VI

THE COURTS

Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it judged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel

of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.

I am not now thinking of the courts as the lawyer thinks of them, as places of technical definition and business adjustment, where the rights of individuals as against one another are debated and determined; but as the citizen thinks of them, as his safeguard against a too arrogant and teasing use of power by the government, an instrument of politics, — of liberty. Constitutional government exists in its completeness and full reality only when the individual, only when every individual, is regarded as a partner of the government in the conduct of the nation's life. The citizen is not individually represented in any assembly or in any regularly constituted part of the government itself. He cannot, except in the most extraordinary cases and with the utmost difficulty, bring his individual private affairs to the attention of Congress or of his state legislature, to the attention of the President of the United States or of the executive officer of his state; he would find himself balked of relief if he did by the laws under which they act and exercise their clearly specified powers. It is only in the courts that men are individuals in respect of their rights. Only in them can the individual citizen set up his private right and interest against the government by an appeal to the fundamental understandings upon which the government rests. In no other government but our own can he set them up even there against the government. He can everywhere set them up against other individuals who would invade his rights or who have imposed upon him, but not against the government. The government under every other constitutional system but our own is sover-

eign, unquestionable, to be restrained not by the courts but only by public opinion, only by the opinion of the nation acting through the representative chamber. We alone have given our courts power to restrain the government under which they themselves act and from which they themselves derive their authority.

And this is not merely because our constitutional understandings are explicitly set forth in written documents which the courts must regard as part of the body of law they are charged to maintain and interpret, — the chief and fundamental part to which all other parts must give way; for a very important part of the constitutional understandings upon which the English government rests is written in Magna Carta and in the great Bill of Rights, and yet the English courts have no authority to check the law-making organs of the government even though they override Magna Carta and the Bill of Rights in the statutes which they enact. No doubt the definitions of Magna Carta and of the Bill of Rights lie at the foundation of all government and of all individual privilege in England, and if any statute of doubtful interpretation were brought before an English court which seemed in contravention of rights clearly stated in those documents, the court would interpret it in accordance with the terms of those revered instruments of liberty; but if a statute should in plain terms ignore the definitions and restrictions even of Magna Carta and the Bill of Rights, I understand that the court would be obliged to enforce it. Parliament is sovereign and can do what it pleases. Only the opinion of the nation can check or restrain it. Only repeal can set an obnoxious statute aside. No government is more entirely governed by opinion than the government of England, but it is gov-

erned by the general opinion of the nation, not by the particular opinion of the courts.

This is not because the English courts have been less interested than our own to maintain individual rights and liberties or less liberal in their interpretation of individual privilege. No courts have been more liberal or more disposed to safeguard private privilege. The common law of England has, more than any other law, been a mirror of opinion and of social adjustment and has been made in its development to fit English life like a well-cut garment. Time out of mind English judges have liberalized and broadened it by reading into it good principle and enlightened opinion. There are some notable old cases in the English law reports in which the judges declare all principles of right reason and of humanity to be parts of the common law of England without precedent. But there is no fundamental law susceptible of interpretation by the courts which defines or limits the powers of Parliament. Magna Carta and the Bill of Rights define the rights of individuals as against the crown, but not as against Parliament, not as against those whom the nation has authorized to make its laws. Upon them no document which the courts can read or elucidate as law places any restraint. The courts must enforce whatever they enact. The powers of our law-making bodies are, on the contrary, very definitely defined and circumscribed in documents which are themselves part of the body of our law, and the decisions of the courts interpreting those documents set those law-making bodies their limits.

To us this power of the courts seems natural not only but of the essence of the whole system; but it is in fact extraordinary and has been looked upon by not a few of

our foreign critics with unaffected amazement. And they have been the more amazed because they did not find this extraordinary power conferred upon our courts in any part or sentence of our fundamental law. "The judicial power of the United States," so run the quiet sentences of the Constitution, "shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish" and "shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made under their Authority." It is only an inference drawn by the courts themselves that "the laws of the United States and treaties made under their authority" shall be tested by the Constitution and disallowed if they lie outside the field of power it has granted Congress and the President, — a very plain inference, no doubt, but only an inference: an inference made upon analogy, drawn out of historical circumstances and out of a definite theory as to the origin of our government.

There was never any sovereign government in America. The governments of the colonies were operated under charters granted by the English crown, and could legally exercise no powers which those charters did not confer. If they exceeded those powers, the king could annul their acts, and the king's courts could declare their charters forfeited. The same principle and practice still obtains with regard to the powers of the chartered English colonies. The constitution of Canada is "the British North America Act," an act of Parliament, federating the several provinces, giving each its legislature and its separate field of law, and setting over all the Governor and Parliament of the Dominion. Anything done either by the government

of the provinces or by the government of the Dominion in excess or contravention of the terms of the British North America Act is null and void and can be so treated by the courts of the Dominion itself, though an appeal lies in all cases of such consequence to the Judicial Committee of the Privy Council in England, a court of the sovereign power. The sovereign power now set over us is the people. When the authority of the crown lapsed by revolution, they assumed it. For colonial charters they substituted their state constitutions, to which they presently added the Constitution of the United States. Their sovereign grant of power can no more be exceeded than can the grants of the sovereign king of the older day or the sovereign Parliament of our own time. Statutes must conform to the Constitution and are null and void if they do not. Our constitutions are comparable, say Professor Dicey and Mr. Bryce, to the charters of great corporations, our statutes to their by-laws, our treaties to their contracts. No by-law or contract made by them will be upheld by any court if in contravention or excess of their charter powers. Any English-speaking lawyer would have reasoned the matter out as we have reasoned it out.

None the less, plain inference though it be, this power of our courts renders our constitutional system unique. No other constitutional system has this balance and means of energy, — this means of energy for the individual citizen. The individual citizen among us can apply the checks of law to the government upon his own initiative, and they will respond to his touch as readily as to the touch of the greatest political officer of the system. More readily, indeed, for the courts will not hear abstract questions. Some concrete and tangible interest, involving the right

of some particular individual or corporation, must be implicated, and implicated in some form which makes a legal inquiry and remedy both necessary and possible under the ordinary rules of suit and procedure. They will not take the question up otherwise, and an individual citizen is a more natural and usual party to such an inquiry than an officer of the government. An officer of the government cannot be a party to a suit in his official capacity except as he represents some claim or defense of the government itself. The rights of the individual touch the subject-matter of the law at a thousand points, and he may in mere controversy with his neighbor call in question rights which his neighbor professes to exercise under the authority of acts of Congress. No officer of the government need be or can be a party to such a suit; the court is adjudicating private rights and will not hesitate to set an act of Congress aside if it invade those rights in contravention or in excess of the powers granted Congress in the Constitution.

Only by slow and searching labor have the courts been able to keep our singularly complex system at its right poise and adjustment. It has required a long line of cases to thread its intricacies and afford the individual a complete administration of its safeguards. It is a system of many counterpoises and prescriptions. First, there are the restrictions placed upon our governments in respect of the powers they can use upon the individual. Congress can exercise no powers except those explicitly or by plain implication conferred upon it by the Constitution. And there are certain things which it is explicitly forbidden to do. "The privilege of a writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion

public safety may require it. No Bill of Attainder or *ex post facto* Law shall be passed." The powers not granted to Congress remain with the states, but certain powers are denied the states by their own constitutions, some by the Constitution of the United States. "No State shall enter into any Treaty, Alliance, or Federation; grant Laws of Marque or Reprisal; coin money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility," is the language of Section X of the first article of the Constitution. And added to the restrictions placed upon state and federal governments by the Constitution of the United States are the still more complex and numerous limitations imposed upon the states by their own constitutions. All these, from whatever constitution drawn, the courts must interpret and enforce. In respect of all of them the courts are instruments for the protection of the individual. Besides these definitions and restrictions, which partake of the nature of a Bill of Rights, our constitutions apportion power between the states and the federal government, and that apportionment the courts must assist to make definite and secure. They apportion powers also to the several parts of our state and federal governments, the executive, the legislature, and the courts themselves, and this apportionment also the courts must define and maintain.

It is thus that they are the balance-wheel of the whole system, taking the strain from every direction and seeking to maintain what any unchecked exercise of power might destroy. They are at once instruments of the individual against the government, of the government against the

individual, of the several members of our political union against one another, and of the several parts of government in their legal synthesis and adjustment. No wonder De Tocqueville marveled at the "variety of information and excellence of discretion" expected of the American citizen by the constitutional system under which he lives. All these things he may sooner or later find himself obliged to call upon the courts to adjudicate and keep at their right balance for his sake, that the terms of his partnership with the government may be strictly and righteously observed.

It throws upon him a great responsibility and expects of him a constant and watchful independence. There is no one to look out for his rights but himself. He is not a ward of the government, but his own guardian. The law is not automatic; he must himself put it into operation, and he must show good cause why the courts should exert the great powers vested in them. They will not allow the validity of any statute or treaty or of any act of the government to be called lightly in question or drawn unnecessarily under discussion. He must show that, in order to determine definite, concrete rights of his own which are in dispute between himself and his opponent in litigation, it is necessary that the courts should answer the question he raises as to the validity of what the government has done or attempted; not drawing them on to an abstract thesis, but bringing them face to face with an actual question of law. If it lies in his direct way to do that, it makes no difference in what court he raises the question. It need not be the Supreme Court of the United States or the highest court of the state in which he brings suit. Any court can adjudicate the question of the constitutionality

of the acts of the government, if it have jurisdiction over the general subject-matter of the case in which the question is raised. The dignity of the question does not alter the jurisdiction. Of course, constitutional questions of capital importance are very likely to be carried sooner or later to the Supreme Court by processes of appeal, but they may originate in any court of any grade and belong not to the extraordinary but to the ordinary processes of adjudication. It may fall in the way of any court in the ordinary administration of justice to compare by-laws with charters, statutes with constitutions, the subordinate parts of the law with the ultimate and fundamental parts, the acts of the government with their legal norms and standards.

The same jurisdiction would no doubt spring up in England were the rules of the British constitution to be reduced to writing and put upon the footing of Magna Carta, were the authority of Parliament to be limited and defined by charter as the authority of the crown has time out of mind been. For English legal practice is the same as American. American practice was derived from it. In England, as in America, the individual citizen is bidden take care of himself, not only against his neighbor but also, if he can, against the government. In England, as in America, an officer of the law ceases to be an officer of the law when he acts in excess of his authority. He may be fined or imprisoned or executed as any other man would be if he overstep the limits of his warrant and authority and do things which he has no right to do. He has no authority but that which is legal and for which he can show rightful warrant. But it is not so in any other country. In every other country an officer of the government is an officer whatever he may do, and cannot be haled before the

ordinary courts. He will be restrained from doing illegal things, but only by his superiors, to whom injured persons must complain, or by special administrative tribunals provided for the purpose, before which the individual may cite him. No superior officer, no administrative court, will handle a complaint against him as an ordinary court would handle a suit or indictment. The offense charged will be looked at from the point of view of administrative officers, as a public indiscretion rather than as a private wrong; great latitude will be allowed an officer of the law if he profess to act in the public interest and cannot be shown to have acted in malice. The atmosphere of the inquiry is the atmosphere of authority, and the discipline applied will be the discipline of a corps, not the judgment of an ordinary court against a breaker of the law. Citizens are subjects, not partners of the government. It is against the whole spirit of our polity, on the contrary, that we should be running to the government with complaints. Our practice is built upon individual rights, and the individual is freely given the means to take care of himself in courts which are his own no less than they are the government's. The courts are meant to be the people's forum, open to all who wish the law determined.

It is of the deeper consequence that the courts should in fact be open to all, equally accessible and serviceable to every man. If it be true, as it is nowadays common to charge, that our courts are serviceable only to the rich, we should look to it, for in that case our system is impaired at its very heart; its poise and balance are gone. *Are* our courts as available for the poor as for the rich? It is not a question of impartiality or fairness, of disposi-

tion to hear the suit of the poor as readily and as attentively as the suit of the rich. Some inferior men are no doubt appointed to our federal bench; our state courts are many of them filled by processes of election which take account of the judge's political opinions and of his service to a political party rather than of his learning or of his rank among his fellow practitioners at the bar, and many men are chosen who are not suitable either in character or attainments; but the average integrity of the American bench is extraordinarily high. There are not many courts of which it can justly be said that a man will be denied his legal rights because he is poor or without influential connections. The question I raise is of another kind. Are not poor men in fact excluded from our courts by the cost and the length of their processes? The rich man can afford the cost of litigation; what is of more consequence, he can afford the delays of trial and appeal; he has a margin of resources which makes it possible for him to wait the months, it may be the years, during which the process of adjudication will drag on and during which the rights he is contesting will be suspended, the interests involved tied up. But the poor man can afford neither the one nor the other. He might afford the initial expense, if he could be secure against delays; but delays he cannot abide without ruin. I fear that it must be admitted that our present processes of adjudication lack both simplicity and promptness, that they are unnecessarily expensive, and that a rich litigant can almost always tire a poor one out and readily cheat him of his rights by simply leading him through an endless maze of appeals and technical delays.

If this be true, our very constitutional principle has

fallen into dangerous disrepair, and our immediate duty is to amend and simplify our processes of justice. There is no guarantee of liberty under a system like ours, if the courts be not as accessible and as serviceable to the poor man as to the rich. Of course, they never can be so literally. The processes of justice must always, if they are to be thorough, be deliberate, not hurried, often elaborate, not always simple. Even if they were available to the poor man without any cost whatever in money, they must in any case cost him something in time and trouble; and the very poor, tied to their tasks in fear of momentary need, cannot spend time or attention on anything which does not earn them bread. But it were shame upon us if we could not bring our courts nearer to the poor man than they are now, and the most immediately necessary reform of our system lies in that direction. The individual of whatever grade or character must be afforded opportunity to take care of himself, whether against the power of his neighbor or against the power of the government.

I have spoken of the state and federal courts without discrimination. They are all branches of the people's forum. Constitutional questions may be determined by them all, of whatever grade, because individual rights must be adjudicated by them all. But it is interesting to observe the line that runs between state and federal jurisdictions. It affords a sort of insight into the character of our complex constitutional system which no other part of our study can afford. The political relations between the states and the federal government I shall consider in another lecture, and inasmuch as their political relations rest in large measure in a system like ours upon their legal relations, I will reserve also the greater part of what I have to say about the

law of their union and separation until all parts of the picture may be put together in a single sketch. But some part of the matter lies immediately under our eyes here.

The tests of the federal Constitution can be applied in the state courts, and the tests of the state constitutions in the federal courts, but only in such a way as to make the federal courts the final judges of what the meaning and intent of the federal Constitution is, and the state courts the final judges and interpreters of what the state constitutions forbid or require. The Constitution of the United States makes the federal courts the forum for the trial, not only of cases arising under federal law, but also for the trial of suits between litigants who are citizens of different states and who have therefore no other common tribunal. Cases between citizens of different states need not be tried in the courts of the United States, if the litigants are content to submit them to the courts of the state in which the cause of action arose; but the federal courts are open to them; and if in such a case tried in them it should become necessary to interpret the provisions of a state constitution, the federal courts must of course attempt that interpretation as they would attempt any other question the case might bring under their examination. But they would feel themselves obliged to adopt the interpretation already put upon those provisions by the courts of the state whose constitution was under examination. Only when there were no decisions of the courts of the state upon the subject would they feel at liberty to follow their own reading and interpretation. The courts of the United States have not the right to impose upon litigants their own interpretations of the fundamental law of a state when that law in no way involves the jurisdiction or the

authority of the federal government, and in the trial of ordinary cases between citizens of different states they must hold themselves to the administration of state laws as they are interpreted by the courts of the states in which they originated.

Similarly, the courts of the states are at liberty to determine cases which involve an interpretation of the Constitution of the United States. No question is foreign to them which belongs to a case regularly instituted before them; but they in their turn are bound to follow in such matters the decisions of the courts of the United States, so far as they may have covered the matter drawn in question. The courts of the United States must be the ultimate judges of the meaning and intent of federal law, as the courts of the states are of the principles of state law. A litigant in a state court may contend, for example, that some statute, or even some constitutional provision, of the state, under which his opponent is suing him or making defense, is inconsistent with the Constitution of the United States. If the court uphold him in this contention and treat the law which he challenges as null and void because inconsistent with federal law, there is an end of the matter. The court has upheld federal law against the law of the state, and no appeal can be taken to a court of the United States, — which could do no more. But if the court disallow the plea and declare the state law valid notwithstanding its alleged conflict with the law of the United States, the defeated litigant may take an appeal to the courts of the United States; for with a federal tribunal must lie the final determination of the conflict, lest the state court might have been biased in favor of the law and privilege of the state under whose authority it acted.

The significance of this principle of action is that the federal government is, through its courts, in effect made the final judge of its own powers. In no case can a conflict of authority between it and the government of a state be finally decided against it by a state court, by any court but its own, if the parties in interest choose to appeal. The whole balance of our federal system, therefore, lies in the federal courts. It is inevitable that it should be so. Our constitutional law could have no final certainty otherwise. "This Constitution, and the Laws of the United States which are made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding:" such is the definite, uncompromising language of the Constitution of the United States. No one can doubt that it was necessary for the maintenance of the system that the courts of the federal government should be the arbiters of all questions of disputed jurisdiction or conflicting authority. But of course such a principle constitutes the courts of the United States the guardians of our whole legal development. With them must lie the final statesmanship of control.

For by according such powers to our courts we virtually vest in them the statesmanship of control. The Constitution is not a mere lawyers' document: it is, as I have more than once said, the vehicle of a nation's life. No lawyer can read into a document anything subsequent to its execution; but we have read into the Constitution of the United States the whole expansion and transformation of our national life that has followed its adoption. We can

say without the least disparagement or even criticism of the Supreme Court of the United States that at its hands the Constitution has received an adaptation and an elaboration which would fill its framers of the simple days of 1787 with nothing less than amazement. The explicitly granted powers of the Constitution are what they always were; but the powers drawn from it by implication have grown and multiplied beyond all expectation, and each generation of statesmen looks to the Supreme Court to supply the interpretation which will serve the needs of the day. It is a process necessary but full of peril. It is easier to form programs than to exercise a wise and moderate control, and the task of the courts calls for more poise, nicer discriminations of conscience, a steadier view of affairs, and a better knowledge of the principles of right action, than the task of Congress or of the President. Both the safety and the purity of our system depend on the wisdom and the good conscience of the Supreme Court. Expanded and adapted by interpretation the powers granted in the Constitution must be; but the manner and the motive of their expansion involve the integrity, and therefore the permanence, of our entire system of government.

By common consent the most notable and one of the most statesmanlike figures in our whole judicial history is the figure of John Marshall. No other name is comparable with his in fame or honor in this singular field of statesmanlike judicial control, — a field of our own marking out and creation, a statesmanship peculiar to our own annals. Marshall may be said to have created for us the principles of interpretation which have governed our national development. He created them like a great lawyer, master of the fundamental conceptions which

have enlightened all great lawyers in the administration of law and have made it seem in their hands a system of life, not a mere body of technical rules; he created them also like a great statesman who sees his way as clearly without precedent as with it to those renderings of charter and statute which will vivify their spirit and enlarge their letter without straining a single tissue of the vital stuff of which they are made.

A thoughtful English judge has distinguished between those extensions of the meaning of law by interpretation which are the product of insight and conceived in the spirit of the law itself, and those which are the product of sheer will, of the mere determination that the law shall mean what it is convenient to have it mean. Marshall's interpretations were the products of insight. His learning was the learning of the seer, saturated with the spirit of the law, instinct with its principle of growth. No other method, no other principle has legitimate place in a system which depends for its very life upon its integrity, upon the candor and good conscience of its processes, upon keeping faith with its standards and its immemorial promises.

One of the most dramatic and interesting scenes in our history, the scene with which the imagination of the historian who is keenly alive to those processes of constitutional development which have made the nation and yet have threatened to unmake it is most engaged, is that enacted on the fourth of March, 1829, when Andrew Jackson, the sincere apostle of principles of action which were apt to make light of law, was sworn into office by John Marshall, the aged Chief Justice at whose hands the law of the nation had received alike its majesty and its liberal spirit of ordered progress. Jackson himself was not young. He had grown gray in

having his own way, in acting upon principles he deemed right, whether they had the warrant of law or not; — no outlaw; on the contrary, a man of conscience and honor, but habituated to the principles of the frontier and of the field of battle, where action did not wait upon law but formed itself on the exigencies of the occasion. He took the oath of office in all solemnity and good faith, swearing "to the best of his ability to preserve, protect, and defend the Constitution of the United States." But he afterward explained, when he chose to ignore the decisions of the Supreme Court, uttered by Chief Justice Marshall in authoritative interpretation of the Constitution, that he had sworn to uphold and preserve it as he understood it, and would take no dictation as to its meaning from any source but his own intelligence and conscience. The two men were at the antipodes from one another both in principle and in character; had no common insight into the institutions of the country which they served; represented one the statesmanship of will and the other the statesmanship of control. General Jackson was a brave man, devoted to the performance of his duty with a genuine ardor of unselfish patriotism, and rendered services in his administration of the great office he held for which he must always be honored so long as the large interests of the nation are understood; but he was the sort of man who might very easily twist and destroy our whole constitutional system, were the courts robbed of their authority and the great balance-wheel of their power shaken from its gearings. One might moralize upon the picture of these two old men standing there face to face at Jackson's inauguration until he had expounded the very genius of our institutions. Marshall, putting the

oath of office to Jackson, was repeating in quiet, modern form the transaction of Runnymede.

Some German critics of our constitutional system, trained in another school of politics and another school of law, have looked upon the powers of our courts as a dangerous anomaly. We have, they say, taken our courts out of their proper sphere and put them where courts do not belong, in the field of politics, where they are set as masters over Congress and the President by whom the policies of the nation are formed. But such criticisms ignore both the principle of constitutional government and the actual practice of our courts. They emanate from men for whom all law is the voice of government and who regard the government as the source of all law, who cannot conceive of a law set above government and to which it must conform. It must be admitted that such a law is not everywhere essential to the maintenance of constitutional government. The English nation restrains its king by written compact, but it has never restrained its Parliament. Parliament its law leaves supreme because Parliament is representative of the nation, and opinion is strong and concerted enough to restrain it without law and the assistance of the courts. But we faced a very singular task when we undertook to combine the one-time colonies of England in America into a constitutional federal state. There had been no time to form a national habit or accumulate precedents with regard to a common government. It was necessary to create it by law, to accommodate its various parts to one another by law, to define both its powers and the relations of the people to it by law. No other constitutional understanding was ever quite so detailed or so definite, no other constitutional

understanding ever rested upon just such foundations of circumstance and purpose.

But we did not, with all our inventing, create anything abnormal or unnatural; and our continental critics mistake the actual practice of our courts in acting upon constitutional questions. They do not act as instruments of politics, but only as modest instruments of law, as any other courts would. A very superficial examination of the constitutional decisions of the Supreme Court of the United States will suffice to show how careful it has been to refrain from even the appearance of dictating to Congress or to the executive. It has sought to respect their authority and to give full scope to their discretion in every possible way, at every possible point, never setting its judgment or opinion against theirs in any case which admitted of reasonable doubt, never drawing political questions into discussion, but confining itself most scrupulously to its proper business of adjudicating individual rights, whether those rights arise under the Constitution or under statutes; and it has demanded that a very clear case be made out against any act of Congress said by the litigants before it to be unconstitutional, before it would venture to set aside what Congress had ordained. In no instance has it acted upon political grounds when setting aside an act of Congress, but always upon clearly defined legal grounds, because the act had been shown to be inconsistent with indisputable provisions of the fundamental charter of the government itself. There could be no alternative in the case of a government of limited and specified powers.

And there has never been any serious friction between Congress and the courts. Occasional irritation there has been, of course. Congressmen have sometimes, forgetting

their constitutional principles, spoken in sharp and resentful criticism of the presumption of federal judges who have declared favorite pieces of legislation unconstitutional and refused to execute statutes by means of which politicians had hoped to store up credit to themselves or their party. Senators have shown a particular sensitiveness in the matter. There are many distinguished lawyers in the Senate whose opinion upon points of law ought no doubt to be regarded as individually quite as weighty and conclusive as that of a district or circuit judge of the United States who has declined to enforce acts which had passed under their scrutiny. Second-class lawyers, it has been said in heat, men who had themselves once been members of the House or Senate and who had there shown their inferiority in legal discussion, venture, when appointed to seats on the bench, to set aside the judgments of the very men who formerly worsted them in debate upon those very questions. But members of Congress must usually be patient under these crosses. They will often remember that it was upon their own recommendation that these very men, their one-time comrades, were appointed by the President; that the appointments passed the scrutiny of the Judiciary Committee of the Senate and were confirmed; and that the point of view of the lawyer in Congress is after all not always the point of view of the lawyer on the bench, whose concern is not with political considerations, but with the legal rights of the litigants before him and the exact maintenance of the terms of the law.

There are instances which they will recall which are full of instruction. Mr. Salmon P. Chase, when Secretary of the Treasury under Mr. Lincoln, advocated the issue of

irredeemable paper currency in relief of the Treasury, and was largely instrumental in inducing Congress to pass the statutes which filled the country with "greenbacks," declaring it to be his opinion that such issues were legal under the powers granted Congress in the Constitution; but Mr. Salmon P. Chase, when afterward Chief Justice of the United States, joined with the majority of that great court in declaring the legal tender acts unconstitutional. The thing might happen with the most conscientious lawyer. It is one thing to have to decide a matter of that kind in connection with important business you are conducting, and it is quite another thing to have it to decide as a judge lifted above all personal interest in the matter and bidden take it upon its merits, not as an advocate but as an arbiter.

Undoubtedly federal judges may be mistaken and lawyers in Congress right, if the lawyers in Congress be of better stuff morally and intellectually than the judges they have recommended or allowed the President to appoint; but that simply points an old moral. No part of any government is any better than the men who administer it. A distinguished member of a well-known reform club once told me that after twenty years of hard work in trying to further the objects of good government to which the club had devoted itself, he had a very humiliating confession to make. Throughout all those years he had labored assiduously to get the laws of the State in which he lived modified and improved, and to have all practices of which his club disapproved in state or city governments made illegal by statute. Year after year he had gone to the capital of the state and pressed every legitimate influence he could command to induce the legislature to enact

the desired laws, and once and again he had succeeded. But government did not seem to be reformed, whatever his success. Old practices went on unchecked, or took new forms, or eluded the processes of law. It was a long lesson, and he had very stubbornly refused to learn it, but he had learned it at last and was now ready to make his confession that after all he had been mistaken: the way to reform government was to elect good men to conduct it, and that was the whole matter. Good laws were desirable, but good men were indispensable, and could make even bad laws yield pure and righteous government.

Every government is a government of men, not of laws, and of course the courts of the United States are no wiser or better than the judges who constitute them. A series of bad appointments might easily make them inferior to every other branch of the government in their comprehension of constitutional principles, their perception of constitutional values. But that would be because the government had fallen into wrong hands, and would not invalidate the principle upon which our courts are constituted and empowered. It is an argument for electing the right men to the presidency and to the Senate, which confirms the President's appointments; it is not an argument for changing our constitutional arrangements. The constitutional powers of the courts are no less indispensable, no less central and essential to our whole system and conception of government, because they are sometimes unwise or unintelligent in their exercise of them.

Indeed, it is not easy to speak of this subject, so fundamental, so deeply significant, without pausing to point out the interesting interdependence of the several parts of our government and the many contingencies upon which

their excellence and their integrity depend. The courts of the United States control the action of the other branches of the government in the interest of our fundamental constitutional understandings; and yet the courts of the United States are constituted by federal statute and by the President's appointment. The judicial power of the United States is vested "in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish"; only the Supreme Court exists by direct provision of the Constitution itself. Other courts Congress may establish or abolish, increase or decrease, assign to this jurisdiction or to that. The Constitution provides, indeed, that all judges of the United States shall hold their offices during good behavior, but Congress could readily overcome a hostile majority in any court or in any set of courts, even in the Supreme Court itself, by a sufficient increase in the number of judges and an adroit manipulation of jurisdictions, and could with the assistance of the President make them up to suit its own purposes. These two "coördinate" branches of the government, to which the courts speak in such authoritative fashion with regard to the powers they may and may not exercise under the Constitution, — namely, Congress and the executive, — may, in fact, if they choose, manipulate the courts to their own ends without formal violation of any provision of the fundamental law of the land. There has never been any serious fear that they would do anything of the kind, though an occasional appointment to the Supreme Court has made the country suspicious and uneasy. But it is well to keep the matter clearly before us, if only that we may remind ourselves of the only absolute safeguards of a constitutional system. They lie in the character, the

independence, the resolution, the right purpose of the men who vote and who choose the public servants of whom the government is to consist. Any government can be corrupted, any government may fall into disrepair. It consists of men, and the men of whom it consists will be no better than the men who choose them. The courts are the people's forum; they are also the index of the government's and of the nation's character.

The weightiest import of the matter is seen only when it is remembered that the courts are the instruments of the nation's growth, and that the way in which they serve that use will have much to do with the integrity of every national process. If they determine what powers are to be exercised under the Constitution, they by the same token determine also the adequacy of the Constitution in respect of the needs and interests of the nation; our conscience in matters of law and our opportunity in matters of politics are in their hands. There is so much to justify the criticism of our German critics; but they have not put their fingers upon the right point of criticism. It is not true that in judging of what Congress or the President has done, our courts enter the natural field of discretion or of judgment which belongs to other branches of government, — a field in its nature political, where lie the choices of policy and of authority. That field they respectfully avoid, and confine themselves to the necessary conclusions drawn from written law. But it is true that their power is political; that if they had interpreted the Constitution in its strict letter, as some proposed, and not in its spirit, like the charter of a business corporation and not like the charter of a living government, the vehicle of a nation's life, it would have proved a strait-jacket, a

means not of liberty and development, but of mere restriction and embarrassment. I have spoken of the statesmanship of control expected of our courts; but there is also the statesmanship of adaptation characteristic of all great systems of law since the days of the Roman prætor; and there can be no doubt that we have been singular among the nations in looking to our courts for that double function of statesmanship, for the means of growth as well as for the restraint of ordered method.

But our courts have stood the test, chiefly because John Marshall presided over their processes during the formative period of our national life. He was of the school and temper of Washington. He read constitutions in search of their spirit and purpose and understood them in the light of the conceptions under the influence of which they were framed. He saw in them not mere negations of power, but grants of power, and he reasoned from out the large political experience of the race as to what those grants meant, what they were intended to accomplish, not as a pedant but as a statesman, rather; and every generation of statesmen since his day have recognized the fact that it was he more than the men in Congress or in the President's chair who gave to our federal government its scope and power. The greatest statesmen are always those who attempt their tasks with imagination, with a large vision of things to come, but with the conscience of the lawyer, also, the knowledge that law must be built, not wrested, to their use and purpose. And so, whether by force of circumstance or by deliberate design, we have married legislation with adjudication and look for statesmanship in our courts.

No one can truly say that our courts have held us back

or have ever exhibited a spirit of mere literalness and reaction. Many a series of cases has built the implications of the Constitution out to meet the needs and the changing circumstances of the nation's life. The process has seemed at times a little too facile. The courts have seemed upon occasion to seek in the law what they wished to find rather than what frank and legitimate inference would yield. Once and again they have been all too complacent in giving Congress leave to read its powers as best suited its convenience at a particular exigency in affairs. It is to be feared that they did so in connection with the many difficult questions which arose in regard to the settlements which followed upon the war between the states. But for the most part their method and their inferences have been conservative enough. The wonder is that they have kept so level a keel while serving a nation which has always insisted upon carrying so much sail.

When the Constitution was framed there were no railways, there was no telegraph, there was no telephone. The Supreme Court has read the power of Congress to establish post-offices and post-roads and to regulate commerce with foreign nations and among the several states to mean that it has jurisdiction over practically every matter connected with intercourse between the states. Railways are highways; telegraph and telephone lines are new forms of the post. The Constitution was not meant to hold the government back to the time of horses and wagons, the time when postboys carried every communication that passed from merchant to merchant, when trade had few long routes within the nation and did not venture in bulk beyond neighborhood transactions. The United States have clearly from generation to generation

been taking on more and more of the characteristics of a community; more and more have their economic interests come to seem common interests; and the courts have rightly endeavored to make the Constitution a suitable instrument of the national life, extending to the things that are now common the rules that it established for similar things that were common at the beginning.

The real difficulty has been to draw the line where this process of expansion and adaptation ceases to be legitimate and becomes a mere act of will on the part of the government, served by the courts. The temptation to overstep the proper boundaries has been particularly great in interpreting the meaning of the words, "commerce among the several states." Manifestly, in a commercial nation almost every item of life directly or indirectly affects commerce, and our commerce is almost all of it on the grand scale. There is a vast deal of buying and selling, of course, within the boundaries of each state, but even the buying and selling which is done within a single state constitutes in our day but a part of that great movement of merchandise along lines of railway and watercourse which runs without limit and without regard to political jurisdiction. State commerce seems almost impossible to distinguish from interstate commerce. It has all come to seem part of what Congress may unquestionably regulate, though the makers of the Constitution may never have dreamed of anything like it and the tremendous interests which it affects. Which part of the complex thing may Congress regulate?

Clearly, any part of the actual movement of merchandise and persons from state to state. May it also regulate the conditions under which the merchandise is produced

which is presently to become the subject-matter of interstate commerce? May it regulate the conditions of labor in field and factory? Clearly not, I should say; and I should think that any thoughtful lawyer who felt himself at liberty to be frank would agree with me. For that would be to destroy all lines of division between the field of state legislation and the field of federal legislation. Back of the conditions of labor in the field and in the factory lie all the intimate matters of morals and of domestic and business relationship which have always been recognized as the undisputed field of state law; and these conditions that lie back of labor may easily be shown to have their part in determining the character and efficiency of commerce between the states. If the federal power does not end with the regulation of the actual movements of trade, it ends nowhere, and the line between state and federal jurisdiction is obliterated. But this is not universally seen or admitted. It is, therefore, one of the things upon which the conscience of the nation must make test of itself, to see if it still retain that spirit of constitutional understanding which is the only ultimate prop and support of constitutional government. It is questions of this sort that show the true relation of our courts to our national character and our system of government.

The relation of the courts to opinion is a difficult matter to state, and as delicate as difficult; yet it lies directly in our path. I have pointed out in previous lectures that opinion was the great, indeed the only, coördinating force in our system; that the only thing that gave the President an opportunity to make good his leadership of his party and of the nation as against the resistance or the indiffer-

ence of the House or Senate was his close and especial relation to opinion the nation over, and that, without some such leadership as opinion might sustain the President in exercising within the just limits of the law, our system would be checked of all movement, deprived of all practical synthesis by its complicated system of checks and counterpoises. What relation, then, are the courts to bear to opinion? The only answer that can be made is this: judges of necessity belong to their own generation. The atmosphere of opinion cannot be shut out of their court rooms. Its influence penetrates everywhere in every self-governed nation. What we should ask of our judges is that they prove themselves such men as can discriminate between the opinion of the moment and the opinion of the age, between the opinion which springs, a legitimate essence, from the enlightened judgment of men of thought and good conscience, and the opinion of desire, of self-interest, of impulse and impatience. What we should ask of ourselves is that we sustain the courts in the maintenance of the true balance between law and progress, and that we make it our desire to secure nothing which cannot be secured by the just and thoughtful processes which have made our system, so far, a model before all the world of the reign of law.