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THE SUPREME COURT IN CONTEMPORARY LIFE

by

Paul A. Freund

IT IS a very great privilege to be asked to deliver the first Robert G. Storey Lecture. Dean Storey is known and honored throughout this country and abroad for his manifold contributions to law and the legal order, and to have one's name associated with his, even in this modest capacity, is an honor indeed.

The role of the Supreme Court can best be viewed in the perspective of time. Some missions of the Court have remained constant, or fairly so, over the years. The Court has stood almost from the beginning as an arbiter or umpire of the federal system. By standing ready to adjudicate suits between states over such conflicts as boundaries, the apportionment of interstate waters, and the escheat of intangible property, the Court has served, as has been said, as a substitute for diplomacy and war.

More broadly the Court has played a vital role in maintaining a free national market of continental extent, overturning when necessary local trade barriers and commercial preferences. At a time when Western Europe and other areas of the world are struggling haltingly to achieve a common market, this contribution can hardly be overstressed. It was not however, a role assumed without protest. Chief Justice Taney (and here *The Jacksonian* was echoing the view of the arch-Federalist Chief Justice Kent of New York) could not bring himself to declare that an act of the state was in violation of the commerce clause of the Constitution where no federal statute had interposed the national will.¹ But Marshall's position,² that the power granted to Congress, even though unexercised, established a negative duty on the states which the courts were bound to enforce, carried the day,³ and fortunately so, for the variety and ingenuity of state parochial laws in the field of trade are such that a case-by-case judicial scrutiny is highly valuable if not indeed essential.

Similarly, the Court has served our federal system in the basic function of assuring the uniformity of federal law, whether through statutory or constitutional interpretation. This mission requires, of course, the review of state court decisions, an authority which was

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¹ *License Cases*, 5 How. 504 (1847).

² *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

³ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852).

bitterly contested in some quarters in the early 19th century. When Marshall declared that the decisions of the highest court of the state applying its criminal law were thus reviewable under the Constitution,⁴ he drew a violent attack from Judge Roane of the Virginia Court of Appeals, the judge who in all likelihood would have been sitting in his place had the appointment of a chief justice fallen to Thomas Jefferson rather than to John Adams in the late days of his administration. Roane declared in a letter that it was "a most monstrous and unexampled decision. It can only be accounted for from that love of power which all history informs us infects and corrupts all who possess it, and from which even the upright and eminent judges are not exempt."⁵

Not all the missions of the Court have been so constant. Others have shifted from period to period. In this respect the Constitution is like an enduring work of art: the meaning of its great clauses takes color from the concerns and capacity, the needs and aspirations of the time. The great constitutional guarantees of equal protection of the laws, due process of law, the free exercise of religion, and the freedom of speech and press all derive meaning and content from the intellectual and moral climate of the age. There has been in fact a moving consensus, whereby the fighting issues of one era become the commonplaces of the next, resolved either for or against the position of the earlier court majority.

I have already spoken of the commerce clause in the role of cementing the Union and the supremacy clause as a basis for review of state court decisions. In the period following the Civil War the Court exercised its authority to a predominant degree in safeguarding capital and burgeoning industry against measures that in the Court's judgment were hostile. In the one year 1895 three crucial cases were decided. *In Re Debs*⁶ ruled that the federal courts themselves, without benefit of an act of Congress, could issue injunctions against strikes that threaten to impair interstate commerce. *United States v. E. C. Knight Co.*⁷ held that a combination of ninety-five per cent of the sugar-refining capacity of the country did not constitute a restraint of trade among the states, since manufacturing is not commerce. And the *Income Tax*⁸ cases held that Congress was powerless to levy a tax on income from property inasmuch as the tax was a tax on the source and therefore a direct tax. In combination this

⁴ *Cohens v. Virginia*, 6 Wheat. 264 (1821).

⁵ 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 555-6 (1932).

⁶ 158 U.S. 364 (1895).

⁷ 156 U.S. 1 (1895).

⁸ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

trilogy of cases provoked understandable wrath on the part of labor and its sympathizers. The spirit of the cases was well-foreshadowed in a statement by Mr. Justice Brewer, which indicates that he was performing a labor of love in the decisions two years later:

"To him that hath shall be given" is the voice of Scripture. "From him that hath shall be taken" is the watchword of a not inconsiderable, and through the influx of foreign population, a growing portion of our voters. In such a time as this the inquiry may well be, what factor in our national life speaks most emphatically for stability and justice, and how may that factor be given the greatest efficiency? Magnifying, like the apostle of old, my office, I am firmly persuaded that the salvation of the nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary.⁹

It is hardly necessary to say that in these instances the Court overreached itself, and the moving consensus became that of its critics.

Slower to be recognized were the guarantees of freedom of speech, press, assembly and religion as applied against the states under the standard of liberty and due process of law. In 1907 Mr. Justice Holmes himself could say, in a case on contempt of court by a newspaper publication, "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First."¹⁰ In 1920 Mr. Justice Brandeis observed, with some sharpness, in a dissenting opinion, "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."¹¹ And in 1925, in *Gitlow v. New York*,¹² the majority assumed for purposes of the case that freedom of speech and press are among the fundamental personal rights and liberties protected by the fourteenth amendment from impairment by the states. Thus the evolution occurred, from doubt through protest to assumption.

Today it is these very liberties with which the Court is preoccupied in the name of the due process and equal protection clauses. But the basic recognition of these liberties goes back to the 1930's, in the Chief Justiceship of Charles Evans Hughes. Freedom of the press as a guarantee against the states was clearly established in 1931 in *Near v. Minnesota*.¹³ Freedom of assembly was recognized in a provocative case, *De Jonge v. Oregon*,¹⁴ ruling that it could not be made an

⁹ Address before the New York State Bar Association, "The Nation's Safeguard" (1893).

¹⁰ *Patterson v. Colorado ex rel., Attorney General of the State of Colorado*, 205 U.S. 454, 462 (1907).

¹¹ *Gilbert v. Minnesota*, 254 U.S. 325, 343 (1920) (dissenting opinion).

¹² 268 U.S. 652 (1925).

¹³ 283 U.S. 697 (1931).

¹⁴ 299 U.S. 353 (1937).

offense to conduct a legitimate public meeting even though under Communist auspices. State criminal procedure was held up to strict standards: the right to counsel, at least in the most serious cases, was established;¹⁵ coerced confessions were held to invalidate a conviction;¹⁶ and the same was true of the knowing use by the prosecution of perjured testimony.¹⁷ A beginning, too, was made in the direction of desegregated public education when the Court decided that Missouri could not satisfy its obligation of equal protection of the laws by offering Negro university students a subsidized education at a university outside the state.¹⁸ Mr. Justice McReynolds, dissenting, saw which way the wind was blowing, and he did not like what he saw. He said:

For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without impairing petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races.¹⁹

It is no mere coincidence that during the 1930's, when these developments were taking place, totalitarianism was on the rise elsewhere in the world. The dark clouds of repression and inequality hovering over Europe made us more keenly aware that we could fortunately look to the Constitution for the blessings of liberty. Nor was it an accident, I suggest, that the two most notable political dictators in the United States received their comeuppance in the Supreme Court at this time. Governor Huey Long was rebuffed when the Court held that his tax on newspapers, graduated according to the volume of their advertising and thus directed against the big-city press, constituted a restraint on freedom of the press in violation of the fourteenth amendment.²⁰ Mayor Frank Hague of Jersey City was rebuked when the Court held that his control over the selection of speakers in the public square of his city constituted a violation of the guarantees of freedom of speech and assembly.²¹ We are apt to think of the 1930's in the history of the Supreme Court as a time of conflict over economic policies, dramatized in the Court-packing crisis of 1937. It is well to remember, however, that during this period the

¹⁵ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

¹⁶ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁷ *Mooney v. Holohan*, 294 U.S. 103 (1935).

¹⁸ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹⁹ *Id.* at 353.

²⁰ *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

²¹ *Hague v. CIO*, 307 U.S. 496 (1939).

Court was effectively shaping the guarantees of personal rights that have loomed so large in the business of the Court ever since.

Today the momentum of this movement has greatly increased. Despite the variety of forms which the movement has taken and the diversity of cases it has produced, it can perhaps be summarized under two large rubrics: responsible government and responsive government.

By responsible government I mean the duty of public authorities to turn square corners when dealing with the most sensitive interests of the citizen. In this light responsible government means observing the symbolic code that we have devised as a condition of using the criminal law to deprive persons literally of liberty or life. The symbolic code is important not merely, or indeed not so much, because it protects the defendant as because it protects society, those of us engaged in the administration of the law, from roaming at large in the retributive processes of the criminal law. Only by this kind of self-discipline can we avoid what Justice Holmes called "playing God" and make tolerable the responsibility of imposing dooms on our fellow men. In their constraints the judges, and those for whom they speak and act, must find their freedom.

It is hardly necessary to rehearse the ways in which the symbolic code has been applied in these later years. The right to counsel has been extended, and indigence is no longer a reason for proceeding to trial in a criminal case without benefit of counsel.²² Earlier it had been held, incidentally, that indigence was no longer a sufficient ground for a state's exclusion of migrants from other states; Mr. Justice Byrnes observed that indigence could not today be equated with contagious disease or flight from justice.²³ Evidence obtained as a result of an illegal search or seizure is no longer admissible in a state criminal trial.²⁴ The possible limits of these new doctrines regarding counsel and evidence will be considered in a moment.

By responsive government I mean one which keeps itself open to the play of criticism, which reflects the will of the electorate, and which is nourished by an educated citizenry. From this point of view a number of otherwise disparate new doctrines take on a certain coherence. The safeguard of a free press is now held to mean that even defamatory statements directed at the conduct of public office are privileged if they are made without malice,²⁵ that is, without knowledge of their falsity and without a reckless disregard for the question of falsity. Malapportionment of the legislature has become a jus-

²² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²³ *Edwards v. California*, 314 U.S. 160 (1941).

²⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁵ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

ticial issue under the equal protection clause.²⁶ And desegregated public education rounds out this range of decisions directed toward a more responsive government.²⁷

The question should be raised and faced whether some at least of the new developments may be carried too far, to an absolute or doctrinaire point where counterconsiderations are neglected. Certain of the recent decisions are surely not subject to such a charge. In *New York Times v. Sullivan*,²⁸ establishing the new principle of privilege in political criticism, a more absolute position was in fact urged by the three concurring justices,²⁹ who would have set up an unqualified immunity, thus protecting the press or other speakers from even the threat of litigation. On balance, however, as the majority concluded, such a doctrine would have gone unnecessarily far, giving clearance in advance to the most reprehensible elements in journalism and political debate. Some of the other decisions are more arguable from this point of view. In particular, the reapportionment cases³⁰ have carried the principle of equality to an extreme limit, insisting upon approximately equal districts for both houses, even where a departure from that principle has been sanctioned by a state-wide popular referendum. Perhaps the result was inevitable given the starting point of a personal right to a proportionately equal share in the choice of representatives, whether from one's own district or from other districts in the state.³¹ Had the starting point been different, had the standard of equal protection been applied not to the individual voter but to the electoral groups themselves, greater latitude would have been possible in weighing the reasonableness of a classification that gave weight to factors other than population, factors such as geographic area, predominant economic interests, and a desire to impose some structural checks and balances in the legislative process.

Again a question may be raised for the future about the limits of right to counsel in the pre-trial stage of criminal law enforcement. There are some signs that confessions, even though voluntary, may be excluded if obtained without offering the suspect an opportunity to confer with counsel.³² This is a large and involved problem, and it is to be hoped that before fashioning a uniform rule for the states

²⁶ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

²⁸ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁹ *Id.* at 293, 297.

³⁰ *Reynolds v. Simms*, 377 U.S. 533 (1964); *Westberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

³¹ *Baker v. Carr*, 369 U.S. 186 (1962).

³² *Escobedo v. Illinois*, 378 U.S. 478 (1964).

the Court will await the studies and suggestions that will be forthcoming from disinterested bodies giving attention to the problem, including the American Bar Association and the American Law Institute. In particular, attention may be paid to other sanctions than the exclusion of confessions: possibly a strict time limit on the period of interrogation together with a requirement that a confession be confirmed promptly before a magistrate. Another arguable issue in this area is whether the exclusion of illegally-obtained evidence shall be given retroactive application, or more precisely, whether it must be applied in the case of collateral attack by convicted prisoners whose time for appeal has expired. If, as seems to be the case, the rule of exclusion is a prophylactic one, designed to give reality to the guarantee against illegal search and seizure, and if the intrinsic quality of the trial itself was not affected by the introduction of such evidence, a limitation of the rule to prospective application only would appear adequate to its purpose and not unfair. The question is presently under submission.³³

One hears it said that the Supreme Court is the conscience of the country. How true is the statement? On the face of it, it would be a sad state of affairs if our collective conscience were in fact entrusted to nine lawyers who happen to have been appointed to our Supreme Bench. This is especially so because such an identification of Court and moral conscience overlooks the difference between that which is constitutional and that which is morally right or just. Many acts may pass the test of constitutional validity without necessarily qualifying as the wisest or fairest public policy. Sunday closing laws, for example, may validly deny exemptions to those who close for religious reasons on another day;³⁴ but it may be the part of legislative fairness to extend the exemption in such instances of nonconformist religious practice. A legislative investigation may pass muster in the courts because the judges are reluctant to inquire into the motive of the legislators, and yet public morality might be better served by desisting from an investigation which has as its object the discrediting of particular individuals.

Moreover, an identification of Court and conscience tends to obscure the need for constructive measures of reform undertaken by other branches of government. It is not a healthy polity that is forever dependent on its courts for the spirit of self-examination and reform. Indeed, much of the collision course that has been run

³³ Subsequent to this lecture retroactive application of the *Mapp* rule was denied in *Linkletter v. Walker*, 381 U.S. 618 (1965).

³⁴ *McGowan v. Maryland*, 366 U.S. 420 (1961).

by legislators and judges might have been avoided had the legislative impulse for correction been stronger. We waited too long before recognizing the essential justice of providing legal aid for the indigent defendant. We failed for too long to provide sanctions against illegal searches and seizures that might have made the exclusion of evidence unnecessary. A procedure, for example, that subjected state or local government to a civil action by the victim of such a search would have been in many ways a more satisfactory sanction and might have relieved the Court of the necessity of turning to the law of evidence. Still on the agenda are such pressing matters as the problem of bail and possible substitutes that do not place so great a premium on economic advantage, and the problem of pre-trial publicity in criminal cases with its impact on the fairness of a jury trial. If we are to avoid an ever-increasing occupation of the field by the Supreme Court, the way is open through greater resourcefulness and greater diligence in our internal legal housekeeping.

When all this has been said, it remains true that the Court has made some great contributions to our moral thinking. Working within the framework of litigation that comes before it, the Court has sharpened our understanding of equality, the basic equality that does not depend on comparing value or merit but that inheres in the intrinsic worth of a human being as he stands before the law. Beyond this, the Court at its best has shown us a way of resolving conflicts by searching beneath slogans and shibboleths for concrete points of agreement and difference. In a world beset by the clash and clamor of conflicting "isms" this is surely a service of the law and of the Court that reaches beyond their special mission and their time. At its best the Court exemplifies the wisdom of Lord Acton when he said, "An absolute principle is as absurd as absolute power," and again, "When you perceive a truth, look for the balancing truth." Finally, the Court has set a high moral example in the openness of its decisions, the exposure of its reasoning and the freedom of dissent. How important this example is, and how much it puts to the hazard the rationality of the society in which the judges perform, may be seen by a comparison with the practice elsewhere. In Germany the Constitutional Court publishes only the prevailing opinion, lest its authority be weakened by the disclosure of disagreement. It is rumored that on some occasions dissents have been prepared and deposited in the archives against the day when public opinion may be ready to accept a wider exposure to the actual process of deliberation.

In the end, despite its contributions of substance and method, the quality of our society and our life cannot be made to depend on the

Court. Whether the arts and sciences will flourish, whether the aged and the young are properly cared for, whether reason or passion will be our guide, these depend finally on ourselves. If the Court is possessed of neither the sword nor the purse, it is equally not possessed of the whole tutelage of our people.

It was said by John Maynard Keynes that in a healthy economy the economists would become no more important to society than dentists: they would simply be called on for a little repair work now and then. When the importance of the Supreme Court is similarly scaled down, it will be a sign that we have achieved a really civilized life. Mr. Justice Frankfurter used to say that the most important office in a democracy is that of citizen. As citizens, the American dream and destiny are ours to shape.