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### Henry Wells Lawrence Memorial Lectures, Number 2

Carl Joachim Friedrich

Arthur Meier Schlesinger

Alpheus Thomas Mason

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HENRY WELLS LAWRENCE MEMORIAL LECTURES NUMBER II

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THE DEMOCRATIC PROCESS:  
LECTURES ON THE AMERICAN LIBERAL TRADITION

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BY

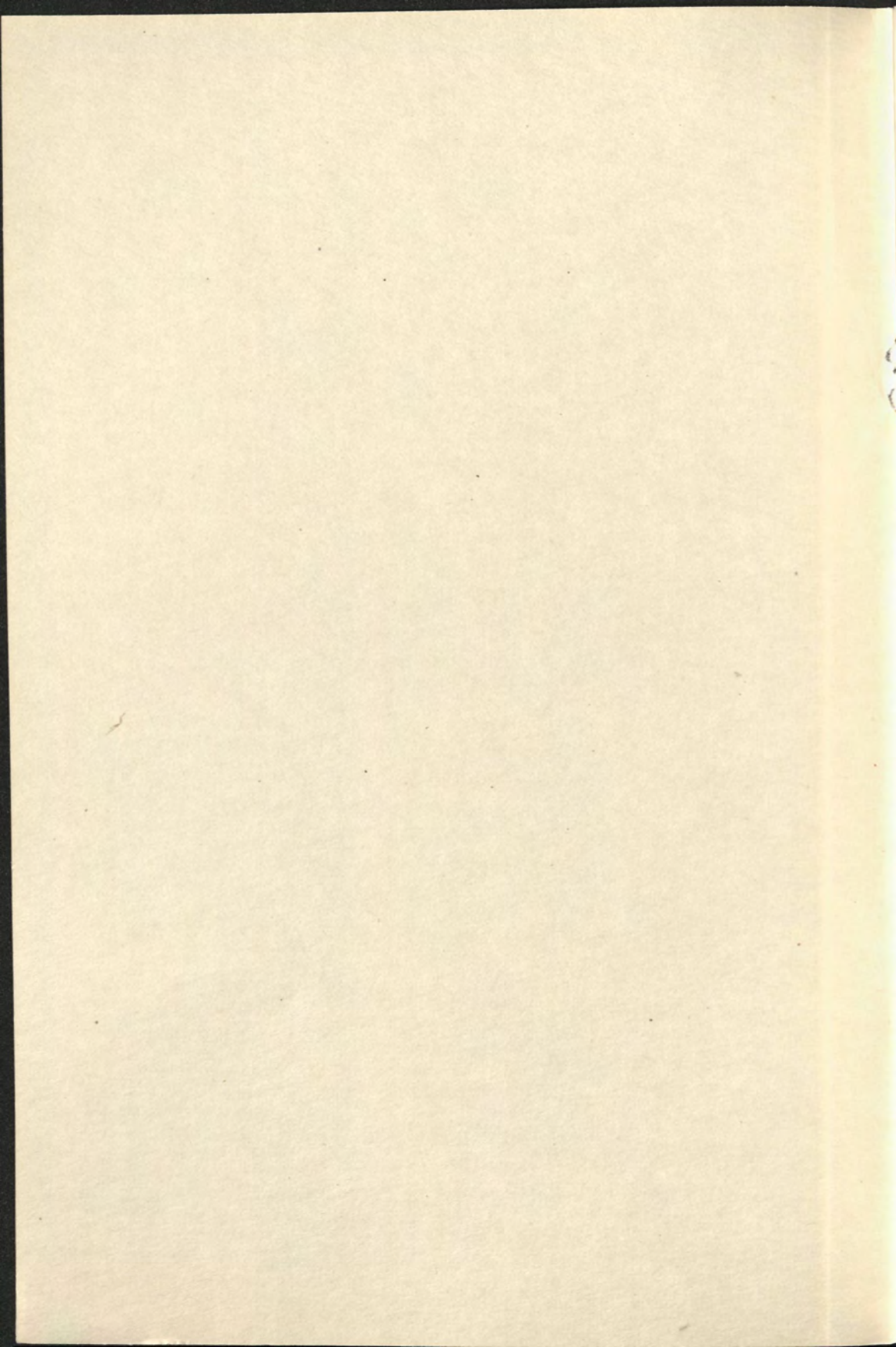
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PRINCETON UNIVERSITY

NEW LONDON, CONNECTICUT  
CONNECTICUT COLLEGE

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## I.

### INTRODUCTION

The Henry Wells Lawrence Lectureship was founded in 1944 as a memorial to Dr. Henry Wells Lawrence, Chairman of the Department of History and Government at Connecticut College from 1920 to 1942. The lectureship was established by friends, colleagues, and former students of Dr. Lawrence "to bring to the campus annually a scholar in the broad field of history who will present his subject in the spirit of the liberal tradition to which Dr. Lawrence was devoted."

The present volume contains the second, third, and fourth lectures delivered under this foundation.

The first annual lecture, "The Problem of International Security: Historical Backgrounds," was delivered by President Charles Seymour of Yale University, an old friend and fellow student of Dr. Lawrence's, on February 27, 1945. It was published together with representative essays from Professor Lawrence's pen, as Volume I of the Henry Wells Lawrence Memorial Lectures.

The lectures in the current volume are all concerned with the American liberal tradition, either with its domestic aspects or with the contemporary attempt to extend it into an erstwhile authoritarian state.

The second lecture, delivered on February 26, 1946, by Arthur Meier Schlesinger, Jr., now Associate Professor of History at Harvard, analyzes the "pattern of democratic change" during the eras of Andrew Jackson and Franklin Delano Roosevelt.

The third lecture, delivered on October 24, 1946, by Carl Joachim Friedrich, Professor of Government at Harvard, contains a first-hand report of a recent trip to Germany where Professor Friedrich advised American Military Government authorities and conferred with German political leaders on their attempts to establish constitutional governments in the several states of the American occupation zone.

The fourth annual lecture, delivered on October 30, 1947, by Alpheus Thomas Mason, McCormick Professor of Jurisprudence of Princeton University, discusses some of the variations that have developed within the American liberal tradition. Drawing in part upon his long study of the career of Louis Dembitz Brandeis, Professor Mason presents here an analysis of certain types



of liberal thought and action that have developed in the United States during the past seventy-five years.

Together, these essays do much to illuminate the complexity of American democratic liberalism and to explain its continuing vitality. At the same time they suggest the difficulties that Americans face overseas when they attempt to transmit it via military government to peoples of a somewhat different cultural heritage. Presented originally to undergraduates, these lectures are offered now to a wider public in the hope that they will promote an appreciation of the theme to which they are addressed.

CHESTER MCARTHUR DESTLER, *Editor*  
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## II.

### THE PATTERN OF DEMOCRATIC CHANGE IN THE UNITED STATES ANDREW JACKSON AND FRANKLIN DELANO ROOSEVELT

BY ARTHUR M. SCHLESINGER, JR.

The life-and-death problem for any society is the problem of change. This world of ours is basically an unstable world (or so the experience of recorded history suggests, and a generation which has split the atom can hardly offer contradiction). Every society to survive must make an endless series of adjustments, large and small, trivial and cataclysmic, to the endless series of changes in its environment.

Change, this generation has concluded, can be for better or for worse. The Victorian faith in progress has disappeared along with the cabriolet and the hansom cab; and even the Victorians never believed in the inevitability of short-run progress. But we have lost the animal faith in the long-run progress. Our generation is dazzled by images of disaster. Our Utopias, whether chromium-plated and hermetically sealed like that of Mr. Huxley, or rising from the rubble of a world—shattered by suicidal war like that of the later Wells, are gloomy Utopias. Our Utopias in practice, one may add, are even gloomier because they are real. Our attitude toward change is no longer innocent and joyous. We gamble neither on its not taking place nor on its taking place for the better. And, let no one mistake it, the twentieth century is like the sixteenth—a century of transition and transvaluation, of despair, fanaticism and war, a century when the world is cut loose from old moorings and seeks desperately for new.

We thus have a grave responsibility to understand what change is about, why it must come, and what forms of change are, in the highest sense, legitimate. We can neither oppose change without discrimination nor accept it without discrimination. We must avoid both the suffocation in the blind alley and the wild leap into the black abyss. Our job is to focus what feeble and flickering light we have to pick out the insecure path along the edge of catastrophe.

In this century the issues of change will probably present themselves under a political guise. To understand the process of political change we must understand first of all the role of the ruling class.

Every society has a ruling class, whatever its pretensions, whether to democ-

racy or even to classlessness. The social character of that class has changed according to circumstance from the priesthood to the armed warrior, from the capitalist to the bureaucrat; but its function has remained the same. It may be briefly defined as that class which benefits from the continuance of the existing order, and it so benefits because the existing order is set up to supply it with power and prestige.

The rest of the community tends in time to grow increasingly dissatisfied with its lot. The length of the period of tolerance depends on the wisdom, efficiency and vigor of the ruling class. But, as that class fails increasingly to solve the greatest economic questions, as it fails to hold the political loyalty of large sections of the community, as it fails to recruit promising outsiders and thus drives them into opposition, so its position becomes increasingly precarious. It is soon faced by new problems of production and subsistence, less easy than those it met when it first came to power; and it is confused, in addition, by that treachery of the soul which has insured that every ruling class known to history, whatever the objectives with which it came to power, has ended by becoming much less interested in those objectives than in power itself.

Thus the question of change becomes imperative. An enlightened ruling class can relieve the pressure by making concessions, though these concessions will soon involve the partial loss of power to the opposition. A wise ruling class, like the British, renews itself from below by a steady and patient process of absorbing the most vital elements among the ruled. A tough ruling class like the Soviet liquidates its opposition; and it looks as if the Soviet rulers may be wise as well. The introduction of universal education under state control provides an admirable mechanism for spotting able men at an early age and tapping them for the Communist Party, lest they become disgruntled and turn to opposition. The recent action of the Communist Party in conferring membership upon great numbers of war veterans is another measure designed to assimilate all powerful groups to the ruling class.

The invention of democracy in the eighteenth and nineteenth centuries made possible a new stage in our approach to these questions. Democracy seeks to solve the problem of change by abolishing the ruling class. The attempt at abolition has proved abortive; the ruling class has persisted in a new and less obvious form; but democracy did mean, at least, a blurring of class lines. Though the ruling class has an effective existence, it no longer has a legal or statutory existence. A democracy has no equivalent for an hereditary nobility with governing power, or for a single party enjoying a political monopoly. It is thus easier to cross the tracks in a democracy. The process of recruitment is less complicated and formal. The ruling class, no longer stiffened by a special tradition or by a peculiar status, can make the accommodation to change more harmoniously and quietly.

A second contribution made by democracy to the problem of change has



been a more mature conception of legitimate change. Our margin for maneuvering is wider; a greater range of possibilities exists within constitutional bounds, changes which thus invoke neither the specter of revolution nor the terror of repression. The ruling class can no longer cope with opposition by off-the-cuff violence or by secret police without jeopardizing its whole moral claim to govern.

Democracy has further devised political techniques to express and regularize its solution of the problem of change. The secret ballot, the parliament, the division of powers, the fixed elections—all these are established to make sure that political change comes about in an orderly manner.

The broad result has been to create a flexible political and social structure, in which the premium is placed on tolerance, bargaining and compromise—a structure which has on the whole brought about a steady education of the ruling class to the necessities of change and at the same time has kept alive enough hope for discontented minorities to deter them from taking up the option of revolution.

Democracy itself was the expression of a fundamental change in property relations; and its apparatus for the peaceable solution of its internal problems has never been brought to its crucial test—that is, another fundamental change in property relations. It is widely believed—it is, for example, a premise of Leninist thought—that no such fundamental change would be possible without armed resistance by the ruling class and thus violent revolution from below.

Yet the resources of democracy may be greater than some suppose. In Great Britain today we are observing the phenomenon of a majority government elected on its promise to interfere basically with property relations; and it is my guess that the Labour Government will be able to go very far indeed before the Parliament gives way to the barricades. Great Britain is a nation of substantial and tenacious libertarian traditions. But so, I hope and believe, is the United States.

Democracy in the United States has had one conspicuous failure. That failure is, of course, the Civil War, the great tragedy of our history; and an understanding of the Civil War makes clear certain limitations of the democratic solution. The questions which brought on the Civil War were not class questions but sectional questions. When views are held strongly, exist across class lines, and are concentrated in special areas, the problem of conciliation is no longer an internal problem of bargaining, jockeying and compromise. It becomes virtually a problem of foreign relations; and, when the resources of diplomacy are exhausted, the alternative is war. Democracy could not have avoided the Civil War because the majority solution would have been imposed by one section on the other and would have been resisted as a species of foreign aggression.

But on no other occasion in our national history have we failed to surmount



peaceably our internal crises—a distinction which Great Britain is the only other great nation in modern times to share. Our ruling class, never clearly defined but in general to be understood as our business community, has been on the whole a weak and incompetent ruling class. Since the death of Alexander Hamilton and the disappearance of the Federalist Party, it has never had first-class political or intellectual leadership. Because, after the failure of Hamilton, it was obliged politically to deny any explicit conception of itself as a ruling class, it has been intellectually handicapped in resisting the arguments of the democratic opposition. Because America has been in a very real sense a nation of opportunity, the ruling class has been fluid and heterogeneous in its composition. When the laws of economic gravity have brought it political power, it has shown little responsibility in the use of that power, and has typically muddled its way into dilemmas from which it has to be bailed out by the democratic opposition. The American ruling class has been politically, ideologically and socially vulnerable.

The existence of an economically powerful but politically feeble ruling class has had important consequences for our history. It accounts, for example, for the peculiar timorousness with which our business community continues to regard the world outside America. The great Marxist theorists expected the first world war to mark the debut of the American capitalists on the world stage and anticipated the ruthless spread of American imperialism through the world. If our business community had the nerve or vision of, say, the British merchants and industrialists in the sixteen, seventeenth and eighteenth centuries—of the men who built the British Empire on a set of shoe-strings—the Marxists would not have been disappointed. But what, in fact, did happen? Our business community spearheaded the frightened retreat from world responsibility, attacked participation in world affairs, from the League of Nations to the Second World War, and in general astounded the rest of mankind by its timid underestimate of its own power and opportunity. Except for a few special fields, like oil, banking and air transport, the business community seems as lacking in bold imagination as ever. If it had authentically powerful commercial instincts, it would make its peace with labor and pay labor's price by invading the world's markets with the help of labor, just as British business has survived the rise to power of the trade union movement by taking it into junior partnership and battering together off India and the Empire.

From the point of view of democratic change, the political feebleness of the ruling class had had fundamental results. Feebleness implies a combination of ineffective and incoherent brutality with basic and pervading weakness. Thus we have occasional lurid incidents in which hired company thugs shoot down strikers, but the general picture is rather one of confusion and uncertainty—lack of purposeful action rather than too much of it. Popular dissatisfaction with the American ruling class has sprung from its incompetence rather than from its energy; discontent has been directed at inefficiency, not at tyranny.

Yet, for all the conditions working against sharp social struggle, there have been two periods of acute class tension in the United States. The two periods have been the age of Andrew Jackson and the age of Franklin Roosevelt. These were the periods when popular dissatisfaction with business rule was strongest, when the dissatisfaction found voice in a broad coalition directed under vigorous presidential leadership against the business community, and when the ruling class itself became most bitter and implacable in its resistance to change.

Jackson and Roosevelt were one hundred years apart—a long time in a country with as short a history as the United States. The face of America had changed almost beyond recognition in this period. The population had multiplied, the area increased, and a century of science and invention had transformed the tempo of American life. Yet in the pattern of democratic change the age of Jackson and the age of Roosevelt present curious and instructive parallels—parallels all the more significant because of the contrast between the pastoral simplicity of life under Jackson and the frightening complexity of life in the twentieth century.

It is worthwhile to inquire in some detail into the nature of these parallels, and the inquiry may cast useful light on the character of democratic change. Both Jackson and Roosevelt came into power as beneficiaries of widespread discontent. Both succeeded a conservative regime which had shown itself conspicuously unable to cope with the sources of this discontent. It is probably only a meaningless coincidence that each succeeded a relatively high-minded and intelligent conservative, personally cold, politically inept, but neither stupid nor corrupt. John Quincy Adams, it should perhaps be noted in justice, had his sights half trained on a future which few of his contemporaries were able to appreciate, while Herbert Hoover was enslaved by economic theories invented one hundred years before his birth and hardly valid then; but, in their relations to the situations which overthrew them, they played corresponding roles.

Similarly there are surprising personal resemblances between their successors. Both Jackson and Roosevelt could be described as country squires. Jackson's fine plantation, the Hermitage, was as remote from the cabins of the small farmers and the hovels of the city workers as Roosevelt's mansion at Hyde Park. Both were lawyers by profession, neither a very good nor successful lawyer, and both had military instincts and experience—Jackson in actual army command, Roosevelt as assistant secretary of the navy.

Both were men of personal charm and presence, but neither had displayed particularly firm or profound political views before their elections. Sickness played an important part in both lives. Where Roosevelt's character was recast by his bout with infantile paralysis, Jackson's was subjected to the ordeal of constant, nagging illness in the White House. The fact of illness may not have been unrelated to the immense capacity both developed for intuitive understand-



ing of the people. Both had a faculty for judgment, of tactics as well as of policy, to which the experts with which each surrounded himself always deferred.

On the whole these personal resemblances between Adams and Hoover, Jackson and Roosevelt, may be dismissed as inconsequential, with the exception perhaps of the fact that both Jackson and Roosevelt were more or less members of the class which they attacked. Strictly speaking, they were *rentiers* and not businessmen, but their natural affiliations were surely with the conservative party. My suspicion is that the leadership of successful liberal movements in this country will continue for some time to come from the upper middle class or the aristocracy.

Both men faced unprecedented presidential problems. Consequently each had to improvise and experiment with policy and with personnel. Each found, moreover, that a concerted attack on problems of such novelty required the expansion of executive power. The presidency entered a new phase with Jackson, who made clear for all time that the executive would be the dominant arm of the government; and Roosevelt developed the resources of presidential leadership to the highest point in our history—a fact symbolized strikingly by the fourth term.

Each too found it necessary to resort to certain executive devices unknown to the Constitution. Both discovered, for example, the inadequacy of the cabinet as an instrument for policy guidance. The cabinet is inevitably selected in response to an intricate political and geographical calculus designed to provide all important factions in the party and regions in the country with a feeling of representation in the government. It may be a satisfactory enough policy instrument in normal times; but, when problems are urgent and unprecedented, it is not likely to supply the qualities of imagination and disinterestedness which the executive will require.

These qualities include a militant reform drive, which can come only from a basic dissatisfaction with the existing order, a lack of ambition, a complete personal devotion to the executive, and an absolute loyalty to the cause. Thus both Jackson and Roosevelt relied for their most intimate advice and bestowed their most confidential assignments upon a small group of men endowed, in the modern phrase, with a "passion for anonymity." Amos Kendall, Francis Preston Blair and others constituted Jackson's Kitchen Cabinet, as Harry Hopkins, Judge Samuel I. Rosenman, Benjamin V. Cohen and Thomas Gardiner Corcoran and others constituted Roosevelt's Brain Trust. It is of interest that the two closest to each president—Kendall and Hopkins—were men whose chronic ill health may well have created special bonds of sympathy with the presidents.

Some of these men—like Kendall and Hopkins—eventually emerged from the shadows to become cabinet members; and, in each case, certain cabinet

members, like Martin Van Buren and Roger B. Taney, or Henry Wallace and Harold Ickes, enjoyed the familiar status of brain trusters.

Harriet Martineau's paragraph on Amos Kendall in 1834 is still the classic description of the brain truster in operation. "He is supposed to be the moving spring of the whole administration; the thinker, the planner, and doer; but it is all in the dark. Documents are issued of an excellence which prevents their being attributed to persons who take the responsibility of them; a correspondence is kept up all over the country for which no one seems answerable; work is done, of goblin extent and with goblin speed, which makes men look about them with a superstitious wonder; and the invisible Amos Kendall has the credit of it all."

In 1838 a Southern Democrat who had broken with the administration because of its radical economic policy—a type not perhaps unknown today—said in the House of Representatives of Amos Kendall, "He was the President's *thinking* machine, and his *writing* machine—ay, and his *lying* machine! . . . he was chief overseer, chief reporter, amanuensis, scribe, accountant general, man of all work—nothing was well done without the aid of his diabolical genius."

Another phenomenon, the probably unavoidable by-product of the brain truster, is the frustrated brain truster—the man who goes down to Washington filled with ideas, gains momentary access to the president, is eventually thrown out, and then revenges himself by writing a book exposing the administration which refused to follow his advice. Thus Robert Mayo wrote two bitter little books revealing the vile purposes of the Jackson administration and, in particular, denouncing the person and plans of Amos Kendall, whom he must have regarded as his more successful competitor.

At the start, the executive will get cooperation from the Congress, because the Congress is fairly fresh from the people and recognizes the pressures for change. But the experience both of Jackson and Roosevelt suggests that, as the president continues to press his reform program, the Congress will become more and more the voice of conservatism. Both Jackson and Roosevelt had increasingly strained relations with Capitol Hill. Jackson's veto of an act to recharter the United States Bank—an act, as his opponents incessantly pointed out, passed by a majority of both houses—precipitated the first all-out attack on his administration and supplied the leading issue in the campaign of 1832. His relations with Congress grew steadily worse in his second term. He used the veto power more than all the presidents before him had together used it—as a result of which he was widely denounced as un-American, undemocratic and dictatorial by those whose political and economic interests stood in his line of fire. After the removal of the government deposits from the Bank, the Senate actually passed a resolution charging the president with having violated the Constitution. When Jackson replied by a long protest, the Senate refused to enter it in its records. The passing of this resolution of censure represented



a worse impasse between the executive and legislative departments than ever existed in the age of Roosevelt, in spite of the statements in recent years of self-appointed constitutional experts to the effect that relations between the President and the Congress have never fallen so low in our history. Experience suggests that no strong executive can avoid tangling with Congress, and also—if we observe Mr. Truman—that a weak executive can hardly avoid it either.

The chief reason that a vigorously democratic president will be opposed by large elements of the Congress is that special interests can always expect a welcome somewhere on the Hill, especially when the door is closed to them at the White House. The situation is complicated by the fact that the president to sustain his position must, like Jackson and Roosevelt, appeal over the heads of Congress to the people. This very strategy always appears to some to threaten the constitutional prerogatives of Congress—an objection which can only be based on the curious theory that the Congress is the exclusive representative of the people.

This question of constitutional prerogative supplies the champions of special interest with a much nobler platform from which to attack a democratic president. They concentrate on this issue; and sometimes they persuade others to work themselves into a state of honest anxiety over the supposed threat to constitutional ways. My guess is that the lather over the Constitution is pretty much a phoney. You can see today that senators and representatives who were alleging lofty constitutional fears of dictatorship as grounds for fighting Roosevelt's measures are now just as vociferous when the measures are sponsored by a man who, whatever he is, is certainly not a dictator. The same thing happened when Van Buren succeeded Jackson.

You may expect further that in any period of rapid democratic change the executive will run up against, not only the Congress, but also the Supreme Court. The president always inherits his court, which means that it has been appointed either by his conservative predecessor or by some liberal president at such a remote time that the liberal justice has long since turned conservative. Justice Story was appointed to the Court by James Madison, just as Justice McReynolds was appointed by Woodrow Wilson, but Jackson and Roosevelt found them as unsatisfactory as the designates of more conservative presidents. There are strong tendencies toward conservatism inherent within the court. Its powerful but ambiguous constitutional position presents constant temptations to enlarge that position. In any case conservatism is implicit in the very nature of the law, in the very process of judicial decision in terms of precedents.

Thus a clash is inevitable. As Jackson had the more dramatic fight with the Congress, so Roosevelt had the more dramatic fight with the Court. The scope of federal legislation had of course expanded greatly by the age of Roosevelt, so that the Court could obstruct Roosevelt's legislative program as it could never obstruct Jackson's. Death intervened more favorably also on Jackson's behalf, and he was able to put his own men on the Court without resorting to

extreme measures like the Roosevelt court bill of 1937. His appointments had about the same reception as Roosevelt's. When Jackson chose Roger B. Taney to succeed Marshall as Chief Justice, the opposition was as violent as the recent opposition, say, to Hugo Black. Said one conservative newspaper, "The pure ermine of the Supreme Court is sullied by the appointment of that political hack."

The first reactions to the Court as reconstituted by Jackson were not unlike the first reactions to the Court as reconstituted by Roosevelt. Chancellor Kent, the most eminent conservative jurist of the time, remarked in 1837, "When we consider the revolution in opinion, in policy, and in numbers that has recently changed the character of the Supreme Court, we can scarcely avoid being reduced nearly to a state of despair of the Commonwealth." Or is this a quotation from some pronunciamento of the American Bar Association a century later?

Well, the commonwealth always survives. Very few justices can long resist the inherent tendencies toward conservatism.

The conflict between president and court, it should perhaps be added, is not just an unfortunate by-product of a determined liberal administration. It is an essential part of the physiology of our system; it is the natural and wholesome process by which the tissues of the Court are restored before they are fatally injured. Without the occasional struggle with a strong executive, the Court would probably succumb wholeheartedly to the temptation to take over legislative functions; and popular protest would soon set firm constitutional limitations upon its power. The present system has periodically reminded the Court—as Roosevelt's attack reminded Chief Justice Hughes—to undertake its own program of self-discipline. The Court has thereby maintained its place at the apex of our government.

Thus a fighting executive, surrounded by a corps of intimate advisors devises a program to meet the pressures for change; and in so doing he runs athwart both of the Congress and of the Supreme Court. Those whose economic position is menaced by the program will rush to defend the coordinate bodies, unfurling the banner of high constitutional principle to conceal the actual motives of opposition. I have said that the executive will crack his log-jam by appealing over the heads of both bodies to "the people." This appeal is fundamental to his success; and the question next arises: who are the people who respond to this appeal?

Here again, when the facts are examined, a surprising resemblance is to be discovered between the age of Jackson and the age of Roosevelt. This resemblance has been too long obscured by the two theories of the source of American democracy which have dominated our national imagination. These theories, which arose in different periods but which reinforced and complemented each other, may be called the Jefferson theory and the Turner theory. The Jefferson theory is briefly that American democracy was born on the small freehold, that it is essentially a rural phenomenon; and the Turner theory is that it was born



in the wilderness, that it is essentially a frontier phenomenon. Whatever American democracy is, these theories agree, it is not, like European radicalism, the product of a conflict among the classes created by the Industrial Revolution.

Both views, one operating as a fundamental moral axiom, the other as a fundamental historical interpretation, have satisfied profound national needs—the need in particular for establishing the uniqueness of the American experience and thereby of protecting the United States from analogies drawn from Europe. Both contain serious elements of truth. But, in both cases, the theories have been developed out of all proportion to the actualities which underly them. They have been partially transformed into myth; and, in their complete statements, they are to be understood as portions of the national myth, not as definitive explanations of the actual origins of American democracy. They are to the facts much as the Garden of Eden is to the Darwinian theory.

The theories of Jefferson and of Turner make little sense, for example, when compared with the facts of the New Deal. This perhaps does not prove anything, since many persons regard the New Deal as itself the product of European radicalism. But they make little more sense when compared with the facts of the period which has been long regarded as the classic demonstration of the truth of the theories—that is, the age of Jackson. Modern scholarship has shown that the controlling beliefs and motives of Jacksonian democracy came predominantly from the East and South rather than from the frontier, and that some of its characteristic measures emerged directly out of the class conflicts in the industrial Northeast.

Take, for example, the question of the Bank. Jackson's war against the Bank has long been loosely ascribed to the frontier's instinctive democratic hatred of a great financial institution. Yet, when you analyze the sources of opposition to the Bank, it becomes quickly evident that there were two main grounds of dislike. Some people opposed the Bank because it restrained the free issue of paper money by local banks. Others opposed it because it issued paper money at all. The first ground was the characteristic frontier ground; it was the natural preference of a debtor region which stood to gain by inflation and which, in fact, had already fought with the United States Bank over this very question. The second ground—the so-called "hard money" position—was the natural preference of wage-earners, who stood to lose by any downward fluctuation in the value of money. These two incompatible parties joined in the crusade against the Bank. But, when the smoke died down, it became clear that Jackson and his administration were fighting the Bank for hard money reasons, not for frontier reasons. The final test was to come when the Jacksonian policy was presented to the West without the glamour of the Hero of New Orleans. The West never gave very ardent support to Martin Van Buren.

The basic backing for the Jacksonian program thus did not come, as historians in the Whig-Republican tradition have claimed, from a rabble of rough backwoodsmen, clad in buckskin and flourishing Bowie knives. It came from

a broad popular coalition made up of various and somewhat disparate groups, united by their dislike of business rule. Who were in this coalition? A variegated assortment, including intellectuals, writers, trade unionists, small farmers, small businessmen, city machine politicians, members of the Democratic Party organization (not least its Southern elements), and even some large businessmen who could not identify themselves with the leadership of the business community.

There are certain points worth noting here. The alliance of bossism and reform, for example, obviously did not begin when Roosevelt first accepted the support of Frank Hague, nor the participation of labor in politics when John L. Lewis contributed to the Democratic Party war chest in 1936. The political activity of the writers is another significant phenomenon. In normal times writers are non-political folk; but they are among the first to feel restless and uneasy when times get out of joint; and, since verbalization is their business, they play vital roles in awakening and guiding public opinion. When the intellectual class goes in for political criticism, it means that the existing order is losing its foundation in faith and loyalty. It is an evidence of impending crisis as unmistakable as a temperature of 101 in a medical thermometer. Jackson, for example, had behind him Nathaniel Hawthorne, William Cullen Bryant, Walt Whitman, James Fenimore Cooper, George Bancroft, Washington Irving and most of the leading authors of his day. They not only voted for him, but they identified themselves with party activity and some took jobs in the government. There was no such mass participation of writers in politics again until Franklin Roosevelt succeeded equally well in capturing the imagination and loyalty of the writers of the nineteen thirties.

Jackson and Roosevelt had the same enemy—the ruling class, the business community—and, in each case, the business community went through the same process of what can only be described as nervous breakdown. It was in power and did nothing to solve existing discontents. Then it went out of power, began to resist attempts on the part of the democratic opposition to solve these discontents, failed again, and next descended into the psychoneurotic stage of opposition.

In this phase business hysteria transfigures the president into a raving dictator, a madman foaming at the mouth, a sick man whose reins of leadership have fallen to a clique of sinister but obscure advisors, or whatever bogeyman conservative fantasies demand. (There is a distressing lack of originality from one century to another in the folklore of conservatism.) Similarly the reform program is transformed by fevered imaginations from measures, generally innocuous in retrospect, designed to plug up a few holes in the capitalist economy, into a vast and criminal conspiracy, aimed at private enterprise, democracy and the American way of life, to end with the annihilation of business, the destruction of religion and the nationalization of women.

“For the first time, perhaps, in the history of civilized communities, the



Chief Magistrate of a great nation . . . is found appealing to the worst passions of the uninformed part of the people, and endeavoring to stir up the poor against the rich." "We are in the midst of a revolution, hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man." "Though we live under the form of a republic we are in fact under the absolute rule of a single man." "The message is a heartless, cold-blooded attack upon our most valuable and most cherished classes of citizens." "The people, the country, the business men have nothing to hope from the message, (the President), or any of his clan." "What, then, sir, is the policy of the administration? . . . For myself, I believe it to be . . . a war of extermination on commerce and the currency." "All the calamities of war with the most potent power on earth would be a blessing compared with the consequences of this measure." "Our business is disappearing like the melting snow . . . The manufacturers of New England are baffled, crippled and desponding and beyond endurance." "THIS REPUBLIC WAS NEVER IN GREATER DANGER THAN AT THIS MOMENT!"

These quotations happen to be from the eighteen thirties, not the nineteen thirties. But any student of the political writings of Governor Bricker, Mr. Herbert Hoover, Mr. George Sokolsky, Mr. Westbrook Pegler or Colonel McCormick of the *Chicago Tribune* could match these quotations, sentiment by sentiment and almost word by word.

After a few years, of course, the hysteria dies down. The American way of life turns out not to be so fragile as the business community thinks. Democracy, far from being weakened, comes out stronger and more alive than before. Even business continues prosperously at the same old stand. These hallucinations of disaster are characteristic of a feeble and insecure ruling class. Few British businessmen today, facing a Socialist government, are remotely as alarmed as American businessmen were when faced by the much more conservative New Deal administration.

The exhaustion of conservative hysteria, as life simply fails to live up to nightmare, accompanies also an exhaustion of the reform impulse. After a time, in any government, temptation begins to take over. The original reform objectives give way to the desire to stay in power. Jackson and Roosevelt were the great dominating personalities; when they were removed from the scene, their followers began to quarrel among themselves, their movement to disintegrate. We have observed this phase in Washington over the past two years. Some leave to take well-paying business positions, like Jackson's Amos Kendall, who ended as the great entrepreneur of Western Union, and Tom Corcoran, Thurman Arnold, Lauchlin Currie and many New Dealers today. As the party becomes set in its ways, its internal paths to power are choked up. Energetic younger men tend to join and revitalize the opposition, like W. H. Seward and Thaddeus Stevens a century ago, or the Willkies and Stassens today. They are

opposed within the conservative party, by the Websters and Rufus Choates or by the Tafts and the Brickers, but eventually they will win. When men who have learned the lessons of reform take over the leadership of the business party, the period of rapid change is over.

This is the basic pattern of democratic change in the United States. On the content of the programs, the differences between Jackson and Roosevelt are great. It was one of Jackson's triumphs, for example, to pay off the national debt—an achievement which is the occasion for the annual celebration of Jackson Day by the Democratic Party. Indeed, so far as the responsibilities and powers of government are concerned Roosevelt and modern liberals are much more in agreement with Hamilton and John Quincy Adams than with Jefferson and Jackson. But the question of the content of the measures is not the key question. The key question is for whose benefit are the measures employed? What are the social sources of the support? And here the answer is identical for Jackson and for Roosevelt. One may conclude that the fundamental impulse of democratic change, the basic meaning of American liberalism, is an impulse on the part of the other sections of society to restrain the power of the business community.

It should be noted that this is an essentially conservative impulse. The aim of Jackson and of Roosevelt was to preserve capitalism—if necessary, from the capitalists themselves. For this reason some observers, not incorrectly, regard our class conflicts as sham conflicts since they are not aimed at altering basic property relations. It is a question of perspective whether you regard the Jacksonians and the New Dealers as a brighter and abler wing of the ruling class, or as a genuine opposition. From the viewpoint of the business community, they certainly represented a genuine opposition; but, as we have seen, this is likely to be a shrill and nervous viewpoint.

Nevertheless the Jacksonians and the New Dealers never represented a revolutionary opposition. They never challenged the constitutional guarantees of free speech, free press, free assembly and due process; indeed, they have generally tried to reinvigorate these guarantees. Any movement which operates in this sense within constitutional bounds is full in the American democratic tradition, no matter how much it may offend current prejudices of the business community or threaten corporate concentrations of economic power. A movement which rejects these guarantees—or favors them only so long as it remains a minority—a Communist or a fascist movement—is not in the American democratic tradition. But we must never forget that the business community will infallibly charge every honest democratic movement with rejection of those guarantees, with Communism or fascism. These are serious charges in a democracy. Experience suggests that they should be regarded with extreme suspicion when they come from persons with economic stakes in the political battle.

It is essential for us to understand fully the pattern of democratic change. In a few years we may well experience a terrific economic crisis. When this



crisis comes, the problem of preserving our democracy will be at its most acute phase. We will need every weapon in our arsenal. The total release of our energies will require in particular a complete and exact understanding of what our democratic tradition is; what the methods and purposes of American democracy have been; what, in hard historical fact, our political resources are.

The future crisis will probably bring a new version of the Jackson situation, of the Roosevelt situation. An energetic democratic leader will attempt to push through measures designed to secure the stability of the country. These measures will inevitably threaten vested interests. They will be fought as Jackson and Roosevelt were fought under the same rallying cries. We have seen that the facts of history disclose that part of the pattern of democratic change is a shrill scream of protest from the respectable conservative elements of the nation. When this scream comes again, we must be prepared for it and see it in its correct proportions. When a great corporation buys full pages in newspapers across the country to claim that some minor adjustment is going to mean the death of the American way of life, this should be regarded as an exercise in ritual for the edification of the faithful, not as a serious contribution to political discussion. So long as the democratic movement remains honestly in the tradition of Jackson and of Roosevelt, it will be no more a threat to the American way of life than they were. Indeed, it will probably again represent that re-infusion of militant democracy essential for the preservation of our way of life.

Our democratic tradition is big and resourceful. Given time and space, it can solve the problems which confront us. We may take heart, in addition, from the present British experiment where a government is conducting the most perilous operation of all—a revolutionary change in property relations without a revolution. Thus far there has been no violence or terror, no secret police, no curtailment of the historical British liberties, no restrictions on the free play of democracy. The next decade in Britain may well contain vital lessons for our own future. These will be lessons which our own ever-growing democratic tradition must assimilate and return to its own uses.

History can aid significantly in inculcating that vivid sense of the potentialities of our democratic tradition—the tradition which can yet save us. If we know precisely wherein the American past has been strong, we can face the American future without fear.



### III.

## THE PROBLEM OF THE DEMOCRATIZATION OF GERMANY

BY CARL J. FRIEDRICH

Mr. Chairman, fellow students, and friends, I ought to thank your chairman for his very gracious introduction. It certainly is a privilege to speak here under the foundation commemorating Professor Lawrence, and I would congratulate the committee upon its third choice because I am neither as distinguished as President Seymour nor as brilliant as Arthur Schlesinger, Jr.; so I am just what Aristotle called "the fair mean."

The problem of how to develop a sound and viable democracy in Germany is of absorbing interest to all Americans. I am happy to discuss the issue here tonight because I have had a most challenging opportunity to catch a glimpse of the inside of that development during this past summer. For at the invitation of American military government authorities I spent several weeks assisting them in the work they were engaged in: to guide the Germans in the American zone in re-establishing constitutions in the three states or *Laender* of Bavaria, Hesse and Wurttemberg-Baden. Since these constitutions are about to be adopted, we can consider the whole program with some perspective. It should be born in mind, however, that when I speak of Germany in the following pages, I am usually referring to the American zone of Germany.<sup>1</sup>

Originally, I had been very much at variance with American official policy and disinclined to participate in what seemed to me an undertaking betraying old and established American ideals. But to help leading American occupation officials solve the problems involved in constitution-making in our zone and at the same time to help those Germans who were engaged in that enterprise understand the American point of view, seemed to me an enterprise to which one could justifiably devote oneself as an American liberal.

Let me preface what I have to say by an introductory observation. Many Americans at present show a renewed interest in Germany out of a rising

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<sup>1</sup>The American initiative in establishing these constitutions, or rather requiring the Germans in their zone to establish them, was soon followed in the Soviet zone, where constitutions were adopted around the first of the year 1947, and in the French zone which adopted constitutions in the course of April and May. Only the British zone has not to date (December, 1947) completed this work, but in all the *Laender* of the British zone constitution-making is actively going forward.

antagonism to the Soviet Union. This seems to me regrettable, and not in keeping with our professed aim of democratizing Germany.<sup>2</sup> Nothing seems to frighten democratic Germany as much as the growing hostility between the United States and the Soviet Union. The correspondents who report that this development is playing into the Germans' hands are mistaking all Germans for Nazis. Democratic Germans don't see it that way and there is no realistic basis for assuming that they would. On the contrary, the most anxious question that every German put to me when he got a bit intimate was: Is it really true that you are planning to attack the Soviet Union? And when I would assure them quite firmly and with considerable conviction that such was by no means the case and that I considered it quite out of the question, and on the contrary believed that our country would make every effort to avoid a war-like conflict with the Soviet Union, it came every time as a profound relief to the person with whom I was talking.

Democratization is one of the five *D*'s that characterize our policy in Germany today. It's rather kind of fate that it has provided five *D*'s to describe these policies, because it makes it easier to remember them. These policies, as delineated in the Potsdam Agreement are: demilitarization, denazification, decentralization, deindustrialization and democratization. They are very important; they are all, in fact, essential; but our truly significant policy from the point of view of permanent and lasting peace on this earth is democratization. One of the difficulties with democratization is that it is obviously linked to ideological problems which provide ample sources of disagreement with the Soviet Union. We did not disagree with the Soviet Union on demilitarization; we both wanted to get rid of the general staff, we wanted to get rid of the army organization, and we wanted to get rid of war industries. There was no problem here. We did not disagree a great deal over deindustrialization at first, although lately the Soviet Union has adopted the policy of reparations from current production which the United States rejects. Also we disagreed somewhat on denazification, and I shall have a little more to say about that later. But on decentralization and democratization we really disagree a great deal, and the reason is that the concept of democracy which the United States stands for and believes in is quite different from the concept of democracy that the Soviet Union stands for and believes in.

Now, as long as we are in the United States and the Soviet Union is in Russia, we can get out of the difficulty by saying, "Well, let us recognize that each goes his own way and never mind about what the other is doing." Some-

<sup>2</sup> At the time this lecture was delivered Professor Reinhold Niebuhr had just published an article in *Life* in which he stated it as his conviction that the purpose of the Soviet Union was to conquer all of Europe. Besides disagreeing with this, I pointed out that our administrators in Germany did not proceed on this assumption then.



times there may be difficulties but they can be overcome. But in Germany we are both together in the same place, and we are both committed to democratization. You can't say "Let each go his own way" unless you are willing to make one assumption which we are precisely not willing to make, and that is that the zonal boundary between the Soviet and the American and British zones becomes an iron curtain on the one side of which is a country belonging to Western Europe. If we reject such a permanent division,—and we do, because it is contrary to American policy,—then we are in for a continuous period of argument and controversy with the Soviet Union on the related problems of democratization and centralization. We might just as well face this.

I think that it is rather silly to assume that because you have serious conflicts of interest with a country, you are necessarily going to go to war with it. I don't suppose that many of you here have ever studied the relations between the United States and Britain after the War of 1812 with a view to comparing them to our relations with the Soviet Union today. If you did this you would find that there was the same kind of fierce mutual suspicion you now find in our relations with the Soviet Union, yet both countries after 1812 had come to the conclusion that there was no point in fighting each other. Both governments had made up their minds that they were not going to go to war against the other and they never did again. That is very significant because they kept on scrapping but they scrapped without going to war. And I would like to submit to you that we are going to scrap a great deal with the Soviet Union but somehow I seem to feel in my bones that we are not going to go to war with them over it. We're just going to go on scrapping. And as we find that we can scrap and compromise and then scrap again we are going to get accustomed to the thought that it is possible to be quite at loggerheads and still go on. One of the places where we are going to do most of the scrapping is Germany, and one of the issues on which we are going to do most of the scrapping is democratization (including decentralization).

Before I go any further in this theoretical analysis, vitally related as it is to the whole problem of constitutional development, I would like to give you—just by way of an indication of where I went—a brief sketch of the tour of duty I made. Before entering Germany I had been to England and talked there with some of my old friends and with some of the people involved in the British occupation. I had also gone to France and talked to a number of old friends there. Then I went to Switzerland where I talked at Geneva and at Zurich to the university students about our own foreign policy, which is one of the gravest issues in Europe today. Everybody is looking toward the United States and everybody is worrying about the United States, and a good many of our people do not help it a bit by talking very irresponsibly when traveling in these countries.<sup>3</sup> I entered our zone from Switzerland,—from the back door, so

<sup>3</sup>Cf. "As the Swiss See It," *Atlantic Monthly*, November, 1946.



to speak. It was quite romantic—a telephone call from Munich, saying that a car would wait for me at the border to take me to Munich. I was told that this car could not come into Switzerland but would wait for me half-way between the French and the Swiss custom house, which a little bit frightened me. Although my bags were light, I did not know just what I would run into. Happily, as I arrived at the little border station on Lake Constance, two American boys in uniform grinningly greeted me. When I said, "How'd you get here," they replied, "We didn't think you'd like very well to meet us between the two custom houses; so we fixed it." A long single-track bridge connected the two custom houses; this bridge went over a branch of Lake Constance. It would indeed have been most uncomfortable to walk halfway across this bridge and stand waiting there in the broiling sun.

After traversing the French zone, we drove through rural Bavaria in the American zone reaching Munich in the late afternoon. It was on the eve of the elections for the constitutional conventions which had been called for the thirtieth of June in each of the three states of Bavaria, Hesse, and Wurttemberg-Baden to debate and adopt a final constitution to be submitted to the people. The idea of Military Government was that I should spend as much time as possible with German leaders to determine what was in the back of their minds, in regard to these constitutions. Consequently, a meeting was immediately arranged with Dr. Wilhelm Hoegner, the minister-president of Bavaria. There followed other sessions with the various members of his ministry who had participated in the preparation of the draft constitution. In Stuttgart, the capital of Wurttemberg-Baden, I did the same, but also participated in the meeting of the *Laenderrat* or Council of States. This organization was developed to enable the Germans in our zone to cooperate more fully. It was here that Secretary Byrnes made his historic speech. In Wiesbaden, the capital of Hesse, I found an old friend, Professor Karl Geiler, installed as minister-president, so the conferences with him and his associates were especially fruitful. At Marburg, a town with a famous old university where I grew up, I spent a little time with professors interested in the rebirth of democracy. There meetings were arranged by a brilliant and remarkable young American who recently, as you may have read in the papers, was killed, Ted Hartshorne. Ted had been engaged in denazifying the Universities of Marburg and Frankfurt, and had done it with extraordinary success. In most of the universities a substantial number of the academic teachers had to be eliminated—in Marburg I think it was 60%, in Frankfurt 50%, and in Heidelberg 75%. All these scholars have been obliged to retire because they had been supporters of the Nazi regime. This "cleansing" has seriously disrupted higher education because the number of students is greater than before. We in the American universities trying to handle double the number of students with the same staff can readily appreciate what this means.

My next stopping point was Frankfurt, where our Military Headquarters

are. The sight of utter destruction of the ancient city, which was the center of the Medieval Holy Empire was even more ghastly than I had seen in Munich, Stuttgart and elsewhere. In Heidelberg, my old Alma Mater, I again conferred with professors who had been engaged in the drafting of these constitutions. I also wanted to talk with some of the religious leaders among the clergy who had opposed the Nazis. I had an extremely interesting session with Dr. Martin Niemoeller in Frankfurt and with similar men in other places who are less well known internationally, but who, of course, knew their people and therefore could shed light on the popular interest, or lack of it, in framing constitutions. What I learned I shall report presently. Next came Franconia with the court at Nuremberg. In contrast to this utterly destroyed gem of medieval architecture, the beauty of Bamberg is hardly touched and the great cathedral towers above the medieval town in all its pristine splendor. There followed three weeks in Berlin working at headquarters with the various division chiefs and helping to draft a program for effective guidance of the German constitution makers. I also went into the French zone for a short trip and into the British zone for a little longer, seeing something of Hamburg and Hanover, as well as the Bremen enclave, which is jointly administered. I hope I have given you an idea of the itinerary and the ground I covered.

It was a most interesting and at the same time a rather upsetting trip. I don't mean merely the physical part of it, although I do believe if you have known Germany before it is impossible to imagine the condition of the country without going there and looking at it yourself. You can see pictures but pictures do not add up to the mass of the impression. You take a little town like Darmstadt, the former capital of Hesse—65,000 inhabitants, one fire-bomb attack of 20 minutes, 90% of the city destroyed, one-half of the people killed—today, of course, just one vast desert with the people who remain living on the outskirts, trying slowly to work toward the inside. It is hard to realize what this destruction means in a city like Frankfurt. The entire interior of the city is in ruins. It was quite a task to find Dr. Niemoeller. He and his confessional church are installed in a building that was partly preserved but it stands within a sea of rubble. I shall never forget the face of the man who directed us. We were driving, of course, in our military vehicle, and I had the street address but I couldn't find any signs among all this rubble. As we turned I sort of leaned out of the car and saw a man coming up. He looked like an elderly official, worn but thoughtful. I said to him, "Where is Schlesinger Gasse?" He pointed to a pile of brick and replied, "That is where it was." As he said it, an unforgettable, indescribable expression crossed his face.

I also think it's rather difficult to appreciate the extent of mass starvation. There are, of course, now, some pretty adequate reports. For example, Anne O'Hare McCormick in *The New York Times*<sup>4</sup> in a couple of columns in the

<sup>4</sup> See *The New York Times*, October 1, 1946, p. 28.



last few days has given a very vivid picture of that mass starvation. The caloric content of the rationed food available throughout the British zone is a thousand calories; this is way below the concentration camp ration. That kind of a ration for people in a concentration camp is bad enough, but for millions of people it becomes a pretty terrific proposition. There are quite a few people who argue that the Germans were responsible for the war and they have to pay for it. True enough. For even if we wanted to prevent misery, we could not have prevented it; they were bound to pay for their sins. But what worries the more conscientious Americans is that many millions are suffering as a result of mistakes we made, more especially giving our consent to expelling ten million or more Germans from their homes in the provinces annexed to Poland and Soviet Russia. Most of the well-intentioned Germans I talked with appreciate fully their own great share of responsibility. In fact, to some extent, it is even justifiable to say that they welcome an opportunity for atonement.

But has this not gone too far? Does it not threaten to jeopardize our policy of democratization? The extent of economic disintegration and chaos is unbelievable. To illustrate it, I'll give you two little facts. You probably smoke cigarettes—quite a few of you do—and you probably never pay any attention to cigarette butts, but if you saved them—suppose you smoked ten cigarettes a day, which is not a terrible lot, that would give you 300 cigarette butts a month—and if you packed those 300 cigarette butts a month into a bag and shipped them to Germany, that would provide the money for the sustenance of a family of four, because each butt can be sold on the black market for three marks and it takes 250 marks to keep a person going on rationed food. Another illustration is provided by a bit that a friend of mine, Colonel William Dawson, head of the military government in Stuttgart told me.<sup>5</sup> "You know that it's my misfortune that every time I go to Frankfurt I get the room in the Carlton Hotel that faces out on the yard on which the back door of the Red Cross kitchen also faces." I didn't know what he was leading up to; so I was quite puzzled, and I said, "Why is that such a great misfortune?" He said, "Because in the evening all the cans that have been used during the day are dumped out into the yard by the Red Cross kitchen, and at four o'clock in the morning a swarm of emaciated women comes into this yard and starts gathering cans to get what little food is left in them to carry home. Every morning when I'm there, they wake me up with the clatter, and I go there and look at them again and my heart aches for them." Unless you face these conditions, you cannot appreciate the difficulty of democratizing Germany today.

Democracy, as you know if you remember the great depression, prospers on full stomachs. This basic importance of food is not peculiar to democracies; it is true of all regimes, but it is particularly true of democracies because each

<sup>5</sup> Colonel Dawson, one of the outstanding military government officers we have had in Germany died suddenly in February, 1947, of a heart condition caused by overwork.



and every individual has a voice and can express his discontent. Therefore when our people first began to say, "You ought to make a constitution; you ought to come forward and organize yourself," many German leaders said, "How can we make a constitution? Our problems are food, housing, clothing. How are we going to get our people to go along?" But General Clay and his staff took the position that it was essential since for us democracy means constitutional democracy.

There is a very clearcut and realistic issue involved. We swept away in Germany all vestiges of the established order. We were determined to get rid of the Nazis and we were also determined to get rid of the militarists. The Nazis at the end turned the government over to the militarists and when the militarists tried to deal with us, we took them into protective custody, too. When that happened, then, for the first time in a thousand years or more there was no German government. I do not know whether you ever asked yourself how difficult it is to go into a foreign country and try to govern that country without having any native authorities to work for you. In Japan, we used the Emperor; we gradually changed the regime, but at any one time General MacArthur always had Japanese to speak to when he wished to address the Japanese nation. But our people did not have any Germans to address; they had to reach the citizens, a passive mass of ordinary men and women, directly. That, of course, could not go on forever. Some kind of German government authority had to be set up. Unfortunately, under the Four-power Allied Control Council, the four zones have each gone their own way and have evolved a system suitable to their masters. Naturally, since our people were committed to constitutional democracy, they insisted on constitutions. The western tradition of democracy and constitutionalism has been one of autonomous initiative. Constitutions have been made by people who fought for the right to order their own existence. That was the outlook, of course, of people who fought for independence in the United States and made the constitution of the United States; that was the outlook of the '48'ers who failed in Germany; that was the outlook of the French Revolution and of the various developments in France afterwards. Always, the constitutional development came as a part of the uprising of the people becoming self-conscious of its role and determined to achieve freedom.

But in this situation, the Germans did not say, "We want a constitution." The Germans did not say, "We insist that you allow us to act freely according to our convictions." They were not in any position to do it. We had the military power; we laid down the law; we said that any German criticizing military government is subject to arrest and punishment. This situation might in the course of time have led to a revolutionary development in Germany, but that time certainly had not arrived last spring. Instead *we* said to Dr. Hoegner in Munich and to Dr. Geiler in Wiesbaden and to Dr. Reinhold Maier, minister-president in Stuttgart—all three of them good democrats, presumably—"The United States speaking through the military governor, request that you

appoint a constitutional commission to draft a constitution." And when these men said, as I told you before, "Is it *not* a little early; ought we not to wait a little while?" We said, "No, we want you to go ahead." So they said, being good Germans, "Very well, if you wish us to do it, we will do it." And they went to work.

Let me digress a little into ancient history here. There was a time when such changes in constitutions regularly followed defeat in war, especially during and after the Peloponnesian War, the Athenians always brought democracy with them, the Spartans oligarchy (aristocracy). Among the Greeks, the notion of constitutions as instruments, not results, of change went even farther. Plato sailed to Sicily in the hope of persuading the tyrant of Syracuse, Dionysius I, to liberate his people and to make them into the perfect commonwealth by organizing a constitution. Unhappily, Dionysius I, who was a practical politician said, "That's all wonderful theory, but it cannot be done." Plato was very disappointed, but he had to acknowledge that all his magnificent thought came to nothing. You have clearly here the idea of the constitution as an educational force, as a formative force that is put upon a people from above to make them free. Later, some tyrants in other city-states *did* try to follow the Platonic pattern—they never succeeded but they tried. As far as our modern Western tradition is concerned, the idea that you can use the constitution as an educational force is a new and untried proposition. It is a revolutionary undertaking. Whether it will work or not nobody knows, but we are committed to it. We are unquestionably going to try to make it succeed.

If the Germans knew as little about democracy as our official wartime propaganda pretended, I am quite satisfied that the enterprise would be foredoomed to failure, because we would not have anything to work with; we would have had to work out the constitution ourselves. We would have said, "Here it is; now live according to it," as Plato wanted Dionysius I to do. Actually our military governor could go to these three minister-presidents and could say, "Will you appoint constitutional commissions to prepare a preliminary draft?" And these Germans in turn could gather in others who had been active in constitutional life in Germany before the Nazis and request that they participate in this labor. As a result, the constitutions which were drafted by these commissions and which I had to analyze and discuss with the men who had been engaged in the job, very much resembled the constitutions of the Weimar period. They resembled the constitution of the Weimar Republic itself, and they resembled the constitutions of Bavaria, Wurttemberg, and so on, which had had state constitutions during the Weimar period.

Actually, the constitutional tradition in the states composing our zone goes much further back. This is particularly true of Wurttemberg which is very proud of its constitutional tradition. There are some people in Stuttgart who think they know a lot more about democracy than we do; and Colonel Dawson, who has worked with them, is not sure that they are not right. At any rate,



if you look at the commentaries written on the constitutions of Wurttemberg, when it was still a kingdom before 1914,—a constitutional kingdom like England in 1800,—you find that many provisions that were in the constitution of the kingdom of Wurttemberg in the nineteenth century are found again in these constitutions. In sum, we are really reinforcing ideas that have been suppressed, and are giving them a chance to grow. We are, I might almost say, in the position of a gardener who is going into a flower garden in which the flowers have been all but crushed by weed growth, and we are pulling up the weeds, and giving the flowers a chance.

In a way I was distressed by the extent to which these constitutions resembled the pre-1933 constitutions. And I think that some very important lessons have *not* been learned. The final drafts we have now before us as they are going before the people to vote upon,\* in my opinion are going to give both the Germans and the United States a lot of trouble, because they once again will require unstable coalition governments, such as always result from combining the system of parliamentary responsibility with proportional representation. I don't want to go into these technical issues, but those of you who are students of government will probably agree with me that it is a very unstable type of government which has given trouble everywhere. It has been a major factor in the French crisis, and many Frenchmen wish to see it abolished. It works fairly well in some countries like Belgium and Sweden, when the king, who is the traditional representative of the country as a whole, acts as a balance wheel, a guardian of the constitution as it were. Perhaps in these German states in the American zone it may work because the military governor is in the position of the king. Maybe an American can somehow succeed in balancing the conflicting forces. But I am very much afraid, particularly in countries like Hesse which are very evenly balanced between the parties that we are going to get the same kind of deadlock which discredited democracy in Germany before 1936.<sup>6</sup> I wish that at least one of these states had been bold enough to experiment with the Swiss or American system of a stable executive. I believe that the stable executive is better adapted to the German mentality; I think, also, that the stable executive is better adapted to the extraordinary conditions existing in Germany today. But the Germans adopted this unstable system.

Another weakness, common to European constitutions, is the absence of adequate institutional safeguards for civil liberties, although they contain a vigorous proclamation of such civil liberties. Curiously enough, the constitu-

\* Ed. note. The constitution of Wurttemberg-Baden was ratified in a popular referendum on November 24, 1946. Bavaria and Greater Hesse ratified their constitutions on December 1st of the same year. Immediately after the adoption of these constitutions and the simultaneous election of new *Landtage* in each state, American Military Government officials transferred responsibility for administration to the cabinets selected by these legislatures.

<sup>6</sup> Unfortunately, the year 1947 now drawing to a close has already confirmed these predictions; in each state there have been going on the bickerings typical of such coalition governments.



tions are equally emphatic about socialism. All three of these constitutions are collectivist in their general meaning and significance. This is perhaps surprising because the constitution of Bavaria was fashioned by an assembly that was predominantly composed of members of the so-called Christian-Social Union. It is a Catholic-Protestant party with a considerable conservative element in it although it is by no means simply a conservative party since it also contains the leftist elements of the Christian trade unions. Yet Bavaria, although not quite as radical as the people in Hesse, nevertheless fashioned a constitution which provided for a system of extensive collective control. Combined with it, you have an explicit and emphatic recognition of the basic freedoms—freedom of expression, freedom of the press, freedom of assembly, freedom of association, and so forth. Some special provisions are rather amazing: under the Bavarian constitution every Bavarian is guaranteed the right to hike in the open forest and enjoy the beauties of nature.

I think you as students in a Women's College might also be interested in the fact that all three constitutions, but more particularly the constitution of Hesse, provide that the position of men and women is absolutely equal, that women must be paid identically the same pay for identical work as men, and that the work of the housewife at home must be recognized as the equivalent of a husband's professional labors, and that any property accumulated by the family must be considered to belong equally to her as to him. Likewise, you might be rather startled to know that the Catholics, having a majority in Bavaria, included the same article in their constitution which the Hessians and Wurttembergers also have, providing that the rights of illegitimate children are the same as those of legitimate children. The Bavarian Constitution incidentally makes it incumbent upon the state to take care of illegitimate children.

After this brief survey, you may well wonder how these constitutions are going to work out. I, myself, consider them an unique experiment. Some Germans with whom I talked tend to look upon their constitutions as bridging East and West. They say: "We cannot go back to the system of non-collectivist individualism that you Americans favor, but we also do not wish to go over to the totalitarian collectivism of the Soviet Union. We must find something in between, and therefore we want to try democratic socialism." That is exactly what they said in 1919; the idea is coupled with a number of expressions or phrases that are very peculiarly in the continental European tradition. The underlying conceptions are not particularly German, for you find them also in the Scandinavian countries and in Switzerland. Property is, of course, basic to socialism. All these constitutions say something like this: "The right of private property is guaranteed, provided the property is not noxious to the community. Particularly, the right of the people is guaranteed in property which they have acquired as a result of the labor of their own hands." At the same time, all three of the constitutions say: "Property constitutes an obligation toward the community, and any violations by property owners of this duty toward the

community justify the community in collectivising the property." Whether such an approach can be effectively combined with the maintenance of civil liberties as we understand them remains to be seen. If you are familiar with the discussions that are going on today in England and in France, you will know that in both these countries, people are moving in this direction; even a conservative like DeGaulle has come out for the necessity of a measure of collectivism. You will recognize that this democratic socialism is what a short while ago we idealized as Sweden's "middle way." In Sweden's program cooperatives are of central significance. In all the three German constitutions cooperatives are not only recognized but are put under the special protection of the community.

Now you may say, "Well, all this is done possibly just to please the American conqueror." I don't think so. Apart from the earlier historical roots to which I have referred, I happen to have here a document which our people found when they dug into the background of the Putsch of 1944; it's a private copy that was used by the Nazis in convicting one of the men who was hanged as a sequel of the Putsch of July 20, Carl Friedrich Goerdeler, a very prominent man. And if we had time here, I could translate for you sections of this document, written before 1944, which expound almost verbatim the ideas which have now found expression in these constitutions.<sup>7</sup> In the very midst of the war these opposition elements tried to clarify what the future might require and they hit upon this kind of a compound of ideas. That does not mean success is assured, even psychologically, and there are a number of reasons why that is not so. For one thing, a great deal depends upon what we do. If we ourselves show lack of respect for constitutional procedures, through violation of civil liberties and the like, we cannot hope to increase respect for them among the German people.<sup>8</sup> If we continue to allow the German economic situation to deteriorate by preventing them from working, if we de-industrialize beyond the point at which the Germans may become self-supporting—and this means a very extensive foreign trade for rump Germany since it will have to import 50% or more of its food—if we discredit and humiliate the democratic elements in Germany, we will completely fail in our policy of democratization.

Another serious obstacle is the indifference among the masses of the people

<sup>7</sup>The document here referred to is a memorandum by Carl F. Goerdeler; since this lecture was given a full discussion of it and other related matters has been published by Allen W. Dulles in *Germany's Underground* (1947). Cf. also the report of the Morale Division of the U. S. Strategic Bombing Survey entitled *Effects of Strategic Bombing on German Morale*, 1946.

<sup>8</sup>Since this was said, American military government authorities have made a very real effort to have all occupation personnel become aware of this aspect. General Clay himself has repeatedly spoken of it in addresses to our military and civilian personnel. The new directive issued July 15, 1947 and superseding JCS 1067, likewise states: "As a basic objective of the occupation is the reestablishment of the rule of law in Germany, you will require all agencies under your control to refrain from arbitrary and oppressive measures . . . You will protect the civil rights of persons detained under charges . . ." (Section 11d).



resulting from preoccupation with the daily struggle for existence. When you lack the essentials, like food, housing and clothes, constitutional liberties become shadowy and unreal. Remember the New York taxi driver in 1932 who shouted at a passenger: "I can't eat liberty." When I went to see a number of clergymen, including Dr. Niemoeller, to find out whether the people in his congregation had put their shoulders behind the wheels of constitutionalism, Dr. Niemoeller said, "Frankly, we have not thought of it. This is the first time this problem has been brought forcefully to my attention." I said, "Well, don't you think that freedom of religion is an important consideration today, considering what has been happening to you under the Nazis?" "Well," he said, "you are right." "Don't you then feel you ought to do something to arouse the people?" "Yes, we should, but we haven't thought of it." Thus in spite of the elections, much indifference and ignorance concerning the constitutions was prevalent. We hoped to reduce this indifference by submitting these constitutions to a popular referendum; the idea was that the average German would become committed to the ideas contained in the constitutions by either saying "Yes" or "No." But the unrelieved struggle for survival has continued to hamper our constitutional effort.

A third factor affecting constitutional development is the activity of the Soviet Union. The Soviet Union, as I said at the outset, has its own ideas as to democracy. They are "democratizing" their zone, but they are not doing what we are doing. They are building a Soviet pattern of community. You know, probably, that they had a referendum last spring in Saxony to allow the people to approve of the collectivization of certain industries. But the contrast of the two zones can be overstated. The Soviet Union held the referendum on the collectivization of the coal mines first, but because of what is happening in our zone, they are now following suit in having popular elections, and I would not be at all surprised if in the course of next spring they decide that they also must have constitutions fashioned in their zone for their five states.<sup>9</sup> These elections were held, however, without adequate freedom of speech and assembly and one major party, the Social Democrats, were entirely forbidden to carry on, thereby removing the major competitors of the Communists. Thus although the Soviet Union and we came at it from opposite poles, we do to some extent meet in the middle.<sup>10</sup>

A fourth factor that I think has to be borne in mind trying to evaluate the future of German constitutionalism is the extremely complex and unfortunate pattern of quadripartite government. I have reserved that topic to the

<sup>9</sup> As mentioned in footnote No. 1 the states in the Soviet zone adopted constitutions soon after ours. These constitutions follow the pattern of the rejected French constitution of 1946 which was the result of a compromise between the Communists and the Socialists.

<sup>10</sup> Unfortunately, the USSR have since severely aggravated the situation by developing the so-called Soviet A.G.'s—monopolistic industrial enterprises under Soviet control.



end. I shall frankly tell you that the government which today is operating in Germany is the most complicated and cumbersome government that I have ever encountered in my twenty-five years of work as a student of comparative government. I believe if someone had sat down trying to devise a government that would not work, this is the sort of scheme he would have hit upon: to have a government which is territorially divided into four parts, unrelated to any pre-existing boundaries, each supported by the remnants of a real fighting army, with a council composed of the commanding generals of each of these four armies on top, capable of acting only by unanimous vote. Each of these generals is then subject to his own government, governments of very different outlook and method and pursuing divergent policies. It has become the fashion in the United States to blame the Soviet Union for the breakdown, but we too have blocked action, and our policy makers are as responsible as the others for the crazy-quilt pattern of quadripartite government and the zonal boundaries. I think if we succeed in operating that government—that "quadripartite" government compounded of the Soviet Union, Great Britain, the United States, France, and the Germans—I think everyone will be obliged to take his hat off to the ingenuity and patience of man in accomplishing the impossible.

There is a fifth factor obstructing the growth of constitutional democracy in Germany which has to be borne in mind. It brings me to the end of my talk. In spite of all that has happened, there are many Nazis left in Germany. We have denazified; perhaps we are the only ones who have really energetically denazified. I gave you the illustration from the universities, and one could quote similar figures from other fields of activity. But these people are around, and even though the worst malefactors are going to be in labor camps, they are going to be there only five years or ten years, then they are going to come out (many, however, will be deprived of their vote). In this connection I ought to tell you one thing that surprised me more than anything else, perhaps, in my wanderings about Germany, and that is the fact that every German with whom I talked said, "You must stay and continue to occupy the country." I'd say, "How long?" and they would reply, "As long as is necessary." When I would ask, "How long is it necessary" they would answer, "Maybe fifteen years, maybe twenty years, maybe twenty-five years." I asked, "Why?" because after all when I first heard it, the idea amazed me. They replied: "Because if you left Germany there would be civil war." In other words, you see, the entire social structure has become so basically upset, and underneath this order maintained by force there are so many causes for chaos, that unless someone sits on top of this structure, benevolently or malevolently, but at any rate sits on top of it, it will fall to pieces.

Let me give you just one illustration. When we turned the denazification over to the Germans, and the law that was made provided for denazification boards in each town, before which these presumed Nazis were to appear in order to be adjudged, it proved extremely difficult to man

these boards. They are now staffed, but it was a long-drawn-out struggle. Time and again, people, good people, people that we believed in, people that had the right kind of ideas, said, "Well, friends, pick somebody else. Why? Well, I don't know whether you are going to stay. If you leave, I'll be strung up on a tree. I'd rather live; find somebody else." And there were a lot who said, "Why don't you do it? Why ask us to do it? We can't do it." In short, the fifth difficulty is that you have the remainder of the Nazi element as a persistent disturbance, and there is going to be plenty wrong for those fellows to make hay of, to agitate and to get people excited about.

Yet, in conclusion, I will confess to you that I am somewhat more hopeful now than when I went over. When I went, my state of mind was one of utter despair. But I must say that as I watched the scene, I recaptured some hope, for in the midst of all the destruction you find human beings who are rebuilding in faith, not only constitutions, but churches. I stood in the center of Nuremberg, which is completely destroyed, and talked with a little team of old stone masons who were chopping away at their work; they had rebuilt three columns of their fifteenth century church of which only the entrance was standing. When I said to them, "What are you doing here?" they carefully explained to me in detail just where they were going to get this stone and when that arch. As they displayed the old blueprints I finally said, "How long do you think it will take you to rebuild this church?" They said, "Well, perhaps twenty years, twenty to twenty-five years. If you stay twenty or twenty-five years, that church will be rebuilt." That church in a way became in my mind a symbol of the whole situation. These men realized that they must rebuild the basic center of life. Until it is done someone has to stay around to keep a measure of order. They can rebuild the foundations, but it will take time.

By way of an epilogue, may I remind you of the common cultural heritage which binds us to the Germans. Think of Beethoven; his *Ninth Symphony*, which nobody who has any feeling for music can ever forget. It culminates in the immortal choir, "Be Embraced All Ye Millions," based on a poem of Schiller. This is music and poetry. But think also of Immanuel Kant. He wrote the most penetrating philosophical analysis of the peace problem. If you compare the charter of the United Nations with Kant's essay *Eternal Peace* you find that the charter of the United Nations is a step toward the fulfillment of his dream.<sup>11</sup> To me there is something deeply touching in the thought of this little wizened man in far-away Konisberg, projecting a reign of eternal peace in 1795. He was old and he had been living a life of provincial seclusion in his native East Prussian city. Yet in this essay he knocked down one by one the foundations of the mighty Prussian kingdom. And in his mocking ironical way—he was a timid man, you know—Kant requests the statesmen who look

<sup>11</sup> For this see the author's *Inevitable Peace* (1948), especially ch. I.

down upon the philosopher anyhow as an impractical man without experience not to suspect dangers for the state from his essay. After having cautioned the reader he leads him forward to the conclusion that a universal order under law may be hoped for, and that it is our duty to work for it. Therefore "eternal peace . . . is not empty idea, but a task which can be gradually solved and is steadily approaching."



#### IV.

### VARIATIONS OF THE LIBERAL THEME

BY ALPHEUS THOMAS MASON

"Catchwords and labels," Justice Benjamin Nathan Cardozo observed in 1936, "are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection."

I submit that liberalism, perhaps our most cherished of current creeds, is subject to the dangers against which Cardozo warned us. Liberalism, like democracy, is now a power symbol, a political catchword, an imperial slogan, and as such of limited usefulness in intellectual discourse. Today nearly all men, regardless of formal party or creed, are professing liberals, while the conservative is almost an extinct political species. Conservatism, once more than respectable political theology (especially among the educated), now carries overtones of reaction well nigh as discrediting as the rabidities attributed to communism.

This confusion in political doctrine has been particularly marked since 1933, when Franklin D. Roosevelt inaugurated his far-flung, many-sided legislative program to win for all men, here and now, the more abundant life, and soon thereafter the four freedoms, "everywhere in the world." Roosevelt led his campaign under a liberal banner, but his strength and zeal promptly stimulated "liberal" protest, provoking counter-moves that mustered against him high-ranking members of his own party. Thus the lords and magnates of the American Liberty League, harking back to liberalism of earlier vintage, saw New Dealers overthrowing the very fundamentals of our country's tradition. Roosevelt was embarked, they clamored, on bold courses that would surely destroy the principles under which "we have prospered as has no other nation in the world." The League, pretending to be wholly cleansed of any corroding self-interest and calling itself "absolutely non-partisan," began forthwith to teach its own brand of liberalism.

Yet Liberty League spokesmen in 1934 merely echoed Herbert Spencer's dogma of 1884, namely, that there is and can be only one measure of liberty—the "paucity of restraint" which *government* in any form imposes on human

freedom. Electoral acceptance of Roosevelt's reform program thus embodied and empowered an ideological triumph of extraordinary significance, a revolution in outlook, in theory, the most far-reaching and enduring of all revolutions. The New Deal successes mark a break with the longest and deepest line of the modern American tradition—that of rugged individualism—the dogma that identifies individualism with laissez-faire, and considers liberty as possible only in a society relatively free from government controls. Inequality, according to this theory, is the price society pays for liberty; inequality, that is to say, results inevitably from liberty. Whether liberty results inevitably from inequality was not made quite clear.

Some time after 1933, the national government in all branches, including the Supreme Court, endorsed quite a different theory. Suppose we call the new approach pragmatic or positive — positive because it holds that government intervention does not necessarily war with liberty. Government, it is contended, must create and recreate anew the conditions requisite for freedom, and must at times enter fields normally the domain of private enterprise so that urgent social services may be supplied. Under the complexities of industrialism, of highly organized group interests and self-defeating conflicts, liberty is possible, we are told, only if government be the dominant power. "New conditions," Mr. Roosevelt said in a campaign speech of 1932, "impose new requirements on government and those who control government."

But the contrast between Old Deal and New Deal theory is less sharp than these observations may imply. The difference consists largely in the values deemed fundamental and the relation of government thereto. Edward S. Corwin puts it this way:

"Under the democratic system there are two possible conceptions of what a government ought to be doing, provided neither is pressed to a logical extreme. One is that government ought to preserve an open field for talent and not disturb the rewards which free competition brings to individuals. The watchword of such a government will, of course, be Liberty. The other theory is that government ought to intervene for the purpose of correcting at least the more pronounced inequalities which are apt to result from the struggle for advantage among private groups and individuals. The watchword of such a government will be Equality."

Old Dealers, failing to take into account the fact that liberty is often infringed by forces other than government, stress the absence of governmental restraint as the true measure of freedom; New Dealers, sensitive to the blighting effects of modern economic forces on equality of opportunity, hold that government must intervene to safeguard and protect the individual against them.

Franklin Roosevelt, stressing equality, extended enormously the theory of positive government, but he did not originate it. The New Deal in fact represents the resumption and culmination of various popular crusades dating from the last quarter of the nineteenth century, when the masses, recently enfran-

chised, began urging use of government as an instrument for protecting and advancing their social and economic welfare.

Before 1850 Democracy, in the sense of manhood suffrage, had been, so to speak, on the make, and industrialism still in its early phases. But in *Forum Magazine*, November, 1889, a big New York lawyer, T. G. Shearman, said that "the United States is practically owned by less than 250,000 persons." By 1919, he said it would be controlled by "fewer than 50,000 persons." Shearman recognized that business had already begun to crystalize into the structure of corporate and super-corporate monopoly.

Still other forces emerged: labor awakened and organized; populists and socialists, grangers and greenbackers had their fleeting hour. The masses were manifesting the disinclination De Tocqueville had foreseen in the 1830's—their refusal "to remain miserable and sovereign." For the evils of industrialism, they sought far-reaching corrective legislation at both state and national levels, setting in motion congeries of movements and ideas.

The upshot was that Americans, sometime before 1900, were confronted with the dilemma so sharply posed by Daniel Webster in the Massachusetts Constitutional Convention of 1820. "The freest government," Webster had said, would not long be acceptable if the tendency of the laws were to create a rapid accumulation of property in few hands, and to render the great mass of the population dependent and penniless. In such a case," Webster continued, "the popular power must break in on the rights of property, or else the influence of property must limit and control the exercise of popular power."

In these words Webster had projected in clear, perhaps oversimplified form the strangely disordered course liberalism has taken during the years since about 1870. We see political power widely diffused, economic power organized and concentrated presenting precisely the issue Webster had anticipated. A strangely confused panorama of aggressive, exploitive, and militant forces then introduced a new and revolutionary period. Extensive political and philosophical realignment was in order; interests formerly united were now divided; conservatives turned liberal as erstwhile liberals became conservative. In due course, however, all these varied and conflicting movements invoked as its own the fair and comprehensive name liberalism.

Among the numerous and divergent currents flowing into the broad river of ideas we call liberalism, the most clamorous was the torrent of the reformers. Itself the confluence of many separate, and sometimes antagonistic streams, reformist liberalism held that new and strange forces were subjecting liberty to unprecedented peril, that governmental power could no longer be confined to the narrow bounds of police. Democracy must now press on against the rise of what Henry Demarest Lloyd called "industrial Caesars." Lloyd was overly optimistic as to the outcome. "In making themselves free of arbitrary and corrupt power in government, the Americans," he said, "prepared themselves



to be free in all else, and because foremost in political liberty they have the promise of being the first to realize industrial liberty."

Other groups, less bold in outlook than Lloyd—Grangers, Greenbackers, Henry Georgites, Knights of Labor, Populists, etc.,—also favored, in varying degrees, enlisting government in freedom's war against new tyrannies. For all these crusaders as for their spiritual followers today, enlargement of liberty by means of government, popularly based, was the very essence of liberalism.

And yet it was this same popular power, emancipated and organized, a truly liberal force in the minds of its leaders, that stimulated strong counter-currents. Edmund Burke, a century earlier, had anticipated why mass revolt must be a most ominous fact for men of property. "Liberty," he said, "when men act in bodies is, power." Now for the first time in our history "mere numbers", "over-bearing majorities", "factions"—that dreadful spectre most feared by the founding fathers, and the force they painstakingly tried to curb became crucial in our politics. And when legislatures, under the stimulus of popular crusades, began to "break in on property", lawyers and judges were conspicuous among those proclaiming their genuine liberalism against so "spurious" a blend of mere popular power. Suppose we label these legalist guardians of freedom—*status quo* liberals. I can mention only a few of their number, but these may be considered as typical.

Chief Justice Thomas M. Cooley of Michigan, known for his treatise on *Constitutional Limitations*, alerted the legal profession to the alarming potentialities of Jacksonian democracy. "By far the larger part of all doubtful legislation," Cooley said (in an article of 1878, published in the *Princeton Review*), "which the history of the country presents has taken place since the year 1846, when radical ideas began to be characteristic of State constitutions, and the theory that officers of every department should be made as directly as possible responsible to the people after short terms of service was accepted as a political maxim."

Against this threat of popular power and the "doubtful legislation" resulting therefrom, Judge Cooley noted two safeguards: Such legislation was enjoined by the Constitution, if properly construed. And what did proper construction entail? Fixity and stability—in short, maintenance of the *status quo*. "If principles are not fixed and permanent," he wrote, "they are not Constitutional, and may be suspended or overridden to suit the passion or caprice of the moment."

Regulatory legislation was also doomed as violating the law of "supply and demand"—higher law, natural law. Denouncing current violations of this natural law, Cooley recalled that attempts to regulate wages and prices during the colonial period were abandoned when the "wise men" of the time "were brought by observation and reflection to the conclusion that there were laws determining prices which were inherent in the nature and circumstances of

civilized society, and that the operation of these laws was not likely to be improved by legislative interference."

Once again the guiding rule was *status quo*. Furthermore, any deviation from the limits set by this higher law of economics on the scope of legislative power imperiled "free government" itself. "It is not to be understood," Cooley asserted hopefully, "to be now pretended that any general right to fix the price of commodities or to limit charges for services can exist as a part of any system of free government." And Cooley was prepared to stand by his own peculiar brand of "free government" even in a situation where a commodity or service had become monopolized. "Does . . . the mere fact," he inquired, "that one owns the whole supply of anything, whether it be of a certain kind of goods or of a certain kind of service, confer upon the state the authority to interfere and limit the price he may set upon his wares or his services . . . Suppose in some state," Cooley continued, "a single individual should own the only mine in the country of some metal important for use in mechanical arts, would it be competent for the state, on the ground that competition with him was impossible, to restrict at discretion the price he should be able to charge for it? . . . Who ever shall undertake," Cooley replied defiantly, "to answer these questions in the affirmative should be expected to show how the power may be harmonized with the general principles of free government."

This is precisely what Chief Justice M. R. Waite had sought to do two years earlier, 1876, in the leading Supreme Court Case of *Munn vs. Illinois*, that is, he had tried to harmonize price-fixing in businesses "affected with public interest" with principles of free government. Waite had reasoned that if a state of facts could exist which might conceivably clothe a business with a public interest so as to justify price-fixing, the court must assume that they did exist. And still further, the chief justice declared flatly that if persons (owning property in which price-fixing was deemed appropriate) felt that the rates set were arbitrary and unreasonable, they should, under well-established principles of free government, "resort to the polls, and not to the courts." Leading lawyers, however, bitterly attacked Waite's principles and framed contradictory doctrines of their own—that is of *status quo* liberalism—and urged them with increasing insistence and, in time, successfully on the courts.

Frederick N. Judson, a leading member of the St. Louis Bar, continued the war against reformist liberalism in a full-length address of 1891 before the American Bar Association. Judson saw clearly that all this government regulation, abridging the right of free contract, "must tend generally to increase" and that this was liberty's only peril. "The vice of so-called social legislation," he said, "denying freedom of contract, is that it deprives the individual of his 'personal rights' and subjects him to the only tyranny which in this democratic age is possible . . . —the power of the state exercised in the abridgement of individual liberty." The menace especially to be combatted was as our ancestors



knew, the sheer force of numbers, whether embattled in the ranks of labor or represented in legislative bodies. Judson summed up the issue:

"Social and economic conditions . . . within the past few years . . . have forced into public and judicial discussions, as never before, the relation of the fundamental rights of the individual to the police power of the State. It is now not the question of what constitutes 'due process of law' but the limits of State authority in the exercise of the legislative discretion as to the requirements of the public welfare, in abridging the citizen's liberty, or denying him the use of his property, without any process.

The stress of competition in business, the prevailing social unrest, the distinct trend of a certain class of social agitators in the direction of State socialism, the superstition that legislation is a sovereign cure-all for social ills, and last, but by no means least, the competition of reckless politicians for the unthinking vote, all are potent factors in inducing legislation, which is forcing upon the attention of our profession and the courts a new class of constitutional questions, and signs are not wanting that these are to be the weighty questions of the future in jurisprudence, as well as in social economics . . ."

Judson was no less sure of the remedy than of the evil. The bar, he said, entertained "one simple rule about industry, that it should be free"—free from social legislation and immune from coercion by organized labor.

The very next year, 1892, John Randolph Tucker, distinguished as a lawyer as well as for his commentaries on the Constitution, carried on the campaign especially deploring paternalistic panaceas—"that organic malady which destroys the Constitution itself." And Tucker, like Cooley and Judson, reminded lawyers of their special task "to safeguard society and the Constitution" against labor demagogues and doctrinaire reformers. Let Tucker portray the ominous threat of reformers to our free institutions:

"In such a condition of affairs as confronts us, when Paternalism offers to furnish anything to its offspring which ignorance or caprice or greed may demand, parties in their zeal to win power play upon the popular unrest, the result of misfortune, disaster or bad legislation, to suggest panaceas for the diseases of the body politic. The press teems with the proclamation of these medicines for a sick country. Believe me, most of these will bring no cure; but many will breed the worst disease which can come, *that organic malady which destroys the constitution itself!* For that there is no cure!"

What, then ought to be done? What was the truly liberal remedy?

"Better throw physic to the dogs," Tucker recommended. "Purge the patient of the poison with which quacks have filled him, . . . The young Hercules will recover if left free from the paternal doctors, to work out his cure by his own self-reliant efforts and his invincible energy. Unbind his limbs; nurse him no longer; let him walk, leap, and run his career of immortal and God-ordained destiny, for his own glory and for the advancement and elevation of the human race."

"The evils which infest and menace our country in the close of



this dying century," Tucker went on, "will be crushed by the free and unbounded and independent manhood of the American people, unhelped and unhindered by the paternal care of their governments. This must be done or liberty will perish. It shall not perish! This work shall be done and the supreme law of the land shall regain its paramount title.

"Brother lawyers of America!" Tucker exhorted vigorously. "In all ages, our profession has furnished the trained and skilled champions of right and justice, of liberty and law. Don your armor. Set knightly lance in rest. Demagogues deride and would discard you. The schemes of Paternalism allot you only, disinherison. [*sic*] . . . Though a disinherited knight, the American Bar enters the lists as the champion of Institutional liberty under Constitutional guaranty. We boldly strike the shield of the proud Templar of misrule, and challenge his power. We will not, cannot, must not, fail. The Constitution in its integrity must be restored; political heresies must be exorcised, and our free institutions must be perpetuated."

Implicit in all this is the unique American theory that the Constitution and principles of "free government" are entrusted exclusively to safekeeping of the bar. Ordinary men outside the ranks of the "priestly tribe" had placed unhallowed hands on the sacred ark of the covenant. Thus President Edward W. Phelps of the American Bar Association had noted in his annual address of 1879 that "the Constitution had become more and more a subject to be hawked about the country, debated in newspapers, discussed from the stump, elucidated by pothouse politicians and dung-hill editors, by scholars in the science of government who have never found leisure for the graces of English grammar, or the embellishment of correct spelling."

To the American Bar, Phelps argued, is committed "the safekeeping of the Constitution. The lawyers of today are the judges of tomorrow. It is by your discussions, in the light of your writings, by the aid of your labor that every successive question that arises touching the fundamental law is to be adjudicated . . . The lawyers' influence is great," Phelps said; "their influence upon the public mind, upon political sentiment. It is from them that the true spirit of the jurisprudence of the country on all subjects—and above all on Constitutional law—must of necessity emanate. It is they who make it; it is through them that it must take effect."

But the truth is that the lawyers' principles of "free government" were then (1879) on the defensive. Certain Supreme Court judges have indeed gone so far as to say that lawyers' principles afforded evidence of "some strange misconception" of a broad power vested in the judiciary to "frustrate the legislative will." But Justice David J. Brewer of the United States Supreme Court made it clear which way the judicial winds were blowing in 1893 when he interrupted his judicial labors to discuss before the New York State Bar Association "Movements of Coercion", i.e., organized-labor and the current legis-

lative effort to regulate rates in public utilities. Justice Brewer, taking account of the exigency, and of current theories of popular powers, came out strongly for judicial intervention. Here is what he had to say:

"The great body of judges are as well versed in the affairs of life as any, and they, who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from the mass of sciolistic verbiage that falls from the lips of expert witnesses in patent cases, will find no difficulty in determining what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and the owners; while, as for speed, is there anything quicker than a writ of injunction?"

A year later (1894) William Howard Taft, then Federal Circuit Court judge of Ohio, suggested the use of military force against labor, as President Hayes had done in the Pittsburgh "riots" of 1877. Commenting on the Pullman strike of 1894, Taft said:

"The situation in Chicago is very alarming and distressing and until they have had much bloodletting, it will not be better. The situation is complicated by demagogues and populists. Word comes tonight that thirty men have been killed by the federal troops. Though it is bloody business, everybody hopes it is true."

Next day, however, the future President of the United States and future Chief Justice was discouraged:

"The Chicago situation is not much improved. They have only killed six of the mob as yet. This is hardly enough to make an impression.

Underlying *status-quo* liberalism, as Taft made baldly apparent, was a new version of a very rugged old idea—natural law. This higher law, re-enforced by the then prevalent Darwinian principles of evolution and survival of the fittest, interpreted as *the Constitution*, its eternal essence and verity, and within the exclusive safekeeping of the American Bar, placed very definite restrictions on what government could do. Justice Brewer put it this way: "It is the unvarying law that the wealth of the community will be in the hands of a few," that "rich men are essential even to the well-being of the poor." Lawyers and judges thus envisaged plutocracy as part of a universal process that held all nature—including our own—in its grip, a cosmic process sweeping mankind on, willy-nilly, to some far-off, and presumably good, certainly inevitable end. Mandeville's "Fable of the Bees" clothes *status-quo* liberal thought in these satirical lines:

"No Bees had better Government,  
More Fickleness, or less Content:  
They were not rul'd by wild Democracy;  
But Kings, that could not wrong, because  
Their Power was circumscrib'd by Laws."

But the laws of plutocracy were curiously paradoxical, being conceived as



binding on all save the privileged classes themselves. Universal law did not, for example, prevent endless governmental intervention in the form of protective tariffs. It did not block judicial use against labor of that speed-breaking device—the writ of injunction—or even the use of military force. The courts freely interposed judicial power as a barrier against both social legislation and against the power activities of labor. James Bryce, in the 1889 edition of his *American Commonwealth*, commented on this quaint contradiction in *status-quo* liberalism, saying: "One-half of the capitalists are occupied in preaching laissez-faire as regards railroad control, the other half in resisting it—in tariff matters—in order to protect industries threatened with foreign competition. Yet they manage to hold well together." And so they did, being sure that any shift from legislating for the few to legislating for the many, any transfer of emphasis from their pseudo laissez-faireism to a social philosophy which takes cognizance of human welfare and social justice would reverse the very currents that were sweeping them, and of course the nation on to permanent prosperity.

The economist, Henry R. Seager and the industrialist, George F. Baer stated this eternal evasion of privilege: "It is his (the economist's) confident expectation," Professor Seager observed, "that men will grow better as conditions of their economic life become pleasanter; and his belief (the economist's) that they are destined to grow better in no other way." President Baer, reporting in 1905 to his Reading Railroad stockholders, took the same stand: "In the long run, these troubles (those growing out of the anthracite coal strike) will be settled not by demagogues but by the Christian men to whom God in his wisdom has entrusted the destinies of this country." The inference is that politics is non-existent, and government action, (except against interlopers, or in the form of bounty or protective tariff), is unnecessary to win the new economic paradise.

But the more realistic Webster had known better in his day; he knew that when popular power began "to break in" the "influence of property" would find political ways and means of neutralizing that effort. What he, perhaps, had not anticipated was that the power-hampering formulae would turn out to be a judicious and judicial fusion of providential decree with Darwinian Constitutional principles. It is doubtful, too, whether he foresaw the insurmountable nature of this property barrier. Commenting specifically on the peculiar status of property in the United States, President Arthur Twining Hadley of Yale, wrote in 1908: "I will not go so far as to say, that this set of constitutional limitations on the political power of the majority in favor of the political power of the property owner has been a necessary element in the success of universal suffrage in the United States, but I will say unhesitatingly that it has been a decisive factor in determining the political character of the nation and the actual development of its industries and institutions."

"This theory of American politics has not often been stated," Hadley concluded slyly. "But it has been universally acted upon, . . . The voter is



omnipotent within a limited area. He can make what laws he pleases, as long as those laws do not trench upon property rights. He can select what officers he pleases as long as those officers do not try to do certain duties confided by the Constitution to the property holder. Democracy was complete as far as it went, but constitutionally it was bound to stop short of social democracy."

President Hadley's point, as I interpret it, is this: The Constitution relies upon and sanctifies *status-quo* liberalism; it therefore absolutely precludes social democracy—the central objective of any truly reformist liberalism. It also ignores the most elementary tenet of any truly conservative creed—"A constitution without the means of some change is without the means of its own conservation." Hadley's words remind one of the sentiments etched into the bronze plaque that hangs in Kirby Hall of Civil Rights, Lafayette College: "This Hall of Civil Rights is the gift of Fred Morgan Kirby to provide facilities for instruction in the Anglo-Saxon ideals of the true principles of constitutional freedom including the right of a man to own property and do with it as he will . . ."

Reformist liberalism and *status-quo* liberalism, in the extremes at least, appear to be headed toward altogether different goals: one is moral and spiritual, the other material and mundane. Edward Bellamy, as exponent of the former, emphasizing man's well-nigh infinite capacity for cooperation, envisaged new environmental conditions as capable—without change of human nature—of creating a more tolerable world in which determination of man's needs would not turn on the quantity of material goods he produced but on "the fact that he is a man." One observes in Bellamy's literary fantasy the meditative silence that seized Dr. Leete on being questioned as to "wages." There was no wage equivalent in this imaginary world of 2000 A.D. because, as Dr. Leete explained, "Desert is a moral question, and the amount of product a material quantity . . . The amount of effort alone is pertinent to the question, desert. *All men who do their best do the same.*"

And in Bellamy's imaginative world, men were driven to do their best, not because of the prospect of material gain but because of the forthcoming "badge of distinction"—that is, because of public recognition. Industrialists and their lawyer-judge adjuncts, on the other hand stressing man's competitive instinct, saw material gain as the sole drive of human activity. Consider what Justice Henry Billings Brown had to say concerning human motivation in his "real" world of 1892: "The man who writes books, paints pictures, moulds statues, builds houses, pleads causes, preaches sermons, or heals the sick, does it for the money there is in it; and if, in so doing, he acquires a reputation as an author, painter, sculptor, architect, jurist, or physician, it is only an incident to his success as a money-getter. The motive which prompted Angelo to plan the dome of St. Peter, or paint the frescoes of the Sistine Chapel was essentially the same as that which induces a common laborer to lay brick or dig sewers."

We turn now to the more philosophic kind of liberalism—the aloof sophis-

tication and "enlightened skepticism" implicit in the thought and work of Mr. Justice Holmes.

Holmes was sensitively aware of all the pressures and drives of industrialism—the political turmoil, the cultural crudeness, the rise of self-seeking corporate power, the emergence of trade unionism, the threat of communism. He looked it all over with cool equanimity. For him neither the growth of business combinations, nor of labor unions, was unmitigated evil; both must be accepted as the outcome of the natural, inevitable working of the laws of social development and change. He was about equally distrustful of reformist liberals who believed that by "tinkering with property we could have women free and a piano for everyone," and of *status-quo* liberals who thought they could fix society forever in a constitutional straightjacket. The Brewers and their like on the Court he sketched as "naive, simple-minded men," needing "education in the obvious," education that would enable them to "transcend their own convictions" and thus allow that which "we hold dear to be done away with short of revolution by the orderly change of law."

Holmes discerned the stubborn negativism so characteristic of privilege, the shape and set of mind, as de Tocqueville once expressed it, that make men "refuse to move altogether for fear of being moved too far." Holmes also understood the blinding zeal that so often afflicts reformers—the "upward-and-onward-fellows," he called them. Lacking any certain measure of truth, Holmes could not join social movements nor enlist in public causes, even if judicial office had not precluded such activity. Not being God, as he was accustomed to say, he could neither follow those whose passion for reform was greater than his nor agree with "simple-minded" colleagues who believed they could block change and maintain the *status quo*. "To rest upon a formula," he said, "is a slumber that, prolonged, means death."

Holmes' liberalism was a by-product of an ingrained skepticism that manifested itself in relativism: "I am so skeptical as to our knowledge about the goodness and badness of laws that I have no practical criterion except what the crowd wants. Personally I'd bet the crowd, if it knew more, wouldn't want what it does; but that is immaterial."

Relativism, rejection of the absolute, pervades Holmes' thinking on economics, ethics and politics, "I know no way of finding the fit man," he said, "so good as the fact of winning in the competition of the market." That is why Holmes could admire such men as James J. Hill, the railroad magnate. That is also why he could denounce the Sherman Anti-Trust Act as "humbug based on economic ignorance and incompetence," and describe the Interstate Commerce Commission as "an unfit body to be entrusted with rate-making."

"When I say a thing is true (summing up his approach to ethics) I mean that I can't help believing it . . . I therefore define truth as the system of my limitations and leave absolute truth for those who are better equipped."



"Truth," he wrote in a Supreme Court opinion, "is the power of thought to get itself accepted in the competition of the market of ideas."

Relativism was likewise basic in his politics, but here it resulted in a kind of absolutism. In sharp contrast with his "naive" colleagues, he recognized that legislatures rather than courts represent "the actual equilibrium of forces in the community. What proximate test of excellence," he asked, "can be found except correspondence . . . that is, conformity to the wishes of the dominant power?" "Such conformity," Holmes admitted, "may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not . . . the test of a good government is that the dominant power have its way." Herein lies the clue to Holmes' widely heralded liberalism in politics. Basically it meant that the might of the majority, even though it embodied a public policy he distrusted, spells right. "I have no practical criterion except what the crowd wants."

Justice Holmes showed no sensitiveness to the danger of inaction, no marked inclination to shape social forces constructively. All of which suggests that his famed liberalism must be measured primarily in terms of rare open-mindedness as to matters wherein most lawyers and judges were singularly obtuse.

How does Justice Brandeis fit into this variegated liberal pattern? What sets him apart? What is the secret of his great power and enduring influence?

Brandeis is, of course, known among his friends as a great liberal and roundly denounced by his enemies as a radical. Neither label fits. There is not, to my knowledge, any evidence that the Justice himself accepted either tag as a correct description of his social and political outlook. Brandeis thought of himself as a democrat with a little "d". He campaigned for "good causes" without the slightest regard for practical politics or tenderness for any philosophical system. He worked indiscriminately and simultaneously with labor leaders, captains of industry, trust magnates and trustbusters, muckrakers and academic scholars.

No formal political organization could count implicitly on his allegiance. He supported Theodore Roosevelt with enthusiasm, and in 1908 voted for William Howard Taft, anticipating that he would "be a good President, rather of the Cleveland type." He broke with Taft in 1910 and with T. R. in 1912. In the latter year he campaigned actively first for Robert M. LaFollette, and later switched to Wilson. In 1920 he was "100 per cent," as he put it, for Herbert Hoover, and when the Old Guard passed over the "great engineer" to elevate Harding and Coolidge, Brandeis deplored it as "a sad story of American political irresponsibility." In the face of such a record, is it any wonder that critics, including some friendly ones, are not quite sure what place, if any, to assign Brandeis in our liberal constellation?

In the rough and tumble of his pre-judicial struggles, Brandeis was usually on the popular, progressive, or reformist side, on the side of labor and the



consumer. But he was no blind champion of the underdog. As long as it was a matter of one corporation against another, where the lawyers on two sides were fairly well balanced in competence, he was content to practice law in the more conventional way. But when a corporation achieved enough power to end competition or hold labor or the consumer or the public hopelessly within its grip, "a very different question presents itself." Under these circumstances one could not fairly assume that the "two sides are reasonably well matched," or that a decision will be reached such "as justice demands."

"I cannot conceive," Brandeis wrote in 1905, "of anyone being really sensible who was not a reformer as well as earnest and progressive." But he must be carefully distinguished from the conventional saviors of society. He did not fare forth with fire and sword to win Utopia. Brandeis does not fit neatly into Holmes' category of "upward and onward fellows." Taking men for what they now are and can be, not for what they ought to be, he dealt with particular evils at given times and places as these came to light in the natural course of his law practice. Unlike so many raucous muckrakers then flourishing, he did not, "by hating vices too much come to love men too little," even though those men were unconscionable capitalists. Nor was he content merely to expose and deplore. For known wrongs he proposed a knowable remedy and worked systematically and tenaciously toward its elucidation and enactment.

Brandeis sympathized with the rise of popular power and was much impressed by the quality of thinking then (1905) being done by working men. Many of them, he said, talked about the labor question "far more intelligently than some of the most educated men in the community." Social unrest could not therefore be safely or effectively brushed aside as the outcropping of mass envy and iniquity; nor should social legislation be summarily declared unconstitutional, nor labor activities put down harshly by bloodletting or a writ of injunction. Brandeis never concurred in President Hadley's caveat that the Constitution enjoins social democracy. Yet he, like other "corporation lawyers," recognized the explosive nature of popular power, and the danger implicit in it for men of wealth like himself. He foresaw as early as 1905 that "immense wealth would in time develop a hostility from which trouble will come to us unless the excesses of capital are curbed." "Our country," he warned, "is, after all, not a country of dollars but of ballots; the working men must in a comparatively short time realize the power which lies in them."

And Brandeis, like Cooley, Judson, Tucker, and Brewer, pointedly reminded the bar of its peculiar responsibility. All were equally cognizant of the socialist peril. But whereas the conventional corporation lawyer traced this danger straight to agitators, muckrakers, and labor leaders, Brandeis saw industrial magnates themselves unwittingly aiding the socialism they deplored: "The greatest factors making for communism, socialism and anarchy among a free people are the excesses of capital. The talk of the agitator does not ad-

vance socialism a step, the great captains of industry . . . are the chief makers of socialism." The lawyer-judge reactionary outlook recalls Burke's words of 1790—"I must bear with infirmities until they fester into crimes." Brandeis knew that such blindness was as self-defeating in the America of 1905 as it had proved to be in the England of 1790.

Brandeis, appraising the situation at the turn of the century, saw the rise of popular power and trade unionism as the natural outcome of a changing social order. Power was moving from the few to the many. Lawyers and judges, if wise, would not try to freeze privilege and indiscriminately thwart change; nor was it prudent or even safe to stand aloof from the struggle, as Holmes was inclined to do, ready and willing to apply the measure—"what the crowd wants." Here, Brandeis thought, was a signal opportunity for lawyers—"the richest field," as he put it, "for those who wish to serve the people." It lay within their power to determine the course of political and social action, "to determine whether it is to be expressed temperately or wildly; whether it is to be expressed in lines of evolution or in line of revolution." Believing this, Brandeis left the beaten track of trust-belt lawyers, abjured the Olympian detachment so typical of Holmes, not to battle solely for the people (in the sense of the underdog), not to undermine our time-honored institutions. He interpreted his function as that of safeguarding society against blind change as well as against blind opposition to change. His was the constructive task of canalizing human aspirations for freedom into law and orderly progress.

The evening of Brandeis' judicial career came in the first decade of President Franklin D. Roosevelt. The Justice strongly sympathized with certain New Deal objectives, and was deeply involved in the effort to implement them, but he was not a 100 per cent New Dealer. He joined in setting aside NIRA, among other measures, and on more than one occasion vehemently doubted whether grandiose plans and a few fallible planners could achieve genuine freedom and self-government. Even when F. D. R.'s program was in its first and more glamorous phases, the Justice mingled skepticism with sympathy. In early January, 1934, for example, he noted with approval that Washington was the scene of "more intellectual striving than I have ever known," but in quotation marks he added these lines:

"The world's wise are not wise  
Claiming more than mortals know."

Brandeis was concerned lest the curse of "bigness" which had been so long the characteristic malady of business might also afflict government. After 1934, his letters to personal friends exhibit the same sort of skepticism toward bigness and unrestrained power in government, and in organized labor, as he had earlier voiced against the evils of industrial giantism and monopoly. "What," he was wont to ask, "do they (New Deal administrators) know about the practical problems of business?" Nor did the rising power of labor elicit his unqualified approval. Many years earlier he had said, and now repeated:



"Society gains nothing in substituting the tyranny of labor for the tyranny of capital." As he continued to affirm and reaffirm his faith in little men and little institutions, and to voice distrust of the uncommon man, the big man, some erstwhile friends—including even ardent New Dealers—began to think of him as outmoded, wanting to turn the clock back.

The most obvious practical quality that sets Brandeis apart from the entire miscellany of American liberals was his inductive, factual approach and, as a direct result, his amazing grasp of economic and social complexities. His moving knowledge would not allow him to condone the *status quo* or assume Holmes' attitude of detachment. Brandeis had to take sides; knowledge of the facts of our economic and social situation alone was calculated to create in him a sense of militant urgency. Uncanny premonitions that man's failure to solve today's problems accentuates and complicates tomorrow's issue, drove him to take a resolute stand in favor of social control as against the anarchy of greed and private economic power. That is why his writings and opinions are alive with deep conviction. Thus Holmes might uphold legislation because the "crowd" wanted it and the Constitution did not prevent it, whereas Brandeis might uphold it or set it aside depending on whether the statute conformed to certain standards of social justice as established by the facts.

And for Brandeis' measure of facts, Holmes expressed the utmost confidence and respect. It was Holmes who proclaimed that "the man of the future is the man of statistics and the master of ceremonies." It was Holmes who said that "every lawyer ought to seek an understanding of economics." It was Holmes who warned against any "slackening in the eternal pursuit of the more exact"; it was Holmes who spoke of the futility of arguments on economic questions by anyone whose "memory is not stored with economic facts." It was Holmes who asserted that "it is the essence of improvement that we should be as accurate as we can."

But Holmes' interest in "the more exact" was only verbal. For the factual studies in which Brandeis reveled, he frankly expressed fastidious disrelish. Holmes talked much of wanting to "improve his mind," and toward the end of the 1919 term of court, Brandeis told him precisely how he could do it.

"Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations," Holmes wrote Sir Frederick Pollock, May 26, 1919. "He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently, you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course, a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties,



but I shrink from the bore — or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies. . . .”

Thus, while Holmes read and reread the philosophers Hobbes and Plato, Brandeis studied “some domain of fact”—facts as the accumulating evils of unemployment, the abuses of industrial life insurance, the paralyzing effects of long hours and bad working conditions. And he did more than amass factual ammunition about specific wrongs. Firm in his belief that knowledge is power, he went out on the firing line and fought for specific remedies—and not infrequently won.

Brandeis could not find ease in Holmes’ citadel of “enlightened skepticism.” Holmes savoured what he called the “secret isolated joy of the thinker.” Brandeis’ greatest joy was in the thick of social and economic conflict. He was the self-styled man who “would rather fight than eat.” And as a “man of statistics and master of economics,” Brandeis could measure the perilous consequences of inaction. Knowledge moved him to constructive social action against economic privilege and greed. When most of our lawyers were either smugly complacent or eager only to preserve the *status quo*, a profound sense of urgency moved him to guide and direct “the power that lies in the masses.” Informed, conservative impulse, not radicalism, drove him to find remedies for human suffering and exploitation. Masterful command of industrial and political complexities generated in him moral voltage so conspicuously lacking in the liberal Holmes, in the reactionary Taft.

Brandeis’ mood was militant because he knew in his own time what none of us can fail to see now, that public ignorance and apathy (“the greatest peril to freedom”) in the face of unresolved social and economic conflicts is an open invitation to authoritarian rule, that failure to solve today’s problems complicates tomorrow’s issues—worse still, that failure dangerously narrows the range in which man is free to shape his own destiny.

Brandeis realized as did few, if any, of his contemporaries, that liberty is a many faceted thing, that the forces that hedge it in are manifold and changing, that liberty cannot be reduced to any economic or political formula. Thus the worker whose best effort barely wins a livelihood is not free. Those who go through life in aimless search for pleasure, who live solely to impress others or to win their approval, are not free. The corporation executive whose thought is merely of profit and more profit is thereby enslaved. The lawyer whose life is spent showing corporations how they can evade the law is himself enchained. The politician bent on office and power is not his own man but his electorate’s or his party’s. In short, no man is free if personal ambition masters him.

For Brandeis’ liberty does not consist merely in emancipation *from* things that exploit, dwarf, and enslave. Liberty is essentially positive and expresses itself principally in spiritual growth, in terms of the individual and his development. The social and political organizations under which men live are

good only as they facilitate that development by enlisting individual participation and responsibility in matters of common concern. Therefore, Brandeis could say with John Stuart Mill: "The worth of a state, in the long run, is the worth of the individuals composing it, and the State which postpones the interests of their mental expansion, and elevation to a little more of administrative skills, . . . a State which dwarfs its men, in order that they might be more docile instruments in its hands, even for beneficial purposes,—will find that with small men no great thing can really be accomplished.

In due course, Brandeis discovered for himself the further truth, which he held to be applicable generally—that by participating in and assuming responsibility for specific public causes, he enjoyed a keen sense of duty done, of liberation—an enlargement of his own freedom.

That is why Brandeis' statesmanship (or liberalism, if you will) must be measured by stands taken, things done. Believing that nothing in this world is inevitable—neither democracy nor freedom, neither peace nor war—Brandeis joined movements, labored in behalf of specific reforms. In his youthful notebook he had written Bacon's words: "In the theatre of human life it is only for God and the angels to be spectators." Even as a Supreme Court Justice, he was still the fiery crusader, the "moral teacher," demonstrating his belief that man does have considerable control over his own destiny, proving to the very end that given knowledge, leadership, participation, and persistence, man can approach nearer than was ever thought possible to an enlarging liberty through a living law.

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- II. "Our Next President's Job Is Like Lincoln's."
- III. "Declaration of Interdependence."
- IV. Excerpts from an Unfinished Paper for a Memorial Day Address, 1941.

Henry Wells Lawrence Memorial Day Lecture, 1944.

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