VOLUME XXXVI DECEMBER, 1935 NUMBER 144

The American
MERCURY

BACK TO *WHAT* CONSTITUTION?

BY RALPH ADAMS CRAM

WITHIN the last few months the American public has, so to speak, become Constitution conscious. Some of the reasons for the appearance of this phenomenon are not unconnected with considerations of partisan expediency, but the repercussions are wider than this narrow circle. Probably more citizens have of late had the Constitution in mind — have even read it — than has been the case during the last fifty years. On the one hand arises the vociferous cry, "Back to the Constitution!"; on the other, in substance, "Down with the Constitution!" The line of demarcation lies between those who support the New Deal both in its intent and in its operation, and those who, for one reason or another, oppose it in both respects. "Back to the Constitution!" is a mouth-filling and plausible phrase. It is an excellent campaign slogan. But what, exactly, does it mean? To what Constitution do those who use it refer: to the Fundamental Law promulgated in 1787, or to the same document as it stands today? This is a question that should be settled; for between the two documents there is very little relationship.

We hear the most reverent testimonials to the wisdom, sagacity, and philosophical acumen of the framers of the original Constitution, with a consequent appeal to the electorate to forsake current leadership and return to that of the Fathers. If this appeal were heeded, however, those who advocate it would be considerably surprised by the result. There is, of course, a good deal to be said for a return to the Constitution of 1787, but a careful scrutiny of the document, together with a comprehension of the social and political theories of those who were most instrumental in framing it, gives ground for belief that a return to the Constitution of Washington, Hamilton, Madison, Gerry, Randolph, Morris, and the rest of the immortal galaxy, is the last thing desired by those who now are shouting the loudest. Evidently the bourne of their desires is the present Constitution, with all the Amendments, judicial interpretations, and accepted precedents on its head. Yet these ardent advocates have little justification in appealing to the Framers, individually and collectively, for support. What may be called The Constitution of 1935 would un-

doubtedly have filled those colonial statesmen with dismay. In several vital respects it runs counter to their measured convictions and does violence to what they held to be fundamental truths.

The Framers had no illusions as to the nature of what they had produced. They realized that it was in many ways a compromise; but it was the best they could hope to have ratified by some of the recalcitrant small states. They expected the Constitution to be revised from time to time, and they provided easy methods of amendment. It is hardly probable, however, that any of them anticipated that this inevitable process of amendment would in so many cases run counter to their ideas as to the just basis of civil government. This, however, is exactly what has happened. Every Amendment subsequent to the Bill of Rights, except the Thirteenth, has done violence in varying degrees not only to the plain intent of the Constitution of 1787, but to what we know of the convictions of the Framers. This is not to say that the members of the Constitutional Convention were of one mind; on the contrary there was a wide diversity of opinion on many matters. But on certain points they were substantially agreed, and there was a majority so clearly of one mind that they were able to fix the character of the great document in substantial accordance with their convictions.

It is a mark of the great wisdom of the Framers that, after a century and a half, we show some signs of returning to these basic principles; it is even more an evidence of their wisdom that the Constitution of 1787, together with the twelve first Amendments and minus those that have followed after the Thirteenth, would, with a few changes and additions, now fit our case to admiration. Primarily, it is these last eight Amendments which play so large a part in making the Constitution unworkable. Nearly all of them are the offspring of political or partisan expediency, or of an inflamed and uninformed mob psychology. They issued from a time when such statements as "The cure for democracy is more democracy" were considered good gospel, when books were written with such titles as *Triumphant Democracy*, and when it was considered sound business to indulge in Noble Experiments.

That the Framers could not have envisaged the world which was to come into being a century and a half after the end of their labors, is not surprising. At that time gunpowder and the printing press were about the only things added to the social stock since the time of Julius Caesar. Three million people, predominantly of British stock, strung along the Eastern seaboard of a vast and unexplored continent, the great majority of whom lived on the land and with practically no landless class whatever, is one thing; the present estate of a country covering two-thirds of the continent, with a population of 130,000,000, sixty per cent of which belongs to the landless class, is quite another. Nevertheless the basic principles of the Fathers are still sound today. These principles they held to be self-evident. That there would inevitably be changes in the methods putting them in operation the Framers foreknew, and welcomed. But they could hardly envisage a time when the whole cultural and social condition would have become so changed that a new system of values and circumstances would negate and reverse their own system of political philosophy.

In their individual opinions the members of the Convention covered the entire field from limited monarchy to limited democracy; but the discussions always

concerned the means to an end, never the end itself. This is not surprising, for that conclave of fifty-five men was probably the most patriotic, high-minded, and statesman-like group ever gathered together on this continent either before or since. It is questionable if today there could be assembled, from a population of more than one hundred and thirty millions, a group of such distinction and ability as was drawn from a population of three millions. Twenty-six of their number were college-bred; all were broadly educated, well-versed in history, the classics, and jurisprudence. Some had traveled or lived in England; some even had been educated there or had been students in the Temple. All were men of substance and standing in their communities. They were statesmen and patriots. Yet it is doubtful if more than two or three could qualify today as politicians. The general temper of the assemblage was well expressed by Washington who, at the opening of the Convention, said with great solemnity:

> It is probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God.

The Convention was as predominantly and continuously conservative as its members. The favorite model was the English government, which the delegates tried their best to reproduce in a republican form. They were afraid neither of a king nor of a House of Lords, but they were mightily afraid of democracy — even of that mild form in which it had, at that time, shown itself. Even Sherman of Connecticut, one of the selfmade men, opposed the trend in this direction, holding that

> the People should have as little to do as may be about the government; they want information and are constantly liable to be misled.

Elbridge Gerry of Massachusetts endorsed this and said:

> The People do not want virtue; but they are the dupes of pretended patriots.

Hamilton was of course frankly outspoken:

> Gentlemen say we need to be rescued from the democracy, but what are the means proposed? A democratic assembly is to be checked by a democratic Senate and both these by a democratic chief magistrate. . . . I despair that a republican form of government can remove the difficulties. I would hold it, however, unwise to change it. The best form of government, not attainable by us, but the model to which we should approach as near as possible, is the British Constitution. . . . Its House of Lords is a most noble institution. It forms a permanent barrier against every pernicious innovation, whether attempted on the part of the Crown or of the Commons.

Said Dickinson:

> I wish the Senate to bear as strong a likeness as possible to the British House of Lords, and to consist of men distinguished for their rank in life and their weight of property.

Concerning the method of election and the President's tenure of office, the Convention was divided as between election by Congress or by the state legislatures. The term of office was to be either for life or for a period of years, with re-eligibility. This matter involved complicated discussions, with no less than seven plans before the Convention at the same time. The only scheme never seriously considered was the one which is today in force, *i.e.*, election by popular vote. Gouverneur Morris, supported by Dickinson, did in-

deed propose this, but only on the basis of indirect voting; that is, by a system of electors substantially as provided for in the original form of the Constitution. It is to be remembered also that the electoral franchise was closely restricted. Universal suffrage was not only unheard of, but undreamed of.

The Constitution of 1787 was what may be called an aristocratic-republican form of organic law with no salient democratic features. The Senate was an elective House of Lords, the members of which were chosen by the legislatures of the several states. The House of Representatives was the House of Commons chosen, as in the England of that day, by a privileged electorate. The President was a replica of the British sovereign, except that he did not occupy office by hereditary right, but was chosen by special electors: he was to hold office for four years, but it was assumed that he would be re-elected indefinitely if he gave good service. (The debates show that, had it been foreseen that custom would limit his tenure to two terms at most, he would undoubtedly have been given a life tenure.) He could not dissolve the national legislature and order a new election, and he had only a suspensory veto over legislation, in place of the absolute veto (a stiff fight was made to give him this); but by then the royal prerogative had become virtually a dead letter in England. The grotesque Continental system whereby a Ministry is responsible to Parliament and must resign on an adverse vote, had then never been thought of; had it been, so impractical a scheme would not have commended itself to the Convention. Incidentally, the American system has been the one factor in our plan of government which has saved the country from chaos and possible destruction, in spite of the shortsighted democratization in unimpeded progress for the past seventy years.

Is this the Constitution, then, to which such widespread and admiring reference is now made? It seems highly improbable. For the original Constitution was essentially anti-democratic and markedly aristocratic — monarchial, even. It could hardly appeal to the politicians of today; there is nothing in it for them.

Or is the present Constitution the document to which we are urged to return? If so, the proponents thereof can hardly call on the memory and the just fame of the Framers for support, since the Constitution of 1935 bears scant resemblance to the fruit of their labors and, as already said, runs counter to their most solemnly cherished convictions. To substantiate this statement, it is only necessary to consider separately the several Amendments, from the Thirteenth to the Twentieth, inclusive.

II

We may ignore the first of these. The passage of time and a changing world have wiped out chattel slavery (the form that has taken its place in the industrial world may be no very great improvement, but that is another question), and probably the makers of the Constitution would, in principle, have been only too glad to have incorporated this clause in their draft.

The Fourteenth Amendment occupies a different category. In the Convention, the "right" of suffrage was frequently referred to, but this was a case of mere carelessness in phraseology. What the members said and did shows very clearly that none of them looked on the electoral franchise as one of the rights of man. Nothing of the sort was in existence then or ever had been. The idea would have seemed irrational, had it been proposed. The giving or withholding of the vote was one of the

points the Framers held to be an attribute of state sovereignty, and they carefully kept their hands off it. As the further provisions of this Amendment, which would have seemed equally if not more obnoxious, have never been enforced and never can be, it is unnecessary to consider it further at this point. It is referred to merely as another example of the violence done the Constitution itself and the convictions of the Framers during the seventy years following the close of the Civil War. For the Fourteenth was the first of the Amendments to issue from a combination of sinister political expediency and inflamed mob psychology. In order to perpetuate the domination of the Republican party and to keep the conquered Southern states in continued subjection, it was conceived that the simplest plan would be to give the emancipated slaves the vote, so binding them forever to the party which had enfranchised them. There had to be in decency (the word is hardly opportune in this connection) some new political theory to give color of reason to such a revolutionary move, so Charles Sumner, Thaddeus Stevens, Benjamin Wade, and others of the dominant oligarchy proposed the idea of the electoral franchise as a natural and inalienable right of man by virtue of his humanity. The peculiar and unwholesome time was ripe for so anomalous a procedure and the revolution was speedily accomplished. The graves of the founders of the Republic and the Framers of the Constitution must have been much disturbed for a considerable time thereafter.

The Fifteenth Amendment is supplementary to the Fourteenth and falls under the same condemnation.

The Sixteenth Amendment proceeded to negate Article I, Section 9, Paragraph 4, of the Constitution, whereby direct taxation was denied the federal government. The old adage, "That state is best governed that is governed least", was pretty generally held to be correct by members of the Convention. Sherman of Connecticut put the idea clearly when he said:

> The objects of the Union are few: defense against foreign danger, internal disputes and a resort to force; treaties with foreign nations; the regeneration of foreign commerce and drawing revenue from it. These and perhaps a few lesser objects, rendered a confederation of the States necessary. All other matters, civil and criminal, will be much better in the hands of the States.

I do not raise here the question as to whether this Sixteenth Amendment was wise. The only point is that it reverses the considered judgment of the Framers. Hamilton would probably have endorsed it for he advocated the strongest and most centralized government. Could the others, in vision, have had some preview of the America of 1900, they might also have provided for the levying of such direct taxes. But on the other hand, could they have foreseen the infinite ramifications of executive, legislative, and judicial powers, the federal government's penetration into almost every sphere of personal interest and privilege with a consequent expenditure of public funds raised by the most exigent schemes of taxation, which bests the Moguls of India at their most opulent estate, they might well have been more zealous in their efforts to prevent forever such an issue. In any case, the Amendment is in radical opposition to the beliefs and interests of the Framers, and is the Magna Charta of the new system of government that has now been in effect (and is going forward with ever-increasing momentum) for the past twenty years.

If there may be some doubt as to what, under certain mystical and occult (but quite impossible) circumstances, might

have been the attitude of the members of the Constitutional Convention as to the principle and intent of the Sixteenth Amendment, there can be none in the case of the Seventeenth, which gave the election of senators into the hands of the electorate as a whole. The Convention was firmly opposed to a single legislative chamber, and it knew perfectly well that the essence of a bicameral system is that each house must owe its mandate to a different electorate. This principle was as fundamental as the idea that the choice of a President could not be left to popular vote. Neither, in their opinion, could the choice of members of the Senate. The best plan seemed to be to place the power of election in the state legislatures. The Framers' estimate of the future estate of these local governments was rather of the nature of what is known as wishful-thinking than of any intimation of what was to be. They were persuaded that the state legislatures would prayerfully choose the most learned, upright, and distinguished men as senators — representatives of property, of social status, and of the cumulative wisdom of generations, as opposed to the fluctuant and intemperate opinions of a lower house chosen by popular vote. This dignified conclave of hand-picked elder statesmen was to serve as a check both on the President and on the House of Representatives, curbing anticipated human ambitions and strengthening the Chief Executive by individual and corporate wisdom, counteracting the anticipated flightiness of the popular chamber.

James Bryce, in speaking of the Senate prior to the enactment of the Seventeenth Amendment, said in *The American Commonwealth*:

> The Senate has succeeded in making itself eminent and respected. It has drawn the best talent of the nation, so far as that talent flows to politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak with authority to their fellow citizens.

What Lord Bryce might say today would hardly bear resemblance to this high and well-deserved estimate of the Senate as it once was.

The inordinate growth of the party system and the complete transformation of the electorate brought about a condition in the state governments which largely nullified the intent of the Framers in that particular. This, together with the progressive democratization of society, argued for some new mode of choosing the upper house and, under circumstances such as they then were, no one could think of any panacea except election by the people. By this process the fundamental idea and value of a bicameral system of legislation has been completely destroyed; and furthermore, the existence and operation of two legislative bodies chosen by process of universal suffrage means, and has meant, incessant bickering, irritating delays, log-rolling, compromises, and, too often, bribery and corruption. The standard of character and intelligence in the Senate has steadily degenerated, keeping pace with, and even outdistancing, the same process in the lower house. There has always been a small minority of able men in the Senate, such as were envisaged by the Framers of the Constitution, but their eminence only throws into deeper shadow the quality of the general run. Had the Convention foreseen, for example, the coming of a time when a free electorate would choose the late Huey Long as governor of one of the states, and then send him to Washington as senator, it is highly probable it would have given up its task in despair, thinking the game hardly worth the candle. The

Framers had a lofty ideal of the American people and of the American nation they were trying to make. There was no place in their minds for the possibility of what has actually come to pass.

The Seventeenth Amendment thus not only violates the most cherished convictions of the Framers in negating the idea of a bicameral legislative system, but it has also been, in its effects, the most calamitous of all those inflicted on the Fundamental Law since the completion of the original Constitution by the Bill of Rights. The Eighteenth promised to be as bad, and largely fulfilled this promise during its short life. As it has since been abrogated it needs no further consideration here except to note it as a horrible example of what has happened and might perfectly well happen again.

The Nineteenth Amendment is without political significance. It is wholly a social matter; it might simply be called one of taste. Giving the vote to women has had no effect on government; it has simply increased the number of voters.

So, step by step and with increasing momentum, the original Constitution has been transformed and distorted. Each one of the Amendments has been enacted as the result of political expediency, emotional excess, or the clamor of an electorate uninformed, ill-advised, and acting under exactly those influences that in the Convention were predicted if it were in any considerable degree permitted direct action. From the election of General Jackson to the Presidency, the descent was facile to the Avernus of Democracy. The Republic of Washington, Hamilton, Gouverneur Morris, Elbridge Gerry, was one thing: the Democracy of 1935 is something of a very different order. And to these revolutionary Amendments the Supreme Court, from Marshall onward, has added equally revolutionary interpretations of Constitutional provisions. As a result we are now laboring under what is to all intents and purposes an entirely new Fundamental Law, bearing only the remotest relationship to that of 1787.

III

It is therefore quite logical to demand of those who are clamoring for a return to the Constitution just what document they refer to. "Back to the Constitution" is a sound principle if it refers to the original one as it stood prior to the nineteenth-century amendments. Of course, it could not serve in all respects to meet a revolutionized society and state: the process of amendment would have to be begun over again, but with the later amendments out of the way, it might be possible to effect the desired purpose more sanely and successfully than has actually been the case.

But would it? If the attempt were made to call a Constitutional Convention, or new amendments were initiated by Congress, is there anything in the nature of present legislators, politicians, or public opinion which would offer any reasonable hope of judicious results? For in either case the matter would be in the hands of politicians and the conclusions would be determined by partisan considerations. There was, as has already been said, hardly a member of the original Convention who would now rank as a politician. If such a personnel could be gathered together today, man for man, then there would be little fear of the result; but this, of course, is impossible.

Yet drastic amendment is admittedly necessary. At present the Supreme Court possesses and exercises a more than absolute veto of legislation, which somehow seems inconsistent with the Framers' idea

of the division of governmental powers. The Sixteenth Amendment has given Congress such exorbitant, even extortionate powers over the personal property of individual citizens and corporations that there is no impediment to its becoming confiscatory. Recent experience would indicate that some curb should be effected at this point. The same experience would lead to a belief that nullification of the Twelfth Amendment (at least in intent) should also be rectified, with the election of the President removed from popular (*i.e.*, partisan) control, while in the interests of democracy and sound principle the Seventeenth Amendment should be abrogated and the choice of senators either restored to the state legislatures or in some other way completely differentiated from the manner in which elections are carried out in the case of the House of Representatives. Finally, in one way or another, the electoral franchise must be measurably restricted and the fundamental principle re-established that suffrage is a privilege and not a right inherent in man by virtue of his inclusion in that debatable genus, *Homo sapiens*.

RETURN TO AN OAK TREE

BY FRANCES FROST

I RECALLED a massive oak on the southern hill
Into whose heavy shade I came as a child
Panting after the climb and stricken still
Hearing the crow-calls husky-hoarse and wild,
Under whose great beneficent boughs I sprawled
Breathless at seeing the cloud-streaked mountains hold
That valley fiercely loved and fenced and walled
Into its squares of green and mustard-gold.

The moon-hot summer evenings I remembered,
When, escaped on stubby legs, I sat
On dewy grass, and like a black leaf a bat
Jerked downhill; and mornings in September
Rimed with the incomparable glitter of early frost
When bluejays flashed in the brown enormous boughs.

That childhood country being too long lost,
I returned in the russet time of autumn plows,
Strode up the slope and found the monstrous oak
Dead and bare of leather-leaves, its vast
Body strangely small — and something broke
Between that hour and the faithful past.
Not even the cries of unseen whippoorwills
Could make those darkening mountains more than hills.