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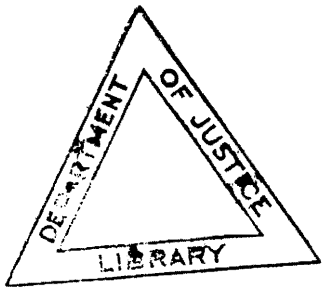

THE MEANING OF FREEDOM

AN ADDRESS

By

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The opportunity to be here with you this evening is a particular pleasure for me, for quite a number of reasons.

It has afforded me an occasion for a return to my native New England, under auspices that are not only agreeable but distinguished; I am deeply sensible of the honor of being asked by Amherst College to address an Amherst audience. More than that, it has enabled me to formulate some thoughts on the subject which has been set for me, "Justice in a Free Society" -- and that is a theme peculiarly appropriate for anyone who has been all his life a lawyer, and no doubt even more appropriate for one who has been additionally fortunate to have held public office. As Governor of my own State of Rhode Island and as one of its senators I have necessarily been aware of the manifold problems implicit in the title of my address tonight. And now, honored by the President with the office of Attorney General, I have deep and immediate responsibilities in that connection -- and I refer to that circumstance not at all boastfully, but with a deep and genuine humility in the face of the tasks which the duties of that office necessarily involve.

Finally, I am especially happy that my talk tonight is one of the series of the Harlan Fiske Stone Memorial Lectures, not only because I had the privilege of personal acquaintance and friendship with that distinguished son of Amherst, but because the life and the judicial labors of Chief Justice Stone exemplify in the highest degree those precepts and approaches which, in the complex modern life of today, constitute and summarize the principles which, in the last analysis, make for justice in our free society.

Let me emphasize that what I say tonight is thus restricted: I am dealing only with <u>our</u> free society. I shall be discussing only the problems peculiar to the America of today, with its written Constitution, and its background of Anglo-American common law. I shall limit my field accordingly, not

because I believe that the common law system, in the abstract, is better than the civil law system of those countries which had Rome as their juridical ancestor, nor because I harbor the notion, not perhaps entirely alien to some American lawyers, that the common law is a prerequisite to freedom. I do not view thus narrowly the great civilizing heritage of the Roman law. Similarly, I do not share the views of some that a written Constitution is the sine qua non of ordered liberty; the British have done very well indeed with a Constitution that was not written, that was as unwritten as the common law itself. Significantly, it was from their unwritten Constitution that the American colonists and the Framers of our fundamental law drew those concepts of liberty and of personal guaranties which lie at the very base of all our most cherished institutions.

No, I limit myself only because I am dealing with things as they are, with the backgrounds and institutions which we have, and with which our statesmen, be they law-makers or law-givers, must necessarily deal.

And so I turn first to what is, necessarily and inescapably, the central fact of our constitutional system, the role of the Supreme Court of the United States. Only with that in mind can we evaluate the work of that great alumnus of yours whom we honor tonight; only with that in mind can we appraise the problems with which he and his predecessors dealt and with which his successors must deal in the years that lie ahead.

We have, in our free society as in all others, the task of reconciling the liberties of the individual with the demands of the state. And, additionally, because we are a federation, because our nation is composed of many States, we have the task in our society of delimiting a boundary between the powers of the States and the powers of the Federal Government.

The broad general outline between the several zones of permitted activity are laid down in our Constitutions, State and Federal. Some of those

lines, even in the Federal Constitution, are drawn in clear and specific terms. Thus, no State may coin money or grant any title of nobility or, without the consent of the Congress, lay any duties on imports or exports. The Congress is forbidden to pass ex post facto laws or to grant any title of nobility; it is given power to coin money, to provide for patents and copyrights, to declare war, and to legislate for the Seat of Government and for the Territories. With respect to the individual, the Federal Bill of Rights guarantees that no soldier shall in time of peace be quartered in any house without the consent of the owner; that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; and that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

These specific provisions have been duly construed, with a minimum of disagreement as to the finer points. But, by and large, they present no broad debatable areas, and certain it is in any event that the great constitutional controversies of the immediate past, of today, and I have no doubt, of the future, originate, not in the specific provisions which I have enumerated more or less at random, not in similar provisions of like specificity, but in the broad general grants of power and in the equally broad prohibitions against governmental action.

Article I, Section 8, declares that "The Congress shall have Power *** to regulate Commerce *** among the several States." Is that broad enough to authorize the enactment of legislation establishing a pension system for the employees of interstate railroads? The Tenth Amendment provides that "The powers

not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Is that broad enough to forbid the operation of a law to control agricultural production through a tax which is distributed by way of benefit payments to those complying with the law? The Fourth Amendment declares that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Does that authorize law enforcement officers to arrest an individual whom they see actually committing a felony, or does it require them to apply to a magistrate for a warrant in the event that they had prior knowledge that a felony would be committed when they arrived on the premises? The Fourteenth Amendment commands that no State "shall *** deprive any person of life, liberty, or property, without due process of law." Is a State minimum wage law consistent with or in conflict with that clause?

Before I suggest answers to these questions -- and they have all been asked, and authoritatively answered, sometimes indeed answered differently on different occasions -- let me emphasize that in our system the answer comes from the Supreme Court. In moments when large segments of the country dislike the answer, there is recurring agitation against the answering body. As I shall point out presently, such agitation is nothing new. But as passions subside, and as the climate of opinion in the Supreme Court chamber approaches the climate of opinion outside, then there is general agreement that the power to make ultimate decisions, the power to draw the line between the individual and his government and between State and Federal authority, must reside somewhere,

and that, on the whole, it had better reside in the highest court of the land.

At any rate, that is where the power rests, in law and in fact, and to call it usurpation -- which for myself I do not believe it ever was -- does not assist in solving constitutional problems. The basic problem, I submit, is this: Grant that the final judgment on every constitutional question must be spoken by the Supreme Court -- how can we best make certain that those who render judgment there will hold the balance even? That is our basic, and, I believe, eternal problem, for our history has shown that whenever the Court read into the written document more than what a substantial majority of those concerned could find in the text on their own, then there was criticism of the Court, criticism which on occasion brought us to the verge of constitutional crisis.

Back over ninety years ago, in the Dred Scott case, the Supreme Court undertook to go beyond the narrow limits of what that case actually involved and, in a series of dicta, not necessary to the decision, laid down principles which a majority sincerely believed would settle for all time the vexed problem of human slavery. The decision called forth a storm of protest. Men of the stature of Abraham Lincoln criticized the Court in strong and scathing terms. We know the result: the problem of slavery remained, to be settled on the battlefield.

A generation later, when the Court reversed itself on the validity of legal tender legislation, first striking down and then sustaining the challenged enactment, there was similar criticism; and so it

was in the 1890's, when the Court first upheld and then invalidated the income tax law. In the latter case, a constitutional amendment was necessary to enable the Federal Government to levy upon incomes, a source of revenue without which national existence would be quite impossible in a world in which world wars seem to succeed each other at discouragingly short intervals. The instability of decision which both instances reflected hurt the Court seriously; these were, in the language of Chief Justice Hughes, "self-inflicted" wounds.

Later, in our own day, when the deepening depression that followed 1929 exposed the defects and weaknesses of our economic life, so far reaching that, at the time of the 1933 bank holiday, they brought this nation literally to the brink of the abyss, the measures which a determined executive and an equally determined Congress thereafter adopted to correct abuses and, if possible, to prevent their recurrence in the future, were challenged in the courts. One by one, these measures were struck down by a majority, frequently a bare majority, of the Supreme Court. The lay public was disturbed, profoundly disturbed. What seemed so clear to the Supreme Court majority was far from clear to the justices in dissent, least of all was it clear to the uninitiated. And when the legislative program in its broad outline was referred to the electorate in 1936, and by them overwhelmingly approved, the Court crisis was upon us.

Chief Justice Stone, then Associate Justice, had indicated how this crisis might have been avoided. In a discerning address on The Common Law in the United States (50 Harvard Law Review 4, 24-25), he had pointed out how accepted common-law and constitutional techniques

would have obviated the kind of decision which had resulted in such outcries. He said:

> "In ascertaining whether challenged action is reasonable, the traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken. Action plainly unreasonable at one time and in one set of circumstances may not be so in other times and conditions. The judge, then, who must say whether official action has passed the limits of the reasonable, must open his eyes to all those conditions and circumstances within the range of judicial knowledge, in the light of which reasonableness is to be measured. In this he but follows historic precedent, even though he does less than did Lord Mansfield in learning the practices of merchants in order to adapt the rules of common law to the needs of a mercantile community.
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> "He is aided, too, by the fact that the matter ultimately to be ruled upon is the reasonableness of official action, to which the common law has always attached the presumption of regularity where action is based on official ascertainment of facts and conditions. It is but the resort to a familiar technique of the common law which takes into account the nature of the official function and the circumstances that attending its performance are both the duty to ascertain the facts and special facilities for learning them which entitle it to deferential treatment by courts. And, finally, by a step typical of the methods by which the common law has grown and accommodated itself to changing needs, courts have developed their own technique for safeguarding coordinate branches of the government from encroachments of the judicial power. By a self-denying ordinance of immeasurable importance to the balanced functioning of the constitutional system, the courts, under the leadership of Marshall, have declared that every law duly passed is presumed to be constitutional, and that the burden is on him who assails it to establish its unconstitutionality beyond the reasonable doubts of objective-minded men. There was thus adopted as a check upon any excess of judicial power a device familiar to the common law, in the presumptions of regularity of offical action, and of the innocence of one accused of crime, by which the reasonable freedom of official action and the sanctity of life and liberty have traditionally been shielded

> from the zeal of courts, so that court action, ordinarily subordinate to that of legislatures, is similarly restricted in the constitutional field when called upon to set aside legislative action.
>
> "Whether the constitutional standard of reasonableness of official action is subjective, that of the judge who must decide, or objective in terms of a considered judgment of what the community may regard as within the limits of the reasonable, are questions which the cases have not specifically decided. Often these standards do not differ. When they do not, it is a happy augury for the development of law which is socially adequate. But the judge whose decision may control government action, as well as in deciding questions of private law, must ever be alert to discover whether they do differ, and, differing, whether his own or the objective standard will represent the sober second thought of the community, which is the firm base on which all law must ultimately rest."

Harlan Stone's concept of the judicial function, as this perhaps necessarily long excerpt indicates, was that it was no part of the judge's function to rewrite the Constitution or to rewrite a statute. He considered himself as a judge, not a legislator, and still less an ordained protector of the people, who alone could be expected to bring them wisdom or guard them from the consequences of their folly. And in what I believe will stand as his most powerful judicial utterance, his dissent in the case which invalidated the Agricultural Adjustment Act, he set forth that philosophy in striking terms. Said Mr. Justice Stone (United States v. Butler, 297 U. S. 1, 78-79, 87-88):

> "The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:
>
> "1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from

judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

* * * * * * * * * *

"A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent -- expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money."

And, at the same term of Court, in the case which invalidated the New York State Minimum Wage Law, Mr. Justice Stone all but violated the confidences of the conference room when he said in dissent (Morehead v New York ex rel. Tipaldo, 298 U. S. 587, 633):

"It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an

> appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest."

These expressions, to put the matter mildly, were not calculated to increase public confidence in what the majority had decided, and in fact they were used as weighty ammunition by the supporters of the Court Plan. I do not propose to dwell upon the details of the struggle that followed. Suffice it to say that it was a fight which would either be won by both sides, or lost by both sides. In the end, both sides won. The Constitution and the Court both endured, as more sober counsels prevailed, and as -- very significantly -- one by one the dissents of Mr. Justice Stone became law.

The about-face in the minimum wage situation came within a year (West Coast Hotel Co. v. Parrish, 300 U. S. 379). The effect of the decision in the Agricultural Adjustment Act case was felt for only a few years, until Mulford v. Smith (307 U. S. 38). And before very long, in Mr. Justice Stone's opinion in the Darby case (United States v. Darby, 312 U. S. 100), there was laid at long last the ghost of the old child labor case, Hammer v. Dagenhart (247 U. S. 251), which for twenty years and more had blocked all worthwhile efforts to prohibit child labor. Eventually, too, Mr. Justice Stone's dissent in the first flag salute case Minersville School Dist. v. Gobitis, 310 U. S. 586) became the law of the Court, and of the land (Board of Education v. Barnette, 319 U. S. 624).

Thus much constitutional deadwood was cleared away, and, as the judicial philosophy of Harlan Stone became, as it should always have been, the lodestar of the Court, the number of Federal statutes declared unconstitutional decreased perceptibly. It is significant that, since 1936, only two Acts of Congress have been invalidated by the Supreme Court.

But, notwithstanding all the instances in which his dissenting opinions became majority opinions, it was noted that Mr. Chief Justice Stone was dissenting after 1941 from the views expressed by the so-called "new Court" quite as frequently as Mr. Justice Stone, prior to 1937, had dissented from the views of the Court as earlier constituted. Just as in the late '20's and early '30's the catchline had been "Stone, Holmes, and Brandeis, JJ., dissenting", with Cardozo substituted for Holmes after 1932, so now it was "Stone, C. J., Roberts and Frankfurter, JJ., dissenting", with Mr. Justice Burton later replacing Mr. Justice Roberts.

A number of facile explanations were at hand to explain this phenomenon. Wiseacres whispered that the Chief was getting old. Learned commentators -- cliche experts -- explained that the once "liberal" Justice had turned "conservative." Still others were at hand to venture the suggestion that here was a man who liked to be in a minority, whose greatest pleasure lay in culling flowers from the thorny shrubbery of dissent. Actually, however, as any reasonably careful reading of the cases will show, the Chief Justice had remained constant. His own views as to the proper scope of judicial activity never changed. He was always the same, always dependable, always as solid as the granite of the State which had given him birth.

The only change was one of emphasis, based on the circumstance that most of the controversies that engaged the Court after he became Chief Justice involved statutory rather than constitutional problems. The cases then decided were laywers' cases, not decisions capable of arousing heated public discussion. But just as Mr. Justice Stone had

dissented in the past when he thought that his brethren were reading their economic predilections into the Constitution, so in his later years Mr. Chief Justice Stone dissented when he felt that the majority of the Court were reading their social and political predilections into statutes.

I think I can best illustrate the change by bringing to your attention two cases out of many that might be cited. The first was the Schneiderman case (Schneiderman v. United States, 320 U. S. 118), which was an attempt by the Government to cancel the citizenship of a member of the Communist Party on the ground that he had procured his certificate of naturalization by fraud, the fraud involved being his representation that he was attached to the principles of the Constitution of the United States. A majority of the Court reversed the judgment of denaturalization, on the ground that fraud had not been satisfactorily proved.

Insofar as the decision involved a new approach to the quantum of proof required in denaturalization cases, it is of technical interest only. But the broad expressions in the majority opinion went far indeed, and Chief Justice Stone dissented vigorously. He objected, first, to those aspects of the decision which in his view involved fashioning a new rule to apply to the particular case. He said (320 U. S. at 170):

> "The two courts below have found that petitioner, at the time he was naturalized, belonged to Communist Party organizations which were opposed to the principles of the Constitution, and which advised, advocated and taught the overthrow of the Government by force and violence. They have found that petitioner believed in and supported the principles of those organizations. They have found also that petitioner 'was not, at the time of his naturalization . . ., and during the period of five years immediately preceding the filing of his petition for naturalization had not behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.'

> "I think these findings are abundantly supported by the evidence, and hence that it is not within our judicial competence to set them aside -- even though, sitting as trial judges, we might have made some other finding. The judgment below, cancelling petitioner's citizenship on the ground that it was illegally obtained, should therefore be affirmed. The finality which attaches to the trial court's determinations of fact from evidence heard in open court, and which ordinarily saves them from an appellate court's intermeddling, should not be remembered in every case save this one alone."

He went on to criticize the majority's formulation of what the principles of the Constitution in fact were, and he concluded in ringing terms which I quote here because what he said then, in 1943, has perhaps even greater significance in the light of what we have so painfully learned about Communism in these present years of the cold war. Chief Justice Stone said (320 U. S. at 196-197);

> "**** Petitioner's pledge of adherence to Communist Party principles and tactics, and his membership in the Communist organizations, were neither passive nor indolent. His testimony shows clearly that during the crucial years he was a young man of vigorous intellect and strong convictions. He spent his time actively arranging for the dissemination of a gospel of which he never has asserted either ignorance or disbelief. His wide acquaintance with Party literature, and his zealous promotion of Party interests for many years, preclude the supposition that he did not know the character of its teachings and did not aid in their advocacy. They are persuasive that he was without attachment to the constitutional principles which those teachings aimed to destroy. Yet the Court's opinion seems to tell us that the trier of fact must not examine petitioner's gospel to find out what kind of man he was, or even what his gospel was; that the trier of fact could not 'impute' to petitioner any genuine attachment to the doctrines of these organizations whose teachings he so assiduously spread. It might as well be said that it is impossible to infer that a man is attached to the principles of a religious movement from the fact that he conducts its prayer meetings, or, to take a more sinister example, that it could not be inferred that a man is a Nazi and consequently not attached to constitutional principles who, for more than five years, had diligently circulated the doctrines of Mein Kampf.

> "In neither case of course is the inference inevitable. It is possible, though not probable or normal, for one to be attached to principles diametrically opposed to those, to the dissemination of which he has given his life's best effort. But it is a normal and sensible inference which the trier of fact is free to make that his attachment is to those principles rather than to constitutional principles with which they are at war. A man can be known by the ideas he spreads as well as by the company he keeps. And when one does not challenge the proof that he has given his life to spreading a particular class of well-defined ideas, it is convincing evidence that his attachment is to them rather than their opposites. In this case it is convincing evidence that petitioner, at the time of his naturalization, was not entitled to the citizenship he procured because he was not attached to the principles of the Constitution of the United States and because he was not well disposed to the good order and happiness of the same."

I do not suppose it will come as any surprise to this audience that one of the most difficult of current legal problems in this country is the effective control of Communism. Chief Justice Stone and those members of the Court who agreed with him were of the opinion that existing law was adequate, that the principles of our Constitution were so diametrically opposed to the principles of Communism that a good Communist could not possibly be a good American. They felt that nothing in the Constitution required it to guarantee its own self-destruction, and they were unwilling to dilute the meaning of the phrase, "attached to the principles of the Constitution", so that anyone paying lip-service to free speech could prove such an attachment. It is probably fair to say that the difficulties in the way of a lawful and orderly control of the forces that are actively seeking to subvert our institutions will not be appreciably lessened until, in this instance also, a majority of the Supreme Court shall finally espouse the dissenting views of Harlan Stone.

Another instance, and a dramatic one, of Chief Justice Stone's dissent in the face of what he conceived to be a rewriting of an Act of Congress occurred in the case of Girouard v. United States (328 U.S. 61), decided on the very day of the Chief Justice's death.

In that case, the Supreme Court held that an alien who had religious scruples against bearing arms was not ineligible for admission to citizenship, and in so doing overruled its earlier decisions to the contrary in the Schwimmer and Macintosh and Bland cases, decided some fifteen years or so earlier. The Chief Justice had joined in the dissent in the latter two cases, in 1931, so that his own views, as an original proposition, were in accord with the result reached by the majority in 1946. But, in view of the circumstance that a statute was involved, and that Congress, by its refusal to amend the earlier law and by later reenacting it without change, had indicated its approval of the earlier interpretations, Chief Justice Stone felt that he could not regard the case de novo. And so he dissented, expressing the view that he was bound to follow the path that Congress had indicated, regardless of his personal attitude or preferences. He said (328 U. S. at 76):

> "In face of this legislative history the 'failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute . . . has brought forth sharply conflicting views on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.' . . . It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former

> language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make such an assumption is to discourage, if not to deny, legislative responsibility. By thus adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940."

And he concluded by saying (328 U. S. at 79):

> "It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power."

I myself recall vividly, how, in the course of his oral summary of that dissent, in the Supreme Court chamber, the Chief Justice closed by saying that there should be an end to "judicial tinkering" with statutes - - and those were the last coherent words he ever uttered, because he was stricken immediately afterwards.

It has always seemed to me a highly significant circumstance that the theme of this last dissent in the Girouard case was identical with the theme of the dissent in the Butler - AAA case a decade earlier -- the theme that the wisdom of statutes is for the legislature, the theme that the judge is not to obtrude his own views of wisdom or of expediency or of public policy into his decisions. I do not know what Chief Justice Stone thought about the soundness or the unsoundness or about the social or economic desirability of the Agricultural Adjustment Act. I do know, from his vote in the Macintosh and Bland cases, and from what he said in his Girouard dissent, that had he been a legislator he would have agreed

with and voted for the Girouard result. But he dissented none the less, because he was of the opinion that Congress in the exercise of its undoubted constitutional power had determined otherwise. And that, or so it seems to me at any rate, is the mark of the great Judge in a free society: One who decides cases according to his views of what the law compels him to decide.

For Harlan Stone, that was the guiding principle of his approach to the judicial process -- and in that connection I urge you to discard, for all time, those current catchwords of "liberal" and "conservative" which becloud clear analysis. (I should add that both labels appear in quotation marks throughout my text.) Chief Justice Stone's whole life should warn us of the pitfalls of ready-made labels.

Those of you who are familiar with his career know that, after a fruitful year spent as Attorney General, in the course of which he remade the Department of Justice -- and that Department needed rehabilitation, its previous head having resigned under a cloud -- Harlan Stone was nominated to fill a vacancy on the Supreme Court. In the retrospect of a quarter of a century, it is clear that the Attorney General was the logical man for the place. For myself, reconstructing the scene as of 1925, I think that he was the logical man then even without benefit of hindsight. But it is a curious circumstance that while it was later whispered by the purveyors of gossip that his nomination was in the nature of a kick upstairs, occasioned by an alleged threat on his part to proceed against large corporations for violations of the antitrust laws, in fact the opposition to his nomination -- and there was vociferous opposition -- was not based on that circumstance. The objecting Senators

did not urge that Mr. Stone should be kept in the Attorney General's Office in order that he might continue his trust-busting activities in the interests of the public; they argued that he should be kept there because he was unfit to sit upon the bench. And why? Why, because he had been a member of a large Wall Street firm, and because no man who had ever put his feet under the dinner tables of the rich could ever be expected, as a judge, to place human rights above property rights. And so on, and so on, with a lot of similar silly demagoguery. In the end, there were only six votes against his confirmation; but if there is anywhere in our recent history a more striking example of the threadbare cliches and catchwords of the left wing, it escapes me at the moment.

So I suggest that the labels applied to Stone's judicial labors do not assist us in solving the basic problem of justice in a free society. I know that, fifteen and twenty years ago, it was said that Mr. Justice Stone was a "liberal," and that in the last years before his passing, when he had become Chief Justice, many persons sagely remarked that he had become a "conservative." But what, after all, is a "liberal"? I know a good many people who are inordinately proud of calling themselves "liberal" who in fact are most illiberal when they encounter other views that they consider less "liberal" than their own. And at this point I am far from confident that I can with any accuracy define a "conservative." I used to think I could, but in some of my more recent experiences I have been forced to conclude that very frequently a "conservative" is one who votes "liberal" when to do so bids fair to embarrass other "liberals."

No, it does not much advance our thinking to endeavor to fit people into rigid categories. Particularly is this true when we are dealing with the judicial function in a constitutional democracy. A matter as

complex and with so many facets as a judge's outlook on the task of adjudication cannot, even in this tabloid and dehydrated age, be summed up in a single word, more particularly when the word has connotations as to which there is sharp and even bitter disagreement. And the short review of the judicial labors of the late Chief Justice which I have been able to bring to you tonight makes it plain to me, as I am sure it will be plain to you, that it would be more than ever futile to attempt to classify Harlan Fiske Stone according to the categories under which, to paraphrase Gilbert and Sullivan, every judge is either a little liberal or else a little conservative.

Particularly in the field of statutory construction, which occupies courts far more, though far less dramatically, than does constitutional interpretation, the labels of "liberal" and "conservative" are without real meaning.

Is it a mark of "liberalism" to water down the phrase, "the principles of the Constitution," a phrase first used by Congress in 1795 when America was the only successfully functioning republic in the world, so that any man of professed good will can, given tongue in cheek, bring himself within it? Is it a mark of "liberalism" to visualize no differences between the principles of the American Constitution and those of Marxist Communism? Is it a mark of "conservatism" or of "reaction" to insist, as Chief Justice Stone did in the Harry Bridges deportation case (Bridges v. Wixon, 326 U. S. 135, 166), that a rule of general application in habeas corpus cases involving deportation orders should not be departed from in a particular case?

It was a matter of regret to me that, in the graceful and eloquent addresses which were delivered at the Memorial Services for Chief Justice

Stone in Washington, addresses which pointed out how the constitutional doctrine that he had espoused in dissent became one by one the law of the land, there was no mention of his later disagreements with what he deemed to be unwarranted judicial interference with the legislative function. For surely one necessary corollary of the functioning of the judiciary in our free society, namely, that they must hold the scales even in order to insure justice in accordance with constitutional processes -- one necessary corollary of that must surely be the proposition that no judge shall tip the scales because of what for the moment seems goodness of heart.

Nearly three and a half centuries ago, Chief Justice Coke warned King James I that judges were non sub homine sed sub Deo et lege -- not under man but under God and the law -- that, in short, there were rules having moral authority beyond any mere whim of the lawgiver, no matter how benevolent. Chief Justice Stone was true to that tradition; his view of the judicial function insured justice in a free society. And I do not think I can better summarize that view than in the graceful words of a kindred soul and great American, Chief Judge Learned Hand of the Second Circuit, who recently, speaking of his own law school, expounded an ideal of law for our time. Judge Hand said (Harvard Law School Bull., Jan. 1949, p. 8):

> "* * * What was it that brought to the School its resplendent fame in the profession, and changed the course of legal education? Everyone is likely to have his own answer, and I cannot vouch for mine; but it is this. They taught us and we believed--and those of us who are left still believe, I fancy--that every civilized society must depend for its existence upon its recognition of, and adherence to, some body of principles, ascertainable from not inaccessible sources, having moral authority and carrying sanctions. This authority, which alone makes the sanctions tolerable, is derived in large measure from continuity with the past; it is traditional. This is not because the compromises of the past, which these principles embody, are necessarily those that would emerge from similar conflicts today, or, for

> that matter, were ideally the best even when originally they got themselves accepted. It is because they have proved their ability to withstand the shock and abrasion of time; because no better solutions have as yet been able to establish themselves in their place; and because man by his nature inevitably will act in large part on habit and convention. He feels their authority, if for no stronger reason, because the alternative is war in one form or another. These men taught us that to make use of this inheritance flexibly, yet authoritatively, we must know how it came about and why it had continued to maintain itself. They taught us that, particularly in a democratic society, a loyal enforcement of these principles as they are, until by accepted procedures they have been superseded, is the condition of that orderly change without which civilization perishes either by atrophy, or by convulsion. They taught us that, though government is an adjustment of conflicting interests, its stability depends upon the measure of moderation that the more powerful groups are willing to impose upon themselves; and that such moderation cannot be imposed in invitum by any bench of judges, but must depend upon the mutual forebearance of the citizens."

Those were the principles of Harlan Stone, a great judge and a great American, who knew that, absent reason and authority and continuity, law would be merely a screen of words expressing will in the service of desire, unable to administer justice, and impotent to preserve a free society.