

The American Political Science Review

VOL. XXXII

FEBRUARY, 1938

NO. 1

FROM PHILADELPHIA TO PHILADELPHIA*

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From Philadelphia in 1787 to Philadelphia in 1937 our minds turn back and forth tonight, to pay tribute to the constitutional contributions of the Fathers and to inquire into the constitutional conduct of some of their sons. If we praise the Fathers as hard-headed realists, we may invoke their example to justify a propensity for realism among ourselves. They were creators. We seek to be scholars. Their aim was to build; ours is to understand and to evaluate. Toward them and their building we may bow in deep piety, but without obligation to let awe or reverence obscure our glance at the work of their successors.

Happily, too, our piety need not dim our eyes in looking at the work of the Fathers. Without falsity of fact or of sentiment, we may appraise their achievement. We need not think of them as demigods or as men who met to lay their fortunes on the altar of their country. We can accept to the full the view that their design was to create a government that would serve the interests they had most at heart. If they assumed that what would be best for themselves would be best also for the general good, in this they were not unique. Even today, men sometimes fuse the special and the general, as perhaps some papers on our program may prove.

Man need not be noble to be wise, unwise as it may be in the long run not to be noble. The advancement of special interests may at a given time conduce greatly to a wide general interest. The wisdom of the achievement of 1787 may be assessed by an evaluation of results without inquiring whether it was the fruit of sacrifice. The results, of course, may be overestimated. *Post hoc* and

* Presidential address delivered before the American Political Science Association at its thirty-third annual meeting, Philadelphia, Pennsylvania, December 27, 1937.

propter hoc are not the same. I do not attribute to our Constitution or to our form of government all the good things that have come to us in a hundred and fifty years, as some foolish and flowery folk are wont to do. I do not suggest that our form of government is superior to that of our English brethren across the sea. I know that it is far from ideal, as are most things that I know. Yet I am firm in the judgment that it fully meets high tests of statecraft. No words are needed to adorn the tributes inescapably rendered by the familiar facts. The Fathers may rest their fame, both upon the survival and evolution of the system they devised, and upon a comparison between what the Constitution created and what it destroyed. Happily when we reckon gains and losses, we can count the loss as part of the gain.

By the adoption of the Constitution we lost thirteen small, almost independent nations which had struggled none too sacrificially in a common cause that geography, a great leader, and foreign aid brought to a successful end. This successful end was followed by a failure to make a new successful beginning. Thirteen commonwealths—and in addition my own rebellious Vermont that was independent in fact though not in law—fourteen commonwealths went their almost separate ways with more thought of what each had in isolation than of what together they had in common. Our early *e pluribus unum* had in it more of *pluribus* than of *unum*. The jealousy and selfishness of separate states afforded nothing to be proud of. We may explain and excuse and forgive, but we cannot be proud. So far as I know, we have never had local or national celebrations in honor of November 15, 1777, July 9, 1778, or March 1, 1781. Only by diligent research did I discover that these are the significant dates in the initiation and ratification of the Articles of Confederation.

We celebrate the Fourth of July, and we have Sons and Daughters of the Revolution who seek to guard us against further revolution, or even evolution. Causes may be celebrated even though they are lost causes. There are Sons and Daughters of the Confederacy. But there are no Sons and Daughters of the Confederation, unless perhaps because of some of their ideals we should so classify the late but unlamented American Liberty League. Some one said of Gladstone that his conscience was not his guide but only his accomplice. Many there are who enjoy a similar companionship with the Constitution. For guidance, they seem to pre-

fer the Articles of Confederation. Yet they do not emblazon the Articles on their banners and they do not point with pride to those who fought hard to save the Confederation from its fall. There is no hero of the lost cause of the Confederation to compare with Robert E. Lee of the Confederacy.

Government under the Articles was a slim and pretty futile performance. Its fortunate feature was that it was so unfortunate that it cried aloud to Heaven and to George Washington and Alexander Hamilton and others for something drastic to be done about it. Something was done about it, and that is what we are here to celebrate. Whether we look back from Philadelphia in 1937 to Philadelphia in 1787 or look back from Philadelphia in 1800 to Philadelphia in 1780, the contrasts pay the same tribute. To me, the miracle is not that something was done about it, but that the particular something was done so wisely that the Framers have proved themselves builders not merely of a temporary bridge but of broad avenues beyond that are adequate today if only we have the wisdom to follow where they lead.

As one muses over the miracle, one must wonder what the Framers would think today if they could return and receive the homage that we pay them and see what we have done with what they began. They might be amazed to find that the structure they designed is still the formal framework of our institutional life. They ought to be amused to discover that to some of their descendants this framework seems so sacred that the thought of change is impious. For they indulged in change, they planned for change, they provided the way of change. They and their friends agreed upon further change as the price of securing the immediate change they sought to bring about.

More important still, they left open the way of change by what they left undone. In framing their grants to the new national government, they contented themselves with marking great outlines and designating important objects, leaving to the future the deducing of minor ingredients from the nature of those objects. It was a Constitution they created, not a narrow prison crammed with the prolixity of a legal code. So Marshall tells us, and so in his time in some far-reaching ways he helped to prove true. If in other ways he sometimes forgot that it was a Constitution he was expounding, he but exemplified a human frailty against which we must be ever on our guard.

Perhaps the Framers would be more pleased than surprised that their instrument has so long endured. They left it so flexible that future generations could adapt it to their needs. The strain of adaptation could hardly equal the strain of creation. The Fathers were not men to let themselves be strangled by the dead hand. They were not slavish and abject worshipers of precedent. They were creative architects. They knew that the Articles of Confederation declared that the loose union created by it should be perpetual and that no change should be made therein except by the vote of Congress and the ratifications of the legislatures of all the thirteen states. They knew also that such a strait-jacket left little room for the expansion essential to effective national life. So, boldly they disregarded the Articles and proposed a new way of securing a new and wholly different plan of government. They acted, not as lawyers tracing a chain of title, but as statesmen dealing with a crisis.

Had such boldness come from men wielding political power, it would have raised grave questions of legitimacy. The Framers, however, were without power. They had only judgment. They were impotent to impose their will on anyone. They could only propose their wisdom and hope it might prevail. It was not they who ordained and established. Though they had credentials from their states, their function was not official. Thus their infidelity to the existing legal order fell short of treasonable indulgence in the rebellion they would instigate if indispensable to the formation of the new union. With Congress and the state legislatures competent to prevent it, it was no great blot on the legal scutcheon that ratification was to be by conventions. What was really unconstitutional was the cancelling of the requirement of unanimity in state ratification. There was offered in the convention some high political theory to make nine equal to thirteen, but the stiffer canons of law and mathematics made the enterprise precarious even for such a flexible wand as political theory. There was a season when North Carolina and Rhode Island were the victims of secession. Not until that season ended can we regard the Constitution as constitutional. In the interim, there was no Supreme Court to interpose without impugning its own paternity.

Philadelphia has often been called the birthplace of the Constitution. It would be gracious of a guest in Philadelphia to endorse the claim, but regard for truth and legality forbids. The Constitu-

tion was born in Congress and in the legislatures and conventions of thirteen states. Only by wrongly regarding the Framers as usurpers and dictators can Philadelphia claim to be the birthplace of more than a suggestion. Yet Philadelphia has other claims to similar fame. It was the sole birthplace of the Declaration of Independence. It was one of the multiple birthplaces of the Articles of Confederation. And if the Constitution is what the Constitution does and what is effectively done in its name, Philadelphia may claim to be the birthplace of new articles of the Constitution every time that a Supreme Court decision turns upon the fact that Mr. Justice Roberts has made another shift. Yet this of course is true only if the Supreme Court or the Justice with the casting vote exercises something that could be called power. Unhappily for Philadelphia, the possession of power is officially disclaimed.

As today it is the vote of the odd man that tips the scales in crucial constitutional conflicts, so in 1787 and 1788 it was the votes of the men in the ratifying conventions that tipped the scales in resolving whether we should have a new strong government or relapse into futility before venturing to try again. The cities which were hosts to these conventions will do well to celebrate this sesquicentennial season on their several appropriate dates. They will do well to study the constitutional battles between opposing parties in as detailed and objective a way as military men study the battle of Gettysburg. For in various states it was a hard tussle to win for general measures. To open argument on the merits were added skillful political strategy and tactics. If to the appeal to reason was added the appeal to interest, the activity of interest was not confined to either side. The appeal to interest is prevalent and potent even in 1937. Economics is the stuff of politics in campaigns, in legislation, and in executive acts. Those who think it vulgar for farmers or laborers to exert political pressure to gain desired ends may find comfort in remembering that this is in the best aristocratic tradition. The well-born and well-to-do may proudly claim that they have served as teachers and leaders of the masses.

New Hampshire was the ninth state to ratify, on June 21, 1788, and she should have a special celebration. Yet whatever the Framers said about nine states being enough, the New Hampshire vote would have been ineffective had not Virginia and New York

later acceded. Whether really legal or not, the Constitution can count its actuality from the narrow squeeze in Poughkeepsie on July 26, 1788. North Carolina and Rhode Island could not long endure their loneliness after eleven seceding sisters had left them. The seal of ultimate legality was placed upon the Constitution by their recalcitrant and reluctant hands. Political scientists with their sordid sense of realism may crown New York as the final co-donor of the Constitution, but lawyers with their nobler feeling of respect for what is nominated in the bond must give the palm to Rhode Island. She it was who first conferred constitutionality upon the Constitution a year and a half after the dying Congress under the Confederation had started the new electoral machinery and a month after the new government had fully started on its way.

In nothing did the Framers show more political skill than in devising the plan of ratification. I will pay no tribute to their high political theory in asserting that legislatures were incompetent to ratify and that conventions were the only true organs that could speak for the people, for I know that they cared more for the people in theory than in fact. Whether they fooled others, some of them did not fool themselves. Gorham and King and Randolph put forth hard-headed practical reasons for preferring conventions to legislatures. The new system would excite the envy of local demagogues who would be strong in the legislatures. Clergymen in Massachusetts could sit in a convention but not in the legislature. They were generally friends of good government. Their services were valuable in forming and establishing the constitution of Massachusetts. Legislatures have two houses and a lot of business. A convention is a single body concerned only with a single question. Legislators would hate to lose power to the new Federal Congress. Members of conventions could contemplate impartially without the intrusion of selfish aims. So it goes in Madison's Notes. And perhaps the high political theory added a moral insulation that helped some minds to keep their left lobe from being too aware of what their right lobe was doing.

How well conceived in fact if not in theory was the mode of ratification is established by its triumph in the face of great apathy and hostility. Only in conventions could the requisite ratifications be secured. In five state conventions, the vote was so close that a few changes would have meant defeat. The roll of such necessary changes is as follows: in Pennsylvania, 12; in Massachusetts, 10;

in New Hampshire and Virginia, 6 each; and in New York, 2. Without New York and Virginia the new union would have been impossible; and in these two states the result depended upon eight votes that did not go the other way. In Massachusetts there were 24 clergymen in the convention, presumably friends of good government. The majority for ratification was 19. Rhode Island's ultimate seal of legitimacy had the purifying power of a vote of 34 to 32. All in all, it was a near thing, as Wellington more emphatically said of Waterloo. It is familiar history that the so-called ratification by the people was in fact ratification by a selected few who not infrequently did not represent the views of the majorities that chose them and who in some cases violated instructions. Had the result been something to be deplored, one might feel secure in saying that it was obtained only by all sorts of wire-pulling. With the result such as it was, the fitting comment is that it was obtained only by the superb exercise of masterly statesmanship.

Of course ratification was conditioned on substance as well as on procedure. The organization and powers of the new government had to be so planned as to appease opposition as fully as was consistent with the major ends in view. The struggles in the convention were chiefly over political mechanism rather than over the functions of the national government or the curbs upon the states. Mr. Irving Brant, who is adept at timing constitutional paces, has made clear how closely quarrels over powers were enmeshed with quarrels over control. Delegates feared wide powers when they feared that their foes would govern their exercise. They sought to insure themselves against sweeping measures, not by denying power, but by devising composite methods of representation and of legislative organization that promised safeguards against excessive and unwelcome use of power. The few restrictions on the commerce and taxing powers served to emphasize the general amplitude of the grants. The generous necessary-and-proper clause made the constitutional propriety of national legislation turn on considerations of statesmanship and not on the meaning of words.

Doubtless the Framers thought they had devised a tighter system than they had. They could hardly anticipate what strongly organized political parties would do to the electoral college or to the antiphonal disharmony of checks and balances. They could hardly foresee that national parties and nation-wide campaigns would in time inevitably make the President the protagonist in

the legislative process. If those in favor of general measures thought that their group would be in secure control of the new government, they were soon to grieve that their tenure was brief. They built a house that their enemies could live in without changing the walls. If they built better than they planned, they may have the credit of results if not of motive. To quote the familiar words of Mr. Justice Holmes:

. . . when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

Happily, but for the episode of 1861–1865, our sweat and blood have been more metaphorical than physical. Metaphoric and atmospheric is much of the effusion from other constitutional struggles, not excluding the one at the moment most vivid in our minds. On this item of contemporary constitutional history we can hardly refrain from comment, even though we meet primarily to praise the Fathers and not to bury any of their descendants. For the succession of twentieth-century judicial negatives that long cried aloud for remedy, I do not hold the Fathers responsible to any large degree. If they failed to prescribe suitable remedies, it must be said in extenuation that the needed remedies are for diseases that no one could rightly call upon them to foresee.

Of course the Fathers created an organism into which disease might enter. No design for a living can guarantee against disease. Governments must be run by mortal men. The most gifted of progenitors could not create a system that would be fool-proof or folly-proof. Surely the Fathers are not responsible because legislators and executives do not always prove adequate for their tasks. Against such inadequacies there are safeguards in the requirement of trinitarian coöperation, and there are remedies at the polls. For judicial inadequacies, there are no such safeguards or remedies. There is of course the safeguard of self-restraint, which, though more appropriate to the exercise of will than of reason, may fittingly be invoked to minimize unreason. But for remedies, there are only the cumbrous or unsuitable ones of impeachment, constitutional amendment, the chances of changes in personnel, and the pressure of public awareness of judicial misbe-

havior with threats of hostile action if new ways do not succeed to old.

The Framers must accept responsibility for conceiving of constitutional limitations on governmental power, of life tenure for judges, and of a mode of formal constitutional amendment unsuited to escape from judicial obstructiveness. In imposing constitutional limitations on governmental authority, most of our states have gone to excess in emulating the Fathers. They have too often indulged in the prolixity of a legal code. There is no appreciable dissent from the American system of limited and departmentalized government. When we turn to judicial tenure and the mode of constitutional amendment, we meet a different attitude. In devising the mechanics of these matters, our state constitution-makers have largely departed from the ways of the Fathers. In so far as twentieth-century constitutional ideals are disclosed by contemporary constitutional creations, they include an insistence upon safeguards and remedies against judicial autocracy. Most of our states favor limited terms for judges and fairly feasible methods of securing formal constitutional change.

Whether the Fathers should have foreseen the need for similar emollients in their system, can hardly be judged with confidence. They did not clearly establish judicial review over acts of Congress, though they pretty well anticipated it. They must have intended the courts to observe those provisions directed to the courts, and many of them assumed that other provisions would likewise be subject to judicial scrutiny. They did not foreclose the question either way. Marshall was not a usurper, even if he made an unjustified assumption of power. Open and novel questions have to be decided one way or the other, and the possibility of a wrong decision is inherent in the power to decide. At this late date it is unfruitful to fight over *Marbury v. Madison*. It is of more moment to inquire whether the Framers had any conception of a judicial power so plainly political in the legislative sense as judicial exercise of power has since by self-expansion become. Do we get a secure negative answer from the fact that they expressly refused to incorporate the Justices of the Supreme Court in a body to supervise legislation on grounds of policy, and that they thus denied to the Court a participation in the legislative process outside of what they regarded as the field of strict law?

This depends upon how they would draw the boundaries of the

field of strict law. Who can answer with any assurance? Undoubtedly they believed that contradiction between Constitution and statute is a simpler matter than it really is. Considerations of policy in some large sense cannot be excluded from the process of judicial law-making, whether in the field of common law or of constitutional law. Yet it was not the intellectual fashion to emphasize the point a hundred and fifty years ago. Readers of Blackstone lived in a different mental climate from that which warms or chills victims of the case method of legal study today. Civilians are prone to refer to the text a conclusion that is nothing but a gloss. Even to intelligent men a century or more ago, categories and captions contained clear-cut answers; and right and wrong, will and reason, power and judgment, creating power and furnishing the occasion for the exercise of power, might be dichotomies as sharp as black and white. Because intelligent men know better today, we must not assume that the Fathers knew better or that they were not intelligent.

Obviously our Fathers thought many things to be clear that were really cloudy. They regarded constitutional interpretation as more of a self-executing enterprise than it ever was or could be. Moreover, in their day the problems were more exclusively those of interpretation rather than of application. Today but few of the cases involve reference to the meaning of constitutional phrases. Given the issue between the parties and nothing but the text as a guide, the only possible answer is the impossibility of finding one. Surely the Fathers could not have anticipated a fraction of twentieth-century judicial self-determination in passing judgment on the merits of statute after statute dealing with situation after situation so utterly different from any that they knew and so much more complicated than any they could conceive. I for one am compelled to acquit them of any blame for failing to foresee the extent to which judicial government might run riot. Hence I must also acquit them of blame for failing to surround judicial government with some adequate analogue of the controls they deemed essential to keep other government from straying so far from dominant opinion as to invite forcible overthrow.

Before we turn to the stirring events of 1937, our Philadelphia hosts who are our guests this evening may pardon us if we give some consideration to ourselves. We profess to be scholars. We are

members one of another in a body with the high-sounding title of the American Political Science Association. It is in some ways an unfortunate name. It was presumably made in Germany, but even some of the *Gelehrten* must have accorded a different significance to *Wissenschaft* when appended to *Rechts* or *Staats* than when preceded by *Natur*.

Although our collegiate and university departments of government or political science are for the most part offshoots of departments of history, formed by the process of segmentation characteristic of worms, the historians have seldom been inclined to call themselves historical scientists. The economists have not always been so modest. The science they have sometimes claimed has been called a dismal one. Their titular transition from "political economy" to "economics" was itself a step in the direction of intellectual inflation. It suggests that we might at least stop with calling ourselves politicists rather than political scientists.

We have seldom been so pretentious in our conduct as in our nomenclature. Often when we have confined ourselves too closely to mere description of structure and organization, we have crawled too low instead of soared too high. Observation, ample and accurate, we must emphasize, for we are in a field where falsehood of fact and insincerity and chicanery in argument are all too characteristic of those who deal with affairs of state in other forums. Yet observation alone will not entitle us to any high place as followers of public affairs.

In our study of government, we must be not only accurate reporters, but analysts and critics as well. We cannot content ourselves with prattling some mythology from a legal Golden Bough. When the mythology takes the form of constitutionology, we must substitute constitutional analysis. Whatever our several tinctures of philosophical or psychological mood, we must be eager to discover how the political animal actually behaves. What the animal says is a part of what it does, but only a part. We cannot accept professions that do not accord with practice. We cannot stifle inquiry because simpler-minded folk may choose to invest the holders of office with some symbolic majesty that hedges them from humbler eyes.

For such an observant attitude toward the Supreme Court, we have the approval of the Chief Justice of the United States. In speaking before the American Law Institute, he quoted a state-

ment that "the court must be watched to see what it is doing," and then continued:

I entirely agree with that sentiment, and I have had the impression that this important duty has not been neglected. Perhaps in a perfect state there would be no court of last resort, but judges and their critics would serve in rotation in perennial reviews of each other's work, and both would thus find their paradise in a continuous process of restatement. Short of the realization of that dream, your experience in this Institute may demonstrate the advantage of matching the uncertainties of judges with the uncertainties of law professors so that both may find relief.

This does not give undoubted assurance that judges welcome the coöperation of their critics, but it is high authority that the critic has his rightful place in the administration of equal justice under law.

There are several angles from which to view the work of the Supreme Court of the United States. There is the precedent-matching game to see how well the cases square with each other. Most of them fit together nicely if you bend an intellectual corner here and there. Between two statutes or two situations there is always a difference which becomes enough of a difference to make a difference whenever the judgment of the judges so resolves. Obviously, lightning rods are pointedly different from ice-making machines, as the tacit authors of the silence of the commerce clause must by hypothesis have clearly seen. Otherwise, they could not have dictated the two opposite results announced by Mr. Chief Justice White in marking the line of state power over affixation of materials brought in from sister states. Illustrations could be multiplied indefinitely. A state may retain all shrimp, but not merely unshucked shrimp. If it lets shrimp leave after their heads and hulls are removed, it must let them leave before. It makes a vital difference whether a head is on or off. The pieces of the picture puzzle fit together perfectly. And underneath are the everlasting principles which know no whimsy or caprice.

Another approach to the work of the Supreme Court is to liken the judicial veto to the executive veto and to appraise the gains and losses from judicial negatives by various criteria of legislative policy. Has the Court in recent years, as the final participant in the legislative process, been predominantly a killer of good laws or of bad laws? An all-wise man might consider the statutes that the Court has condemned and decide whether on the whole it was bet-

ter or worse to have them written off the books. Such all-wise men are unknown to me, though there may be some who have assumed the rôle. Should mattresses be made from shoddy? Should an Old Folks Home be in a first-class residential district? Should ticket scalpers be free to charge all that the traffic will bear? Should processors pay taxes to help farmers? Should subjects be taught exclusively in English in private schools? Should all children go to public schools? Should bread have its weight kept down as well as kept up? Should employers of children have free access to markets in sister states? Find the all-wise man, and he may tell you. But there are two reasons why it is either inappropriate or insufficient to judge the work of the judges by these standards.

The inappropriate reason is this. It is unfair to judge the judges by standards they are not free to consider and apply. "It is not the province of the Court to consider the economic advantages or disadvantages of . . . a centralized system." The Court's duty "is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation." The "Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." Since the Court cannot consider whether a law is a good law or a bad law, it would be unscientific and unfair for others to apply these inapposite tests to the judicial product. If this were done too widely, it might move the judges unconsciously to harbor views of policy and so be swerved from their appointed course.

Even if the judges, in their readiness to be watched, would condone unsuitable inquiry into the wisdom of the results they reach, notwithstanding wrongful ascription of such results to them rather than to the Constitution, we should be on our guard against applying insufficient tests of wisdom. It would be quite myopic to look at each unconstitutional statute singly and separately and to try to think disjunctively whether in each case it would have been better if the Framers had written the Constitution the other way. We do not thus regard those provisions of the Constitution that raise no questions in the courts. The compromises of the Constitution were not induced by ideals of abstract perfection. They came from a yielding here and a yielding there of what was intrinsically

preferred, a yielding on parts in order to secure agreement on a whole that was superior to what it was to replace. No statute liveth to itself alone. The processing tax cannot be fairly weighed in scales that exclude the protective tariff. Only if the Supreme Court were the sole legislative sovereign, with competence to enact as well as to repeal, with power to build up as well as to tear down, could we rightly subject its work to the tests of legislative wisdom or folly.

The Justices of the Supreme Court, therefore, are not to be criticised if they sustain a statute which they might deem to be intrinsically foolish, if by an act of will they could force themselves to reflect about it. Since they do not permit themselves so to reflect, they are not to be praised for condemning a statute which otherwise men might concur in calling foolish. Against unwise statutes, there are other remedies than judicial annulments. Laws, however constitutional, do not have to remain on the books forever. If they do not arouse sufficient hostility to suffer amendment or repeal, any condemnation of their supposed unwisdom is likely to be the reflection of some specialized sentiment or interest. It is easier to pose a question of wisdom than to answer it, little as this is evident from the fact that the humility of Socrates is not universal, even among expert economists or leaders of industry and finance. To the hazards of judging the merits of a particular statute in hypothetical solitude are added the hazards of weighing its worth as one of many components in the balance of a complex whole. Wisdom is an ideal to cherish, but its canons are not universally conceded and their applications are not automatic.

Legislation, unlike judicial decision, is to some extent an expression of will and desire; and will and desire have their proper place in government. The compromises of the Framers created a system that tends to secure the compromise and adjustment of competing desires and competing wisdoms and unwisdoms in the legislative arena. There is a dislocation of the adjustment whenever the Supreme Court tinkers with it. The Court may kill a processing tax, but it cannot change the situation which unduly depressed the price of farm products and it cannot raise new revenues to fill the fiscal hole it dug. The Court can repeal, but it cannot repossess. Precluded from considering policy, precluded from considering popular will and popular desire, its rôle as a partner in the enterprise of government is practically so restricted that it must move

with consummate caution if it is to prove adequate to its task.

Happily, from the beginning the Justices have given frequent expression to the appropriate canons that should be their guides. As Mr. Justice Sutherland has put it:

This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so.

This suggests a third approach to the work of the Supreme Court. To what extent does the Court live up to its own professions? To what extent have we had clear and indubitable demonstrations of opposition between statute and Constitution when that opposition has been judicially decreed? To what extent have the repeated dissents of three or four distinguished Justices been so indubitably irrational that their contrary convictions were rightly disregarded by the majority as no foundation for a rational doubt? To what extent have these majority Justices succeeded in convincing experts or laymen that they were both sincerely devoted to these professions and completely competent to apply them?

Before the members of this Association, one might well invoke the formula of a former Chief Justice and say that to ask the question is to answer it. However zealously the Supreme Court majorities of the two decades prior to the beginning of 1937 have striven to give to Congress and the state legislatures the benefit of all rational doubts on issues of constitutionality, they have woefully failed to do so. However carefully they have tried to keep from intruding their personal views of policy into the canons of constitutional clauses, they have woefully failed to do so. Tried by the standard of their own professions, they must be condemned as incapable of living up to them. To feel confident of this, we need not depend upon the judgment of those not privileged to share in their deliberations. The condemnation can be firmly rested upon the repeated declarations of colleagues who have intimate knowledge of what has been going on. Whether these majority Justices have willed it or not, whether they have been conscious of it or not, they have repeatedly acted as governors and have far transcended the rôle of mere interpreters. Invested only with the ermine, they have in fact assumed the sceptre.

I can appreciate the views of those who prefer to be governed by judges rather than by legislators, executives, and administrators. When they give me these views, they are recognizing that in fact the judges have been acting as governors. If the judges were equally discerning, they might do their governing better. If they know not what they are doing, they are unlikely to do it well. If they do know in the dim recesses of their minds but somehow keep the dimness from illumination, the case is no better. I have often wondered whether Professor Burgess pointed to a genuine distinction when he said of Calhoun and his followers that "they were sincere, or at least thought themselves so." Perhaps I may leave the question to some of our members who are also matriculants in the psychological school. Without waiting for their answer, I would refrain from putting my condemnations otherwise than in the alternative. When a reverential friend heard that I had said that certain judicial statements seemed to me either stupid or crooked, he was greatly shocked. When I asked him what he thought of the statements, he said that of course they were grievously wrong. I am content to let him leave it there, though I may add that he did not mind my saying that some judicial distinctions were so tenuous that one was tempted to suspect either the candor or the capacity of the distinguishers. The intellectual court of appeal must always be ready to accept a plea of ineptitude against a charge of intellectual turpitude.

I am always amazed at the readiness of majority Justices to endow posterity with numerous statements so obviously inept that they seldom if ever find a defender, and this in the face of minority puncturing well calculated to cause their brethren pain. I select three illustrations from parts of opinions not requisite to the ultimate determination of the major issues, except as they may have been necessary to secure some hesitant votes. The first is from the Macallen Case, which found in the Massachusetts statute "the imposition of a tax which uniformly for a century has been condemned by this court as unconstitutional." If the majority did not know the opposite, they were singularly lonely in their ignorance. The second is the failure in the Carter Coal Case to deal with the fact that under the Guffey Act the wages and hours provisions would never come into operation unless there came about the requisite agreement between employers and employees. To hold these provisions inseparable from the rest without considering their

conditional quality would be a sad failure in the work of the merest tyro. The third is the profession in *Morehead v. Tipaldo* that the Adkins Case had to be accepted as the basis of decision without inquiry as to its present standing as a criterion of due process of law. The profession was belied by the praise of the Adkins Case that followed. Judges who can do these three things can certainly plead incompetence against a charge of conscious dereliction. Or *vice versa*.

Four members of the present Court, not counting Juniors not then sitting, have been privy to none of these perpetrations. In their various dissents, they have made clear as day the majority infelicity of reasoning or neglect. I have picked these illustrations because they are outside of that large field where the issue turns on considerations too varied and subtle to permit of dogmatic judgments. Only because of temporal limitations have I confined myself to assertion. The assertion is buttressed by much conference and classroom discussion in which no one has sought to contend to the contrary. The illustrations are to me evidence of such fearful straining to find a way toward a result that, but for the professions to the contrary, I should have assumed that the result was strongly willed. Such use of subordinate techniques by various Justices reveals the fallible nature of the judicial process and confirms the insight into that process that comes from mere cataloguing of the ultimate results. In handling these subordinate techniques, there can be no invocation of the terms of the Constitution. Equally true is it that in fact the ultimate judicial negatives are seldom dictated by the terms of the Constitution. In the few cases where clear words give the answer, the Justices do not disagree. In the cases that for twenty years have caused concern to able minorities, there is no doubt whatsoever that the terms of the Constitution have been not a guide, but a sword.

How the sword is wielded depends upon the temper of the wielder. Temper, I am inclined to believe, is more determining than intellectual capacity, although the preponderance of such capacity has been with those whose temper is reflected by the remark of Mr. Justice Holmes: "I try to remember that I am not God." The popular classification of judges into liberals and conservatives is likely to be misleading. Those who by their conduct show genuine respect for the canons that all profess are not for that reason to be placed on one side or the other of the political, social, and

economic fence. The essential capacity they have in common is a strong common-law sense of confining themselves to the issue before them, as good common law pleaders were prone to do. In constitutional interpretation, these non-usurping judges define and confine the issue in the light of appreciation of the fundamentals of the tripartite division of powers and of insight into what in a democracy is essential if the judiciary is to retain the confidence and respect of the nation.

Such judges remember that the Framers denied to the Justices of the Supreme Court a participation in the legislative process outside of what they regarded as the field of strict law. Difficult as it may be by any formula to delimit the boundaries of the field of strict law in constitutional interpretation, we know readily enough what is surely within the boundary. When the opposition between the Constitution and the statute is so clear that no reasonable man can fail to perceive it, then we are indubitably within the field of strict law. How little some recent judicial majorities have confined themselves to this, is as familiar to those who approve as to those who protest.

Obviously, the judicial professions of aloofness and humility are too pretentious for full observance. The words seem most excessive when deeds lag most behind. If the contrast were not so striking, it might be unfair to criticise judges because they fall short of ideals which in their verbal zeal they raise beyond the possibility of attainment. Only because they have fallen so far short of what is easily attainable is it permissible to hoist them by their own petard. What is attainable is clearly apparent from the dissenting votes of twenty years. What has been attained is evident from the contrast between the attitudes dominant in recent years and the majority outlook in the Slaughter House Cases and the Granger Cases of 1873 and 1877.

The Justices of the seventies and eighties who believed in judicial self-restraint have had their spiritual successors in five Justices who for over twenty years have constituted three successive trios. Had these five Justices for these twenty years been on the bench together, our constitutional law in some of its most far-reaching aspects would have been significantly different from what it is to-day,—or perhaps I should say from what it was yesterday. The great phrase “a government of laws and not of men” has been translated by a great philosopher to mean “a government of law-

yers and not of men." The written Constitution has been translated largely by lawyers, and many of the renderings have been due to the fact that they were the work of some lawyers rather than of others.

This needs no further reinforcement than that given by the judicial votes in the series of Minimum Wage Cases from Stettler through Adkins and Tipaldo to Parrish. In the Adkins Case, Mr. Justice Sutherland observed that the elucidation of the question of constitutionality cannot be aided by counting heads. Time has shown that this is the most effective method of elucidation. Of the state judges who considered the minimum-wage issue prior to the Adkins Case, the overwhelming majority of twenty-seven to two thought the legislation constitutional. Five Supreme Court Justices thought it constitutional in 1917, when the Stettler appeal was dismissed without decision, but Mr. Justice Brandeis was disqualified by reason of having been of counsel, and the sitting Justices divided four to four.

From 1917 until June, 1921, there was no change on the Court. Then Mr. Chief Justice White was succeeded by Mr. Chief Justice Taft, and for the next term there were certainly five, and probably six, Justices who at one time or another voted to sustain minimum-wage laws. The Adkins Case would have reached the Supreme Court for decision in that term but for the illness of a judge in the court below and his subsequent intrusion to vote for a rehearing in a case in which he had not sat. From 1923 to 1925 there was on the Supreme Court a majority of half a Justice more than half of the Justices on the Court who read the words due process to make them forbid minimum-wage laws. When in 1925 Mr. Justice Stone succeeded Mr. Justice McKenna, there were again on the Court until 1930 five Justices who at various times read due process to mean the opposite. Thus in the thirteen years from 1917 to 1930, there were only two terms of Court in which there were not on the bench five or six Justices who have voted to sustain minimum-wage laws—and yet from 1923 to 1937 such laws were barred by Supreme Court veto.

To summarize the counting of heads, which has nothing to do with elucidating questions of constitutionality, we find that seventeen Justices of the Supreme Court have participated in minimum-wage decisions. Eleven Justices have voted in favor of such legislation and seven Justices have voted against it. This makes one more

Justice than those who have participated. This is because Mr. Justice Roberts has voted both ways. If his two votes were to cancel each other so as to count him zero, ten Justices have voted in favor and six against. The preponderance of repeating has been with the Justices whose votes were in the negative. Justices Van Devanter and McReynolds have had four negative votes each, and Justices Sutherland and Butler three negative votes each. Exclusive of the final decision in the Parrish Case, there were thirteen negative votes from six Justices and eleven affirmative votes from ten Justices, still counting Mr. Justice Roberts as zero. If we include the votes in the Parrish Case and count Mr. Justice Roberts twice instead of as before, there were eighteen negative votes from seven Justices and sixteen affirmative votes from eleven Justices.

The change from the Tipaldo Case to the Parrish Case is familiar to you, as are the intervening events. I am not condemning Mr. Justice Roberts for changing sides or for acquiring enlightenment from all possible sources; but I should have been glad if he had thought it fitting to enlighten others with respect to what had enlightened him. Since, however, we are at the moment confining ourselves to the issue whether the elucidation of questions of constitutionality can be aided by counting heads, I am content to note that the head of Mr. Justice Roberts counted heavily in the ultimate result, if not in the elucidation of the justifying reasons.

Mr. Justice Holmes has said that on certain questions a page of history is worth a volume of logic. Long ago a distinguished New York lawyer of conservative cast of thought pointed out that in a long series of tax cases the Justices of the Supreme Court divided into exactly the same camps, although the issues were so varied that, if the decisions turned on technicalities, one would expect all sorts of scattering. But some Justices were always for the taxpayer, and others always for the Government. Too familiar to need recital are the recurrent sixes and threes and fives and fours of the latter years of the Taft court. The dominant attitude of that court aroused and explained and justified the concern of senators over the nominations of ex-Secretary Hughes and Judge Parker. Widespread hostility to that dominant attitude intensified the demand for Chief Judge Cardozo when search began for a worthy successor to Mr. Justice Holmes. For an interim after the new appointments, the previous concern was mollified, but only for an interim. It was soon aroused again in increasing intensity. Of late years, the news-

papers have been giving the line-ups of Justices as they give the line-ups of legislators. Yet in spite of this the air is filled with reiteration of the myths that somehow the Justices are mere mouth-pieces of an oracle not themselves and that the decisions are in some miraculous fashion immaculately descended from some juristic Mt. Sinai or Mt. Olympus.

The persistence of such fancies is not infrequently encouraged by utterances of the judges. Yet the plain man can dispel the fancies with knowledge of what actually happens. Farmers know what actually happens when by a six to three vote the Supreme Court declares the Agricultural Adjustment Act unconstitutional. Railroad workers know what actually happens when by a five to four vote the Supreme Court declares the Railroad Retirement Act unconstitutional. The trainmen and the farmers know that if one or two Justices had voted the other way, the results would have been different. Mr. Justice Roberts, however, modestly seeks to assure them that he had little or nothing to do with it. The judicial job is like that of a surveyor with his instruments of precision. You lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former. The Constitution, it must be assumed, stands four square. If any bias appears, it must be in the statute. The only power of the Court, if such it may be called, is the power of judgment. The Framers were at fault in suggesting false connotations by calling it the judicial power.

The simile of the square is an invitation to see in mechanics and geometry the analogues of the nature of the judicial process in constitutional interpretation. A greater distortion could hardly be imagined. Fantastic beyond words is the hope that such a simile could dull the perceptions of any moderately intelligent observer of that process. Yet it is reiterated by leaders of the American Bar Association, if not by leaders of the bar. A writer in the *Journal* of the Bar Association quotes the simile along with the companion declaration that it is a misconception that the Court assumes a power to overrule or control the action of the people's representatives. Such automatists should naturally hold the view that it does not matter how many judges we have or who appoints them. Yet they use their credo of automatism to support the exactly opposite conclusion. Here, as elsewhere, anima is better revealed by what men do than by what they say.

If we are to invoke similes, the square seems less appropriate than the circle. William Graham Sumner once said that you can get out of a major premise all that you put into it. The conclusion that no compulsory pension plan can be a regulation of interstate commerce was referred to the premise that it is not a regulation of commerce to help employees unless the help to them is a help to transportation. If we could accept the further judgment in the minor premise that an assured pension can in no way aid transportation, then the major premise would lead to the conclusion about commerce. The premise, however, came from five Justices and not otherwise from the Constitution. The premise followed from the conclusion as naturally as the conclusion from the premise. Had the majority Justices been dealing, not with an act of Congress, but with the statute of a state, it seems a safe guess that they would have found it unconstitutional, and wisely so, because it *was*, rather than *was not*, a regulation of interstate commerce.

The premises and conclusion of the Agricultural Adjustment Case may be put as follows:

Major Premise: The national spending power may do what other national powers may not do.

Minor Premise: National spending to compensate for curtailment of production does what other national powers may not do.

Conclusion: Therefore such national spending is unconstitutional.

Professor Sumner understated the power of logic. You can get out of a major premise, not only what you put into it, but what you expressly withhold from it. To deny a test and then apply it is a masterpiece of manysidedness. The broken circle of the major reasoning is not pieced together by the minor strands. Slight knowledge of the grain market should preclude the notion that those who receive compensation for idle acres will be able to undersell those who cultivate to the limit. Idle acres increase the money yield of busy ones. To call a bonus coercive and treat it like a fine is to confuse. To dilate on coercion and then to condemn whether coercive or not is to waste words in order to confess weakness. To assume that money is ever spent just for the sake of spending it rather than to secure something else or to compensate persons for desired conduct or restraint, is to invent a new economics. These frailties of the opinion do not of necessity condemn the decision, but they make it suspect. It is comforting to know that the conclusion squares with the Constitution, but it would conduce to intellectual

symmetry to pick a premise that could fit into the picture as well.

Plain men like farmers and trainmen and the members of this Association may of course be unduly harsh on judges, because we lack a sufficient appreciation of the rôle of rigmorole in legal argumentation. Lord Coke might remind us, as he reminded King James, that great causes are not to be decided by natural reason but by the artificial reason and judgment of law. Artificial reason helps common-law judges to move forward while professing to stand still. It can pay its respects to order while furthering change. If we are to persist in preaching fictions, we need further fictions to save us from putting the preaching into practice. The artificial reason of the law must serve some useful function in order to maintain its priestly power. If it has its uses, it most certainly has also its abuses. It must be counted one of the abuses if it causes the high priests to deceive themselves. We who are not priests but trainers of future priests may well make it part of our training to guard them against the self-deception that seems too prevalent among their predecessors.

One hundred and fifty years from now our descendants will celebrate the tercentenary of the framing of the Constitution. They will inevitably give thought to the constitutional crisis of our sesquicentennial year and estimate its influence on the developments that ensued. It is rash to act as prophet and assure you how the Supreme Court will be playing its part a century and a half from now. Yet the danger of being found in error is so remote, at least in time, that I am tempted to venture. It is to me inconceivable that judges will then be chanting the myths which judges bow to now. It is inconceivable that in translating due-process clauses and establishing the boundaries of national power, judges will so presumptuously thwart the execution of legislative policies as has been the fashion in the recent past. Long before then, I believe that the self-expansion of the judicial rôle in constitutional interpretation will have ended, to be followed by curtailment imposed, if not from within, then from without. Long before then, I am confident that our contemporary judges who will hold the lasting place of honor will be those who so often have had to prove their insight in dissent.

In this development, I believe that the events of 1937 will be thought to have played their part. I seem to see them playing a part already. From some source has come new light about the

Constitution which has penetrated the marble walls of the Temple of Justice and wrought a change in judicial attitude. Into the secrets that lie behind this change, we cannot go. We are familiar with the results. There may have been more than mere wit in the wag who said that a switch in time saves nine. It seems a pity that wisdom and continence have to be driven into judicial heads with a club instead of being innate, as they have been innate with those whose dissenting opinions have afforded the solid test by which to condemn their colleagues. Unhappily, the sudden reformation that follows a whipping is by no means the most secure. The mythical gentleman who when sick would become a monk was guilty of backsliding upon recovering his self-assurance. I have seen too many judicial moods succeed to their opposites to feel confident that the mood of the moment will never falter. Yet the lesson of the moment must have cut deep, and successors may well wish to escape such painful teaching. If necessary, the lesson can be repeated, in other and in better ways.

Eternal vigilance is the price of liberty, from whatever source the unwelcome restraint. The Supreme Court must in the future, as in the present, be watched to see what it is doing. In the struggle of the past year, there has been no victory for the individual judges whose conduct provoked the assault on their exclusive sway. Not from admirers or approvers came the effective support of their untrammelled power. The voices of the American Liberty League were advisedly hushed or hidden behind other masks. The stalwart and successful defenders of the judiciary as an institution were those who readily conceded that the controlling holders of the judicial office had given ample cause for just complaint. To these controlling judges it must be galling to remember that the safeguarding of their function has been due not to them but to some of their severest critics. Had they appreciated earlier the two decades of similar criticism from wise dissenting colleagues, we should have been spared the shock of what in substance though not in form was a threat against one of the institutions ordained by the Fathers.

For the initial form of the threat, there is little to be said. As implemented by the accompanying bill, the plan left it to incumbent septuagenarian Justices to determine the future size of the Court between the limits of nine and fifteen. The idea was ill-conceived and ill-sustained by supporting data and argument.

Only indirectly was the underlying trouble necessarily due to age, significant though it is that with life tenure a determined group may continue to dominate long after they would have been denied nomination or confirmation. Longevity meant perdurance, and perdurance prevented vacancies from arising. This, however, was of public moment only because of the confirmed outlook of those who, irrespective of age, continued to vote as they had voted before. While added years did not bring enlightenment, yet with one exception the quartette which so long had sung in unison retained such efficiency as they had earlier brought to bear. The Court was abreast of its docket, and the cases it refused to hear were on the whole declined with wisdom. The Court was doing, not too little work, but too much of the wrong kind. This was possible only because of the frequent concurrence of one or two of its members whose tenure had been fairly brief.

In this situation the early varnish on the proposal for rejuvenation was protective discoloration quite obviously transparent. The reality was clear enough, but the prescription was excessive for the disease. Only if the major desire were to coerce resignations from judges who would yield their constitutional tenure to prevent absurdity could there be sense in making elderly persistence the generator of permanent increases in the size of the Court. When suffragans or coadjutors are needed at the moment, the House of Bishops is not permanently enlarged. One good test of the wisdom of a particular move is whether it offers a good model to be copied in the future. The plan of a permanent increase could not often be repeated without turning a court into an assembly. By choice of an untenable position and of a preposterous remedy, the proposal gave opponents a vantage ground which they were quick to seize. Only because the Court was wrongly attacked was it possible for some of its members to come to its defense. Fully as was chastisement deserved and great as was the need of reformation, the remedy first offered had weaknesses that made common sense forbid its ultimate adoption however wisely it might welcome the threat thereof.

This false start continued to curse and cloud the situation. Not until defeat was imminent was there any clear indication of cordiality toward some modification. What was wise from the standpoint of political maneuvering, I do not profess to judge. Hind-sight after the death of Senator Robinson is not a sufficient criterion of what might have been better tactics before. Modifications

might have come from the floor had the extreme bill been favorably reported. More resignations might have come if the movement had not faltered with the loss of the Senate leader. Be this as it may, I am concerned not with political maneuvering but with the intrinsic merits of a proposed remedy. It would have been easier to support the movement if its initiation and development had been decidedly different. The later, more definite, and more exclusive invocation of the substantial justification for some form of relief was a step in the right direction, crippled though it was by unhappy syncopation of a major constitutional clause. The step would have reached still firmer ground if seasonably accompanied by a clear and explicit statement that the idea of a permanent increase was not of the essence and that other methods of curbing or overcoming oligarchical power might be acceptable. It was not enough to refrain from insistence on the bill, the whole bill, and nothing but the bill. The bill remained as an unsuitable threat so long as suggestions for modification came, not from its friends, but solely from its foes.

The future, I am confident, will approve the making of a productive threat but will pray that it need not be repeated. When constitutional monarchs misbehave, something may have to be done about it. Our English brethren, with their immunity from obfuscation about judicial review of legislation, were not so horrified as some of us. They also were disturbed by the misbehavior of a constitutional monarch. They had no formal machinery to deal with their crisis without undue jar, but with their gift for informality they found a way. In the background we too have the threat to stop supply. This, however, is as ill-designed for execution as the threat to swamp our House of Legal Lords. The parallels are persuasive that in a democracy there is no place for long-time uncontrolled political power. If an institution that our Fathers thought non-political has in time developed otherwise, there is need to reverse the evolution or to add some formal and effective means of political control. For such control of specific decisions, our formal method of constitutional amendment has little promise. We need some better way than the making of distasteful threats. Parlor statesmanship might easily devise one, but I see no likelihood of adoption unless another storm blows up. Storms need not blow if our judicial constitutional monarchs keep to the paths appropriately theirs.

Nearly fifty years ago, Professor Burgess told us: "I do not hesitate to call the governmental system of the United States the aristocracy of the robe; and I do not hesitate to pronounce this the truest aristocracy for the purposes of government that the world has yet produced." Whether aristocracy has its place in democratic government must depend upon how aristocracy behaves. It cannot continue in control unless sufficiently imbued with respect for *noblesse oblige*. To speak only of the dead, the gallant figure of Holmes is a sufficient reminder that a true aristocrat may be the greatest of servants to a commonwealth as to a king. If the Founders were aristocrats, they nevertheless conceived an instrument of government fit for the functioning of democracy if men will make it so. The strains which our structure of government has survived are testimony both to its strength and its resiliency. Both are essential. For any of our misfortunes, I cannot regard the Fathers as responsible. We could ask no more for ourselves today than that we in our time could meet our national occasions with that measure of adequacy which they achieved in theirs.