The Living Constitution [1]

By Charles A. Beard

THE Constitution of the United States has been called a "sheet anchor," a "lighthouse," an "ark of the covenant," a "beacon," and a "fundamental law." The terms used in the document itself are of necessity abstract—House of Representatives, Senate, President, power, property, due process, life, liberty, and so forth. They lend themselves to metaphorical and figurative treatment, and our orators have taken full advantage of the opportunity.

By the use of analogies, those who discourse on the Constitution turn symbols to many ends. If the Constitution is a sheet anchor, then it may be "lost." If it is a lighthouse, then a storm may bring destruction. If it is an ark of the covenant, the wicked may steal it away. A beacon can be "extinguished."

Symbols Apart from Reality

These symbols are supposed to represent some reality, something tangible, a substance which all good and wise men can see and agree upon. Yet in truth they are mere poetic images that correspond to no reality at all, and the employment of them is sheer animism. They contribute nothing to our knowledge of the Constitution as practice. On the contrary they confuse thinking and reduce discussion to the level of sorcery and thaumaturgy.

The distinction between "fundamental law" and "statutory law" is, of course, substantial, as made manifest in judicial and administrative practice. Yet law itself is bewildering abstraction. There is something in it, but the reality is hard to grasp. When we speak of "a government of law, not of men," we doubtless enunciate a principle that is significant for life. If anyone doubts its significance, he has merely to observe the operations of the Hitler government in Germany, where masterful leaders make their own laws and judicial decisions as they go along, to suit their immediate purposes. When public authorities are not bound by any established laws or rules of action, they can simply make their own whims, passions, and convictions prevail over the thought and action of their subjects. Tyranny is the correct definition of such a "system."

But if the principle of government by law is pushed too far, it becomes unreal. The distinction between the commands of law that are inescapable and the commands that are open to variant interpretations is lost. The rôle played by men as legislators, administrators, and judges is thrust out of sight. And even the great principle itself is opened to the charge of falsity—is weakened even where it should be supported. The fiction that the legislator or the judge is a puppet moved inexorably in the right and only possible direction by an unseen force called "law" is too palpable to command the respect of that part of the public on which government must rely for support. Theory cannot indefinitely prevail unless in some respects, at least, it conforms to practice.

[1] For further discussion of the problems treated in this article, the reader is referred to Nos. 27, 52, 60, and 172 in the bibliography at the end of this volume of The Annals.—Editor's Note.

Putting imagery entirely out of the window and conceding that there is something in the idea of law, we are led to inquire how much of the Constitution is law beyond the peradventure of a doubt. Even a glance at the document reveals that many of its commands are unequivocal. There are to be two Senators from each state. The President is to hold office for four years. Representatives are elected for a term of two years. There are many clauses of the Constitution that are commands of law so clear that neither the wise and good nor the foolish and crooked can fail to understand them and to agree upon their meaning.

AMBIGUOUS EXPRESSIONS

But important clauses of the Constitution, apart from those dealing with the machinery of government, are not unequivocal commands of law, utterly beyond variant interpretations. Consider these expressions: legislative power, executive power, judicial power, general welfare, commerce among the states and with foreign nations, necessary and proper, promote the progress of science, full faith and credit, republican form of government, freedom of speech or of the press, life, liberty, property, due process of law, unreasonable searches and seizures, impartial jury, cruel and unusual punishments, powers not delegated to the United States by the Constitution, privileges and immunities, race, color, or previous condition of servitude.

Each of these words or phrases covers some core of reality and practice on which a general consensus can be reached. But around this core is a huge shadow in which the good and wise can wander indefinitely without ever coming to any agreement respecting the command made by the "law." Ever since the Constitution was framed, or particular amendments were added, dispute has raged among men of strong minds and pure hearts over the meaning of these cloud-covered words and phrases. If such words are "law," then moonshine is law. Hamilton was right when he wrote in his memorandum on the constitutionality of the Bank that such phrases cannot be made the subject of purely legal tests, but must be interpreted by good conscience in the light of expediency.

Now, these vague words and phrases must be interpreted by men and women who have occasion to use them, as members of government and as citizens urging policies on government. The words and phrases cannot rise out of the Constitution and interpret themselves. Some human being, with all the parts and passions of such a creature, must undertake the task of giving them meaning in subsidiary laws and practices.

This is obvious enough, even to Macaulay's schoolboy. It seems absurd to have to mention the fact. Yet there is a deep-rooted tradition in the United States to the effect that the Constitution, from the Preamble to the last word of the latest amendment, is so clear, positive, and unequivocal that even the wayfaring man cannot err in understanding and expounding its commands. "Great constitutional lawyers," eminent politicians, leaders of the bar, columnists, editors, and thousands who ought to know better talk that way. They claim to "know" the Constitution. They can tell us just "what it is." They can give the "right" interpretation, and disclose with infallibility just wherein any opposing interpretation is "wrong."

It is not too much to say that this cult of constitutional certitude is the

prevailing cult of the American Bar Association and its subsidiary organizations. To be sure, intelligent members of the bar seldom talk that way privately, but they permit the creed to pass as the gospel cherished by the nobility of the robe. In years to come, probably, it will join the themes celebrated by Erasmus in his *Praise of Folly;* but for the present it is the faith displayed by the legal profession on all ceremonial occasions. Hence its absurdity must be pointed out whenever an effort is made to get a realistic understanding of the Constitution as it exists in theory, law, and practice.

A LIVING THING

Since most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings, it follows that the Constitution as practice is a living thing. The document can be read at any moment. What the judges and other expounders have said in the past can be discovered in thousands of printed pages. From the records of history we can get some idea of past practices under the instrument. But what the Constitution as practice is today is what citizens, judges, administrators, lawmakers, and those concerned with the execution of the laws do in bringing about changes in the relations of persons and property in the United States, or in preserving existing relations. The Constitution as practice is thus the contemporary thought and action of citizens and authorities operating under it. It is the living word and deed of living persons, positive where positive, and subject to their interpretation where open to variant readings. How could it be otherwise? How could intelligence, as distinguished from sophisticated interest, conceive the document as practice in any other terms?

Indeed, it seems utterly impossible to construct any mental picture of the Constitution that does not include the human personnel engaged in formulating and discharging functions under its provisions. Surely no one means by the term "Constitution" merely the engrossed copy—the original parchment deposited in the national archives in Washington. The words "House of Representatives," "Senate," "President," and "Supreme Court" may be read, recited, and sung, over and over, but no understanding comes out of that operation. The old battle over realism and nominalism still rages.

CONGRESS CONSISTS OF PERSONALITIES

How can anyone think long about the House of Representatives without drawing into consideration the membership and the proceedings of a particular House or a succession of Houses? And what boots it to think of a House apart from the personalities in the majority and the opposition—apart from the Speaker, the floor leaders, the chairmen of committees, and the whole hierarchy of the organization of persons engaged in the business of legislation?

Then take the Speaker alone. What image appears in the mind when the office mentioned in the Constitution is cited? Surely no understanding comes from a blurred picture of some being sitting at the high desk with gavel in hand. Meaning arises only when we observe or study the policies, rulings, and decisions of the long line of particular Speakers. And none will contend that a Byrns is a Longworth, that a Champ Clark is a Joe Cannon, that a Tom Reed is a Henry Clay. All have been governed

by some common principles, but each has brought something unique to the office and has given some form, color, and direction to the proceedings.

The same is true of the Senate. It has ninety-six members, but what a variety of personalities! None save a shadow conception of the Senate under the Constitution can be formed without recalling separate sessions of Congress and the great figures which have occupied the upper chamber—Robert Morris, Henry Clay, Daniel Webster, John C. Calhoun, Sumner, Lamar, Hoar, Aldrich, La Follette, Spooner, and Norris, for example. From the historical point of view, the Senate is a vast collection of biographies. Practically, it is an organization of diverse personalities. From year to year the themes they discuss and the actions they take vary widely. It is these living beings that constitute the Senate—the interests they represent, the habitual assumptions they make, the ideas they expound, the passions and prejudices to which they give expression. From generation to generation the Senate changes. The Robinson-Bankhead combination of the New Deal is not the Hanna-Lodge combination of the Square Deal. Even those Republicans who seem to believe in a fixed and unchangeable Constitution would like to change this feature of its manifestation.

THE PRESIDENCY

Then pass to the other end of the Avenue. The Constitution provides for a President and gives him some executive powers, but the term "President" is colorless until bodied forth in a living personality. Many things may be said about the President as an abstraction—his constitutional and statutory duties—and yet no one will contend that the meaning of the office is to be found merely in statutes and executive orders. Nor will anyone contend that the President is President and that it makes no difference who holds the high place. The presidency under the Constitution is one thing when occupied by a Jackson, and something else when filled by a Taylor. The views held and the powers wielded by Theodore Roosevelt were far different from the theories of office entertained and the actions taken by Coolidge.

All Presidents perform some duties that are similar if not identical, but these are in the main routine. It is his ideas, his force of character, his conception of his office, his voluntary assumption of responsibilities, that make each President unique, and his office under the Constitution is different from that of his predecessors and successors. Who has been the one true, right, correct President under the fundamental law? Washington? Or Jackson? Or McKinley? Or Cleveland? The very thought suggests the unreality of the conception that the Constitution is mere law—positive command. Article II of the parchment may repose peacefully in the archives, but the Article that counts most in real life is the personality occupying the White House.

THE LEGAL MYTH

It is in the Supreme Court of the United States that the fiction of mechanical and unhuman certitude most generally prevails. According to the legal saga, the Court always says exactly what the law is, never merely what the judges would like to have it. Justice Roberts expressed the creed in the AAA case last January when he said that the Court has only the duty of laying the Constitution which is invoked beside the statute which is challenged and of deciding "whether the latter squares with the former."

The term "squares" is borrowed from the certitude of physical measurement. There is never any doubt whether one thing "squares" with another or not. The Court never declares an act of Congress invalid if it has any doubt, even though four of the judges have decided doubts. Such at least is the myth which is celebrated and praised by intelligent men who would not make use of any such "logic" or "reasoning" in any of the practical affairs of life.

As a matter of fact it is difficult to believe that anybody takes this myth seriously except on ceremonial occasions. Surely there is no man on the bench or among the authorities empowered to appoint judges who would publicly declare that it makes no difference who is selected for the Supreme Court so long as he has the requisite *knowledge* of the law. A business firm about to choose an engineer to "square" the timbers of a bridge does not inquire whether he is a Republican or a Democrat, of the right or the left persuasion. It merely wants to know whether he knows. So far as the records go, every judge appointed to the supreme bench since the Constitution was established has been scrutinized by the President and the Senate with some reference to his general conceptions of public policies. President Harding did not appoint William H. Taft without any knowledge of Taft's past career and views. Morris Hillquit was a better lawyer and a far more highly educated man than several men who have served as Federal judges, but no President ever thought of selecting him for his knowledge. Even the fictionist who says that the judge *knows* the law and does not *make* it would cry out against putting the most learned Socialist in the country on the Federal bench. George W. Wickersham thought that the appointment of Brandeis was little short of a crime. He did not like Brandeis's ideas.

Indeed, with a mind delicately attuned to the obvious, Justice Roberts did not venture to say in the AAA case that all the Court did in "squaring" the Statute with the Constitution was to announce the mathematical and mechanical result. "All the Court does, or can do," he said, "is to announce its considered judgment upon the question." Now into a "considered judgment," other things besides exact knowledge enter—considerations of ethics, wisdom, and policy. Justice Stone, possessing doubtless as much knowledge as Justice Roberts, reminded his colleague that judicial power may be "abused," that "the only check on our own exercise of power is our own sense of self-restraint," and that it is not the business of the courts "to sit in judgment on the wisdom of legislative action."

HUMANITY OF THE SUPREME COURT

Like Presidents and members of Congress, judges of the Federal courts are human beings, with "all the parts and passions of men." Most of them have taken a more or less active part in partisan politics previous to their appointment. To say that on mounting the bench they cease to be human beings and cut themselves off from all that they were before is to express a belief in miracles. On constitutional points that are open to various interpretations, they will be influenced by their preferences. No one who has ever sat in the chamber of the Supreme Court, listened to the tremulous tones of Counsel, heard the questions of the judges, and followed the tones of judges in reading opinions, majority and dissenting, will imagine for a moment that he is attending a dem-

onstration in mathematics. Judges as living men weave their traditions, sentiments, attachments, and convictions into the interpretation and decision that is the Constitution for the moment—until by discrimination or reversal, or both, the Constitution becomes something else.

FLEXIBILITY OF THE CONSTITUTION

So we seem led to the conclusion of Judge Cooley that the Constitution, apart from its few indisputable passages, is what living men and women think it is, recognize as such, carry into action, and obey. It is just that. What else could it be?

The flexible character of many constitutional provisions is not to be regarded as an element of instability in our constitutional system, but rather the contrary. The fathers intended to leave room for interpretation, growth, and modification within the letter of the Constitution. This prevision on their part has made it possible for the document drafted in 1787 to survive almost intact to the present day. Had every clause of the document been as rigid as those which prescribe the term of the President or of Senators, the whole fabric would probably have been shattered long ago. Even conservatives should regard the flexibility of our Constitution as its most admirable feature, and in fact they do when they are in power at Washington.

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