

A Personal Issue to Every Citizen—The Constitution

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HOW far does public opinion still accept the fundamental principles of the Constitution? This question is of vital importance; for there is no greater error than to suppose that the Constitution has some inherent vitality to insure its perpetuity. The breath of its life is public opinion, and when that public opinion ceases to support any or all of its fundamental principles, they will perish. Its continued vitality must depend upon the continued and intelligent acceptance of its political philosophy by the people. Human institutions gather no strength from pieces of parchment or red seals. In a democracy the living soul of any human institution must be the belief of the people in its wisdom and justice. It is true of all human institutions, ecclesiastical or political, that the form may often survive the substance of the faith, and while the government which the Constitution brought into being might for a time survive the destruction of its vital spirit, even as a dead oak stands for a while after the sap has failed, yet if the fundamental principles of the Constitution cease to receive popular support the whole edifice will slowly crumble, even though the corporal entity remains.

The American commonwealth is something more than the mere machinery of government. It is a great spirit, whose principal purpose is to reconcile the authority of law with the rights of the individual as a responsible moral being. The Constitution is not static. It changes from generation to generation, sometimes by formal amendment, more frequently by judicial interpretation, and sometimes by mere usage, and the grave concern of all true Americans must be whether its vital spirit, which should be eternal, shall be slowly destroyed. If so the best hope of man will perish.

The essential principles of the Constitution of the United States, which together form its political philosophy and which, at least at one time, constituted the American doctrine of free government, may be summarized as follows:

The first is representative government. In the discussions before the Constitutional Convention all speakers made a distinction between that which they called "democracy" and that which they called "republicanism." By the former they meant direct legislative action by the people, or, as we would say, a pure democracy. By "republicanism" they meant representative government. However much the fathers disagreed upon other questions, they were substantially of one accord in the opinion that direct legislative action by the people was impracticable. They believed that no wise legislative action was possible without conference, and that in a commonwealth of many scattered communities, such a conference was impracticable, especially in cities where the size of the population made a town meeting impossible.

General Distrust
Representative government no longer has the complete acquiescence of the American people. Our constitutional system consists not only of the Federal Constitution, but also of the organic laws of the forty-eight states of the Union. Together, they comprise the organic law of the American commonwealth. It is to be noted that, in twenty-two states of the Union, the principle of the initiative and referendum, which is clearly antagonistic to the doctrine of representative government, is a part of the organic law of those states, and clearly indicates a very general distrust of the representative principle.

It cannot be questioned that if the principle of the initiative and referendum continues to gain faith and is ultimately made a part of the Federal Constitution, representative government will be greatly impaired, and, as a principle, wholly destroyed. For those who solace themselves with the thought that this gives more effective expression to the will of the people, it is well to remember that, in many referendums, it is a minority of the people—generally the proponents of some startling innovation—who triumph at the polls through the failure of the opposition to exercise the right of franchise.

The second principle of the Constitution was our dual form of government—and this may be said to have been the basic principle of

our system of government. The thirteen colonies were most reluctant to surrender even a portion of their sovereignty to the Federal government. They were widely scattered communities and varied greatly in racial origin and local habits and customs. They were tenacious of the great principle of home rule, and, even when our country did not extend beyond the Alleghenies, there was, on the part of the local communities, a deep-rooted objection to being governed by a central power. Only the immense influence of George Washington could triumph over this feeling of opposition, and his triumph could only be secured by confining the Federal Constitution to those matters of general concern which required of necessity a common rule and which each state was incompetent to determine for itself. For this reason, the Tenth Amendment, without which the Constitution would not have been adopted, was formulated, providing that all rights not expressly delegated to the Federal government should be reserved forever to the states and the people thereof.

To-day there is imperative necessity of adapting, by judicial interpretation or amendment, a rigid constitution to the growing necessities of the most progressive people in the world. But, in doing this, it is not necessary to sacrifice wholly the basic principles of the Constitution, especially that of home rule; for, if the principle of home rule be very seriously impinged upon, it will inevitably lead to a spirit of civil strife and possibly ultimate disunity.

Prohibition And Home Rule

Whatever opinion one may hold with respect to statutory prohibition, no fair-minded man can question that in the adoption of the Eighteenth Amendment—if, indeed, it has been legally adopted—the principle of home rule has suffered a serious, if not fatal, impairment. Nowhere in the Constitution is the slightest trace of a purpose on the part of the Fathers to determine questions of individual morality or personal habit. In a country of one hundred millions of people, inhabiting a vast continent, which begins with the edge of the Arctic and ends with the edge of the tropics, and which is inhabited by men of many races and varying social standards, it is, in my judgment, a hazardous experiment to impose by a rigid constitutional amendment a doubtful principle of morality, which justly offends the pride of individual liberty. Whatever the merits of prohibition may be as a local measure, its adoption as an unbending national principle destroys the symmetry of the Constitution and invades those reserved rights of the states and of the people thereof which the Tenth Amendment was designed to preserve inviolate. I regard the adoption of the Eighteenth Amendment as a fatal impairment of the principle of home rule, and as such the deadliest menace to the perpetuity of the Republic that has risen in the last half century.

Individual Liberty

The third principle was the guarantee of individual liberty through Constitutional limitations. This marked the great contribution of America to the science of government. In all previous government building the state was regarded as a sovereign which would grant to individuals or classes out of its plenary power certain privileges or exemptions, which were called "liberties." Thus, the liberties which the barons wrung from King John at Runnymede were virtually exemptions from the power of government. Our fathers did not believe in the sovereignty of the state in the sense of absolute power, nor did they believe in the sovereignty of the people in that sense. The word "sovereignty" will not be found in the Constitution or the Declaration of Independence. They believed that each individual, as a responsible moral being, had certain "inalienable rights" which neither the state nor the people could rightfully take from him. This conception of individualism was wholly new, and is the distinguishing characteristic of American constitutionalism. As to such reserved rights, guaranteed by constitutional limitations and largely by the first ten amendments to the Constitution, a man, by virtue of his inherent and God-given dignity as a human soul, had rights, such as freedom of the press, liberty of speech and religious freedom, which even one hundred millions of people could not rightfully take from him. The Fathers did not believe that the oil anointing that was supposed to sanctify the monarch and give him infallibility had fallen upon the multitudinous tongue of the people to give it either infallibility or omnipotence. Even the Pilgrims on the Mayflower had this noble conception of individual lib-

The Subtle Assaults That Have Endangered "the Greatest Achievement in Government"—Every Man's Duty to See the Constitution Preserved

By Hon. James M. Beck

erty, for while in the famous compact they agreed to abide by the rule of the majority it was with the qualification that the laws to be passed by the majority should be "just and equal." This theory of government gave a new dignity to manhood. It exalted the human soul as no previous government institution had ever done. It said to the state: "There is a limit to your power. Hitherto shalt thou come and no further, and here shall thy proud waves be stayed."

This principle has been challenged by the recall of judicial decisions, which, if ever generally adopted, would mean the potential destruction of all constitutional limitations. The only method of guaranteeing to the individual his reserved rights as against the power of the state or the people was in making the judiciary a city of refuge for the man against whom the destruction of his inalienable rights was sought to be inflicted. In vain, however, would be such decisions, and impotent and helpless would be the individual if, when the judiciary had decided that a given law which unduly trespassed upon individual rights and thereby violated the Constitution, the people, by a mere majority vote, could nullify the decision. The recall of judicial decisions is a fatal negation of constitutional government and might make of it little less than "a scrap of paper."

The Judiciary

Closely allied to this doctrine of limited governmental powers, even by a majority, is the fourth principle of an independent judiciary. It is the balance wheel of the Constitution, and, to function, it must be beyond the possibility of attack and destruction. The recall of judges is obviously fatal to such independence. Judges are at best human and are already swayed to some extent by the tides of popular opinion; but it is obvious that if a judge in protecting the reserved rights of an individual by a decision could be dragged from the bench and the crime soiled in the mire of popular disgrace, then the court would be as little able to defend popular rights as though an armed mob were in the courtroom and exercised its duress. Indeed, there are many judges who would fearlessly face mob violence in a courtroom, but who would be influenced by the far greater duress of popular disgrace.

The principles are of inestimable

value in preserving property rights against socialistic or Bolshevik attacks. Our country was founded upon the rock of property rights and the sanctity of contracts. Both the nation and the several states are forbidden to take away life, liberty or property "without due process of law." This is the very palladium of our liberties. It is as old as Magna Charta; for "due process of law" is but a paraphrase of "the law of the land," without which no freeman could be deprived of his liberties or possessions.

Due Process Of Law

"Due process of law" means that there are certain fundamental principles of liberty, not defined or even enumerated in the Constitution, but having their sanction in the free and enlightened conscience of just men, and that no man can be deprived of life, liberty or property, or of his right to the pursuit of happiness, except in conformity with the fundamental deficiencies of liberty. It is the contradiction of Bolshevism, which means the unrestrained rule of the majority.

In vain, however, the Fifth and Fourteenth Amendments, each guaranteeing the individual from ruin "without due process of law," if the principle of constitutional limitations shall be destroyed by the recall of judicial decisions and the independence of the judiciary shall be impaired by the recall of judges. It is no answer that such departures from our system of government have not yet had serious effects, for the old spirit of ordered liberty, supported by an intelligent public opinion, still prevents the exercise of these potential instruments of oppression.

More than half a century ago Macaulay wrote to Randall, the biographer of Thomas Jefferson, that our system of government would prove effective as long as we had vast areas of unoccupied land. But he added that when all available land was occupied, when our cities became congested, when we had our Manchesters, Birmingham, Liverpools and Londons, then "spoliation would follow spoliation." The voice of the few pleading for property rights and the sanctity of contracts would be submerged in the angry demands of the majority, intent upon a new distribution of property through the forms of law. He added: "Your Constitution is all sail and no anchor." Time was when the prediction seemed an idle one,

but when the spirit of the referendum and the recall becomes the true doctrine of America then in truth it will come to pass, as the great essayist predicted, that our Constitution will be "all sail and no anchor." When it thus drifts from its ancient moorings it will be little better than a derelict, moving hither and thither on a stormy sea of class passion and without chart, compass or anchor.

The fifth fundamental principle was a system of governmental checks and balances, whereby it was sought to divide official authority and responsibility that power should never be concentrated in one man, or even in one branch of the government. The founders of the Republic were not enamored of power. They had just thrown off the tyranny of a king. As they viewed human history, the worst evils of government were due to undue concentration of power. Undoubtedly their belief in the policy of dividing power was due to Montesquieu's philosophy, as set forth in his "The Spirit of the Laws," and his doctrine was written with the experience of France, where all legislative and executive power had been centered in a monarch who could say "Letat, c'est moi." Undoubtedly such concentration made for efficiency; but it also made for tyranny.

Here again the fathers, living in a simpler age, did not adequately realize that no arbitrary division can be too rigidly made between the executive, the legislative and the judicial branches of the government; nor, indeed, did they attempt to draw an absolute line of demarcation. For instance, the executive, with the veto, was given an important legislative function; but the legislative branch, and especially the Senate, was vested with important executive powers.

Moreover, the governmental machinery, with the increasing complexity of life, became so intricate that many important delegations of legislative power to executive bureaus became inevitable to make the different parts of the machine function with efficiency. No one can now say that we have yet reached the final adaptation of our system of checks and balances to the imperative needs of an efficient government. During the present war the concentration of authority in the executive branch of the government has been inevitable. The principle, however, remains, but it is subject to ever increasing and more successful challenge. The fathers intended the legislative department of the government to be the most important.

The development of the Constitution has made the executive the predominant influence. It is idle to quarrel with this tendency, for it is part of the evolution of the Constitution, but the protest of the Constitution against one man power still remains and should not be disregarded.

Foreign Relations

The sixth fundamental principle was a concurrent power of the Senate and the Executive over the foreign relations of the government. Nothing, excepting the principle of home rule, was of deeper concern to the framers of the Constitution, and in nothing did they make a more radical departure from all existing forms of government. When the Constitution was framed every government of Europe except Switzerland was a monarchy, and it was the accepted principle that whatever control parliaments or other legislative bodies had over domestic concerns, the right to determine the foreign relations of the government, including the issues of peace and war, was the exclusive prerogative of the sovereign. In England, the freest of all governments at that time, the only check on the power of the King to select the diplomatic representatives of the government, to make treaties and generally to determine the issues of peace and war, was the power which the House of Commons had over the purse of the nation. If the King had the necessary means to make war without a parliamentary grant, he was free to do so. But, as he rarely had sufficient means, he was generally dependent upon parliament for the necessary grants. Many of the greatest struggles for English liberty concerned the rights of the King to exact money without parliamentary grant, in order to carry on wars in which his dynasty was engaged.

The colonies were not willing to grant such a power to the old Confederation, except with the consent of nine states, and when the Constitutional Convention met it was at first resolved that the power to appoint ambassadors, ministers and consuls and to make treaties should be vested exclusively in the Senate, as the body that most directly and equally represented the constituent states. It was, however, recognized by these practical men that the Senate was not always in session, and in any event that it was not so easy for a body consisting originally of twenty-six

men to negotiate treaties with advantage; and therefore it was finally resolved that the President should, "with the advice and consent of the Senate," appoint ambassadors, ministers and consuls and make treaties; but that if a declaration of war was contemplated only the concurrence of both houses of Congress could authorize such a declaration.

Model of Style

The language of the Constitution was drawn with the greatest precision. It is a model of literary style. In it there is no tautology, not even a wasted word, and when, therefore, the Constitution made necessary the "advice and consent of the Senate," something more than a mere ratification of an appointment or of a treaty was in contemplation. The word "advice" clearly meant cooperation with the Executive in an advisory capacity before a conclusion was reached, and the nation, to some extent, morally committed.

It was the undoubted intention of the fathers to make the Senate the final treaty making power, and, as such, to enable it, at any stage of the negotiations, either to propose a treaty, to express disapproval of treaties in contemplation, to determine the suitability of those who were appointed to negotiate a treaty, to advise with the President at any stage of the negotiations, and, finally, to consent to, or reject, or to amend, any tentative draft. The President thus was the agent of the Senate in negotiating a treaty; but, through usage, which may have some justification, he has been freely given in practice the initiative to such an extent that precedent no longer requires him to discuss preliminarily with the Senate the terms of a treaty before he tentatively offers it to another nation. Nevertheless, some cooperation between the Executive and Congress is necessary, lest an unseemly deadlock should arise to the embarrassment of the nation, if it is called upon to reject that which was tentatively offered in its name by the Executive, and, to avoid this unfortunate result, it has been the practice of the Executive for many years, in all important foreign questions, to consult with the Committee on Foreign Relations of the Senate, so that he could be reasonably satisfied that the Senate would ratify that which the Executive offers to another nation in the name of America.

An Incorrect View

There are students of the Constitution who have held that in its development the Senate's function in the treaty making power is little more than to ratify that which the Executive has negotiated. The most forceful statement of this theory is found in President Wilson's "Constitutional Government of the United States," which reads as follows:

"The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy; and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of a negotiation until it is complete; and when in any critical matter it is completed, the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also."

That this view cannot be correct and was not so intended is plainly shown by the fact that no treaty can be entered into unless two-thirds of the Senate concur in its wisdom. To our fathers, the chief difference between a monarch and a republic was that in a republic a treaty making power required the assent of representatives of all sections and parties. Hence the refusal to vest authority even in a majority of the Senate.

The League Of Nations

Current events show that the Senate has not abdicated its great duty under the express language of the Constitution. Let us hope that the Senate, in its consideration of the far-reaching proposal of a league of nations, will take such action, either in its acceptance, rejection or amendment, as it thinks best without dividing on party lines, for the question is infinitely above party. If it failed to exercise its own judgment it would set a precedent which in the future would go far to put the destinies of this mighty nation in its foreign relations in the exclusive control of one man. Nothing was further from the intention of the fathers, and as America is now the first power of the world and is destined to play the most potential part in shaping its destinies, it is vitally important that any decision which affects the future relations of this government with the rest of the world should

have the consideration and approval, not merely of the Chief Magistrate, but of that body of Congress which, in a peculiar way, represents the forty-eight sovereign commonwealths of the Federal Union. Our foreign relations should rise above party politics, and the best method of bringing this about is to have the Senate resume its full authority as the final treaty-making power.

These are the six fundamental principles of the Constitution. It may be suggested that the challenge to these six fundamental principles is not a very serious one, and that no real concern need be felt as to their continued efficacy. This quite ignores the fact that there are important bodies of men, numbering hundreds of thousands of voters, who challenge some or all of these principles.

Indeed, in the period from 1914 to 1917, seventy-nine amendments to the Constitution were proposed relating to twenty-four different subjects, most of them being subversive of one or more of the principles of the Constitution.

Eternal Verities

I do not claim that the Constitution is a perfect instrument. The Fathers themselves recognized their own fallibility or they would not have made provision for its amendment; but I do contend that its fundamental principles are eternal verities, and cannot be impaired or destroyed without reducing the noble fabric to a careless ruin.

Unless the present tendency to change the Constitution by amendment, interpretation or usage is checked by a sound public opinion, it will one day become a noble and splendid ruin like the Parthenon, but, like the Parthenon, useless for practical purposes and an object of melancholy interest only. It is sadly true that the Constitution is being slowly undermined by forces which, if not checked, will result in its subversion. Let all patriotic Americans take up the cry: "Save the Constitution!"

The Constitution rests upon public opinion. When that ceases to support it, the end will be at hand. While the scarcely veiled antagonism to its principles is serious, a graver aspect is the profound ignorance and indifference of even educated Americans with respect to America's greatest contribution to the science of government. Even in our higher institutions of learning it is amazing how few of their graduates have a real knowledge of either the history or the provisions of the Constitution. They may know its most important provisions in a perfunctory way, as they know the rules of parliamentary law, but the profound political philosophy which brought it into being and the basic principles which underlie it are not familiar to our college graduates. For my part, I would make it a rule in every college and university that no man shall graduate or receive a degree, no matter how elective the course may be or what specialty he is studying, unless he can pass a real examination with respect to the history and provisions of the Federal Constitution.

Danger Never Greater

The danger was never greater than in this hour, when in every country there is a revolt against accepted principles of government. Indeed, the future historian may say that the first quarter of the twentieth century was marked by a revolt against the past in all departments of human life. One can see this tendency in literature, art, music, sociology and political government. Everywhere there is a craze for innovation; everywhere hostility to that which has the sanction of the past.

This nation has spent its treasure like water, and what is infinitely more, the blood of its gallant youth, to make "the world safe for democracy." The task is accomplished, but in the mighty reaction from the supreme exertions of the war it is now apparent to thoughtful men that a new problem confronts mankind—and that is to make democracy safe for the world. Kaiserism has been haled to the bar of civilization and has been convicted and sentence of execution pronounced. And now the world is slowly perceiving that democracy is also on trial, charged by its foes with unduly restraining the will of the majority to inflict their will upon the inalienable rights of the individual, and, by its friends, with inefficiency.

In this period of popular fermentation, the end of which no man can predict, the Constitution of the United States, with its fine equilibrium between efficient power and individual liberty, still remains the best hope of the world. If it should perish the cause of true democracy would receive a fatal wound and the best hopes of mankind would be irreparably disappointed.

After the Fish of Mystery—Shad

By John D. Anderson

SHAD are coming—but from where? From the rivers and bays, of course, but from further. The fact and the truth of the matter is that the whole, or nearly the whole, of the life story of this fish of the herring tribe is one of the mysteries of the big ocean. What we do know about its life is in substance as follows: It is born in fresh water. In late April, or early May in our Northern rivers, the shad come up to spawn. This fish is very different in many ways from the common herring. The spawn of the herring is heavier than the water in which they develop and are carried down by the current or up by the tide. Not so with the spawn of the shad. This is to a degree adhesive and the early development of the little shad—the hope of the future—is in fresh water.

Take a river into which the older ones come to spawn—a stream like the upper Delaware—and a curious and pleasing sight will greet you by mid-August. It may be the first sight that you have ever had of the very youthful shad. On a bright, clear day you can see them, as I have, leaping and jumping about the surface of one of the hundreds of picturesque pools which abound in the Delaware from Milford northward to Port Deposit. By that season of the year that which was spawn in May has become millions of little shad, not much over an inch in length.

But this is not all. By late October or early November, if you but watch closely enough, you would see these little shad all going seaward. They grow rather rapidly even during cool September, and have seen those hatched in April at least four

The Plot Thickens

inches in length before they go out of the rivers. From November to late April at the earliest our Northern rivers are free of shad—of big and of little shad. We all know that after the spawning season the shad which have survived being caught in the many nets which are set for them, after spawning again, seek the salt water. But a small portion find it alive. All along the banks of the river, in the eddies and along the shoal places, hundreds upon hundreds of dead shad may be seen in late May or early June.

One end of a net is anchored to a stake a few feet from shore; then, by the aid of a good-sized rowboat, the other end is carried down the pool; then circled around half way or more across the river, its complete course describing nearly a circle. A good catch is fifty fish, and with a long net on a rather warm evening seventy-five is no unusual number to take into captivity at a single haul. These men are not professional fishermen, but country folk and farmers who either have fishing rights along the river or work for those who have such rights. Shad taken in this way rather well up from the mouths of our Northern rivers will average in weight about five pounds, although those which will tip the scales at eight pounds are no unusual sight, and also it is rare that any will be taken which are less than two pounds in size. This is, of course, due to the size of the nets which are used.

The Shad Knows His Way

The shad does one thing which would establish a degree of at least worldly wise wisdom in an animal or person. I refer to the fact that once it is on its way up a stream it never turns into a branch or tributary stream. Between Delaware Bay and the upper Delaware are many places where good sized streams flow into the main stream and where a less wise fish might easily get lost and go the wrong way, but never the shad. On and on he takes his way until the spawning places are reached.

Shad are much less plentiful than in the time of our fathers and grandfathers. Not so very long ago shad taken in the Delaware were seldom shipped to the city markets, but

were "peddled out" through the country districts in both New Jersey and Pennsylvania; were sold in "strings" of five each and were so cheap in price that people in the small towns, villages and in the country salted them down for winter use. Salt shad in those days were as highly regarded as the salt mackerel.

Those who have examined shad closely put them into two general classes—the allis and the twaite. An examination of the gill formation is necessary in order to distinguish them. The allis shad has from sixty to eighty very fine and long gill-rakers along the concave edge of the first branchial arch. Its cousin, the twaite, possesses but from twenty-one to twenty-seven short gill-rakers. In habits the two are much alike. Those in Europe are found along the coasts in the temperate regions. The twaite shad are found in large numbers in season in the rivers which empty into the Mediterranean Sea. At one time shad were numerous in the Thames River, and are still found in the Severn. They now shun the Thames for much the same reason that we find them no longer in the Passaic, nor in the Raritan, with the same frequency as in the days before these rivers were polluted.

Little or nothing has been done in this country to cultivate the shad. At Elbeuf on the Seine, some way above Rouen, there is a shad hatchery which has done much to propagate this fish. While there is no immediate danger of the shad becoming extinct in the rivers of the United States, its numbers are much smaller than before so many were taken, and by reason of the pollution of many larger rivers the shad's spawning grounds are more restricted than in former years.