

THE CONSTITUTION ON THE DEFENSIVE.

BY HOMER HOYT.

I.

A WRITER¹ in the September number of *The Open Court* voices a kind of dissatisfaction with the Constitution of the United States that is receiving more attention now than ever before. It is characteristic of the thought of an age of rapid scientific progress to approach to the inner shrine which shields our most sacred institutions and to demand that those very articles of faith be subjected to the impartial testing of the scientific laboratory. No longer are we content to accept basic institutions upon faith alone. The value of the Constitution of the United States must be tested, not by its original purpose and results, not by its antiquity, and not by the benefits it confers upon a few, but by its present service to democracy. If the Constitution was designed to protect the special interests of an autocracy of wealth, and if its purpose throughout its long history has been to raise the few into power by the sacrifices of the many, then no reverence for its antiquity, and no sentimental regard for its patriotic origin should deter us from abolishing it. If the Constitution "has fostered corruption, graft and exploitation"² we should strip it of authority until it has no more power in our national counsels than the traditional scrap of paper, and the final sentence rendered against it should be all the more severe because it has so long imposed upon us by assuming the guise of a sacred and patriotic institution.

The attack on the Constitution does not stop with the charge of corruption. Ancillary to this main indictment is a charge which is sometimes made the basis of an independent indictment and sometimes the cause of the main indictment, but which invariably accompanies the cry of "corruption" and "special interests." This charge is made by the writer previously referred to when she says that the Constitution binds us to the customs and habits that existed in 1787. It is probable that she regards conservatism as an evil *per se* in this restless age of changing fashions and changing laws. It is certain that she regards the conservatism maintained by the Constitution as the chief means by which it produces an unjust result to-day, because the Constitution has thus perpetuated the in-

¹ Mrs. Lida Parce.

² Mrs. Lida Parce, "Democracy and the Constitution." *Open Court*, Sept., 1917, Vol. XXXI, p. 560.

justice which she thinks entered into its formulation. The issue is thus raised as to whether or not there is any merit in an iron law that never changes. We must also bring to the fore another issue that lies back of that, namely whether or not the Constitution is an iron law that never changes.

These charges against the Constitution cut deep and no swift or biased judgment should be passed. So serious an indictment must be considered in all its aspects. The Constitution is so deeply imbedded in our national life that it affects almost the whole range of our social relationships. In order to make a decision upon the charges against the Constitution, we must consider whether its good qualities outweigh the bad. This kind of an assay is no easy task, because we are not all agreed upon what constitutes pure social gold. Only a study of economic, political, psychological and sociological factors that are intertwined in the complex grouping we call society can throw light upon this problem. Manifestly it is by far too large a problem to be considered in the scope of this paper. The writer can only muster some facts within the circle of his acquaintanceship for the purpose of defending the Constitution at the points of attack.

II.

Upon three questions part of the battle between the defenders and challengers of the Constitution must be fought. These three questions are: First, whether or not the Constitution fosters graft and corruption; second, whether or not there is any value in the unchanging character of the Constitution; and third, whether or not the Constitution is in fact an unchanging organ of government. These three points of controversy by no means indicate the whole contour of the battle line, but they do seem to be strategic points. The writer would therefore like to direct the attention of the reader to the forces that may be mobilized to support the defenders of the Constitution.

It must be frankly admitted at the outset that there is a cause for the dissatisfaction which has thus been expressed against the Constitution. That cause is undoubtedly a tendency of recent decisions of the Supreme Court of the United States to strengthen the position of the propertied classes in their struggle with the laboring classes. The writer feels a strong sympathy with the movements for the minimum wage for women, for the shorter working day, for sanitary regulations in factories, for the abolition of the company store, and for the various measures designed to safeguard the interests of trade unions and thereby increase the bargaining power

of labor, but he does not believe that the most serious impediment to the enactment of these reforms is the Constitution of the United States. Admitting that there is an evil to be remedied, the writer believes that there is not sufficient evidence to hold the Constitution responsible for that evil. On the contrary it is submitted that the forces in the Constitution which are the most maligned are in fact productive of much good. This brings us directly to a consideration of the points of controversy.

We are told first that the Constitution serves special privileges and that it is a bulwark of vested wrongs. The charge is not specific, and the answer can therefore only meet the prevalent types of discontent which "special privilege" suggests.

The Constitution has always had a very special regard for the vested rights of property. It has shown its solicitude for the interests of the owners of property by throwing up bulwarks to protect them against the arbitrary forfeiture or seizure of private property without just compensation. The protection of the special interests of property however is not usually regarded as unworthy of a democracy unless there is discrimination in the treatment of various persons holding property. The Constitution guards the interests of the owner of the humble cottage as zealously as the lord of a mansion on Sheridan Road or Riverside Drive. The value to our civilization by the protection of property rights *per se* can best be seen by comparing conditions in countries with shifting constitutions like Mexico with the conditions that obtain in countries where the right of property is regarded as fundamental.

Perhaps the critics of the Constitution have another thing in mind, however, when they attack the Constitution for protecting special interests. Perhaps they refer to the conflict between the property interests of a few capitalists and the health, morals and general welfare of the many laborers. In spite of our ethical scheme of values in which we regard life as worth more than meat, and the welfare and happiness of a people worth more than material wealth, it is asserted that the Constitution places property above the health, morals and even the life of the individual laborer. In truth, however, there is ample authority in the Constitution for sacrificing property interests to the interests of morals, health and life, and this authority has been frequently exercised. Of course there must be a balancing not only between absolute property rights and absolute rights of health and happiness, but between various amounts of property rights and various amounts of health rights. A great property interest should not be destroyed to protect a very

small health right. The upper stories of a sky-scraper should not be torn off merely to decrease the danger of fire. It is significant, however, to note that the Supreme Court has refused to allow equal property interests to stand above equal health interests when it clearly saw the issue. It may be that the Supreme Court has not gone far enough. It is probable that the members of that body have not comprehended the connection between the health and happiness of workers and the measures designed to secure those results. They may not have made enough allowance for the increasing complexity of industrial society, whereby the result of legislation conducts itself through many channels before it reaches its intended destination. They may have overlooked the growing interdependency of the human family whereby the good or evil that is brought to bear against one man communicates itself by a series of widening circles to the whole of society. Many social workers are feeling that the property rights should give the right of way to the broader human rights on all occasions, and that property rights should be forced to yield not only when they conflict directly with the interest of health, morals and life, but also when they conflict with any legislation which indirectly or by roundabout means promotes health, morals and life. It is not the fault of the Constitution, however, that the judicial reaction toward social legislation has been rather narrow, because it is not unconstitutional to confiscate property when it is being used for a purpose that is detrimental to health and morals.

It is probable that the critics of the Constitution have still another conception in mind when they charge the Constitution with fostering special interests. They would hold the Constitution responsible for permitting if not actually encouraging the growing concentration of wealth into the hands of a few. Admitting that the establishment of an aristocracy of wealth is a serious evil under any form of government, it still remains to be seen whether the Constitution is the cause of the widening gulf between the rich and the poor. It is true that the Constitution has prevented and will continue to prevent the breaking up of large fortunes by confiscation. It has stood guard over the property of millionaires who have plundered the people when the people in turn would have plundered the millionaires. In thus protecting the vested interests of the few, not for the sake of the particular persons who happened to own the vested interests, but for the sake of the institution of private property, the Constitution has saved us from evils far worse than those which we sought to cure. It has saved us from the repetition

of the shock to credit that resulted from wild-cat banking and the repudiation of state bonds. It has saved us from the disorders and demoralization that followed the sudden forfeiture of crown lands in Russia. It has saved us from the panic and utter collapse of our whole financial structure that rests upon the security of property rights. It must be remembered too that this panic would be felt all the more severely because of the delicacy of the parts that bind our financial machinery together.

The Constitutional guaranty of property rights has been of great importance to our nation, because it is founded upon principles of justice to the individual. Property originally acquired wrongfully soon becomes divested of its evil character and it is then unjust to restore the *status quo* that existed before the wrong was committed. The gain of robbery, fraud and oppression soon mingles with the stream of property produced by honest effort and loses its identity completely. That part of the value of a share of stock that is due to railroad rebates cannot be distinguished from the part of value that is due to honest production. The purchaser of the stock on the market parts with money that is usually earned by honest effort, and to confiscate the value due to railroad rebates would be a monstrous injustice to him. The old saying that two wrongs cannot make a right applies here with great force. The cure for the evil of vested interests lies not in the confiscation of property, for that would be akin to burning down a house in order to disinfect it. The only just method is to prevent the proceeds of graft extortion and monopoly from ever becoming property in the first place by striking directly at the evil practices themselves. By prohibiting the evil practices of unfair competition, railroad rebates, price discrimination, franchise grabbing, legislative lobbying and all the other hydra-headed forms in which graft displays itself, we would prevent the canker of corruption from ever becoming a vested right of property. We would apply the policy of locking our barn before the horse is stolen, instead of leaving the door open and protecting ourselves after the catastrophe by stealing a horse from a malefactor of great wealth to replace the horse that was stolen from us.

Probably the critics of the Constitution have many other reasons not here adverted to for believing that it is a fortress of special privilege. If so, they owe it to their cause to reveal the secret of their discontent. Their specific proof has failed to disclose any basis for an indictment against the Constitution as a traitor to the general welfare.

III.

The second serious indictment against the Constitution is based on the assumption that it has not changed since the days of our grandfathers and proceeds to expound the evils of adopting the mummy of the eighteenth century as a model for the life of to-day. Without admitting the whole charge that the Constitution has not changed, the apologist for the Constitution insists that some elements of our modern life should be patterned after the days of old and that any considerable change in these elements is not desirable. The apologist refers particularly to the necessity of maintaining the stability of property rights.

There is every reason for maintaining stability of property rights. The chief incentive to thrift is the prospect of an assured income from property. The stimulus to the undertaking of a new enterprise consists in the probability of profit from the venture. The business man balances the risk against the prospective profit, and if the risk is great compared with the expected profit, he will not extend his plant or start a new business. The greatest of all possible risks is the risk of losing the whole of the principal as well as the interest through capricious changes in the laws of private property. Society progresses through the action of individuals striking out into new fields of endeavor, and hence it is to the interest of society to stimulate and not discourage individual initiative. The chief spur to progress is the knowledge that property rights will remain stable.

Even as it is economical so also is it just to maintain the stability of property rights. An individual who has labored long to acquire property would surely have a grievance if he was suddenly divested of his title because of a changed rule of law. The only way to assure a man that he will be allowed to enjoy what he has bargained and paid for is to make the laws governing the title to property as uniform and stable as possible.

Stability is a virtue in more ways than one. The stability of the Constitution is of inestimable importance in protecting the rights of a minority when they are threatened by the brute strength of a majority. When gusts of popular passion dominate the sentiment of one locality or even of one state, the objects of public disfavor can appeal to the broader principles of right and justice guaranteed by the Constitution. When even the whole nation becomes stirred with wrath and in a moment of forgetfulness would do something for which it would afterward be ashamed, the Constitution holds

up a warning hand. Thus a minority, whether it be composed of an unpopular race, an unpopular religion, or unpopular business interests, has found a refuge against the rage of the mob. The Constitution has brought to bear a force for the protection of life, liberty and property that the furious power of a temporary majority could not beat down. However much the majority has been momentarily exasperated by the steadiness with which the Constitution has resisted its purpose, in many cases its members have later honored the instrument that restrained them. When there was a real grievance against the Constitution, its very stability compelled a clear statement of the reason and necessity for its amendment. It did not give way to the first wild rush, and hence the Constitution has blocked hasty legislation, the mass of which has been a plague to this country. The Constitution has thus been more than a scrap of paper in the past when the changing current of public opinion has left its channel, and if our nation in the future is ever swept along by a powerful psychology that threatens to overturn individual rights, the Constitution will doubtless again prove to be a precious instrument.

IV.

Although the Constitution is essentially stable, it is by no means as hard to change as most of its critics believe. In addition to the process of external amendment there is a process of internal adaptation that is no less dynamic because it is not heralded by the clamor of debate and the roar of the cannon. Notwithstanding the common belief that the whole constitutional law of the United States is to be found in the original document itself, in fact our Constitution to-day consists of a library of bulky volumes. Not to mention the thousands of cases in the lower federal courts, the decisions of the Supreme Court of the United States alone fill 250 large books. The celebrated words and phrases of the Constitution have been so interlined, amended, interpreted, expanded, and annotated by the courts of the United States, that even a magician might be astounded to see so many twentieth-century products drawn out of an old beaver hat of the eighteenth century. The process of judicial interpretation is entirely different from the process of casting plastic material into an iron mold. The rules of the Constitution are not drawn tightly over each detail of conduct, but they are broad and loose, giving opportunity for fresh definition and specific application in thousands of concrete cases. The law laid down by the Constitution was confined to principles which centuries of experience had demonstrated to be universal in scope

and therefore least subject to change. Thus the constitutional phrase "Congress shall have power to regulate commerce" was framed in the days of the stage coach, yet it has been extended to meet the needs of the steamboat, the railroad, the telephone, the telegraph, the wireless and the aeroplane. It was conceived at a time when transportation was regarded as a private enterprise, it has lived to see transportation brought within the domain of public regulation, and it will be adequate for the needs of public ownership if that ever becomes necessary.

Some clauses in the Constitution are purposely elastic. Phrases like "due process of law" and "cruel and unusual punishment" adapt themselves to the views of each successive age. The right of every man to be tried according to "due process of law" does not require that he be tried according to the conceptions of due process that prevailed in the eighteenth century. On the contrary it guarantees to the citizen all the protection of modern notions of a fair hearing in addition to those essentials of a fair hearing that have existed since the days of the Magna Charta. Similarly with the constitutional prohibition of "cruel and unusual punishment." Manifestly what one age would regard as ordinary punishment, another would regard as cruel and unusual. The fundamental change in our theory of punishment as witnessed by the movements for prison reform and the psychological study of crime demonstrates that the social attitude on these matters progresses from one age to another. The Constitution accepts this fact of change and allows the average ethical standards of the time to judge whether a given kind of punishment is "cruel and unusual" or not.

In addition to all the elasticity provided for by the terms of the Constitution, there is a rule of interpretation which gives still greater leeway for progress. This rule was stated by Chief Justice Marshall in the famous case of *McCulloch vs. Maryland*. In referring to a situation not expressly covered by any language in the Constitution he said: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional." By this principle, which has been subsequently followed, the people are not hampered by obsolete machinery when they seek to attain an end that is clearly within the spirit of the Constitution. They can devise new methods for meeting new problems. The Constitution is thus a living instrument which is responsive to the needs and wishes of each successive age.

The same liberality of spirit is shown toward social legislation. The Constitution does not attempt to make each legislative act fit into an iron bed of Procrustes, but it only sets up broad limits beyond which the legislature may not stray. These limits are not absolutely rigid. There is a twilight zone or No-man's land where the legislative power meets the restraining hand of the Constitution. A broad interpretation of the Constitution would extend the legislative power over most of this disputed ground; a narrow interpretation of the Constitution would drive it back. The gains that might be made for social legislation on this border line would be sufficient to meet the needs of progress. That these gains have not been made is due to a conservative attitude on the part of the judges of the Supreme Court and not to the Constitution itself. The members of the Supreme Court who have felt the pressure of the public opinion of this age have been willing to grant as much power to the laboring masses as it would be wise to give at present. The judges who have declared social legislation unconstitutional because they did not appreciate its significance would probably emasculate an amendment to the Constitution covering the same subject-matter. The problem lies deeper than any form of words. It consists of the lack of understanding of modern industrial relationships. That problem cannot be solved by a recall of the Constitution nor even by a recall of judges, but as Roscoe Pound suggests only by a recall of law professors and much of the judicial thinking of the past generation.¹

The writer does not believe that the Constitution is without faults. There is need for some reforms. Such reforms, however, must be based not only upon a thorough analysis of our industrial situation, but also upon a thorough knowledge of the Constitution, because we cannot reform either unless we understand them thoroughly. Before we invoke the cumbersome process of amendment, we should also understand what is the most that could be accomplished without amendment. Before we relegate the Constitution to the limbo of historical documents, we should be sure that our new Magna Charta does not leave us as helpless as of old. The sudden uprooting of a long-cherished ideal would undoubtedly disturb our whole social structure and bring about a panic even in quarters where there was no cause for a panic. The element of *morale* is a factor in our national life that must be reckoned with,

¹ "Social Problems and the Courts," *American Journal of Sociology* (1912), Vol. XVIII, pp. 331-341. Also cited in W. H. Hamilton, *Current Economic Problems* (1915), pp. 651-653.

however, and it is folly to frighten people when nothing is to be gained by it. The substitution of new and untried maxims of government for those which have been defined by a process of court decision might very well complicate instead of simplifying our legal problems. Unless we are sure that we have something better we may well hesitate to throw overboard the results of one hundred and thirty years of judicial experience. In changing constitutions our motto should be "Safety first."

AN AUTONOMOUS UKRAINE.

BY AN UKRAINIAN.

WHEN in 1863 a Russian minister of state declared that "there never has been and never will be an Ukrainian language or nationality," he did not foresee the tragedy of the last Romanoff and the apparently accomplished disintegration of the empire of the Czars. In point of fact the very arrogance of his utterance was but a reflex of that will to conquer which has characterized the house of Romanoff from the time when it first took control of Great, or better, Muscovite Russia and added one subjected people after another as jewels to its crown. Among these was a former nation once of great power, later an object of contention between medieval Poland and Muscovy until in 1654 a political blunder on the part of its ruler, the Hetman Bogdan Chmielnicki, put this wealthy but politically weak state first under Muscovite tutelage but later under the conqueror's heel of the Czars, so that it preceded its enemy Poland which fell a victim over a century later.

For one hundred and fifty years the wrongs of Poland have aroused and obtained the sympathies of the non-Russian world, but rarely has the voice of justice been raised in behalf of a people whose only crime has been the misfortune of its undefended geographical situation between rapacious neighbors. The English world has forgotten the stirring *Mazeppa* of its greatest nineteenth-century poet, Lord Byron, and the present political situation will hardly allow any Englishman to take up the pen in defense of a nation whose rebellion seems to jeopardize the cause of the Entente by weakening the aggressive strength of Russia against her enemies of Central Europe. But putting aside the question of abstract justice, is such a stand even politically expedient? Cannot the aims of the new Ukrainian nation be utilized to the advantage of a strong Russia, so as to make her a potent force once more in the