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SECOND SERIES



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PRESIDENT EDMUND JANES JAMES
(From portrait by Ralph Clarkson, 1919)

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INTRODUCTORY NOTE

The three following lectures form the second series delivered at the University of Illinois on a foundation established in 1935 by Mrs. George E. Frazer of Winnetka, Illinois, as a memorial to her father, the late Edmund Janes James, President of the University from 1904 to 1920. Under the terms of the gift the lecturers are chosen by a committee selected from the professors of political science and economics.

The first series of lectures, published in 1938, included a "Biographical Note of President James," by Evarts B. Greene, Professor of History at Columbia University (formerly Professor of History and Dean of the College of Literature and Arts at the University of Illinois), and lectures on: "The American State University: A Problem in Political Science," by Herman G. James, President of Ohio University; "Public Service and the University Graduate," by Leonard D. White, Member of the United States Civil Service Commission and Professor of Public Administration, University of Chicago; and "The Role of the Supreme Court in a Democratic Nation," by Robert E. Cushman, Professor of Government, Cornell University.

The lectures of the second series also have been given by men distinguished for academic and scholarly ability and for practical experience in public affairs. It is the hope of the University that publication of these lectures will be of value to the citizens of Illinois and other states in stimulating their interest in the problems of government and politics.

JOHN A. FAIRLIE
SIMON LITMAN
JOHN M. MATHEWS

THE CONSTITUTION IN TRANSITION

THE CONSTITUTION IN TRANSITION¹

By THOMAS REED POWELL

Story Professor of Law, Harvard Law School

First of all, let it be said that the Constitution always has been in transition and always will be. Thus in my title there is a charter of freedom and liberty, not only for the nation, but for myself as well. The breadth of the topic gives me liberty to roam at will over several hundred years of American constitutional history. For we have had several hundred years of American constitutional history, and not merely a century and a half, as our present-day sesquicentennial celebrations might lead one carelessly to assume.

American colonial history is American constitutional history. The independence of the colonies from each other was a constitutional fact with significances that are of continuing moment today both in sentiment and in constitutional fact. The relation of the colonies to the Mother Country was likewise a constitutional fact of far-reaching significance, not only in the colonial period, but in the organization of our constitutional federalism and in its progressive evolution. The past and the present are members one of another, as are stability and change. In the past as in the present, there is always the interaction of stability and change.

If etymology may be our mentor, "The Constitution in Transition" may include transition in space as well as in time. As the colonies varied in their internal organization and in their relation to central control in England, so did the succeeding states adopt constitutions of different types. Separation of the executive from the legislature was common to all, but there was divergence in the ways of choosing the executive and in the delimitation of executive powers. Two-chambered legislatures were predominant, but not universal. The methods of apportioning representatives among counties, cities, and towns were far from identical. The measure of local autonomy had a wide range from state to state. I well recall the shock when I first learned that there were other ways of doing things than those sanctified by my New England forebears.

These diversities of our seventeenth century organization have hardly lessened with the years. Though we have had but one departure from legislative bi-cameralism and our chief executives are now all chosen by the electorate, executive powers of appointment and of

¹Delivered March 22, 1939. With the consent of the authorities at the University of Illinois, portions of this lecture have been incorporated in an article in the *Boston University Law Review*, Vol. XIX, No. 4 (Nov., 1939), pages 509-532.

control over administrative agencies and over the legislature follow different models. No state gives to its governor the wide powers of executive control conferred upon the President. The time is not likely to come when we shall have any form of national popular choice of cabinet officers, judges, ambassadors, and members of administrative commissions. In the states, the so-called short ballot is making headway, but a state voter would still find his perplexities greatly reduced if he had to choose only a state representative, a state senator, and a pair to serve respectively as governor and lieutenant governor. The state voter in his state field would find no parallel in the disappointment of the Princeton professor who announced that he was going to vote for Governor Thomas Marshall for Vice-president but not for Governor Woodrow Wilson for President.

The striking contrasts between state and national types of government caused me some perplexity when as a prerequisite to teaching in the summer school of the University of Washington at Seattle, I had to take an oath that I would by precept and example promote respect for the flag and the institutions of the State of Washington. Had this been all, I might have got along for six weeks by promoting respect for the initiative, the referendum, the recall, and the popular election of judges for short terms, provided that upon my return to Massachusetts I could lawfully promote respect for her institutions, because she refrained from any of these democratic procedures. The difficulty was, however, that the State of Washington required me to promote respect for the institutions of the United States concurrently with promoting respect for her local departures from our national model. I had to promote respect for the judicial system of the United States, in which the judges are appointed by the executive and hold office during good behavior, and at the same time promote respect for the judicial system of the State of Washington, in which even good behavior cannot save the judges from the judgment of the electorate at frequent intervals.

To the diversities already suggested we must add the many more that we find in the kaleidoscope of local governments. About a dozen states have some constitutionally secured municipal home rule, and it takes a second edition of a very fat book to portray the resulting vagaries. I wonder whether Mr. Fairlie's students of municipal government still have to have at their finger tips all the permutations and combinations of city charters that we had to struggle with in our preparation for examinations. Single chambers and double chambers, mayor and council, election by wards and election at large, proportional representation by plumping or by single transferable vote, commission government and city manager, city and county separate and city and county combined, tax limitation, debt limitation, this type of budget and that type of budget, appointments by the mayor or elections by the

council, park boards and school boards and library boards and police commissions, some chosen one way and some another, with powers and tenure arranged in an astronomical number of different ways—such were the things poor students once had to master, trying to remember which city had which on the date of the latest edition of the textbook, and what changes had since taken place.

In this sesquicentennial triennium, when we rightly devote so much attention to the Framers and their great achievement, we must bid ourselves remember that not all government is yet centered in Washington, however much the orators and headliners may strive to excite our alarm. When we think of state government, we must remember that it is not all centered at the state Capitol. I do not know how many towns and cities and counties and districts and boards of various sorts there are in the United States, but I know that there are more than forty-nine. In numbers alone, the forty-eight state governments and one national government are infinitesimal compared with local governments. From the standpoint of direct participation in framing governmental policy, town and city and county government must enlist the services of many more citizens than do the nation and the states. In numbers of minor officials and employees, in expenditures and in extent of activities the sum total of local government is stupendous. We should not minimize its far-reaching importance and significance because it has no single focal point. Many a mickle makes a muckle.

I suggest the magnitude only to emphasize the multitude of the diversities of governmental forms and mechanisms prevailing in the United States as we observe constitutional transition from bailiwick to bailiwick. Where our written constitutions have not constrained choice, we have been prolific in experimentalism. So far as mere forms of government are concerned, one could hardly complain of a statute resembling the infamous Lusk Laws of New York, provided one remained free to advocate all forms of government that might be found somewhere in the United States. We may not have anywhere a parliamentary system closely modeled on that of Great Britain, but our city managers must retain the confidence of an elected body and there are forms of the recall which somewhat resemble the recall of a Prime Minister by an adverse vote in Parliament. When the Prime Minister falls, it is often due, less to a change in the opinion of his party supporters in Parliament than to a change in the climate of opinion in the country at large. Presidents who remain secure in their place may not remain secure in their power. Nevertheless it would be a strain to contend that we have shown much hospitality toward the most characteristic feature of the government which has developed from the government from which we successfully rebelled.

We might, if we chose, go a long way toward subordinating the President to some organized cabal in Congress. With the power of the purse and the Senatorial power to withhold confirmation of presidential nominees, there are clubs to make a President submissive if the legislative possessors choose to wield them. The only time when these clubs have been extensively exercised was the most disgraceful season of American political history. In my youth I assumed that Charles Sumner and Thad Stevens were noble giants battling for the right. I discovered the contrary when I grew to maturity and changed my residence from a Republican stronghold run by an old-soldier oligarchy. The Congressional heroes of the Reconstruction era had their powerful day but they do not shine in glory now. Yet there might conceivably arise some worthier occasions for the exertion of Congressional power and such power might be directed more wisely than it was against Andrew Johnson. The only point I am making is that the constitutional articles of partnership between the President and the two houses of Congress leave so much to the play of political forces that with respect to this partnership the Constitution has been in transition in the past and may at any time be in transition again.

This possibility of transition finds ready illustration in the contemporary quarrel over so-called Senatorial courtesy. The Constitution leaves the Senators wholly free, if they wish, to consent unquestioningly to the appointment of a present or past Senator to any other office. It leaves the Senators wholly free, if they wish, to defer absolutely to the preference of a single Senator from the state of which any nominee is a resident. If the Senators choose habitually to accord deference to such Senator, then, as Mr. Howard Lee McBain put it, the Living Constitution is that the Senator has a power to nominate and the President a power to confirm. I see no reason to call it usurpation if the Senators choose to accord such deference. Though the constitutional power of Senatorial advice and consent applies to the ultimate appointment and not to the prefatory nomination, this does not negative a power to refuse to consent if the President in making the nomination has disregarded extra-constitutional prior Senatorial advice. The whole matter is left to political practice. We may talk about wisdom and unwisdom, but we have no right to talk about constitutionality and unconstitutionality.

As to wisdom, it is to me quite clear that it is unwise to pervert power over judicial appointments into a mere tool for the building of political fences, whether by the President or by a Senator or group of Senators. Apparently in the recent situation in Virginia, the crucial issue was a disagreement as to which of two fences should profit from the leverage of the appointment. One might quote two well-known men and say, "A plague on both your houses." A political scolding for a political refusal to confirm would come better with respect to a

nomination untainted by political considerations. Yet the cross-scoldings of the quarrel may serve a useful purpose if they stimulate public opinion to oppose perpetuation of any notion that judicial appointments are the perquisites of Senators. The past evils of such a notion have been due, not to Senatorial failures to confirm, but to Presidential fears of such failures in the absence of Presidential acquiescence in the recommendation of the Senator. Senators have demanded judicial appointments as their perquisites and have secured them when the President, if unfettered, not only could but in many instances would have made much better appointments. Of one instance I know from the most trustworthy source. Reports of other instances are frequent, with good ground to trust their accuracy.

I am not talking about Collectors of the Port, District Attorneys, Collectors of Internal Revenue, or United States Marshals. I am talking about federal judges who hold office for life. If a Senator promotes the appointment of a particular person to such a judgeship in hope of future favors in return, he is seeking a judge who will be swerved from his duty in order to pay a political debt. Receiver-ships are fat things, and their fatness should not be political fat. A judge should be unfettered in appointing receivers, in supervising their work, and in fixing their fees. He should be under no suspicion of using his office to pay for getting it. If he is under a debt to an individual Senator or to a party organization of which that Senator is a leader or a follower, the possibility of suspicion must always be present. Though in fact the Senator may have picked his man solely as a reward for past services without thought of future favors, the case is hardly better. Past political activity is neither an essential nor a particularly appropriate qualification for able and disinterested judicial service. Ties of mere gratitude may still prove to be fetters or at least will be suspected of being such.

One who attends conventions of state bar associations is quite likely to hear mention of this or that lawyer who is highly commended as a most appropriate person for a vacant federal judgeship, but who is said to have no chance because of lack of the right political backing. The backing thus lacking is that of the Senator and the relevant political organization. No one knows how many superior persons have been passed over in favor of inferior ones because it was known or assumed to be useless to urge upon the Attorney General and the President a man who did not enjoy the preference of the Senator who might invoke Senatorial courtesy to prevent confirmation. No one knows how many times the Attorney General and the President have yielded to Senatorial suggestions of mediocrities because of reluctance to face a fight over confirmation. Every informed person, however, knows that both have happened more frequently than is to be desired. The case is no better if the President takes the lead in treating a judgeship

as patronage for a Senator or as patronage for a faction more disposed toward the President and his policies than is the Senator. The appointees may turn out to be able and independent judges, but the system can hardly be said to be a contributing factor toward any such happy result.

The best way for a President to free himself of the shackles of Senatorial courtesy in filling vacancies on the federal bench would be to refrain from political tactics himself and to make nominations of such undoubted excellence that individual Senators would either wish to claim credit therefor or be discouraged from instituting opposition. If judgeships became prizes for outstanding merit, with no intrusion of any requisite of political qualifications, more men of outstanding merit would make the financial sacrifice involved in surrendering the rewards of practice for the relatively small judicial salary. Notwithstanding one strikingly unhappy exception now under public notice, there has for so long been a record of such distinction in the United States Court of Appeals for the Second Circuit that men of high ability have welcomed opportunities to sit on that court and on the courts that are vestibules to it. Vacancies on the federal courts arise with sufficient infrequency to enable the Attorney General and the President to canvass fully all worthy suggestions for filling them. With general knowledge that the highest possible merit was to be sought for, merits could be widely canvassed before the actual occurrence of the vacancy. Without the slightest doubt, constitutional customs long prevailing could be modified materially with greatly improved results.

Most of the recent discussion of the controversy between the President and Senators Glass and Byrd has been conducted in terms of constitutional law. So far as constitutional law is concerned, I see no room for debate. If a majority of the Senators wish to defer to the views of two Senators and withhold consent to a proposed Presidential appointment, they have a complete constitutional power and right to do so. It does not follow that they are wise in doing so. It does not follow that we should not strive to establish a constitutional custom that would induce them to refrain from doing so wherever the President is as free from playing politics as he may desire them to be. The evil, as I have noted, is not in the occasional Senatorial negatives that attract public attention. It is in numerous positives that may seldom come clearly into view. Special considerations apply to the judiciary because of function and tenure that do not apply to other officers. In this recent controversy as in so many others, it is a mistake to think in terms of constitutional power when the genuine issues are ones of statesmanlike policy and constitutional wisdom.

Because of our written Constitution and its interpretation by the judiciary, we are inclined to overemphasize that part of constitutional

power that can be passed upon in authoritative judicial decisions. Because the words of the Constitution are so seldom added to or subtracted from, we are apt to forget how much actual constitutional change can take place within the words or wholly outside of them. The Constitution as a document knows nothing of national political parties with national conventions to promulgate a platform and nominate candidates for the presidency and vice-presidency. It knows nothing of a national campaign for the presidency in which the national candidates debate vastly more about legislative policies than they do about executive appointments and other strictly executive acts. The Constitution assumed something very different. It assumed a small selected group of men, chosen as state legislatures should direct, who should deliberate independently on the best man for the presidency. Yet the Constitution left room for the development that has come about. We could reverse that development if we wished. One constitutional transition could be succeeded by another.

Presidential leadership in legislative policy has developed naturally from the fact that the candidate for president, if we omit his coadjutor, is the only national candidate that appeals to a national electorate. Senators and representatives think primarily of their states and their "destricts." The tariff as a whole may not be a local issue, but the tariff on steel or wool or hides or shoes may be a bundle of varying local issues. There are silver states, and cotton states, and wheat states, and manufacturing states. There are preponderantly farm districts and preponderantly manufacturing districts. The national platform seeks to catch them all, and the party candidate for president must be mindful not to please too few of them. When the candidate for president seems to be catching the favor of the voters, the candidates for senator and representatives who are of his party hail him as chief and promise to follow in his train, with such reservations as peculiar local conditions may seem to make advisable. If you give due thought to what takes place in presidential campaigns, you will see why the party leader who becomes president is bound to assume the role of legislative leader. You cannot ask him to be chief proposer and promiser in campaigns and then to refrain from seeking to translate promise into performance.

Though we put upon the President the responsibility of legislative leadership, we do not leave his leadership unfettered. It is not usurpation for the President to seek to lead; but it is also not usurpation for the Congress to refuse to follow. When Congressmen complain of being mere rubber stamps, they are usually complaining that a majority of them find reasons for thinking it better to follow presidential leadership. The docility of Congress varies greatly from time to time. The honeymoon period seldom lasts eight years. It is not a matter of pride that temporary docility is not unrelated to patronage, but patronage

is not the only instigator of Congressional concurrence. Senators and Representatives are likely to have ears well attuned to the ground, and they will not long follow a leader who has lost his following in the country. The President's position as legislative leader is continually in transition. The actual powers of his office change from year to year, perhaps from month to month, certainly from proposal to proposal. And this in a vital sense is the Constitution in transition, though the shiftings are not nominated in the bond.

There are, of course, issues as to the relation between the national executive and the national legislature that give rise to litigation and to the ultimate pronouncement of the Supreme Court. The Court has told us in recent years whether the Senate may reconsider the confirmation of a Presidential nominee, whether the President may sign bills more than ten days after the adjournment of Congress, whether the President's power of removal is constitutionally safeguarded or subject to legislative restriction. On this latter question, the Court has told us different things at different times. In a case involving merely a postmaster, Mr. Chief Justice Taft went quite out of his way to assure us that the President must be as free to remove members of high administrative commissions as to remove postmasters. When there came before his successors the case of a member of the Federal Trade Commission, the prior dictum was rejected. Mr. Chief Justice Taft had been President. His successor as Chief Justice had not been, though he had come near it. The Constitution itself drew no distinction between postmasters and members of the Federal Trade Commission. The distinction which the Supreme Court drew in the second case, after denying any distinction in the first case, was a sensible enough distinction, but the transition from the first case to the second does not establish that the relation between the executive and legislative departments is an immutable one even with respect to matters subject to judicial control.

While it is established by way of generality that none of the three departments of government may encroach upon a field that is the exclusive province of one of the others, the boundaries of possible exclusive provinces are in many respects by no means clearly defined. In the words of Judge Bynum of North Carolina in 1874: "While it is true that 'the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct,' it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage,' bordering the domains of each." The generalities apply automatically only in the clearest cases, where dispute is unlikely. Beyond this, there

is the ever-present difficulty of drawing the line. In special situations legislatures and administrative officials may do things that generally only courts may do. In foreign relations and in control of the army and navy, the President has a wider immunity from legislative dictation and restraint than he has in some other exercises of executive authority. Yet Congressional control of foreign commerce can affect international relations most decisively, and the Commander in Chief of the Army and Navy must get from Congress an army and navy to command. The clear blacks and whites are much less frequent than the many intervening shades of gray. We do well not to talk in absolutes. From function to function and from field to field there is constitutional transition with respect to the specific application of the general canon of separation of powers.

If we are to maintain the essentials of our tri-partite system of government, it is clear that no department should be completely superseded by another. Each must retain a realm in which it is free from dictation or constraint. Such freedom of choice on the part of each may of course block the wheels of government if the different departments persist in remaining at odds. With a mulish President, a mulish judiciary, and a mulish Congress we would of necessity have a balky governmental team. This to a degree is what the system of checks and balances was designed to make possible. Those who insist that that government is best that governs least should have no complaint. Yet few are such complete anarchists as to push this slogan to its extreme. Those who resent what they call governmental interference with business have not resented a protective tariff against the products that compete with theirs. They have welcomed governmental protection of their property and their transactions and governmental promotion of their interests. They are more anarchistic in their talk than in their political activity. A complete and permanent deadlock between the three departments of government could hardly be pleasing to any one but a thug. What our Framers must have wished is not a permanent deadlock but sufficient independence of the departments so that there must be an accommodation between them to arrive at concurrence. Neither alone should have its way unfettered. There must be give and take and co-operation.

The co-operation of two or more departments is a very different thing from the encroachment of one department on another or the supersession of one department by another. When the legislature delegates power to executive or administrative authorities, there is no encroachment on legislative authority or supersession thereof. There is no encroachment on judicial authority so long as the judiciary still has its say when administrative action comes before it for review. If the judiciary holds that findings of facts by administrative authorities, when supported by substantial evidence, are to be accepted as final, it

gives no more weight to administrative findings than to the findings of untrained and perhaps unlettered jurors. Even juries have been known to make mistakes, as many a disappointed litigant will bear witness. All administrative power must have legislative sanction behind it. If the legislation is not explicit, it is because the legislature preferred to give latitude in filling in a blank check or in filling the interstices in a check with open spaces. Political pressure on the legislature may be directed against extending latitude to administrative authorities as well as against specific prescriptions under consideration by the legislature. Political pressure may be directed against the legislature to revoke wide powers given to executive or administrative authorities. Executive and administrative authorities exercising power delegated by the legislature are not masters of the legislature. They are its servants and agents.

The major cry against administrative authorities is a cry against government, against the only kind of government that in many instances can be effective government. In so far as it is a complaint against the particular policies the administrative commission is vested with power to enforce, complaint should be directed against the legislative policy and not against the commission. Those who complain against the National Labor Relations Board are not so apt to complain against the Reconstruction Finance Corporation. They prefer loans to banks and insurance companies and railroads to restraint on employer interference with collective association of employees. Congress has chosen both, and has chosen to put the execution of both in the hands of administrative agencies. Judicial review of the orders of the N.L.R.B. is both legally and practically much more feasible than judicial review of the lending of the R.F.C. The Labor Board is without power to enforce its orders. The R.F.C. makes its loan, and if it turns out that a horse has been stolen the barn door is not shut until afterwards. Whether the policy behind the Labor Relations Act or the Reconstruction Finance Act is a good policy or a bad policy, is not my concern. I am talking about governmental mechanisms for executing legislative policy. The enforcement of the policy underlying the Labor Relations Act requires the co-operation of three departments of government. The Act and its execution interferes with the independence of no department of government. Adverse criticism has no just occasion to speak of encroachment or usurpation. From the standpoint of the three departments of government, what we have is co-operation between them.

There remains always the question of the procedure by which administrative commissions reach their conclusions. The work of such commissions is sometimes legislative in character and effect and sometimes judicial. Both are subject to censure and condemnation by the courts. It would be hard to say that in exercising this function the

courts have been lax. Not infrequently they have seemed to deny to commissions the power they regard as sacred when exercised by juries. They have certainly rendered rate regulation much more cumbersome and ineffective than able Supreme Court dissenters have thought wise. They, like the lay critics of administrative power, have too often directed against the commission some complaints that are really founded on aversion to the substantive policy of the legislation. Nevertheless, issues of procedure are vital issues and it is well to have them emphasized. Men may disagree about what is a fair day in court, a fair trial, a fair procedure, but men should not disagree that the ideal of fairness should be zealously cherished. A procedure requisite for one kind of administrative action may not be requisite for another. There can be constitutional transition to and from the procedures for dealing with rates or labor relations or public lands, or security issues or old-age pensions or workmen's compensation, or admission or deportation of aliens, but the procedure must be fairly adapted to the fair execution of the particular governmental function, or we may be recreant to cherished canons of our polity that in these days more than ever need to be held aloft before a tragically misguided world.

While the validity of executive action under authority delegated by the legislature has been the subject of judicial pronouncements from the beginning of government under the Constitution, the inauguration and growth of subordinate administrative agencies is comparatively recent. It is perhaps not strange that courts have been inclined to view them with suspicion—a suspicion born, it may be, in part from consciousness of rivalry. It may not be pleasant to discover that other agencies may perform certain tasks better than we can. Many judges have in fact had the same suspicion of legislatures. Statutes that change the common law have often been interpreted narrowly by judges to confine the change as much as possible. Many judges have been prone to think of themselves as exercising a priestly function, revealing to the uninitiated the mysteries of a common law that derives from some almost supernatural reason untainted by the will and frailties of mere lay mortals. This may explain why judges have so often deceived themselves when they have set their judgment against that of other departments of government, but have denied that they as human beings played any part in the process. It may explain why judges in declaring legislation unconstitutional have so often insisted that it is not they that speak but the Constitution that speaketh in them.

Events of recent years have made it unnecessary any longer to contend that the voice of the Supreme Court is not wholly an impersonal one. We all know that it makes a difference whether the majority on the bench is composed of men with one attitude or of men with another. It should not, however, have been necessary for any discerning person to postpone this perception until the recent past. Marshall

has long been praised for so shaping the Constitution that we became a nation and not a loose congeries of states. Contrasts between Marshall and Taney have had their place in the school histories. The initiated know that in the early years of the Fourteenth Amendment the majority Justices of the Supreme Court led by Mr. Justice Miller were opposed to the broad censorship over state legislation advocated by the minority group led by Mr. Justice Field. Slowly the changes in the composition of the Court brought Mr. Justice Field into the ascendancy. The earlier tolerance toward state legislation was succeeded by increasing readiness to apply canons of *laissez faire* as tests of constitutionality under the vague if not meaningless contours of the phrase "due process of law." From year to year the Fourteenth Amendment was in transition away from the judicial conceptions first dominant in its interpretation.

Of late the transition has been in the opposite direction. Ten hour laws and minimum wage laws that once denied due process do so no longer. The sacred right of the employer to dismiss men for union activities and to require them to pledge themselves in advance not to become or remain members of a union is now a right no longer. In the latter years of the Taft court, recurrent majorities overruled old cases and invented new doctrines to condemn state taxation that had long historic sanction. In federal taxation there was the same striving to emasculate tax statutes and aid taxpayers in devices to avoid taxation. With the advent of the Hughes court, the tendency came to a halt. Some former cases of the Taft era were now overruled, and novel points were decided in ways that the earlier majorities would condemn. The changes can be measured by noting how frequently those who used to be in the majority were now usually in the minority. At the very last term of court, Justices McReynolds and Butler dissented together in 22 cases in which not one of their colleagues joined them. It was not thus before 1930. Then the dissenters most commonly grouped together were Justices Holmes, Brandeis and Stone. With the passing of the years, a change has come.

Of course it is not only the years that have passed. Men have passed also. A significant change came in 1930 when Mr. Chief Justice Hughes and Mr. Justice Roberts succeeded Mr. Chief Justice Taft and Mr. Justice Sanford. This change put Justices VanDevanter, McReynolds, Sutherland, and Butler together in dissent with increasing frequency. Some new decisions involved square reversals of former decisions. Other new decisions were decisions that would not have been anticipated earlier. The quartette that so long had executed fours right dissented together in the cases sustaining the regulation of milk, mortgages, and gold. The tables were turned when they carried Mr. Justice Roberts with them to condemn the Railroad Retirement Act, the New York minimum-wage law, the Municipal Bankruptcy Act, the

Coal Conservation Act, and the Agricultural Adjustment Act. Only in the latter instance did the Chief Justice join them. As went Mr. Justice Roberts, so went the most important cases. The situation resembled that of an earlier era when Mr. Chief Justice White and Justices VanDevanter and McReynolds canceled Justices Holmes, Brandeis, and Clarke, and the decision depended upon which side could get two of Justices McKenna, Day, and Pitney. There was constitutional transition from case to case, as there has been constitutional transition from era to era.

A new era is now with us. How long it will last, no one knows. I recall that an eager friend of mine saw in the *Nebbia Case*, which sustained New York's fixing of minimum prices for milk, a firm assurance that the old obscurantist views of the Supreme Court had been forever relegated to the past. He thought me foolish when I prophesied that the Court would shift in the future as it had shifted in the past. Then came the minimum-wage and railroad pension cases, and for the new future he foresaw darkness rather than light. Later the light dawned for him again. Yet it was a light that could hardly have been anticipated at the time. Before the President's court proposal, it would have been a rash man who would have prophesied that we should see the Court sustaining the Social Security Acts, the Wagner Labor Relations Act, the new Municipal Bankruptcy Act, and the new Frazier-Lemke Act. When the majority apply the Wagner Act to manufacturing corporations much less preponderantly concerned with interstate commerce than was the Carter Coal Company, the minority beg the majority to tell them whether the Carter Case which condemned the Guffey Act is still law. The majority do not answer. There has been more differentiating than overruling. Hence in the Supreme Court reports there are cases that slant to the left and cases that slant to the right, cases to the right that at the moment are not followed but that may in the future again become guiding lights if later Supreme Court majorities should prefer their beacons to those that at the moment direct the judicial course.

These most recent changes in judicial attitude may, for all their diversity, be put under the general rubric of a new tolerance toward legislative experimentation. For such tolerance to have play, there must be the legislative experimentation to tolerate. It would not be unconstitutional to repeal all the laws that the Supreme Court has sustained. The Supreme Court is not putting a temporary legislative policy into the Constitution as a command merely because it fails to find in the Constitution a prohibition. One who says that the Court is really controlling the future because it will be impossible to secure legislative repeal of many of the laws that the Court sustains is merely saying either that the laws are certain to continue to enjoy preponderant popular favor or that the supposed democratic processes of our

system are not adequate to secure expression of the popular will. Those who most criticise a court for not safeguarding their interests against legislative interference are often the ones most likely to be fearful that the democratic process is in fact well adapted to secure expression of the popular will. They are apt to be the ones who in secret or in public insist that what we most need in government is an efficient way of curbing what they may call the mob. For their comfort, it can be said that we still have barriers against precipitate majority rule. Yet it still remains true that legislatures are sensitive to the views of voters and that a policy that will not work or will not prove sufficiently pleasing is not immune from abandonment or modification.

To some it is confusing that the judges who on the whole prove most tolerant toward legislative experimentation are the ones most ready to condemn the legislatures or inferior courts when by proscription or by procedure they act to curb those freedoms that we put under the general head of civil liberties. The same apparent paradox appears on the other side of the divided bench. It is Mr. Justice McReynolds and Mr. Justice Butler who have less zeal for civil liberties than for judicial curbing of governmental regulation of business. Yet on both sides the paradox is more apparent than real. There may be no chance for legislative experimentation if those who hold unpopular views are curbed in the expression of them or are subjected to other restraints because of the views that they hold. Moreover, freedom of speech and of religion and of the press have an explicitness of protection in the First Amendment that no particular economic policy can claim from the indefiniteness of the words "due process of law," or even of "obligation of contracts." If the Fourteenth Amendment is as vague as the Fifth, it still remains true that constitutional canons of liberty, wherever expressed, must get sharper contours and reinforced sanction from clauses where they are expressed most definitely. If history means anything, the Fourteenth Amendment finds its best fulfillment when it is a shield against oppression of lowly persons. And above all, if current events teach anything, they teach that suppression of thought and of utterance and of political expression is a menace that threatens what is most vital in the civilization which we have striven to beget, to nourish, and to preserve.

And so, though in time and in place, we have a Constitution that always has been in transition and always will be, though new forms succeed to old and new policies to old, there are essentials which must always be preserved. It took us generations to admit to the electorate all who have a stake in our common life, but now we have done so, and the free expression of the electorate is a cornerstone of our polity. The popular will may be something of a myth, but popular response is not a myth. So long as our chosen officials know that they must face the issue of an untrammelled popular response to their

governing and an untrammled popular choice between them and those who are proposed in their stead, we have a safeguard against absolutism and oppression that other peoples now so sadly lack. We may not like the direction toward which our temporary officials may strive to turn our ways, but we must like the fact that we can say so most vehemently, bad as it may be for the blood pressure, and that at stated seasons we can turn the rascals out. We must safeguard the right of others to talk as vehemently as we, provided they refrain from inciting other means of change than those we leave open to them and those which alone we ask for ourselves. We must continue to be ready to accept defeat, as we always have been, except perhaps once when the passions of fratricidal strife had not yet cooled. As we have always espoused democracy, we must not complain if democracy comes. Even by those of us who are now most favored, the changes which the full fruition of democracy might bring should be preferred to what our state would be if democracy were overthrown.

THE COMPROMISE PRINCIPLE
IN POLITICS

THE COMPROMISE PRINCIPLE IN POLITICS¹

By T. V. SMITH

Illinois Congressman-at-Large

*In a Colorado graveyard
Two men lie in one grave.
They shot it out in a jam over who owned
One corner lot: over a piece of real estate
They shot it out: it was a perfect duel.
Each cleansed the world of the other.
Each horizontal in an identical grave
Had his bones cleaned by the same maggots.
They sleep now as two accommodating neighbors.*

—CARL SANDBURG

Then—

*I shall have to bate my price,
For in the grave, they say,
Is neither knowledge nor device
Nor thirteen pence a day.*

—A. E. HOUSMAN

COLLEAGUES OF THE UNIVERSITY OF ILLINOIS, JUNIOR AND SENIOR:

A sense of guilt incident to the practice of compromise is perhaps the worst inner enemy of the democratic way of life. Suspicion that the practice is absolutely necessary alone renders tolerable to many the sense of guilt accompanying. To make the practice of compromise completely fruitful, as well as merely tolerable, would require to find embedded in it a principle above the merely expedient, though the expedient is not itself, without a hearing, to be deprecated as a respectable form of the moral ideal. Scrupulous inquiry as to whether there is a superior principle operative in compromise is to pay democratic theory the compliment of a profound query. If we find at the heart of compromise an ideal higher than utility, we honor it with an observation. Either way, we have the fun of inquiry for our pay—and retirement into solitude or malcontentcy if we too much dislike the accommodations required for urbane living.

I

Whatever you may estimate the outcome of this inquiry, it is highly appropriate that we make the appraisal of compromise upon such a Foundation as this, a foundation happily bequeathed by filial piety in honor of a distinguished president of this University. To be president of any university is to practice the politics of compromise, covert

¹Delivered March 14, 1940.

politics at least—and at a state university the practice is more overt than covert. Upon the record itself, President Edmund J. James was a successful, I may even say a great, president. Under his long administration here, the University of Illinois shook off its awkward clothes of adolescence and stepped forth fully clothed for maturity. Under him the faculty morale was good, and relations with the legislature were excellent. Those two factors spell successful compromise in University politics.

Happy is the University with such a past salted away to make savory any future days of leanness. Fortunate the University whose president leaves descendants as percipient as this Foundation attests of President James. His daughter's splendid gift for, and his son's distinguished contribution to, this lectureship meet tonight and mingle in memory to deepen my own appreciation of this occasion. As I read President Herman James initial lecture upon this Foundation, entitled "The American State University: A Problem in Political Science," my mind went back to my first contact with this remarkable James family. It was in the halcyon undergraduate days at the University of Texas, where I first met Herman, now himself President of Ohio University at Athens. He was my early teacher in political science, later respected colleague in Texas, and now for many years my beloved friend-at-large.

Is there some magic in the name James? There have been at least three remarkable families of that name in America. There was the family of Henry and William James, belonging to New England and the nation. There was the bandit family of Frank and Jesse James, distant kinsmen of mine, belonging to the Southwest and the nation. And there is latest but not least the family of Helen and Herman James, belonging to Illinois and the nation.

Happy is the state which has had the services of such a father and retains the loyalty of such a son and daughter. Fortunate is the University of Illinois in receiving and perpetuating such a foundation as this. To the fifth fruitage in print of this lectureship let us now turn.

II

I have been assuming that compromise has at least the justification of necessity in political life, and even the same in educational administration. Have I proceeded too rapidly? Must what has been assumed, now be proved? If one hold the ideal alone to be required of men and then insist that compromise contradicts the ideal, he might by a succession of motivated syllogisms prove that truly good men do not have to make compromises at all. Just such an argument has been paraded on religious grounds in behalf, say, of pacifism. To be religious, one hears at times, means just this: that one will never be put in the po-

sition of having to choose between evils. It may be so. I cannot speak too confidently of how the saints must face reality in order to preserve their sanity. But of sinners I know a thing or two, and of democrats even more. I know that democrats (I mean people intent upon living together without condescension)—democrats face a necessity that renders many a compromise relatively virtuous. Since necessity is the beginning or end of all argument, let me now illustrate and evaluate the types of necessity here involved.

Are we troubled at hearing lovers quarreling and parting? Then look to the lives of those who do not part, whether they quarrel or not. Above the level of "you-and-I-am-one-and-I-is-de-one" harmony, the lasting marriage moves along the path of successive reactions toned down to the tune of mutual concessions. Such give-and-take seems to require a minimum of "give" only to those habituated to the maximum "take." If men think that modern marriage does not require compromises that hurt, it is because men live in a society where wholesale concessions are sanctioned by custom before masculine bookkeeping begins. And if women think the same, let them correct their impressions by the tremendous price in peace, prestige, and ambition more and more men are willing to pay for that misty mirage named divorce. Compromises are necessary in marriage, but the very necessity renders them tolerable.

Are we troubled at the strife that goes on in every community, rising in spirals from neighborly askances, through gossip, to litigation? Then let us celebrate in art and otherwise the patience, the reticence, the sagacity, and the downright magnanimity that prevent our falling on each others necks with axes. Paul Laurence Dunbar, the Negro poet, has deliciously written:

*There is a heaven, for ever, day by day,
The upward longing of my soul doth tell me so.
There is a hell, I'm quite as sure; for pray,
If there were not, where would my neighbors go?*

Yes, compromises between neighbors are necessary, but the very necessity renders them tolerable.

Are we troubled at the class conflicts of our more and more impersonal world? Then let us know and honor the work of intermediaries that professionalize the task of composing human differences. The lawyers make a living at it from of old. Labor conciliators are building a new career for men possessed of both strategy and good will. And the oldest profession next one—I mean politics—engages its practitioners now as ever, and ever, and ever, at the task of mediating the conflicts of life that outrun in stridency the mellowing influence between lovers, between friends, and between neighbors, all of whom may still soften malevolence through meetings face-to-face.

These latter forms of enmity flow down from hills so old as to have developed ruts that make life together possible with or without completely satisfactory techniques of adjustment. Compromises go on at each of these levels, of course; but man's old infelicities would hardly merit an academic lecture from a congressman-at-large if these were not intensified, each and all intensified, by the strange new social distance which the division of labor has produced, imbedded, and embodied in what we call modern industrial society. How much of sociality survives this division of labor—and at what price, we must now inquire.

Let us observe at the start the drain upon human nature imposed by the specialization required in the acquisition of any and every particular skill.¹ To subdue fancy from freedom to concentration of attention is to achieve a disciplined mind; but the cost of the discipline is reflected in the fact that a man who is good for severely technical thought is often good for little else. He loses luster as he narrows himself to the rut required for efficiency. It is a tremendous price that man pays for the privilege of being specialized. If it be costly to the individual, it is also costly to (though not without precious compensation for) society, as we mean to show.

Its cost to both alike is a species of dismemberment: "we murder to dissect." When man who is "born for the universe narrows his mind" and for any one thing gives up all the reaches of imagination, he becomes less than he might be, but in order to become something more than he might otherwise have been. It is this double-dealing involved in civilization which lays so heavy a weight of woe upon modern men. We must give up freedom, as it were, in order to become free men, sacrifice the juices of life for the leanness of a livelihood. If we follow fugitive impulse, however, we shall remain the slaves of nature as well as accidental victims of one another's ranging. If we subdue to too-rigorous discipline the heart's desires, we invite reaction against the aridity of efficiency and motivate this reaction with grievances and aggressions stored up against the social order which houses our efforts.

That the division of labor has today become oppressively minute needs no proof. It is hardly too much to say that the average industrial worker must now make his living (if he makes one) at a job which does not at the same time yield him the essentials of a life. That is the direst spiritual tragedy which can befall a man, to toil at labor so minute and mechanical as not to be self-rewarding. No shortening of hours, no addition of leisure can wholly compensate for work which itself is belittling. To provide such compensation as is possible is a major requirement of industrial statesmanship today, but what is possible in this regard is not enough. We observe the fact in order to

¹I have borrowed here several paragraphs from my collaboration with Leonard D. White, *Politics and Public Service*. Harpers, New York, 1939.

remark the problem which democratic peoples face in daily competition with totalitarian countries, where on the surface the morale of citizens may seem superior.

The problem is further intensified by the same virus on the level of mental work. Here, too, the labor has been divided into ever and ever more restricted spheres. Here specialization has eventuated as professionalization with subspecializations inside each profession to further segment earlier solidarity. There are doctors who can hardly speak intelligently with other doctors for lack of common knowledge, and this in spite of what purports to be common training. This is apparently true of every profession. Pride achieves particularistic prestige; it feeds itself upon further details honored by more technicalities until at last the sea of sympathy once charted by a common profession is drained off into any number of inland lakes defying intercommunication save at the price of heavy portage.

If this be true inside the same profession—and it appears true of every profession today—how much further is the separation and more onerous the portage between the several professions as such. One who supposes that all problems are solved with the solution of his own should observe a legislature, where the problems mostly arise from one solution meeting another solution. The teachers solve at last, as in Chicago, the problems that long kept them apart in warring groups. Then, united and unionized, they meet the Board of Education which, united though not unionized, was up to that point “sitting pretty.” The legislature has its peace disturbed by the problem that arises from the meeting of two groups each unified but against the other. Or the teachers meet the taxpayers’ associations; and the legislature is busy for months, trying to reconcile claims that arise at the edge of well-functioning organizations. Consider also the not-too-civil relations between learned professions themselves: preachers and lawyers, or lawyers and doctors, or engineers and teachers, or even of doctors allopathic and doctors homeopathic, not to mention osteopaths and chiropractors! By narrowing the gaps between persons and sub-groups *within* the professions, the gulf *between the professions themselves* is not infrequently widened and deepened. Problems arise from the solution of problems. And these newly required solutions long delayed breed group repressions and aggressions to swell greatly the individual aggressions from repressions naturally inherent in every social form.

The professions themselves represent on the negative side, therefore, an influence deeply antisocial when viewed from the standpoint of the Great Society. Their very great glories and unquestioned services arise from, illustrate, and even intensify the psychic distance which constitutes the major problem of industrial society. As first fruit of this distance we have as substitutes for *the* class struggle of Marxism any number of group antagonisms, each heightened by failure to

understand across the social distance of special vocabularies and the blindness of technicians toward whatever lies beyond their own sharp-edged competence.

As illustrated thus by even the favored professions, our society breaks up into a few happy men in a context all the more seamed by the very conditions of their happiness. "Moral man" but, as Niebhur picturesquely puts it, in an "immoral Society." We shall summarize the matter less picturesquely. With manual work turned by the division of labor into frequent individual frustration, and mental work left self-fulfilling to fortunate ones but frustrative also of social unity, we face the peculiar fact that our means of industrial grace are in a larger sense the work of the devil. When our very efforts at goodness turn into badness before our eyes, we are put at a disadvantage before our competitors, particularly before the communists with their emphasis upon comradeship and their confident prediction of a classless society.

We say communists advisedly. But let us note first that all the totalitarians have, to an extent alike, heightened the morale of citizens, and especially of youth, by promising to restore, or claiming to have restored, some idyllic solidarity. Through historical appeal the fascists have actually begotten a sense of unity with centuries gone and through clever propaganda have induced a continuity of present effort and of glory for the future. Imperial unity made seductive through promised grandeur borrows obverse significance, it is true, from the sight of castor oil on the Italian handy shelf and from vague fear of what else but. The happiness of the nation as a whole is paid for terrifically by the misery of domestic dissenters and by the insecurity generated beyond the borders. But, conspicuous as the negative side is to us, we do well not to underplay the strength of the positive side.

We can see this same strength also in the work of the Nazis. True, their negation is stronger also. By finding a prepared scapegoat in the Jews, and also in other minority groups, they have concealed from themselves, as they have revealed to more humane peoples, the horrible debits of their drive for "Volk" unity. "Be my brother," thunders the voice of Thor in a German proverb, "or I will bash your head in." Still, their affirmation of Nordic unity upon the ancient estate of a common and superior blood has an appeal that is deeply satisfying to such as can do the bashing and to such others as can hug illusion as wise men love the truth. The myth of a gregarious "Volk" resurrects the musical tramp, tramp, of primeval inter-participation and cures the lesions of the industrial epoch with the surcease of a paradise no less grand because very dimly visioned. This dimly visioned afterworld and the too vividly remembered foreworld of dissatisfied sophistication and of guilt from war failure combine to focus their weird glows into a present mirage of national grandeur. Parties are past; freedom is fulfilled; action impends; and German blood is sanctified as the holy

ghost of gregarious glory. Outer order becomes the framework of an inner unity that is mystic and mighty.

But the communists, as we have already suggested, carry to its logical limit both the negative and the positive aspect of the sanction of unity. The stronger the purges, the stronger the alibis, until at length the rationalization of holy violence becomes impregnable to any suspicion of self-odium. Any dissidence is "wrecking," and paradise-betrayers are simply too wretched to be accorded any right save access to the gallows. For here is the benediction of that "comradeship" which nestles down to restore faith in the dream that has lured every utopia-builder since time began. The common use of so holy a salutation—"Comrade!"—is a stroke of ironic genius if not, indeed, a plain dispensation of Plutonian grace. For at a time when saintliness has veered to the secular, the subdual of cold citizenship to warm comradeship is a magnificent presumption of strength in weakness.

With the simplification of all aggressions to a single struggle between only two classes goes also the dearer simplification of many "may-be's" into one mighty "must-be"—Marxian inevitability of outcome. Though God forget, the processes of nature roll on their ruthless way to a felicity that's foregone, guaranteed "to come to pass whether it ever happens or not." Whoever has gazed with St. Marx into the crystal ball of dialectical materialism can see there, plain as day, a classless society arising just precisely out of the shell of a State that has miraculously withered away, as wonderfully as honey flowed from the carcass of the devitalized lion on pious postcards of our Sunday-school days. It's a real comfort to know, indeed to *foreknow*, that no efforts of the faithful will prove vain if the faithful but dedicate their energy to a catharsis of all that is divisive and to the creation of all that is comradely.

Seeing clearly the psychological disadvantage of our sober realism to their extravagant romanticism, let us take frank stock of ourselves and our assets. Forewarned, we can forearm. Nor let us underestimate the disadvantage of our failure to match these European myths of unity. Frankly and finally, we are not in a position to compete with either set of fanatics on the sheer grounds of conscious mythmaking, even if we had the will to do it. We paralyze our will to perform such wonders by calling the promises thereof lying. Moreover, we cannot keep our minds on the myths of classlessness or even of folkiness for shuddering at the blood which drips from old-world pretenses of having solved thus the problem created by division of labor.

But what have we to offer as the solution of that problem in lieu of their magnificent myths?¹ Well, we have the art of compromise as practiced primarily by the politician. For it is precisely the indicated

¹A few paragraphs follow, slightly changed, from my *The Promise of American Politics*. University of Chicago Press, 1936.

outcome of these intergroup conflicts that the democratic politician exists to shield us from. If such compromise is our alternative, is indeed the only alternative to myths implemented by purges, then it would pay us to afford as favorable a view as possible of both our principle of compromise and the persons who carry that principle. Any honest fanatic can see that this is the crucial alternative if he but press himself to answer this question: "What happens to community peace if I meet a fanatic on the opposite side as honest and unyielding as I?" Not every fanatic can entertain this question. Only a very honest fanatic will ask it of himself and press for an answer. If he answers himself that there is no equally honest person on the opposite side, he is not only a fanatic; he is also an ass. You may bray back at an ass, but you do not try to argue with him, not even with the front end.

The vices of our practicing politicians we must compare not with the virtues projected from the consciences of secluded individuals but with the vices of fanatics who have become dictators. In this context more beautiful things than one might think could be said of our politicians—by way of compensation, if not by way of extenuation, for whatever vices attend upon the arduous process of saving us from violence and murder. People elsewhere get killed in the conflicts of interest over which our politicians preside with vices short of crimes and with virtues not wholly unakin to magnanimity. If in this process of accommodation, politicians sometimes lie, it is regrettable but better than dictatorship. If they sometimes truckle, it is despicable but better than dictatorship. If they are sometimes bribed, it is execrable but better than dictatorship.

Whoever has seen great legislative battles with interests clashing, pressure groups pressing, lobbyists lobbying, and then has seen emerge through the slow, fumbling, and inefficient process called compromise such an adjudication of the issues as gets accepted by all—whoever has seen this has seen a process gracious in comparison with what is felt, even when not seen afar, in the alternative methods of a Mussolini or a Hitler or a Stalin as they settle issues by taking the easy way with dissenters.

III

When all this is said, however, we have hardly more than got around to the point of re-stating our problem against alternative failures to solve this problem inherent in society itself and intensified in all industrial societies by specialization. For when animosities become such as to require professional mediators and these must buck general suspicion in efforts to soften conflicts, hope of perfect solution should not run too high.

The attitude of the average high-minded American citizen toward his politician is certainly a case in point. It reflects itself not merely in the citizen's withdrawal from politics as from something dirty. It

reflects itself also in attributions invidious to him who does volunteer for political service. Exceptions but prove the rule, as the politician knows from hearing his own praise chronically coupled with dispraise of his political fellows to whom he knows himself not substantially superior. Let us not deny that shoddiness can be found among politicians to document the citizen's distrust. But it is not probable that the generalized feeling can be adequately explained by any objective quality, nor therefore that the distrust could be made to cease by any change in the personnel of politics. My suspicion is that citizens must change more than politicians before this happy day of mutual trust comes round. For my conviction is that politicians are victims of generalized aggressions deflected from the nagging self-guilt of idealistic citizens.

Not only is the conviction so. But one can actually observe the deflection itself rebounding to intensify the self-guilt that originally produced it. Is it not a common experience for the best citizens, in their better moods, to feel a little guilty at their own depreciation of the politician? We all sense, what the fact really is, that we cannot get along democratically without the political representative, since he is the custodian of our common business, business all the more compellingly common when we disagree as to what we have in common. But thus to intensify self-guilt is hardly to allay it. So great is the democratic need to allay this malevolence toward our moral middle-men, political carriers as they are of our private consciences, that we should look shrewdly at the etiology of this particular form of self-guilt, the form felt by good men, I mean, as regards their relation to politics and politicians.

The simple truth is that we Americans are heirs not only of this political tradition of compromise, but heirs also of a tradition older than it, and speciously more precious. The moral tradition counsels us to have high ideals and to live up to them. It is bad enough that we fail to do so in numerous details. Bad that is, but tolerable; for at the best ideals remain constant to renew their lure toward perfection, and at the worst they serve as standards to remind us that aspiration still has a mission to perform. Much worse, therefore, than this piecemeal failure to fulfill our highest ideals, is disunion in our ideals themselves. To have two sets of ideals that always diverge a little and not infrequently almost contradict—that is something serious in the life of the earnest man and woman. So serious is it indeed that a heroic remedy is often sought for it.

As between the claims of morality and the demands of politics, many a good citizen has longed, with the older saint, for some deliverance from the body of this death. Politically motivated, as most of us are on Monday, Wednesday and Friday; and morally motivated, as most of us are on Tuesday, Thursday and Saturday, no wonder that

Sunday has been felt required to reunite into one these two divisions of the self. But so deep has this conflict become between what we would do but do not, and what we would not do but do, that Sunday is not long enough, and for many not holy enough, to join together what the week has dissevered. This feeling of personal disunion is often worse in a democratic society than in a monarchic or any form of authoritarian one. There one can obey orders without the responsibility that attaches to giving them. In a democracy where every man is king and sovereign, whatever divisions there are, are carried closer to the soul.

Better as democracy is, then, in some senses, it does impose a heavier moral load upon its citizens than does any other form of government. More in need than others of religious relief from moral burdens, citizens of a democracy have more woes and get less relief. They have more woes for reasons already given. They get less inner relief because the religion they have inherited is mostly borrowed from societies whose citizens were not responsible as democratic citizens are. Acquiescence is poor, even perturbing, advice to those who must act, but do not know which line to take. There is a piety social and a piety solitary. One tradition encourages us to measure up to our ideals even if we have to live alone and like it. The other tradition would shame us into the magnanimity of "going along," as the political word always has it. Religion that is relevant to this division is itself divided in counsel: on the one side it is "the social gospel" hardly distinguishable from the democratic way of life; on the other side it is "what one does with his solitariness" closely identified with "keeping oneself unspotted from the world." No, Sunday, I repeat, is hardly long enough a day, and for many not holy enough a day, to cure the disunion of a soul torn between political compromise and the unequivocal conscience.

IV

Why, then, not give up compromising and return to the unequivocal conscience? But that is to accept dictatorship. To avoid dictatorship *somebody* must do compromising. It is a necessity for the democratic life, not to say for any form of social life. *Then, let the politician do it. He knows that game. What did we elect him for, anyway?* All right, then, let the politician do the compromising. But stay!—do it wholly without us, or partly with us? If wholly without us, then he has become our ruler and representative government is dead. A fairly heavy price, that, to pay for peace of mind; so heavy a price in fact that peace itself is paid for peace of mind. Page Germany, and ask Niemoller! Page Mexico or Hades—and ask Trotsky! Page Chicago and ask Borgese! *Then let the Politician make the compromises for us.* In that event we really are making the compromises through him, as

democracy implies; and all our responsibility is back upon us, full tide. There's no way around compromise, Sir, no way save dictatorship; and that's no way either. We must go through compromise, and if through it, then bravely not fearfully through it. There are some evils that are dissipated, all evils are lessened, by simple understanding. While I do not suggest that the equivocality attached to the practice of compromise is that simple, I do say that we have everything to gain from an honest analysis of this democratic practice. Perhaps we shall find hidden in the act a principle that even the stoutest conscience will recognize.

One principle, indeed, is worn upon the sleeve of every compromise, the *principle of expediency*. If we distinguish social from individual expediency and if we then substitute a long run for the short run view of the matter, already we are on our way to a principle of action the dignity of which is belied by that tone of voice—"mere expediency!" But I mean to avoid every suspicion of a short cut in this matter. To avoid even the suspicion of evil here is to refuse the aid, to begin with at least, of one of the great schools of ethics, the Epicurean and in later days the Utilitarian.

There is in democratic compromise a principle operative whose outer aspect alone is expediency. Its inner aspect is something pure to every aspiring soul. And that inner aspect is nothing other than the sacred thing called growth. We start life unseeing; we open our eyes as we go along; and in the end, if fortune favor, we behold our world wide-eyed in wisdom, knowing not only this and that but something also of good and evil. How is this progression started, how maintained, how culminated?

Take food. We start with the lukewarm, and it only in liquid form. This preference for the bland is strong and resists enlargement. The sours repel, the salts irritate, and the colds annoy. The adult gamut of piping hot coffee *and* teeth-chattering ice cream is an achievement in gustatory growth every step of which has been resisted by somebody and many a step by everybody. Is it better to have a range or merely a unitary taste? And is that "better," mere expediency? Variety here is not only better in its consequences; it's better in its very being. Tolerance in taste is an elemental ingredient of democratic compromise, and that we mean to show.

Take a humble skill like typewriting. One starts upon the lowly process of learning to type by touch with no organized resources at all for doing it and no purpose higher than the utilitarian. The machine itself has no holding power stronger than idle and easily satisfied curiosity about it. Attention is fugitive and easily divided. The keys are recalcitrant to fingers, and fingers are stiff when called upon to deliver the fruitage of print.

Then supervene the tedious, toilsome hours of practice, in which

attention slowly gets harnessed through disciplined fingers to keys. To make a long and sure story short, the day arrives in which mastery passes from the typewriter to the writer of the type. A machine has been broken in through manual mastery to serve the rapid processes of the mind. Fingers are alert, eyes are free to follow the lines of copy or in glad creative abandon to roam the foothills of thought or to seek surcease from fatigue in climbing the happy highlands of fancy.

The same joy that children feel in the pure precipitation of laryngeal liquidity is now sublimated through nimbly flying fingers as it pours into print. And as one cans pure fresh talk, he may be musing to himself all the while¹:

“Half the fun of life is in flowing freely at the mouth, the other half in flowing even more freely through the fingers. It may be but a bubble at the tea table, rising to a babble before the liquored bar, and striding to a bickering before the enrobed bench. It may rise to a nobler gushing from the rostrum and the stump. It may become an avalanche of foam and fury in the presence of hardly suffered wrong. In whatever form the flowing flows, the heart is eased of fulness so that it may enjoy itself to fulness once again, and back again.

“Newspapers are but talk still sticky with ink; magazines, talk where the ink has dried; books, talk canned in decorous code and preserved against hours of solitude and silence. Our meditative musing is but free-wheeling talk, and our most cogent thinking, talk rehearsed in private against the happy hour when the stage or typewriter will once more be ours. Talk is full telltale of our simian ancestry, chattering among the trees; talk is full commemorative of our human heritage, sharing sense through sound; talk is faintly predictive of our fairest clairvoyance, in some romance-grounded after-gloaming of perfect understanding. Meantime, they live fullest who talk best. And as for service, they also serve who only sit and clatter.”

An agency of utility has grown through the lowly discipline of learning to type by touch into an organ of joyful self-expression. A beloved object, though but a machine, has risen from a sea of perceptual indifference; and mind and muscle, now married through its ministry, have conspired together to reach a new dimension of communicability. Character has evolved from the amorphous to the amalgamated in finding something to do in the doing of which there is mastery and joy. It is all humble enough—a fingered thing of cold technology; but one is never the same after having acquired this skill; and what has happened on the inside is more important than anything, that because of the skill, is likely to happen outside.

The acquisition of such skill is an elemental ingredient not unconnected with democratic compromise, and that we mean to show.

¹I have borrowed here a few paragraphs from my collaboration with Leonard D. White, *Politics and Public Service*.

Take a man of the world. He is all things to all men, without ever ceasing to be himself. He meets the lowly without making them feel their humility. He meets the proud without making it his business to belittle their preferences. He meets the gentle with gentility to match; and he meets the truculent without giving them occasion to bustle or without himself giving an inch of ground to arrogance. Such character is not developed in a day, nor is its value exhausted in cultivating others as a paying policy. Such a man has learned how to meet men halfway; and, from the vantage point of halfway, to see all the way into their characters. This is the disposition that can arrange things among men and as between men and himself. It is the resilient spirit.

The development of such a temper is a thing organic to democratic compromise, and that too we mean to show.

One and all, these and more than these exemplify the fact of growth. In food, from one to many; in typewriting, from insensitivity to a mastery that quickens a thousand things beyond itself; in sophistication, an understanding that forbears and enjoys what is forbore. Growth it is, growth in many forms; but ever growth, the encompassing of the many without deserting the home base of the one. If excellence means the harmony and utilization of one's capacities—and what better could it mean?—then we are here describing a thing that far from being mere expediency is also the very process through which principle perfects itself in practice. In short we have here the rarest of all principles, the principle of growth; and, as applied to the total man, the principle of self-realization.

But so far we have been describing the process from the leeward side of the self. Socially speaking the process is much the same. We start in life with many dislikes, and not a few with trigger releases. We fasten almost accidentally onto a face, or tone of voice, or gait; and we don't like that fellow. With little enough excuse, such fugitive dislikes deepen into animosities. The Spaniard who upon the first meeting tried to assassinate his king, was questioned as to his motivation. Charles Lamb, who reports the story, says that the would-be assassin admitted, under questioning, that he could find nothing in the king's face or feature justly to blame; he could not convict, or even accuse him of any evil—yet, notwithstanding, hated him like the devil.

Now a life motivated by aggressions, having few friends and many enemies, does not need argument to be branded inferior; it is self-branded. It is small by any and every test that we know, from the monetary to the moral. It is a life that wastes human resources, and most of all its own. The opposite type of life is large, and roomy, and good. It is good by every test that we know, from aesthetics to ethics.

To get along with men means to be accommodating. The roots of amiability, no less than of animosity, are within us all. They await watering. But under proper conditions they do grow and flower into

the friendliness of a self-respect that respects others as a part of the very same. Such a man is a cell in democracy; and democracy as an institution both depends upon and creates such men. This is, as Walt Whitman had it, "the base and finale too" of all democratic metaphysics:

*The dear love of man for his comrade—the attraction
of friend to friend,
Of the well married husband and wife, of children
and parents,
Of city for city, and land for land.*

More strain is involved in learning to like people widely than in raising appetite from the bland to the variegated. More discipline is required to learn to play upon the stops of our fellow men than to clatter the keys of the typewriter. And even the man of the world, accomplished as he is, has often far to go to become the genuinely magnanimous man. But all of these are steps on the pilgrim's path from relative insignificance to moral worth. Only by entertaining in our own proper person the points of view and by respecting the interests of others, do we, negatively speaking, escape dogmatism and fanaticism; and only so do we, positively speaking, come to the realization and maturation of our powers. As we come to enjoy various foods, so also it is not too ideal to think of men and women learning to enjoy what at first they suspect and only hardly tolerate, namely the infinite variety of ideas and actions that go to make up this gallant human show. When we reach this dénouement, we are plainly and simply wiser and better than we were before, and wiser and better than those who rest at dogmatism in thought and rise only to fanaticism in action. That is the inner lining, silvery as the glow of a sunset cloud, of what in human relations we have called the compromise principle.

In saying all this we have not sought to deny an outer aspect more rude, nor sought to disassociate it from the expedient. The outer aspect of compromise is simply this: it is highly expedient for us to make with others whatever arrangements are necessary to give us—and if possible them also—room in which to grow. If we do not meet men halfway, as is required by democratic theory, then they will at times meet us far over on our half of the terrain. It was this outer, the expedient, need of compromise which led Thomas Hobbes to rationalize primordial accommodation into a lasting arrangement for authoritarianism. And there is clearly a sociology of fear, as there is of friendliness. If the expedient were alone, it were justification enough for compromise. But it is far from standing alone.

Here indeed, as so often elsewhere, the expedient is for the sake of the intrinsic. We have found, we may now say, imbedded in compromise both a highly expedient principle and a principle also justified

by that which makes us act expediently, the deepest demand of our moral nature.

We have here, then, in the principle which conditions democracy, something dynamic enough to condition also an inner self of high integrity. Compromises cannot be made effectively save by men who have the accommodating spirit. Each must be able to envisage the other's attitudes. Apprehension leads to comprehension, and comprehension makes possible the compromises of which we have been speaking. A man who makes such adjustments understandingly can meet the other man's views without actually giving up his own; for his "own," dynamically regarded, includes the accommodation which he is of a will to make out of sympathy, out of expediency, out of aspiration to be bigger and better than he is in his given narrow self.

What we have been saying does not mean, however, that some compromises may not be bad. It does mean that any course of action reached by voluntary concession has this much of good in it: it embodies sociality to whatever end the agreement may be made. Since we normally assume that men act in the light of what at least they think their interests are, any compromise arrangement is better than autocracy where one gets all his way; the other man in our case gets part of what he regards his good, and the one gets the enlargement that comes from substituting for the initial view of his interest an imaginative participation in the other person's view as his very own. The one may get less goods for his pains, but he has more of goodness for the attitude.

Moreover, men must often choose between evils. Every compromise arrangement is an evil (with what element of good we have indicated), but it may represent the least of the evils open to option. This does not mean, however, that some compromises are not better than others. Since the readiest evil that compromise avoids is coercion, that compromise is better than another which most fully guarantees more and better compromises as its own fruition. To guarantee perpetuity to any principle better than coercion is a consummation devoutly to be wished in days like these. Munich was bad—we may say with the easy wisdom of retrospect—because it made other compromises necessary that all together abolished compromise and substituted coercion in Czechoslovakia, and later a war to get back to the compromise principle aborted at Munich.

I do not know that this is the best way to formulate the criterion to show some compromises better than others. Yet it is clear that the way we make some, determines both whether we can make others and of what kind the others can be. Such a matter is better resolved as near to the ground as possible, so that we may not get lost in abstractions.

Fortunately, we Illinoisans do not have ever to go away from home to get the best of illustrations of most principles that are importantly political. For Illinois had Lincoln; it had Douglas; and it forced the two to knock their heads together for the clarification of many an issue. In their debates, and elsewhere, these men have given us ample illustration of both the easy and the more excellent way to compromise.

Slavery was an issue that totalized most other animosities and ran deeper than the division of labor, though it was intensified by that issue. Even from the Constitution itself, but especially from 1820, slavery necessitated more crucial compromises than any other issue in American life. Lincoln and Douglas were both participants in the democratic process of accommodation, and both had compromises of their own to propose as the best public policy. Neither's compromise was wholly bad, for each wished to avoid war and both hoped for the final extinction of slavery. No compromise proved able to forfend war. But all this does not mean that one of their proposals was not very much better than the other. This we mean to show, and we hope to glean from the analysis how Lincoln's was better and why.

Lincoln and Douglas had a constitutional quarrel and, beyond that, a material difference. They quarreled as to what the Constitution *should* be as well as to what it *was*. Douglas argued in Ohio in 1859 that "the Fathers understood this question just as well, and even better, than we do now." Lincoln took up this refrain in his famous Cooper Union address (1860), gloried to admit it true; and then proceeded to show that the Fathers' understanding of slavery favored his compromise rather than that of Douglas. But apart from this constitutional quarrel, in which each, as always, tried to make his interpretation of the Constitution the veritable Constitution itself, they had a material difference. It will pay us to concentrate upon this rather than upon their jousting over the document. Eventually, as Lincoln said at Cooper Institute, we must come to questions of right and wrong. So why not initially?

It has been thought by idealists, who confuse our living legend of him with the man Lincoln, that Illinois' most famous son was above compromise. Of course such was not the case. Lincoln was a politician, we may be grateful, with capacity to grow and with reverence for the process of growth. Like every politician, Lincoln was engaged in the lowly art of compromise. But like other politicians, Lincoln strategically denied upon occasion what he was doing. There is a carrying power to the unequivocal conscience which makes it expedient for politicians often to seem more certain than they actually are about the right and the wrong. In his Cooper Institute speech, for instance, Lincoln pleaded with those already of like mind with himself: "Let us

be diverted by none of those sophistical contrivances wherewith we are so industrially plied and belabored—contrivances such as groping for some middle ground between the right and the wrong.”

In no sense would he be one, not he—“to unsay what Washington said and undo what Washington did.” If Washington didn't cut down a cherry tree with a hatchet, Lincoln wouldn't with an axe. But no politician will be deceived by such claims, least of all by such claims from a politician like Lincoln, whose major achievement during four years in the Illinois legislature was to bargain the state capital from where it was to his own district! Lincoln both preached and practiced this maxim: “Important principles may and must be flexible.” The very paragraph indeed from which I have quoted his refusal to have traffic with those who obfuscate the line between right and wrong, begins with this sentence of opposite import: “Wrong as we think slavery is, we can yet afford to let it alone where it is, because that much is due to the necessity arising from its actual presence in the nation.” Before Lincoln was able to shake the genuinely unequivocal moralists, i.e., the abolitionists, off his back, he knew who was the lily-white devotee of unqualified right, and it wasn't Abraham Lincoln.

Not Lincoln, as may be seen from these scorching words on Lincoln taken from the twenty-eighth annual report of the executive committee of the American Anti-Slavery Society: “A sort of bland, respectable middle-man, between a very modest Right and the most arrogant and exacting Wrong; a convenient hook whereon to hang appeals at once to a moderate anti-slavery feeling and to a timid conservatism practically pro-slavery, halfway assertions of human rights, and whole-way concessions to a wicked prejudice against dark-colored manhood, arguments against slavery extension, and apologies for the continued complicity in slave-holding . . . in short, if we rightly understand him, [he] regards impartial justice as a most excellent thing, but as somewhat too fine and costly for everyday wear.”

Not to Lincoln's discredit, as you now know, but to keep the record clear, do I record the simple fact, that as touching slavery Abraham Lincoln was indeed a compromiser, no less so than his enemy, Stephen A. Douglas. But he had the better compromise, which is a difference not to be overlooked.

Their compromises differed in a way which we can easily make plain, and cause to appear important as it was. Given an old evil and a new territory free of it, Douglas proposed to divide the new territory so as formally—even if he hoped not actually—to leave part of it open to the extension of the evil. Given the old evil and the new territory, Lincoln proposed to leave the evil of slavery alone where it was but to save the new from its corruption. As regards the old, they were agreed: it was evil but could not be got rid of by overt action short of the greater evil of war.

This acceptance of evil by both was compromise with the bad smell. But compromise in the bad sense is often inevitable in things social. Lincoln was hardest hit by this inevitable evil. His abolitionist friends pressed down upon his saddened brow this crown of thorns: You admit slavery is evil; yet you refuse to try to right a practice which you admit to be wrong. Lincoln would not promise what he should not, lest he be called to perform what he could not. Cogent as abolitionist indictment was, and bitter as the invective that followed it, Lincoln knew that he was not God, and continued, until war broke out, to defend with fortitude an evil that he hated but knew not how to end. But he had experience of evil in many forms and knew how to accept the inevitable with a kind of natural piety that would shame most philosophers who give that thorny plant so nice a name. That much, he said, he "owed to necessity." "I hold it to be the paramount duty of us in the free states due to the Union of the States, and perhaps to liberty itself (paradox though it may seem) to let slavery of the other states alone; while on the other hand, I hold it to be equally clear that we should never knowingly lend ourselves, directly or indirectly, to prevent that slavery from dying a natural death."

This saying marks well enough the double faith upon which Lincoln depended to recommend his compromise on slavery as more rational than that offered by Douglas: he trusted, that is, the new, if guarded, to grow better than it was; and the old, if let alone, to grow less bad than it was. His was a strategy of both forbearance and intervention, the one soft-boiled, the other hard-boiled. He merely hoped, that is, that to tolerate evil would terminate it in the old, but he was determined to prevent evil in the new by positive federal action. What he regarded the historic matter he would compromise; what he regarded the moral matter he would improve. The moral he conceived in terms of growth, and the growing point of the Union he determined to keep from contamination with the old and evil. It was with reference to this that Lincoln gave birth to the immortal declaration at Cooper Union: "Let us have faith that right makes might and in that faith let us to the end dare to do our duty as we understand it."

Lincoln's overt difference here from Douglas is great but is not of the kind it seems to some. Douglas, too, disliked the corruption of the new and growing by the old and evil, but he did not propose federally to implement his dislike. It is not always remembered that Douglas thought slavery would not spread to Northern territory because it could not. He had learned this too easy doctrine from Webster and Clay. The Missouri Compromise was really motivated by the doctrine, as was the compromise of 1850. I refer to the notion that the domain of slavery was fixed by soil and climate—a so-called "law of nature" which Webster declared "the foundation of all." Lincoln

trusted providence to see to the death of slavery in the South; but Douglas made two trusts grow to Lincoln's one; he trusted the God of soil and climate to keep slavery out of the territories as well as to doom it to eventual death in the South. This was one trust too many. It is when men know not what to trust that they trust they know not what.

The difference between Illinois' two greatest sons is, then, not a difference on abolition. Both refused abolition, and Lincoln joined Douglas up to the very War in demanding that even the fugitive slave laws be enforced. It was not, as we have just seen, even a difference as to whether the territories should be free of slavery. Douglas insisted that he was as much against the extension of slavery as was Lincoln. The difference was simply this: whose responsibility is it to see that an evil tolerated in the old shall not poison the new? Douglas trusted God with the responsibility; Lincoln trusted men. I do not say that Lincoln mistrusted Providence, or that Douglas distrusted men. It's not the negative, but the positive that marks the difference. Lincoln, always a growing man, prized growth so dearly that he thought himself responsible for its preservation and direction. Douglas trusted inaction; Lincoln the efficacy of federal effort.

And here we are back on ground which earlier we trod. Our example of fruitful compromise has brought us back to the principle already discovered, the principle of growth. If men are not to be responsible for growth, for what can they be fruitfully responsible? The old is ever full of evils, which mostly we can do nothing about save tolerate. The past is done for; it's dead and irrevocable. The future alone belongs to man. The good man will safeguard and improve it, for it is within our power. Lincoln did not argue with some that because he could do so little, he'd do nothing save to let Providence provide. Nor could he go with the easy-going in the belief that if we work with the forces of nature, they'll do all the work. Since men can do so little, Lincoln argued, they should do all they can.

How great the difference between these two attitudes! If Douglas' compromise had failed (I mean if God had not kept the Negroes out of Northern climate and from Northern soil, which, looking at Illinois now, I dare say God wouldn't), then others, and they the weakest, would have had to pay the freight for Douglas' faith. It was a compromise risked upon the fruits of human lethargy. It promised peace for the moment, like Munich; but it was not such a compromise as laid the basis for continuing accommodations at successively higher levels until slavery should become extinct. Since Lincoln had to concede slavery to the South, he proposed such a compromise as would save what was left for democratic accommodation at ever higher and higher levels. Since the only chance to make the best out of the worst was

to save growth for improvement, Lincoln insisted that while he'd compromise many things, he would not compromise the purely potential with the actual evil.

Though his insistence occasioned, even if it did not cause, the war, war is not the worst of human evils. Moreover, there's no adequate ground to have expected continuous peace from Douglas' course. If war will come without a compromise and if compromises cannot be arranged without the continuous threat of war to render them invidious, then war for some minimum right may save a semblance of right as basis for more reasonable men to continue this process of give-and-take which we call democracy. Such the Civil War with all its horrors proved to be. The slaves were emancipated, as a military measure; but they were not freed. Men must free themselves, or forever go without freedom. But between slavery and freedom, emancipation was again a compromise, and a compromise in the direction of growth. Lincoln started to save the growing nation from an old evil, and he ended, through the involuntary aid of those who would not compromise with him upon the dynamic, by beginning the process of freeing the old as well as saving the new from the poison of serfdom.

We have discovered operative in ourselves, and illustrated now from Lincoln, a principle of social action that counsels us to work for *more and better compromises!* When the compromise principle fails us, all principle fails us. Principle gone, prowess alone remains. Prowess will be pushed by the wise in such fashion as to return social practice to the compromise principle as soon as possible and as fully as may be. For domination, when necessary, exists for the sake of accommodation, but accommodation exists in substantial part for the sake of its own excellence.

VI

As at the beginning we celebrated the James family, so now at the end let us celebrate the larger university family of which this James Foundation is so fine a part. As a colleague in the intellectual enterprise and as a former state legislator, I have a peculiar pride in the University of Illinois. It is a shining example of what the democratic state can do to inculcate in men and women as citizens the accommodative spirit, to the elucidation of which this lecture has been devoted.

Looking of late at its career-line, from the mount of solicitous aspiration, I beheld a University named after this great state accepting its responsibility to budge our citizenry toward the light of learning. I beheld it continuously re-devoted to the vision with which it began as a great people's laboratory to discover new truth and to exemplify it as a way of life. I beheld it under energetic and sympathetic leadership plunge upon that radical belief that all men are entitled to the educational best and that all can profit from the higher learning be its

ministration only touched with the light of imagination. I beheld it a medium that accepted silver from the legislature and transmuted it into brightest gold for the larger community. I beheld its reputation outrun the confines of the state until as from foreign parts intellectual tribute came back from equals, so from the vast territory around came up from all citizens the homage of their hearts. I beheld it accepted as what was common and indispensable to all interests, however conflicting, assured thus of perpetuity whatever class conflagrations may be a-brewing in the cauldron of change.

I beheld it as the sign that humanized knowledge, instead of superstition, was at last, at last to prevail; as the symbol that the heart and the head of humanity could come to terms, as the means whereby fear could be supplanted by confidence and conflict by cooperation. I beheld it, in short, as the radiant embodiment of all that memory and imagination, that love and hope, that faith and work have made, may make, of this our University of Illinois.

HISTORICAL FOUNDATIONS FOR
A DEMOCRATIC CHINA

HISTORICAL FOUNDATIONS FOR A DEMOCRATIC CHINA¹

By Dr. HU SHIH

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I

In these days when China is being regarded as a partner and ally fighting on the side of the democracies, it is natural that political scientists and students of comparative government should ask some such questions: Is China a democracy? Has Chinese republicanism or Chinese democracy any historical basis?

There have been different answers to such questions. Some say that there is not an iota of democracy in China. Others want us to believe that the only hope for Chinese democracy is found in the Communist-controlled districts of Northern Shensi, and that a Communist triumph will make China democratic.

The purpose of my paper is not to refute such statements which need no refutation. My paper purports to describe a few historical factors which have made China inevitably the first country in Asia to abolish the monarchy once and for all and seriously to work out a democratic form of government; and which, in my opinion, furnish the solid foundation on which a democratic China can be successfully built up. These historical factors have been at work for tens of centuries and have given to the Chinese people the tradition and the preparation for the development of modern democratic institutions.

Of these historical foundations I shall mention only three: first, a thoroughly democratized social structure; secondly, 2,000 years of an objective and competitive system of examinations for civil service; and thirdly, the historic institution of the government creating its own "opposition" and censorial control.

You will notice I have singled out only the institutional foundations and have not included the theoretical or philosophical basis for a democratic China. I believe that the best way of showing the influence of a philosophical tradition is through the historic institutions which are both the product and the embodiment of those intellectual forces.

But before taking up these historical institutions, I would like to say a word about a few powerful philosophical ideas which have had a great influence in molding the social and political development of the Chinese people. The first of these is the Confucianist conception of human nature as essentially good. In a rhymed primer which was

¹Delivered March 12, 1941.

written in the Sung Dynasty, and was still used in all village schools during my childhood, the opening lines read:

*In the beginning
Man's nature is good.
Near to one another by nature,
Men are set apart by practice.
Without teaching,
Nature degenerates.*

These ideas which go back to Confucius, and particularly to Mencius, have been the basis of Chinese education and have inculcated into the people the sense of human equality. Confucius laid down the philosophy in four words: "*Yu chiao wu lei*" (With education there is no class). This conception of the essential goodness of human nature and of the infinite possibility of education is the most important philosophical idea which has produced an almost classless society in China. Centuries before China came into contact with the democratic ideas of Western countries, Chinese children in all village schools were humming such popular rhymes as the following:

*Prime Ministers and Generals do not belong to any class:
Youths should exert themselves.*

That is a popular paraphrase of the Confucian doctrine that with education there is no class.

The second important democratic doctrine is the scriptural justification of rebellion against tyrannical government. The story is told of Confucius who passed by the foot of Mount Taishan and heard a woman crying plaintively. He asked her what was the cause of her deep sorrow. She said, "My father was carried away by a tiger: recently my husband was killed by a tiger and now my son was devoured by a tiger." "Why don't you run away from this place infested by such ferocious tigers?" And the woman said, "There is no tyrannical government here." Confucius thereupon turned to his disciples and said, "Remember this! Tyrannical government is more oppressive than ferocious tigers!"

Mencius in particular was the most outspoken advocate of the right of rebellion against tyrannical government. He said, "When a ruler treats his subject like grass and dirt, then the subject should treat him as a bandit and an enemy." And he characterized some of the historical rebellions, not as revolts of subjects against rulers, but as justified revolutions against despots whose misrule had alienated them from the people. This doctrine of justifiable rebellion against tyranny and misrule was easily and naturally revived with the coming of revolutionary and democratic ideas from the Western world.

The third important political doctrine is that the subordinate has a sacred duty to criticize and oppose the wrong-doing of his superior. A

little classic, "The Book of Filial Piety," has this saying of Confucius: "If an Emperor has seven outspoken ministers [*chêng ch'ên*: literally, 'ministers who fight or oppose him'], he could not lose his empire in spite of his misdeeds. If a feudal lord has five outspoken ministers, he could not lose his state in spite of his misdeeds. If a minister has three outspoken servants, he could not lose his family fortune in spite of his misdeeds. . . . Therefore, in the face of a wrong or unrighteousness it is the duty of the son to oppose his father and it is the duty of the servant to oppose his sovereign."

This idea of encouraging outspoken advice and even opposition from one's subordinates has been a most important political tradition which has made possible the development, not only of the institution of the government's own censors, but also of the hundreds of great personalities who made history by fighting fearlessly against the misdeeds of despotic rulers and powerful ministers.

It is from these basic seeds of Chinese political thinking that there have been developed social and political institutions which have played, and will continue to play, an important role in shaping the political development of my people.

II

China was unified for the first time in 221 B.C. The First Empire founded on military conquest of the contending states, did not last more than a dozen years, and was overthrown by a revolution of the people. The Second Empire, the Empire of Han, lasted 400 years (202 B.C.-219 A.D.).

Even before the first unification under the First Empire, the numerous small states which flourished at the time of Confucius were gradually being absorbed and consolidated into seven great powers. The old feudal society was rapidly disappearing in an age of conquest, migration of races, and political concentration. Practically all the seven states of the 4th and 3rd centuries B.C. had highly centralized government and administration. That tendency of centralized political control was made uniform under the First Empire, which divided the whole country into thirty-six administrative districts or provinces governed by officials appointed by the central government.

During the 400 years of the Han Empire, this tendency of political consolidation was continued and perfected. In their first reaction against the despotic consolidation of power under the First Empire, the founders of the Han Dynasty created new feudal states and gave them to the princes of the blood of the new royal family. But the statesmen of the second century B.C. soon realized the mistake of this political anachronism which had led to armed revolts by some of these powerful princes against the central government. In order to avoid an abrupt departure of policy, the political wisdom of these statesmen

devised a peaceful method for abolishing the new feudalism. This new procedure consisted of abolishing the law of primogeniture and of dividing the hereditary fief equally among the sons of a deceased or banished prince. After a few generations of equal division of feudal estates among the male heirs, all the newly created principalities were reduced to political nonentity and were peacefully subject to the civil administration of the governors and prefects appointed by the central imperial government. Feudalism has never been revived during the last twenty-one centuries.

This tradition of equal division of hereditary property among the sons of a family was adopted by all classes of people and has worked for the equalization of wealth and landed property. Primogeniture seemed to have been swept overboard with the disappearance of ancient feudal society, and this new procedure came to be recognized as just and equitable. Because of this, no great estate could stand three generations of successive equal division among the sons. The result has been the total absence of large holdings of land by wealthy and powerful families for any great length of time. This economic equalization has tended greatly to bring about a social structure in which there are practically no class divisions and not even any enduring differences between the rich and the poor.

The founders of the Han Empire came from the lowly strata of society, including butchers, sellers of dog meat, undertakers, peddlers, and farmers. Many of their women were of poor and lowly origin. This was the first and probably the greatest dynasty and empire founded by the people. That fact alone was an important asset in the democratic tradition of China. The four hundred years of political and social development under the Han Empire practically shaped and conditioned the main lines of historical evolution of Chinese national life and institutions throughout the later ages.

In addition to the institution of equal division of hereditary estates, the Han statesmen were responsible for initiating as early as the second century B.C. the system of selecting men for public office from among those persons either recommended by public opinion of the localities for their special achievements, or chosen through a competitive examination on their knowledge of the classical literature of ancient China. Throughout the Empire men of poverty and lowly origin often arose to highest positions of honor and power. One of the greatest generals, who fought the Huns and drove them far beyond the Great Wall and the desert, arose from slavery. And hundreds of cabinet ministers came from families of destitution.

The earlier statesmen of the Empire consciously practiced the policy of *laissez-faire* and strict economy in order to allow the people to recuperate from the devastations of the terrible wars of the third century and to grow accustomed to the peace and order of a unified Empire.

It was a conscious effort to put into practice the political philosophy of *Wu wei* (non-activity) taught by the school of philosophic Taoism. Under this *laissez-faire* policy commerce and industry flourished and the Empire prospered. There grew up a class of wealthy merchants and "capitalists" who lived in comfort and luxury.

The new political leaders after 140 B.C. were largely Confucianist scholars who were trained on books that exalted a static and essentially agricultural society and who viewed with suspicion and disapproval the rising commercial class, whom they considered as social parasites that toiled not nor spun but lived on the sweat and blood of the toilers. There were several serious attempts to limit the amount of land owned by any single individual and to undertake governmental action for the amelioration of the conditions of the poor. These reform movements culminated in the socialistic policies of Wang Mang, who, in the first years of the Christian Era, acquired political power and proclaimed himself Emperor of the New Dynasty which lasted sixteen years (8-23 A.D.). Wang Mang nationalized all land, emancipated all slaves, and instituted government regulations and monopolies of salt, wine, coinage, credit, mining and natural resources. He was the first "New Dealer."

Wang Mang's many socialistic reforms were swept away and he was killed in the revolution which overthrew his dynasty and restored the Han regime. But anti-mercantile, agrarian, and equalitarian thought had become a part of orthodox social and political thinking of Chinese intelligentsia and accounts for the low position which the merchant occupies in the social scale. The conventional ranking of the professions (not classes) into the scholar, the farmer, the artisan, and the merchant is a product of this anti-mercantile tradition.

All these factors—the abolishing of primogeniture, the custom of equal division of inherited property among the sons, the recognition of the justice of people arising to power from lowliness, the selection of men for office-holding by means of competitive examination, the conscious curbing of the men of wealth—all these factors continued to influence the social structure of China, making it more and more democratic. There was no aristocracy as a class except that of learning, and learning was always accessible to all who had the intelligence and the will to acquire it. The social structure was so thoroughly democratized and the process of leveling had gone so far that when the Manchu Dynasty was overthrown in the Revolution of 1911-1912, no one could think of a Chinese family sufficiently prominent to be qualified as a possible candidate for the throne left vacant by the downfall of an alien dynasty. Some thought of the family of Confucius; but it happened that at the time the direct lineal descendant of Confucius, and the inheritor of the ducal title reserved to the Kung family, was a little child hardly one year old. So he was passed over, and even

the so-called "constitutional monarchists" had to agree with the republican revolutionaries that the monarchy must be abolished and that a republic was the only thing feasible.

III

All important schools of Chinese thought of the classical period agreed that government should be in the hands of the wisest and best-informed people. They were unconsciously undermining the feudal society by this advocacy of government by those best qualified to govern. With the passing away of feudalism, and especially with the establishment of a unified empire founded and governed by people who arose from the masses, there was felt a great need for securing men of knowledge and wisdom for the ordering of the state.

The founder of the Han Dynasty, who was an unlettered political genius, once rebuked a scholar in these words: "I conquered the Empire on horseback; what use have I for your classical books?" The scholar retorted: "Sire, it is true you have conquered the Empire on horseback; but can you govern it on horseback?" The early years of the Second Empire witnessed the gradual rise of the scholarly class who tamed the conquerors on horseback and helped them to write the laws and institutes, to work out the details of administration, to remedy the grotesque mistakes of the uncouth rulers, and to pacify and stabilize the Empire.

The task of empire-building was truly tremendous. The Han Empire in its great days was almost as large as the China of today. Without modern means of transportation and communication, the work of administering such a vast empire from a central government at Chang-an, maintaining unity and peace for four hundred years, and thereby setting up a permanent framework of a unified national life for 2,000 years, was the greatest achievement of the political genius of the Chinese people.

The civil service system originated in the realization of the need for men who knew the language of the classical literature of ancient China. The Empire was composed of vast areas which spoke different dialects, and the only common medium of empire communication was the classical language, which had been at one time a living dialect of fairly wide currency in eastern and northern China, but had become dead by the time of the second Empire. The first step was to establish a government university with separate faculties or "doctoral colleges," each specializing in one of the ancient classics. But the revival of learning through university education took time and the Empire needed men for government offices. About the year 120 B.C., the Prime Minister, Kung-Sun Hung, in a memorial to the throne, said that the edicts and the laws which were written in elegant classical style were often not understood even by the petty officers whose duty it was to explain and interpret them to the people. Therefore, he recommended

that examinations be held for the selection of men who could read and understand the classical language and literature and that those who had shown the best knowledge should have the first preference in appointments to offices requiring the use of the written language. His recommendation was adopted and marked the beginning of the civil service examination system.

Throughout the four hundred years of the Han Empire, however, there was not worked out any systematized procedure for the selection of men for public offices. Broadly speaking, there were three methods in use. In the first place, there were the examinations which had not yet commanded much respect and were apparently limited to clerical and secretarial offices. Secondly, there was the university, which in the second century A.D. was said to have 30,000 students and was becoming a political power much feared by the politicians. The university education naturally gave the youths a fairly reliable chance of civic advancement. Thirdly, from time to time the government would ask the provincial authorities to recommend men of various kinds of attainment. Men were recommended for their "filial piety and purity of character" (*hsiao lien*), for "marked talent" (*mou ts'ai*), for "specially distinguished attainments" (*tso i*), etc. Such recommendations were often, but not regularly, requested by the central government, and those persons thus recommended were usually given offices.

Ts'ao Ts'ao (d. 219 A.D.), one of the greatest statesmen of the age, worked out a system of classifying men into nine grades according to their ability, knowledge, experience, and character. When his son became Emperor in 220 A.D., this system of nine-grade classification was officially adopted for the selection of men for government service. Under this system, the government appointed a special official for each administrative area, who was called "Chung Cheng" (the Impartial Judge) and whose duty it was to list all possible candidates for office and all men of good family, and, on the basis of public opinion and personal knowledge, grade them into nine grades according to their deserts. These gradings, which were to be revised periodically, were to serve as the basis for appointment of these men to offices in the local, provincial, or central government.

This system, known in history as that of "Nine-grade Impartial Judgment," naturally involved much subjective opinion, family influence, and political pressure. It was humanly impossible to find an objective standard for the nine degrees of grading. After being tried out for fully four centuries, it was finally abolished under the Sui Dynasty, which re-unified the country in 589, after a long period of division, and instituted the Government Examination for civil service in 606.

From the beginning of the seventh century to the beginning of the twentieth century, for 1300 years, the main system of selection of men for office was by open and competitive examination. Roughly speaking,

this system has undergone three stages of evolution. The first period, approximately from 600 to 1070, was the age of purely literary and poetic examination. There were other subjects, such as history, law, the Confucian classics and others, in which examinations were regularly held. But somehow the purely literary examinations came to be the only highly prized and universally coveted channel of entrance into public life. The best minds of the country were attracted to this class of examinations. The winners of the highest honors in these poetic and literary examinations became idolized by the whole country and especially by the women; and the successful candidates in these literary examinations usually attained the heights of governmental power more rapidly than those who took the other more prosaic examinations. In the eyes of the nation only these literary and poetic examinations commanded the interest and the admiration of the people, and the other examinations seemed not to count at all.

The reasons for this peculiar pre-eminence of the literary and poetic examinations are not far to seek. While the other examinations required book knowledge and memory work, this class of *ching shih* (advanced scholars) was expected to offer creative poetic composition. The difficult themes assigned and the strict rules prescribed only made the successful winners shine more glamorously. And it is not true that poets are always born and not made. Fashion and training can always make a poet of some sort out of a man of native intelligence. Besides, these original compositions required wide reading, wealth of knowledge, and independence of judgment. For these reasons the *ching shih* came practically to monopolize the civil service for almost four centuries, and great statesmen and empire builders came out of a system which, though fair, seemed completely devoid of practical training.

The second period of the civil service system may be called an age of transition. The purely literary examination had been severely criticized on the ground of its failure to encourage the youths of the nation to prepare themselves in the practical and useful knowledge of morals and government. In the year 1071, the reformer-statesman Wang An-shih succeeded in persuading his Emperor to adopt and proclaim a new system of examinations, in which the poetic compositions were entirely abolished and the scholars were required to specialize in one of the major classics as well as to master the minor classics. Under the new system the scholars were also asked to write an essay on some historic subject and to answer in detail three questions of current and practical importance. This new system was naturally severely attacked by the sponsors of the old poetic examinations. For two hundred years the government wavered between the two policies. The prose classical examination was several times discarded and again re-established. Finally the government compromised by offering a dual system placing the poetic composition and the prose classical exposition as two alternate systems for the candidates to choose.

Then came the third period during which the prose classical examination finally became the only legitimate form of civil service examination. The Mongol conquest of North China, and later of the whole of China, had brought about much interruption and dislocation of Chinese political life, including the abolition of the civil service examination system for many decades. When the civil service examinations were revived in 1314, the classical scholars had their way in triumphantly working out an examination system entirely centering around the Confucian classics. In order to make it more attractive to the creative minds, a special form of prose composition was gradually evolved which, though not rhymed, was highly rhythmic, often running in balanced sentences, and so rich in cadence that it could be often sing-songed aloud. All candidates were also required to write a poem on an assigned theme as a supplement to every examination paper. These new developments seemed to have satisfied both the desire for original poetic expression and the more utilitarian demand for a mastery of the Confucian classics which were supposed to be the foundation of the moral and political life of the Chinese nation. So this new examination system lasted from 1314 to 1905 with comparatively few radical changes in the general scheme.

In a broad sense, therefore, the statesmen of China have seriously attempted to work out and put into practice a system of civil service examination open to all people, irrespective of family, wealth, religion, or race. The subject-matter of the examinations, whether it be original poetic composition or rhythmic prose exposition of the classics, has been severely and probably justly criticized, as useless literary gymnastics. But the main idea behind these examinations is a desire to work out some objective and impartial standard for the selection of men for public offices. The sincerity of that desire was attested throughout history by the development and improvement of the safe-guards against favoritism and fraud in the examinations. One of the safe-guards was the method of sealing the name of the examinee so that no name should appear on the examination paper. Another safe-guard was to have every examination paper copied by the government copyists and to submit to the examiners only the copy and not the original, so that the examiner could not recognize the hand-writing of his own students, friends, or relatives. These techniques were invented about the year 1000 and have been in use in all the later centuries. Fraud in the examinations was punished by the heaviest penalties.

Indeed, the system was so objective and fair that scholars who repeatedly failed to pass the examinations rarely complained of the injustice of the system itself but often comforted themselves with the proverb, "In the examination hall literary merit does not always count," meaning that luck may be against you. As the subject-matter was

always taken from the few classics and in later centuries always from the "Four Books" for the lower examinations, it was possible for the poorest family to give a talented child the necessary education which cost practically nothing in books or in tuition. In the popular theatres, one often sees well-known plays portraying a poor young man or a poor son-in-law of a beggar-chief successfully taking high honors in the examinations. It was a just system which enabled the sons of the poorest and lowliest families to rise through a regular process of competition to the highest positions of honor and power in the Empire.

Throughout the centuries of training under this system, there has grown up a deep-rooted tradition in the minds of the Chinese people that government should be in the hands of those who are best fitted to govern; and that officers and officials of the state are not born of any special class but should be selected through some system of competitive examination open to all who are prepared to take it.

IV

The office of the Imperial Censor, or literally the "Imperial Historian," probably derived its extraordinary censorial authority from the very ancient days when the historian was a religious priest and represented the will of the gods. At the time of Confucius stories were told of historians who defied despotic rulers and powerful prime ministers in insisting upon telling and recording the truth as they saw it. They preferred death to changing their recordings. Confucius himself tried to write a kind of history where every word would imply a moral judgment of approval or disapproval, so that rulers and leaders of states might be encouraged to do good and refrain from evil-doing by their natural regard for the judgment of posterity.

In later ages the historians rarely kept up this rigoristic tradition of truth-telling, but there grew up a new tradition of out-spoken advice and admonition on the part of the Imperial Censors. The duty of out-spoken interrogation and censure of the misdeeds of all government officials from the highest to the lowest was not confined to the Imperial Censors alone or to any particular censorial office. It was in fact a right and a moral duty of all officials of rank to speak freely and frankly to the Imperial Government on all matters concerning the misery and suffering of the people, or astrological signs or warnings pointing to bad government in any particular direction, or policies which should be promoted or abolished. In short, Chinese moral and political tradition required of every government official this sacred duty of serving as the out-spoken adviser of his sovereign.

All political thinking of ancient China taught the importance of out-spoken censure as the only means for the ruler to know his own faults, the disastrous policies of his government, and the grievances of the people. An ancient statesman of the eighth century B.C. is recorded

to have said: "To stop the voice of the people is more dangerous than to dam the flow of a river. The wise manager of the river deepens its basin and facilitates its flow. The wise ruler of men encourages them to speak up freely." Free expression and out-spoken opposition are, therefore, safety-valves through which the complaints, protests, and grievances of the people are expressed and heard. They are also mirrors in which the rulers can see their own shortcomings. It is, therefore, the duty of the ruler to tolerate all forms of out-spoken advice and opposition, however offensive they may be.

Throughout the long history of China, there are numberless cases of statesmen who incurred the displeasure of their rulers by courageously opposing what they considered as ruinous policies of the government. Not a few of these out-spoken advisers were put to death or subjected to bodily torture. But, in general, even the most notorious despots usually had an almost religious regard for the tradition which exalted tolerance of frank censure as one of the highest virtues of the ruler. With the exception of the few dark periods of the Ming Dynasty, most of the dynasties treated the out-spoken censors with tolerance and leniency. Some of the great rulers, such as the second Emperor of the Tang Dynasty, were famous for their eagerness to seek frank advice from their ministers. The intimate memorials to the throne by such famous statesmen as Wei Cheng of the seventh century and Lu Chih of the eighth century read like heart-to-heart advice of one faithful friend to another. They cover all kinds of topics from private conduct to military campaigns of great importance. Such works have been an inspiration to statesmen throughout the ages.

Even in those periods when out-spoken censors were punished brutally by the despotic rulers, those martyrs in the cause of free political criticism were usually vindicated, sometimes after a few years and sometimes after one or two generations. In such cases the vindication came in the form of conferring posthumous honors on the martyred censors, some of whom were given seats in the Temple of Confucius. The policies they had sponsored were now adopted and the persons against whom they had fought were now disgraced. As a philosopher of the seventeenth century put it: "There are only two things that are supreme in this world: one is reason, the other, authority. Of the two, reason is the more supreme. For in the history of the struggle of the righteous statesmen against the powerful prime ministers and eunuchs, reason always triumphed over authority in the end." This best expresses the spirit of the Chinese censors: they represented the Chinese historic struggle for liberty.

In a sense, the censorial system may be called the Chinese counterpart for a parliament. Indeed, the censors were called "The Officials Who Speak" (*yen kwan*), which is an etymological reminder of the modern democratic parliaments. The Censorial Office, or Tribunal, was not a law-making organ but undertook almost every other political

and semi-judicial function of a modern parliament, including interrogation, impeachment of government officials, passing on the accounts of the governmental departments, and receiving complaints and grievances of the people. Tradition gave it the right "to speak out even on hearsay." There was naturally the danger of malicious libel and political attack without sufficient evidence. But the main idea was to encourage free speech and to initiate investigation in cases where evidence could not be easily obtained without the effort of special investigators.

As I have pointed out, the right and duty to advise the government were not confined to the censors alone. All central and provincial officials above a certain rank had the right and the duty to petition the throne on all matters affecting the policy of the government or the interest of the people. In the light of history, much of the advice offered was ridiculous, and many of the issues bitterly fought were trivial. But this tradition of encouragement to out-spoken opposition has, on the whole, played an important and beneficial part in the molding of Chinese political life. It has not only trained the nation to regard out-spoken and fighting officials as national heroes and protectors of the interests of the people, but it has also taught the people to think that government needs censorial check and control and that out-spoken opposition to the misdeeds of government officials and even of emperors and empresses is a necessary part of a political constitution.

These three historical factors—a democraticized and classless social structure, a traditional belief in the selection of office-holders through an objective competitive examination, and a long history of encouragement of out-spoken censorial control of the government—these are the heritages of my people from the political development throughout the long centuries. They are the historical factors which alone can explain the Chinese Revolution, the overthrow of the monarchy, the establishment of a republican form of government, and the constitutional development of the last thirty years and of the years to come.

The best evidence of the great importance of these historical heritages is the fact that Dr. Sun Yat-sen, the Father of the Chinese Revolution and of the Republic, deliberately adopted the power of examination for civil service and the power of censorial control of the government as two of the five divisions of governmental power, the other three being the traditional executive, legislative, and judicial powers. In these three decades of revolutionary wars and foreign invasion, China has not yet worked out a permanent constitution. But it is safe to predict that the future constitution of China will be a workable democratic constitution made possible by these historical factors without which no importation or imitation of foreign political institutions can function and take root.

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