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New York County Lawyers Association

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JAMES MADISON 1751-1836

The United States Constitution Sesquicentennial commission of which President Franklin D. Roosevelt is Chairman, are perfecting plans for the 150th anniversary celebration of the formation of the constitution of the United States, which celebration will begin September 17th, 1937, and will continue to April 30th, 1938, and undoubtedly be of great patriotic value from an historical and educational point of view.

It seems fitting therefore that our Association should express itself in this, its official publication, in some way to impress the minds and memories of our members with the accomplishment completed in the adoption of the constitution on the 17th day of September, 1787.

While our members are more or less familiar with the proceedings preceding the adoption of the constitution, and the men who took part in the convention, it should be interesting to hear again something about men who took part in it, and what they did there, naturally the name of James Madison would occur to the most of us as it does to me, and in this number I propose to give you extracts from an introduction and address given at the Town Hall in New York City, on May 13th, 1936, at a meeting there held in observance of the Centenary of the death of President James Madison, which was arranged by the New York County Lawyers' Association thru its committee which also has the duty of arranging suitable ceremonies for the celebration of the 150 Anniversary of the adoption of the Constitution.

In order that this copy of our magazine does not transcend beyond computation the limits set for the size of any one number I am obliged to omit the word for word opening of that meeting by President Morris in presenting Mr. Henry W. Taft as Chairman of the Committee who had charge of the program, and the eloquent patriotic allusions in his introduction of the speakers. Space requirements will also limit me in presenting but one of the addresses, that of Honorable George Wharton Pepper of Philadelphia, who the Honorable Henry W. Taft presented as follows:

"Mr. Taft: The next speaker is by education, family connection, public career and professional standing, worthy to be the exponent of the best traditions of the State of Pennsylvania. By vocation he is a lawyer, devoted to his profession and pursuing it in his native city of Philadelphia. For some years he represented that great State in the Senate of the United States. A Professor of Law in the University of Pennsylvania, a distinguished figure in academic life, a statesman of distinction, and a graceful and forceful orator, he is one of the most distinguished citizens of his native State. He has but recently received the high distinction of being made the President of the American Law Institute, an aggregation of leaders of the bar, of eminent judges and of law professors. Such recognition of leadership at the bar is of exceptional value because it is based, not on adventitious circumstances, but upon legal learning, broad vision, and high character. I have the pleas-

ure of presenting to you The Honorable George Wharton Pepper, of Philadelphia.”

“Senator Pepper: When a New York lawyer condescends to attend a conference in Philadelphia his brief-case always contains a timetable indicating the hour of departure of returning trains. I prefer to attribute this evidence of homesickness less to dissatisfaction with our hospitality than to his consciousness that great captains of industry and other important metropolitan clients are clamoring for his prompt return. Whatever the explanation, the painful facts remain. This naturally makes me diffident about extending to you all tonight a cordial invitation to transport yourselves to my native city and to spend there the four months intervening between May 25 and September 17. If at this suggestion you strive politely to conceal a shudder, let me remind you that such an invitation was accepted by the delegates to the Federal Convention which sat between those dates through the torrid summer of 1787; and let me further relieve your embarrassment by explaining that I am proposing nothing but a flight of the imagination. In short, I want you to think yourselves back 149 years and to take your stand with me outside of Independence Hall. I say ‘outside’ because the Convention is sitting behind closed doors and Mr. Fry, the doorkeeper, has strict orders to exclude us if we try to enter.

That such a regulation should be made and enforced is astonishing to us who have almost forgotten that there ever was such a thing as privacy and that public business ever was successfully conducted in the absence of reporters and a gallery full of spectators. In point of fact, the pledge of secrecy was so well kept by all delegates that what took place in the Convention was never fully known until nearly a half century later when James Madison had died and his record of proceedings had become available through publication by Congress.

“Perhaps, however, if after a time we persuade the doorkeeper to inform the President of the Convention, General Washington, that a delegation of New York lawyers is actually honoring Philadelphia by their presence we may be allowed by him to enter the historic building and to listen to the debates. Let us, in imagination, make this plea and let us further imagine that we are allowed to enter. There sits the Father of his Country in the chair of the President. Delegates from all the thirteen original States, except Rhode Island, have now taken their seats. It is a remarkable group of men. I wish there were time for us to individualize them. We cannot do this because the debate in progress immediately absorbs our attention. We note, however, your own New York delegation, consisting of Robert Yates, John Lansing, Jr. and Alexander Hamilton. Of them, only Hamilton will remain until final adjournment, his two colleagues withdrawing in protest against action which they disapprove.

“We focus our attention upon the delegate who is speaking. We soon learn that he is none other than James Madison. As we

look and listen we find that we agree with the estimate of him which I quote from the notes of one of his fellow-delegates, Major William Pierce, of Georgia:—

“Mr. Madison is a character who has been long in public life; and what is very remarkable every person seems to acknowledge his greatness. He blends together the profound politician with the scholar. In the management of every great question he evidently took the lead in the Convention, and tho' he cannot be called an Orator, he is a most agreeable, eloquent and convincing Speaker. From a spirit of industry and application which he possesses in a most eminent degree, he always comes forward the best informed man of any point in debate. The affairs of the United States, he perhaps, has the most correct knowledge of, any Man in the Union. He has been twice a Member of Congress and was always thought one of the ablest Members that ever sat in that Council. Mr. Madison is about 37 years of age, a Gentleman of great modesty—with a remarkably sweet temper. He is easy and unreserved among his acquaintance, and has a most agreeable style of conversation.’”

“Pierce is right: Madison's leadership in the Convention was so generally recognized that he has often been styled ‘The Father of the Constitution.’ In 1936, when boys go to college at the age at which some of us graduated, it seems strange to hear a man of 36 spoken of as if he were a veteran in public service.

“It so happens that at the moment of our imaginary visit the delegates are facing the most difficult of all their problems—the relation between the States and the proposed central government.

“Perhaps this problem, difficult as it is, is no more baffling than to determine the relative weight to be accorded to large and small States when represented in Congress. This problem of representation has, however, been solved by the proposal of Benjamin Franklin that in the House representation shall be in proportion to population but that in the Senate each State shall stand on a footing of equality with every other. The adoption of this compromise between the large States and the small ones makes of the upper house of Congress a federal body while the lower house is in some sense a national body. The device makes it possible to bring the government into direct contact with the people without endangering the equal rights of the several States. That Madison, a representative of the Old Dominion, should have been willing wholeheartedly to effectuate this compromise by supporting it is strong evidence of his unselfish statesmanship and his wise determination to shrink from nothing essential to insure safety, liberty and happiness.

“The specific question which he is debating at the moment of our visit is how effectively to preserve local authority and at the same time to achieve an adequate federal union. We in 1936 realize that Madison and his colleagues in 1787 by no means exag-

gerated the importance of this question when they recognized that upon the right answer depended the success of all their efforts.

"Madison tells his colleagues that there is a graduation from the smallest corporation with the most limited powers to the largest empire with the most perfect sovereignty. A point in that graduation must be chosen, happily designed both to preserve local authority and at the same time secure and guarantee a federal union of adequate force and power.

"I pause to remind you that the idea thus strikingly expressed by Madison was later to be voiced by that great English student of legal history, Professor F. W. Maitland. Maitland uses as an illustration the case of the East India Company, organized in England in the 18th century for the purpose of trade with the Far East. He observes that no man can specify the moment of time at which the corporation ceased to be a trading company and became the British Empire in India.

"Madison sees the difficulty of preserving local authority and building up central power. He rejects the idea of a mere confederation of States as well as the other extreme conception of a national government which absorbs them. The two extremes, he observes, are a perfect separation and a perfect incorporation of the thirteen States. In the first case they would be independent nations, subject to no law but the law of nations. In the last they would be mere counties of one entire republic, subject to one common law. He insists that each alternative is equally inconceivable. He therefore urges that a middle ground be taken which will at once support the due supremacy of national authority and leave the States in their position of subordinate but indispensable usefulness.

"People who conceive of the States of the Union as if they were merely so many French administrative departments are incapable of understanding either the difficulty which Madison is seeking to surmount or the modern form of the problem which we are facing today. Only the man who individualizes the several States and who knows the history of the development of each of them can realize that in pressure for centralization something more is at stake than mere governmental efficiency. Group self-consciousness, pride in the local tradition and the existence of interests that are common to the people of a State for reasons other than geographical are factors of great importance. As he proceeds from point to point it becomes obvious to us that Madison understands this perfectly. He recognizes that while all the people of all States are to be citizens of the United States, yet the act of ratification of the new Constitution is to be separate group action taken by the people of each State and that therefore the Union is to be thought of, in one sense at least, as a compact between the States. Because he is a Virginian he gives due weight to the State factor. Because he is an American he concedes that when a power is given to the central government it becomes effective even if it interferes with the laws or even the constitutions of the States.

"In 1936 we talk less than we used to do about States' rights and are more inclined to the realistic considerations which Madison, Wilson, and others pressed upon their colleagues with such effect. We know now that the United States is too big to retain more than a semblance of freedom if governed from a single centre. Regimentation of local activities, if it is to be achieved effectively, is a vast administrative process, combining both legislative and executive functions. The Congress is compelled, by the very nature of the case, to renounce to the executive the sole power of legislative determination. If, when the process of regimentation is in full swing, you go to your Congressman to protest against this or that, you are not surprised when he tells you that he entirely agrees with you but that he has his orders and must vote accordingly. This is not unworthy subservience on the part of a cowardly representative. It is the inevitable outcome of an attempt to stretch congressional control to a point at which collective legislative judgment becomes impossible. The legislator, from sheer necessity, turns to the executive and says 'You do it.' It is at this point that the American citizen rebels. He does not express himself in terms of States' rights. He thinks and talks about his own rights but he realizes that the preservation of those rights depends upon the continued existence of the States.

"It is not surprising that Hamilton should be less State-conscious than Madison. Not only was he born abroad but he is even younger than Madison. The primary purpose of the proposed constitution being union and strength, Hamilton, with all the ardor of youth, supports every proposition which seems to him likely to insure them. This ardor leads him to assert that a government which cannot be trusted with all power is not a safe depository of national interests. This statement of Hamilton is today accepted as axiomatic by advocates of unlimited congressional power. It is, however, the mere assertion of a disputable conclusion rather than an argument in support of it. Interests that are truly national may well be promoted by a federal legislature with limited powers. For more than a century they have been so promoted, notwithstanding that the people of New York, of Pennsylvania and of every other State always have been and I suppose today are unwilling to allow their internal affairs to be controlled by the votes of senators and representatives from distant States. If Madison were with us today I fancy that he would dissent emphatically from the familiar assertion that merely because many interests interlock therefore all interests must be centrally controlled. The constant and confident repetition of this fallacy has confused our thinking about the international affairs as it has the thinking of some in regard to matters domestic. The idea that there is no business which you can call your own and the other idea that to mind your own business has ceased to be a virtue of practical value are ideas to which Madison would never have subscribed. You can easily provoke a big war by being too busy in well-meant efforts to prevent a little one; and you

may readily stifle American business by subjecting all of it to a regulation suitable for only a fraction of it.

“While Madison’s State-consciousness leads him to place emphasis on the States, he is far from forgetting that all the people of the nation are to be parties of the Constitution. You cannot do justice to his philosophy unless you realize this. I have found in his writings no trace of the destructive idea later developed by Calhoun that the tie binding the State together is a mere tie of convenience, dissoluble, therefore, at pleasure. The truth is that there is sometimes a consciousness of common interest and the sentiment of a common loyalty which binds States together as firmly as any organic tie. It is not a relation susceptible of statement in terms of political science merely. The will to be one is an irresistible force. I suppose that the sentiment of loyalty to the Crown is the most powerful factor in uniting the self-governing commonwealths of the British Empire! and this tie seems to grow stronger as efforts at central regimentation and control are progressively abandoned. It ought not to be difficult for Americans to appreciate the political and economic value of unquenchable personality. The conception of individualism as essential to liberty is imbedded in our history and is in fact embodied in the first ten Amendments to the Constitution. But we sometimes forget that the type of man who values such guarantees as the Bill of Rights contains is essentially a frontiersman and that he is at his best when you do not over-regulate him.

As we listen to Madison we become convinced that he is one of those statesmen with whom the balancing of opposing or conflicting tendencies is a ruling passion. Some of the delegates, like Hamilton, may plunge into the current of nationalism and let it carry them whither it will. Others, like Hamilton’s colleagues from New York, may go to the other extreme and even withdraw from the Convention in anger. Madison will remain steadfast and calm and with patience and wisdom will win acceptance for a dual system which he believes will prove both flexible and strong.

To this conception the term “dual federalism” has been applied sometimes with an implication of contempt. There are minds which are incapable of appreciating the value of a system that embodies two factors both of which are necessary and indestructible, with such an emphasis upon each as varies when conditions change. Such minds are gravely disturbed by insistence upon the continuing integrity of the States. It is with confidence asserted by such that by the turn of the 20th century we, the people of the United States, had become so unified that the usefulness of dual federalism has disappeared and that our constitutional law should reflect this fact. I doubt whether Madison would share this view; and it appears not to be the view of the Supreme Court of the United States.

“If Madison, as he stands before us, were gifted with foresight he would doubtless be confirmed in his conviction that the balance which he is advocating is an equilibrium that is essentially stable.

“He would see the great Marshall, during his long and providential period of service, placing so great an emphasis on nationalism as to cause Madison acute concern. Following Marshall’s death (which was to occur a year before his own) he would see the Court under Taney placing so great an emphasis on the States as to give rise to concern of a very different sort. He would look forward to the time when Seward could say contemptuously of James Buchanan that the President had provided that no State had a right to secede—unless it wished to; and that the United States had the right to enforce its laws — unless they were resisted. Then, in vision, he would see the supreme struggle between North and South and the ultimate triumph of the doctrine that both the States and the Union are indestructible. He would regard that war as placing fresh emphasis (to use John Fiske’s phrase) upon ‘the pacific implications of federalism.’ He would stand spell-bound at the spectacle of ‘eleven revolted states at first completely conquered and then reinstated with full rights and privileges in the federal union, with their people accepting in good faith the results of the contest, with their leaders not executed as traitors but admitted again to seats in Congress and in the Cabinet, and with all this accomplished without any violent constitutional changes.’ He would claim, I am sure, ‘that the strength of the pacific implications of federalism has been more strikingly demonstrated than if there had been no war at all. Certainly the world never held such a spectacle before.’ Looking beyond the war, Madison would follow the course of the decisions of the Supreme Court distinguishing between commerce that is of national concern and that which is internal to the States. He would see, in the present decade, the assertion of the triple proposition that our entire American economic structure must be regulated by government, that this structure is essentially a unit, and that the regulating authority must therefore be that of the federal government. Finally he would perceive growing restlessness and resentment on the part of the American public, the negation of mere nationalism in some recent decision of the Supreme Court and the vindication, to that extent, of the views which we hear him expounding to his fellow-delegates.

“When we withdraw from Independence Hall it is with the conviction that we have been listening to a political philosopher of sound learning, comprehensive mind and ardent patriotism. When we mingle with the crowds outside we are amused to find what strange misconceptions are prevalent respecting what is happening behind the closed doors. We hear it confidently stated, for example, that a return to monarchy is certain; and a group of Tories in New England even send to the Convention the name of one of the fifteen children of George III as the man they favor as King. We, however, have seen Washington and Dr. Franklin and we have heard both Hamilton and Madison in debate. We know that in the hands of such men the constitutional destiny of the Republic is secure.

“If, gentlemen of the New York Bar, you happen to prolong your Philadelphia visit until September 17, you will see the dele-

gates emerging from Independence Hall after the Constitution has been signed and final adjournment had. You will observe that Madison is treated with the general respect due to his character, his ability and his political wisdom. You will watch the venerable Dr. Franklin as he is accosted by a lady in the crowd of onlookers and you will overhear their conversation. 'Well, doctor,' she asks, 'what have we got—a republic or a monarchy?' 'A republic', replies the doctor, "if you can keep it."

"I commend this observation of Dr. Franklin's to your thoughtful consideration."

Credit to the 1936 Year Book of the New York County Lawyers Association.

A LAW STUDENT LOOKS AT THE SUPREME COURT

It has been said that the constitution of the United States cannot function as the rule of Government without the Supreme Court, or the Supreme Court without the constitution, any more than either of the other departments could; and that to exercise their powers fully, justly and fairly each must be independent and uninfluenced by the other in the control thereof.

That the head of the executive department of our government is now planning on doing that directly as announced by his special message to Congress on reform of the Supreme Court is hardly open to debate.

That the older men in our profession are not alone in their respect for the Supreme Court is evidenced by expression from the younger men in their publications, and to substantiate that statement I quote from an article appearing in the January number of *The Law Student* by William N. Hensley, Student, John K. Weber School of Law, San Antonio, Texas, and only regret that lack of space prevents my publishing it all; it is entitled, "A Law Student Looks at the Supreme Court."

"I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of the national and state sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of states in peace and harmony, by the ability, the moderation and the equity of its decisions." — James Kent, in "Commentaries on the American Law," (Eighth Edition), Volume One, page 490.

"During its seven score and seven years of existence, the Supreme Court of the United States has never loomed so predominant in public thought as it does today. A compendious commentary upon the enunciations of the Court, with recourse to its expressed opinions, suffices to convince both dogmatist and skeptic of the proper assertion of judicial power by the supreme