ADDRESS

DELIVERED BEFORE

THE GRADUATING CLASS

OF THE

LAW DEPARTMENT

OF THE

University of Maryland,

AT THE

ANNUAL COMMENCEMENT,

JUNE 1, 1877,

BY HON. JOHN RANDOLPH TUCKER, LL. D.,

OF VIRGINIA.

Baltimore:

PRINTED FOR THE LAW FACULTY AND THE GRADUATES,

BY KING BROTHERS, JOB PRINTERS.

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Baltimore, Md., June 1st, 1877.

HON. JOHN RANDOLPH TUCKER, LL. D.

My Dear Sir:

I have the honor to inform you that at a meeting of the Graduating Class of the Law Department of the University of Maryland, held to-day, the following resolution was unanimously adopted:

"Resolved, That the President of this Class be directed to express to Hon. John Randolph Tucker, LL. D., our high and grateful appreciation of the eloquent and able address delivered by him to-day, and to respectfully request a copy for publication."

In performing the pleasant duty assigned me by my fellow graduates, I desire to assure you, in their name, that the resolution adopted by them is much more than a formal expression of their sentiments and wishes.

With high regard, I remain,

Your obedient servant,

GEO. SAVAGE,
President of the Graduating Class.

GEORGE SAVAGE, ESQ., *President of the Graduating Class:*

Dear Sir:

Your polite note enclosing the resolution of your Class, requesting a copy of the address I had the pleasure to deliver before you on the 1st inst., has been received, and its request considered.

I yield my own reluctance to your desire, and place the address at your disposal, with the hope that it may at least serve to cheer and stimulate all the students of our noble and honorable profession to do their part in making it subserve all the great ends it is designed to achieve in the progress of civilization in our country and in the world.

With kind acknowledgments of your courtesy, and with high regard for yourself and for the Class you represent,

I am, very truly,

Your friend,

J. R. TUCKER.

June 7th, 1877.

ADDRESS.

Young Gentlemen:

Upon the invitation of the Faculty of the University of Maryland, and in the presence of the manhood and beauty of this great city, I welcome you to the ranks of the noblest and most important of the secular professions.

It is my purpose in this address to vindicate the claim of the legal profession to the highest position of influence in the conduct of human affairs.

Physical Science deals with the forces which hold the material universe in its orderly movements and relations; Moral Science with the principles and motives which govern the individual man; Religious Science with the relations between man and his Creator; and Social Science with the related affinities of men, and with their co-operative activities in a common progress.

Legal Science, while it has important reference in all of its investigations to each of these branches of science, of which no jurist can afford to be ignorant, but with which he should be largely familiar, yet has its chief and closest connection with the social science—the philosophy of human relations, personal and proprietary, governmental and international,—in their beginnings, their progress, and to their final and (it may be) their perfected consummation.

This science, at whose altars this day you have consecrated yourselves as its priests, offers to you the widest field for labour and for glory. It does not only ascertain the rules which control the petty affairs of every day life—the laws of property, and of contract and duty between man and man; nor only the ties which bind the family in one at their quiet home; but it stretches its eye across the main, travels with every ship which wind or steam drives over the deep; it presides in the council chambers of nations, and sways the fate of empires; it follows the warrior's standard, and sits with the statesman in his cabinet; it waves its sceptre over the surging masses of the populace, and lays its sovereign hand upon tyrannical power; and thus, upholding the right on the land and on the sea, at home and abroad, between individuals, between the governor and the governed, and between independent nations, it seeks to ensure order and peace in a combination of the energies of the units of mankind, for the common advancement of our entire race and for the promotion of a noble civilization.

It is very obvious, that in every society or body politic, there must be some supreme force, under which the human units composing it will be controlled and their relations regulated. The organic force of society, that which concentrates all its power for the control and regulation of its members, is *government*, and the expression of that force is *law*.

It is further obvious, as society improves in the development of the capacities of its members, and of the social capacities of the entire body politic or State, as we term it, that law, the expression of the force which guides and governs the State and its members, must adapt itself to these new forms of activity, individual and social. Law must lead civilization, or at least must keep step with its march; for all growth, not under law, will be unhealthful, and when growth is abnormal, it will soon cease, and decay will begin.

It follows from this simple view, that law will be a progressive, and is eminently an historic, science.

One other principle must be stated. As society is ordained of God as the school of our race; as government is ordained of God for the conservation and progress of society, we conclude that law must be the *natural* expression of the social force, that is, must adapt itself to that condition of things which Providence has constituted in each society. In other words, law would fail of its functions, if it engrafted upon society a force which was contrary to its nature and in conflict with the principles of its organic life. To be efficient for good, it must therefore be the natural expression of social force, or, to use other words, government must conform its law to the nature of that society for which it is enacted.

But it will be seen that this statement involves the idea of some natural law, which government should exercise itself in discovering for the particular society; that there is in truth, what the Civilians called the *Jus*—the abstract right, which government seeks to express through the *Lex*: for *Jus non est lex, sed potius id quod lege praescribitur, seu mensuratur, (St. Thomas Aquinas.)* *Jus* is the natural right, of which *Lex* is the human (and imperfect) expression. *Jus* is that of which Cicero speaks in that familiar passage: *nec enim alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore, una lex et sempiterna et immutabilis continebit.* *Lex* is the ideal best of every great law-giver, of whom St. Augustine thus speaks: *Conditor legum temporalium, si vir bonus et sapiens, legem æternum consulit, ut secundum ejus immutabiles regulas, quid sit pro tempore jubendum vetandumque discernat.*

Do you not thus see that the legal science must be the companion, if not the leader, of all civilization? and that its students must comprehend the fundamental principles of right and justice according to the law of God, as the force which He has

imposed upon society, ordained by Him as the means for the elevation and progress of the whole race?

Law should be, therefore,—and lawyers must make it so,—the scientific expression of social progress. If it be so, it will guide, if it be not, it must hinder, civilization.

Your duty, whether at the bar, or on the bench, or in the halls of legislation, or in the professor's chair, is to dig deep into the historic foundations of the law; to follow the development of its germinal principles, and their modifications under the influence of social progress; and to gather light from the study of comparative jurisprudence, (as the anatomist from comparative anatomy,) for the adaptation of your system of laws and your judicial administration, to the ever expanding needs of society under changing forms of human activity, and the new combinations of individual power for social advancement in all the departments of human affairs.

No man can be a great lawyer who does not comprehend how law has been the outgrowth of social institutions, and how each has modified and controlled the other in human history. Much will become obsolete, and you may say, therefore, need not be learned. But the reason for its being obsolete; what social need has superseded it; and by what it has been replaced; and why; and with what effect, direct and indirect; what portions may still be lopped off, because no longer of avail; and by what they should be substituted: these are the enquiries into which the philosophic legal student must plunge, these the problems he must solve, before he can claim to have fulfilled the noble duties to which he is this day called, and for the achievement of which I would fain inspire him to struggle with manly ambition. Your motto should be that adopted by Mr. Fearne for his great work: *Scire autem proprie est rem ratione et per causam cognoscere.*

My proposition is this: Law, being the expression of the social force in each body politic, must be fitted to its existing *status;* must advance with its social growth, and so act upon the elements composing it, as not to convulse or radically transform them or their relations, but conserve them.

Law must not be applied to any society upon *a priori* principles, but should by judicious experiment be skilfully adapted to its needs in every stage of its progress. To use the Divine illustration in a like case, we must not "put new wine into old bottles; else the new wine will burst the bottles and be spilled, and the bottles shall perish. But new wine must be put into new bottles; and both are preserved." It is political empiricism to put laws upon a people, regardless of their social status; it is political wisdom to make laws the reflex of the institutions of society; and thus the wise legislator will let his laws grow out of social institutions, and will not force them

upon a people to whose life they are not suited. In the one case, law is the conservator of civilization ; in the other, it will be its destroyer.

It follows from this that constitutions and laws, which are not institutional in their nature, will retard progress and not benefit society ; and constitutions and laws, though advantageous to one people, may be injurious to another. There is no panacea in any one system of laws, however ingeniously devised, which will cure the diseases, or be a stimulant to the healthy growth of every society. Each must have a medicine for its special evils, and a vital force promotive of its peculiar life.

If these principles be true, you will see that law will be very different in the early and advanced stages of society. It grows with the growth and strengthens with the strength of the particular type of civilized life. And, therefore, for the comprehension of any system of laws, we must trace its growth in the history of the nation, from the legal germ found in the infancy of each people, to its development into those splendid forms of jurisprudence manifested in the enlightened age in which you now live, and are to act your several parts.

You will pardon me, therefore, for offering some suggestions for an investigation into the historic growth of our legal science, that is, into the philosophy of the British-American jurisprudence.

In the family, the divine germ of all nationality, the expression of social force is found in the form of simple mandates. These in time will assume the dignity of habits, submission to which is the bond of family unity. In the patriarchy, the expansion of the family germ, these primitive mandates and habits will take on a more durable form, and still more so in the tribe ; and when the tribe enlarges into the nation, they will expand into the compact and well-defined customs and institutions of a people.

It is thus that you find, in primitive society, very meagre positive legislation, and that customs springing from the will of men, and born of the popular heart, form the substratum of the law of the State. Such law is the social force, operating with the sanction of universal consent. For, says Lord Bacon, "Customs are laws written *in living tables*." (2 Volume Bacon's Works, 231.) "The unwritten law is that which usage has approved ; for daily customs established *by the consent* of those who use them, *put on the character of law*." (Justinian, Lib. 1, Tit. II, §9.) "What," says one of the Pandects, "is the difference between the consent of the people, given by their votes, and their will, signified by their acts ?" The answer is palpable : it is the difference between a law decreed at best by a majority of the people, against the will of a dissenting minority, and a law enacted by universal consent, the consent of all

to the social force which controls them, of all the governed to the laws of the government.

When these habits of the home crystallize into law, we have those institutions of society whose roots are deeply planted in the hearts of men, and which, springing from them, nurture the tree of civilization that overshadows and protects them; a better security for civil liberty, social order and real progress than all the constitutions ever devised by the wit of man, without respect to the habits and sentiments of the people—and sometimes, (in our day,) fastened upon them in contempt of the popular will, and in violation of the rights of free men!

It is this system of institutional customs, "whereof the memory of man runneth not to the contrary," expanded, settled and well-defined, from the year books of the fourteenth century to this day, which constitutes what is known as the Common Law of England; or, as Bracton calls it, *Jus non scriptum consuetudinarium*. If these ever had the legislative form, as some antiquaries hold, and are worn-out statutes, it is certain they have not worn out of the hearts of the people; and were, no doubt, if ever enacted by the legislative power, only statutory expressions of pre-existing customs, the outgrowth of the popular will.

I love this rude old Common Law in its simple, antique grandeur; not that it is suited to a refined civilization, but because it is not a result of governmental power, but the outgrowth of popular will, the expression of a people's consent to laws suited to their condition. Such a people are a law to themselves. They yield to it, for it is self-government. It is an anchor against revolution, a guaranty of order and solid freedom. The men out of whose sturdy nature it grew, cried out "*Leges Angliæ nolumus mutari*," while they wrenched liberty from a craven crown, and gave Magna Charta to the Anglican race all over the world. A people, whose great hearts germinated institutions so fitted to their social status, and made for themselves self-restraining laws, will always remain free, and will wage eternal hostility to tyranny. These institutions become so intensely personal to a people, so much a part of themselves, that they will fight to defend and save them from the grasp of the usurper.

England, it is true, has no written constitution; but she has these institutions "written on living tables." She has appealed to them in her first extant statute, Magna Charta; in her Petition of Right; in her Bill and Declaration of Rights; not as new constitutions, but as her "ancient and indubitable liberties." And our own great Federal Compact, if it shall be revived in its original integrity, is but a body of ancient customs and liberties, guaranteed under new forms of government, and fitted to a new order of civilization. The Federal Constitution is a

bundle of the ancient, institutional and chartered liberties of the British-American Race! Our institutions are the foundations of all our constitutional law. Our constitution is but the expression of institutional principles, inherited by our race from our fathers through centuries of successful struggles for liberty and right.

But you readily see that the common law was only fitted for a primitive society, and a narrow circle of interests. It gives law to the home, to the family, for title to the land, for inheritances, and such like important and fundamental rights.

But when society extended its projects to active trade among its members, and to commerce with the world, it demanded the expansion of jurisprudence to meet its new and larger necessities.

This demand has, of course, in a great degree, been met by statutory regulations, grown to great excess in our day; but this is but a small measure of that which in modern times constitutes the great body of our system of jurisprudence. And this brings me to an important question.

The interests of men are so various; their relations by contract and from contact so complex; their enterprises under free institutions so multiform and unlimited, that it is impossible in the nature of things for any legislature to enact laws which will comprehend all of the infinite number of cases of conflicting rights which must arise in every society. A statute may devise a general rule, but its application to all the cases which human caprice may generate, or human needs may demand, will always require the judicial function to solve this enquiry. What is the law of *this* case? In interpreting and evolving the meaning of general phraseology, when brought to govern a special transaction, there must be the substitution of judicial construction for continuous and special legislation; and thus the judge really makes, out of the general rule prescribed by the legislature, a special law for each case. And this is no great evil; "for," says Lord Bacon, "in all sciences, they are the soundest that keep close to particulars." (2 Bacon's Works, 231.)

I need not do more than refer you to the extraordinary history of judicial dealing with the celebrated statute *de donis*, which, enacting in simple terms that the will of the donor be observed, was construed by the courts to create that system of perpetual entails, which in two centuries the same courts broke down in *Taltarum's* case; thus, by judicial interpretation, building up a system under a statute, which, by like interpretation, was broken down under the same statute. Other like illustrations might be suggested.

And this power of "judicial legislation," as it may fitly be termed, must be the greater when law-making is in its infancy.

All the statutes passed in a session of Parliament five centuries ago, would scarcely occupy the space of a single statute of a Parliament of the present day—a fact which has given rise to the modern canon of judicial interpretation, of sticking more to the words, and relying less upon the so-called equity, of a statute.

As early as the reign of Edward II.—perhaps earlier—the year books began, which were the annual collections of the decisions of the courts upon the cases brought before them in the realm. These have been followed in later times by the more extended books of reports. This body of infinitely varied cases, arising out of every class of human contracts and contacts, give to the lawyer a fund of precedents from which he is able to ascertain the law of a large proportion of the transactions brought under his notice, and to which the language of the statute law would furnish a very inadequate guide.

Nor is this peculiar to the common law system. From Justinian's Institutes we learn that the written law of Rome consisted of the plebiscites of the commonalty, the decrees of the Senate, the ordinances of the princes, the edicts of the praetors and other magistrates, and the answers of the lawyers (*responsa prudentum*)—yes, of lawyers, licensed to give answers on questions of law, even when the lawyer is not a judge. And thus the *Corpus Juris Civilis* of the Romans was constituted in large part of judicial opinions by the jurisconsults upon mooted legal points submitted to them. (Inst. of Justinian, Lib. I., Tit. II.) This, as Mr. Maine suggests, is analogous to the "case-law," of the English courts. (Maine's Anc. Law, p. 32.)

Let us now enquire into the sources of this "case-law" of this judicial law making, which occupies so large a space in our libraries, and so influential a place in our jurisprudence.

However rude the social state, we must conclude that no lawmaker or judge, if conscientious, would fail to confine his enactments or decisions to the principles of natural justice; and if not conscientious, that he would assume a virtue, if he did not really practice it. Thus, every judge, where positive statutes did not require a contrary judgment, would decree according to the very right, as he understood it.

But what is right? What is justice?

These are questions which take hold upon the very roots of moral science, and strike into the soil of religious faith. For right, not only philologically (*rego, rectum,*) but in its common sense, refers to the eternal fitness of things, as adjusted by the Eternal Rex! And hence legal judgments are resolved by this deep fundamental question: *What would the Infinite Judge decide in this case?*

And, by way of parenthesis, I may here say to you, young gentlemen, that the best canon for your professional life is this: to enquire, not for the literal, the technical, the dogmatic resolution of the subject for judgment, but what is the real right, what the inherent justice of the case. If you discover this, in nine cases in ten, you will find the true solution, and thus realize what my Lord Coke has declared, that "the law is the perfection of reason."

Narrowing our enquiry, let us find the sources whence our British judges acquired their notions of right and justice, which they have engrafted by "case-law" upon the common law of England.

Rome, by tradition, sprung from a vanquished and exiled race, and expanding from the nurseling of a wolf, (according to the early, and not infallible, fables of its people,) filled her Pantheon with the gods, and adorned her jurisprudence with the laws and institutions of her vanquished foes. The genius of Athens lent its art, philosophy and law to the iron hand of the victor. Rome got her twelve tables from Greece; the polity of her republic from the sociology of Aristotle and Plato and the other philosophers of Athens. The blood of that wondrous civilization, which had filled the veins of the living Greece—now "living Greece no more"—poured its vital current into the rude giant, and gave him culture, refinement and civilization. Thus, Rome, the progeny of Ilium, the victim of Greek prowess, after many centuries, avenged a slaughtered Hector by the conquest of the land of Achilles; and conquered Greece, in turn, vanquished her victor by the milder weapons of her polity and her philosophy.

But Rome, in the beginning and during the course of her imperial history, became debtor to another civilization, to which I must briefly refer.

Thirty-three centuries ago, a child, whose cradle was kissed by the lip of the deified river of Egypt, became the foster-son of its queenly daughter. His manhood directed the exodus of his race from bondage into the nomadic nationality of the wilderness; where, as its first law-giver, he framed the first written code of laws, which has survived the wreck of ages.

The Hebrew Code was simple, and suited to the primitive habits of a new and nomadic nation. But in the sublimity of its moral principles, in its solemn assertion of the real right, in its broad and sometimes delicate discriminations, and in the profound nature of its polity, it presents this historic dilemma to the curious; either its origin was divine, or it is a miracle of human wisdom. For I scruple not to say, that the Hebrew boy, snatched from the waters of the rising Nile, has done more to tunnel the mountain boundaries of human knowledge, through

which trains of living wisdom have passed to these later ages, than any other mere man of the human family.

Fifteen centuries later, another Hebrew boy, trained at the dishonored town of Nazareth, propounded a system of morals, whose splendid purity outshines the glory of all other philosophies, and ended his brief but noble life upon a Roman cross.

His system did not die with him. The instrument of his shameful death became the symbol of faith in his Divine philosophy, and though the imperial legions destroyed the temple and the city of God, in three centuries the Roman eagle nestled beneath the Christian cross, and Constantine raised the doctrines of the despised Nazarene to the throne of the Cæsars!

In the sixth century, Justinian, the Roman emperor, codified the Roman law into the famous *Corpus Juris Civilis*, upon whose frontlet he inscribed these memorable words: IN NOMINE DOMINI NOSTRI JESU CHRISTI!

Without attempting to trace the contributions to the Roman law of the Mosaic and the Christian systems, it will suffice to say, that skepticism cannot fail to accredit to both, much of the refinement and elevation it acquired in its later stage of development. Indeed, traces of both may be found, even if the inscription placed by the imperial hand upon it, and the Christian culture of two centuries prior to the publication of the *Corpus Juris Civilis* would not be conclusive. Strange would it be, if the Bible, which was revolutionizing the whole European mind, had failed, under imperial recognition for two centuries, to make its deep impression upon a code dedicated to the world in the name of its Divine Author.

In truth, such an influence was natural to the Roman mind. Rome was ruthless to her foes, but liberal to her colonies; and gathered for her own internal polity, as well as for her imperial rule, all the light which the vanquished could throw upon the science of law.

In her history as a republic, we find that she gathered from the laws and customs of the Italian nations she subjugated, materials for that branch of her jurisprudence destined to play an important part in modern law. Generalizing common principles from these various systems, she set these down as according to the *communis consensus* of all nations. "That law," says Justinian, "which natural reason appoints for all mankind *vocatur jus gentium quasi quo jure omnes gentes utantur.*" (Inst. of Just., Lib. I., Tit. II., Sec. 1.) And so Mr. Maine says: "Some common characteristic was discovered in all of them, which had a common object, and this characteristic was classed in the Jus Gentium. The Jus Gentium was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes." (Maine Anc. Law, 48.)

If Rome was wont to gather light in her rude and barbarous infancy from the tribes of Italy, as indicative of right according to the common sense of mankind, could she fail, in the stage of her advanced national life, when recognizing the Sacred Book as the word of God, to take the doctrines it taught in morals as the real right, as the absolute justice, because revealed by Him? It is impossible, therefore, to deny or ignore the powerful influence of Christianity upon the later civil law.

But, you will now ask, what had this Roman law, in its ultimate state, to do with the rude common law of England? The answer is of historic interest.

The ancient Briton was heathen. Rome fastened its power upon the British Isle for four centuries, and planted in the soil of our fatherland the seeds of her fruitful civilization.

We may not be able to trace the distinct effects of Roman influence upon the original Briton. But from the nature of things, those four centuries were not fruitless of consequence to the barbaric tribes of England. The foot-prints of extinct beasts in the rocky strata of the globe prove their former existence; and so we may discern the impression of a now extinct civilization upon the institutions and laws of a country, though the steps in the history and the very mode of its influence may be beyond the reach of our analysis.

But before the Briton expelled the Roman, the Roman, converted to Christianity, bore the seeds of the new faith to the Island.

The Saxon and Dane invade, and each leaves the influence of its presence on British history—the Saxon in predominant degree. The conversion of the Saxon to the Christian faith was completed in the seventh century.

Alfred the Great, in the ninth century, is said to have embodied Saxon institutions in written forms; and his *Dom-boc*, supposed by Blackstone to have been lost, has been exhumed by the record commissioners in the "Ancient Laws and Institutes of England," under the title of "Alfred's Dooms." (Vol. I., pages 45 to 101. See 1st Turner's Ang.-Sax., 474.)

In this *Dom-boc*, Alfred introduced the Decalogue,—that eternal *jus* for all time and all peoples; the Golden Rule; and the 21st, 22d and 23d chapters of Exodus. And no one can read these chapters without perceiving germinal traces of the English law of homicide and of trespasses, and especially of the luminous and celebrated judgment of Lord Holt on the law of bailment, in the leading case of Coggs *vs.* Bernard.

But the Norman, in the eleventh century, by the victory of Hastings, engrafted the feudal system, the basis of British land law, upon Saxon institutions.

Thus we see of what a mixture our parent jurisprudence is composed of the customs and laws of these several northern

barbaric tribes. In the quaint language of Lord Bacon, in *a proposal for amending the laws of England:* "It is true, they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs. And as our language is so much the richer, so the laws are the more complete; neither doth this attribute less to them than those that would have them to have stood out the same in all mutations; for no tree is so good first set as by transplanting." (2 Bacon's Works, 230.)

Now, while I do not doubt, from the facts already stated, that the Roman law had, even before the conquest, infused some of its refined spirit into English law, yet we are not left to conjecture its influence at a later day.

Bracton, (in the reign of Henry III.,) in the thirteenth century, published his great work, *De legibus et consuetudinibus Angliæ*, the fullest and most complete of the earlier works on the common law. In it are to be found, not merely traces, but whole passages, taken without any statement of their source, from the works of civilians; and he has cited maxims and rules in respect to law and practice, to be found in the imperial and pontifical jurisprudence. (1 Reeves' History of English Law, 531.) And Mr. Maine has remarked, in respect to the "plagiarisms of Bracton," "that an English writer of the time of Henry III. should have been able to put off on his countrymen, as a compendium of pure English law, a treatise of which the entire form and *a third of the contents* were directly borrowed from the *Corpus Juris*, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence." (Maine Ancient Law, 79.)

But this point has been more fully examined by Dr. Carl Guterbock, of the University of Kœnigsberg; and it has been shown that Bracton's work is not only saturated with the maxims and principles of the *Corpus Juris*, but that large and uncredited quotations from Azo, a civilian of Italy in the twelfth century, have been introduced as a part of the common law of England—a fact seemingly unknown to Reeves when he published his history of English law in 1787, and even to Mr. Maine, in the full extent; and for which we are indebted to the industry of the learned German professor. And he gives pages in parallel columns, of Bracton, the common law author, and Azo, the civilian, on the "acquisition of property," in which there is almost identity in language. (Bracton and his Relations to the Roman Law.)

I do not think Bracton's so-called plagiarisms are an enigma. In the civil law, there was one expression, which was always hateful to the Saxon freeman: *Quod principi placuerit, legis habet vigorem!*

The will of a king never had the force of law, under the institutions of the Anglo-Saxon race. The civil law was the law of the alien. The canonical law was the law of an alien priesthood. The British island was ever a foe to the power of the stranger, and jealously opposed the ingress of his law.

But the enlightened jurist could look through the prejudices of his race and his country, and discern the wisdom and equity of the refined and profound civilian. The rights of property, regulated by a well-digested jurisprudence, which had gathered into itself all the moral principles of the Pagan and Christian systems, must be as well adapted to English society as to Roman society; and, hence, whenever they did not conflict with English polity, and were in accord with the highest ideas of right and justice, Bracton and other common lawyers might well engraft them on English jurisprudence, and commend them to the sanction of the lawyers of the realm. But to do so, it might be necessary not to prejudice their adoption as English law, by notifying the source whence they were obtained.

You will find that the obligation of Bracton to the civil law in the law of "Alluvion" was fully recognized in the House of Lords by the opinion of Lord Chief Justice Best, in Gifford *vs.* Lord Yarborough, (5 Bingham, 161,) with the sanction of the Lord Chancellor Lyndhurst and Lord Eldon.

It is thus obvious that for the last six centuries the civil law has infused its life-blood into the common law of England.

But the civil law has had a more powerful and disclosed influence upon the equity department of British law.

The Roman ecclesiastic was from an early period the keeper of the royal conscience, and held the great seal in the chancery. The canonist held the ecclesiastical court for causes of marriage, divorce, &c., and in ordinary, for cases of wills and administration.

In these branches of judicial procedure, the ecclesiastics openly referred to and rested upon the more refined and discriminating views of the civilians, and drew largely from that part of the *Corpus Juris* to which I have referred under the name of the *Jus Gentium*. And so operative has the civil law thus become, that despite the early struggles of Lord Coke as the champion of the common law, and of Lord Ellesmere as that of the equity law, the two systems in our day draw mutual strength from each other, in a co-operative and harmonious administration of real right and justice; and reform in England is now directed to the merger of the two in one jurisdiction.

And it was under the same liberal views that, as England became more and more a great commercial nation, Lord Mansfield broke away from the crude common law notions of contracts, and adapted its procedure to the universal needs of

the commercial world, by the development of a system of law applicable to mercantile contracts and private international relations. And for this purpose he looked abroad for light; and discarding the narrow territorial limits of his own kingdom, made the customs of merchants throughout Christendom the law-merchant of England, upon the broad basis of right and equity, and a comprehensive commercial policy with all nations.

But the civil law accomplished another great result in respect to another branch of jurisprudence.

Hugo Grotius, born in Delft, Holland, in 1583, conceived the necessity, in the growing activity of international relations, of defining by a code the laws which should regulate the intercourse of nations in war and in peace.

But what law could govern the nations? Between them, there is but one arbiter, the *ultima ratio regum*, the wager of battle.

He conceived the idea, that as God had constituted society for man; as the nations were severally ordained for this great duty; as all, though separate, were not insulated, but must be bound by the one bond of a common humanity, there should be a law recognized as controlling these international relations. The law of God, or that based on common consent, must be the basis of such a system. The law which was just between men, would in the main be just between the corporate bodies of men, the representatives in separate nations of the individuals comprising each.

He looked for light to the revealed word of God, and deduced important principles from the *Jus Gentium* of the civil law.

This last, as we have seen, was the recognized rule of right between men, deduced from the institutions of the Italian nations. The *prætor peregrinus* administered it between alien litigants, or between an alien and a Roman citizen, as more just for those parties than the Roman positive law, which was held to be the rule only for contests arising between Roman citizens.

This was a fruitful idea. The *Jus Gentium*, the law of the nations, embodying the customs, institutions and rules to which various nations have assented as right and just, was thus assumed to be a right rule *between* the nations. And thus the common sense of mankind in all ages, as well as the moral code of the word of God, has come to be the international law of the world; or the *Jus Gentium* has become the *Jus inter gentes;* the law of nations the law between the nations.

Time forbids me to do more than refer to that important branch of the law known as Private International law, or the Conflict of laws. The great works of Mr. Justice Story and of Dr. Wharton on this branch have won merited honour to American jurisprudence.

It is that system of rules which should regulate rights arising under the diverse laws of different nations. No law common to all has been or can be enacted. The decision of strifes thus occurring can only be made by referring to the principles of natural law, and resting on the basis of natural justice and right.

This review will not be in vain, if it inspires you with a purpose to drink deep from these ancient and modern well-springs which supply our jurisprudence. No man can be a master in the law who does not, by the study of comparative jurisprudence, come to understand that all law must be the result of right reason, deduced from the best thoughts of all jurists, and from the fountain of all justice—the will of God. And I may here venture to suggest, that the jurist of the common law would find an enlarged view of that system by a sedulous reading of the civil law; as every civilian would derive great benefit from the study of the common law.

We have seen that the law is a science, which is the result of historic development. All eras of the human race have paid tribute to its stores. Our law is the accretion of the ages. The Jordan and the Ilissus, the Tiber and the Thames pour their united currents into the channel of our jurisprudence. Resting on the law of nature, which is the law of God, it gathers from Sinai and Olivet, from the Acropolis and the seven-hilled city, and from all the laws of all the nations, the materials with which to enrich, adorn and expand its beneficent influence and power. It does not, cannot, stand still. It moves while we speak. With an earnest purpose to do your whole duty, you of the rising generation may and should greatly improve the legal science, and make its ministry the means of the largest benefit to our country, by causing our jurisprudence itself to be the collected sense of justice of all the ages, and of all laws, human and Divine.

This rapid review would be inexcusably imperfect, were I to fail to refer to one branch of the legal science, which is peculiarly American: CONSTITUTIONAL LAW.

This is the science of the relation between the government and the citizen, in respect to which America claims to have made important improvements. Upon this subject I must consult brevity, and condense into propositions what I have to suggest.

Political science is of historic growth. Government, in some form, is coeval with society. It is the organic force of society, essential to its well-being as the school of our race.

Man is that unit of society, who is under responsibility to his Maker to work out his own destiny. Society is the divinely ordained means through which he can best do this; and government is the divinely ordained means through which the social

force is organized to preserve peace and order, to secure the right and prevent the wrong.

Society and government are divinely ordained trustees for man's use and development. But the *form* which the social force shall assume is not divinely ordained nor prescribed, but "man is left to perfect what the wisdom of the Infinite ordained as necessary to preserve the race."

Constitutions, or the manner of organizing the social force, are left for man's contrivance. Without government, society would be anarchy. Between these two, God has ordained the existence of government; but there is no *jus divinum regum*, nor *jus divinum populi*. Man must himself constitute the social force, or government, because God has ordained it shall exist, but without prescribing its form; and man is under Divine obligation to see that government is so organized as to promote and not impair, much less destroy, his capacity to accomplish his destiny according to his duty to his Divine King. It is not only, therefore, man's *right*, but his *religious duty*, to secure the best government for the free and full use of his God-given powers, for his high development as a creature of God.

This is the American idea, whose germ you will find in the works of the English writers of the seventeenth century, and again and again asserted in the public papers of our revolutionary era. And as our fathers threw into written forms this cardinal principle, and arranged the distribution of the powers of government in the various State constitutions, beginning with the Virginia bill of rights and her constitution, dated June 29th, 1776, we find the first canon of American constitutional law, in the adoption of *written* constitutions to organize governments, and to define, by grant or limitation, their powers, and the functions of the various departments.

We find the germ of written constitutions, however, in Magna Charta, in the thirteenth century; in the Petition of Right, in the reign of Charles I.; and in the Bill and Declaration of Rights at the settlement of the monarchy, in 1688–9.

But there is a still more remarkable principle in our American law, of which we have the germ in the last provision of Magna Charta, in these words: "We have granted to them, for us and our heirs, that neither we nor our heirs shall attempt to do any thing whereby the liberties contained in this charter may be infringed and broken. *And if any thing should be done by any one contrary thereto, it shall be held of no force or effect.*" (1 Reeves' Hist. of Eng. Law, 291)

This statement is the germinal idea, which, ever since the case of Marbury *vs.* Madison, has become a political axiom in America; that a constitution is supreme and paramount to all acts of all departments of government; and that any such act, repugnant to or inconsistent with the constitution, is null and

void, and by the courts "shall be held of no force or effect." (1 Cranch, 137.)

This supremacy of the constitution-making power over the acts of government, whether legislative, judicial or executive, lies at the foundation of our political law, and is in its full force the greatest American discovery in the science of government.

The authority to make constitutions is held to be in the body politic; and although in practical statesmanship there must be an initial point assumed, as the alternative to anarchy, for the composition of this body politic; that is, a determination of what persons shall have voice in its action; yet, after settling that question, as did Aristotle, (Politics, B. III., chapter 1,) that the *mass of citizens* shall constitute the body politic, the logical result is reached; that the body politic utters its sovereign will, calls government into being, organizes its functions, defines and limits its powers, and declares to this its creature by its creative fiat: "Thus far shalt thou go, but no farther!"

"The powers that be" are two-fold; original and derivative. The sovereign authority of the people is original; that of government derivative. The former is paramount; the latter subordinate. The one is creative; the other is created: the one delegates; the other is delegated: the one is principal; the other agent.

This principle rejects wholly the idea, that any government is divinely entitled to a servile obedience, or to any obedience, where itself violates the law of its creation, or sets at naught the charter of its authority. The king, the aristocracy, the democracy which obeys not the constitution under which it derives and exercises power, so far from having claim to a *jus divinum*, or to a supremacy as the "powers that be," is a usurper, defiant of the fundamental authority of the people, the true *jus divinum*, because the primary and fundamental "powers that are ordained of God." The author of Paradise Lost, in his memorable defence of the people of England, has vindicated the doctrine thus stated, which has become an axiom in American polity.

But whence did our fathers deduce the materials for constitutions as the fundamental law? Whence will you draw the weapons for your defence of constitutional liberty?

I answer, as I have suggested in an earlier part of this address, you will find them in the history of our race for one thousand years! Your constitution must express the institutional liberties of your people; must grow out of the institutions of the British-American home; must respond to the freedom whose fires have burned brightly upon the hearthstones of the Saxon, the Norman, the Celt and the American for ten centuries of struggle against extinguishment by despotic power in every form of violence and usurpation. The battles of our race for

liberty make the history of its triumph to be written in blood-lines; but they assure to us the faith that we can never lose our freedom, if we are resolved never to surrender it! The security of our liberties is in the transmitted instincts of thirty generations of brave men, which have become a part of their very nature, and cannot be uprooted by any human power. The foundation of all our constitutions must be laid in these institutions of liberty, which are the inheritance of the British-American race.

You must go back to Saxon England to find the Wittenagemote, the germ of representative government; the Shiregemote, the germ of local government; to the Saxon Kingdom for the germ of an elective executive; and to the laws of Alfred for the jury trial, that impenetrable shield of personal liberty and of property rights. You will find the conquered Saxon demanding of William the Norman the laws and customs of his Saxon fathers, and that the conqueror yielded them. (1 Reeves' Hist. of Eng. Law, chaps. 1 and 2, p. 57.) You will find Magna Charta, with its security of person and property against royal power, *nisi per legale judicium parium suorum vel per legem terrae*, granted and regranted in every reign, from John to Henry VII. You will see, in the struggles between the Saxon people and the Norman king and nobility; in the contest between the law and the chancery; in the conflicts of the popular religion with the foreign priesthood; in the jealousy by a free people of the feudal despotism, the elements of "that action and counteraction, which, in the reciprocal struggle of discordant forces in the political and physical world, draw out the harmony of the universe." You will note that the Saxon commons were at first called to consult with the barons as a part of the parliament, then consisting only of one house, but became a separate legislative body in 34th Edward I., when it was enacted that no tax should be laid upon them without their consent, (nearly six centuries ago); that with this lever of the money power to check the sword in the royal hand, (a check recently placed upon presidential power by the American commons!) and to put limits upon the kingly administration, the Saxon freeman had, before the end of the fifteenth century, established these cardinal political doctrines: that all tax power must begin with the commons and could not be exercised but with their separate consent; that no law could pass but with their assent; that no man could be arrested but by judicial warrant, (the germ of the *habeas corpus*,) and must then be speedily tried; that he must be tried by jury, and could only be condemned by the unanimous verdict of his twelve peers; and that ministers of the crown were liable to impeachment, to criminal trial and to civil action, for all their acts, despite the colour of royal permission or authority. (Hall's Const. Hist., chap. 13.)

The germ of all liberty is in the freedom of the person and of his property, which is the equivalent into which he has converted his muscle, brain or moral force, (and therefore as much and as personally his own as the original force was a part of himself,) from all power except his own, or that of those having an identity of interest with him. And the germ of all the assurances or muniments for this liberty, is in the retention of ample governmental authority in the hands of those whose liberty, lives, or property, may be in peril from any power whatever.

It was in the continual assertion of these fundamental rights, and of this independent power in the commons as their assurance, which made the English Revolution of the seventeenth century result in the constitutional monarchy of 1689, and has brought about that transformation of the English Government during the last half century, and specially under the influence of the reform bill of 1832, into a monarchy where the real executive authority is a cabinet, directly responsible to the representatives of the people; and the real authority of the kingdom is in the House of Commons.

Now, if you will examine our colonial history you will find that each colony, a commonwealth in embryo, had all the traditions of the fatherland; all the principles for which the battle had been there fought and won during the seventeenth century; and were, therefore, really unitedly, in the Continental Congress of 1774, to declare in favour of those ancient and indubitable rights and liberties, which were the heritage of all Englishmen, whether in the mother country or in the colonies. And you will find in every bill of rights, and in every constitution adopted in the States, the same cardinal principles asserted, and like powers for their defense secured in the governmental organism.

Happily for popular liberty, there were in the colonial history, the institutions upon which to establish a federative republic of free and self-governing commonwealths; furnishing a basis for local self-control to each, and a security against external force, and from internal wars, by a union of all in a federal association for the common safety and the general welfare. And in the Federal organism, balanced against the several State organisms, we find such a distribution of powers and influence, as to check the unbridled domination of numbers, as well as the oligarchic dominion of States, by requiring the concurrent majorities of mere numbers and of States, represented respectively in the House of Representatives and in the Senate, in order to the passage of a law. And many of the British checks upon executive power, which, if faithfully used, will conserve our liberties, have been adopted in the federal constitution.

It is sadly true, that despite all the contrivances of our fathers, the federal system has failed to realize all the hopes of its

founders. The spirit of centralism has seduced men at the mad bidding of fanatical sentiment, to extend the domain of federal power to the detriment of the reserved rights of the States. And this has brought about results upon which the true friend of liberty must look with despondency, almost akin to despair.

You have seen in this city the venerable chief justice, wearing the ermine of the highest court in the land, defied by the military, when he threw about the person of one of your citizens the sacred writ of *habeas corpus*. You have seen your own State legislature invaded, its members imprisoned and its organization broken up. You have seen the governments of eleven States superseded, and military governments established over them by authority of Congress. You have seen the writ of *habeas corpus* suspended by order of the President in time of civil war, and the same thing done by him, under authority of Congress, in time of peace. You have seen the question of State government determined by the President, and the whole State power placed at the mercy of his decree. You have seen the federal soldiery standing at the doors of State capitols as the arbiters of their legislative organization ; and the civil subordinated to the military power. And these things done in the teeth of constitutional prohibitions and limitations, and in violation of the sacred and institutional principles of British-American liberty!

But, gentlemen, I have not despaired ; I will not despair of this Republic of confederated commonwealths. They created the Union by their concurrent compact ; and they can save it by their concurrent action. Already the mighty power of public opinion has dictated a reversal of many of the errors, and an abandonment of the worst measures of the past decade. And if we are faithful to the institutions of our freedom; if the legal mind of the country will stand true to the transmitted traditions of our ancient liberties during these ten centuries; if, recurring to the fundamental principles on which our federative system rests, we maintain the complete autonomy of the States, as an essential and permanent part of our organic law, and steer wisely between the national centralism of power on the one hand, and any tendency of the States to deny needful authority to the Federal government on the other; if we can check corruption by limiting power, prevent decay by vitalizing the organic forces of the Constitution, and purify the administration by controlling patronage, we will save the Republic, and what is better, will through it perpetuate our liberties. But if centralism shall eat out the powers of the States as the independent creators of the constitution, as the parties to the federal compact, and as essential factors in the government, then the days of the Republic and of liberty will be numbered, and the

free citizens of these States will become the subjects of an imperial despotism.

But I forbear to say more on this tempting subject.

You will see, gentlemen, from what I have said, that there will devolve on you the study of jurisprudence in its two-fold aspect, of the legal and the political science. Be assured, as each is historic and progressive, neither has reached, but both are very far from, perfection. Both will require, in your day, the skilful amendments and adjustments of wise and comprehensive statesmanship. I trust I have said enough to stimulate you to a devoted study of this great historic science, which, taking hold, as it does, of all the relations of men in social union and under government, is the most important practically to human happiness of all the human vocations.

In the past, you have great names to cheer and stimulate your laudable ambition. In this State, the name of Taney stands like a tower of majestic strength and beauty to beckon you onward. In extraordinary forensic ability and eloquence, your Pinkney and your Wirt had scarcely any peers; and in the later time, the fame of your McMahon, your Johnson, and others, have made the bar of Maryland distinguished in the whole country. The living lights of your bench and bar, of whom delicacy forbids me here and now to speak, except in grateful remembrance of their noble courtesy and generous consideration to me, when, as a stranger, some years ago I came among them for a short residence, afford you splendid examples of learning and ability in your profession, and of diligence and honour in its practice.

Young gentlemen, let me beg you to take no low or unworthy views of your calling. I do not disparage the glorious privilege of making a competent independence by your honest industry. But let not this lead you to a love of mammon as one of the objects of your great mission in life. Do not degrade the noble aspirations for moral achievements, to a sordid and grovelling devotion to the accumulation of wealth. Seek *first* the moral rewards of professional labour and genius, and be sure its material recompense will be added unto you.

In the needed reforms of the law, it will be yours to take part. This should be done by avoiding as well a blind adherence to ancient systems, as a too ready adoption of every new device which promises amendment. Many think every thing good because old, and everything evil because new; others directly reverse these propositions. Neither is right; both are in error. Change is not reform; nor is a blind conservation of the established order of things, wisdom. You may derive a profound canon for conservative progress from Lord Bacon. He says: "I dare not advise to cast the law into a new mould. The work which I propound tendeth to pruning and grafting

the law, and not to ploughing up and planting it again; for such a remove I should hold, indeed, for a perilous innovation."

But above all, because inclusive of all, let me beseech you here, at the altar of your Alma Mater, and in the presence of God and of this noble audience, to prepare, by solemn consecration, to advance the right and destroy the wrong; to promote justice and defeat iniquity; to defend the oppressed and assail the oppressor; to protect freedom and oppose tyranny; to uphold the institutional liberties of your people and to guard them against all usurpation; and so, keeping your hands clean, your heart pure, and your mind nobly aspirant to achieve these high purposes, may you serve God, honour your country, do good to your fellowmen, and thus merit this honourable epitome of a well spent life:

"A TRUE GENTLEMAN, AN UPRIGHT CITIZEN, A SINCERE PATRIOT, AND A CHRISTIAN LAWYER!

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