I had several notions about the content of my remarks for tonight, none of them any good. At first I thought I should simply read to you the communications I have received from Dan Polsby, for they are erudite, amusing, and relevant. I rejected this, however, for whatever the merits of bringing coals to Newcastle, bringing the wit of Polsby to Minnesota would surely be an act of supererogation.

My second idea was that I should speak on the subject of Charles Reich’s *The Greening of America*. Indeed, I had the title and the approach ready at hand. I was going to call the talk, *The Browning of America*, and I was going to demonstrate that Charles Reich was in the great tradition of Robert Browning, as an optimist who could put the best face on the worst situation. But I soon realized that my recitation of Browning’s poetry would probably make you sick and my reading of Reich’s prose would make me sick. And so I retreated to a position generally regarded as heretical among after-dinner speakers. I decided to offer a few remarks on a subject about which I have a smattering of knowledge, or at least familiarity. At the outset I should warn you that however these remarks may appear to you, I do not intend them to be humorous or even entertaining.

The subject natural to this time and place is the influence on the Supreme Court of its two new Justices, both of whom were appointed from Minnesota. I had thought that I might essay to prove that Justices from Minnesota, throughout the history of the Court, have come from a common mold. But the evidence is still too sparse to reveal whether Chief Justice Burger and Justice Blackmun do in fact emulate the attitudes of the only other Minnesotan to achieve the same post, Justice Pierce Butler.

What is already clear, however, is that the 1970 Term of the Supreme Court, the first full term of Court with both Minnesotans participating, is destined to be marked by American history as the most important since that which witnessed the fateful decision in *Brown v. Board of Education*. There is a difference between the impact of the two Terms. That of 1954 might be analogized to the explosion of the atomic bomb at Hiroshima; the 1971 events are more like the actions of the American strategic bombing command over Europe in World War II. We are witnessing in the Court’s work not one major explosion, but a large number of smaller but by no means insignificant ones, cumulatively perhaps as devastating.

The coincidence of *Brown* with the arrival of Earl Warren has misled the public—and many others who should have known better—into the belief that the Court is an instrument of the will of its presiding officer. It is appropriate to point out that the “Warren Court” was not transmuted into the “Burger
Court" until Mr. Justice Blackmun replaced Mr. Justice Fortas. Blackmun is no less essential to the apparent changes that are occurring than is Burger.

Even so, there is or should be something disturbing about the proposition that a watershed in constitutional jurisprudence should be marked not by changes in constitutional text nor by changes in the social conditions that give rise to the problems to which that text is purportedly applied. The changes are rather clearly the result of a change in the personnel charged with explication of that basic document. Certainly if the meaning of a constitution is as fluid as the personal whims of the Court's membership would make of it, it is really no constitution at all. A set of principles purportedly setting bounds for government action and allocating governmental authority within those bounds is meaningless if nine Delphic oracles are permitted to divine its meaning and state it anew each time a question is proposed for resolution. No less so when those modern oracles speak with the same lack of clarity and with the same obscurity that marked the efforts of their famed predecessors, the Greeks that is. Mr. Justice Frankfurter once asserted: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." Perhaps he would have been more accurate if he had spoken in normative rather than descriptive terms.

On the other hand, if the Constitution is no constitution at all, if it is dependent for its meaning upon the whimsy of its expositors, it is equally clear that a Constitution framed in one age, assumed to have a fixed and unalterable content, except as changed by constitutional amendment or revolution, is not likely to remain viable in a totally different era.

On the one hand there is the demand for rigidity, for adherence to what is known euphemistically as the "intent of the Framers," for the alleged "absolutes" that inhere in the words of the Constitution. On the other hand, the demand... for flexibility, for the adaptation of the "central meanings" of the Constitutions to the times in which they are being applied, for a "living Constitution." These competing concepts have resulted in calls for the Courts to adhere to one pole or the other. Especially today when polarity accounts for so much of our political life.

For many there is no other possibility than a mechanical application of fixed rules to determined facts. These are the "strict constructionists" of the kind that President Nixon thought he was appointing to the Court. For others, the only possibility is a complete discretion on the part of the Court to express the personal values of the incumbent justices. These are the neo-realists of our day. As to both groups, I think it appropriate to repeat a remark I made with reference to a recent Harvard Law Review article by Judge J. Skelly Wright: "Only for the simpleminded are all things simple."

There is a way—however discredited by modern psychologists and sociologists—for reconciling the need for change with the need for stability in constitutional construction. The means are the means of reason derived from experience. A court, and particularly the Supreme Court, cannot mechanically apply earlier solutions to contemporary problems and still fulfill its role in the scheme of American government. If, however, the Court is to depart from its earlier notions as to the meaning of the provisions of the Constitution, it ought to be able to explain why it thinks that such change is appropriate or necessary. It may be that an earlier rule is believed to have been erroneously formulated. If so, the Court ought to be able to say why. And when it does say why, it ought to do so honestly and not disingenuously or fraudulently. This has been the burden of my complaint over the years about the Warren Court. To ignore earlier decisions or to distort them—as has so frequently been done—is to fail the function for the performance of which the courts have been given their independence from the political realm. To issue edicts rather than reasons is to betray the ideal to which courts should aspire.
I have put forth my creed or screed, however you will have it, in order to suggest that the Burger Court’s efforts cannot and should not be measured against that chimera that was President Nixon’s standard for judicial competence. There is and can be no “strict construction” of the grand clauses of the Constitution. Perhaps one can say that the $20 stated to be the dividing line in the Seventh Amendment on civil jury trials can be strictly construed. Yet one wonders whether such strict construction would treat $20 in 1787 as the same as $20 in 1970 or measure it in terms of purchasing power equivalents for each period. Certainly, however, with the terms due process of law, the equal protection of the laws, privileges and immunities of citizenship, cruel and unusual punishments, unreasonable searches and seizures, and so on, there are no strict constructions only historical ones. And, Mr. Justice Black to the contrary notwithstanding, what is true of the ambiguities of the Fourteenth Amendment is not less true of the so-called absolutes of the First. Ambiguities are to be found even in the First Article’s description of the qualifications for electors, as Black’s dominant but unpersuasive opinion in the Voting Rights Cases of this Term makes abundantly clear.

The changes in Supreme Court jurisprudence that have already been revealed by the Burger Court are attributable to different causes than “strict construction.” Essentially, the two new votes have changed a Warren Court minority into a Burger Court majority. Warren and Fortas were taken from one wing of the Court and Burger and Blackmun were added to the other. The result, however, has not been overruling of the Warren Court’s major decision. Instead the Warren Court momentum has been brought to a screeching halt. Whatever the media may have reported, Miranda has not been overruled by Harris. The new case on bastards’ rights to inherit (Labine) did not overrule the old one on bastards’ rights to sue for wrongful death (Levy). The earlier nationalization cases denying Congressional power to prescribe loss of citizenship have been left intact by the more recent decision sustaining a legislative authority to qualify citizenship on a period of residence. Reitman v. Mulkey has not been reversed by the more recent approval of that Progressive era panacea, the referendum. True, it is likely that none of the aforementioned cases would have been decided the same way by the Warren Court, which would also have probably imposed standards for instructions to juries authorized to fix the death penalty, and would have more readily interfered with the criminal jurisdiction of the state courts. Nevertheless, it is one thing to say that the Burger Court has not been prepared to honor promises implicit in Warren Court opinions, still another to say that it has overruled the earlier Court’s precedents.

Perhaps one of the reasons that the earlier promises need not be kept or cannot be kept is that they were set out in opinions that failed to provide rationalizations for their conclusions. Who can say that Reitman v. Mulkey, California’s “Proposition 14 case,” commanded a different conclusion in this Term’s public housing referendum case, when the most ardent supporters of the Reitman decision cannot tell you on what ground it properly rested?

The essential difficulty in the Reitman situation is that “substantive equal protection” is not a principle, it is an excuse for the absence of one. It is no more than an expression of personal preferences by each of the Justices. To that extent, Reitman v. Mulkey justified rather than inhibited the Burger Court in approving the requirement of a referendum on public housing. “Substantive equal protection” is, no less than “substantive due process” upon which the Warren Court looked with such disdain, a license not a principle. The absence of rationales for the conclusions in the earlier nationalization cases again did not preclude but permitted the Burger Court to hold valid a Congressional require-
ment for residence in this country in order to complete the citizenship of a person born abroad of American parents.

Each of the decisions to which I have adverted was certainly consistent with the holdings and the rationalizations, such as they were, of the earlier opinions. Each of the decisions to which I have adverted was also inconsistent with the spirit of the earlier decisions. Certain prime values that dominated the Warren Court, no longer have the ascendency in the Burger Court. Denigration of state power is no longer an end in itself. Equality is no longer a magic word compelling a conclusion. The Court has, in part at least, abandoned its role as maker of a criminal code for the States to follow. The legislative voice—both state and federal—is once more to be given credence, perhaps even when it is inconsistent with the predilections of the Justices themselves. In just one place, and even there on only a grudging basis, has the Burger Court advanced the Warren Court principles beyond the boundaries earlier established. In the North Carolina school integration cases, it has ordered integration, by busing if necessary, to eliminate state-created segregated public schooling. The unanimous decision here is a model of caution, resolving no more than necessary. But it did, at least, reveal the independence of the two new Justices from the political goals of the President who appointed them.

The Burger Court has effected one other change of some importance. It has already changed the Court’s aficionados into the Court’s critics. Suddenly an institutional value has loomed on the horizons of those who carefully avoided seeing that value when the Warren Court was in its ascendency. Suddenly those who had rejected Mr. Justice Frankfurter’s standards for judicial behavior as the carping of a pedant now demand that the Burger Court adhere to those standards. Witness a recent column by Anthony Lewis in The New York Times. Anthony Lewis, who applauded the reapportionment opinions, the nationalization cases, the right to counsel cases, etc., without any regard to the absense of reasons to support the conclusions, as Mr. Justice Frankfurter pointed out in cogent dissenting and separate opinions, suddenly charges the Burger Court with a failure to adhere to Frankfurter’s standards. Thus, Lewis said in a recent article on the *Bellei* case that concerned the citizenship of children born abroad of American parents:

That is the result of reading the Constitution of the United States as if it were a bill of lading. As always, thoughtless analysis makes bad law.

It is sad to imagine what Felix Frankfurter would have thought of all this. Justice Frankfurter believed passionately that the Supreme Court should allow Congress broad power to lay down rules for citizenship. But he also believed it the Court’s duty to say honestly what it was about. Only by doing so, he thought—only by the attempt at intellectual persuasion—could judges justify their extraordinary function in American life.

Certainly Lewis is right about Frankfurter’s attitude. Certainly he is right in demanding that the Court now adhere to these principles, that principles have been disregarded for so long. Certainly he is wrong in expecting that the new Court will easily be dissuaded from indulging the bad habits of its predecessor.

In sum, we know that the Burger Court is a vastly different Court from the Warren Court. We know that the directions taken by the Warren Court will not be followed by the newly constituted Court. We know that the new Court will be more tolerant of state government power and of Congressional authority as well. We have no evidence yet that the new Court will afford principled opinions justifying its conclusions. Evidence to date suggests rather that they will emulate the Warren Court in this regard. We do not yet know what the new directions of the
new Court will be, to what degree they will overlap those of the Warren Court, to what extent they will reject those of the Warren Court. We do know that the professional Court watchers among the political scientists and law professors will be demanding a recognition of the institutional restraints that the Court should observe, just as these same critics discovered the desirability of the limitation on presidential authority when it was no longer wielded by Kennedy but rather by Johnson and Nixon.

In a book on the Warren Court that I recently published, I suggested problems that the Burger Court faces:

At the close of Warren’s tenure, both the Supreme Court and the law were at low tide so far as public reaction was concerned. The Court’s lack of prestige was reflected in the data published by the Gallup Poll. The disdain for the law was demonstrated not only by the FBI’s crime statistics but by the behavior of all levels of American society. It is revealed no less in the actions of three presidents and five Congresses who have indulged a war not sanctioned by constitutional procedures and in those organizations and individuals who set themselves above the law.

We were, in the recent past, (as we still are) concerned about the “credibility gap” created by the executive branch when it became apparent that its words and the truth were not necessarily related. There is another credibility gap between the Court’s pretensions and its actions. The restoration of public confidence is vital both to the continuance of the Court’s powers and to the maintenance of the rule of law in this country.

The Supreme Court has been and must continue to be a strong force in the vital center that provides cohesion for a democratic society. The accomplishment of its mission is not measurable in terms of individual decisions. Its functions is to help maintain a society dedicated to the notion that law must be the choice over force as the means for resolving the conflicts that burden society. It must epitomize reason rather than emotion in helping seek justice.

Above all it must emphasize individual interests against the stamp of governmental paternalism and conformity. At the same time it must retain the confidence of the American people.

At the moment, whether because of their own efforts or because of the interpretations put on those efforts by the news media, the members of the Burger Court have not yet moved toward the reestablishment of the credibility of the judicial process. As of now, all change is ascribed to a new majority asserting different personal preferences from those asserted by the old majority. It is to be hoped, but it is not to be expected, that the Burger Court will eschew the methods of its predecessor rather than simply reject the former Court’s rulings by the same inadequate reasoning that endangers the function that the Court is intended to perform.