

# A Machine That Would Go of Itself

The Constitution in  
American Culture

MICHAEL KAMMEN

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*The Constitution in  
American Culture*

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Michael Kammen

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## *Forethoughts*

THIS BOOK EXAMINES THE CULTURAL IMPACT of the United States Constitution. Although a vast literature exists in the traditional field of constitutional history—including works on the Supreme Court, biographies of justices, so-called biographies of the Constitution, and pertinent aspects of American legal history—no one has attempted to describe the place of the Constitution in the public consciousness and symbolic life of the American people. Consequently I consider this a study in popular constitutionalism, by which I mean the perceptions and misperceptions, uses and abuses, knowledge and ignorance of ordinary Americans. “Ordinary” does not refer to their social status or degree of education, but rather to the fact that they are nonprofessionals: not lawyers, nor judges, nor professors of constitutional law.

Even though our libraries are filled with books and journals telling us what the specialists think, we do not have a single study that traces what the Constitution has meant to the rest of the populace. Pieces of the story have appeared here and there; but no one has brought them together or established a framework for exploring their cultural significance. Moreover, the most revealing clusters of pertinent source material have been ignored entirely. I have in mind, for example, the papers of the Constitution Centennial Commission of 1886-87 (2,200 items in the Historical Society of Pennsylvania); the records of the Constitution Sesquicentennial Commission of 1935-39 (sixteen cartons in the National Archives); the extraordinary correspondence of Cass Gilbert, architect of the Supreme Court building in Washington, D.C. (9,000

items in the Library of Congress's Manuscript Division); and all the public opinion polls taken since their genesis in 1936 that pertain to the Constitution, Supreme Court, and civil liberties (in the archive of the Roper Center at the University of Connecticut).

The sources I have utilized most extensively suggest the sort of book this is. More attention is given to an essay by Senator Albert J. Beveridge in *The Saturday Evening Post*, for example, or to an interview with Chief Justice Warren Burger in *The Reader's Digest* (which has more than 18 million subscribers), than to original and exhaustively researched articles that have appeared in law reviews with limited circulation. I am more interested in the content and impact of best-sellers like *The Nine Old Men* (1936) by Drew Pearson and Robert S. Allen, or *The Brethren: Inside the Supreme Court* (1979) by Bob Woodward and Scott Armstrong, than I am in weighty tomes that reach a highly select circle of readers. Sidney George Fisher's *The Trial of the Constitution* (1862), for example, is a thoughtful work concerning the most serious crisis of American constitutionalism, and was favorably reviewed. Nevertheless, it sold only 650 copies (out of 1,000 that were printed) during the first two years after publication.

I have devoted more space to the rise and demise of Constitution Day following 1919 than to the emergence or decline of Supreme Court doctrines. Opinions rendered by the Court have been exceedingly important, but they are read by relatively few individuals; and some of the most famous opinions were ignored by the press and the public when they first appeared. In any case, the literature concerning significant Court decisions is already massive. Similarly, although books about the intellectual antecedents and formation of the Constitution fill many shelves, we know amazingly little about the Constitution in American education, or the constitutional knowledge required of those millions of immigrants who have been applicants for naturalization and U.S. citizenship, or the content of cartoons and editorials in the press, or oratorical statements uttered on celebratory occasions.

In examining this range of sources, I have come across a recurrent complaint that the Constitution is a "dry" document. Curiously enough, that lament has usually been uttered by its most ardent devotees. As James M. Beck, then Solicitor General of the United States, observed in 1924 (with a wistful blend of pride and realism): "the Constitution, in which there is not a wasted word, is as cold and dry a document as a problem in mathematics or a manual of parliamentary law."<sup>1</sup> When Frank Gannett, the conservative newspaper magnate, took a prominent role in organizing national opposition to Franklin D. Roosevelt's 1937 "Court-packing" plan, he told Senator William E. Borah that they faced tough going because the Constitution was a dry sub-

ject in which most people were not interested. Congressman Sol Bloom of New York, who organized the Sesquicentennial celebration of 1937-39, echoed Gannett's concern.<sup>2</sup>

Borah replied to Gannett, however, that whenever he discussed the Constitution, people seemed to be quite interested. That response was neither hyperbolic nor boastful, for there is another theme that laces the sources and was forcefully expressed in 1918 by Senator Beveridge when he finished his massive, four-volume biography of Chief Justice John Marshall. "The more I study history," he remarked to Edward S. Corwin, "the clearer it becomes to me that too little account is taken by historians of the human conditions under which men do things." Max Farrand, editor of the multivolume *Records of the Federal Convention of 1787* (1911), made the same point a few years later. After referring to "the dry-as-dust work I had been engaged in for ten year [sic] editing the Records of the Federal Convention," Farrand explained that he gradually achieved "an appreciation, through the study of those records, of the necessity of understanding the human aspects which lay behind the formal actions."<sup>3</sup>

Having devoted the past seven years to exploring the cultural impact of the Constitution, I can heartily concur, and would like to demonstrate the point with two illustrations that also exemplify the comparative dimension of this book.

On July 11, 1908, Turkish newspapers printed a curt imperial communiqué: His Majesty, the Sultan, intended to restore the constitution of 1876. Groups of educated men and women gathered privately to discuss the implications of this announcement. As one of them recalled two decades later, "the subject seemed alien and hard to discuss. The word 'constitution,' after its exile from the dictionary, was now suddenly used again in an imperial communiqué."

The omnipotent sultan, Abdul Hamid, had ruled repressively for more than thirty years. In 1906, however, a group of revolutionaries based in Saloniki, the central city of Macedonia, began to plot a revolution. Covert contacts attracted new members. Sympathetic groups formed in other Macedonian towns; the movement spread; and the "young Turks," as they were known, assassinated or kidnapped high-ranking deputies of the sultan who opposed their plans.

A major turning point occurred when regiments from Smyrna sided with the rebels. On July 10, 1908, three of the leaders announced their goal of returning to constitutional government. They telegraphed Abdul Hamid to demand official restoration of the constitution, and threatened that if he refused they would march on Istanbul with the Third Army Corps. The sultan

responded immediately with his grudging communiqué. During the next few days Turkish cities erupted, wild with excitement. Among the organizers of this movement, the most popular public speaker was Dr. Riza Tewfik. He travelled among the crowds on horseback, calming them with explanations of the meaning of an upheaval that had been created in the name of constitutionalism. One witness described a typical scene where Dr. Tewfik faced a crowd of Kurdish porters in Istanbul.

"Tell us what constitution means," the porters shouted.

"Constitution is such a great thing that those who do not know it are donkeys," Tewfik responded.

"We are donkeys," brayed the porters.

"Your fathers also did not know it. Say that you are the sons of donkeys," Tewfik harangued.

"We are the sons of donkeys," the porters chanted.

For more than a generation, the concept of constitutionalism had been unmentionable in Turkey. Suddenly an ecstatic society could speak of little else.<sup>4</sup> To Americans, whether in 1908 or today, this whole episode must appear both fascinating and bizarre—but ultimately alien. Before as well as after 1908, according to Edward S. Corwin, a "cult of the Constitution" existed in the United States.<sup>5</sup> We have had a rich tradition of constitutionalism, a tradition that is fundamental to our political culture. Right? Well not quite. Perhaps a second episode may help to reveal why.

During the spring of 1923, transport workers who belonged to the IWW (International Workers of the World) went on strike in San Pedro Harbor, California, and received repressive treatment by the police, who had strong encouragement from the Los Angeles Merchants' and Manufacturers' Association. Upton Sinclair, the well-known novelist and muckraker, went to San Pedro on May 15. He planned to speak before a large gathering of strikers and their families, and carefully arranged that the event should take place on private property with the owner's written permission.<sup>6</sup>

Because six or seven hundred dockworkers had already been "packed into a jail under especially shocking conditions," Sinclair began the rally by attempting to read aloud the Bill of Rights of the U.S. Constitution. The police waited while he recited three sentences, those guaranteeing "freedom of speech and of the press, and the right of the people peaceably to assemble, and to petition the government for the redress of their grievances." Before Sinclair could complete his recitation of the First Amendment, the police not only arrested him but, according to most accounts, "kidnapped" him. They drove Sinclair around Los Angeles for hours, taking him from one station house to another without actually lodging charges against him. The Los Angeles police



chief intended to bring Sinclair into a court just before it closed at five o'clock, ask the judge to appoint defense attorneys, place Sinclair in jail without bail, and then conceal his whereabouts.

As it happened, however, a subordinate of the police chief secretly telephoned an associate of Sinclair's so that his lawyers could be ready with a writ when Sinclair was brought into court. All in all, he had been held "incommunicado" for twenty-two hours. The complaint issued against him, and the basis for his arrest, charged Upton Sinclair with "discussing, arguing, orating and debating certain thoughts and theories, which . . . were detrimental and in opposition to the orderly conduct of affairs of business, affecting the rights of private property. . . ."

Two days after being seized, and less than a day following his release, Sinclair wrote a public letter to Louis D. Oaks, the chief of police—a letter that Sinclair reprinted in his autobiography. Some of the most pertinent passages follow.

*Pasadena, California, May 17, 1923*

Louis D. Oaks,  
Chief of Police, Los Angeles

Having escaped from your clutches yesterday afternoon, owing to the fact that one of your men betrayed your plot to my wife, I am now in position to answer your formal statement to the public, that I am "more dangerous than 4,000 I.W.W." I thank you for this compliment, for to be dangerous to lawbreakers in office such as yourself is the highest duty that a citizen of this community can perform.

In the presence of seven witnesses I obtained from Mayor Cryer on Tuesday afternoon the promise that the police would respect my constitutional rights at San Pedro, and that I would not be molested unless I incited to violence. But when I came to you, I learned that you had taken over the mayor's office at the Harbor. Now, from your signed statement to the press, I learn that you have taken over the district attorney's office also; for you tell the public: "I will prosecute Sinclair with all the vigor at my command, and upon his conviction I will demand a jail sentence with hard labor." And you then sent your men to swear to a complaint charging me with "discussing, arguing, orating, and debating certain thoughts and theories, which thoughts and theories were contemptuous of the constitution of the State of California, calculated to cause hatred and contempt of the government of the United States of America, and which thoughts and theories were detrimental and in opposition to the orderly conduct of affairs of business, affecting the rights of private prop-



erty and personal liberty, and which thoughts and theories were calculated to cause any citizen then and there present and hearing the same to quarrel and fight and use force and violence." And this although I told you at least a dozen times in your office that my only purpose was to stand on private property with the written permission of the owner, and there to read the Constitution of the United States; and you perfectly well know that I did this, and only this, and that three sentences from the Bill of Rights of the Constitution was every word that I was permitted to utter—the words being those which guarantee "freedom of speech and of the press, and the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

But you told me that "this Constitution stuff" does not go at the Harbor. You have established martial law, and you told me that if I tried to read the Constitution, even on private property, I would be thrown into jail, and there would be no bail for me—and this even though I read you the provision of the State constitution guaranteeing me the right to bail. When you arrested me and my friends, you spirited us away and held us "incommunicado," denying us what is our clear legal right, to communicate with our lawyers. . . .

You did all you could to keep me from contact with the strikers in jail; nevertheless I learned of one horror that was perpetrated only yesterday—fifty men crowded into one small space, and because they committed some slight breach of regulations, singing their songs, they were shut in this hole for two hours without a breath of air, and almost suffocated. Also I saw the food that these men are getting twice a day, and you would not feed it to your dog. And now the city council has voted for money to build a "bull-pen" for strikers, and day by day the public is told that the strike is broken, and the men, denied every civil right, have no place to meet to discuss their policies, and no one to protect them or to protest for them. That is what you want—those are the orders you have got from the Merchants' and Manufacturers' Association; the men are to go back as slaves, and the Constitution of the United States is to cease to exist so far as concerns workingmen.<sup>8</sup>

Sinclair went free, and along with his associates hired a large hall in Los Angeles on a weekly basis. They held crowded meetings every afternoon and evening, and promptly established the Southern California branch of the American Civil Liberties Union. Within a month, police chief Oaks was dismissed by the "city fathers." He had been found parked in his car at night with a woman and a jug of whiskey.<sup>9</sup>

Taken all alone, *l'affaire* Sinclair demonstrates nothing conclusively. What happened during that warm week in May 1923 was neither a unique episode in American history nor part of a flagrant pattern. Although similar episodes have occurred, they have not been the norm. What took place in Los Angeles does suggest, however, that cynicism about constitutions and civil liberties is not to be found exclusively among authorities in other nations. It also serves as a reminder that ignorance of the Constitution—not to mention ignoring the Constitution—has also been commonplace in our past. And finally, an editorial response that appeared in the Hartford, Connecticut, *Times* urged readers not to take for granted a document that so often had received perfunctory praise while simultaneously being slighted: “There is nothing to indicate that the Constitution and the preamble thereof are to be read only at Fourth of July meetings, convocations of the Ku Klux Klan . . . and teas for Women Patriots. There is nothing in that preamble to indicate that the blessings of liberty were suspended during dock strikes or that they do not apply to socialist novelists.”<sup>10</sup>

The lesson of *l'affaire* Sinclair is that constitutional conflict in various forms has been an integral though episodic part of American cultural history. Nevertheless, most of us have rather blithely managed to take that lesson for granted, perhaps because the role of constitutionalism in American culture has been more complicated than one might expect. Whatever the reasons, that role is part of a fascinating story that has never been told. The purpose of this book is to tell it, and to do so with particular attention to the *problématique* of constitutionalism in the United States.

At this point some readers may want a working definition of constitutionalism. I will oblige them, though briefly, because the concept has a complicated history that ranges from Aristotle's *Politics* and Polybius' *Histories* to *The Republic*, written by Charles A. Beard more than two millennia later. The most pertinent definition that I have encountered was prepared by Walton H. Hamilton in 1931. Although superb in several respects, it is also aphoristic, even sardonic, and presumes considerable knowledge of the Constitution's place in American political culture. It impressed me far more after I had completed the research for this book than when I began.<sup>11</sup>

According to Hamilton, constitutionalism “is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order.” He declared (with sarcasm rather than chauvinism) that “the constitutionalism of the United States is richest in incident and meaning”; and after a succinct historical discussion, asserted that “the rising constitutionalism, which was to outlast the [nineteenth] century, left a varied expression. There was worship at the shrine of liberty and of law. The document was the

most perfect instrument of government ever contrived. . . .” Hamilton then elaborated several additional points, all of them germane, and the final one a slightly opaque anticipation of my central theme in this inquiry:

- “The magic of infallibility was extended from the constitution to its official exposition and even to the president’s appointment of justices.”
- “In the decorous course of time a simple text is elaborated into a complicated code.”
- “If there is to be appraisal, the constitutionalism of the people must be distinguished from that of the bench. . . . The object of worship is an ideal of law; the act of faith is almost untainted with knowledge. . . .”

Walton Hamilton implied, quite validly, that a glaring discrepancy exists in the history of American constitutionalism between the recurrent declarations of reverence for “our Ark of Covenant” (Congressman Caleb Cushing called the Constitution that in 1834, and Chief Justice Taft did so again in 1922)<sup>12</sup> and the ongoing reality that most of us do not adequately understand the Constitution; that most of us fail to appreciate how frequently means have been found to circumvent the Constitution and to flout or even attack the Supreme Court; or that the Golden Jubilee of 1837, the Centennial of 1887, and the Sesquicentennial celebration of 1937 failed to generate very much genuine enthusiasm. What is widely assumed to have been a great success story—not the functional adequacy of our Constitution but the public’s relationship to it—turns out to have been a failure.

Why? This book attempts to answer that question. The most important explanations will be found in the character of our public culture, in our educational system and self-perceptions; but a few words should be said here about the subdiscipline of constitutional history. For a generation following the 1880s it made a strong start. For more than three decades after that, however, denigration of the discipline was heard, even from some who had been pioneers in the field. As Max Farrand wrote to a colleague: “In order to understand the development of America it is necessary to study something more than the political and constitutional history.” Subsequently, others called for constitutional history to marry social history, with the latter as dominant partner. Eventually, in 1950, an able historian urged us to regard constitutional history “as an aspect of intellectual history—that is, constitutional ideas and ideals and those institutions and procedures which have been intended to embody them.”<sup>13</sup>

Each of these objectives sounded perfectly sensible at the time, and each one seems unexceptionable in retrospect. Yet the appeals went largely unanswered and the field somehow failed to progress. As Henry Steele Commager wrote to Andrew C. McLaughlin upon the latter's retirement from the University of Chicago in 1935: "I am inclined to doubt that you will have a successor, because it seems to me that constitutional history has been shelved. I think you will agree with me that one consequence of the neglect of constitutional history in favor of social etc. history, is a discouraging tendency to loose and fuzzy thinking."<sup>14</sup>

If the field has not exactly been shelved, neither has it flourished over the past half century. It was never even betrothed to social history, and has managed only an occasional flirtation with intellectual history. There is still no scholarly organization of constitutional historians, and no journal exclusively devoted to constitutional history (unless one counts *The Supreme Court Review*, an annual founded in 1961 that is equally concerned with legal history, public policy, and constitutional law).

In 1968, G. R. Elton's inaugural lecture as Professor of English Constitutional History in the University of Cambridge included a statement of his perception of the purpose of the field: "to study government, the manner in which men, having formed themselves into societies, then arranged for the orderly existence, through time, and in space, of those societies." That part would have been familiar and acceptable, I believe, to anyone from John Locke to F. W. Maitland. Elton then talked about constitutional history as "a form of social history, a form of the history of society." Very well. That part sounds like our avant-garde scholars of the 1920s and '30s. But eventually, in step three of his statement, Elton moved toward our own perspective: "What does the society think its government is, how does it treat it, what does it do to amend it?"<sup>15</sup>

Over the years, Americans have applied various images to their Constitution. In his first inaugural address, in 1809, James Madison called it "the cement of the Union."<sup>16</sup> Others have referred to it as "the great code," as "a frame of government," and as "that fundamental law." My concern throughout this book, if I may paraphrase Elton, hinges upon this query: How has the society felt about its frame of government? (When it has felt or thought about it at all.) Another British observer recently made an acute comment upon "our age's preference, in intellectual history, for the subversive and rancorous over the official and self-congratulatory."<sup>17</sup> This exercise in cultural history will be much concerned, though by no means exclusively, with the official and self-congratulatory.

One other matter must be mentioned: my disqualifications and my intended audience. Davy Crockett boasted in his autobiography (1831) that

he "had never read a page in a law book in all my life." I could say the same, at least until rather recently, though I am not so proud of my parochialism as Crockett seems to have been. Aware of my limitations, I have tried to maintain some distance from technical aspects of legal and constitutional history. I cannot say whether this book represents a marriage between cultural and constitutional history or merely a flirtation. Perhaps the answer lies somewhere in between: a sustained affair in which the cultural side is dominant. I do sympathize with a sentence written by Theodore Roosevelt in 1901: "I am not a lawyer, but I have never believed that a layman who thought soberly was incompetent to express a judgement upon the constitution."<sup>18</sup>

Above all, I have attempted to prepare a substantial, original, serious yet engaging work for nonspecialists. A few years ago, Charles E. Wyzanski, senior federal judge of the U.S. District Court in Boston, offered this observation: "There is always the risk . . . that persons start with the totally false assumption that the Constitution is the province of the lawyers. . . . Moreover, I think it is quite clear that there is a grave danger that if we think of the Constitution exclusively in terms of constitutional law, we shall lose some of its most important symbolic, as well as practical, values to our society."<sup>19</sup> If my major contention proves to be correct—that Americans have taken too much pride and proportionately too little interest in their frame of government—then this book will have helped by calling attention to that disparity, by explaining how it evolved over time, by indicating the undesirable consequences, and by suggesting some ways in which the gap between ideal and reality might be reduced.

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Perhaps I may quote and even embellish Montesquieu's preface to *The Spirit of the Laws*: "If this work meets with success, I shall owe it chiefly to the grandeur and majesty of the subject." And a little help from my friends.

*Above Cayuga's Waters*

M.K.



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