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<td>著者</td>
<td>Robinson, Leroy</td>
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<td>発行日</td>
<td>1980-01-31</td>
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<td>URL</td>
<td><a href="http://hdl.handle.net/10069/15112">http://hdl.handle.net/10069/15112</a></td>
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JOHN HOWARD LAWSON’S

PEOPLE AND CITIZENS

A Fable for Americans

By Leroy Robinson

When playwright John Howard Lawson passed away in August 1977, the Los Angeles Times (August 15, 1977) reported that Lawson “never wrote another play after 1958.” This statement, though probably generally accepted, was not correct. After 1951, when he finished In Praise of Learning, 1) Lawson wrote at least three other plays: Thunder Morning (1953) has not been produced or published. 2) Parlor Magic was performed in the German language (Lily Leder, translator) at the Staatstheater, Schwerin, G.D.R., in March 1963, and performed in the Russian language (I. Epstein, translator) at several theaters in the U.S.S.R. in 1963 and 1964. 3) People and Citizens: “A Fable for Americans” (written late in the 1950s or early in the 1960s) has not been produced or published. The present article provides for the first time a full description of People and Citizens. This description will enable historians of twentieth century American drama to bring the history of John Howard Lawson’s career as a playwright more up to date. (This description is based on a xerox copy of a manuscript of People and Citizens provided me by Lawson’s daughter, Susan Amanda Lawson.)

1) Lawson wrote this play while he was confined to the United States penitentiary at Ashland, Kentucky, where he was imprisoned for ten months (June 20, 1950-April 9, 1951) of a one-year sentence for Refusing to Testify Before a Congressional Committee (the House of Representatives Un-American Activities Committee) in 1947.
People and Citizens: "A Fable for Americans" is a three act play designed for a hall or auditorium, with a setting suggesting an ordinary university classroom...changes effected chiefly by lighting. It can be done as a reading, with the actors sitting on the stage after their entrances, and rising to participate, without theatrical elaboration. However, a musical accompaniment, with group singing, would strengthen the dramatic design.

The characters of the play are a professor of Law, law students, an 18th century opponent of the Constitution of the United States, five former judges of the Supreme Court, and various Voices representing other judges.4)

Act I ("The Constitution") takes place on a stage surrounded by a dark curtain.

Fifteen classroom chairs face at an angle a slightly raised platform upstage center on which is the professor's desk. On the desk, a number of law books. Behind, a large, colored map of the United States, and a little distance from it a large globe of the world.5) At the right side of the stage a table, six chairs around it.

Before the rise of the curtain, a musical introduction begins. When the curtain rises, everything is dark except for a dim light on the map of the United States and for one brightly lighted area, in which law student Molly Anderson sits, making notes in her notebook. There are large tomes all around her, on the side of the chair, and piled on the floor.

Molly is about twenty. She is lovely, but there is none of the nonsense about her that Americans sometimes associate with feminine beauty. She is straightforward, and when something bothers her she says so. At present

4) The five judges and those represented by Voices speak almost entirely in their own words, with slight changes and occasional brief speeches to connect the dialogue. Their decisions and dissents are used, as well as some passages from Justice Oliver Wendell Holmes Jr's The Common Law. Their quoted statements are in quotation marks, almost all cited by John Howard Lawson in footnotes, herein omitted.

5) In Roger Bloomer (1923) and The International (1928) Lawson used a flag and a globe, respectively, for the same symbolic purpose.
the law books she is studying bother her a great deal. As Molly works, the musical introduction continues, the theme a sort of muted and echoing note of triumph. Then there is silence.

Molly mutters: "People and citizens... No sense to it... What's the difference?... People are citizens, citizens are people... It's crazy... Rights... Immunities... I just don't get it..." 6)

Enters Joe Gibbs, a serious young law student who has worked his way through college and into law school. Molly and Joe discuss their personal relationship. Joe wants to get married at once; Molly wants him to wait. Molly wants a career as a lawyer for her security as a woman; she wants to have a profession to be able to take care of herself.

The other law students now begin to drift into the classroom. Including Molly, there are four women, one of them, Peg Itamuri, a neat, bespectacled Japanese-American. Among the eleven men are two Negroes and one Puerto Rican.

The most important of all the students in the play is Mark Phillips, at 27 growing to look like a successful politician: "He is too neatly dressed, too stout. He has an air of knowing too much and having too much money. He will go far." As some students cluster around him, Mark, feeling his own importance, explains the subject their class is about to take up, people and citizens:

It's a trick their professor uses. "He ties up a whole series of cases in an artificial package." Artificial, because the professor takes his own philosophy of law and tries to impose it on the facts. The professor "believes the law is a social, moral force that shapes society and makes people live the good life—whatever that is. It's a sort of socialist, statist concept. So people are just citizens. You see, that's the gimmick, people and citizens are one and the same—which means a person has no soul of his own—The law doesn't look very human to me—I want it to let me alone. I don't like government, I'm not interested in being a good citizen—I can be punished if I commit a crime—But my dreams are my own."

One student asks: "I suppose your dreams are a little criminal?" Mark answers: "I'll say so." Everyone laughs. Mark adds: "And I don't

6) I have abridged Molly's speech as I have abridged most speeches of People and Citizens.
want to be psychoanalyzed by the government."  

Molly feels the idea of people and citizens relates to women: "There is a distinction between women as people and women as citizens. As people, we don't have any rights until we get accepted as citizens."

Mark says that's his point:

"The law can give you certain rights as citizens. But it cannot change your female nature. It cannot change your shape, I'm glad to say." Even if Molly is not talking about shape, shape is important: "It expresses your function, bearing of children and all that, which makes you special and wonderful and emotional..." "What's important in you or me is the inner drives, the dark impulses. It's different in men and women, it's different in everybody. But citizens are all alike, drab, do what they're told, mouth the same ideas, obey and conform to a pattern. There's only a few people capable of being themselves. Maybe they're beat or crazy, but nobody's going to cut them down to size, and they're the ones that matter, because they're unique, they rise above the average..."

Here, carrying a bulging briefcase, enters Professor Evans: "He is a Negro, forty years old, and his bearing is that of a scholar who knows his own importance. He is a tall man, very dark, with handsome features. His manner is reserved, his humor dry, but there is warmth in his deep voice."

Professor Evans notices the students having their usual debate before class and suspects it may be more interesting than his lecture, which, after he raps for order, he begins. "The light dims on the rest of the stage, and it is bright on Evans, and on the brightly colored map and globe."

"Our subject is the Supreme Court. It is sometimes assumed Constitutional law is a matter of abstract principles, and the Judges conduct their deliberations in an atmosphere of rarified legal reasoning, far from the din and heat of the market place. But recent decisions have aroused intense political passions. The Court has been accused of exceeding its authority, interfering with the legislative branch, violating the rights of the states; it is even charged with endangering the security of the nation. This is a matter of extreme urgency for all of us, but it cannot be understood unless we ap-

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7) There are many humorous "bits" of this pertinent kind throughout the play.
approach the history and function of the Court, its relationship to the Constitution as the framework of American life, the life of the nation as it has developed, in which each of our lives, and the lives of all who have gone before us and will follow, are interwoven—" (Evans points to the map of the United States) "In 1787, when the Constitution was adopted, there were these thirteen colonies along the Atlantic seaboard. The history of our country is the history of expansion, across the plains, over the mountains to the Pacific, the growth of power and wealth, our emergence as a world power—" (Evans turns to the globe and spins it) "In order to present the pattern of our constitutional development, I have asked you to study a series of cases, under the general heading, People and Citizens'."

The light brightens again on the students. Evans questions: How did the term citizen originate? In the ancient city state one class of people had certain privileges and powers; only they were citizens. In feudal times almost all of the inhabitants of a state were vassals; with the development of national monarchies, subjects.

**MARK.** I suppose you're leading up to the fact that the Constitution of the United States is the first written constitution which states explicitly that the power of the government is derived from the people.

**EVANS.** Something new under the sun.

**MARK.** That's true, as far as it goes.

**EVANS.** How far does it go?

**MARK.** It does not make citizenship the whole end and purpose of life. At one stage in the French Revolution, everybody called everybody else citizens, as if they had no other quality or interest.

"So the question is," Professor Evans says, "how citizenship relates to being people."

"The human condition is primary. But if a person is not a citizen, he may be a slave, or a vassal, chained, abused, dishonored, shamed. Only citizenship can protect us from these evils. Therefore, the great question of law and government is the way in which citizenship relates to people, to the infinitely varied needs and aspirations of the human personality. This is the key to the constitutional development that has reflected and shaped our national experience, inspired our American dream."

Bob Saunders, one of the two black students, now gets up to say: "I got no reason to feel anything like that. When I dream, I don't dream
American — not the way you mean it.” Professor Evans responds: “A dream is not the same as reality. The problem of the law is to realize the dream.”

Now Molly rises to say:

“I don’t feel it either. I guess I’m patriotic—but I dream about other things. (She is serious and troubled) I suppose I’m proud of being an American. Not in any intense, personal way. And the law seems pretty abstract. (She looks around at the other students) I know the people in this class. We come here and listen to you and make notes. Most of us admire you.”

Professor Evans says: “I try to give you a sense of purpose to make the profession you are entering a creative challenge.” Molly says most of the students are impressed by Evans’ feeling, but they do not share it:

“I don’t think we feel deep or creative about anything. Anyway, I don’t. I appreciate the Constitution, but I don’t get emotional about it. I mean, you swear to uphold it, and that’s that. I’m not really talking about the Constitution. I’m talking about what’s back of it. Government and law. There’s no sacred flame about it. It’s politicians in Washington and false promises in election campaigns and fine talk about ‘We the People’.”

Professor Evans asks: “If that’s all there is to the law, why do you wish to become a lawyer?” Molly hesitates but answers: “To make money.” She is not so sure making money is so good, but it’s tough to do, “and it seems to be the biggest challenge there is.”

Professor Evans apologizes: “I have failed to provide any other challenge. I am aware of the feeling of cynicism that exists among many young people today—I feel it here in this classroom—an atmosphere of low-pressure doubt. Once upon a time, the people of this country had a burning faith.”

Mark Phillips says: Once upon a time is the way fairy tales begin.” As for history, “History is a bloody and tortured story—even the history of our country—.” Molly, with a tone of despair, asks: “Where do we go from here?”

Professor Evans says:

8) In a college essay entitled “Idealism” Lawson wrote the great business of life is to idealize realities and to realize ideals. (Williams Literary Monthly, December 1911)
"Where?. We need to be shaken up. Perhaps my version of the past is a fairy tale. But I believe it, and I'll fight for it. It's for you to judge. You are the people who will make the law tomorrow. If you think people have nothing to do with citizenship, the law will be a sorry thing. Let us turn to the past. Let us see what there has been besides the blood and misery."

Music starts softly, its theme interwoven with music of the period of the American Revolution, with the sound of fife and drum, as if coming from a distance. At Professor Evans' request, Molly reads the preamble to the Constitution: "We the people of the United States in order to form a more perfect union, establish justice..." Music continues under the reading.

The music rises and ends suddenly. Everett Bradshaw, in colonial costume, carrying a faded newspaper of 1787, appears from the darkness and moves to the back of the class and comes to the edge of the spotlight illuminating Molly. At the same time the light changes to an eerie bluish glow. Bradshaw, a stout, pompous man with a peevish voice, interrupts Molly's reading with considerable asperity:

The Constitution "simply will not work". The Constitution is preposterous, illusory, and fantastical. "No doubt you have read these rantings called the Federalist. The writer ignores the rights of the states. He says the government 'ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow from that pure'—what's pure about it?—'original fountain of all legitimate authority'. Rhetoric, fustian, bombastic rhetoric—."

Professor Evans tells this man of the 18th century he is behind the times (Bradshaw: "I am not behind the times, I am outside them entirely") and the Constitution has stood the test of time. Bradshaw mocks:

"The test of time! What a mockery and delusion! You might better call it the curse of time on every one of you. You're born, you live and you die, every mother's son of you—that's the test of time, and you all flunk it. I am not infatuated with mortality."

Eerie music counterpoints the scene, interacting with the dialogue as a sort of mystical comment.

Bradshaw explains his presence. It is his job to win converts to despair. When Molly asked where do we go from here, there was a note
of desperation in her voice that was very pleasing to him. "Desperation is all we have." Bradshaw says:

"None of us wants to be one of us. But we have no choice. We have to go on forever. We've escaped from time, but the doom of it is on us. We are caught in the despair and anger that was all we had, and we must convince others there is nothing else. Whenever we hear a whisper of doubt, we must go to win another soul to join us in Limbo. (On the word Limbo there is a dischordant chord and the music stops) There's nothing else. Don't believe these idle rumors of Heavenly bliss—Humanity is lost—We're all lost together."

Joe Gibbs asks, if Limbo is where everybody's lost and if there's nothing else, why Bradshaw has to persuade people to go there. Bradshaw answers: "There are always stupid people who refuse to give up—" The people who made the United States were deluded by mischievous hopes. All their words and sweat and hunger and work and tears were "just a flash of sorry longing in the timeless dark."

Professor Evans admits there are mocking voices from the past but points out there are the great judges who believed and created and shaped the national structure of the law: "I call on Mr. Chief Justice John Marshall." The light goes up and Justice Marshall enters, in black robes. "He is as he looked in his later years, an intellectual, dreamy man, with deep set eyes and heavy sideburns." Marshall speaks: "The government proceeds directly from the people; it is 'ordained and established' in the name of the people." (Bradshaw cannot believe what he hears!)

Evans calls Mr. Justice John Marshall Harlan, the elder, who enters "brisk, combative, with lantern jaw, bald head, and the manner of a ward politician." Harlan speaks: "A constitution of government, founded by the people for themselves and their posterity requires that every interpretation of its power shall have constant reference to these objects." (Bradshaw calls for Chief Justice John Jay, then Chief Justice Samuel Chase, but he does not have the power to bring them into the classroom.)

Evans "packs the court" (according to Bradshaw) by calling upon Mr. Chief Justice Oliver Wendell Holmes, Jr: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corrollaries of a book of mathematics." (For Bradshaw this is "hifalutin', highsounding mummer y.")
Evans then calls forth Mr. Chief Justice Charles Evans Hughes, who enters, with heavy black beard and dignified bearing:

"It is imperative to preserve inviolate the constitutional rights of free speech, free press and free assembly to the end that government may be responsive to the will of the people, and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the republic, the very foundation of constitutional government"

Evans then calls up Mr. Justice Louis D. Brandeis, who says: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."

As these Supreme Court judges sit down, Mark Phillips speaks with hard sarcasm: "You must admit, Professor, you've selected the judges arbitrarily." (Bradshaw: "...in a most imperious and overbearing manner.") Mark does not deny their tremendous influence, but he thinks their statements about democracy and freedom cannot be taken too literally. Evans agrees: "We must see how they apply in human situations, in change and growth." (Bradshaw speaks directly to the audience: "The man is infatuated with change!")

Professor Evans says that for the understanding of the "historical occasion" we need the "sense of history." (Bradshaw says there is no sense at all to history.) In the United States the foundation of the social structure is the Constitution. Justice Marshall rises and speaks to his fellow judges with quiet feeling:

"When, in order to form an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The Government of the Union is emphatically and truly a government of the people."

Justice Brandeis reminds Marshall that the concept of the people in 1819 was not what it later became, but for Marshall the principle is enduring: the governmental power is "delegated by all; it represents all and acts for all."

Chief Justice Marshall is challenged by law student Mark Phillips: "That's a pretty broad statement. The Constitution was framed behind
closed doors; they were sworn to secrecy because they were afraid to let the people know what they were saying.” Professor Evans agrees, adding that in the early days of the Republic a considerable part of the population had no status as citizens. Bradshaw interprets: By the government of all the people, Marshall meant the right people, the people who matter, the people who ride in carriages.

Marshall speaks again: “The government of the United States, though limited in its powers, is supreme. The American people are one, and the government which is alone capable of controlling and managing their interests in all these respects is the government of the union.”

Mark Phillips says Marshall’s overriding purpose was to establish strong central government against the power of the individual states, but “it had nothing to do with the rights of people.” Evans disagrees: The Civil War was fought to preserve the Union, on the principle of one nation indivisible, a government deriving its power from the people.

The music of “Battle Hymn of the Republic” is played softly. As the scene continues the volume of the music grows.

Justice Marshall says: “A constitution is framed for ages to come. Its course cannot always be tranquil. It is exposed to storms and tempests.” Says Evans: “The winds of change winnowed the land.” At this, there is a “crash” of music. Then the music is very low as Evans continues:

“We know the hallowed place-names...the valleys and heights where armies clashed...Bull Run and Shiloh...Chancellorsville...Gettysburg...Vicksburg...the bloody hill above the creek at Chickamauga...the green Shenandoah...and the path of fire from Atlanta to the sea. Out of the smoke of battle came the re-birth of the Constitution...changed...by the Thirteenth, Fourteenth and Fifteenth Amendments...”

The music of “Battle Hymn of the Republic” now swells thunderously and a chorus sings: “Mine eyes have seen the glory of the coming of the Lord...”

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As Act II (“The Winds of Change”) begins, all the actors are in exactly the same positions as at the end of Act I. The background music dies away. Professor Evans continues his lecture: “A clash as fateful as
the clash of armies developed around the Fourteenth Amendment.”

Justice Harlan rises and walks around the table with angry vigor and makes one of his famous dissents:

“I cannot resist the conclusion that the substance and spirit of the recent amendments have been sacrificed by a subtle and ingenious verbal criticism. The sense and reason of the law is the soul. Constitutional provisions securing rights inhering in a state of freedom and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish.”

Peg Itamuri rises and in her precise, careful voice reads from the Fourteenth Amendment: “All persons born or naturalized in the United States are citizens...” As she reads the Fourteenth Amendment, Professor Evans says:

“Everyone is a citizen. Everyone is entitled to the privileges and immunities of citizenship. These are guaranteed by due process, equality before the law. This was what the people of the nation, all the people, had fought for and tried to achieve. That is why the interpretation of the Fourteenth Amendment is the key to whole modern development of Constitutional law.”

Mark Phillips adds that the Court’s interpretation of the Fourteenth Amendment adopted after the Civil War remained unchallenged for over fifty years. Bradshaw comes forward to stage center and speaks directly to the audience: “Now we shall see how all this nonsense about human rights was handled by wise judges.”

Evans continues his lecture:

“...the majority of the Court made a distinction between state and national citizenship, and asserted that ‘the entire domain of the privileges and immunities of citizens of the states’ is ‘left to the state governments for security and protection.’ Then a further distinction is made between people and citizens, so the domain of citizenship is narrowed to include only matters which are specifically covered by governmental authority. The Judges stated that the only rights guaranteed by the Constitution were such things as the right to go to the national capital, to transact business with the government, to take out patents or copyrights, and other matters of an economic or commercial nature. The most precious human rights were said to be ancient, natural and excluded from the purview of the law.”
Evans asks: “What does this mean in practical terms?” Black law student Saunders answers:

“It wiped out the rights that were supposed to be protected by the Fourteenth Amendment. The Supreme Court decided “Individual invasion of individual rights is not the subject matter of the Fourteenth Amendment. The wrongful act of an individual is simply a private wrong.” We are talking of murder. This is the first case of lynching to come before the Supreme Court. They said it is “an invasion of the rights of the injured party, but his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.”

Judge Harlan calls out: “I dissent.” Molly says: “The rights of a man who has been lynched remain in full force!” (Evans: “As a citizen, even though the person is destroyed.”)

Saunders reads the Supreme Court decision on discrimination in inns and public places: “It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guest he will entertain.” Judge Harlan again dissents: “The keeper of an inn is in a quasi-public employment,” which “forbids him from discriminating against any person asking admission.” (Judge Brandeis: “I believe you dissented 314 times in your 34 years on the bench.” Harlan: “...316 times...” Holmes: “I can’t touch that record. I don’t know why they call me the Great Dissenter.”)

Mark Phillips wants to get the record straight. A certain number of Supreme Court decisions did protect certain rights of Negro citizens. 9) Saunders says general statements, like protecting the right to vote in Federal elections were not always enforced. Mark says enforcement is another matter: “It may not be wise to make laws which take no account of human prejudices and failings.” Saunders says: “That’s what they been saying for a hundred years, and some of us are tired of it-.”

Professor Evans raps sharply on his desk:

“It is true that that Court made certain concessions, culminating in the ‘separate but equal doctrine’. An extension of the principle that citizenship gives only limited rights. As citizens, Negroes got certain facilities. As people’ they were degraded.”

9) E.g., Strauder v West Virginia 1880... Ex Parte Yarborough 1884.
Saunders reads what the Court said in 1896:

"The assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" is "solely because the colored race chooses to put that construction on it."

When Mark says this decision constituted an advance, Saunders angrily says: "There wasn't anything equal about it. It was a lie!"

Mark suavely continues:

"I have no sympathy with prejudice. I think mobs are dangerous and stupid. It's simply a question of the limit and function of the law. Let's not get emotional about our special interests."

Professor Evans says: "It's not a matter of special interests. The Court's interpretation of the Fourteenth Amendment affected every phase of national life."

Molly sees how the Court's interpretation of the Fourteenth Amendment affected women's rights. Even though Professor Evans neglected to assign these women's rights cases to the students, Molly looked them up anyway:

"Women were sure the Fourteenth Amendment gave them the right to vote, because it said all persons are citizens. They tried to vote. Here's what one of the lower courts said: 'The constitutional capacity of becoming a voter created by this amendment lies dormant.' The Supreme Court affirmed that opinion: ... The natural and proper timidity and delicacy which belongs to the female sex unfits it for many of the occupations of civil life. In view of the peculiar characteristics, destiny and mission of women, it is within the province of the legislature to ordain what offices, positions and callings shall be filled ... by men ... and shall receive the benefit of that decision and firmness which is presumed to dominate in the sterner sex.'"

Bradshaw, the 18th century scoffer, is delighted at this "most just, sagacious and discreet opinion."

Professor Evans continues his lecture:

"The general effect of the interpretation of the Fourteenth Amendment was to deny the authority of the Federal government in any matter of human rights or welfare. At the same time, it prevented government interference with business or the right of contract, which were held to be privileges and immunities beyond the power of state or federal authority. The majority of
the Court expressed the rugged individualism of the later nineteenth century."

Mark Phillips says: "You are simply telling us that the law reflects the main current of history in a given period." Evans says that the law shapes and molds certain great principles to meet changing needs. Bradshaw is nervous: "Change...change...change...I cannot abide the word." Evans goes on: "An expanding society raised new problems of regulation and control. These problems were sharply posed in the debate on the income tax in 1895. Did the Federal government have the right to impose an income tax? The majority of the Court said No."

Justice Harlan jumps up and shouts: "I most emphatically dissent." Harlan shakes his fist and expresses himself strongly:

"It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich. We are further told 'that the burden of this income tax will fall almost entirely upon the people of a few states.' If some parts of the Country have outstripped other parts in population and wealth, that surely is no reason why the people of the more favored states should not share in the burdens of government. Is a given body of people in one part of the United States, although owning vast properties, from which many millions are regularly derived, of more consequence in the eyes of the Constitution than the like number of people in other parts of the Country who do not enjoy the same prosperity? I cannot assent to an interpretation of the Constitution that impairs and cripples the just powers of the national government and at the same time discriminates against the greater part of the people of our country."

For Mark Phillips, Justice Harlan's dissent of 1895 is "politics, pure and simple." (For Bradshaw, "not so pure and not so simple: an appeal to the mob.") Professor Evans says Harlan's dissent became the law of the land later: "No one questions the federal income tax today."

Mark notes that it finally took a constitutional amendment to authorize a federal income tax. Evans notes the power to amend the Constitution to meet changing conditions is based on the principle of power derived from the

10) John Howard Lawson was not correct on this point—or Professor Evans was not. In the 1950s Vivian Kellums, a wealthy New Englander, was carrying out a national campaign against the Federal tax on personal income.
people, as Justice Marshall stated it.

Marshall dissents: "The power to tax is the power to destroy." Professor Evans says that Marshall could not foresee the problems and needs that would arise on the threshold of the twentieth century, but Justice Holmes... Justice Holmes comes forward to say:

"If American law were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one John Marshall." But Holmes must disagree with "certain dicta of Chief Justice Marshall which culminated in his oftquoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most distinctions of the law are distinctions of degree. The power to tax is not the power to destroy while this court sits." 11)

Professor Evans refers to American history:

"At the threshold of the twentieth century, the vast growth of business, the bigness of our institutions, the disease-or blessing-of bigness, posed inescapable problems. Was it constitutional for the states to regulate hours of labor? In 1905 the majority said it is illegal to limit work in bakeries to sixty hours a week."

Justice Harlan and Justice Holmes stand up together. Both say: "I dissent." Holmes comments: "I think the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."

Mark Phillips does not like the suggestion that Harlan and Holmes took the same point of view. "They disagreed on the right of railroads to force their employees to sign an agreement not to join a union. Harlan voted with the majority, upholding the right of management to prevent organization of workers."

HARLAN. personal liberty, as well as... the right of property embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's labor.

HOLMES. But you don't object to regulating commerce.

11) The year was 1928.
HARLAN. What possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?

HOLMES. It is at least as close as safety-couplers on railroad cars, which we do presume to regulate.

MARK. They also disagreed about the Sherman Anti-Trust Act. Harlan wrote the majority opinion saying the regulation of monopoly is legal.

HARLAN. Liberty of contract does not involve a right to deprive the public of the advantages of free competition in trade and commerce.

HOLMES. I dissent. I cannot agree with an interpretation of the law which would disintegrate society so far as it could into individual atoms.

MARK. But the next year, Holmes shifted his ground, and wrote the unanimous opinion of the Court affirming the right of the federal government to regulate the activities of the meat trust.

Mark then quotes Holmes as saying: "The substance of the law at any given time pretty nearly corresponds with what is then understood to be convenient." For Bradshaw, this is "politics, the pressure of the crowd." There is some excitement in the classroom as Mark and other students agree "it's politics." Professor Evans says: "The law is politics in the deepest and most creative sense." (Mark: "I don't want politics in bed with me." Laughter.)

Mark says Professor Evans has a sociological approach to law, a do-good approach. Evans says he is referring to necessary change, within the framework of Constitutional Principles established by Chief Justice Marshall, who says: "In many respects the American people are one. They have chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent."

Mark considers this another expedient statement which means you can twist the Constitution to serve those in power. He says there are principles more fundamental than the stately paradoxes of the law. Government is a matter of power. "The more it invades the lives of people, the more they lose their unique individuality."

All the students talk at once — protection of individual rights, complex society, corrupt society — and Bradshaw is delighted: "Confusion..."
monumental, historical, paradoxical confusion" — and he thanks Mark for being a "most proficient advocate of chaos." As the argument among the students becomes intense, the following dialogue is interwoven with and accompanied by *ad lib* comments from various members of the class:

**MOLLY.** You're really saying there's no hope of a better society.

**MARK.** You're not going to get it by government control. It's true that the state moves toward greater control of every facet of our lives. That's the curse of the twentieth century.

**EDDIE.** But what can you do about it?

**JOE.** Try a South Sea island. You'll find them testing guided missiles.

**EDDIE.** Take a rocket to the moon.

**MARK.** I'm an individual. I have a soul.

Professor Evans raps for order. Sudden silence. Then Bradshaw says: "Here we are in the twentieth century. How do you like it?"

With startling suddenness, a great blare of trumpets sounds, the music roars and blasts in discord. The actors on the stage are frozen in their positions. The light becomes bleak, cold. The Voices of the Chorus sing frantic, conflicting bits of love songs and songs of war: "You're my baby" — "It's a long way to Tipperary" — "Into the wild blue yonder" — "It's that old black magic" — "St. Louis Blues" — interwoven with the sombre power of a Negro spiritual. The words of the spiritual rise to a crescendo of sound.

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**Act III of People and Citizens, "The Challenge," begins.** The background music fades. Everyone is as at the end of the previous act. Evans continues his lecture: "What is the challenge of the times in the twentieth century?" For him, it is the relationship of the individual to the society in which he lives. For Mark Phillips, it is the conflict between the individual and the state.

Professor Evans questions whether there is a fixed opposition between the function of the state and the human spirit. Mark says:

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11a) John Howard Lawson was probably the first American playwright to use the technique of these "frantic, conflicting" sounds, in *A New England Fantasy* (1924), the first draft of *Nirvana*, produced in 1926. See my "John Howard Lawson's *A New England Fantasy*" (*Keiei to keizai*, March 1979).
"It is demonstrably true. The state represents power, forcing conformity, brutal, deadening conformity. We have seen it. We know it. When a government is threatened, it will use all its police power to suppress opposition. That's what happened in the first World War."

Justice Holmes rises to speak:

"When a nation is at war, many things that might be said in time of peace will not be endured. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger."

Professor Evans explains that only a few months later, Justice Holmes somewhat changed his position of 1919, for he applied the clear and present danger test in a more rigorous way, to give greater emphasis to freedom of speech. Holmes now expresses this dissent from the Court's decision: "I believe the defendants had as much right to publish leaflets as the government has to publish the Constitution now vainly invoked against them." (Justice Brandeis stands up and says: "I also dissent.") Holmes continues:

"When men come to realize that time has upset many fighting faiths they may come to believe that the ultimate good to be desired is better reached by free trade in ideas—the best test of truth is the power of thought to get itself accepted in the competition of the market. That is the theory of our Constitution. It is an experiment as all life is an experiment."

Mark Phillips calls this statement by Justice Holmes "Politics!" The first world war was over, so the great liberal Holmes could savor his opinions with just a sprinkling of the salt of liberalism. Professor Evans says that in their dissenting opinions both Holmes and Brandeis were going back to the intent and meaning of the Fourteenth Amendment.

Mark now moves a little away from the rest of his classmates and consults some law books, with Bradshaw beside him, whispering. Justice Holmes continues speaking:

"The majority holds that it is unconstitutional to legislate concerning the hours and working conditions of women. My learned colleagues assert that they cannot accept the doctrine that women of mature age require or may be subjected to restrictions upon their liberty of contract. I dissent from this
view. Many years ago, the Court's interpretation of the Fourteenth Amend-
ment went no farther than an unpretentious assertion of the liberty to follow
ordinary callings. Later that innocuous generality was expanded into the
dogma of Liberty of Contract. I insist that contract is no more exempt from
law than other acts." 12)

Professor Evans explains that when Charles Evans Hughes became
Chief Justice in 1930, the dissenting views of Holmes and Brandeis tended
increasingly to become the views of the Court. And Chief Justice Hughes
rises to speak:

"It is charged that minimum wage regulation for women is deprivation of
freedom of contract. What is this freedom? The Constitution does not speak
of freedom of contract. It speaks of liberty, and prohibits the deprivation of
liberty without the due process of the law. Liberty in each of its phases
has its history and connotation. But the liberty safeguarded is liberty in a
social organization which requires the protection of law against the evils
which menace the health, safety, morals and welfare of the people. Our con-
clusion is that previous decisions of the court should be and are over-ruled."

Professor Evans explains that while continuing to apply the clear and
present danger formula the Court moved to increasing recognition that the
citizen's liberty to speak and write and think is the most essential attribute
of citizenship. Justice Hughes continues:

'I hold for a unanimous court that freedom of speech and of the press are
fundamental rights. The right of peaceable assembly is right cognate of
those of free speech and free press and is equally fundamental. These
fundamental principles lie at the base of all civil and political institutions,
principles which the Fourteenth Amendment embodies in the general terms
of its due process clause."

Professor Evans says: "The Court gave new recognition to the rights
of labor." And Justice Hughes speaks: "Employees have as clear a right
to organize and select their representatives for lawful purposes as the
respondent has to organize its business and select its own officers and

12) Justice Brandeis here says: "Since I have been the Counsel for those
seeking the protection of the law for women workers, I cannot join in Justice
Holmes' dissent." (The case was Adkins v. Children's Hospital, 1923.)
agents."

Mark Phillips, who has remained apart from his classmates, whispering with Bradshaw, now rises and comes forward:

"Now, wait a minute—just a minute—let's get a little sense into this. (To Evans) How about that sense of history you're always talking about? The cases you mention came up when Franklin D. Roosevelt was President, and the Court rejected a lot of the New Deal legislation. Roosevelt whipped up a storm when he tried to pack the Court, and was defeated. But new judges were appointed, and the Court began to reflect the political pressure of the times."

Professor Evans points out that the Court has always mirrored the pressure of the times: "This has indeed been its function, to interpret the great principles of constitutional government . . ."

"Here's what Thomas Jefferson said about the Court: 'The Judiciary of the United States is a subtle corps of sappers and miners constantly working underground to undermine the federated fabric.' Here's what Franklin D. Roosevelt said about the Court: 'The Court has improperly set itself up as a third house of the Congress, reading into the Constitution words and implications which are not there.' Two of your heroes. Why did they say that? Because it's a question of power."

Mark Phillips interrupts: Professor Evans also quotes Jefferson and Roosevelt:

"Jefferson also said: 'I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man.' Franklin D. Roosevelt also said: 'People die. But books never die. No man and no force can take from the world the books that embody man's eternal fight against tyranny of every kind!'."

The students are quiet. Both Evans and Mark now speak in a very restrained way, their voices edged with anger:

MARK. Words mask the reality of power.
EVANS. Words are the means by which the people shape their destiny.
MARK. Words are manipulated by those who are strong enough and clever enough to lead.
EVANS. Is that what you want to do?
MARK. Even here, you try to force us to agree with you.
EVANS. *Force?*
MARK. You use the pretense of free discussion to put across your point of view.
EVANS. You feel very strongly about these things.
MARK. I resent being led by the nose. And I’m intelligent enough to know what’s going on.
EVANS. What?
MARK. You’re cleverly laying the groundwork for an all-out defense of the present conduct of the Court.
EVANS. Here too we mirror the pressure of the times. The shadow of great issues lies across the classroom.

During the above dialogue, the light has faded on the judges, except for a light remaining on Brandeis.

Justice Brandeis speaks:

“Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. If there is time to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence.”

Justice Brandeis turns and exits. There is a single, loud chord of music, then silence.

Mark Phillips holds that what the Supreme Court is doing is wrong, un-Constitutional and dangerous:

“There’s a struggle for power, all over the world. And it’s here too, in this country. You’ve talked about the Constitution, but you don’t mention the Tenth Amendment: ‘The powers not delegated to the United States are reserved to the States, or to the people.’ I consider the Supreme Court violates the Constitution in seizing power belonging to the States and to Congress. It has usurped the function of the legislative branch.”

Mark states that in the Constitution itself nothing is said about making all legislation conform to the Constitution. Molly says that at the time the Constitution was adopted a great deal was said about this point, and she reads from the accepted authority, *The Federalist*:

“To deny the authority of the court to review legislation would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people
themselves. A constitution is in fact, and must be regarded by the judges, as a fundamental law.”

Professor Evans says we must judge the Supreme Court in relation to the fundamental law, and its application to the social development of the nation, and he calls upon Chief Justice Warren to speak for the Court majority in a 1957 case. Justice Warren does not appear, but over a loudspeaker we hear a Voice:

“The essentiality of freedom in the community of American universities is almost self-evident. To impose any strait-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, study and evaluate, to gain new maturity and understanding. Otherwise our civilization will stagnate and die.”

Mark Phillips says that in the case Justice Warren is referring to, a university professor refused to answer specific questions asked by the Attorney General of the State of New Hampshire: “Did you advocate Marxism? Did you say socialism is inevitable in this country? Did you espouse the theory of dialectical materialism?”

Over the loudspeaker speaks a Voice:

“We believe that there unquestionably was an invasion of petitioners’ liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread. Petitioner’s right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.”

The other students in the class have risen. Two or three move beside Professor Evans. Most of the students stand a little apart, questioningly. Bradshaw observes.

Mark says Professor Evans is ignoring the real problem: “Do certain doctrines really encourage freedom or do these doctrines stultify the mind?” Evans says: “Let people find out for themselves.”

13) This is the case of Sweezy v. New Hampshire 1957.
Some of the students move to Evans. Two men and woman move to Mark. Molly, Joe, Saunders and Peg are between them, listening carefully.

Evans asks Mark's group: "Do you question my right to teach according to my lights?" Mark: "No, but we can question whether your lights are very illuminating."

On the issue of the right to teach, Evans says there is also a right to learn. It is a matter that relates to people as citizens, "and it effects every aspect of our society." For example, the right to practice one's profession should not be limited by a political test. Mark says there is no unlimited right. There are many standards, tests of character and viewpoint and other things.

Professor Evans says the Court has spoken. Over a loudspeaker speaks a Voice:

"We recognize the importance of leaving states free to select their own bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner nor in such away as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective. But it is unnecessary to sacrifice vital freedoms in order to gain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar."

Professor Evans next discusses two equally important rights. One is the right of the lawyer to practice his profession. One is the right of every citizen to have an attorney of his choice.

"Those rights are bound together—that's why we cannot think of the right of the individual without thinking of the whole society. My freedom to teach is bound up with your freedom to learn. An author's freedom to write a book is bound up with everyone's freedom to read. That is how society functions."

Again a Voice speaks:

"Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted."
Mark Phillips thinks this majority opinion of the Supreme Court begs the question. The justices have no right to talk about the vanguard of democratic thought.

The Voice continues: “Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.”

Mark says: “If our society is ill, we know the cause. The fear is real, the danger is real.” Among the other students there is excitement, ad lib argument: “Society has the right to defend itself—take the Smith Act cases.”

Professor Evans calls upon the Court. Speaking for the majority is Justice Harlan as a Voice over the loudspeaker: 14)

“How much one may abhor even the abstract preaching of forcible overthrow of government, it is on the evidence in the record that the petitioners must be judged. We think that as to some of these petitioners the evidence was entirely too meagre to justify putting them to a new trial, and that their acquittal should be ordered.”

Professor Evans calls upon Justice Black, represented by Another Voice:

“I would reverse every one of these convictions and direct that all the defendants be acquitted. The kind of trials conducted here are wholly dissimilar to normal criminal trials. There is the routine introduction in evidence of massive collections of books, tracts, pamphlets, newspapers, and manifestoes. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison and Mason.”

Mark wants to know if Professor Evans, who holds with the latter view, also supports the Court’s interference with the operation of Congressional Committees and the lower law courts and the Department of Justice. Evans says these are matters of due process, about which a Voice speaks:

“The power of Congress to conduct investigations is broad, but it is not unlimited. There is no general authority to expose the private affairs of

14) This is John Marshall Harlan, Supreme Court Justice under Chief Justice Earl Warren.
individuals... We must condemn the practice imputing sinister meaning to
the exercise of a person's constitutional right under the Fifth Amendment.
The right of an accused person to refuse to testify was so important to our
forebears that they raised it to the dignity of a constitutional amendment."

Mark asks Evans: "Are you prepared to defend the action of the
Court in forcing the Federal Bureau of Investigation to open its files?"
Evans says this case involved the most essential principles of due process.
And a Voice speaks:

"The evidence relied upon by the Government was entirely circumstantial.
The demand for production of specific documents did not propose any broad
or blind fishing expedition. Refusal of the request denied the accused evi-
dence relevant and material to his defense. The interest of the United
States in a criminal prosecution is not that it shall win a case, but that
justice shall be done."

Mark Phillips thinks it is dangerous to interpret due process in such
broad terms. Then, black law student Saunders speaks with great inten-
sity: "I don't know about all these dangers you're worryin' about, but I
know about due process. A cop's club on your head don't feel like due
process." Speaks a Voice:

"The Supreme Court holds / in the case of Pikes v. Alabama / that there
is no evidence of physical violence applied to the petitioner. But for a
period of a week he was kept in isolation, except for sessions of questioning.
His father and a lawyer were barred in attempts to see him. We hold that
the circumstances of pressure applied against the power of resistance of this
petitioner deprived him of due process."

Mark says he's not attacking every decision of the Court, but he's
pointing to the general direction the Court is taking, a "dangerous usurpa-
tion of power based on a philosophy of a welfare state." Mark does not
want to see that philosophy triumph, and he doesn't like its being taught,
either.

Saunders says academic freedom is a "burning question." He himself
got his education separate and not so equal. Evans elaborates: "Every
child who is educationally underprivileged at the grade school level is
unable to develop fully as a person and a citizen. The individual suffers;
but the nation also suffers." Mark calls this a "subtle, sociological argu-
The Voice of Chief Justice Earl Warren speaks for the Court in Brown versus Board of Education: “In the field of education, the doctrine of separate but equal has no place.” Mark asks:

“What’s been the result of that decision? It’s caused school appropriations to be cut off. Racial antagonism has increased. There’s bitterness among the people of the South... You can’t force people to change their customs. If federal troops can go into Arkansas, they can come into this university. And I’m afraid of it... People! I don’t get sentimental about people in the abstract. You’ve seen pictures of crowds watching a lynching, or standing in the street waiting for someone to jump from a window-ledge. Those are inhuman faces.”

Professor Evans says the difference between Mark Phillips and him is one of fundamental philosophy, a basic approach to life: “Phillips has no faith in people, or their ability to organize society according to their hope and dream.” Evans has appealed to the history of the American experience because he believes his view of life is the same as that held by the founders of the Republic, which they established in the faith that the spirit of man will be triumphant.

Evans turns slowly to the map of the United States, and, as he stands looking intently at it, there is absolute silence. Then there is a single resounding chord of music “Like the snapping of a strong wire.” As the echo of the music dies, Evans turns to the globe of the world, which he spins. Then he turns back to the class: “The past is prelude. The nation is people.”

Molly cites in brief some of the legal cases already referred to. Evans quotes John Donne: “No man is an island unto himself.” Then Evans says:

“We are all citizens. Our privileges and immunities, preserved through due process, are the means by which we achieve liberty in social organization. No individual can be separate but equal. The integration of schools is a step toward the integration of the human personality.”

Bradshaw, trembling with anger, comes to Mark at stage center, where they stand in an eerie light.

BRADSHAW. You, Sir? Are you bowing to the ignorant crowd? I am pain-
fully disappointed in you.
MARK. Leave me alone. You have been no help to me. You are at least 200 years old and you're living in the past.
BRADSHAW. Not at all. I am not living.
MARK. Things have got to be handled differently nowadays.

Bradshaw speaks sadly to the class: "Can't I help anyone find their way to chaos?" The light fades on him and he moves into darkness.

Mark says that he shall continue to fight for his views. Evans says it is good to make their differences clear, so that each person can judge. Evans says: "Our enemy is fear...fear of thought...fear of the inquiring mind...fear of people. Fear is chaos. Fear is the outer darkness. Let us live in the sunlight, with the wind of change in our faces."

The theme music is heard, in an echoing trumpet call, a note of triumph. Then silence. As Evans dismisses the class and steps down and walks through the group of silent students, the music plays. As he crosses to rear and exits, the students follow him. Mark, apart from the others, leaves. Peg Itamuri exits. Molly and Joe walk to the front, stage center. The light begins to dim. They go down the steps to the center aisle, talking as they go. They want to be part of their country, they want their love to be part of it, they want to be citizens. As the door closes on them, the music again repeats the theme, with heightened intensity. And John Howard Lawson's Fable for Americans, *People and Citizens*, ends on a strong note of triumph.

(Received August 28 1979)