and women who sincerely desire a fuller and better life for our people. Of course it is a question which could not be answered in much more time than I have already taken, and it is not the question I set out to answer; all that I proposed was to eliminate one widely discussed way of working toward the desired result. However, this much may be said:

There is often much that government can properly and advantageously do to alleviate particular evils as they develop and disclose themselves in modern society. To this extent it may be said that there is a helpful kind of government planning, but it is planning how to deal with an evil rather than

planning the arrangements of the society itself. If this kind of governmental action is extended in too many directions and to too many different problems at once it begins to suffer from a kind of law of diminishing returns—the various governmental efforts get in each other's way. This is apt to lead to a demand for still more governmental interference with other things and to a demand for "coördination" of the various governmental efforts. Out of these demands comes in turn the demand for a "planned society"—for vesting government with a complete general power of making all the social and economic adjustments within the society that it regards as necessary to accomplish its purpose.

This progression of ideas and tendencies from necessary governmental interference with some things to complete governmental management of everything is so inexorable, particularly in the mental atmosphere and climate which prevail today, that it becomes desirable to bring ourselves face to face with what complete governmental management of society would mean. That is accordingly what I have attempted to do this evening. If when we look the prospect in the face it is not pleasing, then there is certainly suggested the conclusion that any proposal for an extension of the field of governmental control and management should be viewed with caution and that there is a presumption against it unless clear proof can be given that it will not create more problems and maladjustments than those which it promises to remove. Certainly the data of experience reviewed in what I have here said permit no other conclusion than that governmental management, so far from eliminating the maladjustments which irk us, is likely to produce other and even graver maladjustments of the same character; and this should make us at least somewhat more tolerant and more patient of the maladjustments incidental to the regime of free enterprise in which we have been bred.

Any system of free enterprise, just because it is free and just because it permits and expects initiative and effort to spring up in unexpected places and in unexpected ways from anywhere and everywhere throughout the mass of the people, is bound to result in a good deal of conflict and competition

and disappointment and frustration and success and inequality. Success will not always be achieved by the most deserving, and failure is not always a stigma of incompetence. The rewards of life, under any social or political system, individualist or communist, are always partly the result of chance and partly of rules of the game that are rough and ready and do not recognize the finer values. Sometimes all this competition and conflict and restless effort are drawn into directions which result in wholesale frustrations, failures, destruction of accumulations and unemployment. Within limits there are things which government can do to alleviate the resulting individual suffering and to lessen the likelihood of its recurrence, but only within limits, whether we have a planned society or not.

The maladjustments of life, economic, social and individual, are in part the result of conflict between human aims and purposes, in part of lack of foresight, lack of patience, lack of intelligence, lack of skill. The real tragedies are when some such lack on the part of one individual or a few individuals brings frustration and suffering to many. This is always more likely to happen as more power is concentrated in a few over the many, and especially as more power is concentrated in government; for the very essence of government is that the force of its decisions is felt by all and its failures and mistakes come home to all. A miscalculation by the absolute government of a planned society can produce results more disastrous than a stock-market panic or a glut in the wheat-crop, or a shrinkage in the demand for steel.

The argument for a planned economy assumes that government will be all-wise and wholly disinterested, conditions not likely to occur; and it assumes also that the way to solve economic difficulties and social difficulties is to suppress and iron out all conflicts and inequalities. Supposing that this could be done, which it cannot be, the loss would be greater than the gain; for it is precisely the conflicts, the competition, the shifting inequalities in the mass of the people that contain the hope of all progress and improvement and spell the meaning of democracy.

Accordingly even if it could be proved that a planned society would eliminate some of the particular things that we feel today as evils in the system of free enterprise, we would not do wisely to change one system for the other because of all that we would lose; and in this connection there is a final consideration which is not always given due weight. I referred at the beginning to national tradition as corresponding in the body politic to character in an individual. A nation attempting to step out of its tradition is like an individual acting out of character. It leads to disintegration, ineffectiveness, paralysis of will, impotence of accomplishment. Neither the German nor the Russian people in submitting to planned economies stepped out of their traditions. Both had traditions of absolute government and social servitude. Both had traditions of dominant militarism. They have merely translated their traditions into forms more effective for modern purposes.

Our American tradition is a different one. It is a tradition which vests initiative and decision in all individuals everywhere and calls the result democracy. It puts a man's fate at the mercy of his intelligence and skill and therefore holds him entitled to an education. It expects him to develop enterprise and therefore throws him on his own resources to find and hold a job if he can. It believes in incentive rather than compulsion and therefore insists that the right to acquire and own property shall be protected. It abhors the idea of men being supported by the government except in unusual emergencies. It recognizes that a system of free enterprise does not automatically prevent booms and panics, but it believes that these may also occur under systems of government dictation, and that in the long run their effects can be overcome more satisfactorily by the efforts and decisions of thousands and millions of men and women than by the wisdom of a centralized government. This is the tradition which would have been as well understood at Williamsburg in the age of Queen Anne as by the men who are responsible for the operation of our industry today in North Carolina and Pennsylvania, in Illinois and California. It is the tradition which we inherit from the Williamsburg period of our history.

We have not always kept this tradition in mind in shaping the course of our national policy, especially during the past half-century, and therein lies the source of many of our present difficulties, especially those of the last twenty years. Necessarily there have had to be some readjustmnts of governmental functions and some increase in governmental powers, but the line has not always been wisely understood between the things that government can advantageously do and those in which its interference means ultimate mischief. Indeed the supposed collapse of our economy a dozen years ago was due not so much to the operation of economic forces as to the effect of the unwise governmental policies of prior years. In the face of this, many of us have not yet learned our lesson and are turning to more governmental interference as a cure for the evils that too much governmental interference has caused. The point has at last been reached when some of the more advanced advocates of reform are suggesting a planned society with all that it involves.

But there is one thing upon which we may pin our hope of turning back the tide. There is one point in which a planned economy outrages the deepest layer of our tradition, and which can be understood, I believe, by common men everywhere. A planned society is completely inconsistent with government by discussion and debate, with free elections and with legislation by representative assemblies. It does not tolerate compromise. It necessarily insists upon absolutism, upon supreme uncontrolled power in the ruler and his immediate coterie of advisers. Without this, as I have already pointed out, there can be no planned society, for a free legislature could upset the plan at any time and would certainly do so.

I do not believe that the American people are ready to accept this kind of absolutism. We may no longer know our history but hatred of absolutism is still in our blood and bones, at least in those of us who are of English descent. Our deepest roots go back to the time when England shook off the last shackles of an absolute king. The age of Anne, when Williamsburg was founded, was the dawn of that era of freedom finally achieved. All our most treasured national

memories ever since are linked with the onward march of political freedom. We are not yet ready to turn back the clock and plunge into the night that lies behind the Williamsburg dawn. Williamsburg and what it stands for still have meaning for us. We are not yet ready to accept the Pharoahs and the old kings:

"Over all things certain, this is sure indeed:
Suffer not the old King, for we know the breed.

* * * * * * * *

He shall mark our goings, question when we came,
Set his guards about us, as in Freedom's name.

He shall take a tribute, toll of all our ware;
He shall change our gold for arms—arms we may not bear.

He shall break his judges if they cross his word;
He shall rule above the law, calling on the Lord.

He shall peep and mutter; and the night shall bring
Watchers neath our window lest we mock the King.

Hate and all division; hosts of hurrying spies;
Money poured in secret, carrion breeding flies.

* * * * * * * *

Here is naught at venture, random nor untrue—
Swings the wheel full circle, brims the cup anew.

Step by step and word for word; who is ruled may read,
Suffer not the old Kings; for we know the breed."

The College of William and Mary

in

Virginia

Constitutional Aspects *of* Foreign Affairs

LINDSAY ROGERS

Sixteenth Lecture Under the James Goold Cutler Trust

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CONSTITUTIONAL ASPECTS OF FOREIGN AFFAIRS

JAMES GOOLD CUTLER LECTURE

By LINDSAY ROGERS

Delivered at the College of William and Mary, February 8, 1944

The architectonic principle of government under the American Republic is that constitutionality is placed above every other earthly consideration. Amendment, judicial decision and custom have interpreted and changed the last will and testament of the Founding Fathers, but we are still bound by its explicit provisions.

To an Englishman it is almost incredible that the United States must embark on the disguised civil war of a presidential election at a time when the war against National Socialism may be at its most critical stage. "Why don't you postpone the election?", says the Englishman. You reply that the Constitution requires the election to be held. "Why don't you amend the Constitution, and have your election when the war is won?", asks the Englishman. You answer that the procedure is too tedious and cumbersome to work effectively before the date of the election and that anyway the amendment probably would not carry. Its real purpose, opponents would charge, was to continue in office the present President and Commander-in-chief, and that the avoidance of an election in war time was only a pretense.

As the tide of governmental activity ebbs and flows and as each decade, almost each year, brings problems that suddenly seem acute, particular paragraphs of the last will and testament of the Founding Fathers

wax and wane in their importance. Blood shed in the War between the States wiped out the constitutional ambiguity over slavery. The inability of the national government to levy income taxes without apportioning them among the States missed being catastrophic only because a constitutional amendment came into effect not too long before the country entered its first World War. Only recently have judicial decisions done much (but not enough) in clearing up the debris and waste which resulted from the immunity of State instrumentalities from federal taxation and the reciprocal relief of federal instrumentalities from the impact of State taxation.

A decade ago there were grave doubts first, as to whether the Fourteenth Amendment did not prevent the States from protecting their working populations, and, secondly, whether Congress was doomed to stand by idly while the economic life of the country slowly ebbed. In the first case those doubts were resolved, so far as minimum wage legislation was concerned, by the Supreme Court of the United States changing its mind, or rather by one judge changing his mind. As my friend, Thomas Reed Powell, put it: "A switch in time saved nine". On the second point the doubts were resolved not only by a change of mind but by a change in the Court.

Happily the provisions of the last will and testament of the Founding Fathers have never been unduly limiting in respect of the exercise of the war power. Constitutional pedants have sometimes viewed with alarm and there were grave discussions concerning unconstitutionality during the War between the States. But in 1861 and 1917 national power was not hamstrung, and in this conflict, whatever weakness and indecision may be charged to its conduct have come from human frailties and are not compelled by any language of the Founding Fathers. The exchange of destroyers for naval and air bases, Lend-Lease, priorities, price controls, rationing—there is a plenitude of power and its use can be prompt.

In respect of the manner in which we conduct our foreign relations, however, the situation is vastly different. The formulation and execution of policies which seek to preserve and organize peace, and which if unsuccessful require, in Clausewitz' phrase, "another means" to carry them out, are under a dark shadow cast by the testamentary provisions of the Founding Fathers. If they remain there the United States, after emerging victorious from a second World War, will again be defeated by the peace. That it is not only unwise but unnecessary for our foreign relations to be hampered by the Constitution is the thesis I offer you today.

I.

When, after the first World War ended a quarter of a century ago, we had difficulties in making peace, our constitutional arrangements for the control of foreign affairs were vehemently discussed and their wisdom seriously questioned. Now, while the second World War is still in progress, they are again being discussed and only a tiny minority in the country dares to deny a change would be desirable. As I shall argue with you, change is possible by custom. Indeed, some change has already come about. But I shall also argue, in Edmund Burke's phrase, that the laws reach but a little way. "Constitute government how you please," Burke declared, "infinitely more will depend on the wisdom and discretion of those who have it in charge." Political courage, political morality, accommodations between the executive and the legislature within the wide ambit which the constitutional texts allow for rashness and discretion—these matters may prove as fateful to the future welfare of the country as the constitutional requirement that the President "shall have the power by and with the advice and consent of the Senate to make treaties provided two-thirds of the Senators present concur". Political intelligence and courage in high places is something we can only hope for and seek to deserve.

But the constitutional provision that one more than one-third of the Senate can veto treaties, that, as John Hay put it, "for all time the kickers should rule", is a matter we can do something about.

And we must do it if we are not to lose the peace. Happily there seems to be an increasing awareness of this truth. During recent weeks there has been a good deal of discussion of the behavior of the Senate when it was dealing with the Treaty of Versailles. A distinguished Senator warns against "another kiss of death" and maintains that the osculatory preparations are already under way. This is not the place to rehash old controversies. It is sufficient to say that in 1919-1920 all the fault was not on one side. Proper compromises by President Wilson would have taken the United States into the League of Nations and launched a foreign policy that might have been tolerable in respect of the problems of the post-war world. Whether the succeeding Republican administration, which was so shy of the League of Nations that it refused to acknowledge communications from the Secretary-General, would have cooled on that policy and abandoned it speedily can only be a matter of conjecture.

The plain fact is—and no one can deny it—that, in Mr. Wilson's phrase, used in 1917 when the Senate was considering legislation, "a little group of wilful men"—that is, Senators—can make the great Government of the United States helpless and contemptible. In 1917 the little group did it by filibustering against the Armed Ship Bill. One more than one-third of the Senate can do it in respect of any treaty, and there are few save Senators who would raise their voices to say that such an arrangement is tolerable. To friendly foreign governments with which we negotiate, the arrangement seems intolerable. An English writer uses the sport of kings to illustrate the American position. "The President of the United States", he says, "is in the position of a trainer who (to the distress of the Jockey Club) is allowed to enter his horse 'America' for the classic races. But only the owner

'We the people of the United States' has the power to put up the stake money without which, in this drab world, entries are not finally accepted. For example, every American President since Wilson's time has entered 'America' for the World Court. And each time the owners, represented by their chosen trustees, the Senate, have cancelled the entry. There is no evidence that the owners have become more ready to put up the stake money than they were in 1920 or anytime down to 1939."[1]

II.

The history of the treaty provision in the Philadelphia Convention has been dealt with in many authoritative volumes. I have myself dealt with it in a book which was rather called "provocative"[2]. But here it is worth while to make a brief reference to that history.

As is well known, the framers were all nervous of unrestrained authority, whether it was possessed by an executive or a legislature. With the exception of a small minority, in which Alexander Hamilton was most conspicuous, the men in the Philadelphia Convention desired to get away from a strong government and by checks and balances to avoid tyranny by any branch of the political establishment or even by a majority of the people acting through their elected representatives. That system of checks pervades the whole constitution and is carried so far that practically but one power is conferred without a corresponding restraint on its exercise. This is the power of executive clemency and for misusing it, the President would be accountable to the Senate in an impeachment proceeding.

One of the early drafts of the Constitution provided that "the Senate of the United States shall have the power to make treaties and to appoint ambassadors and judges of the Supreme Court". This was objected

[1] D. W. Brogan: "British and American Foreign Policy", *Nineteenth Century*, January 1943.
[2] "The American Senate" (1926).

to by Madison on the ground "that the Senate represented the States alone and that for this, as well as other obvious reasons, it was proper that the President should be an agent in treaties". There were, however, certain causes which operated to incline the Convention to favor dual control of foreign relations. Hamilton apart, the framers desired to get away from the English precedent of treaty negotiation by ministers and ratification by the Crown. They feared possible autocracy in case the function was given to one man. It was suggested that since other clauses in the Constitution prohibited the States from making individual treaties they should be compensated for this loss through power being given to the representatives of the States in the upper house; they would thus be safeguarded against injury by federal treaty action. Finally, under the Articles of Confederation, the power of entering into treaties and alliances had been vested in "the United States in Congress assembled" and nine—that is, two-thirds—of the thirteen States voting as units in Congress had to assent to any commitments. Congress had been so determined to keep foreign matters in its own hands that when a Foreign Secretary was appointed in 1782 he was instructed by a resolution to submit to Congress for its inspection and approval all letters to Ministers of Foreign Affairs relating to treaties and the plans of treaties themselves. That this was clumsy machinery could not be denied, but clumsy machinery the weaknesses of which are known —in 1782 or a century and a half later—sometimes seems more desirable than a nicely balanced machinery that may run too rapidly. In any event some arrangement midway between that of the Crown and that of the Thirteen Colonies seemed to be indicated.

A fortnight before the Convention adjourned a new draft of the treaty-making clause joined the President with the Senate. To the proposal that ratification by the House of Representatives should be necessary also it was answered that general legislative approval would frustrate the desire for secrecy. If it were to be the

Senate alone, there should be a two-thirds vote. Hence, when the Committee on Style reported only three days before the adjournment of the Convention, the language of the constitutional provision which we now have appeared for the first time. The clause was the result of a compromise. Had the Convention remained in session longer there might have been a change. But the more prolonged the session the more the opportunity for criticism in the country. Moreover, the weather in Philadelphia was quite warm. The delegates were exhausted. They wished to conclude their labors quickly. Not independent of accidental causes, therefore, was the emergence of the provision now in the Constitution. Thus the tergiversations in the Convention should serve to remind us that there is nothing particularly sacred about this clause of the Constitution. It is a child of chance rather than of logic or experience.

The difficulty now is that the advice and consent of the Senate are looked upon not as a check but as inviting the substitution of senatorial judgment for executive judgment. The Senate can and does dictate to the President. "One more than one-third of our number", its ultimatum reads, "will defeat the treaty in its present form but we will approve the treaty if changes are made in certain particulars which we specify. Our judgment is better than yours. Public opinion will not be able to touch us until it has forgotten or is distracted by other issues. We care nothing about delays or embarrassments vis-à-vis other nations, so you had better agree to accept the only conditions on which our minority will not exercise its constitutional veto."

A legislative chamber may of course present a similar ultimatum on pending bills but it is proper that statutes should emerge from the conflict and reconciliation of different views, and that minorities should receive some concessions. Mutilation of a bill is rarely so important or so final as mutilation of a treaty, and there is no foreign contracting party to consider.

Furthermore, on legislation there is no constitutionally protected veto by one more than one-third. Perhaps it is not true, as John Hay maintained, that "there will always be 34 per cent. of the Senate on the blackguard side of every question that comes before them". But there will always be Senators who insist on their individual prejudices or who espouse sectional or racial interests. Not a few Senators are profoundly convinced that their wisdom is greater than that of the Executive. Senator Borah, Chairman of the Senate Committee on Foreign Relations, proclaimed to the country that through his own sources of information which he thought were better than the sources available to the Executive, he had been assured that there would be no European war. Moreover, with the backscratching and capricious accommodation which flourish in every assembly not subject to responsible party leadership, it is easy to create a minority larger than 34 per cent. and to propose the substitution of its program for the program submitted by the Executive.

"There are only two things wrong with Henry Cabot Lodge", wrote Henry Adams. "One is that he is a Senator. The second is that he is a Senator from Massachusetts." This is a political imponderable which cannot be weighed but only pondered. There are ninety-six Senators. The *amour propre* attaching to membership in that august body seems considerably greater—certainly its manifestations are more obvious and objectionable—than the *amour propre* attaching to membership in a chamber composed of 435. It would probably be incorrect to argue that a larger percentage of Senators than of Representatives hold queer opinions or are demagogues or crackpots. But because there is unlimited debate in the Senate, because the newspapers think that the views of one of ninety-six are more important than the views of one of four hundred and thirty-five, the country becomes much more aware of the mental eccentricities of certain Senators than of the eccentricities of their counter-

parts in the House of Representatives. In Great Britain rules of procedure in the House of Commons, the relative unimportance of the private, dissident member, and the shortage of newsprint combine to make demagogues blush unseen. Who will deny that this is an advantage?

Psychologically also the constitutional provision that action may be prevented by one more than one-third of a body is an invitation to individuals to make up a large enough minority to interpose their veto. How, save on grounds such as these, is it possible to explain the refusal of the Senate to consider the protocol establishing the Permanent Court of International Justice when the House of Representatives was voting overwhelmingly—303 to 28—in favor of adherence and asserting its readiness "to participate in the enactment of such legislation as will necessarily follow such approval"? Even if the majority be viewed as somewhat swollen because the House had no direct responsibility and was taking a hortatory rather than a decisive action, it surely represented a willingness in the country for the Senate to act favorably. Yet for ten years after that vote in the House the Senate refused to act and when the test finally came, more than the one-third minority was in being.

How account for the fact that the Fulbright resolution passed the House of Representatives by 360 to 29; that the Senate hemmed and hawed for six months; and that only the tremendous popular acclaim which was given the Moscow Agreement sufficed to rouse the upper chamber from its lethargy, or, more accurately, to make it abandon its antagonism and finical concern with its own constitutional prerogatives? That a resolution which admitted that the country is part of the world was finally passed is encouraging, but I find myself unable to agree with those who think that this is a cause for rejoicing. The resolution is in such broad terms that one could vote for it and then could find good and sufficient reasons to oppose any specific scheme for implementation. If, after months

of consideration, the impact of an unexpected world event was necessary to force the Senate to give approval to a measure which is in such vague terms as to be almost platitudinous, how can one be sanguine of Senate behavior when the question is that of cleaning up the mess that this war will leave in its wake? During the debate on the Treaty of Versailles, Senator John Sharp Williams said that the Senate would not vote approval of the Ten Commandments or the Lord's Prayer without insisting on reservations. I suppose that if the Senate recited "Now I lay me down to sleep", someone would insist on adding "and other appropriate forms of repose".

III.

How far the framers intended the Senate to be a privy council charged with foreign affairs is not clear. Certainly they thought that the Senate—then quite a small body—would consult with the President frequently. Washington did consult but his experience was such that future collaboration was not attempted. The accident of an early incident determined the development of a constitutional practice which has been just as important as constitutional language.

In his memoirs John Quincy Adams gives a much-quoted account of President Washington's having gone to the Senate with a project of a treaty, and of having been present while the Senators deliberated upon it. "They debated it", wrote Adams, "and proposed alterations so that when Washington left the Senate Chamber he said he would be damned if he ever went there again", and ever since that time treaties have been negotiated by the Executive without submitting them to the consideration of the Senate. Only on rare occasions since have there been consultations. In 1830 Jackson asked the Senate for its advice on a proposed Indian Treaty, "fully aware that in thus resorting to the early practice of this government by asking the previous advice of the Senate in the dis-

charge of this portion of my duties I am departing from a long and for many years unbroken usage in similar cases". Sixteen years later President Polk, in his message on the Oregon Boundary settlement, said that "this practice, though rarely resorted to in latter times was, in my judgment, eminently wise and may, on occasions of great importance, be properly revived". If the President is wise, as Lord Bryce remarked, "he feels the pulse of the Senate which, like other assemblies, has a collective self-esteem". But the growing size of the Senate made it inevitable that formal consultation would be rare. The rules still provide for executive sessions with the President, but in 1906 Senator Lodge said that if a request of that sort were made by the President it would be resented.

Until the debate on the Treaty of Versailles, however, the Senate held executive sessions when it considered relations with foreign powers. In 1919, there was unlimited debate on the peace treaties and the Covenant. The Senate was a legislative chamber, amending and reserving. It is not desired "at this particular moment to afford opportunity for intemperate and trouble-making debate on the floor of the Senate. It is known to all well-informed men that the utmost freedom of debate is permitted under the Senate rules. It is further known that Senators do not hesitate to avail themselves of that unlimited freedom. International relations are delicate and sensitive. Unity and harmony require consultation and co-operation". Thus Senator Connally when, for the Senate Committee on Foreign Relations, he explained the reasons for not reporting the Fulbright Resolution.[1]

Secretaries of State consult with the Senate Committee on Foreign Relations but not as much as they should. The ease with which in 1913 Secretary of State Bryan's conciliation treaties were accepted was due to the fact that the then Great Commoner had discussed them with the Senate Committee. Recently

[1] *New York Times*, September 25, 1943.

there have been promising contracts between certain Senators and the State Department for the consideration of post-war policies, but a good deal more could be done. The British House of Commons, which is not organized in committees, does have an informal group of members who are specially interested in international questions. The Secretary of State for Foreign Affairs occasionally appears before this group and discusses matters with them more frankly than he could in the House. The advice and criticism he may get are helpful, and members of the group, made more *au courant* with developing policies, are likely to be better informed and more sympathetic supporters of the Secretary of State when matters become before the House for discussion. Secretary Hull's appearance before Congress to report on the Moscow agreements was all to the good even though, unlike Mr. Eden in the House of Commons, Mr. Hull simply made a pronouncement and did not participate in any debate. The more the State Department abandons its aloofness from Congress and its members the more likely a sympathetic understanding of its policies[2]

IV.

The one more than one-third of the Senate could be made up of Senators from the seventeen smallest States which contain not more than one-twelfth of the people of the country. It may be said that such a calculation is fanciful, and it probably is. But the elected representatives of the people of the United States number 531, and I submit that there is no reason in allowing 33—less than 7 per cent. of them—to determine the foreign policy of the United States. It should in

[2] See the correspondence between Secretary Hull and Senator Wiley over the latter's proposal to set up a Foreign Relations Advisory Council composed of high officials of the State Department and of representatives of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. *Congressional Record*, November 25, 1942.

frankness be added that the 7 per cent "might protect" the more populous States of the country nine of which contain a majority of the population. The Senators from these nine States plus sixteen other Senators could defeat a combination of the thirty-one smallest States. But such alignments have never taken place and it is inconceivable that they could in the field of foreign policy. Section versus section (New York *and* Delaware; California *and* Nevada); farmer versus labor; wealth versus poverty—alignments could and will be on these lines but happily not on bigness versus smallness. Happily also our racial stocks are not thus distributed over the country. Nor is the argument against the two-thirds rule affected by the fact that 24 States with 23 millions would have the same voting power as 24 States with 108 millions population. Who is alarmed by that in respect of legislation?

It should be remembered that, when the present constitutional arrangement was accepted, the conduct of foreign relations was much more the peculiar province of kings than it now is. This is not the place to argue whether, as diplomacy has become democratized, it has become more successful, or to consider the merit or the demerit of the second part of the first of Mr. Wilson's Fourteen Points: "open covenants of peace, openly arrived at". The first part is unchallenged. No non-totalitarian government today, with responsible political leaders, would propose that that government accept international commitments without the nature of the commitments being known in advance, discussed by the public and approved by elected representatives of the people—tacitly, as is the case with the British Parliament, or explicitly in other countries by some legislative ratifying authority. If, as Walter Bagehot said seventy-five years ago, legislation of exceedingly minor importance is debated clause by clause and must run the gamut of parliamentary approval, there is no reason why a

treaty which may commit the lives and fortunes of millions of citizens should not run a similar gamut of criticism and be submitted for approval by a representative assembly.

Indeed, it may be argued that our present machinery for advising and consenting to the ratification of treaties is obsolete and undemocratic not only because a minority of the Senate can interpose a veto but because two-thirds of the Senate are not sufficiently representative to put the kind of imprimatur of approval that there should be on an international engagement. A foreign policy would have much more moral backing if, as a policy, it had to be supported by the House of Representatives as well as by the Senate in order to be binding. Such support must come later when the House passes appropriations or implementing legislation. In effect, then, the House has a veto which it does not exercise.

In so far as the content of foreign policy is concerned, the House of Representatives has a greater interest than it had when international questions were predominantly political. Domestic problems and international relations are far more closely intertwined than they used to be. A Hawley-Smoot Tariff Act sets up a series of tariff retaliations in Europe which lead to economic misery—the well-watered soil in which the seeds of dictatorship blossom and burgeon rapidly. A policy of reflation—as was Mr. Roosevelt's policy in 1933—torpedoes the World Economic Conference in London and has far-reaching international complications. The question of whether we retain in operation the synthetic rubber plants which have been built in this war will determine the prosperity or the penury of native populations in the Pacific Islands and in South American states. Foreign offices, even though reluctantly, have come to recognize that the emissaries that they send abroad must be more than diplomats: they must know something of business and economic organization. They must not be permitted to become aloof from currents of opinion

and from emerging domestic problems in their own countries. Hence both the British Foreign Office and the State Department are paying attention to the problem of recruiting men for the foreign service whose training will cover much more than diplomatic history, diplomatic forms, international law—in short, what one of the writers on diplomacy called the art of negotiation with princes. Pending the recruitment of such a type of public servant, every Embassy now has economic experts, commercial counsellors, labor advisers, press and radio officers whose jobs are more important than the jobs of the military, naval and air attachés.

When war came foreign offices and embassies were not so staffed. Hence a plethora of special agencies which performed special tasks in respect of international relations: economic warfare and foreign propaganda. In the United States there was quarrelling over who was to do what. Economic warfare was at first a kind of step-child of the army and then under a Board headed by Vice-President Wallace. A violent quarrel with the Reconstruction Finance Corporation, which was itself waging economic battles for raw materials, resulted in all such activities, theoretically at least, going under the control of the State Department. But then in September last this new organization, the competing show which the State Department had been running, and Lend-Lease, which had been and still was separate, were thrown together into a Foreign Economic Administration not formally under the Secretary of State but with great powers that must be "exercised in conformity with the foreign policy of the United States as defined by the Secretary of State". Meanwhile, the internal fermentation in the State Department had been incessant. A mere enumeration of the many shifts, which I list in an appendix, will show vividly how the task of diplomacy has been transformed. Once diplomats had to court monarchs and curry favor with royal mistresses. Then it was important that they interpret the views of and get

along well with "the governing classes"[1]. Their popularity with the peoples of the governments to which they are accredited must now be taken into account. But above all, ambassadors must now administer swollen chancelleries and large staffs of their own. They must also keep in touch with and seek to coordinate the activities of a host of officials from different national departments or agencies—commerce, agriculture, labor, information, propaganda—who are seeking to carry out what is the supposed foreign policy of their country. Great Britain has attempted an *ad hoc* solution of the problem in the Middle East and Washington by appointing emissaries of cabinet rank. When this war began foreign offices thought their cavalry was still all important. The bombers and the tanks were manufactured in other branches of the government. Now foreign offices properly seek to take over the direction of the new arms.

In short, modern diplomacy is the business of the executive and the representatives of the people in a sense that it has never been before. Under American constitutional law, as I have said, treaties are not self-executing but always require legislation to implement them. Money must be provided and that can be forthcoming only by an appropriation approved by Congress. The size of the army and navy and air force and the wealth or penury of those forces in weapons are determined by Congress. Why, then, should it be thought that an international engagement from which important domestic and fiscal consequences will flow has enough general backing if it is approved only by two-thirds of the Senators of the United States? Why should the liquidation of lend-lease, arrange-

[1] Since the war began Atticus, a well-known Englishman who contributes a column to the London *Sunday Times*, wrote as follows concerning the appointment of a new British Ambassador to Brazil. It was, he said, "swift promotion for a man who, three years ago, was counsellor at our Embassy in Rome. Sir ———, who will be fifty this year, played golf with Ciano, was faultlessly correct with the Germans, and did his best to keep Mussolini sane. With his excellent wardrobe, his epicurean taste as a host, his good-humoured imperturbability, and his attractive wife, he will make friends quickly in Rio de Janeiro".

ments for currency stabilization, the provision of international development funds, the disposition of excess merchant shipping, and agreement on air routes be subject to veto by one more than one-third of the Senate, or approved without the consent of the House of Representatives? If Congress must declare war, why should the treaty-making machinery be allowed to make peace? These questions have become familiar ones and there is now a growing body of opinion which is eager to put the two-thirds vote on the shelf and to see international engagements approved by a majority vote in both branches of Congress precisely like domestic legislation.

This, of course, would strengthen the position of the President. He would have a much easier time getting a majority of Congress to follow the course which he had charted on what he conceived to be the interests of the country than he has had in the past or than he would have in the future of getting two-thirds of the Senate. But though he would have an easier time he would have a great many difficulties.

Opinion in the House of Representatives is just as accurate a reflection of opinion in the country as a whole as is the opinion of the Senate. Indeed there are sound reasons for assuming that the House is a better mirror—that it may sometimes be too good a mirror when, in yielding to pressure groups, Representatives think more of re-election at the end of their two-year term than they do of serving the interests of their country. It is then that the House becomes too much like a Congress of Ambassadors which does not deliberate and agree but follows instructions. Senators, secure for a six-year term, can afford to be more independent of such pressures. They can also be much more individualistic.

Because of the shorter term, because of the size of the body, because no publicist has ever thought it pertinent to say of a Representative, "I have two faults to find with him: he is a Representative and he is a Representative from a particular state", the House

of Representatives would be a more cooperative partner in the conduct of foreign relations that the Senate has proved to be. But even when the President deals with Congress as a whole, he still has difficulties. He is unable to crack the whip of party discipline. Mr. Chamberlain, to be sure, cracked that whip too effectively when he threw Mr. Eden overboard from his Cabinet and when he flew to Munich.[1] But few in the United States would deny that presidential inability to use the whip at all handicaps him severely in all his dealings with Congress and permits his leadership in foreign policy to be flouted with impunity. There is in the United States an institutional encouragement of legislative antagonism to the President instead of institutional encouragement to cooperation. Sectional or racial pressure which in England is effectively channelled through the conduit of recognized executive leadership and effective party control would continue to intimidate our solons—and also our executive. But President versus Congress on foreign policy would present issues to the country. One-third of the Senate versus the President clouds issues.

Difficulties have arisen from the fact that, during recent years those responsible for the initial formulation of our foreign policy and for explaining that formulation to the legislature and to the public have seemed to be confused in their own minds and have spoken with divided voices.[2] They may reply, to be sure, that they fear to be too explicit because they thereby invite congressional criticism and antagonism. That explains but does not excuse their conduct. For example (*Time*, January 30) Secretary Hull rather

[1] I never use this word without recalling some magnificent lines in Frank Sullivan's Christmas greetings in the *New Yorker* (December 1939):

> "To every moral eunuch
> Who had a hand in the Pact of Munich,
> The rhyme is bad but the Pact was worse
> What was Neville's plane will be Europe's hearse."

[2] Some years ago a group of British Liberals, in a statement of policies they would like to see pursued—a statement which was remarkable because it was agreed to rather than because of its substance—referred to the difficulties arising "from the fact that, owing to the American Constitution and

vehemently denied that there had been any reticence in respect of what the State Department knew about the intentions of Hitler and particularly of the Japanese war lords. Those intentions, he said, were all spelled out in the report which the State Department issued some months ago called "War and Peace". The i's were dotted and the t's crossed in the supporting volume of documents which was published later.

True it is that those who paid some attention to the sweep of affairs, who had had some experience in interpreting newspaper dispatches and the urbane understatements of diplomats, "will be forced to view with alarm, etc., etc.", knew that the Far Eastern situation was steadily worsening. The plain fact, however, is that no one in a high place ever told Congress or the American people in plain terms what Ambassador Grew is now effectively telling the people he had reported to the State Department and what the "War and Peace" volume shows that the State Department knew long before Pearl Harbor. There was no real reporting to Congress or to the nation.

The Department of State is the only one of the executive departments which does not send an annual report to Congress. If as Chief of Staff General Marshall can present to Congress a statesmanlike document which deals rather frankly with strategy, matériel, I see no reason why the Department of State could not present a comparable report. What education of the country there is derives from speeches or press conferences, and here the voices are not infrequently discordant. The counsellors are multitudinous and the people cannot detect which wisdom it is

American traditions, the foreign policy of the United States is less predictable than that of other countries. In America, the agreements which the State Department negotiates with other countries have to be based to an exceptional degree upon principles firmly rooted in American public opinion; and other counties must recognize that the arrangements that they may make with the United States cannot be relied upon to stand in face of a substantial change in American public opinion. Thus the predictability of American foreign policy has perforce to be based not wholly, or even mainly, upon binding treaty engagements, but rather upon the enunciation, and the evident acceptance by public opinion, of certain cardinal principles of policy." *The Next Five Years* (1935), pp. 239-240.

that they should make their own. There was truth as well as cynicism in the remark that Lord Melbourne is supposed to have made after a Cabinet meeting: "Did we act in order to raise the price of corn, or to lower it? It does not matter what we say so long as we all say the same thing." There are other considerations, some minor, some major. Save when Mr. Bryan was Secretary of State, there has not been much attempt to work with the Senate Committee on Foreign Relations. Moreover, the State Department lives in a dark shadow cast by lawyers. Save, I think, in one or two cases, the Secretaries have always been of the profession which, in Burke's phrase, may quicken the intellect but which, save in those happily born, will not invigorate the understanding. Elihu Root and Mr. Hull have been exceptions. They can keep themselves from thinking like lawyers.

V.

To remove the difficulties which I have been considering would not require constitutional change. They are matters of administrative habits and political custom and there is no reason why in respect of them there could not be substantial and early improvement. But the constitutional difficulty would still remain. Proposals have recently been made in many quarters for a constitutional amendment which would assimilate treaties to ordinary legislation and make it impossible for the kickers—that is, for one more than one-third of the Senate—to have the final say. Such a proposal seems to me quite impractical. Save as the result of an unmistakable and long-continued insistence by the country, the Senate could not be expected to join in the submission of such a constitutional amendment to the states for ratification. It is improbable, almost impossible, that a constitutional amendment could be ratified in time to permit the Congress rather than the Senate to approve the post-war settlements. Agitation over such an amendment would be dangerous. Ratifi-

cation by three-quarters of the Conventions in the states or by three-quarters of the legislatures might be possible but it would be opposed by the anti-British, anti-Russian elements, by narrow nationalists who would feel that they would have less hope of getting their views to prevail through a congressional majority than they now have through one more than one-third of the Senate. They would cry, "God save the fair fabric of our constitution from mutilation" when what they really meant was that they wished to retain a constitutional arrangement which would permit them, a minority, to have their way. Their intellectually dishonest opposition would get support from the inertia which works against any institutional change. Meanwhile the Senate would accept the implicit invitation to insist on the full use of all its prerogatives until by the amending authority those special prerogatives had been taken away.

Hence it seems to me that the sensible—indeed the only practicable— procedure is to put the treaty-making authority on the shelf and for the President to enter into international undertakings through executive agreements discussed in advance, so far as is possible, with the House and Senate committees and ratified by joint resolutions of Congress. For this there are many precedents, which have been much discussed.[1]

If, after the Senate, because of the two-thirds rule, refused to advise and consent to the ratification of proposed treaties, Congress could by joint resolutions admit Texas to the Union, annex Hawaii and conclude peace with Germany, what subject of international agreement can be conceived inappropriate for Presidential-Congressional approval? The transfer of fifty destroyers for leases of British bases near the United States was negotiated by the President and legislative approval came when Congress appropriated for the construction of installations in the islands. We have

[1] Wallace McClure: *International Executive Agreements. Democratic Procedure under the Constitution of the United States* (1941).

in effect a continuing defensive alliance with Great Britain which is not in the form of a treaty but which for that reason is no less binding. The President sent the Lend-Lease Bill to Congress and its enactment into law gave the Executive authority to negotiate mutual aid agreements which are binding without Senatorial approval. The agreements setting up the United Nations Relief and Rehabilitation Administration were drafted in consultation with certain members of the Senate and the House, were deliberately withdrawn from the treaty-making authority, and were approved by Congress. The country and Congress realized that they were necessary. Why let a few Senators who spoke only for themselves each cast two votes against the agreements? Who indeed would say that any one of the measures I have enumerated could have been put in the form of a treaty without causing a long and painful fight in the Senate with perhaps mutilation the price that would have to be paid to buy off the one more than one-third.

The complete abandonment of treaty-making in the technical sense would not be anti-democratic, anti-constitutional, or even extra-constitutional. Of course it will be said that putting the treaty provisions on the whelf would do violence to the literary theory of the Constitution. But constitutional and political morality are more important than literary theory. What constitutional morality really means was well expressed by the historian Grote when he was discussing the working of Athenian democracy in the time of Kleisthenes. It meant "the perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the spirit of the constitution will be no less sacred in the eyes of his opponents than in his own".

Quadrennially, we witness in the United States a perfect expression of such constitutional morality: when we elect a President. Anyone who worries about the literary theory of the Constitution and who challenges the approval of international agreements by a majority of Congress rather than by two-thirds of the

Senate should go on to argue that the 1944 Electoral College should disregard the popular vote and exercise a free choice of the President of the United States. There was no constitutional amendment imposing on the Electoral College the requirement that it be a rubber-stamp. Even though the framers intended the Electoral College to be an efficient mechanism and to avoid the choice of the President by popular vote, agreement and custom, now long unchallengeable, have worked the change. We could deal in the same way with the treaty-making authority.

As is so frequently the case in problems of government—in what the late Mr. F. S. Oliver called "The Endless Adventure"—forms are less important than spirit and substance. This was well put by de Tocqueville when he addressed the French Chamber just before the overthrow of Louis Phillippe:

> "It is not the mechanism of the laws," he declared, "that produces great events but the inner spirit of government. Keep the laws as they are if you wish. I think you would be wrong to do so; but keep them. Keep the men too if it gives you any pleasure . . . but in God's name change the spirit of your government for, I repeat, that spirit will lead you directly to the abyss."

NOTE.—Other undertakings and absence from the country have delayed me in preparing this lecture for publication. Although, in the meantime, much water has flowed under the bridge which was my text, I have resisted the temptation to make an extensive revision, and the words which have been read (or not read) are substantially those that were spoken on February 8th. Since then two books have appeared which support the position I took: Edward S. Corwin, *The Constitution and World Organization*, and Kenneth Colegrove, *The American Senate and World Peace.*

I should add, however, that the 1944 Republican Platform, after favoring "responsible participation by the United States in post-war cooperative organization among sovereign nations to prevent military aggression and to attain permanent peace", declares that:

> ". . . any treatment *or agreement* to attain such aims . . . shall be made only by and with the advice and consent of the Senate of the United States, provided two-thirds of the Senators present concur."

If this pledge should receive more honour than planks in party platforms usually receive, the country might just as well make up its mind that the continuation of policy by means other than war will not be successful.

APPENDIX

Most observers of the Washington scene have had the impression that the administrative organization to deal with international economic operations and problems has not been clear cut and unconfused. When the detailed schedule of starts and halts, of trials and errors, of reorganization and streamlining is examined, the wonder grows that the confusion has not been much worse.

In its issue for 5 February 1944 the *Department of State Bulletin* reviewed the earlier development of organizations to deal with economic operations—a chronology which came down to the end of 1943, when the Department reorganized itself and established twelve major "line" offices. Two of the new offices—the Office of Wartime Economic Affairs and the Office of Economic Affairs—"were created to initiate and coordinate policy and action, so far as the Department of State is concerned, in all matters pertaining to the economic relations of the United States with other governments".

During the previous four and one-half years there had been many committees, commissions, corporations, bureaux and offices. The *Foreign Agricultural Service* and the *Foreign Commerce Service* had been transferred to the Department of State on 1 July 1939. On 3 October of that year an *Inter-American Financial and Economic Advisory Committee* had been set up. Two months later there came into being an *Interdepartmental Committee for the Coordination of Foreign and Domestic Military Purchases.* On 26 February 1940 the Department of State established a *Division of Commercial Affairs.* In May the *Office for Emergency Management* was created. June saw the birth of an *Inter-American Development Commission, Rubber Reserve Company, Metals Reserve Company* and *Division of Commercial Treaties and Agreements.* In July an

Office of the Administrator of Export Control was established. Fourteen months later its responsibilities and duties were transferred to the *Economic Defense Board.* In August 1940 the *Council of National Defense,* with the approval of the President, created an *Office for Coordination of Commercial and Cultural Relations Between the American Republics,* and the President and the Canadian Prime Minister set up a *Permanent Joint Board on Defense, United States and Canada,* "to consider in the broad sense the defense of the north half of the Western Hemisphere".

There was a lull until January 1941. There then came into being the *Office of Production Management;* February saw the setting-up of a *Committee for Coordination of Inter-American Shipping;* in March Congress passed the *Lend-Lease Act;* and in May an Executive Order established the *Division of Defense Aid Reports* in the *Office for Emergency Management* to provide "a channel for clearance of transactions and reports and to coordinate the processing of requests for aid under the Lend-Lease Act". Six months later this *Division of Defense Aid Reports* was abolished and its functions were taken over by the *Office of Lend-Lease Administration.* Meanwhile, during these six months the United States and Canada established a *Material Coordinating Committee* and *Joint Economic Committees.* In July the President vested in the Secretary of State, in collaboration with the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Administrator of Export Control and the Coordinator of Commercial and Cultural Relations Between the American Republics, the authority to issue and maintain lists of names of persons and firms who because of pro-Axis ties, would be denied the right to trade with residents of the United States. The Department of State established a *Division of World Trade Intelligence* on 21 July, and on 30 July an Executive Order created the *Office of the Coordinator of Inter-American Affairs* and established in it a *Committee on Inter-American Affairs.* On the same day the President set up an *Economic Defense*

Board, which six months later became the *Board of Economic Warfare.* In July 1943 this latter agency was abolished. Its functions were transferred to the *Office of Economic Warfare,* which two months later was itself transferred to the *Foreign Economic Administration.*

The *Office for Emergency Management* acquired in August 1941 a *Supply Priorities and Allocations Board.* In October the Department of State set up a *Board of Economic Operations* and a *Division of Commercial Policy and Agreements,* which latter absorbed the *Division of Commercial Treaties and Agreements,* created in July 1940. As part of the same organization the Department of State set up a *Division of Exports and Defense Aid,* which was abolished in June, 1942; a *Division of Defense Materials,* which was abolished in August 1942; a *Division of Studies and Statistics,* which was abolished in June 1942; and a *Foreign Funds and Financial Division,* which was abolished in August 1943.

A special *Caribbean Office* came into being in October 1941.

In November 1941 the Canadian-American *Joint Defense Production Committee* became the *Joint War Production Committee, United States and Canada.* The Department of State established a *Financial Division and Foreign Funds Control Division* in November 1941.

In January 1942 the President abolished the *Office of Production Management* and transferred its powers to the *War Production Board.* He and Prime Minister Churchill set up a *Combined Raw Materials Board,* a *Munitions Assignments Board* and a *Combined Shipping Adjustment Board.* The American section of this Shipping Board was to be in the *Office for Emergency Management* as a *War Shipping Administration.*

In February 1942 the State Department created an *American Hemisphere Exports Office.* In March the *Anglo-American Caribbean Commission* came into existence. June saw the birth of a *Combined Food Board* and a *Combined Production and Resources Board.* July

marked the beginning of institutional interest in relief. First, there was the *War Relief Control Board* and in November the *Office of Foreign Relief and Rehabilitation Operations.* In November also the Department of State established an *Office of Foreign Territories* to have "responsibility for dealing with all non-military matters arising as a result of the military occupation of territories in Europe and North Africa by the armed forces of the United Nations and affecting the interests of the United States". Seven months later this was abolished.

In January 1943 the *Division of Economic Studies* was established. In February 1943 the Department of State set up a *Division of Exports and Requirements* and abolished its *American Hemisphere Exports Office.* In April the Treasury made public a provisional outline of a plan for post-war international monetary stabilization (*Post-War International Monetary Stabilization Plan);* in May the *United Nations Conference on Food and Agriculture* met in Hot Springs. In the same month there was a meeting of the *Mexican-United States Commission of Experts To Formulate a Program for Economic Cooperation Between the Two Governments,* and the *Office of War Mobilization* was set up. In June the President sent the Secretary of State a *Plan for Coordinating the Economic Activities of United States Civilian Agencies in Liberated Areas.* Also in June the Department of State set up an *Office of Foreign Economic Coordination* and abolished its *Office of Foreign Territories* and its *Board of Economic Operations.* In July an Executive Order created an *Office of Economic Warfare,* to which was transferred all powers and duties of the *Board of Economic Warfare* and all subsidiaries of the *Reconstruction Finance Corporation* engaged in financing foreign purchases and imports. This Office lived only two months and was transferred to the *Foreign Economic Administration* on 25 September. In August the *War Commodities Division* and the *Blockade and Supply Division* came into existence in the *Office of Foreign Economic Coordi-*

nation of the Department of State, and the *Foreign Funds Control Division* and the *Division of Defense Materials* were abolished. As has been said, 25 September saw the creation of the *Foreign Economic Administration* in the *Office for Emergency Management.* It was to centralize the activities formerly carried on by the *Offices of Lend-Lease Administration, Foreign Relief and Rehabilitation Operations, Economic Warfare,* and *Foreign Economic Coordination.* The Department of State on 6 November abolished its *Office of Foreign Economic Coordination* and appointed four groups of advisers to be "concerned, respectively, with the foreign policy aspects of matters relating to the allocation of supplies, of wartime economic activities in liberated areas, of wartime economic activities in eastern hemisphere countries other than liberated areas, and of wartime economic activities in the other American republics". On 9 November came the *Signature of Agreement for United Nations Relief and Rehabilitation Administration.*