

## WHO ARE THE FATHERS?

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AS it is off to its second century and a half the youth of the Constitution is renewed. It is no longer the institution of 1787, 1837, 1868 or even of 1912. In 1938 it serves a very different national purpose from the instrument of the late year of grace 1936.

But what is the Constitution? A writing set down on parchment in 1787 and some twenty-one times amended? Or a gloss of interpretation upon a margin many times the size of the original page? Or a corpus of exposition which has almost obliterated the original text? Or "the supreme law of the land" as it is given currency by the United States Supreme Court? Or the voice of the people as it is newly made articulate by an aristocracy of judges? Or a collection of precepts to be drawn upon by the judiciary for sanction and rationalization? Or a piling up of the hearsay about its true meaning in precedent—Hughes, C. J., had it thus-and-so from Day, J., who had it from Harlan, J., who had it from the great Marshall himself? Or a cluster of abiding usages which hold government to its orbit and impose direction upon the course of legislation? Or "a simple and obvious system of natural liberty" whose command all affairs of state must obey? And is the Constitution enscrolled on parchment, written in the United States Reports, or engraved in the folk-ways of a people? Whatever it is, an enduring law is being accommodated to the passing times through the acts of men. The year 1937 acknowledged its debt to

1787 in pæans of praise to the Fathers; the year 1938 skeptically inquires, "Who are the Fathers?"

In law a thing is as the question is put. In respect to fatherhood it is generally assumed that the Constitution of "now" is the Constitution of "then." Thus a presumption blesses the gentlemen who tardily gathered at Philadelphia in the May of 1787 with paternity to all doctrine which comes to be drawn from between classic lines. By men who must crowd a continuous process into a single miraculous event the Fathers are to be taken on faith. An antique cut of clothes, the powdered periwig, the neat stroke of the portrait painter supplies the illusion. They give to a group of immortals a personal identity that is unmistakable. In reality they who labored to establish "a more perfect union" belonged to the younger generation, their average age was a bare forty-three, and the Sons who currently interpret their words have man for man an advantage in years of nearly three decades. Yet fact is forgotten as myth joins art to create the illusion. As a result the term "Fathers" has ceased to be a patronymic and has become a technical term with no concrete reference and badly in want of definition.

If then "the Fathers created the Constitution," who are the Fathers? Certain gentlemen of substance and standing who assembled at Philadelphia in 1787? Their number, according to the most authentic of records, was fifty-five. But, such a closed club aside, are these the exact fifty-five

whose portraits should go into a gallery intended to give such a fleeting immortality as time allows to doctrinal paternity? A number of the original group have unquestioned positions; Madison, Franklin, Washington, James Wilson and Roger Sherman must go there. Tradition triumphs over irregular attendance to give place to Alexander Hamilton; and Gouverneur Morris and the younger Pinckney—in spite of a loquacity that knew no quenching—are hardly to be denied.

Yet are all their colleagues to be entitled to the honor? What of the tardy delegates from New Hampshire who missed the formative period yet got in on the result? The unappointed delegate from Rhode Island—"that nest of vipers mixed with adders vile"—lost his chance at immortality by never showing up. Patrick Henry is no Father because he "smelt a rat" and stayed away. What of the delegates from New York, Yates and Lansing, whose diaries tell much of what transpired yet left before the end in disgust at the nationalistic trend? What of the men who signed after remaining mute during all the exciting days? Is paternity to be imputed to so passive a performance? Are niches to be accorded to them as against men, generous with ideas and prodigal with words, whose faith—ardent throughout all the long, hot, summer months—faltered with the coming of frost? Such as Edmund Randolph, whose speech opened the convention and who was to become Washington's Attorney General, but whose signature was enjoined by political expediency? Or Oliver Ellsworth—kicked out of

Yale into Princeton—who presently as Chief Justice of the United States was to become oracle to the document he could not accept? Or George Mason, a lone man of the people in an assembly of the just and the good, who did not find the writing democratic enough?

What, too, of the immortals long since dead who did more to suit the supreme law to the land than all save a few of those who were at Philadelphia. Places must be accorded to those who, consciously or unwittingly, shaped doctrines for inclusion in the dialectical edifice. To a certain Edward Coke, whose sentences have been torn from their occasions and carried across an ocean and the centuries to serve a judicial review of which he had never heard. To a group of John's—Pym, Hampden, Milton and Locke—who in varied assaults against the pretensions of the Stuarts can put in a composite claim to at least one place? To William Blackstone—as vicariously present at Philadelphia as Jeremy Bentham was spiritually absent—whose Tory commentaries were to become the bible of the law in a republican America.

Portraits, done in the abstract, must do honor to men of old whose numbers make them personally unknown. To those who made the old feudal document *Magna Carta* glow with a seventeenth century meaning. To those who hammered authority into responsibility with the Petition and the Bill of Rights. To the British Tories who bequeathed the system of checks and balances, with all its hampering obstinacy, to the American democracy. To the sturdy bourgeoisie, whose solicitude for commerce, prej-

udice against paper money, and respect for the sacred obligations of contract the Constitution itself came to share. To the authors of common law doctrines—caught up within the cosmic phrases on parchment—which fetter with safeguard and irrelevance an instrument of government designed “to insure the blessings of liberty” to the Fathers and their posterity.

An article in the instrument invites formal amendment. It has exposed even the fundamentals of government to an orderly revision. It has made reformers of good citizens who might otherwise have taken the road to revolution. As aspects of the organic whole, addenda must have their paternity. Surely a place must go to the doubting Thomas—to this day “Mr. Jefferson”—whose insistence upon a bill of rights helped to make the Constitution a different constitution? One niche or more must be granted to William Lloyd Garrison, Harriet Beecher Stowe, John Brown and their motley kind who made so loud a noise that an injunction against human bondage was written into the higher law. What of the claims of Generals Mead and Grant who at Gettysburg and in the Wilderness cleared the way for the Thirteenth, Fourteenth and Fifteenth Amendments? Or of Susan B. Anthony and the pioneers of “women’s rights” who removed from suffrage the privilege of sex and made it universal? In such an instance is fatherhood to be tainted with maternity? And what of the white plumed brigade that made dry the law and the land—and witnessed the end of a noble experiment in a constitutional return of rum? Or do the

rival crusades cancel out to zero and render invalid all claims of the combatants.

A Simian adage has it that the gloss, not the text, is the thing. In respect to the Constitution the expositor is the creator. Accordingly places must be found for a number of persons who have suited the parchment to the times. For John Marshall, whose dogmatic exposition has a cathedral authority to which the original words cannot aspire. For Roger Taney, who garnered fragments into a police power which is today the safeguard of public policy. For Stephen Johnson Field, who quickened due process into life and harnessed to property sanctions which had come into the law to serve the cause of liberty. For David J. Brewer, haunted always by the horror of socialism, who innovated the judicial review of rate-structure, distorted a question in price policy into a concern over the value of property and confused even to this day the regulation of public utilities. For the Quadumvirate of Stalwarts—Van Devanter, McReynolds, Sutherland and Butler, J. J.—who refused to allow the Supreme Court to follow the election returns; drew from a nationalistic document the express provisions in the Constitution of the Southern Confederacy; and for a time taught Hughes, C. J., and/or Roberts, J., to say “state’s rights” when they meant “*laissez-faire*.” And for Mr. Justice Holmes, whose it-is-not-unconstitutional explored the possibilities of the double negative and harnessed a redundancy to the cause of social legislation. And what of the claims of a President who appointed

a Justice because "he is of a mind with me in the matters that count"?

At the bar stand officers of the court called lawyers. Jurists often win immortality in the reports when other men have done the work. In support of his cause an attorney may recite a novelty so charmingly that the court is persuaded he is reading from the Constitution. Or over a period of years the bench may be beat upon so persistently that at last it yields to the argument for an interest that seeks to be vested. A place must go to the Hon. Daniel Webster, whose pleas did so much to make Mr. Chief Justice Marshall's opinions sound and majestic and everlasting. To the Cooley—of *Cooley on Blackstone* and *Cooley on Constitutional Limitations*—who translated the social justice of an individualistic country on the make into propositions almost ready for judicial misuse. To ex-justice Campbell, who first saw the possibilities in the "due process" clause, equipped its "liberty" with the natural rights of man for a trust-busting campaign, and headed the Fourteenth Amendment for parts unknown. To a host of attorneys—unsung and well paid—who converted the formula into the privileges of corporations against acts of the state. To William J. Bryan who, in a depression and on behalf of consumers, argued that the rates of public utilities should not carry a toll upon all the bad engineering, extravagance and rascality which had gone into the property but should be limited to "a fair return" upon "the cost of reproduction new." Or should he share a dual portrait with his fellow Democrat, Mr. Justice Pierce Butler, who

clad the doctrine in another livery and when prices were taking the upward trek made it the foundation of privilege?

Attorneys, however, are middlemen. Just as causes are brought to them, so they commute into legal currency ideas that come from the laity. The great values which the Constitution conserves—personal liberty, the protection of property, the obligation of contract, the exercise of the police power for the common good—all come from without the law. Surely places must go to persons who domesticated popular sentiments into propositions so articulate that lawyers could employ them in briefs. Adam Smith is quoted in the reports far more often than any man who made the mission to Philadelphia. It was his theory of *laissez-faire* that went through the legal workshop to re-emerge as an aspect of due process. If a sweep has been given to his words which was never in his mind, he must be set down at least as a conscript father. It is not on record that Sir Henry Maine wrote *Ancient Law* to amend the American Constitution; but jurists read his book and his glorification of the usage made easy the march of freedom of contract straight into the sacred document. And we have it upon the authority of one of its most distinguished members that the Supreme Court has read "Mr. Herbert Spencer's *Social Statics*" into the Constitution.

It is obvious that provocation no less than suggestion prompts creative effort. If so, is that neglected Victorian, Karl Marx, to be denied his rightful due as a Father just because we may not share his views? The very

name caused Mr. Justice Brewer's hair to rise, made his seated heart knock at his ribs and caused him to contrive strange doctrines as a barrier against the rising tide of statutes designed to serve the general welfare. If, however, such a count fails, he has another claim; for his philosophy taints many an act of social legislation. And in protest dissenting judges have often said that the validation of such measures "marks the end of constitutional government in the United States." In such a miscellany of minds as the Fathers present there can be no norm of constitutional orthodoxy.

A sacred document is for the whole of a people. Assuredly the persons whose cases have kept constitutional forces at their work deserve recognition. Here are common folk whose portraits should adorn a democratic section of a gallery of the immortals. Old Marbury waiting vainly for the commission Madison refused to send—and almost as an irrelevance touching off judicial review. Gibbons defying the steamboat monopoly of Commodore Vanderbilt—and causing a power over navigation to be pulled out of the hat of "commerce among the several states." Mrs. Jensen seeking from the Southern Pacific a pittance for the loss of a stevedore husband who in the course of duty had met death on a gangplank—and in her failure elevating the law of admiralty to a pinnacle too lofty to be touched by mortal man. Leo Nebbia, selling two quarts of milk at the legal price, but defying the People of New York by contumaciously throwing in a loaf of Italian bread—and establishing the power of the state to fix

prices. Tompkins, presenting claims for personal injuries against the Erie Railroad—and touching off a judicial explosion that blew the authority of *Swift v. Tyson* into kingdom come. The Schechter Brothers—Martin, Joseph, Alex, and Aaron—trafficking in dead chickens and creating a doctrine of the delegation of powers of which little had been known before. Carter in combat with the Carter Coal Company—which he dominated for all purposes save litigation—and provoking the discovery that the mining of coal is not in interstate commerce. The result is a miracle of constitutional omnipotence; but surely the authority which can decree a pause between the generation and the transmission of electrical energy can banish miner, operator, coal and all from out the national economic order.

In a very real sense the Marburys and Mrs. Jensens, the Nebbias, the Tompkinses, and the Schechters are the authors of the Constitution. The individual who supplies occasion and provocation touches off creative work and thereby becomes a creator. All that the jurists have done is to convert the concretions of fact and issue into abstraction and proposition far too rarified to be understood by ordinary folk. But here personality is too multiple and paternity too unwitting to be accorded specific recognition. A number of symbolic beings, blessed with the best names the myth-maker can devise, must serve for a multitude. Nor must the generic people be forgotten; for they have evolved a language, a common set of beliefs, an atmosphere of opinion which has brought the breath of life to words engrossed on parchment.

The bother is that the work of selection is never done. As the Constitution is remade the list of Fathers must be revised. Until 1877 no one would have acclaimed Sir Matthew Hale a Father of the American Constitution. He had been a person of some repute two centuries earlier—an English Chief Justice of the Restoration period whose learned works were still known to a few scholars. In that year his words were borrowed to affect grain elevators with a “public interest” and so justify their regulation. In the 'twenties, when he was least understood, his prestige rode highest, as industry after industry was found *not* to be “affected with a public interest.” In 1934 he was rather unceremoniously discharged from his office as Father when Mr. Justice Roberts discovered that the whole matter rested upon “historical error.” And what of the strange case of Mr. Walter Gordon Merritt? So long as he fed the Court his prejudices against trade unions in homeopathic doses and persuaded the High Bench that it was not he but the Constitution who spoke, his claim had substantial support. But now that the justices have become less credulous—or lend credulity to other ears—is he to be removed as an impostor, compelled to resign, or retired subject to a call to later duty?

At the moment a reconsideration of constitutional paternity seems inevitable. A grim necessity for a people, such as social security, no longer lies beyond judicial tolerance. The economic system, in all its disorderly detail, is no longer subject to no order—or chaos—but its own. A seething cauldron of “labor relations” has just

been entrusted to the oversight of the federal government. The Congress has a qualified power to indulge an experiment in community building such as TVA, to bring a modicum of discipline to industries whose affairs refuse to respect state boundaries, to impose a semblance of fiduciary obligation upon those who handle other people's money.

The law of the Constitution is in constant process of restatement. One whose reading lags for a year finds himself hopelessly behind. To keep up-to-date one must get his information, not from the Reports, but from the newspapers. A valid minimum wage has celebrated its first birthday. Price is no longer a term in the bargain too holy for legislative meddling. The cruel bankruptcy of the venerable document has been ameliorated into the more merciful bankruptcy of today. The laborer may, without so much as “by your leave” from his employer, make use of collective bargaining in shaping the circumstances of his life and work. Judicial benevolence extends even to the consumer and limits are set to the lies with which even so righteous a cause as salesmanship may be served. “Laws,” says the reformed Court, “are made to protect the trusting as well as the suspicious”; “there is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business.” Even state's rights—*alias laissez-faire*—are waved away; a power to govern as comprehensive as the national economy appears in the offing.

As a pair of dissenters refuse to advance, the bolder of the brethren

occupy positions in advance of the court. Citizens of the United States are not to be deprived of their inherent right to contribute to the support of the federal government just because an unkind fate has made them officials of a state. The very purpose of the granting of patents is "to promote the progress of science and the useful arts"; the limited franchise must not become a prop to suppression and further privilege. The right of the corporation to succeed the Negro as the beneficiary of the Fourteenth Amendment is challenged. A minority of justices has long fought "the cost of reproduction new" with a doctrine of "prudent investment"—the higher hypothetics *v.* the higher hypothetics. At the current term a judicial novice, Mr. Justice Black, finds the whole quest of "the deceptive certitude of certainty" unreal and urges that rate cases be dismissed "for want of jurisdiction." He appeals from upstart doctrine to venerable precedent and proposes no more than that the fading picture of Mr. Justice Brewer be removed from the

Hall of Constitutional Fame. All along the line the march of *laissez-faire* into the Constitution is being arrested—and the catalogue of the Fathers must be made to conform to current reality.

If one has faith in the Constitution, he can accord to only a few abiding places among the immortals. He can write *finis* to his list of portraits only if he stereotypes the clauses on parchment into a closed system from which the letter has banished the spirit. An instrument of government designed to "establish justice," "insure domestic tranquility," and "promote the general welfare" can be endowed with no such arrested perfection. A constitution which serves the necessities of the people is an enabling act that enlists reality, relevance and purpose in its service. In the words of Mr. Justice Moody—who despite the briefest of stays upon the highest of benches is to be numbered among the Fathers—it must forever be newly adapted "to the infinite variety of the changing circumstances of our National life."