1935

The Making and Keeping of the Constitution

Newton Diehl Baker

Repository Citation
http://scholarship.law.wm.edu/cutler/25
The Making and Keeping of the Constitution

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

AT
The College of William and Mary
WILLIAMSBURG, VIRGINIA

December 10, 1934

SEVENTH LECTURE UNDER
THE JAMES GOOLD CUTLER TRUST
The Making and Keeping of the Constitution

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

AT
The College of William and Mary
WILLIAMSBURG, VIRGINIA

December 10, 1934
THE JAMES GOOLD CUTLER TRUST

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

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

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

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

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

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

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

[6]
stitution of the United States. This Preamble is followed by seven articles. They define and distribute the powers of the government and prescribe the mechanics of its organization and operation. Every part of the Constitution indicates clearly that the government to be set up is that of a federated state, and there are many evidences of a consciousness on the part of the makers that jealous and independent sovereignties were pooling their common interests, while preserving their peculiar interests for state and local control.

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

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

The third Article deals with the judiciary. It creates the Supreme Court and entrusts to Congress from time to time the power to ordain
and establish other courts inferior to the Supreme Court, to fix their jurisdiction except as certain elements of jurisdiction are fixed in the Article itself, and to fix compensation for judicial service.

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

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

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

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

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

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

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

Perhaps the most common criticism of the
Constitution in these state-wide discussions
was the absence of a Bill of Rights, and the
reservation most often appearing in the ratify­
ing acts aimed to make quite clear that the new
government was to be one of enumerated powers
and that all the powers not granted were re­
served. Accordingly the amendment we now
know as the tenth provides in terms, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." To those who had desired a bill of rights in the Constitution, it had been replied that no such bill was necessary in view of the fact that the general government was to have no powers except those expressly granted, and that, therefore, none of the liberties and immunities ordinarily contained in a bill of rights needed to be expressed since there was obviously no power delegated to the central government which would prejudice such rights. But this assurance was not enough. It was entirely clear to the first Congress that ratification had been secured by a practical promise of amendment to reassure whatever anxiety there was upon this point.

Since the adoption of the First Ten Amendments, eleven more have been adopted. From the beginning, more than three thousand proposals to amend the Constitution have been suggested and submitted to the Congress. Of that three thousand only twenty-seven have been actually submitted to the States, and of the twenty-seven so submitted, only twenty-one have been adopted and one of those repeals an earlier amendment. From this it is clear
that we have regarded the Constitution as a fundamental expression of the principle upon which we desired our government to operate, and that only under very unusual and special circumstances have we been willing to modify it. A rapid glance at the amendments which have in fact been made is a further evidence of the general attitude on this subject.

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

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

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

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

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

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

The American and the British Constitution are two entirely different things. One is a series of great principles sometimes embodied in documents, beginning perhaps with the Magna Carta, and including parliamentary acts, like the Act of Settlement, evolved in revolutionary and dynastic crises in the life of England, but also involving traditional attitudes of mind which have grown up as unconscious predicates in the political thinking of a determined but biologically conservative peo-
ple. There is, of course, no such instrument as the British Constitution. When a bill is under debate in parliament, nobody can point by article and section to a fundamental law as showing the act to be within or without parliamentary power, but somebody is quite sure to arise and he may be a country squire, a college professor, or one of the lords—law, lay, or clerical—and say, “The bill is unconstitutional.” When challenged for his reason, he will say, “Well, it does not seem to me to be British.” So far as a people universally have that kind of instinctive feeling about the fundamental law of their society, it may be that an unwritten constitution is better than a written one, or at least as good. Certainly this is true about the British Constitution, that under it, without strain and without difficulty, there have taken place incidents and episodes which created no crisis and aroused no feeling of violent antagonism and yet have in themselves marked institutional advances which would have been unthinkable to the ancestors of the men who enacted them. One such incident in our own day is strikingly illustrative of this possibility. Not long ago a dozen gentlemen sat around a table in London and decided that the British Empire had already become a federation of self-governing democracies. They, therefore, announced
their conclusion when the meeting was over and without a vote of any kind, either popular or legislative, the imperial pretensions with which Disraeli aroused the imagination of Queen Victoria and her subjects gave way to the more modern and, I think, the nobler conception of self-governing constituencies uniting their external interests for administration by a central government. This was an instance of the operation of progressive history, but it makes a striking contrast to our own experience.

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

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

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

We are rather disposed, I think, to imagine that the Constitutional Convention of 1787 more or less evolved the document it submitted out of thin air, or at least out of philosophical speculations of an untried and theoretical sort. Of course, that is just not true. The colonial governments in America in the first place had had large experience in the matter of self-government. They had had a long period during which they were tugging against the restraints imposed by royal governors, and in no place is that history more centered than in the very spot where we now are. England in those days was a long distance from America. The British
Parliament was a remote institution concerned primarily with British interests, and it was easy to imagine it with defective knowledge of American conditions. There had grown up in America a race of men who were political figures at home, planters for the most part, with leisure which they had the culture to spend in reading and meditation. These men on the banks of the James and of the Potomac, or in the capitals and county seats of New England, delighted to inform themselves in political theory. There were not many books in those days and all of these scholarly men read the same books and so had an identity of speculative background and more or less an identity of information about political experiments described in history. In other words, they were a highly specialized and educated class and their intimate talk had to do with theories and experiments in government. It used to be said, no doubt with truth, that Thomas Jefferson had at Monticello in the drawer of a desk, a hundred written constitutions of democracies, all of which had failed. Surely one of the great merits of Jefferson, one of his outstanding contributions to our political experiment, lies in the fact that in spite of one hundred failures, he still had the faith to believe that a democracy was a possible thing—that it could succeed. If there was about him at
that time and in the air of America, grave doubt on that subject, there was warrant for such doubt, for the history of the world up to the time of the declaration of independence showed many brave attempts at democracy, all of which gave way readily to dictatorships, which in turn were succeeded by privileged classes under some form of monarchical organization.

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

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

I do not know any book to compare with The Federalist. Most of its papers were written by Hamilton. Jay and Madison contributed those which he did not write. In their original form, these were papers or essays printed in such newspapers as there were and distributed in pamphlet form. As a book they make up
four hundred pages of ordinary print, which educated people in our day find it difficult to read,—it is so compact, so concise and direct in its arguments; it is so weighted with historical references and detailed in its analyses that it makes what we modern people, with our radio minds, call "hard reading." But we must remember that these papers were addressed to the people of the United States and were understood by them, a fact which shows that they were a great people. Indeed, I imagine that a great literature may be defined as great books written by great men, addressed to the interest of great people who are prepared to understand them. The audience is as much as the author in the making of a great book. The plays of Sophocles could never have been written but for the existence of the people of Athens, nor could Shakespeare's plays have survived their author but for the fact that he merely recorded the thoughts and emotions of a highly imaginative and daring people, who were building with rough hands a great civilization upon foundations of sound emotion and character. So if we turn the cart around the other way, I think we are obliged to ascribe the greatness of the Constitution and of its literary and argumentative defense to the fact that the people of the United States in 1787 were a highly developed and highly educated political people.
The Constitution was then a crystallization of the experience and wisdom of a people accustomed to political thinking—a people also living through the disheartening experience of a government structurally incapable of effective functioning. When the new Constitution was tendered, it was accepted by the people as an expression of their best hope and of their highest purposes.

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

If any analogy is to be drawn from the way in which the Constitution was made, it would seem that the keeping of the Constitution would also depend upon our having two qualifications. In the first place there will have to be dedicated to the Constitution the devotion of the highest trained intellects and consciences of the Nation. By these, of course, I mean those whose historical perspective will assure them against short-range thinking—men who know the experience of the race in its institutional struggle toward liberty and will not be tempted to yield for today’s expediency the permanent immuni-
ties and guarantees of the future. Second, and quite equally indispensable, there will have to be a broad and sympathetic appreciation throughout the people of the United States of what the Constitution is and what it means and what its value is to them and to posterity. With that thought in mind, I turn just a moment to the part of this audience made up of young men and young women who are students in this College.

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

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

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

In this modern world where war is just around the corner and just over the hill top, every thing happens with lightning speed. There is left for nations no moment of meditation. The action of every agent is instantly subjected to the emotional judgment of the people. As a matter of fact, the thought which I am thinking now, if it should be transferred to China, would, as a mere matter of calendar and clock time, get there about a day before I say it or think it.
The world is so linked together that we think simultaneously and if we are provoked, we are all provoked at the same time. Indignation does not spread slowly, but its causes wave over us and engulf us all at one time. The atmosphere of the modern world has become explosive and the slow-gaited machinery which was quite adequate in the more reposeful days of the beginnings of the Republic, is quite inadequate now to deal with the tempests of national feeling which are fanning international discords into international conflagrations. There are two reasons, and only two, that I have ever been able to discover for the present allocation of power on this subject in the Constitution. The members of the Convention realized that a certain secrecy, or at least confidential character, was necessary in the preliminary discussions of international questions, and as there were to be but twenty-six senators, the Convention assumed that twenty-six men could keep a secret so that it would be safe for the President to advise with the Senate while national issues and interests were being assessed as they might be affected by one course or another in a prospective treaty. Whether or not the Convention was right in assuming that twenty-six men could keep a secret, it is not now important to consider. The number of senators is now
ninety-six, and among that number it is quite impossible to hope for a universal prevalence of restraint and reserve. Indeed, in quite recent times it has seemed permissible to the Chairman of the Foreign Relations Committee of the Senate to parallel the President's initiative in foreign affairs by himself undertaking to express to foreign representatives his views upon such questions, whether they were at variance with that of the Executive or not. I do not see how any foreign ambassador in Washington, who wants to negotiate a treaty with the United States, can make up his mind whether he ought to begin his conversations with the Secretary of State or the Chairman of the Senate Committee.

The other reason was that in Colonial times there were certain issues deemed of great importance by sections of the country but of relatively little prospective importance in other sections. The people of New England were exceedingly concerned that their fishermen should have access to the waters to the north. Here in the South, and a little farther west and south of us, the people had little concern about fishing rights, but they were quite sure that the expansion and growth of this new country was conditioned by the right of unrestricted navigation of the Mississippi with outlets into the Gulf
of Mexico. Virginia particularly, owning land extending almost indefinitely to the west, was unwilling to have any power given to the Federal Government which would make it possible to barter away the right of navigating the Mississippi for the purpose of securing fishing rights in the northern waters for the people in New England. In all sections of the country there was a fear lest the new government might be tempted by sectional interests to prefer one section to the other, and the two-thirds rule was obviously intended to make it impossible for any section of the country which could not muster more than a bare majority of the senators to prefer northern fisheries to Mississippi navigation, or indeed to effect any settlement with one of our international neighbors prejudicial to some other section of the country.

Now in the long after years, New England's hearty fishermen explore the northern fisheries in serene security from any international restraint, and the commerce of the greatest Nation in the world rides unvexed upon the flood of the Mississippi to the sea, but this compromise is still with us, maiming our power and handicapping us to deal as a modern nation in our international relations. The simple question of the adhesion of the United States to the World Court, a court the establishment of
which is distinctly the contribution of an idea to international development by America, a court which is one of the dignified and conspicuous elements in the machinery which a stricken world set up after the devastating World War to preserve international peace, that question is delayed over a dozen years by the unwillingness of the Senate to act upon it. And this inaction is the more noteworthy when it is recalled that every Secretary of State and every President of the United States from the days of Theodore Roosevelt until now has ardently urged either that the United States take the lead in the establishment of such a court, or adhere to it after it had in fact been established.

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

When the Constitution was first proposed, the debates had very largely to do with revenue and the rights of the States inside the Union. Hamilton’s papers in the *Federalist* enlarge upon the advantage of a strong general government to make common cause for us all in dealing with the rest of the world. A more perfect union would enable us to defend our rights from a military point of view, and the national credit would be an element both of military and commercial
strength. In these days of emotional approach, it is not uncommon for men who have not read and thought much about the Constitution to describe it as a document adopted by property owners for the defense of property. Thoughtless and inflamed speakers and writers permit themselves to point out that members of the Convention were themselves large owners of property and to draw from that fact the unwarranted deduction that the greatest patriots in America, who had nearly all of them exposed their lives in the assertion of the country's freedom, immediately became a lot of conspirators, quieting their consciences for the protection of their purses. In the light of history, that is perfectly untrue. It is true that the members of the Convention had the capacity and willingness to pay their debts. They were people of financial responsibility, but nobody can read Madison's debates without realizing that what George Washington said of the Convention was true and that what John Adams said of it was true. Both praised the integrity of the members of the body, and John Adams said of the Constitution that it was "a document produced by sound heads inspired by sound hearts."

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

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

We have lived to a time when the world is troubling itself about other forms of government. When the World War was over, ancient and traditional forms of government were not only in disrepute, but in a state of collapse. Independent and restless peoples everywhere suddenly realized that they were free. They called constitutional conventions imitating our model. They made bills of rights, distributions of powers, and imagined that that was the end of the old era and the easy and safe beginning of a new one. One after another, these new governments failed, and they failed, of course, because the constitutions they had adopted were not the product of their progressive history. They were not the crystallizations of their own experience. They had had no experience in operating institutions of that sort, and when the multiplying natural difficulties of
operating democratic forms were undertaken by inexperienced people, they soon found themselves adrift at sea, with the result that they called in the Lenins, Hitlers, and Mussolinis to undertake by dictatorial processes the tasks which their unaccustomed hands found it impossible to do. With this the democratic principle began to come into disrepute and there grew up attacks upon it—on the one side by the Fascist theory and on the other side by the Communist theory. The adherents of both of these united only in defaming the principle of democracy. In the United States six months ago there was more uncertainty than there is today as to the pretensions of these alien theories in their competition for the favor which we have always hitherto given to democracy. That uncertainty is being dissipated. Democracy is distinctly regaining its ascendancy in the trained intellect of the world. Even in the countries in which these new and unusual forms have been resorted to, there are evidences of a fresh desire to revert to the democratic process. I doubt whether anybody in Russia really believes that the Communistic State will be the ultimate form of government there. I doubt very much whether anybody in Italy or Germany believes that Fascism or Hitlerism will be the final product of the political turmoil
through which those great countries have passed. In other words, these new forms and fashions attracted for a little while, but their output in human satisfactions has been disappointing to the point of disaster.

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

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

FORMER CUTLER LECTURERS

JAMES M. BECK
“"Our Changing Constitution.””

GEORGE W. WICKERSHAM
“The Constitution and Prohibition Enforcement.”

JOHN HOLLADAY LATANE
“The Constitution and Foreign Relations.”

GUY DESPARD GOFF
“The Appointing and Removal Powers of the President Under the Constitution of the United States.”

WILLIAM E. DODD
“The Federal Constitution and its Application.”

PATRICK J. HURLEY