

1987

VOLUME 66

NUMBER 1

OREGON LAW REVIEW

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Reflections on Teaching and Working in Constitutional Law*

ONE warm afternoon toward the middle of last May, I was leaving the Yale Law School for fair. The Dean of the Columbia Law School, who shares with me three grown children and a little New Jersey granddaughter named Rebecca, had come to New Haven to see that my pitifully few belongings got safely aboard the truck of our kindly moving-man. Herself the Dean lingered *infra portas hereticorum*, inside the Wall Street doors of the Yale Law School, while I strolled with our driver toward the livery-car that was to take us to New York. As I walked toward that car, it came in my mind that on any future visits to Yale I would have in my pocket no key to any door in New Haven. I turned back to look at those wonderful Sterling Law Buildings, made to stand a thousand years. I said to the driver, "You know, that's the shortest thirty years I ever spent!"

I always disliked and even feared the word "retirement" more than I did the word "death." I must say now, with the City of New York as my retirement village, and with a half-time job teaching at

* This lecture was presented March 11, 1987, under the sponsorship of the Wayne L. Morse Chair of Law and Politics at the University of Oregon.

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the Columbia Law School as the form my retirement takes, I might want to rethink that preference. But retirement at best is a reminder of what time it is. I hope you will allow me to look back, to talk here about the life-lines of one academic constitutional lawyer.

Let me tell you just a bit about how I came to be first a law student, then a member of the Bar, with all deliberate speed a law professor, and at long last a lawyer.

I took my first college degree rather early. Then I drifted for five years from one kind of study to another, greatly liking the student's life, not really committed to any of the subjects I was studying. Just short of twenty-five, I somehow sensed that this string was running out. I looked around. I had just one card left to play. My father, an eminent lawyer in Texas, had been subsidizing all this semi-committed study. I later dedicated my first book in constitutional law "To my father, a man of law and equity;" I might have added, a man of great natural generosity, and of faith in me, though by that time faith may have been a little troubled. I knew that he would cheerfully stake me to three years in the Yale Law School. Forty-seven years are a long time, when one is trying to recall one's motives. But I can say that what led me to the law, and positioned me for a life in law, was in very much the largest part a desire to stay in school three more years.

In the Yale Law School, I developed no feeling of deep commitment to law. I found much both of nourishment and of surprise in what I was learning, but I did not see this "law" as my calling; rather it was to be a way of honorably maintaining oneself while searching for what one really needed to do. In my beginning years as a law teacher at Columbia, this position developed itself, but did not fundamentally change. My difficulties come fairly clear in memory.

First, through my father I had come to see the practice of law as *advocacy*, as being on a side, and using all one's wit and will to persuade the judge that that side was the right one. Secondly, this advocacy, to succeed, must track the concepts and categories of "the law," — of that law which, as Lord Coke reminded King James, was founded not on natural but on artificial reason. I felt the artificiality very much more than I did the reason.

In the early years of my teaching law at Columbia, then, I believe I was casting about for ways to escape a life of manipulating legal technicalities to persuade some judge to decide in favor of a position given me to advance — or teaching recruits to practice this art. The

ways of escape I started along were not then seen by me as such, but as desirable expansions, fresh perspectives that brought creative new meanings to the study of law — as indeed they were, and splendidly have been, in the hands of others whose real calling leads to those ways.

First, there was the shift to looking on law as a huge cultural artifact, which one sought to understand rather than to work, as a historian seeks to understand institutions of the past, without expecting to manipulate them or to use them. When you make this shift, arguments about “correct” or “right” or even “good” law lose their point. Legal argument, carried on by others, becomes one more pattern of thought and action to be observed and understood. Then there was the enterprise of bringing to bear, on this cultural complex, insights derived from other disciplines. I became a well-read person on such things as “Law and Psychology,” “The Sociology of Law,” and so on. It was about the last time I was to be well-read on anything.

I had another less intrinsic, more time-bound trouble about law. You cannot form a right impression of the position in 1950 of a person looking to make his life in law, without glimpsing the long face that the law of that day wore. We were, in 1950, still four years short of *Brown v. The Board of Education*;¹ the view of the old men of the tribe was, in now astonishing dominance, that *Plessy v. Ferguson*² had been correctly decided, or perhaps more fundamentally, that you shouldn't rock the boat. We were in the year of the case of *Dennis v. United States*.³ The infamous *Japanese Exclusion Cases*⁴ were quite recent; to the prevailing 1950 mood, they still seemed pretty much all right. The Metropolitan Life Insurance Company had received extensive, massive, absolutely crucial help from the State and the City of New York, in creating an enormous apartment complex, nine uptown blocks long and several crosstown blocks wide, on the East Side of New York City. They called it a “Town”—“Stuyvesant Town”—and after all the public money had been spent, and all the indispensable eminent domain power exercised, and after the insurance men and the politicians had taken bows together, the suddenly “private” owner—the Insurance Company—put up a polite little sign that read, “No Negroes Need Ap-

¹ 347 U.S. 483 (1954).

² 163 U.S. 537 (1896).

³ 341 U.S. 494 (1951).

⁴ *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945).

ply.” The highest court in New York held that there was, in all this, “no state action” sufficient to call down the interdictions of the fourteenth amendment; the Supreme Court of the United States denied certiorari. Arbitrarily cruel decisions concerning aliens were coming down in some number.

Caution, negativism, defeatism were the attitudes of the more prestigious members of the legal academy toward the use of law, and most particularly of constitutional law, to effect large motion toward justice. On patriotic holidays, we spoke with pride of our Bill of Rights, but on workdays it was thought naive to attribute to it any spacious operative meanings. An alert wide-reaching sensitivity to the weaknesses of the courts, to their ineptness to the doing of good, or even of justice, was the trait that established one as sound. Such was the spirit of the times, a down-dragging spirit, a spirit that belittled and denied—all under the arrogated banner of wisdom.

I suffered from this. I don't think it had entered anybody's mind then, in the circles in which I moved, that I was to become a teacher of constitutional law; certainly, I did not look so high. I saw my future as one of earning my bread by teaching admiralty and other private law subjects; I vaguely hoped to do something, someday, linking modern linguistic insights to the understanding of law; I gave a course—rather a shallow course, I now perceive—called “Law in Society.” All this had little to do with the pervading negativity I have described. But that pessimism did touch me in one way. I felt a call to do something about racial justice and about the more ample protection of intellectual freedom. This led me into taking some minor part in litigation. I signed the *amicus* brief of law teachers in the case of *Sweatt v. Painter*,⁵ which won the admission of blacks to the University of Texas Law School. I worked with Franklin Pollak on the case of *Public Utilities Commission v. Pollak*,⁶ wherein he and I sought to put a stop to the practice of degrading city bus riders to a captive audience. I testified in a matter concerning the rights of Indian tribes to legal counsel of their own choosing. On all such enterprises fell the shadow of that dreary spirit of the times. The thought was, in high academic places, that anybody who could think there was a constitutional right not to be coerced into listening to the blare of advertising must be “ruled by his heart rather than by his head,” a favorite saying

⁵ 339 U.S. 629 (1950).

⁶ 343 U.S. 451 (1952).

then—in the mouths, I fear, of many who would rather be thought hard-hearted than soft-headed, rather cold and cruel than deficient in analytic acumen and nicety of phrase. This was a depressing atmosphere for somebody like me.

As I moved on through my late thirties, I was the oldest promising young man they had ever had at the Columbia Law School. This was synchronically a pleasant enough position, but there was possibly very little future in it. I was keenly interested, I kept saying, in applying psycholinguistic insights to the understanding of legal institutions. But this interest stubbornly failed to quicken in me any creative stir.

It must have been sometime in August 1953 that I got a letter from the legal counsel's office at the NAACP, inviting me to be one of a large group of lawyers who were to help with the briefs in a case pending for reargument in the Supreme Court of the United States. The aim of this litigation was to challenge and destroy the old rule that "separate but equal" facilities, for black and white schools respectively, satisfied the requirements of the "equal protection" clause of the fourteenth amendment. I replied, accepting.

On the evening before the first day on which this group was to gather, I was out with my dear friend then as now, Sam Lester - like me an expatriate Texan living in New York. Sam and I, on that hot night, were passing the time quaffing a cool foaming liquid. Somehow, it got very late. All at once I was seized by the thought of the next day's meeting, set for nine o'clock. "Sam," I said, "I know you have to get up and go to work. I want you please to call me when you get up, and tell me to get my anatomy up to that meeting on Forty-Third Street, and please call me again when you are leaving for work, with the same message, and after you get to work try me again. You know I just realized, Sam, that there is something happening up there tomorrow that I can't afford to miss."

So Sam called, and I cursed, and he called the second time, and I said "OK," and, when he called the third time, I didn't answer. I was up at the conference. At but not of, for a while. That first morning I sat there and listened. In the afternoon, I think the engine may have coughed a couple of times, but it didn't catch. Sometime that evening—we worked overtime on that job—it coughed, and then coughed again, and this time it caught for good.

Those among you who are connoisseurs of the special ironies that concern fathers and sons may well guess what began to happen to me on that 1953 day. It only began then; it was something that had

to be lived. After this living-through was well on its way, I realized that two things had happened; I will confess now to one of them and return to the other.

I discovered, to my considerable surprise, that what it took to bring me out was advocacy. I had feared the constraints and channelings of advocacy; I had mistaken my calling and mistaken the nature of that advocacy to which I was to be called. I still believed and I keep believing that psycholinguistics and adjacent disciplines may have much of value to say about the ways of human law. But I came to know I was not the person whose task it would be to develop those insights.

As bigness goes, I was not very big in the *Brown*⁷ case. This is not mock-humility. There were some thirty lawyers; I was junior to almost all of them, by a long gap of seniority, in this anti-racist law work. But I joined a company that I have never left. With some of the lawyers there I retain active comradeship. But all of us know who we were and where we were and what we were doing then. Some twenty-four years after those days I was to be on a panel in Detroit with Kenneth Clark, whom I had not seen in the intervening years. As soon as we got close enough to recognize each other, our eyes met. It would have been clumsy to say anything. We remembered.

The *Brown* case brought to fullness in my mind the mighty theme of anti-racism. When I was a boy of ten, I formed an emotional friendship of some depth with a seventy-five-year-old black man named Buck Green, whom I knew to have been born and raised to the age of fifteen as a slave. I knew this as a thing about him. What did not occur to my ten-year-old mind was that the chances were good that any one of the many older black people in Austin—everybody, let's say, seventy or over—would have distinct memories of having been a slave; even slave children, I imagine, could have understood a good deal about the forced labor, the arbitrary regime of punishment, the buying and the selling—in threat always, sometimes in reality. When I hear people talk about slavery as though it were something so remote in time as to make it far-fetched to think there could be any but a book-fed connection between then and now, I think about Buck Green. If I had been born a black in Austin, all four of my grandparents would all but certainly have been born slaves; one grandparent of mine was born in 1857, the year of

⁷ 347 U.S. 483 (1954).

the *Dred Scott*⁸ case, another in 1862, the two others not much later than 1860. My parents would have been raised in the desperate times of rightlessness, personal and political, following Reconstruction. They would have been getting old, I would have been about thirty, before any breakup of the old regime began—before, for example, we could effectively vote in Texas. At least two of my very own children could have remembered that we were a family that could not go to the good restaurants in Austin, and that all the white people called their father by his Christian name.

We are bound to the times of slavery, you and I, by something much more like contemporaneity than like the ties that bind us to remote centuries. The striking fact is that I am a *late contemporary* of thousands of American slaves. Would it not show more grace in us—perhaps a keener sense of humor—if we did not so eagerly rush to the decision that the results of what is, in a very considerable euphemism, called “past discrimination” are dissipated?

It is one of our arrogances to think we have “compensated” or can “compensate” black people for what has been done to them. There isn’t that much money in the world. It’s too late; so many of the victims are pitiably dead, long dead. The real reason supporting special measures in regard to black people today is that all of us, and all our children, need to belong to an American people that is not a house bitterly divided.

When that comes about, and not sooner, we will have dissipated the effects of the slavery to which we are now so close in time. Two centuries of slavery, and all that followed, created a huge historic duty in all of us, not merely to try to dispel the effects, in one workplace or in one school, of “past discrimination” in that very plant or school,—measuring out this vast duty in coffee-spoons—but to do what it takes for as long as it takes to build a nation not corrupted and poisoned by a racism that in all its works and ways is the legacy of the slavery that was and is our very own. The alternative to guilt is not for us to utter self-serving Acts of Oblivion, but for us generously to assume responsibility to build that nation—a nation at last comprising the American people.

Maybe I got carried away there, but I decided to let the passage stand, because it makes audible why the *Brown* case was fated to be what drew me out into the high seriousness of public advocacy on public questions.

⁸ *Dred Scott v. Sandford*, 19 How. 393 (1857).

I was thus first attracted to working with the human-rights material in American constitutional law. But almost from the beginning I was also interested in the structures of government—the *Constitution* in the etymological sense. This happens to some students of American constitutional human-rights law, first because the practical working-out of these rights occurs in a federal structure, and second because these rights have been said to be binding only on components of *government*—the famous or infamous “state action” requirement—and this line of doctrine has to be worked out in regard to quite complicated structural relations between governmental action and private action.

The “state action” problem engaged me early and strongly through its connection with human-rights law. It happens that the first Supreme Court brief I worked on was in the *Pollak* case that I mentioned earlier. That case concerned the intellectual insult to riders on public transport who were made into a captive audience for commercial advertising. The bus company was nominally a “private” corporation. Was there “state action?”

The “state action” question became central and crucial in the civil rights cases of the sixties, in briefing which I was very active. Before the passage of the Civil Rights Act of 1964, black people—often young people—were throughout the South going into nominally “private” all-white establishments—lunch counters, and the like—requesting service, and refusing to leave when ordered out by the management. Arrests followed. Was there “state action?”

(I worked so heavily on this problem—in the company of such people as Jack Greenberg and James Nabrit III—that for a time I saw the “state action” problem as about all there was to law. I even wrote a poem called “State Action Blues” which my matured dignity has forced me to retire from circulation.)

I later became engaged in another structural problem, concerning the mode of amendment of the national Constitution. In 1962, a number of state legislatures passed resolutions seeking to invoke a never-used mode of amendment. Article V, the amendment article, says that “on the Application of the Legislatures of two-thirds of the . . . States [Congress] shall call a Convention for proposing Amendments . . .” The legislative applications passed in 1962 and 1963 were drawn on the theory that they might validly ask for the calling of a convention for “proposing” *one fixed text* of an amendment, given *verbatim* in the legislature’s application. It was and remains my own view that the article V passage, in authorizing an

“application” for “a convention for proposing amendments” means that to be valid an “application” must be something other than one for the rather preposterous convening of a huge body, coming from Hawaii and Maine and points between, just to vote “yes” or “no”—or, as the applications really say, just to vote “yes”—on a text that has already been “proposed,” in the common and practical sense, by the state legislatures. This has been an endless fight.

Meanwhile, in 1955, just as these constitutional themes had well begun to move in my mind, the Yale thing came along, in the cheerful form of a telephone call from that wonderful yea-sayer Eugene V. Rostow, then the new Yale Law School dean. Our decision was to go. It turned out that this was just the right thing for me at just the right time; the thirty years indeed passed quickly. In one early conversation, I asked Gene Rostow what he wanted me to teach. He looked at me, rather puzzled I think, and proceeded to define the Yale Law School by saying, “Of course you’ll teach whatever you want to teach.” Later in that same conversation, our talk turned to constitutional law. And so it happened, and I have never looked back.

I don’t pretend to be able to sort out teaching and writing. I think it no accident that I’ve done most of my own writing while teaching a full schedule. I don’t know why it works that way, but I know it does, for me. Publishing prepares me for teaching, because I like to teach from commitment, thus to give the students something firm to grow against. Publishing is fullest commitment. Other people have other ways; may they bless mine as I bless theirs.

I will say that I have been uneasy and dissatisfied about much of my teaching. Perhaps a dozen years ago this feeling began to be less intense, the problem less unapproachable—though I hope I shall always have the grace of being somewhat unhappy with my teaching.

Confucius said that nobody should study the Book of Changes before the age of seventy. For teaching constitutional law, I think sixty is about the right age—at least I found it so, with my late start. The beginning teacher of American constitutional law can develop pretty good tunnel-vision into one and then another and then another problem. I believe I was about sixty, with six or seven books in constitutional law to my name, before I felt that I was beginning to enjoy some dawning perception of the subject in its roundness. Please be very sure that neither then nor now did I or do I claim anything like completeness in such understanding. But I do think

that, after twenty years or so, you begin to perceive questions in their places within a wider structure. You never get enough of such insight, but even the beginning of it makes of teaching an exhilarating experience.

My time in constitutional law has had, then, two major themes—the human-rights theme and the structural or constitutive theme. I think these two concerns have nourished one another. When I did a book with the title *Structure and Relationship in Constitutional Law*, the main thesis was that certain human rights had in the past been and could validly be inferred from the very structures of government; a strong minor thesis worked out the consequences, for “judicial deference” in human-rights cases, of the fact that very often the authority the judicial court was called on to control was not Congress, or even a state legislature, but, it might be, a subcommittee in one house of Congress, or the Secretary of State, or the Collector of Customs in San Francisco, or a police chief, or just one policeman—and that this had to make a difference in the degree of “self-restraint” with which the judicial court was to do its duty.

I think for the rest of my time I’ll talk about just two lines of work—the first being my most recent work on human rights, the second dealing with a constitutive or structural problem that I touched years ago, in work which I have lately been trying to refine, under the stimulus of recent events.

I have for some time been one of the many people questing after some rational foundation for the protection of human rights not named in the Constitution. The most obvious support seems to be the ninth amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

I sailed off on my first cruise with the ninth amendment in the Holmes Devise Lectures, delivered at the University of Washington, your neighbor to the north, in 1970. My heart was in the right place, and I was right to look generally toward the ninth amendment, where unnamed rights are dealt with explicitly and not by indirection. But I was certainly not satisfied.

I tried again on the ninth amendment in the Holmes Lectures at Harvard in 1979. I think it was a little better. Maybe. Almost everybody gets buck fever about the Holmes Lectures at Harvard.

Then a third chance came along. I was asked to do a piece for Gene Rostow’s *Festschrift*; that time, in an essay called “On Reading and Using the Ninth Amendment,” I finally got it right. Not

right *sub specie aeternitatis*; who knows how eternity looks at things? I mean I got it like I wanted it, I got it so it was in my own thought both right and defensible. That's all you can ever ask of yourself.

In that piece I turned to the Declaration of Independence and the preamble to the Constitution, as places to which one might legitimately look (and therefore must in duty look) for clues to the nature of the unenumerated rights spoken of and shielded in the ninth amendment. When this lead was followed, in a subsequent lecture, toward the establishment of a "constitutional justice of livelihood,"—a constitutional right not to be abandoned to poverty—one phase in the argument was the discerning, in the preamble's stated aim of promoting the general welfare, and in the article I power to tax and spend for the purpose of promoting the general welfare, a *duty* to promote the general welfare. The exactly parallel case of "the common defense" seems to put it out of doubt that this pattern has legitimacy. Is it not clear that Congress has the *duty* to provide for the common defense because it has the *power* to provide for the common defense? The concept is that of a power held in trust. Here there is a distinct flowing together of the *structuring of empowerment* and the *human right* to share in the wealth and well-being so amply available in our rich society—to be vouchsafed the material basis for life that makes so much as possible the "pursuit of happiness"—or the actual enjoyment of any of the rights promised in the Constitution.

I go on now to a more purely structural problem—the problem—which is today's problem—of the containment of the executive power, and the preservation or return, or even the building-up, of Congress' share of policy-forming, in peace and in war. This problem has often been treated as though it were a *substantive* problem, a problem of correctly discerning or stating the legitimate bounds of the presidential and the congressional powers respectively. This enterprise always fails, because of the procedural structures which are by far the most important determinants of our political constitution.

(It should be said that my alertness to these structural problems was increased, if not produced, by life-long friendship with Bob Eckhardt, another Texan, who was in Congress from the late sixties to 1981. In those years, he and I talked over and over such matters as these, to my benefit surely. We even did a book together. To have had access to such a political intelligence as his was a major factor in my own development.)

When I was a child in law, I used to hear people say that "substantive law is secreted in the interstices of procedure." Too cute by half, I thought, merest phrase-making. As things stand now, I rarely go a week without seeing some new way in which this statement is both true and enlightening. The presidential-congressional power problem, unconditionally the crucial problem in our structure of government, is the best example I know. The procedures set in place in article I are destined to receive in their interstices the substantive secretion of wide, and ever-widening, presidential power. This is because the *president* is, in the nature of the case, the *first* authority to decide on his own power, while the rest of the procedure is heavily biased in his favor. The president's claim need not be in bad faith, or implausible. But reality dictates that the president and his legal advisors will necessarily incline toward the affirmative, where a national need is perceived by them. Then, any measure *Congress* might pass, to annul this exercise of power, or to prohibit it in the future, is subject to presidential veto, with the obvious difficulties about override.

A simple paradigm was Franklin Roosevelt's "destroyer deal." In 1941, Roosevelt traded fifty American destroyers to Britain, in return for naval bases in the West Indies. Roosevelt just did it. There was protest on constitutional grounds. But it was known, being entirely plain on the face of the Constitution, that any congressional action aimed at annulling this deal, must, to be of legal force, go through both houses, and then, when the absolutely certain veto occurred, be put through each house again by a two-thirds vote. The discouragement is daunting; the matter is likely to end without Congress' going the whole bitter road, as a chess game ends not with the taking of the king but upon the establishment of a certainty of his being taken. There was a lot of talk about the destroyer deal, some law review articles. After half a century, the case may look now like an anciently adjudicated precedent, though it was and remains only a unilateral claim of presidential power.

What we have in article I, section 7 is a procedure and that only. There is no substantive regime for the veto in the constitutional text. The president is supposed to give his reasons for a veto, but the force of his reasons is conclusively judged in the votes on override.

It seems likely that there existed an early public understanding that the veto would be quite sparingly used. Possibly some distinct substantive limitations might be worked out, if there were any pro-

cedures in the interstices of which this substantive law could be secreted.

But the first official to *decide* whether a given case is one in which a veto is allowable is *again* the president. The general question seems to have been a real one (though perhaps a vague one) in early times. This would explain such a veto message as Jackson's, in the case of attempted recharter of the Bank of the United States; he supports the propriety of his veto by arguing that he, as president, is not bound by the Supreme Court's holding that the establishment of the Bank of the United States was within the constitutional power of Congress. This argument is needful, even relevant, only on the supposition that the veto is not to be used on mere grounds of policy. Early vetoes, quite few in number, were in greatly preponderant majority placed on constitutional grounds. So dominant was this view that a committee of the House of Representatives, headed by John Quincy Adams, considered whether Tyler should be impeached for having vetoed bills for policy reasons only.

But the procedural fact remained that the president first decided in each case, at least by necessary implication, whether veto was permissible procedure. It was inevitable as time went on that presidents would sense the vast power that would accrue to their office if they acted on the view that permissible grounds for veto were thoroughly general, as we now assume. And the lack of any textually stated limit would make this view at the least respectable.

What procedures were open for challenging such a decision by the president?

The question of the substantive propriety of a veto drops to the ground if the veto is overridden. If the veto fails of override in one house, there is no occasion even for a vote in the other. The only procedure open for contesting the propriety of the veto would seem to be a remonstrance, by one house or both, where override has failed. When all the remonstrance was done, the fact would be that the veto had not been overridden; it would be hard to say that a substantive result could ensue upon such remonstrances. In a two-house body, each house having many members, the putting forward of remonstrances, without the prospect of result-change, is not something likely to be organized. The abortive and ultimately frustrated attempt to do something about Tyler's policy vetoes really ended the question—not because no case could be made for any substantive limits on the veto power, but because the procedural mechanism that would have had to be improvised would be messy

and inconclusive, and could hardly be thought to end up with the vetoed bill's becoming law.

There is, however, one *procedural* road to the disarming of the veto or to subjecting it to a substantive regime. First must come the formation of a broad and stable bipartisan consensus in Congress to the effect that the veto should be disarmed or substantially limited. (As I've pointed out elsewhere, this is not in the long run a far-out idea, because the decline or fall of the veto would considerably enhance the powers of the two houses, and consequently of all their members.) Then all you would need would be an agreement, a convention, that a quorum would be present for the override vote, and that at least two-thirds of that quorum would vote to override. This could be managed without any member's voting for the bill against conscience; where a majority has already passed the bill, the two-thirds of a quorum needed to override could be put together without any strain on consciences. This plan could easily develop a *limited* application, or even a negotiated *ad hoc* application, if it could not attain full generality. The houses of Congress would thus be able, without any change in constitutional forms or powers, to develop and to make stick any substantive rules governing the veto that they thought good.

This suggestion very well focuses the mind on what I might call the overall *procedural* relation of Congress and the president, with its fateful implications for substance. That relation is like a mathematical curve that goes uneventfully along one line, within a certain range of magnitude of one variable, but when that range is transcended begins to climb very steeply, even to reverse direction. In normal times, the president has very large power over Congress—chiefly because the veto puts him in a commanding position, but also for some other and more general reasons. When matters get to the point where a dominant congressional coalition, containing even members of his own party, is fed up with the president, the litmus paper changes color—often rapidly, as litmus paper is wont to do. Something around two-thirds is the magic number—the veto override number, the conviction-number on an impeachment—and almost as though by Providence rather than by accident about ten percent larger than the number (sixty percent) that is the winning number in an American presidential “landslide” (1932, 1936, 1964, 1972, 1984).

People talked a while about Nixon's “imperial presidency”—impoundment, silly uniforms for his guards, the “enemies list,” puni-

tive income-tax audits, and all that. I think I heard some people say, "I'm frightened." Then, when the litmus paper changed, just all of a sudden Nixon was seen to be utterly defenseless. With something like a two-thirds consensus on the Hill, the White House turned out to be guarded by cardboard soldiers with straw-stuffed dogs on leads. They loaned him an airplane to leave in.

When I hear people talk with contempt and despair of Congress, I wince not only because there is in all such talk massive and mindless injustice to many, many able and sincere people (as the great life of Senator Wayne Morse reminds us), but also and above all because Congress is our ultimate and (if we use it rightly) our completely adequate defense against executive-branch outrage. It is made that not by substantive constitutional law considered in abstraction, but by our central structure of constitutional procedures.

I think these thoughts could be useful in the solution of our modern problems. Let me sum up.

If the president does something—let's say, mines the harbors of a country with which we are not at war, a country small enough for us safely to bully—the only direct counteraction of which Congress is constitutionally capable is the passage of a measure—a bill or a resolution—prohibiting the continuance or repetition of this behavior. This is a *procedural* fact. The next procedural fact is that if this measure is to have legal force it must be presented to the president for signature or veto. Pretty much invariably, the president will veto it, expecting—usually rightly—that override will be impossible. It is in the interstices of *this* five-stage procedure—the original presidential action, the passage in Congress of a measure annulling the presidential action, the submission of *this* measure to the president, this expectable veto, the procedural difficulty of an override—that the substantive law of unbounded presidential power is being secreted.

But all this could sharply change if there were to come into being a wide bipartisan consensus, transcending opinions about individual presidential measures, and reaching to a conviction that, *institutionally*, a *procedure* so loaded in the president's favor should not be allowed to dictate, incident by incident, a steady irreversible flow of power to the president. The very simple procedural expression of such a consensus would be a *convention* of automatic override, limited, if that be desired, to cases of just this form—cases where the veto to be overridden is a veto of a measure Congress has passed directly to curb or to annul some action taken by the president

under a claim of "inherent" executive power, or something of the sort.

There would be a satisfying and I believe a healthful symmetry in this. The president now has the power to veto actions of Congress; all that this convention of automatic override would do, for the cases it covered, would be to give the houses of Congress a symmetrical veto over independent presidential action. No constitutional amendment would be required, because no new constitutional procedure would be put in place.

Maybe this consensus seems unlikely of formation. But I wonder about that. The ungovernable growth of executive power is in these years worrying people of all shades of political opinion; listen to *Republican* congressional comment on the present debacle. It may soon occur insistently to many such minds that Republican presidents and Democratic presidents, presidents liberal and presidents conservative, can usually count on the one-third-plus-one, in one house or the other, needed to prevent success in any congressional action that would nullify or make unlawful any presidential exercise of claimed inherent power. Unless there is some break out of this circle, it is fated to happen that while trends in the substance of politics may come and go, presidential power will keep growing.

The medicine is very simple, and may very well be turned to, if the steady growth of the power-scope of the president comes to seem less desirable, to a wide congressional consensus, than particular victories or defeats on particular issues from time to time.

You know, it wouldn't hurt to try. One of the things that would recommend such a plan is that no constitutional change would be needed; if the plan worked poorly, the consensus could dissolve. Not this year, but maybe ten years hence, perhaps after a third presidency of disastrous excess, this plan may get its chance.

It's time to put out the stage-hook for me. I'll just tie up one loose end. A long way back there, I told you I started out in law afraid of advocacy, and was nearly forty before my life in law began, when I felt the shock of recognizing that advocacy was what really drew me out. You may remember that I also started off disliking, and of course fearing, the "artificial reason," the *technicality* of law. Well, you live and learn. I have before now confessed that I have lived in law long enough to learn that, like the technicalities of any true art, those of law are emancipating. The traditions of law, the shop-work and shop-talk of law, its rules of precision and its rules of thumb—these can be made means of coming to think naturally

and creatively. I have discovered lately that some younger people especially look on me as a traditionalist—not in result but in modes of thought. I hope they are right. And I guess that's the way it goes with fathers and their sons, sons and their fathers.