Journal of American Constitutional History

"Not a Lawyer's Contract:" Reflections on FDR's Constitution Day Address

Gerard N. Magliocca[*]

Contents

[*] Samuel R. Rosen Professor, Indiana Robert H. McKinney School of Law. I thank David Schwartz and Laura Kalman for their comments on drafts of this paper.

https://doi.org/10.59015/jach.UXRY5145

> The surest protection of the individual and of minorities is that fundamental tolerance, that fundamental feeling for fair play which the Bill of Rights assumes. But tolerance and fair play would disappear here as it has in some other lands if the great mass of people were denied confidence in their justice, confidence in their security, confidence in their self-respect. Desperate people in other lands surrendered their liberties when freedom came merely to mean humiliation and starvation. The crisis of 1933 should make us understand that.
>
> Franklin D. Roosevelt (September 17, 1937)[1]

I. INTRODUCTION

Franklin Roosevelt's oration marking the sesquicentennial of the Constitution's proposal is the most profound discussion of our founding document by a modern president.[2] Delivered in the immediate aftermath of the Court-packing crisis and against the backdrop of the global rise in fascism and communism, the Constitution Day Address is a time capsule from a pivotal moment and a source of insights into timeless questions.[3] The Address is also the most thoughtful defense of the New Deal ever offered up by its leader, as there is no equivalent of *The Federalist* for the 1930s. Nevertheless, there is little scholarly or judicial commentary on FDR's remarks, perhaps because he attacked the

---

[1] Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), *in* 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 366-67 (Samuel I. Rosenman, ed. 1950) [hereinafter Constitution Day Address]. The Article quotes the speech as given rather than from the prepared text. The President's remarks as given are available at the FDR Library and are reproduced in the Appendix. *See* Franklin D. Roosevelt, "The Master Speech Files," (File No. 1072-A) (Sept. 17, 1937) (designated as "Reading Copy"), at http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01105. The wording of the spoken version can be confirmed by listening to the audio of the Address, which is at https://www.fdrlibrary.org/utterancesfdr. The Article's cites, however, are to the corresponding text in the prepared text. The differences between the prepared text and what FDR said, though, are almost entirely stylistic.

[2] *See* Constitution Day Address, *supra* note 1, at 359 ("One hundred fifty years tonight, thirty-eight weary delegates to a Convention in Philadelphia signed the Constitution."). The Gettysburg Address is the most profound constitutional statement by a president. *See, e.g.*, GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

[3] *See, e.g.,* LAURA KALMAN: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM (2022) (providing a comprehensive overview of the Court-packing plan).

legal profession in the speech; a sentiment captured best by his line that the Constitution is "a layman's document, not a lawyer's contract."[4]

This Article provides the first comprehensive account of President Roosevelt's Constitution Day Address and explains that his remarks speak to the modern problem of "democratic backsliding."[5] FDR's views on the best approach to constitutional construction developed in response to the decline of global democracy after World War I. He taught Americans a lesson on the relationship between foreign and domestic politics before turning to his theme that our Constitution should be construed to give the federal government broad power to raise the standard of living and reduce income inequality.[6] That cure followed from Roosevelt's diagnosis that recent constitutional failures abroad were caused by economic distress.[7] Constitutional loyalty could not be

---

[4] Constitution Day Address, *supra* note 1, at 362. For one of the few lengthy academic discussions, see 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 377–382 (1998). The new volume of the Holmes Devise on the Hughes Court does devote two pages to the Address. *See* MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930 TO 1941, AT 311–12 (2022).

[5] The literature on democratic backsliding is rapidly growing. *See, e.g.,* Adam Shiner, *Democratic Backsliding, Subsidized Speech, and the New Majoritarian Entrenchment, see also* K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1552 (2018) (noting this "important new literature" and contributing to that discourse).

[6] *See* Constitution Day Address, *supra* note 1, at 359–62; *cf.* LINDA COLLEY, THE GUN, THE SHIP, AND THE PEN: WARFARE, CONSTITUTIONS, AND THE MAKING OF THE MODERN WORLD (2021) (offering a pathbreaking discussion of the global links in constitutional thought during the eighteenth, nineteenth, and early twentieth centuries).

[7] *See supra* text accompanying note 1. He reiterated this idea in his well-known Second Bill of Rights speech. *See* Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944), *in* 1944–45 ROOSEVELT PAPERS, *supra* note 1, at 41 [hereinafter "Second Bill of Rights") ("[W]e have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made."); *see also* Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency, (Jun. 27, 1936), *in* 1936 ROOSEVELT PAPERS, *supra* note 1, at 233 ("An old English judge once said: 'Necessitous men are not free men.' Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for."); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION 29–44 (2017) (noting that a wealth inequality view of politics dates to ancient sources). The actual judicial quote that FDR referred to was: "Necessitous men are not, truly speaking, free men." Vernon v. Bethell, 28 Eng. Rep. 838, 839 (Ch. 1762).

maintained, he believed, without an interpretive method that responded to kitchen table concerns.[8]

Consequently, FDR argued for a method of construction that could be described as "constitution-reinforcing."[9] While the President hailed the importance of civil and religious liberties, he said that these rights would collapse without broadly shared prosperity.[10] He explained that we could not "forget that the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities."[11] The wealthy were the enthroned minority, and Roosevelt called for "the ending of that kind of license, often mistermed 'Liberty,' which permits a handful of the population to take far more than its tolerable share from the rest of the people."[12] He argued that the Constitution, properly understood, permitted that action because the Framers used sweeping language in Article I, Section Eight empowering Congress to legislate for the general welfare.[13] In defending this reading of the text, Roosevelt reiterated his longstanding view that the Constitution's greatest virtue was its elasticity.[14]

The most radical aspect of the Constitution Day Address was its dismissal of the rule of law's importance for constitutional success. FDR never used the

---

[8] *Cf.* MARTIN RIDGE, IGNATIUS DONNELLY: THE PORTRAIT OF A POLITICIAN 324 (1964) (quoting a Populist leader in the 1890s who said: "What is freedom worth to a man who is dying of hunger? . . . Can you keep a room warm, next winter, with the thermometer at 30° below zero, by reciting the Declaration of Independence?").

[9] This label, of course, comes from "representation-reinforcing" theory. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[10] *See infra* text accompanying notes 72-74.

[11] Constitution Day Address, *supra* note 1, at 366; *see* GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 92-114 (2018) (discussing how Roosevelt used the Bill of Rights in his rhetoric more generally to legitimize the growth of federal power under the New Deal); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xii-xiii (1998) (introducing the anti-minoritarian features of the first set of amendments).

[12] Constitution Day Address, *supra* note 1, at 361; *see generally* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022) (laying out a comprehensive historical overview of this constitutional approach).

[13] *See* Constitution Day Address, *supra* note 1, at 363.

[14] *See* Franklin D. Roosevelt, Radio Address on States'-Rights, (Mar. 2, 1930), at 1, at http://www.fdrlibrary.marist.edu/_resources/images/msf/msf00371 ("The United States Constitution has proven itself the most marvelously elastic compilation of rules of government ever written."); *infra* text accompanying notes 100-102.

phrase "rule of law" in any official statement, and in his version of history most lawyers were the problem, not the solution, because they opposed public efforts to regulate property and improve the quality of life.[15] A more modest take along these lines was offered a few years later in Judge Learned Hand's inspiring "Spirit of Liberty" speech, which declared that neither constitutions nor courts could save liberty from the indifference of average citizens.[16] Even if FDR's challenge to "legalistic interpretation" overstates the case against the importance of law and lawyers in a constitutional democracy, his perspective (and Hand's) deserves serious consideration in a world where those democracies are again under siege.[17]

I will start by setting the scene for the Constitution Day Address by showing how the speech recast the defeat of the Court-packing plan as a triumph. Then the discussion will turn to how the Address linked the decline of constitutionalism abroad to the health of democracy at home. The next topic will be FDR's claim that economic pain is the main cause of democratic backsliding, and hence that the Constitution must be construed to give government the power to raise the standard of living and equalize income. Finally, I will assess the President's argument that lawyers were the chief obstacle to reform due to their penchant for reading restrictions into general constitutional language to help their clients. The Appendix then reproduces the entire Constitution Day Address as delivered by President Roosevelt on September 17, 1937.

II. DECLARING VICTORY OVER THE COURT

Let us begin by looking at how the Constitution Day Address turned the President's recent Court-packing defeat into a triumph. The Address was FDR's first significant public statement about the defeat of his plan to increase the number of Justices, and he used the occasion to foster the idea that the Court

---

[15] *See, e.g.*, Constitution Day Address, *supra* note 1, at 363-65. A search of Roosevelt's official papers, which are now fully available online, discloses no references to the "rule of law." But other leading figures in this era did use that phrase, *see, e.g.*, Winston Churchill, *What Good's A Constitution?* COLLIER'S WEEKLY, Aug. 22, 1936, at 39, which suggests that FDR's omission was meaningful.

[16] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 469-73 (2d. ed. 2011) (describing Judge Hand's May 21st, 1944 "I Am an American" address in New York City).

[17] Constitutional Day Address, *supra* note 1, at 365; *see id.* at 363-64 ("Those of us who really believe in the enduring wisdom of the Constitution hold no rancor against those who professional or politically talk and think in purely legalistic phrases"). For a modern expression of some related concerns in administrative law, see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

changed its position on the constitutionality of the New Deal in response to his plan.[18] In other words, the speech marked Roosevelt's embrace of the "switch-in-time" story.[19]

1. The Drafting Process

Although the Constitution Day Address was a wide-ranging speech, Roosevelt's immediate goal was to use the Constitution's 150th anniversary to reset his political agenda. Just two months earlier, he suffered the worst setback of his Administration. His plan to increase the number of Justices was set aside by the Senate following the death of Majority Leader Joseph Robinson.[20] The President's lead speechwriter, Samuel I. Rosenman, wrote in his memoir: "During the Court fight, the President had been often and loudly accused of ignoring the Constitution. He wanted to use this opportunity to explain what he thought the Constitution was."[21] Rosenman observed that Roosevelt "did not make any important speeches after the Court fight," which meant that the Address would

---

[18] *See* Constitution Day Address, *supra* note 1, at 364-65 (stating that the Court overruled its prior holding on the constitutionality of a minimum wage for women in *West Coast Hotel v. Parrish* "after my message to the Congress on the rejuvenation of the Judiciary"). There is a scholarly consensus that Justice Owen Roberts shifted his view on the constitutionality of the minimum wage for women in *West Coast Hotel* prior to the Court-packing plan's proposal. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (offering the most detailed internal response to the external "switch-in-time" theory). Other cases from the 1936 Supreme Term were argued after the plan was announced, which means that Justice Roberts may have been influenced by court-packing for them. *See* KALMAN, *supra* note 3, at 175.

FDR did give a press conference the day after the Court-packing plan was defeated in which he said that it was "rather interesting" that the Court's decisions shifted after his proposal. *See* Press Conference #383, July 23, 1937, in 10 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 60-62 (1937). In this era, though, presidential press conferences were not heard directly by the public. Plus, the President told reporters that his comments were on background (in other words, off-the-record). *See id.* at 62.

[19] *See, e.g.*, John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine*," 73 OKLA. L. REV. 229 (2021) (exploring the emergence of that view of the Court's doctrinal shift).

[20] *See* KALMAN, *supra* note 3, at 232-40; JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL 341 (2012).

[21] SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT 163 (1952).

be his first discussion of that failure and give him a chance to regain his footing.[22]

To that end, Rosenman worked on the Constitution Day Address with the fabled New Deal drafting team of Thomas "Tommy the Cork" Corcoran and Ben Cohen.[23] The theme, Rosenman recalled, "was Tom's idea: that the Constitution was not a lawyer's contract, strict and inflexible, but a layman's document, appropriate to a layman's broad and flexible construction. The President accepted that theme."[24] Felix Frankfurter, who was still at Harvard Law School and was an informal advisor to Roosevelt, also supplied a draft section.[25] Frankfurter amplified Corcoran's theme by observing that "[w]hether the Constitution is treated primarily as a text for interpretation or as an instrument of government makes all the difference in the world."[26]

2. Court-Packing Revisionism

The President delivered the Constitution Day Address at the Washington Monument to a crowd estimated at 65,000 people and to a national radio audience.[27] When he turned his attention to the Supreme Court, Roosevelt began by explaining that the document's text says little about that institution: "Contrary to the belief of many, many Americans, the Constitution says nothing about any power of the Court to declare legislation unconstitutional; nor,

---

[22] *See id.*

[23] *See id.*; DAVID MCKEAN, PEDDLING INFLUENCE: THOMAS "TOMMY THE CORK" CORCORAN AND THE BIRTH OF MODERN LOBBYING 42-45 (2005) (describing the partnership between Corcoran and Cohen in drafting legislation during the New Deal).

[24] ROSENMAN, *supra* note 21, at 163.

[25] *See* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 409-17 (Max Freedman ed., 1968) [hereinafter Frankfurter Draft]; *see also* BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 280-81 (2022) (describing Frankfurter's role in drafting the address).

[26] *See* Frankfurter Draft, *supra* note 25, at 409; *id.* at 413; *see also* SNYDER, *supra* note 25, at 281 ("Roosevelt's Constitution Day address was the best exposition of Frankfurter's view of the Constitution as an instrument of government"). Other parts of the Frankfurter draft that appear and do not appear in the final version of the Address are discussed in Parts III and IV.

[27] *See* "Fealty Called For: But to Constitution, Not Its Misinterpreters, Says President," THE NEW YORK TIMES, Sept. 18, 1937, at 1 (estimating the crowd size); *supra* note 1 (providing a link to the radio address).

parenthetically, does it mention the number of judges for the Court."[28] "Four times," he said, "four times, the Constitutional Convention voted down proposals to give Justices of the Court a veto over legislation."[29] "Clearly," he concluded, "a majority of the delegates believed that the relation of the Court to the Congress and the Executive, like the other subjects treated in general terms, would work itself out by evolution and change."[30] In this passage, the President gave a thinly disguised defense of the legitimacy of his Court-packing proposal.[31]

A few minutes later, FDR suggested that Justice Owen Roberts changed his constitutional stance on the New Deal because of the plan. "For twenty years," he said, "the Odd Man on the Supreme Court refused to admit that state minimum wage laws for women were constitutional. A few months ago, after my message to the Congress on the rejuvenation of the Judiciary, the Odd Man admitted that the Court had been wrong—for all those twenty years—and overruled himself."[32] Here the President was referring to one man rather than to the Court. The man in question must have been Justice Roberts. Roberts provided the swing vote in the 5-4 decision in *Moorhead v. New York ex rel. Tipaldo*[33] striking down a minimum wage for women from New York, but less than a year later joined the 5-4 decision in *West Coast Hotel v. Parrish*,[34] which upheld an almost identical state law from Washington. FDR did not say that the "Odd Man" changed his vote because of the Court-packing proposal, but the implication was clear. And by 1941, the President was making that claim plain: "It would be a little naïve," he wrote in an introduction to a volume of his

---

[28] Constitution Day Address, *supra* note 1, at 363. Some press reports about the address mistakenly concluded that FDR was looking to rekindle the Court-packing struggle. In fact, the Address was a valedictory for Court-packing.

[29] *Id.*

[30] *Id.*

[31] In a draft, Roosevelt quoted a radio address by Charles Beard, a leading constitutional historian in this era, in which Beard said that overturning Supreme Court decisions through means other than a constitutional amendment was standard practice. *See* FDR Master Speech File, "Fourth Draft" at 6, [hereinafter Fourth Draft], http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01106; *see also* 81 CONG. REC. appx. 868 (1937) (reproducing Beard's entire address, which was delivered on March 29, 1937).

[32] Constitution Day Address, *supra* note 1, at 364-65. The moniker "Odd Man" was coined by Professor Thomas Reed Powell, who used the term to criticize certain Supreme Court cases decided by a 5-4 vote. *See* Thomas Reed Powell, *Commerce, Pensions, and Codes, II*, 49 HARV. L. REV. 193, 233-34 (1935).

[33] 298 U.S. 587 (1936).

[34] 300 U.S. 379 (1937).

presidential papers, "to refuse to recognize some connection between these 1937 decisions and the Supreme Court fight."[35]

The idea that Justice Roberts switched his position in response to Court-packing was discussed prior to the Constitution Day Address, but not by the Roosevelt Administration.[36] Any concession by the administration that the plan achieved its goal with decisions such as *Parrish* and *NLRB v. Jones and Laughlin Steel Corporation*[37] would have undercut the push to enact Court-packing; a goal which the President doggedly pursued until July 1937.[38] Only after the Senate killed the proposal did Roosevelt begin claiming that defeat was really success because doctrine shifted.[39] The Constitution Day Address was the first step in turning that political lemon into lemonade.[40]

In sum, the Address was conceived as a response to a pressing political problem at home. But Roosevelt also used the occasion to discuss the storm clouds gathering offshore.

III. IT'S A SMALL CONSTITUTIONAL WORLD

The President's main argument in the Constitution Day Address was that the fates of American and international constitutionalism were closely connected. Samuel Rosenman remarked that "with Hitler and Mussolini on the march in Europe, [Roosevelt] was beginning to emphasize a note that he had sounded before and that was material in the Court fight."[41] The note was that the United States urgently needed to lift the standard of living and reduce

---

[35] 1937 ROOSEVELT PAPERS, *supra note* 1, at lxix (repeating this point twice).

[36] *See* Barrett, *supra* note 19, at 233-39.

[37] 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

[38] *See* KALMAN, *supra* note 3, at 222-39; *see also* SIMON, *supra* note 20, at 337-339 (noting that during the summer FDR supported a compromise proposal that would have added only two additional Justices to the Court).

[39] *See* 1937 ROOSEVELT PAPERS, *supra* note 1, at lxx (stating FDR's view in 1941 that "the Supreme Court fight had actually been won" while the Court-packing proposal was still under discussion in Congress).

[40] Claiming that the Court-packing debate was successful also masked the failure of most of Roosevelt's domestic agenda during his second term, which might have been caused in part by the plan's defeat in Congress. *See, e.g.*, SUSAN DUNN, ROOSEVELT'S PURGE: HOW FDR FOUGHT TO CHANGE THE DEMOCRATIC PARTY 14-18 (2010); DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 337-349 (2005).

[41] *See* ROSENMAN, *supra* note 21, at 164 (quoting a passage from the Constitution Day Address).

income inequality, and hence FDR "made a full-dress comparison between our democracy and the concept of government held by the rulers of Germany, Italy, Russia, and Japan."[42] Understanding FDR's panoramic view of constitutionalism is essential to grasp his argument later on about how the Constitution should be read in light of the advance of dictatorship after World War I.

1. External Influences In the 1930s

After beginning the Address with a brief tribute to the Framers,[43] FDR pivoted to his theme that our Constitution is not an island. "That world of 1787 provided a perfect opportunity for the organization of a new form of government thousands of miles removed from influences hostile to it," he stated. "How we then governed ourselves did not greatly concern Europe. And what occurred in Europe did not immediately affect us. But today the picture is different. Now what we do has enormous immediate effect not only among the nations of Europe but also among those of the Americas and the Far East, and what in any part of the world they do as surely and quickly affects us."[44] An early draft of the Address made this point more forcefully: "Contact by word or picture is instantaneous . . . In a flashing second, radio propaganda now filters across boundaries into the very homes of the people. The world of 1937 is a single earthquake zone; a shock anywhere strikes everywhere."[45]

Though American legal and constitutional practice is often inward-looking, Roosevelt's description of global constitutionalism states a truism that international events influence our political evolution. For instance, the conflict between Britain and France during the 1790s shaped many crucial debates about the Constitution's initial implementation.[46] America's acquisition of overseas colonies after the Spanish-American War elevated the Bill of Rights in

---

[42] *See id.*

[43] *See* Constitution Day Address, *supra* note 1, at 359 ("A third of the original delegates had given up and gone home. But the moral force of Washington and Franklin had kept the rest together. Those remained who cared the most; and caring most, dared most.").

[44] *Id.* This portion of the Address can be read as a criticism of isolationism, which was a powerful force in domestic politics at the time.

[45] *See* Franklin D. Roosevelt, "The Master Speech Files," (File No. 1072-B) (Sept. 17, 1937) (undated "Draft A"), at 2 [hereinafter Draft A], which can be found at http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01106.

[46] *See, e.g.*, AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION: 1760-1840, at 379-87 (2021).

our national culture to something closer to its modern status.[47] And the Cold War led to a renewed emphasis on personal rights, such as the free exercise of religion, that distinguished the United States from the Soviet Union.[48] The inverse idea is also true: Domestic upheavals can drive constitutional change elsewhere. One example is the American Revolution itself, which helped cause the French Revolution both by inspiring reformers there and by bringing France to the brink of bankruptcy due to the costs of that war with Great Britain.[49]

But Roosevelt made a broader claim that the constitutional *zeitgeitz*, which he called morale, was also subject to foreign influence and was shifting in response to recent events. As he stated: "[O]ur generation has watched democracies replace monarchies which had failed their people, and dictatorships displace democracies which had failed to function. And of late we have heard a clear challenge to the democratic idea of representative government. We do not deny that the methods of the challengers—whether they be called 'communistic' or 'dictatorial' or 'military—have obtained for many who live under them material things they did not obtain under democracies which they had failed to make function."[50] "So their leaders," he explained, "laugh at all constitutions, predict the copying of their own methods, and prophesy the early end of democracy throughout the world."[51] The President rejected that vision, along with "the overwhelming majority of the nations of the world and by the overwhelming majority of the people of the world," but warned that it takes "foresight, intelligence, and patience to meet the subtle attack which spreading dictatorship makes upon the morale of a democracy."[52]

---

[47] *See* MAGLIOCCA, *supra* note 11, at 75–84.

[48] *See, e.g.*, RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 177–233 (1999).

[49] *See, e.g.*, RON CHERNOW, WASHINGTON: A LIFE 657–68 (2010).

[50] Constitution Day Address, *supra* note 1, at 359–60. FDR raised this theme for the first time at the 1936 Democratic National Convention. See "Acceptance of the 1936 Nomination," *supra* note 7, at 234 ("In this world of ours in other lands, there are some people, who . . . have sold their heritage of freedom for the illusion of a living. They have yielded their democracy.").

[51] Constitution Day Address, *supra* note 1, at 360. An early draft stated: "Our Constitution can absorb the shock of existing world changes because it has already absorbed the shock of other swift and far-reaching changes—changes in territory, in race, in industry, in agriculture, changes indeed in all the processes of everyday life." *See* Draft A, *supra* note 45, at 6.

[52] Constitution Day Address, *supra* note 1, at 360. The President acknowledged that there were domestic voices calling for fascism or communism in the United States. *See id.* at 361. A cynic could say that FDR used the international situation as a bogeyman to scare Americans into endorsing the extension of the New Deal. I am not persuaded by that interpretation, but I also do not entirely reject that reading.

2. The Ebb and Flow of Constitutionalism

The idea that there is a feedback loop that connects constitutional democracies is simple, powerful, and easy to overlook. As the nineteenth-century Austrian foreign minister Klemens von Metternich allegedly quipped, "When France sneezes, the rest of Europe catches a cold."[53] The literature on democratization waves or backsliding supports his insight about spillover effects in politics.[54] Common sense also tells us that some events, such as the Great Depression or the end of the Cold War, are large enough to shake the foundations of any country. And Professor Linda Colley's pathbreaking book The Gun, the Ship, and the Pen makes clear that constitutionalism became a global phenomenon in the eighteenth century in part because of the growth of literacy and communication.[55]

The Gun, the Ship, and Pen also shows how specific constitutional ideas crossed national boundaries. For example, many South American nations borrowed freely from the presidential model established by the United States when they wrote their constitutions in the 1820s.[56] The Constitution of Meiji Japan borrowed heavily from the Prussian and German Constitutions and was a powerful inspiration for anti-colonial leaders in Asia into the twentieth century.[57] And the Union victory in the Civil War, followed by the ratification of the Reconstruction Amendments, inspired the extension of voting rights in 1867 to indigenous Maori males in New Zealand.[58] Thus, Lincoln was on target in the Gettysburg Address when he said that the Civil War was a universal struggle for constitutional democracy and that the world "can never forget what they did here."[59]

---

[53] *See, e.g.*, SPENCER TUCKER, THE ROOTS AND CONSEQUENCES OF CIVIL WARS AND REVOLUTIONS: CONFLICTS THAT CHANGED WORLD HISTORY 201 (2017). This is one of those famous apocryphal quotes that is impossible to trace to its original source and that is stated slightly differently by secondary works.

[54] *See generally* SAMUEL P. HUNTINGTON. THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991) (discussing this phenomenon).

[55] *See* COLLEY, *supra* note 6, at 12.

[56] *See id.* at 129–133.

[57] *See id.* at 379–97.

[58] *See id.* at 340; *see also id.* ("There is little doubt that these measures [in New Zealand] were connected at some level with developments in the United States.").

[59] Abraham Lincoln, Gettysburg Address (Nov. 19, 1863). Though brief, the Gettysburg Address contained more than one universal reference. *See id.* (asking whether "any nation"

One reason why the constitutional ripple effect is easy to overlook is that domestic and international events usually get put into separate silos. But the advance or retreat of freedom is contagious, even if the contagion is invisible or comes from afar.[60] The failure of the Arab Spring of 2011 might seem unrelated to the decline of confidence in our democratic institutions that followed.[61] But they probably are related, in the same way that the decay of Soviet communism during the 1980s reinforced the anti-statist movement led by Ronald Reagan and Margaret Thatcher in their nations.[62] Ironically, lawyers tend to grasp the link between constitutional paradigm shifts and scientific milestones (the theory of evolution, for instance) more easily than the link between international and domestic politics.[63]

Another reason why the gravitation pull of the global constitutional atmosphere may be hard to see is that our Constitution has always existed in a world where either Britain or the United States was a global power. This historical fact, which is largely taken for granted, gave constitutional democracy a tailwind by holding out the promise that other nations could achieve similar wealth

---

dedicated to equality "can long endure"); *id.* (pledging that popular government "shall not perish from the earth").

[60] *See* David S. Law, *Alternatives to Liberal Democracy*, 77 MD. L. REV. 223, 225 (2017) ("If waves of democratization can emanate outward from the world's democracies, so too can waves of non-democracy wash back in our faces.").

[61] *See* NOAH FELDMAN, THE ARAB WINTER: A TRAGEDY (2020); Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1 (2020). I cite Professor Klarman's article only as an example of recent disillusionment with our democratic and judicial institutions, for his article did note the possible link between the retreat of democracy abroad and at home. *See id.* at 8.

[62] *See, e.g.*, Ronald Reagan, Address to Members of the British Parliament, Jun. 8, 1982, at https://www.reaganlibrary.gov/archives/speech/address-members-british-parliament. ("The hard evidence of totalitarian rule has caused in mankind an uprising of the intellect and will. Whether it is the growth of the new schools of economics in America or England or the appearance of the so-called new philosophers in France, there is one unifying thread running through the intellectual work of these groups—rejection of the arbitrary power of the state, the refusal to subordinate the rights of the individual to the superstate, the realization that collectivism stifles all the best human impulses.").

[63] *See, e.g.*, Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 3 (1989) (noting that the Constitution was described as Newtonian or Darwinian depending on the dominant mode of scientific thought at the time). The Constitution Day Address also refers to evolution in a way that someone like Madison or Hamilton would not have because the theory of evolution did not exist in their time.

or influence by following their legal model.[64] The premise that wealth motivates constitutional choices is not obvious. But FDR argued in the Constitution Day Address that economic distress was causing democratic backsliding, which suggests that wealth matters and that economic reform was necessary to save our system.

IV. CONSTITUTION-REINFORCING THEORY

Let us now turn to the Constitution Day Address's economic explanation for the retreat of liberal democracy in the 1930s and the corollary that government needed broad authority over our economy to prevent a similar disaster here. Roosevelt's belief that a falling standard of living caused democracies to collapse made sense given the severity of the financial shocks that his generation felt from World War I and the Great Depression. With that cause in mind, he argued that the Constitution must be read to maximize the federal government's authority to spread wealth as a means of self-defense.[65] Roosevelt also used the anniversary as context to connect his preferred interpretive approach to the design of the Framers, who in his view created a flexible, democratic instrument of government in response to an economic crisis in 1787.[66]

---

[64] *Cf.* Franklin D. Roosevelt, "The Master Speech Files," (File No. 1072-B) (Sept. 17, 1937) (undated "Draft B") at 6 ("The Constitution has been adequate to enable us to surpass all other nations in material adaptation to new physical inventions."), at http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01106.

There are also tangible aspects to this claim. A democracy is inclined (though with many exceptions) to support other democracy movements, while dictatorships tend to do the opposite. Thus, it matters whether the predominant power in the world is a constitutional democracy or an autocracy.

[65] A necessity argument was lurking here, but FDR did not go that far in this speech. For an example where he did contemplate a necessity rationale to defy a possible Supreme Court decision restricting the government's economic power, see Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1275-78 (2011) (reproducing Roosevelt's draft speech that would have defied a decision by the Court that restored gold clauses to private contracts).

[66] Frankfurter's draft of the Address referred to *M'Culloch v. Maryland* and various statements by Justice Holmes as support for an elastic reading of the Constitution. *See* Frankfurter Draft, *supra* note 25, at 413. But those passages were deleted from the final version, perhaps because they were too esoteric for a general audience.

1. Why Do Democratic Constitutions Fail?

The question of what makes or breaks democratic constitutions is ancient and complex. Alexis de Tocqueville drew on cultural, legal, and economic explanations in *Democracy in America* to explain our success.[67] Culture was represented in part by his discussion of the strength of civil society and religion in the United States and the democratic values that participation in those institutions inculcated in the citizenry.[68] Law and legal institutions were emphasized in his thorough discussion of judicial review and the Constitution's structure.[69] But De Tocqueville also talked about the relative equality of property ownership among free people here as a bulwark of liberty.[70] Indeed, the claim that broad property distribution was healthy for democracy was a popular theme for political philosophers before de Tocqueville wrote his book and before the New Deal.[71]

In the Constitution Day Address, Roosevelt argued that shared prosperity was essential for constitutional survival. "[A] new idea," he stated, "has come to dominate thought about government, the idea that the resources of the nation can be made to produce a far higher standard of living for the masses of the people if only government is intelligent and energetic in giving the right direction to our economic life. That idea—or more properly that ideal—is wholly justified by the facts . . . It puts all forms of government to their proof."[72] "[A]s other forms of government in other lands parade their pseudo-science of economic organization," FDR continued, "some of our own people may wonder whether democracy can match dictatorship in giving to this generation the things that they want from government."[73] To respond to that challenge, "our

---

[67] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop, eds. & trans., Univ. of Chicago Press 2000) (1835).

[68] *See id.* at 275-82, 489-92. A classic discussion of the importance of culture in democratic constitutionalism is Walter Bagehot's book on the British constitution, which stressed the role of the Crown's mystical qualities in giving legitimacy to the Cabinet. *See* WALTER BAGEHOT, THE ENGLISH CONSTITUTION 3-12, 33-88 (1867).

[69] DE TOCQUEVILLE, *supra* note 67, at 93-99, & 105-161.

[70] *See id.* at 3, & 47-50, & 269.

[71] *See* SITARAMAN, *supra* note 7, at 53-58, 67-74. Indeed, a similar idea that was debated during Reconstruction, with Thaddeus Stevens taking the view that property redistribution in the South from slaveowners to the freedmen was required to create a durable democracy there.

[72] *Id.* at 360-61.

[73] *Id.* at 361. Indeed, Hitler argued in his speech declaring war on the United States that "Roosevelt's New Deal legislation was all wrong" and that America had failed to match Germany's

constitutional democratic form of government must meet the insistence of the great mass of our people that economic and social security and the standard of American living be raised from what they are to levels which the people know our resources justify. Only by succeeding in that can we ensure against internal doubt as to the worthwhileness of our democracy and dissipate the illusion that the necessary price of efficiency is dictatorship with its attendant spirit of aggression."[74]

In this passage, FDR linked the decline of constitutional democracy abroad and its impact on domestic morale with a call to action. "I have been saying for many months that there is a crisis in American affairs, which demands action now, a crisis particularly dangerous because its external and internal difficulties reenforce each other."[75] He assured the country that democracy would prevail and pointed out the weakness of our foes.[76] Dictatorships, he contended, were inherently aggressive and could not maintain the stability necessary for lasting growth. In those states, "[u]nemployment has been lessened, even though the cause is a mad manufacturing of armaments."[77] Moreover, "the state of world affairs brought about by those new forms of government threatens civilization. Armaments and deficits pile up together. Trade barriers multiply and merchant ships are threatened on the seven seas. Fear spreads throughout the world, fear of aggression, fear of invasion, fear of revolution, fear of death."[78]

---

economic progress since 1933. *See* MAGLIOCCA, *supra* note 11, at 1 (quoting Hitler's speech to the Reichstag on December 11, 1941).

[74] Constitution Day Address, *supra* note 1, at 361-62; *see* Franklin D. Roosevelt, Annual Message to the Congress (Jan. 4, 1939), *in* 1939 ROOSEVELT PAPERS, *supra* note 1, at 6 (asking whether the United States could "compete with them [the dictatorships] by boldly seeking methods of putting idle men and idle capital together and, at the same time, remain within our American way of life, within the Bill of Rights, and within the bounds of what is, from our point of view, civilization itself."). An early draft of the Constitution Day Address made clear that the "illusion" was in other countries. *See* Draft B, *supra* note 64, at 5.

[75] Constitution Day Address, *supra* note 1, at 362; *cf.* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY xv (1941) ("The preservation of democracy on this continent may well depend on an effective government through which it may function. If we are now able to organize our economy effectively to support national defense against totalitarianism, it will be because it no longer can be slowed up by the obstacles to effective government which were interposed in the path of our national defense against depression.").

[76] *See* Constitution Day Address, *supra* note 1, at 362 ("I am not a pessimist. I believe that democratic government in this country can do all the things which common-sense people . . . have the right to expect.").

[77] *Id.* at 360.

[78] *Id.* The argument that constitutional democracy was better because of its economic success was common during the Cold War. President Reagan's Farewell Address in 1989, for instance,

Nevertheless, Roosevelt did not think that the United States could simply wait for the dictatorships to self-destruct and thereby affirm the superiority of democracy. "We know it takes time to adjust government to the needs of society," he said. "But modern history proves that reforms too long delayed or denied have jeopardized peace, undermined democracy and swept away civil and religious liberties."[79] "Nothing would so surely destroy the substance of what the Bill of Rights protects," FDR went on, "than its perversion to prevent social progress."[80] He then followed with the quote that opened this article, which said that constitutional liberty rested upon popular support for tolerance and fair play and that support for those norms would crumble "here as it has in other lands if the great mass of people were denied confidence in their justice, confidence in their security, confidence in their self-respect."[81] While the President said that eventually "the law catches up with life," he warned that "[w]e

---

stated that countries around the world were relearning that: "[T]he moral way of government is the practical way of government. Democracy, the profoundly good, is also the profoundly productive." Ronald Reagan, "Farewell Address, Jan. 11, 1989, at https://www.reaganlibrary.gov/archives/speech/farewell-address-nation. The economic rise of China since 1989 probably raises doubts about this claim in many parts of the world.

[79] Constitution Day Address, *supra* note 1, at 365-66; *see* Fourth Draft, *supra* note 31, at 14 ("[L]et hunger and suffering and indignity go on without remedy or relief, and personal liberties will never be safe because they are printed in the organic law of a government which has failed to govern.").

Drafts of the Address contained much more on the Bill of Rights. At one point there was an argument for incorporation against the states and against the state action doctrine. *See* Draft B, *supra* note 64, at 13 ("Indeed I go further than the Framers of the Constitution. I insist that the Bill of Rights should be observed in the letter and in the spirit not only by the Federal Government, the State governments and the local governments, but by those in private places who have power over other men's lives."). At another point there was the suggestion that the Bill of Rights should not be read to protect "material" interests. *See id.* ("The constitutional guarantees of civil and religious liberties were intended to preserve all that was spiritually fine in the tradition that is America. They were not designed to protect materially-minded minorities in the destruction of the essence of democracy in America.").

[80] Constitution Day Address, *supra* note 1, at 366. Here let's pause and consider the possibility that the international situation in 1937 contributed to the "switch-in-time" itself. Chief Justice Hughes was, after all, a former Secretary of State and may have used his foreign affairs experience to persuade Justice Roberts that an about-face was needed. The fact that the only explanations typically given for the switch-in-time are domestic—judicial doctrine, Roosevelt's landslide victory in 1936, or the Court-packing plan—is just another instance of parochial thinking about American constitutionalism.

[81] *See supra* text accompanying note 1.

cannot afford the luxury of twenty-year lags."[82] Why? The implication was that twenty more years without economic reform would be fatal to democracy in the United States.[83]

Felix Frankfurter's draft section of the Address was more direct in asserting that economic misery was the greatest enemy of liberal constitutionalism. "Tolerance and concern for fair play are virtues," he explained, "which do not flourish in the stony soil of economic want and social distress."[84] "As a practical matter," Frankfurter wrote, "that tolerance and that concern rest only in small part on legal formulas. Far more importantly they are the natural reflection of magnanimity of spirit of the masses which in turn depends upon generally distributed well-being."[85] "We should be deaf to the teachings of history and the admonitions of other lands, if we do not recognize that civil liberties and non-discrimination against minorities can long be maintained only in a contented society."[86] The future justice added that the Framers "knew that guarantees of tolerance written on parchment were nowhere near as important as guarantees written in the hearts and the character of the American people so long as those hearts and that character were not embittered by economic distress."[87]

---

[82] Constitution Day Address, *supra* note 1, at 366. One example of a twenty-year lag that Roosevelt cited was the eighteen-year span between the Supreme Court's decision invalidating the federal income tax and the ratification of the Sixteenth Amendment. *See id.* at 365; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (holding that federal income taxes were subject to apportionment under the Direct Tax Clauses), *overruled by* U.S. CONST., amend. XVI. He may have used twenty years as the benchmark because 1937 was twenty years removed from the Russian Revolution and from America's entry into World War I.

[83] President Roosevelt's Fireside Chat on his Court-packing proposal, which was intended to overcome judicial resistance to the New Deal, closed on a similar note: "You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed." Franklin D. Roosevelt, Fireside Chat Discussing the Plan for Reorganization of the Judiciary (March 9, 1937), *in* 1937 ROOSEVELT PAPERS, *supra* note 1, at 133 [hereinafter "Court-Packing Address"]. For a contrary take on FDR's impatience, see 2 ACKERMAN, *supra* note 4, at 380 ("The question the President begs is that many different visions of 'life' compete with one another in the United States, and that the effort of the law to 'catch up' with 'life' in one direction often demands a departure from much of 'life' that other Americans value.").

[84] Frankfurter Draft, *supra* note 25, at 415.

[85] *Id.* at 414.

[86] *Id.*

[87] *Id.* at 415.

This last sentence parallels an eloquent portion of Judge Learned Hand's "Spirit of Liberty" address, which was delivered in 1944.[88] In that speech, Hand declared: "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, can even do much to help it."[89] Read out of context, this sounds like a general declaration that courts are impotent. But Hand was speaking during World War II to a group of newly naturalized citizens and was describing the difference between a liberal democracy and a dictatorship: "[W]hat is the liberty that must lie in the hearts of men and women? It is not the ruthless, unbridled will; it is not the freedom to do what one likes," he explained.[90] "That is the denial of liberty and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow."[91]

"Fair play" is an idea that connects the Constitution Day Address with the thought of other contemporary leaders.[92] In a precursor to the "Spirit of Liberty," Judge Hand wrote in a 1930 opinion: "[C]onstitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction."[93] Likewise, Winston Churchill thought that some tests for a healthy democracy were whether the courts will "administer public and well-established laws associated in the human mind with the broad principles of fair play and justice? Will there be fair play for the poor as well as the rich? Will there be fair play for private

---

[88] *See* GUNTHER, *supra* note 16, at 469–73.

[89] LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 72 (2d ed. William Safire ed., 2004).

[90] LEND ME YOUR EARS, *supra* note 89, at 73; see GUNTHER, *supra* note 16, at 469–70.

[91] GUNTHER, *supra* note 16, at 470. Judge Hand then offered his canonical definition of liberty, which included "the spirit which is not too sure that it is right." *Id.*

[92] Fair play was also a touchstone in Roosevelt's 1940 State of the Union Address, which discussed the outbreak of war in Europe and said: "We must as a united people keep ablaze on this continent the flames of human liberty, of reason, of democracy, and of fair play as living things to be preserved for a better world that is to come." Franklin D. Roosevelt, Annual Message to the Congress (Jan. 3, 1940), in 1940 ROOSEVELT PAPERS, *supra* note 1, at 9.

[93] Daniel Reeves, Inc. v. Anderson, 43 F.2d 679, 682 (2d Cir. 1930). There is only one significant reference to fair play in a Supreme Court opinion. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (discussing personal jurisdiction in the context of "traditional notions of fair play and substantial justice).

persons as well as for Government officials?[94] And Attorney General Robert H. Jackson stated in his oft-quoted speech on "The Federal Prosecutor" that "a sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power."[95]

2. A Laymen's Document

Since financial turmoil and wealth inequality posed the greatest threat to the fair play norms that support liberal constitutions, Roosevelt argued that our Constitution should be read in a way that emphasized "the concrete welfare of the generation of the day."[96] This was not a formal legal theory, but he said that the Constitution "was a layman's document, not a lawyer's contract. That cannot be stressed too often."[97] (After applause, FDR ad-libbed: "And I'm glad you get the point.").[98] "Madison, most responsible for the drafting of the Constitution, was not a lawyer, nor was Washington or Franklin, whose sense of the give-and-take of life had kept the Convention together."[99] FDR added that

---

[94] Winston S. Churchill, The United States of Europe, in 7 WINSTON S. CHURCHILL, HIS COMPLETE SPEECHES: 1897-1963, at 7322 (Robert Rhodes James ed., 1974); *cf.* Churchill, *supra* note 15, at 40 (writing in a 1936 magazine article: "Public chastisement would speedily overtake any minister, however powerful, who fell below the accepted standards of fair play or who descended to trickwork or dodgery").

[95] Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940-1941); *see id.* at 4 (calling for "a rededication to the spirit of fair play and decency that should animate the federal prosecutor"); *see also* Morrison v. Olson, 487 U.S. 654, 727-29 (1988) (Scalia, J., dissenting) (quoting extensively from Jackson's speech).

[96] Constitution Day Address, *supra* note 1, at 363.

[97] *Id.* at 362. Roosevelt was firmly in the Protestant camp of constitutional interpretation. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) (drawing a distinction between Protestant and Catholic approaches to constitutional law); *see also* Court-Packing Address, *supra* note 83, at 124 ("I hope that you have re-read the Constitution of the United States in these past few weeks. Like the Bible, it should be read again and again."). One definition of a "layman" is a member of a congregation as distinct from the clergy.

[98] Roosevelt's line may have been inspired by Woodrow Wilson's quote (when he was the President of Princeton) that the Constitution is "not a mere lawyer's document; it is a vehicle of life, and its spirit is always the spirit of the age." WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908).

[99] *Id.* Madison never practiced law, though his legal knowledge was extensive. Legal scholars tend to dismiss Washington and Franklin's role in the Convention, in part because Washington rarely spoke up. *See* AMAR, *supra* note 46, at 213-15 & n* (offering a corrective to that view). But Roosevelt mentioned them twice in the Address, in part because they were experts on the practical military and diplomatic arts vital to the layman's Constitution. In an early draft, he invoked Gouverneur Morris alongside Madison as a Framer who was not a lawyer. *See* Draft

"[t]his great layman's document, therefore, was a charter of general principles, completely different from the 'wherases' and the "parties of the first part" and the fine print which lawyers put into leases and installment agreements."[100] The following political cartoon appeared in *The Morning Post* of Camden, New Jersey three days after the Address:

A, *supra* note 45, at 7. The decision to give the Address at the Washington Monument was another way of reinforcing the importance of non-lawyers in creating the Constitution.

[100] Constitution Day Address, *supra* note 1, at 362. Roosevelt prefaced this by saying that the Framers were specific when they thought that was necessary. *See id.* at 363 (giving examples such as the bar on titles of nobility or the rule that appropriations be made by law). He also said "[w]ith almost equal definiteness they detailed the Bill of Rights," though his claim that the Bill of Rights was definite is much more dubious. *See id.*; MAGLIOCCA, *supra* note 11, at 97.

Roosevelt's distinction between laymen and lawyers can be traced back to his tenure as Governor of New York. *See* Charles W. Smith Jr., *President Roosevelt's Attitude Toward the Courts*, 31 KY. L. J. 301, 303 (1943) (describing FDR's 1930 speech to the New York City Bar Association advocating judicial reform).

At bottom, Roosevelt believed that the Constitution was best understood as a flexible blueprint for progress. In his First Inaugural Address, he explained: "Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced."[101] A year later in a Fireside Chat, FDR quoted a speech by former Chief Justice Edward White, which rejected the "impression that the Constitution is but a barrier to progress instead of being the broad highway through which alone true progress may be enjoyed."[102] In the Constitution Day Address, the President said that when the Framers "considered the fundamental powers of the new national government they used generality, implication and statement of mere objectives, as intentional phrases which flexible statesmanship of the future, within the Constitution, could adapt to time and circumstance."[103]

The most important check on this statesmanship was political. FDR said that dictatorships would always wear out their welcome because most "men and women will not tamely commit to one man or one group of men the permanent conduct of their government. Eventually they will insist not only on the right to choose who shall govern them, but also upon the periodic reconsideration of that choice by the free exercise of the ballot."[104] In his Second Inaugural Address, he said: "The essential democracy of our Nation and the safety of our people depend not on the absence of power, but upon lodging it with those whom the people can change or continue at stated intervals through an honest and fair system of elections."[105] In other words, Roosevelt did not think much of the structural limit of enumerated powers as a way of controlling federal

---

[101] Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), *in* 1933 ROOSEVELT PAPERS, *supra* note 1, at 14–15. It is fair to say that many modern observers do not share this view, either because they think that the Constitution is too rigid on matters such as the structure of the Senate or the Article Five amendment process or because they think that the Constitution's greatest strength is its rigidity in protecting rights.

[102] Franklin D. Roosevelt, Fireside Chat (Sept. 30, 1934), *in* 1934 ROOSEVELT PAPERS, *supra* note 1, at 421. Chief Justice White made this statement in a speech to the American Bar Association in 1914. *See* "Proceedings on the Death of Chief Justice White," 257 U.S. v, xxii (1922) (statement of the Attorney General).

[103] Constitution Day Address, *supra* note 1, at 363.

[104] *Id.* at 360.

[105] Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937), *in* 1937 ROOSEVELT PAPERS, *supra* note 1, at 2 [hereinafter "Second Inaugural"].

power. Indeed, he never referred to that idea in any public statement as President.

FDR grounded his claim that the Constitution should be read elastically to permit the redistribution of wealth in the economic failure that spurred the drafting of the text in the first place. "The men who wrote the Constitution," he said, "had watched a weak emergency government almost lose the war, and continue economic distress among those thirteen little republics, at peace but without effective national government."[106] (The Frankfurter draft went so far as to say that the Framers met "in the midst of such economic chaos as we faced in 1933 . . . [and that] their first concern was not with written guarantees of these civil rights but with the formation of a government strong enough to bring economic order and economic security to the land."[107]) "So when these men planned a new government," FDR said, "they drew the kind of agreement which men make when they want to work together under it for a very long time."[108] "But for one hundred and fifty years we have had an unending struggle between those who would preserve this original broad concept of the Constitution as a layman's instrument of government," he said, "and those who would shrivel the Constitution into a lawyer's contract, [and] read it as if were the fine print on the back of your insurance policy."[109] In describing what this laymen's instrument of government was, the President singled out the "general welfare"; a term that appears both in the Preamble and in Article One, Section Eight.[110] He noted that "the framers used broad and general language capable

---

[106] Constitution Day Address, *supra* note 1, at 362.

[107] Frankfurter Draft, *supra* note 25, at 415; *see* JACKSON, *supra* note 76, at 6 (describing the backdrop of the Constitutional Convention as "one of the worst of American Depressions").

[108] Constitution Day Address, *supra* note 1, at 362.

[109] *Id.* at 363. Roosevelt used "contract" as shorthand for unfair formalism. For example, in his Fireside Chat on the Court-packing plan he rejected the view that "the right under a private contract to extract a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation." Court-Packing Address, *supra* note 83, at 122 (invoking *The Merchant of Venice*).

[110] U.S. CONST., pmbl.; *id.* at art. I, § 8, cl. 1. The "general welfare" was featured in many of Roosevelt's major speeches. *See, e.g.*, Second Inaugural, *supra* note 105, at 1-2 ("This year marks the one hundred and fiftieth anniversary of the Constitutional Convention which made us a nation . . . [T]hey established the Federal Government in order to promote the general welfare and secure the blessings of liberty to the American people."); Court-Packing Address, *supra* note 83, at 124 ("In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the general welfare . . . But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become

of meeting evolution and change when they referred to commerce between the States, the taxing power and the general welfare."[111] The "laymen's common sense of what government is for" was that all three branches should "work together to meet the living generation's expectations of government."[112] "The Constitution guarantees liberty," he explained, "not license masquerading as liberty."[113] License, a word that appears twice in the Address, represents the opposite of seeking the general welfare or honoring fair play. The emphasis on fair play in the speech and in other contemporary sources now comes into clearer focus.[114] Fair play was a way of describing the constitutional language on the general welfare that most citizens could understand, mainly because of sports.[115] This was a substantive use of fair play, not merely the procedural idea of a neutral umpire. Theodore Roosevelt and Woodrow Wilson both used the phrase in a similar way in some of their most consequential public statements, including Wilson's 1917 Address to Congress seeking a declaration of war against Germany.[116] This understanding of fair play is consistent with the broader claim in the Constitution Day Address that the Constitution should be applied from a laymen's rather than a lawyer's perspective. Most important of all, fair play is a norm that is vital for the continuation of free elections in which

---

national problems, they gave to the Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and general welfare of the United States.'").

[111] Constitution Day Address, *supra* note 1, at 363.

[112] *Id.* at 365.

[113] *Id.* at 366.

[114] Shakespeare is sometimes credited with coining "fair play," but even if he did not, his plays probably helped popularize the term. *See, e.g.*, WILLIAM SHAKESPEARE, THE TEMPEST act 5, sc. 1, l.5.

[115] A quote attributed to Learned Hand (by Felix Frankfurter) is that "due process is merely an embodiment of the English sporting idea of fair play." FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 62 (1938). I cannot find the original source for this quote, which may mean that the line is apocryphal.

[116] *See* Woodrow Wilson, Address to a Joint Session of Congress Requesting a Declaration of War Against Germany (Apr. 2, 1917), *in* 41 THE PAPERS OF WOODROW WILSON 525 (Arthur S. Link, ed., 1980) (stating that the United States would wage war according to "the principles of right and of fair play"); Woodrow Wilson, First Inaugural Address (Mar. 4, 1913), *supra*, at 27: 150 (referring to "the standards of justice and fair play" as ideals for his Administration); *see also* Theodore Roosevelt, Message to Congress on Workers' Compensation (Jan. 31, 1908), *in* 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7129 (James D. Richardson, ed., 1917) ("Men of property cannot afford to trust to anything save the spirit of justice and fair play.").

the loser concedes and power is peacefully transferred.[117] Given that free elections were the cornerstone of FDR's constitutional view, it is not surprising that he was so concerned about the survival of fair play among ordinary voters to support the Constitution's legitimacy.

FDR's interpretive view does not fit neatly within modern legal categories. For example, the Constitution Day Address seems originalist. The President said that his reading flowed from the text and the Framers' design. But FDR described that design as consciously open-ended, and if that were true, then the Framers' originalism was thin and most concerned with establishing flexibility rather than fixed substantive commitments.[118] On the other hand, the Address gestures toward living constitutionalism. Roosevelt said that the broad provisions that structured the national government and granted authority to Congress should adapt to time and circumstance. But he did not extend that idea to the broad provisions establishing rights and thereby limiting power, most notably the Due Process Clause.[119] Like the Framers themselves, who omitted a bill of rights from the original Constitution, FDR emphasized the voters' power to check the elected branches as the primary constitutional safeguard. One way to reconcile these ideas is by saying that Roosevelt read our Constitution in a British fashion as an organic set of conventions, at least in the absence of specific text. Indeed, he sometimes reached back to British constitutional precedents, most notably to Lords-packing as a lesson for Court-packing.[120] In the context of 1937, there was a certain logic in looking to Great Britain for guidance, as that was the best example of a democracy that was weathering the storm.[121]

---

[117] *See, e.g.*, Tom Ginsburg, *The Machinery of International Law and Democratic Backsliding: The Problem of Term Limits*, 14 LAW & ETHICS OF HUMAN RIGHTS 1, 2-3 (2020) (stating that a basic tenet of democracy is that "losers concede").

[118] *Cf. William Baude, Is Originalism Our Law?* 115 Colum. L. Rev. 2349, 2390 (2015); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2016) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis.* This thesis is one of two core ideas of originalist constitutional theory. The other is the *Constraint Principle*, which holds that the original meaning of the constitutional text should constrain constitutional practice.").

[119] A narrower reading was that the President objected to the judicial evolution of the power-constraining clauses only if that blocked vital economic measures.

[120] *See* KALMAN, *supra* note 3, at 60-61.

[121] Enthusiasm for the British Constitution was not, of course, confined to the post-World War I period. *See e.g.,* WOODROW WILSON: CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885) (using British practice as a model for reform).

President Roosevelt's theory of constitutional construction flowed logically from his conclusions that the failure of liberal democracies abroad mattered for the United States and that those failures were caused by the inability of their elected governments to alleviate severe economic distress. Judicial deference toward governmental efforts to spread wealth among the population was thus necessary to reinforce the Constitution. But he said that in America "nearly every effort to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to read into the Constitution language which the framers refused to write into the Constitution."[122]

V. WHITHER THE LEGAL PROFESSION?

We now come to Roosevelt's sharp criticism of attorneys in the Constitution Day Address. When the President said that the Constitution was not a "lawyer's contract," he meant that the text should not be read in a wooden fashion disconnected from reality.[123] To support the claim that many lawyers held this blinkered view, FDR argued that many important advances in constitutional law were rejected at the time by top lawyers. "We cannot seriously be alarmed," he declared, "when they cry 'unconstitutional' at every effort to better the condition of our people. Such cries, such cries have always been with us; and, ultimately, they have always been overruled."[124] An unstated premise of the Address was that lawyers are also fairly unimportant in ensuring constitutional success because bread-and-butter issues matter much more. This explains why scholars largely ignore, and no court has ever cited, the Constitution Day Address.[125]

---

[122] Constitution Day Address, *supra* note 1, at 366.

[123] This was a common response to the Supreme Court's hostile decisions on New Deal measures. *See, e.g.*, Churchill, *supra* note 15, at 40 ("The judiciary have obligations which go beyond expounding the mere letter of the law. The Constitution must be made to work . . . [W]ords, however solemn, are only true when they preserve their vital relationship to facts.").

[124] Constitution Day Address, *supra* note 1, at 364.

[125] There is one indirect cite in a state court dissent, quoting from a book that quoted the Address. *See* Snetsinger v. Montana University System, 325 Mont. 148, 103, 201 P.3d 445, 480 (2004) (Rice J., dissenting). And Justice O'Connor once cited the Address in a speech on civic education. *See* Sandra Day O'Connor, "Liberty Medal Award," July 4, 2003, at https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_07-04-03 ("President Franklin Roosevelt called the Constitution 'a layman's document,' and certainly it was not intended solely, or even primarily, for judges." (footnote omitted)).

1. Lawyers Distinguished in Their Day

The most arresting section of the Address--drafted by Felix Frankfurter--was a list of examples where lawyers contended that the Constitution withheld the power to achieve some major public end but ended up losing the argument. [126] Frankfurter deployed the rhetorical devices of anaphora and epistrophe, in which a sequence of sentences began with "Important lawyers" and finished with the idea that somebody "overruled them." [127] Roosevelt tweaked this to say "Lawyers distinguished in their day" or an equivalent phrase, but the underlying point was the same: these distinguished lawyers were disastrously wrong.[128] The entire indictment is in the Appendix, but some of the specific charges deserve more attention.

"Lawyers distinguished in 1787," President Roosevelt began, "insisted that the Constitution itself was unconstitutional under the Articles of Confederation. But the ratifying conventions overruled them."[129] This quote referred to the fact that the Articles required unanimity among the thirteen state legislatures for amendments, while the 1787 Constitution required the assent of only nine state conventions to replace the Articles.[130] A moment later he invoked

---

[126] *Compare id.* at 364-65, *with* Frankfurter Draft, *supra* note 25, at 409-10. One part of Frankfurter's draft that stayed in the final version (with minor edits) was: "That great Senatorial constitutional authority of his day, Senator Evarts, issued a solemn warning that the proposed Interstate Commerce Act and the Federal regulation of railway rates which the farmers demanded would be unconstitutional. But both the Senate and the Supreme Court overruled him." Constitution Day Address, *supra* note 1, at 364; *see* Frankfurter Draft, *supra* note 25, at 410. The reference to Senator William Evarts, who also served as Attorney General for President Andrew Johnson, probably went over the heads of the listening audience. *Cf.* Jed Handelsman Sugarman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 137-38 (2014) (describing Evarts' stature during Reconstruction).

[127] *See* Frankfurter Draft, *supra* note 25, at 409-10.

[128] Roosevelt's disdain for lawyers in the Constitution Day Address was consistent with his broader attitude. Robert H. Jackson devoted a chapter in his unpublished memoir of FDR to "That Man as a Lawyer." *See* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 59-74 (John Q. Barrett, ed. 2003). Jackson said, among other things, that "Roosevelt was a skeptic of legal reasoning" and "was not the strong champion of so-called civil rights that some of his appointees on the Supreme Court became." *Id.* at 59, 68.

[129] Frankfurter Draft, *supra* note 25, at 409-10.

[130] *Compare* ARTICLES OF CONFEDERATION OF 1781, art. XIII, *with* U.S. CONST., art. VII. In fact, the Anti-Federalists said little about this issue in the ratifying conventions, thus the identity of these distinguished lawyers is unclear.

Dred Scott v. Sandford: "Lawyers distinguished in their day persuaded a divided Supreme Court that the Congress had no power to govern slavery in the territories, that the longstanding Missouri Compromise was unconstitutional. But a War Between the States overruled them."[131] Next came the *Legal Tender Cases* on the constitutionality of paper money: "Lawyers distinguished in their day persuaded the Odd Man on the Supreme Court that the methods of financing the Civil War were unconstitutional. But a new Odd Man overruled them."[132] Finally, FDR turned to recent events: "Less than two years ago fifty-eight of the highest priced lawyers in the land gave the Nation (without cost to the Nation) a solemn and formal opinion that the Wagner Labor Relations Act was unconstitutional. And in a few months, first a national election and then later the Supreme Court itself overruled them."[133] FDR's takeaway from this history was that laymen were more trustworthy on constitutional matters. "Unlike some lawyers," he stated, "they have respected as sacred all branches of their government. They have seen nothing more sacred about that branch furthest removed from the people than about either of the others which are nearest to the people."[134] The President added that the "lay rank and file can take cheer from the historic fact that every effort to construe the Constitution as a lawyer's contract rather than a layman's charter has ultimately failed. Whenever legalistic interpretation has clashed with contemporary sense on great questions of broad national policy, ultimately the people and the Congress have had their way."[135] "But that word 'ultimately' covers a terrible cost," giving examples including the fact that "goods sweated from the labor of little children" were still lawful.[136]

---

[131] 60 U.S. (19 How.) 393 (1857); Constitution Day Address, *supra* note 1, at 364.

[132] Constitution Day Address, *supra* note 1, at 364. *See* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871); Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L. J. 119. 134-50 (2006) (providing an overview of these cases, in which the Court abruptly changed course in response to fierce criticism); *cf. supra* text accompanying note 32 (using the same "Odd Man" language to describe the Court's reversal on the validity of minimum wage laws for women).

[133] Constitutional Day Address, *supra* note 1, at 364; *see* NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937) (upholding the Wagner Act). Here FDR was recalling a report on the Wagner Act issued by the Liberty League, an anti-New Deal group. *See* NATIONAL LAWYERS COMMITTEE OF THE AMERICAN LIBERTY LEAGUE: REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935).

[134] Constitutional Day Address, *supra* note 1, at 365.

[135] *Id.*

[136] *Id.*; *see* Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). Other examples were the Civil War, unequal taxation while the federal

"[Y]ou will find no justification in any of the language of the Constitution for delay in the reforms which the mass of the American people now demand," said FDR.[137] Thus, "I ask they have faith, faith in its ultimate capacity to work out the problems of democracy, but that they justify that faith by making it work now rather than twenty long years from now. I ask that they give their fealty to the Constitution itself and not to its misinterpreters. I ask that they exalt the glorious simplicity of its purposes rather than a century of complicated legalism."[138]

2. The Vices and Impotence of Lawyers

Though the Constitution Day Address offered no explanation for its critical view of attorneys, Frankfurter's draft tried to fill in the blanks. First, he wrote that private lawyers focus on their clients and not on the public interest. Indeed, his definition of a "lawyer's contract" was "a lawyer's opportunity for private obstruction."[139] Attorneys "complicate things in the service of those who want neither unity nor justice."[140] Second, Frankfurter stated that legal minds were trained to think narrowly and formally. "To a profession trained in the exact use of words," he wrote, "the categories of denial in the Constitution have always been congenial and the broad and purposely vague grants of power to government have always been uncongenial."[141] "Men whose daily work is the nice use of language in conveyances and contracts and legal instruments of every variety," he added, "where the rules of the game provide that nothing is included in the scope of the document unless expressly mentioned, instinctively forget what the statesmen of 150 years at Philadelphia and the statesmen of their own profession did not forget—that the Constitution is a great instrument of

---

income tax was unconstitutional, and the "exploitation of women's labor" without minimum wage laws. Constitutional Day Address, *supra* note 1, at 365.

[137] Constitutional Day Address, *supra* note 1, at 366. Roosevelt's repeated warnings about "delay" in the Address help explain his skepticism about seeking constitutional amendments to overcome adverse judicial interpretations. *See, e.g.*, Court-Packing Address, *supra* note 83, at 131 (explaining that seeking Article Five amendments for the New Deal would take too long).

[138] Constitution Day Address, *supra* note 1, at 367.

[139] Frankfurter Draft, *supra* note 25, at 409; *see id.* (denouncing the "ingenious obstructions of the lawyers . . . for the purposes of their private clients").

[140] *Id.* at 410; *see id.* at 412 ("It is the limited business of most lawyers to protect the interests of the individuals by whom they are retained, not the interests of the larger society of which those individuals are a part.").

[141] *Id.* at 412.

government."[142] Finally, Frankfurter argued that private attorneys were partly to blame for the economic inequality that threatened democracy. "[T]he undemocratic concentration of economic power has brought with it a corresponding concentration of legal ability against the democratic purposes of the Constitution."[143]None of these broadsides made it into the final draft, perhaps because they cut against the Address's broader theme that the survival of the Constitution did not depend upon lawyers at all. Relegating law to a minor role in constitutionalism was the unkindest cut of all and drew a sharp response. For instance, the President of the ABA said in reply to the Address that lawyers "have made America whatever America is." (This was, perhaps, not the strongest way of putting the point.)[144] In a letter to *The New York Herald Tribune*, a lawyer wrote that "the Constitution was emphatically not a 'layman's document'" and that the President was wrong in saying that Madison was not a lawyer.[145] A Congressman from Michigan criticized FDR's "strange tribute" to the text by noting that "26 of the 38 men who framed the Constitution were lawyers" and that "lay judgments are not the cold, dispassionate judgments of the legal mind. They are the biased, emotional judgments of those who discard the logic of law and principle and employ the motive of political expediency."[146] Lastly, a newspaper columnist questioned Roosevelt's quote about lawyers reading the Constitution like the fine print on the back of an insurance policy: "Did the President mean by 'fine print' that lawyers have a way of trying to deceive the layman?"[147] One final reason why FDR may have seen lawyers as an

---

[142] *Id.* at 412-13.

[143] *Id.* at 411.

[144] "Court Issue Is Theme at Bar Convention," *Fort Worth Star-Telegram*, Sept. 27, 1937, at 7. The Constitution Day Address came on the eve of the annual meeting of the ABA and was seen by some as an attack on the association, which opposed much of the New Deal. *See* Arthur Krock, "In The Nation: Presidents Have Caused Much Moaning of the Bar," *The New York Times*, Sept. 28, 1937, at 22 (making this connection).

[145] Edward S. Corwin, *The Posthumous Career of James Madison as a Lawyer*, 25 ABA J. 10, 10 (1939) (quoting the letter but then confirming FDR's conclusion that Madison was not a lawyer); *see* "Gannett Raps Roosevelt Talk," *Chester Times*, Sept. 20, 1937 (stating that Madison "was a profound student of the law" and that Roosevelt "misrepresented that the Constitution was a 'layman's document, not a lawyer's contract'").

[146] Roy O. Woodruff, "News and Comments From Washington," *The Clare Sentinel*, Oct. 1. 1937, at 3; see "Roosevelt and the Constitution," *St. Louis Globe-Democrat*, Sept. 20, 1937, at 2B (stating that it was "absolutely certain that the Constitution was a lawyers' and not a 'laymen's document' as the President now asserts").

[147] David Lawrence, "Roosevelt's Address Decried: View Effort to Rouse Country Against Attorneys," *The Washington Star*, Sept. 21, 1937, at A11. A subtext of the pushback against the Address was the recent revelation that FDR's first Supreme Court appointee—Hugo Black—

irrelevant or a destructive force is that lawyers in the failed constitutional democracies were widely seen as feckless. In his 1963 "Letter from a Birmingham City Jail," Martin Luther King wrote: "We cannot forget that everything Hitler did in Germany was 'legal.'"[148] Not all attorneys in dictatorships aided those regimes or stood aside as constitutionalism disintegrated, of course, but there was also no robust response from them when the rule of law fell under attack.[149] Then again, perhaps "no constitution, no law, no court can save" democracy in those circumstances.[150]

VI. CONCLUSION

Near the end of the Constitution Day Address, the President urged "the American people to rejoice in the wisdom of their Constitution."[151] He added: "For us the Constitution is a common bond, without bitterness, for those who see America as Lincoln saw it, 'the last, best hope of earth.' So we revere it, not because it is old but because it is ever new, not in the worship of its past alone but in the faith of the living who keep it young, young now, young in the years to come."[152] A voice from the crowd then cried out: "Keep on keeping on!" which fit rather well with the final line of the speech. But what does keeping on with the Constitution mean today? One lasting lesson from FDR's remarks is that the Constitution must be understood as part of a global network. Trends in other democracies can shape domestic interpretation or construction. But there is the deeper idea that successes by foreign constitutions enhance confidence in our public institutions and values, while failures do the opposite. This point implies that there is a valid national interest in promoting liberal constitutionalism elsewhere or at least in preventing a sharp decline in those values to avoid a negative feedback loop on the home front. How that encouragement

---

was a former member of the KKK. *See id.* (suggesting that FDR's idea of a layman's Court was "more members of the Ku Klux Klan"); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 249-251 (stating that the Klan stories appeared earlier in September and that FDR did not offer any immediate comment).

[148] Martin Luther King Jr., "Letter from a Birmingham City Jail," *in* THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 294-95 (James Melvin Washington, ed. 1986).

[149] Unfortunately, many German lawyers learned how to build a racial caste system from the United States. *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017).

[150] *See supra* text accompanying note 89.

[151] Constitution Day Address, *supra* note 1, at 367.

[152] *Id.* (quoting President Lincoln's 1862 Annual Message to Congress).

or troubleshooting should go forward is another matter. Substantial public and private funds are devoted to rule of law initiatives around the world that focus on lawyers, legal education, and the courts.[153] Whether these investments improve the rule of law in those nations is not clear. One theme of the Constitution Day Address is that spurring economic progress or reducing income inequality is a better way to achieve democratic goals, though there is no consensus on how to deliver those benefits.[154]

Another lesson is that strengthening the guardrails of democracy in the United States requires substantive reforms to improve people's lives.[155] Too often constitutional lawyers think only about procedural or structural improvements as guardrails (for instance, eliminating the filibuster or establishing term limits for Supreme Court Justices). These ideas, whatever their merits, are not sufficient. They will not restore the feeling for fair play that Roosevelt and his generation believed was essential for democracy. It is probably no accident, therefore, that FDR mentioned "social security" in the Address to talk about what the government needed to achieve.[156] The Social Security Act of 1935 serves as a fundamental constitutional bulwark (though lawyers rarely think of that program in this way) by protecting the elderly from destabilizing financial hardship. Comparable innovations may be required to rekindle the spirit of liberty in democratic citizens.

Finally, any thoughtful consideration of the Constitution Day Address should prompt deeper inquiries into constitutional loyalty. The project of constitutional interpretation presupposes the existence of higher law that is respected. But what makes people feel proud of or obliged to obey their constitution long after its creation? What parts, to use Walter Bagehot's famous description, "excite and preserve the reverence of the population" and thus give

---

[153] The ABA is one significant sponsor of these sorts of programs. *See* https://www.americanbar.org/advocacy/rule_of_law/.

[154] To take one example, direct foreign aid intended to alleviate suffering often ends up with corrupt officials and strengthens their position. For a thoughtful consideration of these problems and some counterintuitive solutions, see BRUCE BUENO DE MESQUITA & ALASTAIR SMITH, THE DICTATOR'S HANDBOOK: WHY BAD BEHAVIOR IS ALMOST ALWAYS GOOD POLITICS 161-194, 271-277 (2011).

[155] For instance, the National Constitution Center's project on "Restoring the Guardrails of Democracy" contains no proposals along these lines from any ideological perspective. *See* https://constitutioncenter.org/debate/special-projects/guardrails.

[156] *See supra* text accompanying note 74

a constitution its political authority?[157] Franklin D. Roosevelt's economic answers may not tell the whole story of constitutional loyalty. But he was asking the right question.

VII. APPENDIX—THE CONSTITUTION DAY ADDRESS AS DELIVERED

It is very right, it is very fitting, that this great gathering has assembled tonight in the National Capitol, at the foot of the Washington Monument.

One hundred fifty years ago tonight, thirty-eight weary delegates to a Convention in Philadelphia signed the Constitution. Four handwritten sheets of parchment were enough to state the terms on which thirteen independent weak little republics agreed to try to survive together as one strong nation.

A third of the original delegates had given up and gone home. But the moral force of Washington and Franklin had kept the rest together. Those remained who cared the most; and caring most, dared most.

That world of 1787 provided a perfect opportunity for the organization of a new form of government thousands of miles removed from influences hostile to it. How we then governed ourselves did not greatly concern Europe. And what occurred in Europe did not immediately affect us.

But today the picture is different.

Now what we do has enormous immediate effect not only among the nations of Europe but also among those of the Americas and the Far East, and what in any part of the world they do as surely and quickly affects us.

In such an atmosphere our generation has watched democracies replace monarchies which had failed their people, and dictatorships displace democracies which had failed to function. And of late we have heard a clear challenge to the democratic idea of representative government.

We do not deny that the methods of the challengers—whether they be called "communistic" or "dictatorial" or "military"--have obtained for many who live under them material things they did not obtain under democracies which they had failed to make function. Unemployment has been lessened, even though the cause is a mad manufacturing of armaments. Order prevails, even though maintained by fear, at the expense of liberty and individual rights.

---

[157] BAGEHOT, *supra* note 68, at 4. Understanding how a constitution acquires its authority is easier. Charismatic leadership often plays a role, along with a democratic process of ratification. The challenge is understanding how that authority is retained over time when the amendment process is arduous.

So their leaders laugh at all constitutions, predict the copying of their own methods, and prophesy the early end of democracy throughout the world.

But, my friends, both that attitude and that prediction are denied by those of us who still believe in democracy—are denied by the overwhelming majority of the nations of the world and by the overwhelming majority of the people of the world.

And the denial is based on two reasons, both of them eternally right.

The first reason is that modern men and women will not tamely commit to one man or one group of men the permanent conduct of their government. Eventually they will insist not only on the right to choose who shall govern them, but also upon the periodic reconsideration of that choice by the free exercise of the ballot.

And the second reason is that the state of world affairs brought about by those new forms of government threatens civilization. Armaments and deficits pile up together. Trade barriers multiply and merchant ships are threatened on the seven seas. Fear spreads throughout the world, fear of aggression, fear of invasion, fear of revolution, fear of death.

The people of America are rightly determined to keep that growing menace from their shores.

The known, the measurable danger of becoming involved in war we face confidently. As to that, your government knows your mind, and you know your government's mind.

But it takes even more foresight, intelligence and patience to meet the subtle attack which spreading dictatorship makes upon the morale of a democracy.

In our generation, a new idea has come to dominate thought about government, the idea that the resources of the nation can be made to produce a far higher standard of living for the masses of the people if only government is intelligent and energetic in giving the right direction to our economic life.

That idea—or more properly that ideal—is wholly justified by the facts. It cannot be thrust aside by those who want to go back to the conditions of ten years ago or even preserve the conditions of today. It puts all forms of government to their proof.

That ideal makes understandable the demands of labor for shorter hours and higher wages, the demands of farmers for a more stable income, the demands of the great majority of businessmen for relief from disruptive trade practices, the demands of all for the ending of that kind of license, often mistermed "Liberty," which permits a handful of the population to take far more than its tolerable share from the rest of the people.

And as other forms of government in other lands parade their pseudo-science of economic organization, even some of our own people may wonder whether democracy can match dictatorship in giving to this generation the things that they want from government.

We have those who really fear the majority rule of democracy, who want old forms of economic and social control to remain in a few hands. They say in their hearts: "If constitutional democracy continues to threaten our control why should we be against a plutocratic dictatorship if that would perpetuate our control?"

And we have those who are in too much of a hurry, who are impatient at the processes of constitutional democracies, who want Utopia overnight and are not sure that some vague form of proletarian dictatorship is not the quickest road to it.

My friends, both types are equally dangerous. One of those types represents cold-blooded resolve to hold power. We have engaged in a definite, and so far successful, contest against that. The other represents a reckless resolve to seize power. Equally we are against that.

And the overwhelming majority of the American people fully understand and completely approve that course as the course of the present government of the United States.

To hold to that course our constitutional democratic form of government must meet the insistence of the great mass of our people that economic and social security and the standard of American living be raised from what they are to levels which the people know our resources justify. Only by succeeding in that can we ensure against internal doubt as to the worthwhileness of our democracy and dissipate the illusion that the necessary price of efficiency is dictatorship with its attendant spirit of aggression.

That is why I have been saying for many months that there is a crisis in American affairs which demands action now, a crisis particularly dangerous because its external and internal difficulties reenforce each other.

Purposely I paint a broad picture. For only if the problem is seen in perspective can we see its solution in perspective.

I am not a pessimist. I believe that democratic government in this country can do all the things which common-sense people, seeing that picture as a whole, have the right to expect. I believe that these things can be done under the Constitution, yes, under the Constitution, without the surrender of a single one of the civil and religious liberties it was intended to safeguard.

And I am determined that under the Constitution these things shall be done.

Let us remember that the men who wrote the Constitution were the men who fought the Revolution. They had watched a weak emergency government almost lose the war, and continue economic distress among those thirteen little republics, at peace but without effective national government.

So when these men planned a new government, they drew the kind of agreement which men make when they really want to work together under it for a very long time.

For the youngest of nations they drew what is today the oldest written instrument under which men have continuously lived together as a nation.

The Constitution of the United States was a layman's document, not a lawyer's contract. That cannot be stressed too often. And I'm glad you get the point. Madison, most responsible for the drafting of the Constitution, was not a lawyer; nor was Washington or Franklin, whose sense of the give-and-take of life had kept the Convention together.

This great layman's document, therefore, was a charter of general principles, completely different from the "whereases" and the "parties of the first part" and the fine print which lawyers put into leases and insurance policies and installment agreements.

When the Framers were dealing with what they rightly considered eternal verities, unchangeable by time and circumstance, they used specific language. In no uncertain terms, for instance, they forbade titles of nobility, the suspension of habeas corpus and the withdrawal of money from the Treasury except after appropriation by law. With almost equal definiteness they detailed the Bill of Rights.

But when they considered the fundamental powers of the new national government they used generality, implication and statement of mere objectives, as intentional phrases which flexible statesmanship of the future, within the Constitution, could adapt to time and circumstance. For instance, the framers used broad and general language capable of meeting evolution and change when they referred to commerce between the States, the taxing power and the general welfare.

Yes, even the Supreme Court was treated with that purposeful lack of specification. Contrary to the belief of many, many Americans, the Constitution says nothing about any power of the Court to declare legislation unconstitutional; nor, parenthetically, does it mention the number of judges for the Court. Four times, four times, the Constitutional Convention voted down proposals to give Justices of the Court a veto over legislation. Clearly a majority of the delegates believed that the relation of the Court to the Congress and the

Executive, like the other subjects treated in general terms, would work itself out by evolution and change over all the years.

But for a hundred and fifty years we have had an unending struggle between those who would preserve this original broad concept of the Constitution as a layman's instrument of government and those who would shrivel the Constitution into a lawyer's contract, read it as if it were the fine print on the back of your insurance policy.

Those of us who really believe in the enduring wisdom of the Constitution, we hold no rancor against those who professionally or politically talk and think in purely legalistic phrases. We cannot seriously be alarmed when they cry "unconstitutional" at every effort to better the condition of our people.

Such cries, such cries have always been with us; and, ultimately, they have always been overruled.

Lawyers distinguished in 1787 insisted that the Constitution itself was unconstitutional under the Articles of Confederation. But the ratifying conventions overruled them.

Lawyers distinguished in their day warned Washington and Hamilton that the protective tariff was unconstitutional, warned Jefferson that the Louisiana Purchase was unconstitutional, warned Monroe that to open up roads across the Alleghenies was unconstitutional. But the Executive. and the Congress overruled them.

Lawyers distinguished in their day persuaded a divided Supreme Court that the Congress had no power to govern slavery in the territories, that the long-standing Missouri Compromise was unconstitutional. But a War Between the States overruled them.

Lawyers distinguished in their day persuaded the Odd Man on the Supreme Court that the methods of financing the Civil War were unconstitutional. But a new Odd Man overruled them.

That great Senatorial constitutional authority of his day, Senator Evarts, issued a solemn warning that the proposed Interstate Commerce Act and the Federal regulation of railway rates which the farmers demanded would be unconstitutional. But both the Senate and the Supreme Court overruled him.

Less than two years ago fifty-eight of the highest priced lawyers in the land gave the Nation (without cost to the Nation) a solemn and formal opinion that the Wagner Labor Relations Act was unconstitutional. And in a few months, first a national election and then the Supreme Court itself overruled them.

For twenty years the Odd Man on the Supreme Court refused to admit that State minimum wage laws for women were constitutional. A few months ago,

after my message to the Congress on the rejuvenation of the Judiciary, the Odd Man admitted that the Court had been wrong—for all those twenty years—and overruled himself.

My friends, in this test, this constant struggle the lawyers of no political party, mine or any other, have had a consistent or unblemished record. But the lay rank and file of political parties, outside political parties, has had a consistent record.

Unlike some lawyers, they have respected as sacred all branches of their government. They have seen nothing more sacred about one branch than about that branch furthest removed from the people than about either of the others which are nearest to the people. They have considered as most sacred the concrete welfare of the generation of the day. And with laymen's common sense of what government is for, they have demanded that all three branches be efficient, that all three be interdependent as well as independent, and that all three work together to meet the living generation's expectations of government.

That lay rank and file can take cheer from the historic fact that every effort to construe the Constitution as a lawyer's contract rather than a layman's charter has ultimately failed. Whenever legalistic interpretation has clashed with contemporary sense on great questions of broad national policy, ultimately the people and the Congress have had their way. But that word "ultimately" covers a terrible cost.

It cost a Civil War to gain recognition of the constitutional power of the Congress to legislate for the territories.

It cost twenty years of taxation on those least able to pay to recognize the constitutional power of the Congress to levy taxes on those most able to pay.

It cost twenty years of exploitation of women's labor to recognize the constitutional power of the States to pass minimum wage laws for their protection.

It has cost twenty years already—and no one knows how many more are to come--to obtain a constitutional interpretation that will let the Nation regulate the shipment in national commerce of goods sweated from the labor of little children.

Yes, we know that it takes time to adjust government to the needs of society. But modern history proves that reforms too long delayed or denied have jeopardized peace, undermined democracy and swept away civil and religious liberties.

Yes, time more than ever before is vital in statesmanship and in government, in all three branches of it.

We will no longer be permitted to sacrifice each generation in turn while the law catches up with life.

We can no longer afford the luxury of twenty-year lags.

And you will find no justification in any of the language of the Constitution for delay in the reforms which the mass of the American people now demand.

Yet nearly every attempt to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to read into the Constitution language which the framers refused to write into the Constitution.

No one cherishes more deeply than I the civil and religious liberties achieved by so much blood and anguish through the many centuries of Anglo-American history. But the Constitution guarantees liberty, not license masquerading as liberty.

Let me put the real situation in the simplest terms. The present government of the United States has never taken away and never will take away any liberty from any minority, unless it be a minority which so abuses its liberty as to do positive and definite harm to its neighbors constituting the majority. And the government of the United States refuses to forget that the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities.

Nothing would so surely destroy the substance of what the Bill of Rights protects than its perversion to prevent social progress. The surest protection of the individual and of minorities is that fundamental tolerance, that fundamental feeling for fair play which the Bill of Rights assumes. But tolerance and fair play would disappear here as it has in some other lands if the great mass of people were denied confidence in their justice, confidence in their security, confidence in their self-respect. Desperate people in other lands surrendered their liberties when freedom came merely to mean humiliation and starvation. The crisis of 1933 ought to make us understand that.

On this solemn anniversary I ask that the American people rejoice in the wisdom of their Constitution.

And so, my friends, I ask that they guarantee the effectiveness of each of its parts by living by the Constitution as a whole.

I ask that they have faith, faith in its ultimate capacity to work out the problems of democracy, but that they justify that faith by making it work now rather than twenty long years from now.

I ask that they give their fealty to the Constitution itself and not to its misinterpreters.

I ask that they exalt the glorious simplicity of its purposes, rather than a century of complicated legalism.

I ask that majorities and minorities subordinate intolerance and power alike to the common good of all.

For us the Constitution is a common bond, without bitterness, a bond for those who see America as Lincoln saw it, "the last, best hope of earth."

So we revere it, not because it is old but because it is ever new, not in the worship of its past alone but in the faith of the living who keep it young, young now, young in the years to come.

JA
CH