

*Law School of Harvard University,
Cambridge, Mass.*

9 January 1936

Dear Stone:

Let me report a colloquy that took place two weeks ago between Marshall and myself which, with sardonic relevance, popped into my head when I heard news of the AAA decision:

F: I hear you delivered a lecture to your mathematicians on the Teachers' Oath Act. What did you tell them?

M: I told them I couldn't really swear to support the Constitution of the United States because nobody really knows what the Constitution means.

F: You are a nice one to say that, when your Dad gets a great, big, fat salary from the country to tell us what the Constitution means!!

M (with the slyest kind of a twinkle in his eye): I thought it's the other guys that tell us.

AND HOW!!—is, I suppose, the only comment called for by economy of speech.

Henry Hart said to me yesterday that he found me much more becalmed, far less impassioned, when news of the decision came, than was that specialist in aloofness and cynical Olympian, T. R. Powell. I told Hart that, apart from all else, mine was the calmness of grim expectation after the Colgate decision. That, as you must know, really put the iron into my soul, so far as the present Court is concerned, as no other decision in my lifetime. A Court that can do that--I beg your pardon, a majority that can do that--deprives us of all intellectual criteria for plotting the future orbit of adjudication. Just because the Colgate Case did not involve legislation in itself charged with high-power emotional explosives did it reveal so ominously the

temper that it did reveal. God knows, AAA means very little to me, in and of itself, for my ignorance about agricultural economics is almost complete. So far as I have a bias it is against improvement through productive restriction. That is why I think I can think about the constitutional problems raised by the Butler Case in the true spirit of Holmes' antiseptic attitude in exercising judicial review under the Constitution. And that is why I am concerned profoundly not with the temporary economic dislocations, not with New Deals or Old Deals, or other merely passing phases of American political controversy, but with those factors which are essential for the maintenance of our traditional Federal system. "They know not what they do", those who profess to care for the maintenance of our Federal system. To you I do not have to avow my deepest conviction, that if we didn't have a federalism for a continental country like ours, with its one hundred and thirty odd millions, and variegated interests of all sorts, we should have to invent a federalism if we wanted a democratic society. It is because this is the very core of my political faith that I say "They know not what they do".

And that is why, in the routine discharge of your duty, you have performed an act of patriotism more dramatic because more subtle, more important because more enduring, than ever did the bravest hero in the armed service of his country. The frequent misuse of a word can not rob it of its relevance, and so I know of no other word than fundamental to characterize the issues that you projected so eloquently because so austerely. If the canons of construction by which John Marshall breathed the life of a Nation into the dead words of the Constitution have the sanctity which the practices and professions of a hundred years give them, then we have here one of those decisions which demonstrably violate the moral and intellectual sanctions on which the ultimate authority of the Court rests. And that is another achievement of your opinion. For it

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is not often true that an intellectual demonstration is made, as you made it, in the field of law that partakes almost of the ineluctability of mathematics--in so far as mathematics still is ineluctable.

On solemn and poignant occasions like these one's judgment is apt to express itself pithily in the spirit of the few great masters whom one has been privileged to know. And so all the time, while I stumblingly try to express my sense of admiration and gratitude to you for having risen, as you did, to the heights of the great argument--even though I feel that the incubating process of deliberation of the whole Court and the time for formulating reasons into language have been much shorter than they should have been--there bubbles up inside of me in the very tone of voice in which I hear Holmes saying, with that fire in his eye that you so well knew, what he was apt to say when he gave ultimate praise, "I am proud of you, lad".

One can only hope that the weightiness and invincibility of your utterance as ultimate wisdom will have a chance to triumph for those very institutions which those who are blind have done so much to weaken and undermine. Like so much in history, it is a race against time. Of one thing I am sure beyond the shadow of a doubt. The kind of dissent that you wrote, expressing the views of such three men as those for whom you spoke, will help most to salvage the best of our traditions and to curb the inevitable tendency to correct wrong by folly.

With warmest regards,

Ever faithfully yours,

F. F.

Hon. Harlan F. Stone,
Washington, D. C.

P.S. Could you spare me half a dozen copies both of the Colgate and the Butler opinions?