

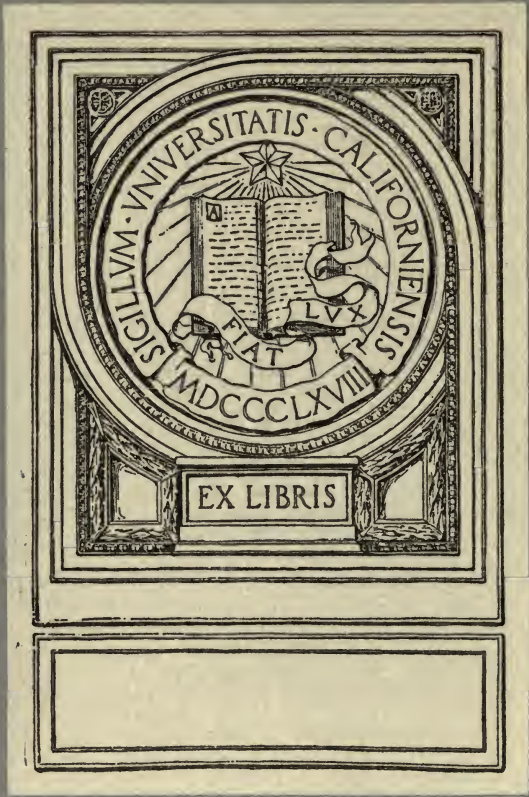
JK  
246  
P5

UC-NRLF



⌘B 139 234

YH131922

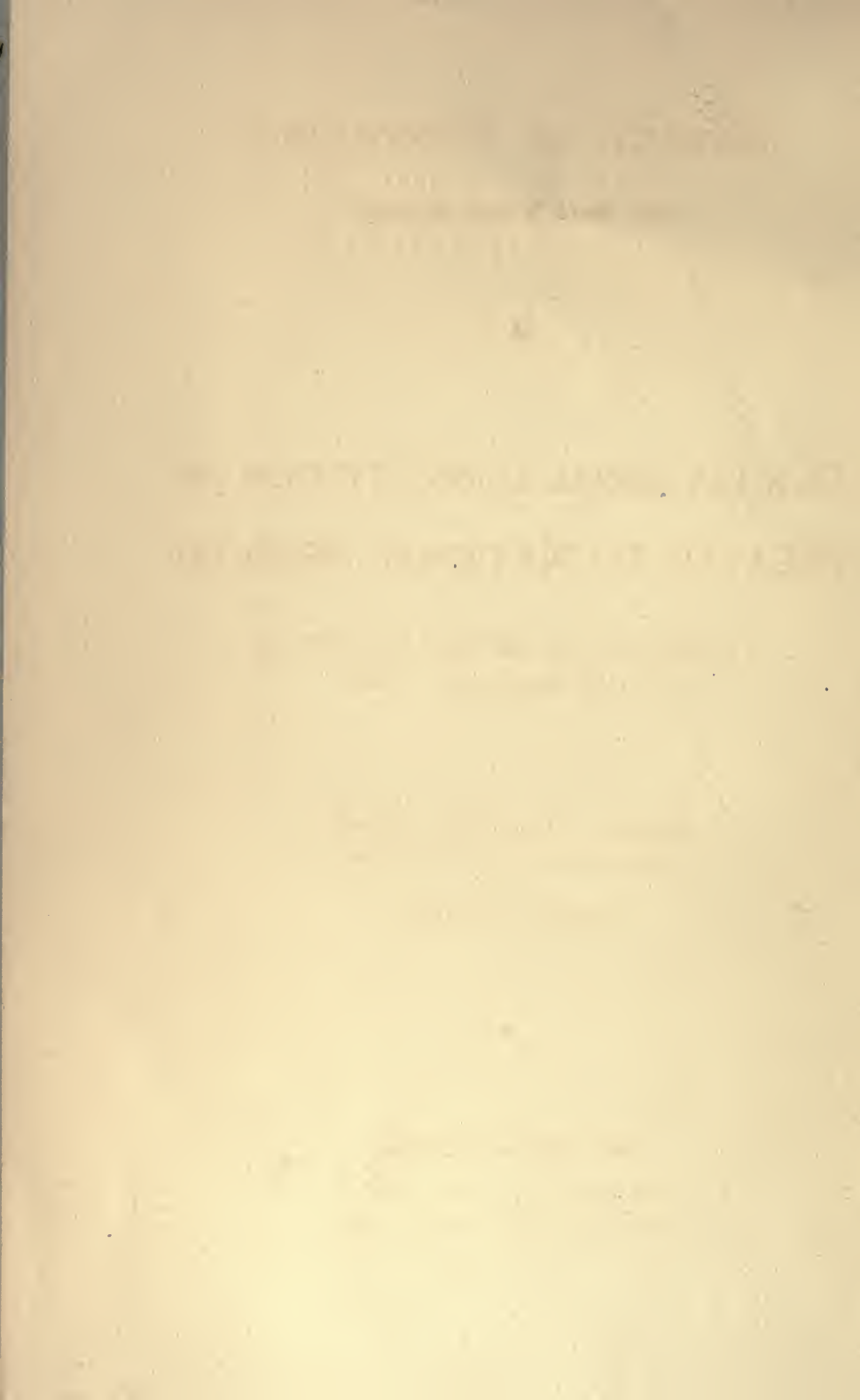


EX LIBRIS

OUR NATIONAL CONSTITUTION  
AS RELATED TO NATIONAL GROWTH

A CONSIDERATION OF  
CERTAIN ASPECTS OF THE  
WAR WITH SPAIN

GEORGE WHARTON PEPPER



UNIVERSITY OF PENNSYLVANIA

Phi Beta Kappa Society

OUR NATIONAL CONSTITUTION AS  
RELATED TO NATIONAL GROWTH

A CONSIDERATION OF CERTAIN ASPECTS  
OF THE WAR WITH SPAIN

BY

GEORGE WHARTON PEPPER

Algernon Sydney Biddle Professor of Law

in the

University of Pennsylvania



THE ANNUAL ADDRESS

DELIVERED JUNE 7, 1898, BEFORE

DELTA CHAPTER OF PENNSYLVANIA

JK246  
P5



Press of  
George H Buchanan & Company  
Philadelphia

TO THE  
ASSOCIATION

UNIV. OF  
CALIFORNIA

# Our National Constitution

## As Related to National Growth

Centuries are arbitrary divisions in the stream of time, but by a coincidence it often happens that great national changes occur a century apart. As we take our stand in the closing days of the nineteenth century and look backward, we observe that a hundred years ago the forces were at work in England which brought about the extinction of personal government and the enactment of such epoch-making measures as the Reform Bill. If we look back another hundred years in the history of the mother country, we may note the interesting succession of events which, following in the train of the Revolution of 1688, culminated in the accession of George I. and the entrance of England upon the stage of European politics. "From the age of the Plantagenets to the age of the Revolution the country had stood apart from more than passing contact with the fortunes of the Continent." Thenceforth, however, England was destined to play an important part, and ultimately a dominating part, in the drama of Continental politics. For the first time she was to exercise an intellectual and moral influence upon the European world. The world heard of Shakespeare and learned that there was an English literature. The study of English institutions became an inspiration to Montesquieu. English science and English philosophy furnished a starting point for Buffon and Rousseau.

In our own country the dawn of the century saw our national Constitution in operation after only a decade of trial. The policy of the infant nation, like the policy of her mother before her, was at first a policy of isolation from the distant world. The ears of the people were still echoing with Washington's solemn warning to beware of entangling foreign alliances. This is the warning that has dominated our policy for the century that has been the century of the childhood of our

nation. Born, as the nation was, in a time of suffering and struggle, the war of 1812 was, as it were, a parental difficulty: a struggle between the parent and the child that had already passed beyond its control. The Mexican War was an incident of national growth and stood for the attainment of that territorial stature which was indispensable to symmetrical national development. Finally, the Civil War came upon us and threatened our very life, as if it were a terrible illness overtaking one about to attain his full maturity. To-day we find our nation full grown, and there are signs that we are going forth, as England did two hundred years ago, to do our work among the nations of the world. To beware of the entanglements incident to foreign alliances was just such wise counsel as one would expect from the Father of his Country in speaking to the nation in its childhood. We may choose acquaintances for our children and keep them from contact with influences which seem to us to threaten harm. It can no longer be so when they have grown to man's estate. The time must come when our admonitions cease to bind them, when it is no longer possible or even expedient to attempt to control their free development. Nations, like individuals, have work to do in their day and generation. Like individuals, they must make the world better for having lived in it. There is such a thing as national character and it must be developed as individual character is developed. In all phases of life the law of growth is a law of progress through struggle: in the physical world, the moral world, the social world. No progress can be true progress unless it costs. There is, therefore, something childlike in the simplicity of those who are surprised to find that the universal law still holds and that the step from Spanish barbarism to English civilization can be taken only at the price of blood. There are those amongst us who suppose that a dynasty can be made to die without a struggle—that Spain might peaceably have been persuaded to commit suicide; that one of the proudest and least enlightened nations could have been made to humble itself under the influence of pure reason. What is there in our experience to



warrant such a belief? Children continue to be born in pain. Character is still sanctified only by suffering. Society is purified only by the operation of forces which, for the nonce, seem destined to overthrow it. Our nation has suddenly awakened, we know not why or how, to a sense of her duty to civilization. The occasion of the awakening may have been the sufferings of the reconcentrados or it may have been the destruction of the *Maine*. It is often a sudden shock which brings us to ourselves. Certainly the awakening has come. It may be demonstrable that to do this duty will hurt our commerce, that it will paralyze business, that it will cost time, money, suffering. Nevertheless the country has made up its mind to act, and it is in the light of this determination that Spain may read her doom. We cannot count the cost. We have already passed, perhaps, through the period of excitement. The strain and weariness have begun to affect us. Could each of the secrets of Time have been disclosed to us in advance probably the country would have hung back from the enterprise upon which we are now embarked. This is always true of great undertakings. It is well for the world that it is so. It is enough for us to know that the step has been taken and that the work has been begun. Once begun, we shall carry it through to a glorious end.

Not only are we unable at this time to count the cost of the war, but we cannot foresee its consequences. Certain things we may feel sure are predetermined. Spain in the end must lose her colonies. The people of the United States will perceive within themselves the growth of a new national spirit. They will learn to hate the cancer-spots upon our political system. They will learn by experience that only those departments of the government that are administered upon a civil-service basis of merit can stand the test of a great crisis; that effective work cannot be done with fiat currency or fiat military officials; that it takes more than a mint mark to make a dollar and more than a commission to make a major-general. We shall find ourselves embarked on a new era of national life. We shall be compelled to solve new problems,

economic, diplomatic, constitutional. We can perceive already what some of them will be. All of them are full of entrancing interest. I invite your attention for a few minutes to one of them—a problem of constitutional development. How will our national Constitution stand the strain to which it will be subjected by the changed conditions of national existence? Such a question sounds strangely in our ears. We love to think of our Constitution as immortal. It has withstood the rude shocks of its early years. It has witnessed, unmoved, the era of foreign and domestic strife. The period of reconstruction left it unshaken. It has survived many a great financial crisis. Compare its majestic stability with the fleeting life of the constitutions of France. Our Constitution has stood unchanged throughout an era during which the unwritten constitution of England has been transformed. “How will it stand the strain?” You reply, “It will never feel the strain. It will stand unmoved and immovable as the everlasting hills.” I trust that you are right. I believe that you are. At the same time I fancy that I can discern in our constitutional development tendencies that are fraught with danger to the Republic. Perhaps at such a time as this it is permissible to substitute for frantic boasts an earnest and dispassionate review of the situation in which we find ourselves.

Consider for a moment the significant contrast between the English constitution and our own. We all know, in a general way, that in England the executive power is vested in the Crown, the judicial power in the courts of the realm, including the House of Lords, and the legislative power in Parliament. To some of us the conception is familiar that the power of Parliament is supreme. Some of us, not many, realize that while the sovereign is by no means a figure-head, far less constitutional power is vested in the crown than in the President of the United States. The real power among our English brethren is the majority in the House of Commons, whose leader for the time being is premier. With us the President wields the whole military and a large share of the civil power of the nation. His veto may control legislation and at times it rests

with him to determine whether we shall have war or peace. In dispensing the enormous patronage which in accordance with our political system he controls, he exercises (as has been well said) "functions which are more truly regal than those of an English monarch." "Elect such a magistrate for life, or give him a permanent hold on office, and he may be termed Mr. President but will be every inch a king." Again, still fewer realize that Parliament has power to pass all laws, with no other limit than that set by the reason and judgment of the Lords and Commons. Parliament may supersede the courts of justice by a commission acting under martial law and may "arrogate to itself the trial of any cause that it does not desire to leave to the ordinary tribunals." The courts have no jurisdiction to declare acts of Parliament unconstitutional. Why, then, may it not be said that Parliament is despotic? In what sense is England under the sway of a constitutional government? I reply that for ages the Parliament has proceeded according to rules and precedents which are deeply rooted in the minds and hearts of all Englishmen, and there is no subject of the Queen who is in danger of being deprived of life or liberty or property except in accordance with that due course of law prescribed by Magna Charta. In a real sense, therefore, it may be said that Parliament cannot run athwart the traditional liberties of Englishmen. We, the people of the United States, on the other hand, have embodied in a written constitution the declaration of principles in accordance with which it has been our will to live. In England, when a measure is proposed in Parliament, no question of legislative *power* need be considered. The only inquiry is: "Is the measure consistent with principle and such as the circumstances demand?" With us the question must be: "Is the measure expedient and, if it is, is it consistent with the provisions of our Constitution?" No matter how great the expediency of an act may be, it is of none effect if it transgresses the limitations set by our fundamental law. As is well known, it is the peculiar function of the American judiciary to determine whether or not an act of

Congress or of a state legislature is constitutional. The exercise of this vast power may be regarded as essential to the conception of a written constitution. The supremacy of the judiciary over the legislature has been our boast. It is a feature of our constitutional system which has excited the admiration of foreigners. Our Constitution, as interpreted and developed by the Supreme Court of the United States, has proved to be the bulwark of our liberty. By a use of the judicial power that may well be regarded as inspired, Marshall (after Washington the greatest of Americans) found it possible to make of us a nation. By a wise exercise of the same power, Miller and Bradley, worthy successors of the great Chief Justice, have removed the barriers interposed by states to check the even flow of national commerce. Perhaps I cannot do better than describe this feature of our American system in the language of Mr. Justice Harlan in a recent case: "The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land." But look at it, my friends. Think for a minute of the tremendous possibilities of evil which lurk in this vast power. As each decision is rendered on a constitutional point the decision passes into the Constitution, and becomes a part of it. We expect of the Supreme Court the same stability of decision that we expect in the case of the Constitution itself. If the Court declares an act unconstitutional we should think it a sign of weakness if the declaration were not to endure for all time. Yet the question may relate to some great power of government which the nation has undertaken to wield. Take, for example, the legislation by which Congress, after the Civil War, sought to make greenbacks

legal tender for payment of debts. An enormous responsibility rested on the Supreme Court of the United States. To declare the measure unconstitutional would hamper the nation forever and would leave it powerless to exercise one of the great attributes of sovereignty. Nevertheless, the Court had the courage of conviction and declared, by a majority vote, that to make paper dollars a legal tender was unconstitutional. But mark that the decision laid a constitutional prohibition upon the exercise of the national will. The spectacle was presented of a sovereign people checked in the accomplishment of its purpose by an agency of its own creation. The result was inevitable. The legal tender acts were reconsidered and their validity was affirmed by a divided court. Observe that I am not discussing the merits of the question, either as a point of constitutional law or of finance. I am merely calling your attention to the way in which, at a critical period of the nation's history, it was found impossible to sustain an exercise of the judicial power in opposition to the will of a great majority. Take again such an important question of national policy as the Income Tax. A majority in Congress decided in favor of a form of taxation which the experience of sister countries justifies us in adopting. The Supreme Court was called upon to determine the validity of the act and the decision, subject to certain limitations, was in favor of its constitutionality. The Court was divided, however, and this time the public sentiment, which charges the atmosphere breathed even by the greatest and purest judges in the world, was adverse to the law, and a reconsideration of the decision resulted in a declaration that the law as a whole was unconstitutional. This decision is more dangerous than the decision in the Legal Tender Cases. There it was ultimately decided that the nation might wield a sovereign power. Here it is made to appear that the nation stands stripped of a power—or is at least hopelessly hampered in the exercise of a power—which may become essential in view of the enterprise on which we are embarked. Before the present war has become a thing of the past, the Supreme Court may find it necessary to overrule itself or else take refuge in an attempt to

draw a distinction, economic rather than constitutional, between the act which it has already condemned and another tax law of the same kind which must sooner or later come before it. Again observe that I am not discussing the merits of the question, although I am of the opinion that an income tax is a most desirable form of taxation and that the decision of the Supreme Court was erroneous. The point is that the Court has construed the Constitution as declaring that the nation may not exercise a power which may yet be found indispensable. If the Court is wrong, the correction of the error will have unfortunate results. If the Court is right, the Constitution is at fault and an amendment to it, except in the face of some extraordinary emergency, is under our system a practical impossibility.

Turn to a different field. Consider for a moment the recent decision in *Smyth vs. Ames*, better known as the Nebraska Freight Rate Case. Nebraska had passed an act regulating the rates to be charged by carriers for the transportation of property and persons within the State. The Court, adhering to the view that the *reasonableness* of a rate is a judicial question, decides that the reasonableness of such regulations depends upon whether they give a fair return to the railway companies inside the state and must be determined without reference to business of an interstate character. A railway company cannot be compelled to do Nebraska business at unprofitable figures on the ground that its lines in another state are so profitable that the company as a whole will make money. A railway expert has pointed out, since the decision, that in thirty-eight States of the Union governmental restrictions would be unconstitutional under existing conditions. In other words, the legislatures in all but eight of our states now find themselves unable to exercise a governmental power to which carriers at the common law have been subject from time immemorial. It is surely a significant thing that upon a court of justice has been thrust the decision of three great problems which are in their nature problems of currency, of finance and of commercial control. It is also significant that

while a generation ago the decision of a doubtful question fell, under the pressure of the moment, on the side of the constitutionality of the measure before the Court, the decision of the problems of to-day is a decision that the acts in question are unconstitutional. An examination of the decisions of federal and state courts shows an increasing number of cases in which questions of constitutionality are discussed and an increasing number of decisions to the effect that acts of legislature are unconstitutional. Our constitutional law is fast taking on the aspect of a general system of restriction and prohibition as respects the exercise of the legislative will. This is an indication that our constitutional law is in danger of growing more and more rigid while the English Constitution retains its flexibility. Our judges are broadening their jurisdiction. They are using their power more and more. The result is an increase in the measure of the responsibility of the courts and a consequent diminution in the measure of the responsibility of the legislatures. The outcome is what might have been anticipated. Close observers of the work done by our legislators, both in Congress and in the legislatures of the of the states, report an increasing tendency towards the passage of ill-considered and crude legislation and they note the half apologetic remark that "If the act is unconstitutional the courts will correct it." When an act passed under these circumstances comes before the courts it is apt to be so imperfect in its structure and so full of possibilities of evil, that the bench and the bar are eager to search the four corners of the Constitution, and even to look beyond them, in a determined effort to protect the people from the consequences of unwise legislative action. The greater the responsibility accepted by the courts the more unworthy of confidence our legislators become. They no longer feel themselves to be the ultimate custodians of the liberties of the people. They assume that the declaration of the unconstitutionality of an act redresses all wrongs and makes dangerous consequences impossible. That such a declaration by a court is a declaration which is of present advantage to the community

no one can deny. We are apt to forget, however, that every such decision becomes a part of our constitutional law, and that while it is a means of averting a present evil it may prove itself a source of serious trouble in the future. It may be a good thing to protect those who control great municipal franchises from unconscionable legislation by state legislatures, by municipal councils and by boards of aldermen. It may be a very serious thing to find ourselves hampered by a long line of decisions rendered to vindicate such rights when the time comes for our municipalities to follow the example of the municipalities of the old world and place in the hands of the people the control and exercise of these protected franchises. It may be a good thing to kill an ill-conceived and slovenly alien tax bill or direct inheritance law. It may be a very dangerous thing to strip the state of the power to enact properly drafted laws of this character. When the legislature of Pennsylvania passed an act relating to admissions to the bar which was so ill-considered that a would-be attorney threatened to intrude himself upon a court before which he was not qualified to practice, the Supreme Court did the community a service in frustrating his reprehensible attempt. It is unfortunate, however, that the Court found it necessary to make a general declaration that acts regulating the admission of attorneys are unconstitutional usurpations of the rights of the judiciary, for such a declaration, if adhered to, will make it impossible for Pennsylvania to accomplish the salutary educational reforms which have been set on foot in some other states. In such cases as these the courts break the force of the blow which our own representatives level at us, and as we seldom feel the blow's full force we do not rise to that pitch of indignation which now and then moves a community to turn away unworthy representatives from its service and substitute legislators more faithful to their trust.

Another result of the tendency which I have been considering has been the growth of the sentiment that a constitutional provision is a panacea for all ills. Because our legislatures abused their powers, it was assumed in many quarters



that special legislation should be made unconstitutional. Accordingly, when in Pennsylvania we framed our Constitution of 1874, we inserted a general prohibition against local and special legislation. When we found that the legislature could not do its work in the face of such a prohibition it became necessary to resort to the device of arranging the objects of legislation into classes in order to legislate generally for each special class. We are now struggling to place some limitation upon the right to subdivide into classes, but the struggle will doubtless end in the nullification of the artificial constitutional restriction. The Pennsylvania Constitution of 1874 contains another instance of the tendency to crystallize contemporary economic conceptions by making them part of the fundamental law. I refer to the prohibition of consolidation as between two parallel and competing railroad lines. It needs but little reflection to satisfy one that it is a shortsighted policy to commit a great and growing community to the declaration that cut-throat competition between parallel lines of railroad is always and under all circumstances a good thing for the public.

What does all this mean? It means that those, on or off the bench, who have been influential in moulding public opinion, have hitherto failed to grasp the full significance of a great national development and growth, together with the accompanying changes in social and economic conditions. We have, as a nation, supposed that present conditions are eternal; that existing economic conceptions are unchangeable, and that by crystallizing them under the protection of a constitution we can check all onslaught upon them. Fatal mistake! What is a constitution that it should be so interpreted as to fetter a nation's growth? Suppose all the people say "We will have an income tax, and have it at once." It is like the legal-tender question. The constitutional restraint imposed by judicial decision would quickly melt away. If not all the people, but a great majority were to raise this cry, the effect ultimately would be the same. The Constitution is as nothing when it ceases to reflect the nation's will. Do we delude ourselves by

supposing that this nation is to be held back from territorial acquisition by the failure of our Constitution to make express provision for colonial government? Do we propose to meet the single-tax advocate by telling him that even if he convinces the nation, the constitutional difficulties in his way are insuperable? Do we fondly dream that we are giving a conclusive answer to the socialist when we tell him that our Constitution does not permit an acceptance of his theories? Fatal misconception of a constitution! We must meet each adversary in the open and unhorse him in a fair fight—a fight fought in defence of the system for which the Constitution stands. We must not take refuge behind the Constitution for the sake of avoiding the fight. The Constitution needs our protection. Its function is not, primarily, to protect us. It follows that we must not incorporate into the constitution of nation or state, either by direct enactment or by judicial decision, principles of restraint and restriction which will precipitate conflicts between constitutional law and inevitable national development. If we read the signs of the times they point us to the coming of new things under the sun—things new for this nation but familiar to every student of national evolution. The nation has become great and strong. It has reached maturity. It must exert its full influence among the nations of the world. Yes! Nations of the *world*. Who are we that we should longer attempt to maintain an imaginary line between so-called Eastern and Western Hemispheres? Is it not our glorious privilege, as we penetrate further into the secrets of the universe, to triumph over the limitations of space and time, causing the ends of the world to meet and time past and time future to merge in time present? I believe that there was once a North and a South in this country, with a line somewhere between them. The line has vanished. Some would tell us of an East and a West; but the thing is clearly impossible. This is a nation, instinct with life—a people with a will to be one. In this we may find the strength of our Constitution. Let us beware that we do not so develop it as to bring it athwart the stream of national progress.

You say to me, "This is all very well, but while you have pointed out many possible dangers, you have made no practical suggestions in regard to the means of guarding against them." My only reply can be that the nature of the case is such that the recognition of the danger is itself the most effective precaution. If educated people who, like yourselves, are in a position to influence public opinion, will lay firm hold upon the conception of national evolution and the futility of multiplying constitutional restrictions upon the exercise of powers characteristic of sovereignty, they will be doing to their country a service of which it stands in great need. We must resolutely oppose the views of the many loyal citizens who conceive of social and economic conditions as static, who seek to solve all problems by the waning light of that political economy which was in the ascendant at our nation's birth. We must set ourselves against the position of those who ascribe such inevitable issues as the present war to the plots and machinations of corrupt politicians. Such people so little appreciate the resistless momentum of a nation that has been aroused to action that they imagine it to rest in the power of individuals to avert a coming war, and they even criticize the President in the present crisis for not having arrested the headlong rush of waters to the sea. They fail to perceive that the so-called "concessions" made by Spain at the eleventh hour were wrung from her only by her realization that the people of the United States were at last awake—that they had risen to the height of a determination to act—and were descending with resistless might to the destruction of her barbarous and despotic sway. It was the sight of this national rising and impending descent that caused Spain to offer concessions; and the fact that the descent had already begun made the concessions worthless as having come too late. Withhold a message? Modify a recommendation? Advise the nation to pause? As well might our friends beseech the smith to stay the ponderous hammer in its decent upon the glowing metal, as to attempt to avert the breaking of a storm that has been gathering for more than

half a century! Fellow citizens, we must see the present in relation to the past if we would scan the future. We must accustom our eyes to the onward movement of institutions and national conditions. We must realize that we cannot keep our dear country always in its childhood and within the realms of quiet retirement from the world. It was a sad day for Æthra when the young Theseus grew strong enough to move the stone beneath which his father's sword lay buried and seized that sword in a sudden impulse to do such deeds as had made his father renowned. A sad day and yet a happy day; for the mother knew that a selfish life is a wasted life and that a man who does not impress himself upon his day and generation misses the mark that is set for his attaining. Let me say again that what is true of individuals is true of nations. If we love our country, if we believe in our institutions and our civilization, we cannot but rejoice that an opportunity has come to shed our light abroad. This has been the mission of England, our Mother Country. It may well be our destiny to carry on the work of subjecting the world to the sway of Anglo-Saxon civilization; even as the young Greek took his father's sandals and his father's sword and caught something of his father's inspiration. We talk of an Anglo-Saxon alliance, as if that were a matter of contract-making. With the same blood in our veins—with the same charter of sacred liberties—with a common instinct for impressing our institutions upon other peoples—such an alliance is ours already; the compact is registered in our hearts.

If I have suggested any thoughts to you to-day, let this be one of them—that the world will be better when this war shall have been fought. It will be the glorious privilege of this nation to have inaugurated a new era of human progress. This is a matchless task; but to do our work thoroughly and well we must do it with all our might. Our nation in this crisis and in every crisis of the future must needs be armed with all the great powers of sovereignty. Our courts must, therefore, curb their newly developed tendency to fetter governmental action by constitutional restraints.





Gaylord Bros.  
Makers  
Syracuse, N. Y.  
PAT. JAN. 21, 1908

359114

JK248  
P5

UNIVERSITY OF CALIFORNIA LIBRARY

