Our Changing Constitution

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Member of House of Representatives

FIRST LECTURE ON THE CUTLER FOUNDATION
THE CUTLER LECTURES
Established at the College of William and Mary in Virginia by James Goold Cutler of Rochester, N. Y.

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

Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.
He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular "lecture each year by some outstanding authority on the Constitution of the United States.”

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

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Dean of the Marshall-Wythe School of Government and Citizenship of the College of William and Mary.
OUR CHANGING CONSTITUTION*

Mr. President, Ladies and Gentlemen:

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

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

In inaugurating this series of lectures, which,

*An Address delivered at the College of William and Mary under the Auspices of the James Goold Cutler Foundation, on November 18, 1927, by James M. Beck, formerly Solicitor General of the United States.
under the terms of the Foundation, must relate to the Constitution of the United States and which we may hope will continue as long as the Constitution itself endures, it seemed to me appropriate that the first lecture should deal with the nature of the Constitution as a living instrument of government, and this suggests the narrower question as to whether the Constitution is like the North Star, "of whose true-fix'd and resting quality, there is no fellow in the firmament," or whether the Constitution is ever-changing to meet the necessities of a changing time and a changing people.

The popular conception, undoubtedly, is that excepting only as it is formally amended, the Constitution is a fixed quantity, a static force, the same yesterday, today and, presumably, forever.) To it has been imputed the immutability of the Ten Commandments, as though its letters, like the Decalogue, were graven in imperishable stone. It has been likened to Gibraltar, against which the winds and waves have beaten for centuries in vain, and John Marshall found in it the realization of that "government of laws and not of men," which was first written into the Massachusetts Constitution of 1780 as the great objective of free government. The fact is that a "government of laws and not of men," in the literal sense, finds little justification in the hard realities of life, and it may be questioned whether such a theory of government would be even desirable. An organism, which develops by evolutionary growth, is better than an unchanging stone.
There is some force in Jefferson's belief that the Constitution was made "for the living and not for the dead." Had the Constitution been a rigid document and insusceptible of change, except through the formal processes of amendment, it would have died still-born. When the Constitution was put into force, that wise and genial philosopher, Franklin, said:

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

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

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

"I would not be understood, my dear Marquis, to speak of consequences which may be produced in
the revolution of ages by corruption of morals,
profligacy of manners, or listlessness in the preservation
of the natural and unalienable rights of mankind, nor of the successful usurpations, that may be
established at such an unpropitious juncture upon the ruins of liberty, however providently guarded
and secured; as these are contingencies against which no human prudence can effectually provide.”

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

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

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

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

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

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

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

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

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

The law, I repeat, is but the reasoned adjustment of human relations. It has no inherent sanctity and its validity, at least in the forum of conscience, depends upon its reasonableness. Hence, it is a good sign when men protest against an unreasonable law. "New occasions teach new duties; time makes ancient good uncouth," and the very essence of the democratic spirit is not merely to adopt new laws when occasions require them, but to repeal old laws when experience has demonstrated either their impracticability or injustice. Let us never forget the historic basis of the American Commonwealth, for the people of Virginia, and later the people of the United Colonies, all revolted against unjust laws, which had the highest sanction, from a constitutional standpoint, in the mandate of a legally omnipotent Parliament.
All this is not said to lessen in any respect the deep regard that every American should have for the wise provisions of a Constitution, which, after 138 years of experience, has been found so beneficial to the American people. On the contrary, my purpose is rather to indicate that the strength of the Constitution is in its capacity for progressive development. The framers were wise in what they provided, but they were wise to the point of inspiration in what they left unprovided. Nothing was further from their pretentions than to provide an immutable rule for all time. They not only made express provision for formal amendment, but in their enumeration of objectives, rather than in their close definition of powers, they made possible the growth of the Constitution through usage, political habits, judicial interpretation and, when necessary, formal amendment. They were not foolish enough to anticipate the changes of the future, or measure its demands. All they tried to do was to provide, first, the machinery of motion, and, secondly, the chart for the voyage, and what they tried to do, and did accomplish with unparalleled success, was to direct the course of the Ship of State as it sailed onward over the illimitable ocean of time. In other words, the Constitution was not a dock, to which the Ship of State was securely fastened, nor was it even an anchor to keep the ship from motion. It was rather a rudder, which should guide the course, and a motive power, which should drive the Ship of State onward. Had it been otherwise, its life would
have been a short one, for the advancement of the most changing and progressive people in the world could never have been "cribbed, cabined and confined" within any hard and unyielding formula.

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

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

"This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should in all future times execute its powers would have been to change entirely the character of the instrument and to give it the properties of a legal code. It would have been an unwise attempt to
provide by immutable rules for exigencies, which, if foreseen at all, must have been seen dimly and can best be provided for as they occur."

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

The proof that ours is a changing Constitution can be attested by a fact, which few intelligent students of our history would deny, that, if the framers of the Constitution were to revisit the "glimpses of the moon," and now study their handiwork as it has been developed since 1787, they would in many respects fail to recognize the product of their labors. Take, for example, the commerce clause of the Constitution, economically the most potential of all. As understood by the Fathers: it was only intended to regulate the ships, which in our coastwise or foreign trade, transported products from state to state. It has now developed into an infinitely complex system,
under which the Federal Government regulates agencies of which the Fathers never dreamed and regulates them in every detail, however minute.

Indeed, an unchanging Constitution would be an impossibility, for Plato uttered a great truth more than two thousand years ago, that a Constitution must correspond with what he called the "ethos" of the people, meaning thereby not merely the spirit of the people, but the aggregate of their habits, conventions and ideas. These obviously change from generation to generation. If there be any conflict between the Constitution and the spirit of the people, it is not the will of the people that is broken, but the Constitution. Therefore, to insure vitality there must be a reasonable correspondence between the Constitution, as interpreted, and the spirit of the people. Of this, undoubtedly, the most conspicuous example is the profound modification in the representative principle which was the basis of the Constitution. The framers believed in all sincerity—and, theoretically, they were right—that the limit of democracy is the selection of representatives, who would exercise their own judgment in a judicial spirit for the common good. Nothing was further from their purpose than any direct decision by the people of public policies, but this view did not accord with the democratic genius of the people, as George Mason of Virginia and Benjamin Franklin of Pennsylvania clearly pointed out in the Constitutional Convention. At least from 1800, when Mr. Jefferson came into power, until the present time the
working theory of our government is that in some way the representative must first determine the will of his constituents and then put it into effect, however unwise. We may quarrel with such a theory, for to it is largely due the deterioration of leadership without which a nation cannot be great, but it is none the less a fact with which we must reckon.

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

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

All this need not be regretted, for nothing that has vitality is at rest. Stagnancy is death and when the people of the United States cease to deliberate upon the meaning of the great Compact and, what is more, when they cease to adapt it, either by
popular usage or judicial interpretation, to the ever-changing needs of the most progressive people in the history of the world, then it will cease to be.

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

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

Take, as one example, the nature of the Presidential office. First, as to its duration. The prohibition of a third term is no part of the written Constitution. It is insusceptible of judicial enforcement and is not a provision in the proper sense of the word. No one can question the legal eligibility of a President to have as many terms as the people care to elect him. None the less, in the English sense of the word “Constitution,” the Third Term tradition has hitherto been a very potent force in limiting the
service of a President to two terms. One of the most striking and portentous phenomena of our time is the altered position of the President in our constitutional system. The Constitution was built upon the English conception since 1689 of a great Council of the Realm, in whom ultimate legislative power was vested. The President was merely to execute the policies which Congress, as the peculiar representative of the will of the people, would require. This, however, did not accord with the subconscious spirit of the American people. Their religion is efficiency. They believe in concentrating power and holding as few men responsible as possible. One has only to view our industrial organization to see the reality of this fact.

Due to this genius for efficiency and to the development of the party system, the office of President has long since become more similar to that of a constitutional monarch than to that of a mere executive servant of the people. In the practical working of our government, the President does not accept from Congress the policies that he is to execute, but it becomes his political duty to compel Congress to execute the policies for which he accepts responsibility to the people. When a Congress is in sympathy with a President, he, as the real leader of his party, prescribes the program, and unless it be plainly unwise, his party in Congress is required to carry the President's policies into effect. Such was not the purpose of the Constitution, but such has become its practical workings through the in-
fluence of the people and the usages of politics. Again, the over-shadowing power of the President has been developed through his power to remove officials, a power not expressly conferred by the Constitution but a necessary incident, as I successfully argued in the Supreme Court, to the executive power.

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

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

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

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

Take, for example, the equality of the sovereign states in the Senate. From a democratic point of view, it is indefensible. The population of Pennsylvania is the equivalent of the aggregate population of sixteen states, which could readily be named and yet these sixteen states exercise sixteen times the power in the Senate that the historic commonwealth of Pennsylvania does.
Only subordinate to that, if I may be permitted an excursion into contemporary controversy, is the undoubted right of each state to select its own representatives in the Senate and not have the representatives of other states select those representatives for it. It is true that the Senators from a state must have certain qualifications prescribed by the Constitution, but, otherwise, the forty-seven states are theoretically powerless to dictate to one state who the representatives of the latter shall be. In the old days of sectional strife, Mississippi might have grave objection to the selection by Massachusetts of Charles Sumner as its Senator, and Massachusetts, in its turn, might have equally grave doubts about the selection of Jefferson Davis by Mississippi, but the right of each state to select its own Senator was a basic condition upon which the Federal Government was formed. In my opinion, the Senate has no right whatever to determine the moral or intellectual qualifications of a Senator. Otherwise, a sovereign State would only nominate its representatives in the Senate and the Senators from other states would have the final right of selection. Such a doctrine would have made the framers rub their eyes in amazement. The right to equality in the Senate and the right of each state to choose its Senator is not anything that usage or judicial interpretation can alter—it is a matter of solemn obligation and, as such, is unalterable. The basic conditions, upon which the states were willing to create a
Federal Government, are unchangeable without a gross breach of faith.

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

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

But the full interpretation of many does not rest upon the letter of the Constitution, but upon the enlightened conscience of mankind. Take, for example, the declaration that a man shall not be "deprived of life, liberty or property without due process of law." What is "due process of law"? The
expression is a vague one. It is the English equivalent of the old Latin maxim in Magna Charta that the rights of freemen should not be taken away except in accordance "with the law of the land." That law was largely a matter of unwritten customs, which constituted the political conscience of the English people.

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

Between these contractual obligations, which inhere in the compact of the Union, and the fundamental conceptions of morality, which justly limit the powers of any government, the Constitution contains many mechanical details of government, which naturally must be adapted from time to time by usage, practical administration or judicial interpretation to the changed conditions of life in the
Twentieth Century. As previously stated, our whole conception of commerce has been amplified a thousand-fold since the Constitution was adopted, and many other illustrations could be cited.

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

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

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

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

I do not agree with Mr. Adams. It seems to me more accurate to say that neither Jefferson nor Hamilton was wholly right or wrong. They represented opposite poles of political thought and yet each was necessary to the development of America. To Hamilton we owe the development of the Constitution through administrative organization, and to Jefferson we owe an equal development by demo-
cratic idealism. Between these extremists, who represented the positive and negative forces of the electric current, was John Marshall, and it was he who found the Constitution "a skeleton and clothed it with flesh and blood." He held the tremendous issues of state and national sovereignty in the even scales of justice and today his great opinions are the living oracles of the Constitution.

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

We are still a young country. In my youth I might well have known a distinguished lawyer of Philadelphia, then over 90 years of age, who saw Washington and Franklin conversing in front of Independence Hall during the sessions of the Constitutional Convention. This measures the brief span of our existence. Centuries are still before America and who can safely say that, if it becomes too centralized for efficient government, one day there may not be a powerful movement towards the division of the Republic into two or three republics, especially if there develop between the sections powerful economic conflicts of policy? The history of nations in an unending cycle of integration and disintegration, of consolidating and then redistrib-
buting the powers of governments. Human institutions, like the globules of mercury, tend to scatter and unite. For more than a century the tendency of America has been to consolidate, but let us remember that if the movement proceed too far, the tendency to disintegrate will begin.

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

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

At the beginning of the Republic, there were thirteen self-conscious states, which had behind them a century or more of traditions. But the union of the states is now composed of forty-eight states, many of which are but the creation of yesterday and which have no such background of tradition to stimulate the consciousness of the people. Most of them are
the creation of purely artificial boundaries and, while there is some local pride, yet they naturally regard themselves as the children of the Federal Government, whereas the historic thirteen colonies had, at least at one time, the proud consciousness that they created the Federal Union and that the Federal Union did not create them. I confess I cannot see the way to combat this changed consciousness of the American people, which is so largely due to mechanical forces which no written Constitution could overcome.

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

This is especially perceptible in our legislative bodies. Time was when Congress felt that it had the primary duty of determining whether proposed laws were within its constitutional power. Many of the greatest debates upon the meaning of the Constitution took place in the halls of Congress and not in court rooms. The controversy over the power to
create a United States Bank, and later, the power to make internal improvements, and later the validity of the Missouri Compromise, were questions which Congress had no disposition to shift to the judiciary, but which they preferred in the first instance to decide for themselves. This is as it should be, for every member of Congress takes an oath, as a Judge, to support and maintain the Constitution of the United States.

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

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

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

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

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

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