1942

The Constitution and the Guarantee of Freedom

James T. Shotwell
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
1942
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

1942
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-
agonist 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 despotism 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 nemprison ne desherite ne mis a mon sauz 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 tumultuous 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 invidious 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 prop-
erty, 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 Montes-
quieu. 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 govern-
ment 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 mem-
bers 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 pal-
ladium of liberty" in popular opinion was shown in the com-
plete 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 nine-
teenth century, Professor Burgess, based his test of govern-
ment. A soldier of the Northern army in the war between
the states and then a student of those German political phil-
osophers who, following Hegel, exalted the state as the em-
bodyment 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 judi-
ciary 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.