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THE AMERICAN TRADITION AND ITS IMPLICATIONS FOR CONSTITUTIONAL LAW

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TRADITION is a peculiarly happy theme for us to consider at this gathering to open a new house of learning in the law. Our theme is not retrospection alone. We, who have received our tradition from those who went before, hold it a little while, and in our turn pass it to our waiting successors. We most fittingly seize this moment from all the busyness of life to look backward, to remind ourselves what we have, and, looking forward, to see in the mists of times still to come what we can expect for our children's children. And surely our constitutional system itself is a great theme in this contemplation of our past, and in this forecast of our future.

This house we have come to dedicate is strongly built. For its steel and its masonry surely a half-century would be a short life. We wish that it may stand as long as some of the venerable university halls in Europe. But we need foresee no such centuries-long span of existence to realize that this hall will see, on the calendar, numerals which would seem to us strangely great. In those future years this house will see alterations of many other things, things which we have come to accept as necessary because to us they have been familiar. Young men who next year begin the study of law in this building will return, notable alumni in their early and vigorous sixties, to celebrate the fortieth anniversary of their graduation and the centennial of the school's establishment. That will be in June, 2005. To those returning sons, the years since they left Fordham will seem as brief as, next June, the years that have passed will seem for the class that entered in 1905. Today, in this place, the past is all recent and the future is only tomorrow.

At such a moment we can appropriately appraise the constitutional tradition under which we live, under which our laws and our institutions have developed. We can most properly ask ourselves what were essentials in the constitutionalism of John Marshall, as he began his Chief Justiceship in 1801; ask how these principles fared during the century ending in 1901; ask how they have fared in the next sixty years only now completed. Looking backward, we may see a past course which announces our course still to come. The direction of our movement may predict our constitutionalism as it will be when this school shall have completed its first century.

The essentials of the Founding Fathers' idea of a free and viable gov-

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ernment cannot be discerned simply by making a topical analysis of the Constitution of 1789 and of its first ten amendments. The constitutional document is intended to provide solutions for specific problems, solutions sought under great principles; but it is not a statement of those principles themselves. Our constitutionalism is far older than that writing. The word "constitution" can be used to describe not only a document, but rather a body of traditional doctrine. Taken in the English usage, and in the usage of our colonial forefathers, it appropriately means the theory of our polity, the group of concepts making up our philosophy of government. In that sense our Constitution is far older than the American experience of our people. We may well, on this day of good omen, remind ourselves of those concepts, those curiously self-contradictory aspirations, those checks and balances, rightly so called in a sense far more profound than they are taken in our habitual usage.

First among them, I suggest, is a deep, insistent belief, clung to through all doubts, through all dismay at indications of human frailty and selfishness and political unwisdom—belief in the right of our people to seek for their own political and economic salvation, to contend for it in competitive persuasion, and ultimately to determine it for themselves. This is a doctrine founded on an optimistic trust in mankind, on a faith in man's essential goodness and in his evolving wisdom. Though we might, we do not choose to state this doctrine as the constitutional privilege of our people to blunder, to be selfish, to go to perdition in their own way. In our theory we are still the children of our country's happy youth: let us only be free from all tyrants, we still tell ourselves, let us only have full liberty to seek our own salvation; then we shall certainly find it in all its inevitable goodness. We sometimes remind ourselves, for the sake of the rhetoric, that this freedom involves possible choice of evil ways; but this possibility we state only to dismiss such a choice as completely incredible. If free, we shall surely be good, and wise, and happy. I remind you a little sourly that today in much of the world this is by no means taken as an obvious truism, an accepted canon of political theory. Our whole concept of the predestined benign result of the first amendment, of free competition of ideas, of dissent and persuasion, argument and partisan pressure, is by no means everywhere taken as *datum*. But among us the happy ending is still an article of faith. We stoutly and persistently assert that where truth and falsehood grapple, contending for majority assent in free and open encounter, truth will not be put to the worse, and free men will freely choose the right. This doctrine underlies our explicit guarantees of free expression and free political participation; but the doctrine itself is far wider than any of its phenomena.

In our constitutional antithesis of beliefs we counter this doctrine

with another commitment, equally deep—a belief in rightness which is independent of majority will. Majorities, we profoundly know, can be wrong. We continually seek for institutions to find rightness. We work and rework forms of words to guide us in this search, trying one formula after another, as successive phrases one by one prove to be only repetitiously synonymous. Coke's 1610 "common right and reason" in *Bonham's Case*;[1] Marshall's "nature of society and of government" in *Fletcher v. Peck*[2] two hundred years later; Van Devanter's "fundamental principles of liberty and justice" in his 1926 *Hebert*[3] opinion; Cardozo's 1937 "concept of ordered liberty" in *Palko's*[4] case; Frankfurter's "canons of decency and fairness" in his 1947 *Adamson*[5] opinion; none of these formulations quite satisfies. Still under each lies a faith much older than the oldest of them, a conviction that even if we cannot state the difference in a discriminating test phrase, wrong differs from right; and we know that our governors and our lawmakers, being fallible men, can do wrong even when they speak with the voice of the multitude.

In the written Constitution we find this aspiration latent in the clauses requiring government to act only with "due process." Today, conjecture as to what the eighteenth century draftsmen of the fifth amendment intended by those words has little importance. What the congressional committeemen may have meant by them in 1866 when they formulated the fourteenth amendment is an obscure mystery. Yet some idea of essential rightness we have found we must have in our Constitution; the due process clauses have absorbed the idea.

A third constitutional belief is the equality of man—a difficult doctrine, which Jefferson stated as self-evident in the Declaration of Independence, but which eleven years later the draftsmen of the Constitution not only omitted, but countered by express provision recognizing human slavery.[6] Even today, though slavery has been gone nearly a century, we do not mean just what we say in the equal protection clause.[7] Government necessarily must treat some persons differently from others—children differently from adults in those matters where tender years call for

1. Dr. Bonham's Case, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).
2. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).
3. Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
4. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
5. Adamson v. California, 332 U.S. 46, 67 (1947) (concurring opinion).
6. U.S. Const. art. I, § 2 provides: "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and . . . three fifths of all other persons." U.S. Const. art. IV, § 2 also provides for the reacquiring of fugitive slaves.
7. U.S. Const. amend. XIV, § 1.

difference; women differently from men where appropriate; in public education, the intellectually alert differently from the slow; in the administration of justice, the prospective incorrigible differently from the prospectively regenerated criminal. One perceives our doctrine to be that all men are created equal as to those matters in which government justly should treat men alike; and so at length we come to see that this doctrine, like that of due process, turns on the elusive formulation of that which is just. We have committed ourselves, and rightly, to complete equality between men in respect to their different races and religions. But, so familiar that we scarcely perceive it, we hold with near unanimity to governmental protection of economic inequality. In 1791 we grouped property with liberty and life when we listed those things especially protected by the fifth amendment; we restated this conviction in 1868 when we adopted the fourteenth. To equality, as to liberty, we aspire as an ideal; but in the meaning, the effectuation, the distribution of that ideal we have found a multitude of differences.

A fourth constitutional postulate is that government must be fragmented lest any part of it be too strong, lest any group of political rulers too completely control the citizen and his nonpolitical associations, his Church, his labor union, his family, his school, his university. Inherent in the calculated diffusion of power in our constitutional arrangements, in our federal structure, in the ninth and the tenth amendments, in the separation of governmental powers, is a conviction of the value of privateness, of the worth of the nongovernmental, of the richness of individualism. Here is another great antithesis of constitutional theory, so widely accepted that it is often unperceived. It generally goes unstated, for in a majoritarian polity the doctrine of cherished individualism, of protected privateness, of defended nongovernment, is the counterbalance for egalitarianism. Our diffusion of power, the better to secure liberty, postulates the right to excel, if excelling results from natural ability; it assumes as *datum* competition with others in a contest for private achievement; it accepts, as desirable, inequality derived from unequal talents. Men comfortingly hide from themselves this antithesis, by praising "equality of opportunity"—meaning that institutions of government should ideally be so arranged that the naturally talented, the men of native endowments, be not by political means inhibited from excelling the less gifted. Here again is the optimism of the enlightenment. Here is our commitment to equal educational access that it may foster native superiority of gifts. A half-century ago I became a devoted reader of the books of Horatio Alger, Jr., now little sought, read only occasionally by literary antiquarians who are apt to speak with a bit of superciliousness of the author's repeated theme, a poor but able boy's

success. Rightly considered, this once-celebrated teller of tales stated, again and again, a fundamental aspiration of our constitutional theory. The gifted individual, so we have thought, best uses his talent when governmental power is segmented, when he is not constrained to mediocrity by the too-concentrated political force of a less able, envious majority.

Precisely because such underlying theses of our constitutional system are not expressly so written in the charter, analysis of our theory is difficult; different men will evaluate our aspirations differently at any one time; the same man's views will change with years and circumstances. But for the moment, unsure of my completeness, I think that most of us hold at least these four doctrines, and hold them at the same time despite their contradictions. Surely these four are a great part of the constitutional tradition we have received. Surely we do well, this afternoon, to ask ourselves how they will fare during the next four decades, what men will think of them when the sons of this school gather to celebrate its centennial year, and what part the wisdom and learning encouraged by our schools of law will play during those years to come in guarding those ideas, in developing and applying them, and perhaps in changing them to fit changed conditions of life.

The theory and the law of our constitutional system, like all legal theory, grows out of the experiences, the beliefs, and wants, and the fears of our people. So to foresee our constitutional course, one should seek to foresee what will happen to us economically, socially, politically, in the years between 1961 and 2005. Foremost, it seems to me, among the governmental facts that will face us, is the continuing prospect of war. For much of our national history we have been able to enjoy the comforting self-assurance that all things having to do with warfare were atypical, occasional, brief interruptions of our normal functions of subduing a rich and abundant continent, and turning its good things to our use. A man who entered on the study of law in the early twenties of this century will remember the relief with which the country greeted Warren Gamaliel Harding's campaign slogan, "Back to Normalcy," as a contrast to a year and seven months of the war just then ended. The lawbooks of the time gave little attention to warfare as a constitutional factor. We then read and received with comfort the words of Mr. Justice Davis in his *Milligan* opinion, handed down when Appomattox was fresh history:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions

can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . .[8]

Our very phrase, "a state of war," carries forward this idea of intermittence, of definite separation from the norm of peace. But popular usage of words can sometimes reveal a widespread sensed wisdom, and today's phrase "cold war" indicates the impossibility of survival of *Milligan* in its literalness. Indeed the generous theory of *Milligan's* case was probably an overstatement even in its own day. It becomes the more unreal in a time when our daily tabletalk concerns the most effective design of entrenchments to protect our families against sudden attack delivered at home. Hamilton in 1787, arguing in the Twenty-fifth Federalist for federal power to maintain a standing army, wrote in irony of our impossible situation if that power should be denied:

the United States would then exhibit the most extraordinary spectacle which the world has yet seen,—that of a nation incapacitated by its Constitution to prepare for defense, before it was actually invaded. As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for, as the legal warrant to the government to begin its levies. . . . We must receive the blow, before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger, and meet the gathering storm, must be abstained from, as contrary to the genuine maxims of a free government. We must expose our property and liberty to the mercy of foreign invaders, and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation.[9]

No real prospect of change toward international trustfulness seems apparent in the prospect of the next half-century. One hears and reads of the "garrison state" as an ill-defined horror, inevitable if we assume a position in readiness, whose very name demonstrates that it is intolerable for our people. But surely the constitutional problems of the next few generations will not be solved by epithets. Man's most appalling problems are ghastly in their simplicity; only the solutions are complex and obscure. The most profound influence on the constitutional system of the United States during the lives of our children and our grandchildren will be our national necessity either to trust in those nations we dare not trust, or to organize our wills, our lives and our resources with wisdom, steadfastness and good heart, to sustain the perilous existence which man, like other living creatures, has found to be his lot through uncounted past generations. We shall not escape the necessity of choice by any rhetorical exorcism; not by repeating to one another:

8. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866).

9. The Federalist No. 25, at 167 (Bourne ed. 1937) (Hamilton).

> For God's sake, let us sit upon the ground
> And tell sad stories. . . .[10]

Rather, during the years ahead, will it be the high duty of the men of this and like centers of thought and learning so to fashion and guide our polity that we shall keep what is essential and generous in our constitutionalism, and still stand to arms with those neighbor-nations who will stand with us.

Another change in our state, already upon us but only coming to be recognized, is our turning to life in crowds. Our grandchildren must cope with this fact; we have not quite yet brought ourselves to do so. We are suddenly discovering, to our somewhat naïve surprise, that most of us are living in fantastically large cities, whose inhabitants pay little attention to the boundaries of what we still like to call sovereign states. By infinitely complex organizations of men and machines we supply ourselves in these immense aggregates of people, with the necessities and luxuries of existence. As our megalopolitan cities grow larger and larger, they compound as they grow, both in their mechanical and their animate complexity. This swiftly increasing corporate interdependence of man is a social and political fact which, equally with wars and rumors of wars will govern the constitutionalism of the generations ahead. More than a quarter of a century ago a President of the United States, in a moment of frustration at a decision of the Supreme Court, reminded a press conference that the economic arrangements prescribed in our Constitution had been written in a time when communities were largely self-supporting, in the eighteenth century, in the "horse and buggy days." He posed as the choice then before the country—only a rhetorical choice, surely—a return to a government of discrete, horse and buggy ineffectiveness, or an advance to a government whose central national power would control its complex economy.[11]

The choice of central controls, then made by a country with a population of one hundred thirty million, has become more obviously inevitable as our people have since added fifty million to their numbers. The necessities of centralized economic organization will increase as the nation grows ever more crowded, more urban, as its various regions grow to be more and more interdependent while the next generations follow in trace. Our once comfortable confidence that there will always be more land, more metals, more fuel, more food, will be troubled by increasing

10. Shakespeare, King Richard II, act III, sc. 2, l. 151-52.

11. Press Conference by Franklin D. Roosevelt, May 31, 1935, in 4 The Public Papers and Addresses of Franklin D. Roosevelt 200-21 (1938). The subject of the conference was the Supreme Court's decision in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

doubt, by consciousness that we must ration ourselves. And the pressures that have pushed our cities outward and outward, ignoring state boundaries, surely will, to an extent now barely perceivable, cause the economic organization of mankind to transcend the boundaries between nations. As I write these pages, the newspapers tell of one of our aircraft flown at a speed of more than four thousand miles to the hour, and tell of the President of the United States suggesting new modes of extensive economic cooperation between our nation and our friends abroad. These two facts are not disconnected. No one who scans our constitutional history can escape the conclusion that interdependence of nations and swift communication between them deeply affect our internal law. A treaty with Switzerland changes inheritances in Virginia;[12] a treaty with Canada restricts wild fowl shooting in Missouri;[13] an executive agreement has a bearing on an asserted governmental taking of property in New York.[14] But I leave to wiser men the future trajectory of international constitutionalism. There is enough for me to cultivate in our own garden.

The new school in which we meet today will thus, we are certain, see swift changes in the life of our people. What effect will these changes have on the four fundamentals of our constitutional tradition which I earlier discussed? On the majoritarian control of our government? On our higher law tradition? On our aspiration to the equality of man? On our calculated weakening, by division, of political government in order that we may more freely go our own way one by one, or in private groups?

In this last I foresee the greatest changes. The exigencies of life under arms will not permit, to the extent we have thought appropriate in past years, either the division of powers between nation and state, or the separation of central powers between the Congress and the President. This movement away from fragmentation of government is not unprecedented among us. In Madison's Presidency we discovered that warfare was a matter for central control, inconsistent with option in some of the states to choose little participation in the campaigns and that participation lukewarm. And during a much later war, fought in a far Asian peninsula, under circumstances which the constitution makers of the 1780's could scarcely have predicted, we found that constitutional

12. Treaty with the Swiss Confederation on Commerce, Friendship, Establishments, and Surrender of Criminals, Nov. 25, 1850, 11 Stat. 587, T.S. No. 353; see Hauenstein v. Lynham, 100 U.S. 483 (1879).

13. Treaty with Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628; see Missouri v. Holland, 252 U.S. 416 (1920).

14. See Russia v. National City Bank, 69 F.2d 44 (2d Cir. 1934).

limitations on the President's powers as compared to those of the Congress and unrestricted private power of decision by organized labor to work or to concertedly refuse to work, could produce grave difficulties in the economic mobilization that is essential to support modern war, and to support preparation for possible war.

I remember President Lincoln's "grave question whether any government, not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies,"[15] but I do not expect to see it answered by an overruling of the *Steel Seizure*[16] case. I do not expect a judicial repudiation of Justice Jackson's trenchant remark, "that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants."[17] Rather if similar but even graver crises arise in the future, I expect to see followed other courses that were suggested in the same opinion of that wise one-time Attorney General. He there wrote:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[18]

As crisis succeeds ensuing crisis, I expect to see the Congress recognize that emergency has ceased to be occasional and has become a continuing condition of our national life. We shall, I think, see reference to Chief Justice White's comforting statement in *Wilson v. New*,[19] written on the eve of the first World War, made as he brushed aside an argument from *Ex parte Milligan*:[20]

> [A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.[21]

We shall see much ready congressional delegation of broad discretionary power to the President, and for this we shall have ample precedent in congressional practice, and in such statements as that of Mr. Justice

15. Lincoln, Response to a Serenade, Nov. 10, 1864.
16. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
17. Id. at 643-44 (concurring opinion).
18. Id. at 635.
19. 243 U.S. 332 (1917).
20. 71 U.S. (4 Wall.) 2 (1866).
21. 243 U.S. at 348.

Sutherland in *Curtiss-Wright*[22] stressing the President's access to confidential information affecting our relation with foreign nations, which

> discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.[23]

These prophecies have been stated in a context of military vigilance; but whether the impulse to change be possible war or the difficult organization of life in peace, the same tendency to less diffusion of powers among the states, and concentration of national powers in the Presidency, will, I think, be progressively more evident in the whole governmental process which controls the economy. Our swift increase in numbers, our increasing crowds in great interstate cities, makes our whole maintenance of existence more vulnerable because more dependent on the continued efficient functioning of our human organizations and on their technological devices, which though more and more activated, controlled, directed, and stopped by only a few experts, are essential to feed, transport, and serve vast multitudes. Here, too, stoppage by any group becomes the occasion of public crisis. That which was tolerable and of merely private concern among the simple plural human organizations of our early days, becomes unbearable, a matter of necessary governmental concern, as we grow more vulnerable. And here, as in military measures, a habit of statutory delegation of wider and wider powers to the executive becomes probable.

To state this group of consequences is not to rejoice in them. Recognition of the inevitable is not the same as satisfaction. We, who can still remember a little of the quiet life before 1914, will probably wish it back again, as time erases recollection of its occasional parochialisms and its unconsciousness of wrongs we now recognize. We are apt to remember only its freedom from the greater troubles we now face, and which our children's children will have to face hereafter.

And in all this, what of our other great commitments? What of our hard-won right to govern ourselves by our own choices; of our aspiration to govern justly; of our urge to equality in race and faith and in political participation? Are these to be diminished by the concentration of power inevitable in our generations of continuing crisis? I hope not; and indeed the future may see these good aspirations increasingly fulfilled. Shared peril breaks down the barriers between man and man, as many of us have learned in active warfare. And I see no prospect of backward steps on the road toward equal opportunity, based on individual merit, for all our people, though I see probable changes in our estimate of the in-

22. United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).
23. Id. at 321-22.

dividual prizes for which opportunity opens. I see increasing limitation, widely applied by the taxing process, on the earnings and accumulations of everyone, a process already well under way. More and more costly machines of war which we must have if we are not to stand defenseless; elaborate transportation devices which keep our spreading cities alive, and which can only be built and maintained at public cost; the massive dwellings of megalopolis, which in one form or another are more and more dependent on governmental subsidy; the services of education, health, cultivation, and amusement which our people more and more demand from political rather than private sources; the increasingly complex and costly machinery of government requisite to keep this multiple activity ordered; all these will absorb a larger and larger share of our aggregate effort. And this will measure itself in taxes, inevitably heaviest on the most successfully acquisitive. Thus we shall, I foresee, continue our present movement toward economic egalitarianism. In the year 2005 success will be measured more by control of power than by magnitude of possessions; we shall remember the words of Mr. Justice Holmes that "the prize of the general is not a bigger tent, but command."[24] If this change turns more and more of our ablest people to the devoted service of government, we may come to welcome it.

I expect no restriction of our popular access to political power. The greater the role of government, the greater our change to political means to do those things which our fathers felt suitable only for private endeavor, the more conscious our people will be that whatever governmental mechanisms they choose for these functions must be within their ultimate over-all control. There are signs, as this is written, that the Supreme Court may reexamine the constitutional questions presented by statutory inequality of political access even when unrelated to race;[25] signs that possibly the Court may abandon the theory that this opportunity of participation in government presents a "political question," beyond proper judicial scrutiny. And concentration of central authority over national matters will probably not take from the citizens' hands those questions of government primarily of local concern even where this would be constitutionally possible. I do not expect to see us give up government either for the people, or by the people.

And assuredly no change in our circumstances will end our commit-

24. Address by Justice Holmes, Harvard Law School Association of New York, Feb. 15, 1913, in Holmes, Collected Legal Papers 293 (1920).

25. In Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959), prob. juris. noted, 364 U.S. 898 (1961), the court held that it had no right under the equal protection and due process clauses of the fourteenth amendment to grant a citizen voter's petition to declare unconstitutional a 1901 reapportionment act.

ment to justice and right in government, no matter what the mechanism by which we choose to govern ourselves. On this hangs all our law. This, before and after all, is an unchangeable article of our constitutional faith.

More than three centuries ago in Massachusetts, a short distance from where these words have been written, some pioneers, beset with hardship and peril, found it essential to build a log palisade around their little settlement on the Charles River, to protect their lives, their families, and their few possessions. Among them every man had to be a soldier on call; every woman had to nerve herself to sustain danger and the prospect of death. And yet there they founded a college which grew and developed into a great university. Here at Fordham we have come together, in another time of anxiety and peril, to signalize the dedication of a new house for legal scholarship in another great university. The building of this house, in this time, is an act of faith in the system of our fundamental law. The faith is well founded.