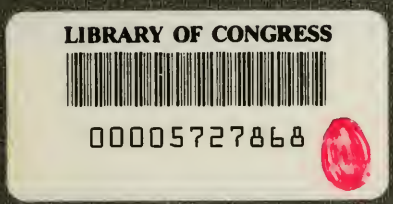

CHIEF JUSTICE MARSHALL

AND THE

CONSTITUTIONAL LAW OF HIS TIME

AN ADDRESS

BEFORE THE

AMERICAN BAR ASSOCIATION

AT

SARATOGA, AUGUST 21, 1879,

BY

E. J. PHELPS.

REPORTED BY J. H. MIMMS, STENOGRAPHER.

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ANNUAL ADDRESS

BY

E. J. PHELPS.

Mr. President and Gentlemen of the Association:—I had hoped to have offered you, this morning, what you may perhaps regard as due to the occasion, a written address. Circumstances not foreseen when I accepted the invitation of your committee, have placed that preparation out of my power, and have reduced me to the necessity either of appearing before you without it, or not appearing at all. I should have accepted the latter alternative, if I had felt myself quite at liberty to disregard such an engagement; and if I had not felt so much solicitude for the success of this our first annual meeting, that I was reluctant to have any of its announcements fail. It seems to me that if these meetings are to succeed, we should regard such invitations somewhat as politicians profess to regard nominations for the Presidency: not supposed to be sought, but not under any circumstances whatever to be declined.

Allow me one word further on this subject. While we shall always listen, I am sure, with greater pleasure and advantage, to the elaborate preparation that produces such admirable papers as we heard yesterday, in the address and the essays that were read to us, I hope that the precedent will not be established among us, that such preparation is indispensable. We all know how difficult in our busy lives it is, at all times to command it. I trust therefore, we shall always feel at liberty, when we are fortunate enough to have anything to say, and to be asked to say it, to address each other in the simple unpremeditated style that prevails in courts of justice. In other words, if gentlemen cannot always redeem their obli-

gations in gold, let us have the silver, even at ninety-two cents on the dollar; it is much better than total repudiation.

I shall ask your attention to some observations, more desultory than I hoped to make them, on the subject of Chief Justice Marshall, and the constitutional law of his time.

If Marshall had been only what I suppose all the world admits he was, a great lawyer and a very great judge, his life, after all, might have had no greater historical significance, in the strict sense of the term, than the lives of many other illustrious Americans, who in their day and generation have served and adorned their country.

A soldier of the revolution—the companion and friend of Washington, as afterwards his complete and elegant biographer—greatly distinguished at the bar and in the public service before he became Chief Justice—and then presiding in that capacity for so long a time, with such extraordinary ability, with such unprecedented success—if the field of his labors had been only the ordinary field of elevated judicial duty, his life would still have been, in my judgment, one of the most cherished memories of our profession, and best worthy to be had in perpetual remembrance. Pinckney summed up his whole character when he declared that Marshall was born to be the Chief Justice of whatever country his lot might happen to be cast in. He stood pre-eminent and unrivalled, as well upon the unanimous testimony of his great contemporaries, as by the whole subsequent judgment of his countrymen. The best judicial fruit our profession has produced.

Another interest, less important, but perhaps to the lawyer who dwells upon the history of his profession more fascinating, attaches to the life of Marshall. He was the central figure—the cynosure—in what may well be called the Augustan age of the American bar; golden in its jurisprudence, golden in those charged with its service, and sharing in its administration. We cannot expect, since change is the law of systems as well as of individuals, and of all human affairs, we can never expect to see

hereafter, a jurisprudence so simple, so salutary, so elevated, so beneficent, as the jurisprudence of those days. Perplexed as the law has become with infinite legislation, confused and distracted with a multitude of incongruous and inconsistent precedents that no man can number, it is a different system now, although still the same in name, from that which Marshall dealt with. And it is no disparagement to the bar of our day—and no man esteems its ability and character higher than I do—to say that we can hardly hope to behold again such a circle of advocates, displayed upon a stage at once distinctive and conspicuous, as gathered round the tribunal over which the great Chief Justice presided. The Livingstons, Emmet, Oakley, Dexter, Webster, Pinkney, Wirt, Sergeant, Binney, Hopkinson, Dallas—no need to name them all; their names are household words among lawyers. Well may it be said of them, "the dew of their birth was of the womb of the morning;" the morning of this country; the morning of Republican government; the morning of American law, of American prosperity, of American peace. It is sad to remember, what we all have to remember, how largely the fame of such men rests in tradition; how much of it is *in pais*, and how little on the record. It is the fate of the advocate. However important his labors, or brilliant his talents, they are expended for the most part upon transitory affairs—the concerns that perish—the controversies that pass away. Like the actor, he has his brief and busy hour upon the stage, but his audience is of the hour, his applause of the moment. When the curtain falls, and he is with us no longer, very little remains of all his exertions. Even the memory of them perishes, when the witnesses are gone.

But it is not, in my judgment, as a great judge merely, or in comparison with other great judges, that Chief Justice Marshall will have his place in ultimate history. The test of historical greatness—the sort of greatness that becomes important in future history—is not great ability merely. It is great ability combined with great opportunity, greatly employed. The question will be, how much a man did to shape the course of human

affairs, or to mould the character of human thought. Did he make history, or did he only accompany and embellish it? Did he shape destiny, or was he carried along by destiny? These are the enquiries that posterity will address to every name that challenges permanent admiration, or seeks a place in final history. Now it is precisely in that point of view, as it appears to me, and I venture to present the suggestion to your better consideration, that adequate justice has not yet been done to Chief Justice Marshall. He has been estimated as the lawyer and the judge, without proper consideration of how much more he accomplished, and how much more is due to him from his country and the world, than can ever be due to any mere lawyer or judge. The assertion may perhaps be regarded as a strong one, but I believe it will bear the test of reflection, and certainly the test of reading in American history, that practically speaking, we are indebted to Chief Justice Marshall for the American constitution. I do not mean the authorship of it, or the adoption of it—although in that he had a considerable share—but for that practical construction, that wise and far seeing administration, which raised it from a doubtful experiment, adopted with great hesitation, and likely to be readily abandoned if its practical working had not been successful, raised it I say, from a doubtful experiment, to a harmonious, a permanent, and a beneficent system of government, sustained by the judgment, and established in the affection of the people. He was not the commentator upon American constitutional law; he was not the expounder of it; he was the author, the creator of it. The future Hallam, who shall sit down with patient study to trace and elucidate the constitutional history of this country—to follow it from its origin, through its experimental period and its growth to its perfection—to pursue it from its cradle, not I trust to its grave, but rather to its immortality, will find it all, for its first half century, in those luminous judgments, in which Marshall, with an unanswerable logic, and a pen of light, laid before the world the conclusions of his court. It is all there, and there it will be found and studied

by future generations. The life of Marshall was itself the constitutional history of the country, from 1801 to 1835.

It is difficult for us, at this time, to comprehend the obstacles that attended the original construction and practical administration of the constitution. Since the way through them has been pointed out by the labors of that court, since experience has justified and established those propositions, they seem very plain and clear. Starting from our point of view, and going backward, we can hardly appreciate the embarrassments that attended them in the outset. But the student of history will discover, the lawyer who attends to the growth as well as the learning of his profession will never forget, the discouragements that surrounded that subject when it was first taken in hand. A constitution adopted with great opposition, the subject of the gravest difference of opinion among the wisest men, on its most material points; quite likely to fail, as its predecessor the Articles of Confederation had failed; the object of a heated party spirit and a bitter political controversy; it not only demanded the highest order of judicial treatment, but such as could be reconciled to the universal judgment of the country. Popular opinion is a matter with which independent tribunals have usually but little concern. But in this case it became as vital as the law itself, because no constitution could stand, that proved repugnant to the general sense.

The field was absolutely untried. Never before had there been such a science in the world as the law of a written constitution of government. There were no precedents. Courts of justice sit usually to determine the existing law, in the light of authoritative precedents, and statutes. Originality is neither expected nor tolerated. A magistrate who should bring much original invention to bear in expounding the law, would be apt to prove one of those questionable blessings that "brighten only when they take their flight." An original field of judicial exertion very rarely offers itself. To no other judge, so far as I know, has it ever been presented, except to Mansfield, in the establishment of the commercial law; unless perhaps the

remark may be extended to the labors of Lord Stowell, in the department of English consistorial law, and to those of Lord Hardwicke in equity. Those are the only instances that the long history of our profession under the common law offers, of what may be called an original field of judicial labor.

Such was the task that addressed itself, when Marshall took his seat upon the bench, to the court over which he presided. A task of momentous importance—fraught with infinite difficulty—in a field without precedent—and under the most peculiar and critical circumstances.

It is a singular fact, that although the Supreme Court had been in existence twelve years before 1801, when Marshall was appointed, and though three Chief Justices with brief terms of office had preceded him, only two decisions of that court had been made, on the subject of constitutional law;—the case of *Hylton against the United States*, which affirmed the validity of a tax upon carriages, laid by the State of Virginia, and the case of *Calder against Bull*, in which it was held, that an act of the Legislature of the State of Connecticut, granting a new trial in a civil action, was not in contravention of any provision of the constitution of the United States. Those were the only questions previously decided, in respect to the American constitution. Between that time and 1835, when Marshall died, fifty-one decisions will be found to have been made and reported by that court, on the subject of the law of the federal constitution. In thirty-four of those cases, the opinion was delivered by the Chief Justice; being twice as many opinions as were delivered on that subject, by all the other members of the court together.

I have spoken of this great work, as the work of the Chief Justice—not unmindful certainly of his eminent associates, and especially of Judge Story, who sat with him during a considerable portion of that time. And I take leave to refer to the testimony of Judge Story, lest some may think I have gone too far in attributing the merit of this system of law so largely to Chief Justice Marshall. Judge Story is perhaps the best witness who can testify on that point, because his means of knowledge were complete.

He was not likely to undervalue or disparage the labors of his associates, nor entirely to overlook his own very valuable efforts in that branch of the law. He says, in an article contributed to the North American Review, "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say of Chief Justice Marshall. For though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made in which he has not delivered the opinion of the Court; and in those few the duty devolved upon others to their own regret, either because he did not sit in the case, or from motives of delicacy abstained from taking an active part."

It is to be remembered further, that in only one of all those decisions did the majority of the court fail to concur with Marshall. In the case of *Ogden vs. Sanders*—where the power of the States to pass bankrupt or insolvent laws was discussed, he was for the first and last time, in the minority. Four of the Judges—against the opinion of Judges Marshall, Story, and Duvall—sustained the power of the States to pass such a law; but all concurred in the judgment in that case, which was that a discharge under such a law could not affect a creditor outside the jurisdiction, who had not thought proper to appear and become a party to the proceeding. I need hardly say to an assemblage of lawyers, that as the half century that has passed away since most of those decisions were rendered, has completely established and confirmed and rendered plainer and plainer the soundness and the wisdom of the law they involve, so experience has likewise shown, that in this solitary instance in which his opinion was rejected, the Chief Justice was right. He cor-

rectly anticipated, with a far-reaching sagacity, what would be the result of a system of insolvency, that discharges a debtor in one State, and fails to discharge him in another; that pays one creditor who is within the State, and fails to pay another who is without it. And he clearly perceived, that if that great power was to be reposed at all in the federal government, as it is, and of necessity must be, it ought to be an exclusive power. There is the only and mistaken instance in which his judgment on a constitutional question did not become the law of the land.

And therefore it is to be said, without injustice to his associates, and without injustice to those great lawyers to whom I have alluded, and whose genius and labors were contributed to build up this system of law, that the value and the credit of it, the authorship and creation of it, are principally due to Marshall. And I believe it will be seen in future history, that as Washington brought this people through the revolution to a period when they were able to have a constitution of their own, so Marshall carried the constitution through that experimental period, which settled the question whether it should stand or fall. If this country has profited, and if through this country the world has profited, by the raising of an instrument doubtless the most important since *Magna Charta*, couched necessarily and wisely to a large degree in generalities, into the beneficent government under which we live, it is more largely due to Chief Justice Marshall than to any other man, or perhaps to all other men, who ever had anything to do with it. That is my proposition. Of course if the revolution had failed, it is not probable we should always have continued to be colonies of Great Britain. Some other leader, in some other rebellion, might have carried us through to a condition of independence. If this constitution had perished, republican government might not have perished. Some other tribunal, under some other constitution, might perhaps have reconstructed it. But taking history as it stands—dealing with the constitution under which we live, and not entering upon the vain conjecture of what might have been the conse-

quences if that constitution had fallen, certainly the success of the experiment of republican government may be said to be mainly due to Marshall.

When those celebrated judgments were rendered, the questions involved were set at rest. Even party and partizan spirit was hushed. They passed by universal consent, and without any further criticism, into the fundamental law of the land, axioms of the law, no more to be disputed. Time has demonstrated their wisdom. They have remained unchanged, unquestioned, unchallenged. All the subsequent labors of that high tribunal on the subject of constitutional law have been founded on, and have at least professed and attempted to follow them. There they remain. They will always remain. They will stand as long as the constitution stands. And if that should perish, they would still remain, to display to the world the principles upon which it rose, and by the disregard of which it fell.

Let me say here in passing, that the service ought to be rendered to the history and literature, to say nothing of the constitutional law of the country, of bringing these opinions together in some compilation that should make them accessible to the general student, as well as to the lawyer. They are scattered, as you know, through some twenty-five volumes of reports, practically inaccessible to readers outside the profession. They are known only through a vague reputation, except to the profession, and not perhaps so completely understood by all the profession as could be desired, if we may judge from some of the recent discussions upon the subject. If they could be brought together, not merely as the repository of the foundation stones of the fundamental law of the land, but likewise as among the highest models of logic and reason, and the purest specimens of judicial style, it would be a contribution to American letters and history, that would be valuable and permanent.

I do not propose, as you may well imagine, to enter into any discussion on questions of constitutional law. But a few words

may be pardoned, in respect to the means and the manner by which the result I have spoken of, was achieved; and not only achieved, but rendered so perfectly satisfactory to the whole body of the American people. It seems to me that it all turned upon one cardinal point, and a point which I shall venture to suggest needs to be more frequently recurred to, and more clearly understood. And that is, that the construction of the constitution of the United States, for all purposes for which it requires construction, belongs everywhere and always to the jurisprudence of the country, and not to its politics, or even to its statesmanship. The lawyer or the student, who shall set himself down to follow the labors of that great tribunal from beginning to end, to learn on what foundation they rested, and what was the guide through the maze that proved as unerring as the mariner's compass in the storm, will find it in that salutary principle, set forth with the utmost clearness and unanswerable force in the early case of *Marbury against Madison*, followed up from time to time by repeated decisions, and adopted by all jurists and all courts ever since, that the constitution of this country has by an inevitable necessity, reposed in the judicial department of the government, the sole determination and construction of the fundamental law of the land. In England, whence our institutions were mainly derived, Parliament is omnipotent. It is the tribunal charged with the administration of the unwritten British constitution. Their action in that sphere is final. Any statute they deem it proper to pass is a valid statute, and controls all rights, public and private. The American constitution is based upon a different theory. That difference, as it seems to me, is the distinguishing and almost the only vital difference from the constitution of Great Britain. The mere machinery of the administration of the government, the manner in which the chief magistrate shall be elected—the term of his office—the appointment of his subordinates—these and other details are subject to change, as time and experience shall point out. They are not essential to our system. It is not upon these that

Republican government reposes. It is, I say—and I repeat in order to emphasize more clearly the proposition I desire to present—it is upon the entrusting to the judicial department of the whole subject of the constitutional law, for all purposes, that our government rests.—While that stands and is maintained in its purity, this constitution will stand. The ship will ride as long as the anchor holds, though storm after storm may sweep across the face of the sea. While that remains, the system will remain. Details may be modified and changed, we cannot foresee to what extent. Changes of that sort have already taken place, but the principle I have stated, is the fundamental idea.

That point once established by the court, the simple, the ancient, the salutary, the perfectly intelligible and just principles of the common law, became sufficient for all the purposes of constitutional construction. When the rule of construction of the great compact was shown to be simply a question of law, the law was found perfectly adequate to dispose of it.

No better illustration can be produced in history, of the profound wisdom of that system of jurisprudence known as the common law, than to observe how completely those rules that are applied to the humblest contract, between the obscurest individuals, were found sufficient for the emergency, when a court of justice was called upon for the first time in the history of the world, not merely to adjudicate upon private rights, but to promulgate from the bench the principles of civil government, and to adjust the rights and powers of conflicting sovereignties. If the eulogian of the common law seeks for the most signal illustration of its comprehensiveness, he will find it there. It was by the application to the constitution of those plain and clear rules, that all the results of its construction were satisfactorily worked out.

When we peruse those judgments, we are reminded, especially and above all, how absolutely free they are from all considerations of political expediency, all motives of party politics,

all State craft, or even statesmanship, unless it may be deemed the highest statesmanship to avoid the attempt at statesmanship in judicial construction, and not to confound two very different systems of administration, belonging to two very different tribunals. How perfectly free from all suspicion of party or political bias or feeling those decisions stand! And that, as it appears to me, is one reason why they were accepted by the universal consent of the American people, and have always remained without question or dispute. No political party ever yet convinced its adversaries by argument. Discussion only intensifies the dispute; harmony with a political opponent is only obtained, by the exercise of the courtesy which suspends all discussion on the points of difference. No living man could have addressed to the American people in that first critical half century of the Republic, a constitutional argument based upon party politics, that would have stood an hour. It would have been universally rejected; denied by its opponents, despised by its friends. Marshall, as it is well known, was a Federalist. His political opinions were doubtless pronounced and decided. It was not because he was without political sentiments, that he excluded them from his court. The Federal party, I may be permitted to observe in passing, will perhaps receive better justice from future history, than it has from the past. It went to final wreck about the time of the last war with Great Britain, encountering the usual fate of a party which sets itself in opposition to any war it may be proposed to engage in. But I believe the ultimate justice will be done it, of remembering that some of the greatest and purest men this country ever contained were the founders and leaders of that much abused party. Their views have been generally misconceived. It was not upon the construction of the constitution we have, that they differed from their opponents, but upon the previous question, whether we should have that constitution or some other. It is idle to busy ourselves with conjectures of what might, would, or could have been the history of this country, if the constitution which Washington, Hamilton,

Jay, and doubtless Marshall preferred, had been adopted, because it was not adopted. But Federalist as he was, and whatever may be said of his party or their views, we can find no more trace in any line of those great judgments, that would indicate the political sentiments or bias of the Chief Justice, than if we were to study his opinions upon charter parties, or policies of insurance.

Let me quote on this subject some very forcible and apposite language, from the resolutions adopted by the Charleston bar (I know not who was the author*) on the occasion of Chief Justice Marshall's death. "Even the spirit of party respected the unsullied purity of the judge, and the fame of the Chief Justice has justified the wisdom of the constitution, and reconciled the jealousy of freedom with the independence of the judiciary."

As every lawyer and every intelligent layman knows, the point of most danger and difficulty in constitutional construction, where the greatest risk of final shipwreck is incurred, is in the attempt to adjust those conflicting—sometimes doubtful—always very delicate—relative rights of the States and the Federal Government. That point, of all others, was treated by the court with the largest sagacity and the greatest wisdom. Critical as were many of the emergencies that arose in those days out of that subject, they were all not only satisfactorily met, but buried and forgotten forever, under the wise and salutary administration of the law which they encountered.

Upon the distinction, so much and so long discussed in some parts of our country, between strict construction and liberal construction in respect to these relative rights, it was the view of the Chief Justice and his associates, that they were unable to perceive what those words meant in that connection, or what just application they had. The court had simply to ascertain the meaning of a written instrument, which upon common principles was to be construed both strictly and liberally;

*Stated by Gen. Lawton, of Georgia, to have been written by Mr. Pettigru.

strictly in ascertaining what powers it contains, liberally in carrying into effect those powers it is found to contain.

Allow me, in taking leave of this point, to read a few words from the language of the Chief Justice himself, out of much that might be usefully quoted did time allow. "In the argument," says he, "we have been admonished of the jealousy with which the States of the Union view a revising power intrusted by the constitution and laws of the United States, to this tribunal. To observations of this character, the answer uniformly given has been, that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon us." Words which are fit to be written in letters of gold, over every tribunal in this country.

One other suggestion in respect to these opinions of Marshall. I have said they were models of reasoning, and of judicial style; and I repeat the remark. If the constitution were out of existence—if the whole subject which they discuss were to become only a thing of the past, of no further human significance, they would still retain their value, as among the most admirable productions in the logic and literature of jurisprudence. There are two kinds of reasoning prevalent at the bar, and prevalent I may say without undue disparagement, sometimes on the bench. There is the reasoning that silences, and the reasoning that convinces; and they are very different things. The casuistry and plausibility, the dexterity and subtlety, the circuitous and round-about processes of indirection which may confound an antagonist who is not strong enough in dialectics to refute them, is altogether a different thing from that simple, direct, straightforward, honest reasoning, that silences as a demonstration in Euclid silences, because it convinces. Such was the reasoning of Marshall, born of the intellectual as well as moral honesty, the tough and vigorous fibre of the man. And this it was, in great measure, that carried home and established in

the understanding and judgment of mankind, the truths it embodied.

It is foreign to my purpose, and beyond the limits I fear I am already transgressing, to follow the labors of the Chief Justice any further. I shall not at all advert to their value, their eminence, their greatness, in so many other branches of jurisprudence besides constitutional law. I shall not try to depict—no poor words of mine could depict—the spectacle which that unassuming but dignified tribunal presented during thirty-five years of time, while with unabated strength he continued to preside there, until the snows of four-score winters had fallen on his head; surrounded by the associates, and the circle of advocates I have before referred to—dealing with the greatest questions, the most important interests, in the light of the highest reason, the finest learning, the most elevated sentiment, and often with an affecting eloquence, which in our busy day has disappeared from courts of justice, to be heard there no more; enshrined in the respect, the affection, the veneration of all his countrymen; no breeze of party conflict but was hushed in his presence, no wave of sectional quarrel but broke and subsided when it reached his feet. His life, strange to say, remains to be written. Lives enough have been thought worth writing, that never were worth living, but the life of the great magistrate is unwritten still. Perhaps it is as well that it should be. Time was needed to set its seal upon the great lessons he taught; experience was requisite to show what was the result of following, and what the result of departing from them. Some day the history of that life—that grand, pure life—will be adequately written. But let no 'prentice hand essay the task! He should possess the grace of Raphael, and the color of Titian, who shall seek to transfer to an enduring canvas, that most exquisite picture in all the receding light of the days of the early republic.

Perhaps the brethren of our profession do not always remember the high prerogative, which under this system of fundamental law, different from any other we know of, the American bar

enjoys. Lawyers in other countries have nothing to do, as lawyers, with constitutional principles of government, or with the basis on which its administration stands. They deal exclusively with the administration of justice, civil and criminal, between man and man, under a government established and fixed, with the operations of which they have professionally no concern. We, on the other hand, are charged with the safe-keeping of the constitution itself. It is from your ranks that judicial vacancies are constantly to be filled up; the lawyers of to-day are the judges of to-morrow. It is by your discussions, in the light of your writings, by the aid of your labors that every successive question that arises touching the fundamental law, is to be adjudicated. Great and distinguished as the English bar is and has been, it never had any such function as this. And that is doubtless one reason, why the great advocates of the period to which I have alluded, were able to achieve such distinction. They were dealing with a class of subjects, which lawyers had never dealt with before. "Your mere *nisi prius* lawyer," said Burke, when harassed with the technical objections of his adversaries on the impeachment of Hastings—"Your mere *nisi prius* lawyer knows no more of the principles that control the affairs of state, than a titmouse knows of the gestation of an elephant." The remark was as true as it was pungent, when applied to the bar to which he referred. But it has no just application to ours. If the fundamental proposition I have stated is sound, if the constitution that affords the basis of government as well as of forensic law, belongs to the judicial department to determine and to administer, then it is placed in the safe-keeping of the American bar. And we enjoy, as I have said, such a prerogative as never before was conferred upon a body of advocates.

But does that high prerogative carry with it no corresponding duty? Are we charged with nothing as the price of such a privilege? Have we no other trust to execute in respect to the American constitution, than that which all citizens are charged with, and are expected to perform? It is idle to adjure men to

maintain the constitution, or to compel them to swear to support it. Every man proposes to maintain and support the constitution —as his party understands it. The question is what is the constitution? When a great and critical emergency arises, when a crisis fraught with extreme and vital consequences approaches, what is the constitution? Who is to determine it, and above all, upon what principle and basis of construction? That is the question.

It was pointed out to us in the elegant and scholarly essay of Mr. Mercer, to which we listened last night, how the concurrent testimony of all human experience establishes the truth, that the interpretation and the strength of law is but a reflex of the national spirit out of which all law arises. There is, as it seems to me, a practical and immediate application of that proposition to the legal profession of this country, in this very particular. Their influence is great; their influence upon legislation—their influence upon judicial proceedings—their influence upon the public mind—upon political sentiment, especially in respect to questions particularly within their province. It is from them that the true spirit of the jurisprudence of the country on all subjects, and above all this subject, must of necessity emanate. It is they who make it; it is through them that it must take effect. That political parties will always exist, is inevitable; that they always should exist, is probably desirable; that members of our profession, as of all other professions, should represent all shades of political opinion, and belong to all parties, is to be expected; though I hope on some of them, party ties hang very loose. The question is, how far party differences shall go. Where shall they set out, where shall they terminate? Shall they invade the province of the fundamental law? Is that to be administered by politicians, to be construed by caucuses, to stand or fall upon political considerations, and for the purposes of partizan success? Are not there divergent paths enough, which starting from the constitution as a common ground, and running in every direction through all the ramifications of the administration of govern-

ment, through the whole boundless field of policy, and statesmanship, and expediency, are not they enough for all the purposes of politics, and all the warfare of party? Should not the lawyers of this country meet as on a common ground, in respect to all questions arising upon the national constitution, dealing with them as questions of jurisprudence and not of party, setting their feet upon, and their hands against all efforts to transgress the true limits of the constitution, or to make it at all the subject of political discussion? It is too true, that this constitution of ours, in respect of which it might well be said to him who approaches it, "put off thy party shoes from off thy feet, for the place on which thou standest is holy ground," it is too true, that it has become more and more a subject to be hawked about the country, debated in the newspapers, discussed from the stump, elucidated by pot house politicians, and dung-hill editors, scholars in the science of government who have never found leisure for the graces of English grammar, or the embellishments of correct spelling.

When we reflect upon all this country has passed through, is there no light to be gathered from experience? Should not the members of this conservative profession, "as honorable as justice, as ancient as the forms of law," charged with a duty in this regard so special, and so important, should not they stand together upon these as upon all other questions of jurisprudence, considering and discussing them only upon considerations that belong to jurisprudence, and not upon those that are in the domain of politics? Should not they of all men stand together, and unite to put an end, as I believe they might put an end, if their action was unanimous, not to political controversy—that is neither to be expected nor desired—but to that most destructive form of political controversy, coming from whatever party, or from whatever quarter, or for whatever purpose, that seeks to invade the foundations of the constitutional law, and to plant them on the shifting and treacherous sands of partizan expediency?

And, gentlemen, allow me one further suggestion. What good is to come from this Association, we are trying to build

up? What is to be its significance, or its ultimate value? What is to repay us, or any of us, for turning aside from the current of our busy lives, to meet together here? Questions of detail in the machinery of the law, will be usefully dealt with, no doubt. The pleasure of meeting and forming acquaintances between men of the profession from all the various States, will doubtless be great. But what final good, what permanent usefulness is reasonably to be expected from it, unless it be the creation in our profession, by common consent, by mutual intercourse and support, of a broad, national, elevated, independent, fearless spirit of constitutional jurisprudence? The spirit that builds up and perpetuates, rather than that which pulls down and destroys.

We come together from all parts of our country—our common country—from the scenes of a desolation and sorrow on all hands, that God alone can estimate—over graves numberless to our arithmetic—the harvest of the effort to settle constitutional questions by force of arms. Let it all pass. We come to bury the armed Cæsar, not to praise him. To renew again, in faith and hope, the work which Marshall and his associates began, of cementing and building up on firm and lasting foundations, the American constitution. Is it the court alone that is charged with that duty? Have we no part or lot in the matter? Lingers among us no memory of those who are gone? Comes down to us no echo from our father's time, that shall awake an answering voice?

Fortunately for us all, we have in the successors of the old court, an upright and excellent tribunal. Judges who have addressed themselves, and will continue to address themselves, with great ability, patriotism, and success, to the difficult and embarrassing questions, born of the troubled time. But no court can stand without the cordial support of the bar. It was the strength of Marshall's court, that those great men who rallied about it in the profession, and aided in its discussions, stood by it and sustained it before the country, when

important decisions were made, with a moral force that was adequate to all occasions.

It is idle to say that our sky is free from clouds. It is useless to deny that wise and thoughtful men entertain grave doubts about the future. The period of experiment has not yet passed, or rather, has been again renewed. The stability of our system of government is not yet assured. The demagogue and the caucus still threaten the Nation's life. But we shall not despair. Still remains to us "our faith, triumphant o'er our fears." Let us only for our part, see to it that we discharge the duty that every man owes to his profession. And come what may,

> "Thro' plots and counter plots—
> Thro' gain and loss—thro' glory and disgrace—
> Along the plains where passionate discord rears
> Eternal Babel,"

let us join hands in a fraternal and unbroken clasp, to maintain the grand and noble traditions of our inheritance, and to stand fast by the ark of our covenant.