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CONSTITUTIONAL RETROSPECT: THE FIRST SERIES OF CUTLER LECTURES REVISITED

WILLIAM F. SWINDLER*

The original Cutler Lectures on the Constitution were established under terms of a grant to the College of William and Mary by the James Goold Cutler Foundation of Rochester, New York. Part of the income from that grant supported an annual lecture series by leading authorities on constitutional law. The series continued until 1944, when it fell into limbo. Thirty years later, the original grant arrangement was altered to conform to the changed curriculum focus of the College, and in 1981 the Marshall-Wythe School of Law formally revived the lecture series. The first "new" Cutler lecture, by R. Kent Greenawalt of the Columbia Law School, is published below in this issue.

In the interest of scholarly continuity, a consideration of some of the surviving propositions of the most important lectures in the original series seemed appropriate. The original lectures were published in the *Bulletin of the College of William and Mary* which has long been out of print; therefore, some of the lectures addressed themselves to issues not of contemporary relevance. These are included for historical interest in the calendar of the complete series found in the appendix to this article.

Several of the lectures in the first series, however, have enduring

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significance, either as part of the intellectual inventory of those lectures whose influence is still substantial, or as innovative propositions of constitutionalism. This retrospect provides today's student of constitutional principles with the opportunity to experience the contemporary viewpoints of those who were living through some of the events that attracted political, constitutional, and academic attention in a period when the United States moved from the "decade of normalcy" through the Great Depression and into the social and economic upheavals of the Second World War.¹ These decades were an epochal transition period in American constitutional history, as the economic consequences of the Depression and World War II necessitated an abandonment of traditional laissez-faire attitudes. The constitutional orientation of the United States was changing inexorably in the course of these events, and if the early Cutler lecturers were unaware of this, they hardly can be charged with lack of prescience. The most that can be asked of such persons is that they competently analyze the current subject that they address in terms of the events leading up to it.

VIEWES OF THE PASSING SCENE

Somewhat ironically, Congressman James M. Beck of Pennsylvania chose as his title for the opening Cutler Lecture in 1927, *Our Changing Constitution*. Beck had been Solicitor General of the United States under President Harding and by 1935 would be a vigorous critic of the New Deal. He viewed Harding's election in 1920, and William Howard Taft's nomination as Chief Justice of the United States the following year, as events that signaled an end to the reform legislation and what Taft called the "constitutional latitudinal marginism" of the Progressive Era. Beck worried in his lecture about the efforts of the progressives in Congress to continue the reform drive. "Many laws are politically anti-constitutional without being juridically unconstitutional," he warned, and added, "Through this breach in the dike, a flood of legislation wholly inconsistent with the spirit, and at times inconsistent with

1. This period has been described in detail in W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY, 1889-1932*, 221-303 (1969); and W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY, 1932-1968*, 1-1116 (1970) [hereinafter cited as *THE NEW LEGALITY*].

the letter, of the Constitution, constantly passes, and, being thus accepted as law, the Constitution itself is slowly weakened."²

Even more retrospective than Beck's lecture was the second, by former United States Attorney General George W. Wickersham, on *The Constitution and Prohibition Enforcement*, in 1929. This second lecturer, however, unknowingly offered a view of a much broader and more serious issue that still confronts American life today—the rise of interstate crime, particularly in urban America. As Chairman of the National Commission on Law Observance and Enforcement, Wickersham helped document the rise of “rum running” and gangsterism that, according to the contemporary and still substantially held view, flourished on public resistance to the Prohibition Amendment. In his lecture, Wickersham expressed concern at the tendency of Congress to react to increasing violations of the prohibition laws by enacting stricter statutes. In particular, Wickersham perceived the Jones Act³ as an example of congressional zeal to compel observance of the law that threatened many fundamental constitutional rights.⁴

John H. Latane of the Walter Hines Page School of International Relations at the Johns Hopkins University gave the third lecture, entitled *The Constitution and Foreign Relations*, in 1931. Latane's lecture considered the relation between the “advise and consent” function of the Senate and the machinery used for committing the United States to treaties and programs proffered by other nations. For the most part, however, Latane confined himself to the political history of this treaty ratification machinery.⁵

THE SEARCH FOR PERSPECTIVE

The Great Depression of the 1930's compelled some of the Cutler lecturers to evaluate profound changes in American life and constitutional thought both in terms of historical perspectives and fundamental principles. Patrick J. Hurley, Herbert Hoover's Secre-

2. Beck, *Our Changing Constitution*, 21 BULL. C. WM. & MARY no. 2, at 29-30 (1927) [hereinafter cited as WM. & MARY BULL.].

3. Ch. 473, 45 Stat. 1446 (1929).

4. Wickersham, *The Constitution and Prohibition Enforcement*, 23 WM. & MARY BULL. no. 4, at 37-38 (1929).

5. Latane, *The Constitution and Foreign Relations*, 24 WM. & MARY BULL. no. 8, at 34-36 (1931).

tary of War, praised the fundamentals in his 1932 lecture on *The Constitution and Current Economic Problems*, and Newton D. Baker, the political liaison between Woodrow Wilson's New Freedom and Franklin D. Roosevelt's New Deal, offered a reappraisal of older values in his 1934 lecture on *The Making and Keeping of the Constitution*.

The two lecturers of this decade who seemed to discern the significance of the changes that inexorably were coming about, and who consequently warrant more extensive quotation, were the historian William E. Dodd and the political scientist Harold J. Laski. Dodd, of the University of Chicago, spoke on *The Federal Constitution and Its Application, 1789 to 1933*. Sketching the development of constitutional doctrine up to the close of the Civil War, Dodd initially contended that the triumph of an industrial over an agricultural economy produced a new American character.

Bankers everywhere doubted the ability of Lincoln to win the war. Their interest in the cause was won, however, in the establishment of the third national banking system—a scheme which enabled men with margins of profit to organize banks in every city, purchase United States bonds at a heavy discount and then issue bank notes up to ninety per cent of their face value. Everywhere men doubled and quadrupled their capital the next three or four years. Financiers, American and European, thereafter lent a hearty support to the “greatest democrat of the age.” Within ten years the bankers procured hostile legislation against state banks and gradually organized themselves into an association which was able in the decades that followed to guide the savings of every section into the vaults of New York banks. Nor was there any strict governmental supervision of a system in which the surpluses of the whole Union were so deeply involved. The financiers had at last acquired a position in the Federal economy which far surpassed that of Nicholas Biddle and equalled that of the slaveholders in 1860; a great oligarchy without effective governmental supervision—government once more of the “rich, the wise and the good.”⁶

The concentration of postwar economic power in the financiers,

6. Dodd, *The Federal Constitution and its Application, 1789 to 1933*, 27 WM. & MARY BULL. no. 5, at 31 (1933).

Dodd continued, meant that they could influence Congress to resume the protective tariffs that had been lowered in the 1840's, and also to fund the great railroad-building that helped to funnel the raw materials and agricultural produce of the rest of the nation into the manufacturing and exporting centers of the East. For the rest of the nineteenth century, Dodd declared, "all the greater industrial units were so associated that they either broke down domestic competition or were able so to control prices and markets as to compel minor competitors to take orders from their greater fellows."⁷

This laissez-faire influence upon constitutional thought continued for more than half a century after the Civil War despite occasional efforts to regulate "rampant capitalism." The Progressive movement, which climaxed in the first Wilson administration and then evanesced into the First World War, was in Dodd's view

a return to the semi-free trade policy of 1846; the masterful association of national bankers, unhindered in their exploitive operations since the beginnings in 1863, was compelled to accept some governmental control under the Federal Reserve System of 1913; and there was some effort to apply the trust regulation ordered in the law of 1890.⁸

The reaction to the Progressive movement after the First World War, however, began a decade of "normalcy" under Warren Harding, a President "even more ignorant than the most ignorant of his predecessors,"⁹ and continued under those who followed him in the White House. "Thus, instead of moving into new paths as Washington had done in 1787-88 and Lincoln had repeated in 1861, the leaders of the United States faced backward from 1921 to 1929."¹⁰ The stock market collapse in 1929 ended a politico-economic system that had been unchallenged for most of the time since 1860; therefore, Dodd stressed, a new application of the Constitution was required. The orientation toward Jeffersonian agrarianism, the frame of reference for the instrument of 1787, needed a new direction in the increasingly integrated, interstate, industrial

7. *Id.* at 33.

8. *Id.* at 43.

9. *Id.* at 53.

10. *Id.* at 54-55.

economy that followed the implementation of the Fourteenth Amendment. The new industrial democracy needed a regulatory process that "only a minority of [even] the Hamilton party would have tolerated in 1789; . . . [t]he old constitution must be made new and no constitution could be made successful, without many and intimate contacts with the industrial world everywhere."¹¹

Dodd, speaking halfway through the New Deal, could not describe the ultimate shape of the new constitutional order; he simply perceived that change was inevitable in the twentieth century. He concluded confidently:

These are the greater leads on the way to the new world, the new United States operating under the reinterpreted constitution of Washington and his fellows. The minor problems may be worked out more slowly. But it must be a new world, a new attitude toward constitutions and a recognition that privileged groups always work their own ruin, if not regulated by government; and working their own ruin, they work that of their fellows in vast numbers. The United States have gone a long way since 1865, a longer way since 1787; but a vaster future is still before us and the principle of democracy is as vital today as in 1776.¹²

Laski, the great political scientist of the London School of Economics, addressed, on the eve of World War II, the issue of the impact of emergency government power upon the Anglo-American tradition of personal liberty in *The Prospects of Democratic Government*. Because this particular lecture was widely read, quoted, and debated on both sides of the Atlantic, it is worth quoting here in some length. The speaker, conscious of the provocative nature of his writings, began by acknowledging that "nothing is gained by the denial that, all over the world, democratic societies are challenged to justify their existence."¹³ Like a number of the previous lecturers, Laski then invited a look back at first principles, but from his perspective.

Democracy is not merely a form of government; it is also a

11. *Id.* at 45, 65.

12. *Id.* at 68-69.

13. Laski, *The Prospects of Democratic Government*, 33 WM. & MARY BULL. no. 4, at 4 (1939).

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.¹⁴

Although political freedom was the ideal of both Jefferson and Hamilton, Laski urged recognition of the economic freedom which now translated into economic equality of the parties in the production process. He cited Justice Holmes' remark that "liberty of contract begins where equality of bargaining power begins,"¹⁵ and added

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.

. . . .

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 conflicts 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

14. *Id.* at 4-6.

15. *Id.* at 6.

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 allegiance 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.¹⁶

CRISIS AS THE SHAPE OF THE FUTURE

Two years after Laski, the American philosopher Max Lerner delivered his lecture on *The Constitution and the Crisis State*, a title he said epitomized his observations "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 respon-

16. *Id.* at 7-9.

sive 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.¹⁷

Lerner anticipated the continuing pressure of the economic and military emergency that a later generation would define as the problem of an "imperial Presidency"; and he argued that the whole course of national and world history in the twentieth century created this condition. The constitutional issue for the remainder of the century, he declared, would be "mainly over the limits of political action and the lines of the distribution of power."¹⁸

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 had to fulfill the conditions of modern economic and administrative strategy to survive.

. . . .

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

17. Lerner, *The Constitution and the Crisis State*, 35 WM. & MARY BULL. no. 7, at 4 (1941).

18. *Id.* at 7.

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.¹⁹

. . . .
 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.²⁰

The challenge to political tenets offered by Laski and Lerner, interspersed with a relatively conventional lecture on federal-state relations by legal historian Charles Warren,²¹ was followed by another orthodox lecture by James T. Shotwell in 1942. Shotwell, historian and international affairs specialist at Columbia University, spoke on *The Constitution and the Guarantee of Freedom*. A candid call for a return to the world of James Beck and George Wick-ersham was issued the following year by John Dickinson, general counsel for the Pennsylvania Railroad. The cycle of lectures had come full circle in the gathering intellectual mists of midwar 1944. From the first to the last, they reflected a sense of change and evanescence of old political values, both domestic and international; and in another sense, they identified the unstable ground upon which American constitutionalism has treaded ever since.²²

19. *Id.* at 15-16.

20. *Id.* at 15-20.

21. Warren, *The Supreme Court and Disputes Between States*, 34 WM. & MARY BULL. no. 5 (1941). See generally C. WARREN, *A HISTORY OF THE AMERICAN BAR* (1911); C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1923).

22. See *THE NEW LEGALITY*, *supra* note 1, at 117-353.

APPENDIX

James Goold Cutler Lectures on the Constitution:
First Series, 1927-1944

The lectures were originally published as numbers in the *Bulletin of the College of William and Mary in Virginia*. They are listed below in chronological order, with the number and date of the *Bulletin*.

Our Changing Constitution, by James M. Beck; Vol. 21, No. 2 (1927).

The Constitution and Prohibition Enforcement, by George W. Wickersham; Vol. 23, No. 4 (1929).

The Constitution and Foreign Relations, by John Holladay Latane; Vol. 24, No. 2 (1931).

The Appointing and Removal Power of the President Under the Constitution of the United States, by Guy Despard Goff; Vol. 25, No. 3 (1931).

The Federal Constitution and Its Application, 1789 to 1933, by William E. Dodd; Vol. 27, No. 5 (1933).

The Constitution and Current Economic Problems, by Patrick J. Hurley; Vol. 27, No. 4 (1933).*

The Making and Keeping of the Constitution, by Newton Diehl Baker; Vol. 28, No. 2 (1935).

The Constitution as a Continuing Principle in Government, by Ethelbert Warfield; Vol. 30, No. 1 (1936).

A Comparison of Executive and Judicial Powers under the Constitutions of Argentina and the United States, by Alexander W. Weddell; Vol. 31, No. 5 (1937).

The Crisis of the American Constitution, by William Y. Elliot; Vol. 32, No. 5 (1938).

The Prospects of Democratic Government, by Harold J. Laski; Vol. 33, No. 4 (1939).

The Supreme Court and Disputes Between States, by Charles Warren; Vol. 34, No. 5 (1940).

The Constitution and the Crisis State, by Max Lerner; Vol. 35, No. 7 (1941).

The Constitution and the Guarantee of Freedom, by James T.

* Published out of order.

Shotwell; Vol. 36, No. 5 (1942).

Planned Society, by John Dickinson; Vol. 37, No. 4 (1943).

Constitutional Aspects of Foreign Affairs, by Lindsay Rogers (1944).†

† Published as a separate pamphlet.