GREAT DEBATES IN AMERICAN HISTORY

From the Debates in the British Parliament on the Colonial Stamp Act (1764–1765) to the Debates in Congress at the Close of the Taft Administration (1912–1913)

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COLONIAL RIGHTS—THE REVOLUTION—THE CONSTITUTION

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INTRODUCTION

The Constitution and Its Makers[1]

BESIDE the question of the maintenance or destruction of the Constitution of the United States all other questions of law and policy sink into utter insignificance. In its presence party lines should disappear and all sectional differences melt away like the early mists of dawn before the rising sun. The Constitution is our fundamental law. Upon its provisions rests the entire fabric of our institutions. It is the oldest of written constitutions. It has served as a model for many nations, both in the Old World and in the New. It has disappointed the expectations of those who opposed it, convinced those who doubted, and won a success beyond the most glowing hopes of those who put faith in it. Such a work is not to be lightly cast down or set aside, or, which would be still worse, remade by crude thinkers and by men who live only to serve and flatter in their own interest the emotion of the moment. We should approach the great subject as our ancestors approached it—simply as Americans with a deep sense of its seriousness and with a clear determination to deal with it only upon full knowledge and after the most mature and calm reflection. The time has come to do this, not only here and now, but everywhere throughout the country.

Let us first consider who the men were who made the Constitution and under what conditions they worked. Then let us determine exactly what they meant to do—a most vital point, for much of the discussion to which

[1] Adapted from an address delivered before the Literary and Historical Association of North Carolina, at Raleigh, on November 28, 1911.

we have been treated thus far has proceeded upon a complete misapprehension of the purpose and intent of the framers of the Constitution. Finally, let us bring their work and their purposes to the bar of judgment, so that we may decide whether they have failed, whether in their theory of government they were right or wrong then and now, or whether their work has stood the test of time, is broad based on eternal principles of justice, and, if rent or mangled or destroyed, would not in its ruin bring disaster and woes inestimable upon the people who shall wreck their great inheritance and, like

> The base Indian, throw a pearl away,
> Richer than all his tribe.

First, then, of the men who met in Philadelphia in May, 1787, with doubts and fears oppressing them, but with calm, high courage and with a noble aspiration to save their country from the miseries which threatened it, to lead it out from the wilderness of distractions in which it was wandering blind and helpless, into the light, so that the chaos, hateful alike to God and men, might be ended and order put in its place. It is the fashion just now to speak of the framers of the Constitution as worthy, able, and patriotic persons whom we are proud to have embalmed in our history, but toward whom no enlightened man would now think of turning seriously for either guidance or instruction, so thoroughly has everything been altered and so much has intelligence advanced. It is commonly said that they dealt wisely and well with the problems of their day, but that of course they knew nothing of those which confront us, and that it would be worse than folly to be in any degree governed by the opinions of men who lived under such wholly different conditions. It seems to me that this view leaves something to be desired and is not wholly correct or complete. I certainly do not think that all wisdom died with our fathers, but I am quite sure that it was not born yesterday. I fully realize that in saying even this I show myself to be what is called old fashioned, and I know that a study of his-

tory, which has been one of the pursuits of my life, tends to make a man give more weight to the teachings of the past than it is now thought they deserve. Yet, after all allowance is made, I can not but feel that there is something to be learned from the men who established the Government of the United States, and that their opinions, the result of much and deep reflection, are not without value, even to the wisest among us.

On questions of this character, I think, their ideas and conclusions are not lightly to be put aside; for, after all, however much we may now gently patronize them as good old patriots long since laid in their honored graves, they were none the less very remarkable men, who would have been eminent in any period of history and might even, if alive now, attain to distinction. Let us glance over the list of delegates to the Constitutional Convention in Philadelphia in 1787. I find, to begin with, that their average age was 43, which is not an extreme senectitude, and the ages range from Franklin, who was 81, to John Francis Mercer, of Virginia, who was 28. Among the older men who were conspicuous in the convention were Franklin, with his more than 80 years; Washington, who was 55; Roger Sherman, who was 66; and Mason and Wythe, of Virginia, who were both 61. But when I looked to see who were the most active forces in that convention, I found that the New Jersey plan was brought forward by William Paterson, who was 42; that the Virginia plan was proposed by Edmund Randolph, who was 34; while Charles Pinckney, of South Carolina, whose plan played a large part in the making of the Constitution, was only 29. The greatest single argument, perhaps, which was made in the convention was that of Hamilton, who was 30. The man who contributed more, possibly, than any other to the daily labors of the convention and who followed every detail was Madison, who was 36. The Connecticut compromise was very largely the work of Ellsworth, who was 42; and the committee on style, which made the final draft, was headed by Gouverneur Morris, who was 35. Let us note, then, at the outset that youth and energy, abounding hope, and the sympathy for the new

times stretching forward into the great and unchartered future, as well as high ability, were conspicuous among the men who framed the Constitution of the United States.

Their presiding officer was Washington, one of the great men of all time, who had led the country through seven years of war, and of whom it has been said by an English historian that "no nobler figure ever stood in the forefront of a nation's life." Next comes Franklin, the great man of science, the great diplomatist, the great statesman and politician, the great writer; one of the most brilliant intellects of the eighteenth century, who in his long life had known cities and men as few others have ever known them. There was Hamilton, one of the greatest constructive minds that modern statesmanship has to show, to whose writings German statesmen turned when they were forming their empire forty years ago, and about whom in these later days books are written in England, because Englishmen find in the principal author of "The Federalist" the great exponent of the doctrines of successful federation. There, too, was Madison, statesman and lawmaker, wise, astute, careful, destined to be, under the Government which he was helping to make, Secretary of State and President. Roger Sherman was there, sagacious, able, experienced; one of the leaders of the Revolution and a signer of the Declaration of Independence, as he was of the Constitution. Great lawyers were present in Philadelphia in that memorable summer of 1787, such men as Ellsworth and Wilson and Mason and Wythe. It was, in a word, a very remarkable body which assembled to frame a constitution for the United States. Its members were men of the world, men of affairs, soldiers, lawyers, statesmen, diplomatists, versed in history, widely accomplished, deeply familiar with human nature. I think that, without an undue or slavish reverence for the past or for the men of a former generation, we may fairly say that in patriotism and in intellect, in knowledge, experience, and calmness of judgment, these framers of the Constitution compare not unfavorably with those prophets and thinkers of to-day who decry the work of

1787, would seek to make it over with all modern improvements, and who with unconscious humor declare that they are engaged in the restoration of popular government.

That phrase is in itself suggestive. That which has never existed cannot be restored. If popular government is to be restored in the United States it must have prevailed under the Constitution as it is, and yet those who just now are so devoured by anxiety for the rights of the people propose to effect the restoration they demand by changing the very Constitution under which popular government is admitted by their own words to have existed. I will point out presently the origin of this confusion of thought. It is enough to say now that for more than a century no one questioned that the government of the Constitution was in the fullest sense a popular government. In 1863 Lincoln, in one of the greatest speeches ever uttered by man, declared that he was engaged in trying to save government by the people. Nearly thirty years later, when we celebrated the one hundredth anniversary of the Constitution, the universal opinion was still the same. All men then agreed that the Government which had passed through the fires of civil war was a popular government. Indeed, this novel idea of the loss of popular government which it is proposed to restore by mangling the Constitution under which it has existed for more than a century is very new; in fact, hardly ten years old.

This first conception of our Constitution as an instrument of popular government, so long held unquestioned, was derived from the framers of the Constitution themselves. They knew perfectly well that they were founding a government which was to be popular in the broadest sense. The theory now sedulously propagated, that these great men did not know what they were about, or were pretending to do one thing while they really did another, is one of the most fantastic delusions with which agitators have ever attempted to mislead or perplex the public mind. The makers of the Constitution may have been right or they may have been wrong in the principles upon which they acted or in the

work they accomplished, but they knew precisely what they meant to do and why they did it. No man in history ever faced facts with a clearer gaze than George Washington, and when, after the adjournment of the convention, he said, "We have raised a standard to which the good and wise can repair; the event is in the hands of God," he labored under no misapprehension as to the character of the great instrument where his name led all the rest.

It is the fashion to say that since then great changes have occurred and wholly new conditions have arisen of which the men of 1787 could by no possibility have had any knowledge or anticipation. This is quite true. They could not have foreseen the application of steam to transportation, or of electricity to communication, which have wrought greater changes in human environment than anything which has happened to man since those dim, prehistoric, unrecorded days when some one discovered the control of fire, invented the wheel, and devised the signs for language, masterpieces of intelligence with which even the marvels of the last century cannot stand comparison. The men of the Constitution could as little have foreseen what the effects of steam and electricity would be as they could have anticipated the social and economic effects of these great inventions or the rapid seizure of the resources of nature through the advances of science and the vast fortunes and combinations of capital which have thus been engendered. Could they, however, with prophetic gaze have beheld in a mirror of the future all these new forces at work, so powerful as to affect the very environment of human life, even then they would not, I think, have altered materially the Constitution which they were slowly and painfully perfecting. They would have kept on their way, because they would have seen plainly what is now too often overlooked and misunderstood, that all the perplexing and difficult problems born of these inventions and of the changes, both social and economic, which have followed were subjects to be dealt with by laws as the questions arose, and laws and policies were not their business. They were not making laws to

regulate or to affect either social or economic conditions. Their work was not only higher but far different. They were laying down certain great principles upon which a government was to be built and by which laws and policies were to be tested as gold is tested by a touchstone.

There is no greater fallacy than to suppose that new and fundamental principles of government are constantly to be invented and wrought out. Laws change and must change with the march of humanity across the centuries as it alteration finds in the conditions about it, but fundamental principles and theories of government are all extremely old.

If you will read "The Republic" and "The Laws" of Plato and supplement that study by an equally careful examination of what Aristotle has to say on government you will find that those great minds have not only influenced human thought from that time to this, but that there is little which they left unsaid. It is the fashion, for example, to speak of socialism as if it were something new, a radiant discovery of our own time which is to wipe away all tears. The truth is that it is very old, as old in essence as human nature, for it appeals to the strong desire in every man to get something for nothing and to have someone else bear his burdens and do his work for him. As a system it is amply discussed by Plato, who, in "The Republic," urges measures which go to great extremes in this direction. In the fourth century of our era a faction called the Circumcellions were active as socialists and caused great trouble within the weakening Empire of Rome. The real difficulty historically with the theories of socialism is not that they are new, but that they are very, very old, and wherever they have been put in practical operation on a large scale they have resulted in disorder, retrogression, and in the arrest of civilization and progress.

In order to reach the essence of what the makers of the Constitution tried and meant to do, which it is most important to know and reflect upon deeply before we seek to undo their work, let us begin by dismissing from our consideration all that is unessential or misleading.

Let us lay aside first the word republic, for a republic denotes a form and not a principle. A republic may be democratic like ours, or an autocracy like that of Augustus Cæsar, or an oligarchy like Venice, or a changing tyranny like some of those visible in South America. The word has become as inaccurate, scientifically speaking, as the word monarchy, which may be in reality a democracy as in England or Norway, constitutional as in Italy, or a pure despotism as in Russia. Let us adhere in this discussion to the scientifically exact word "democracy." Next let us dismiss all that concerns the relations of the States of the National Government. Federation was the great contribution of the Philadelphia convention to the science of government. The framers of the Constitution, if they did not invent the principle, applied it on such a scale and in such a way that it was practically a discovery, a venture both bold and new, as masterly as it was profoundly planned. With the love of precedents characteristic of their race they labored to find authority and example in such remote and alien arrangements as the Achaian League and the Amphictyonic Council, but the failure of these precedents as such was the best evidence of the novelty and magnitude of their own design. Their work in this respect has passed through the ordeal of a great war; it has been and is to-day the subject of admiration and study on the part of foreign nations, and not even the most ardent reformer of this year of grace would think, in his efforts to restore popular government, of assailing the Union of Sovereign States. Therefore we may pass by this great theme which was the heaviest part of the task of our ancestors.

In the same way we may dismiss, much as it troubled the men of 1787, all that relates to the machinery of government, such as the electoral college, the tenure of office, the methods of electing Senators and Representatives, and the like. These matters are important; many active thinkers in public life seek to change them, not for the better, as I believe, but none the less these provisions concern only the mechanism of government; they do not go to the root of the matter, they do not

affect the fundamental principles on which the Government rests.

By making these omissions we come now to the vital point, which is, What kind of a government did the makers of the Constitution intend to establish and how did they mean to have it work? They were, it must be remembered, preparing a scheme of government for a people peculiarly fitted to make any system of free institutions work well. The people of the United Colonies were homogeneous. They came in the main from Great Britain and Ireland, with the addition of the Dutch in New York, of some Germans from the Palatinate, and of a few French Huguenots, whose ability and character were as high as their numbers were relatively small. But an overwhelming majority of the American people in 1787 were of English and Scotch descent, and they, as well as the others from other lands, were deeply imbued with all those principles of law which were the bulwarks of English liberty. In this new land men had governed themselves and there was at that moment no people on earth so fit or so experienced in self-government as the people of the thirteen colonies. Their colonial governments were representative and in essence democratic. They became entirely so when the Revolution ended and the last English governor was withdrawn. In the four New England colonies local government was in the hands of the town meetings, the purest democracies then or now extant, but it is best to remember, what the men of 1787 well knew, that these little democracies moved within fixed bounds determined by the laws of the States under which they had their being.

For such a people, of such a character, with such a past and such habits and traditions, only one kind of government was possible, and that was a democracy. The makers of the Constitution called their new Government a republic, and they were quite correct in doing so, for it was of necessity republican in form. But they knew that what they were establishing was a democracy. One has but to read the debates to see how constantly present that fact was to their minds. Democracy was

then a very new thing in the modern world. As a system it had not been heard of, except in the fevered struggles of the Italian city republics, since the days of Rome and Greece, and although the convention knew perfectly well that they were establishing a democracy and that it was inevitable that they should do so, some of them regarded it with fear and all with a deep sense of responsibility and caution. The logical sequence as exhibited in history and as accepted by the best minds of the eighteenth century, struggling to give men a larger freedom, was democracy—anarchy—despotism. The makers of the Constitution were determined that so far as in them lay the American Republic should never take the second step, never revolve through the vicious circles which had culminated in empire in Rome, in the tyrants of the Grecian and the despots of the Italian cities, which is their turn had succumbed to the absolutism of foreign rulers.

The vital question was how should this be done; how should they establish a democracy with a strong government—for after their experience of the Confederation they regarded a weak government with horror—and at the same time so arranged the Government that it should be safe as well as strong and free from the peril of lapsing into an autocracy on the one hand, or into disorder and anarchy on the other? They did not try to set any barrier in the way of the popular will, but they sought to put effective obstacles in the path to sudden action which was impelled by popular passion, or popular whim, or by the excitement of the moment. They were the children of the "Great Rebellion" and the "Blessed Revolution" in the England of the seventeenth century, and they were steeped in the doctrine of limiting the power of the King. But here they were dealing with a sovereign who could not be limited, for, while a king can be limited by transferring his power to the people, when the people are sovereign their powers cannot be transferred to anybody. There is no one to transfer them to, and if they are taken away the democracy ceases to exist and another government, fundamentally different, takes its place.

The makers of the Constitution not only knew that the will of the people must be supreme, but they meant to make it so. That which they also aimed to do was to make sure that it was the real will of the people which ruled and not their momentary impulse, their well-considered desire and determination and not the passion of the hour, the child, perhaps, of excitement and mistake inflamed by selfish appeals and terrorized by false alarms. The main object, therefore, was to make it certain that there should be abundant time for discussion and consideration, that the public mind should be thoroughly and well informed, and that the movements of the machinery of government should not be so rapid as to cut off due deliberation. With this end in view they established with the utmost care a representative system with two chambers and an executive of large powers, including the right to veto bills. They also made the amendment of the Constitution a process at once slow and difficult, for they intended that it should be both, and indeed that it should be impracticable without a strong, determined, and lasting public sentiment in favor of change.

Finally they established the Federal judiciary, and in the Supreme Court of the United States they made an addition to the science of government second only in importance to their unequaled work in the development of the principle of federation. That great tribunal has become in the eyes of the world the most remarkable among the many remarkable solutions devised by the convention of 1787 for the settlement of the gravest governmental problems. John Marshall, with the intellect of the jurist and the genius of the statesman, saw the possibilities contained in the words which called the court into being. By his interpretation and that of his associates and their successors the Constitution attained to flexibility and escaped the rigidity which then and now is held up as the danger and the defect of a written instrument. In their hands the Constitution has been expanded to meet new conditions and new problems as they have arisen. In their hands also the Constitution has been the protection of the rights of States and the

rights of men, and laws which violated its principles and its provisions have been set aside.

By making the three branches of the Government, the executive, the legislative, and the judicial, entirely separate and yet coördinate, and by establishing a representative system and creating a Supreme Court of extraordinary powers, the framers of the Constitution believed that they had made democracy not only all powerful but at the same time safe and that they had secured it from gradual conversion into autocracy on the one hand and from destruction by too rapid motion and too quick response to the passions of the moment on the other. If ever men were justified by results they have been. The Constitution in its development and throughout our history has surpassed the hopes of its friends and utterly disappointed the predictions and the criticisms of its foes. Under it the United States has grown into the mighty republic we see to-day. New States have come into the Union, vast territories have been acquired, population and wealth have increased to a degree which has amazed the world, and life, liberty, and property have been guarded beneath the flag which is at once the symbol of the country and of the Constitution under which the nation has risen to its high success.