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A Modern Supreme Court in a Modern World

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A MODERN SUPREME COURT IN A MODERN WORLD *

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It is all very well, indeed it is very good, to bear down on the fact that the author of the Constitution was, and still is, "We the People of the United States." But there is more sentiment than explanation in it. We think too much about who is the author of the Constitution. Of course it was not the Convention of 1789, nor the First Congress which wrote the Bill of Rights, nor the Thirty-Ninth which wrote the Fourteenth Amendment. It was We the People, but even when we have recognized this, all we have done is recognize that it is an ambulatory document. We the People did not drop out of the picture in 1789, or in 1791, or in 1868 when We ratified the Fourteenth Amendment. We kept pace with what We had said. But the important question to ask has nothing to do with the author. The important question is, To whom are We speaking?

When I turn to the Constitution, I am not really turning to a single document, except typographically. For the Constitution is addressed to a number of persons. In some places, to the Supreme Court itself; for instance, in the Third Article on the judicial power. It is speaking to Congress in the important section eight of the First Article where Congress' legislative powers are set down; and also in section nine, which prohibits Congress to pass bills of attainder, export duties and other things. Throughout the document we find that different parts are addressed to different persons and institutions, and the point I make is that they may interpret the words very differently. Even the same word may mean different things when they are addressed to different people.[1] The person addressed determines the meaning quite as much as the context, since it is he who will first give meaning to the word or phrase on any particular occasion. In the interpretation of the Constitution, this is of paramount importance, because here the courts must pay the person addressed the respect due to an organ of government of equal rank and dignity.

THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS

I propose to talk about the largest and vaguest, as indeed it is also one of the most important, phrase in the Constitution, "due process of law." It is

* Parts of this article are based on an article in the *Pacific Spectator* in the fall of 1948 (2 PAC. SPEC. 361) and an address to the Association of American Law Schools in December, 1948.

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1. The *Tidewater Transfer* case is a good example. See Rutledge's concurring opinion, National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 604, 69 Sup. Ct. 1173, 93 L. Ed. 1556 (1949).

addressed to institutions of no less dignity than the States themselves. They are then, the first interpreters of this brief phrase, and we shall see how the Supreme Court, with little more help than its own wits, passes on a State's interpretation of what this phrase, due process, means.

The Constitution is precise and definite enough, for practical purposes, about the structure and procedure of our government, though the men who drafted it left some points in the air and some others unsaid. But on the really crucial matters of what we should do, as distinguished from how we should go about doing it, they were wisely, and I make no doubt, deliberately, vague. They indicated what they hoped for, religious freedom, freedom of speech, freedom of the press, commerce among the states, and due process of law; but they did no more than point to them. So what they said comes down to us more like chapter headings than anything else. They put it up to us, their successors, to write the text. And why not? We are better equipped and better able than they to deal with their future, which is our present. At that, we are older and more experienced than they. They died in a younger world.

Our world has its problems, and it may be that they are harder to answer than theirs. I don't know, but I see no reason to think they are. More of us are worrying about ours, and this makes them seem harder. So much the better. Anyhow I am confident that we can give better answers than our forefathers could have given for us, either the Constitutional Convention, or the First Congress, or the Thirty-Ninth, which wrote this phrase, due process of law, into the Fourteenth Amendment.

The immediate purpose of the amendment was to protect the recently freed slaves. But the language of the amendment was too large to be confined to the purpose which prompted it. What the North really had on its mind in the Civil War was not so much freedom for the slaves as its own freedom to subjugate a continent. By 1890 the Fourteenth Amendment was used, not so much for the protection of the liberty of an unfortunate race, as for the protection of the more fortunate corporations which were engaged in industrializing the country.[2] By the 1920's it was seen that its language was ample enough to include also the general freedoms of speech and press.[3] It was not long before the Supreme Court added religious freedom, prodded, such is the virtue of fanaticism, by a fanatical sect.[4] As Charles Warren put it, the Fourteenth Amendment had become "a tremendous engine for attack on State

2. See the remarks of Black, Douglas and Murphy in Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 599, 62 Sup. Ct. 736, 86 L. Ed. 1037 (1942).

3. Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925); Fiske v. Kansas, 274 U.S. 380, 47 Sup. Ct. 655, 71 L. Ed. 1108 (1927); Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931).

4. See Minersville School District v. Gobitis, 310 U.S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375 (1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).

legislation—an engine which could not have been conceived possible by the framers of the first Ten Amendments or by the framers of the Fourteenth Amendment itself."[5]

No doubt some of the Joint Committee of Congress which reported and proposed the Fourteenth Amendment had in mind the simple straightforward proposition of extending our Federal Bill of Rights to the states. There are books to be read which support this view, but there is no need of going beyond a memorandum which Justice Black attached to his dissent in the case of *Adamson v. California*.[6] Fairman, as good a lawyer as Black and a better historian, after fully examining all the available material comes to quite a different opinion. All Fairman can find in the nature of intentions are what he calls "vague aspirations."[7] But I am no more a historian than I believe the Supreme Court should be, and I do not believe that the Court has any right to fasten upon us what may or may not have crossed the mind of some former statesman or politician, and least of all his aspirations. We have aspirations of our own.

In 1908 the Court denied that the first eight amendments had all been taken over by the Fourteenth.[8] The *Twining* case concerned self-incrimination. The Court had already held that a state could properly do a number of things which were forbidden in the first eight amendments—for example, dispense with a grand jury,[9] have a jury of less than twelve,[10] accept nonunanimous verdicts. Some rights, on the other hand, are as good against a state as they are against the national government. Not because they were enumerated in the Bill of Rights, but because they are "implicit in the concept of ordered liberty," as Justice Cardozo said. Of freedom of speech he said, "One may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."[11]

Justice Frankfurter has put it, more recently, like this:

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

5. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 462 (1926).
6. Adamson v. California, 332 U.S. 46, 92-123, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).
7. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).
8. Twining v. New Jersey, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908).
9. Hurtado v. California, 110 U.S. 516, 28 L. Ed. 232 (1884).
10. Maxwell v. Dow, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597 (1900).
11. Palko v. Connecticut, 302 U.S. 319, 327, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).

"To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the seale of the conception of due process." [12]

It always seems a pity when great issues are fought round small occasions. But it is not a pity. It is best that way. For it means that the protagonist has been set on fire by his cause. Brute belligerency aside, which is ignoble because it is the waste of a fine virtue, this is what we mean when we say that a man is ready to fight at the drop of a hat. Whether he is right or wrong is another matter; and who knows? Anyhow, it is good to have a good man on what we may think is the wrong side. It needs him.

The issue which Admiral Dewey Adamson—he was not an admiral, this was his name—brought up to the Supreme Court was the same question of self-incrimination which had been decided in the *Twining* case. The specific prohlem was whether the prosecuting attorney should have been allowed to comment on the fact that Adamson did not take the stand. For if he could do that, what was left of the silence Adamson had a right to keep? And yet seven states allow their prosecuting attorneys to comment on your refusal to testify for yourself, Connecticut, New Jersey, Ohio, South Dakota, Vermont and Iowa, as well as California. So too does the recent Model Code of Evidence which the American Law Institute drafted in 1942.

The Court held that Adamson's constitutional rights did not go so far as to protect his silence from comment.[13] But four of the nine Justices dissented. Here is what Black said, speaking for himself and Douglas.

"I eannot consider the Bill of Rights to be an outworn 18th Century 'straight jacket' as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequence of the Court's practice of substituting its own concept of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforeing that Bill of Rights. . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

"Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course. I would therefore hold in this case that the full protection of the Fifth Amendment's proscription against compelled testimony must be afforded by California. This I would do because of reliance upon the original purpose of the Fourteenth Amendment. . . .

12. Wolf v. Colorado, 338 U.S. 25, 27, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).

13. Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).

"It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violation of the individual civil liberties guaranteed by the Bill of Rights. But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." [14]

Murphy and Rutledge dissented too, but they had qualms, and their qualms emphasize the fact that Black and Douglas were indeed willing to stop permanently in the Eighteenth Century, satisfied that it was too speculative to hope that the Court could ever improve on those standards and those ideals. Or perhaps I should say, their fear that the Court might slip back into worse overcame any hope that it would rise any higher. Murphy and Rutledge did not see why the Court should have to choose between the Eighteenth and the Twentieth Centuries. They wanted all of both, which Black and Douglas recognized was impossible.

"I agree," said Murphy, for himself and Rutledge,

"that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." [15]

So you see, when it comes to the interpretation of the Constitution, the law has little respect for intentions. It does not rely upon revelation, whether it "has been put out by a God on a mountain top, or by a Saint in a cave, or by a divine Despot on a throne, or, at the lowest, by ancestors with a wisdom beyond later question."[16]

This is true of the large vague words and phrases which, I have insisted, are but delegations of authority to those to whom they are addressed. Here, in the Fourteenth Amendment, this phrase, due process of law, was addressed to the states. Its meaning, then, was, to begin with, what the state made it mean. Its first meaning for the Court, in each case, was either the statute which the state had passed or the particular act which had been done under this statute. In truth, therefore, it was not the Court which was roaming, as Black put it, but the state. The Court was only concerned with how far it should follow.

But what of those words in the Constitution which are not vague, whose meaning was definitely and securely clear and precise? Here, surely, there is no delegation of authority to give them any more or any other meaning

14. *Id.* at 89-90.
15. *Id.* at 124.
16. WHITEHEAD, ADVENTURES OF IDEAS 374 (1933).

than they were born with. And yet we are going to find that those very Justices who were most apprehensive of their brethren roaming at large in the broad expanses of vague words have been the foremost to leap clearly marked constitutional boundaries and give current and modern meaning to the Constitution, even, as we shall see, to words whose historical contours were as brittle as bottles. Either they had to be broken, or emptied of their stale contents and refilled with fresh.

And who shall say the Justices were not justified? Not we who encourage them to do it. The fact is, the Court is acting under a head of demand of which we are scarcely aware, until the Court speaks. As the force of the wind may be judged by the belly in the sail, let us now try to appraise the demand we make upon the Court to pour our current political morals into our Constitution.

JUDICIAL SELF-RESTRAINT—ITS IMPLICATIONS

We must appreciate how differently a lawyer or a judge regards our Bill of Rights than anyone else. The legal idea of the Constitution and of the Bill of Rights particularly is reflected in the restraints which the Supreme Court has put upon itself when it is asked to pass upon the constitutional validity of legislation. I should leave out lawyers when they are advocates, for then it becomes their duty to ignore their political responsibilities. It is, then, not surprising that their clients are scarcely aware of these rules of restraint. They were collected and restated by a quartet of judges of such distinction—Brandeis, Stone, Roberts, and Cardozo—that what they said, with Brandeis as their spokesman, is classic and definitive.[17]

The Court will not pass on the validity of legislation in a friendly proceeding. It must be a real law case. Nor will the Court anticipate a constitutional question. Only as immediate dilemma calls for a decision. Nor will the Court lay down a broader doctrine than the dilemma calls for. A constitutional question must be raised in the record. No one may attack a statute unless he is going to be hurt by it. No one may attack it and at the same time accept its benefits. And, finally, the Court will sooner construe a statute than strike it down. Briefly, the Court will not hold a statute unconstitutional unless this is the best way out of an unpleasant dilemma.

Some of these are simply rules of judicial procedure, to the end that a case which turns upon an interpretation of the Constitution may nevertheless be treated as a law case. Others are sound rules for the interpretation of any document, recognizing the respect due to the interpretation of the Congress or a State when the Constitution is addressed to them. But they are all in effect rules of abstention as well as self-restraint, and it is their effect upon

17. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48, 56 Sup. Ct. 466, 80 L. Ed. 688 (1936).

the Court's attitude toward the Constitution, and specially the Bill of Rights, with which we are now concerned. For the more the Court abstains, so it follows that only the worse statutes are unconstitutional, and to call a statute constitutional is no more of a compliment than it is to say that it is not intolerable. In the eyes of the Court, constitutionality is as low a standard of legislative and political morals as we could have, and yet have any at all.

That laymen are almost wholly unaware that the Supreme Court is under any such restraint or that it has such a low standard of morals is as much the Court's own fault as anybody's. For the Court has so often relaxed its self-restraint on occasions which have excited publicity. No wonder, then, that those who are not learned in the law make the mistake of confusing their civil liberties with their constitutional rights. The Bill of Rights, freedom of speech and press, religious liberty, rights of assembly and petition, our rights against unreasonable searches and seizures, against self-incrimination, the right not to be deprived of life, liberty or property without due process of law, and all the others, all these shrink to a minimum under judicial self-restraint. It is a bad habit, and a mean way of thinking, to hold up the Bill of Rights as our ideal of freedom. The Bill of Rights tells us only what we can go to law for, not what we can vote for. Our civil liberties are poorly served by being lumped with the least we have a legal right to insist on.

I heard the phrase I wanted on the radio the other day, and I can think of few persons I should less like to borrow from or owe anything to than the speaker. It was Gerald B. Winrod who was speaking and finding fault with those who "took the Constitution for granted, like good health." That is just what I mean. We *ought* to take it for granted, just as we ought to take good health for granted. Constitutionality, so far as our legal rights are concerned is no more than reasonably good political health.

It is strange that a people who are so proud of being democratic should turn for the protection of their liberties, to the least democratic of their institutions. We turn to the Supreme Court, where the justices are appointed for life, whose salaries cannot be cut, who are removable only by the great process of impeachment, who are responsible really only to the traditions of the court, and who are liable to censure really only by the few who understand what they say. Why do we turn to them with more confidence than we do to the Congress, which we choose every other year? Charles Fairman, in the brightest, briefest, and best of the casebooks on constitutional law puts it this way: "To think of freedom of speech and of the press as some eighteenth-century heirloom, enshrined in the Constitution and guarded for us by the Supreme Court so that we have nothing to do about it but to enjoy it, is bad history and mischievous thinking."[18] And Judge J. Waties Waring

18. FAIRMAN, AMERICAN CONSTITUTIONAL DECISIONS 392 (Rev. ed. 1950).

said recently, about the exclusion of Negroes from a primary election, "It is a shame and a disgrace for a case of this kind to come to a court. We do not need a judge to tell us if we are Americans."[19]

We may well look to the courts for our constitutional rights, but we ought to get for ourselves the new liberties which we now want to enjoy, and not expect the courts to give them to us. Some of you may listen to the Aldrich Family. On Thanksgiving night, in 1948, Charlie Clark suggested that anyone who didn't subscribe to the class picnic ought to be put on detention. Henry said this was against the Bill of Rights. "Where do you find anything about detention in the Bill of Rights?" asked Charlie. "It's there all right. Read between the lines, read between the lines."

No wonder that the Court responds, tries to meet our expectations, tries to live up to them, tries to satisfy us. High expectations always bring out a man's best efforts. At the same time such flattery may go to his head. It certainly puts the Court into a very difficult and delicate position. How far should the Court go, when we transfer more than a fair share of our available faith from Congress and the state legislatures to the Court, in rejecting their interpretation of the Constitution and undertake to substitute its own? Plainly a delicate and sometimes a dangerous undertaking, but it is by no means novel. The Court has always had to match what it believed to be the meaning of the Constitution against public acceptance of its belief, ever since Marshall matched his wits against Jefferson's in *Marbury v. Madison;* and that was in 1803. And the Court has not done too badly. Though it has made a few unforgivable blunders, like the *Dred Scott* case before the Civil War and the *AAA* case in the teeth of the New Deal, yet it has always been forgiven. As Charles Michelson said, "Abstractly the American people may know that our high tribunal is not infallible. They are aware that there have been bad justices, wrong decisions, and other flaws in the court's history; but the reverence remains."[20]

During the period which followed the Civil War, up to, say, the First World War, we put through what I may call our Fifty-Year Plan to industrialize the nation. The Court was called upon to do its part. Its part was to hold that corporations were persons who were entitled under the Fourteenth Amendment to the liberty of contract, and to forbid the government from taxing their incomes, from preventing them to work children, from limiting the hours of labor, from paying higher wages than they thought necessary, and from doing almost anything else which might interfere with our becoming the most industrialized nation on earth. It was a long stretch, but the plan was successful.

19. United Press Dispatch, July 16, 1948; see also N.Y. Times, July 17, 1948, p. 6, col. 5.

20. MICHELSON, THE GHOST TALKS 165 (1944).

The Court was too proud of its part in the plan to pay much heed to anything but our industrial ambitions. Our ideals had to wait until we started complaining that the plan had been finished and now we wanted to enjoy the results. It was the Court's devotion to this plan which made Holmes more than anxious. It led Brandeis to draw up these rules of self-restraint and abstention. Then, to be sure, a few of the Justices, who had devoted their lives to the plan, could not be persuaded that it had been completed. It was their attitude which scared Black and Douglas back into a preindustrial age.

And yet the Court, even in its zeal, never quite completely forgot its own peculiar peril, that its opinions on constitutional questions must always be matched by its prestige. When it forbad the State of New York in 1905 to limit bakers to a ten-hour day or a sixty-hour week, it is true that the majority laid their decision on the fact, as they understood it to be, that the limitation was not necessary to safeguard health.[21] But the minority made it quite clear that they were interested only in public opinion. Harlan, speaking also for White and Day, said,

> "I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are may be difficult to say. It is enough for the determination of this case, and enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion." [22]

Holmes, in his famous dissent, even perhaps the best of them, said,

> "I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." [23]

And three years later, in 1908, when the Court forbad the State of Oregon from limiting the labor of women in factories and laundries to ten hours a day, and Brandeis submitted the Brandeis brief, which contained nearly a hundred reports of committees, commissions, factory inspectors and others, expressing their opinions, the Court accepted it as evidence of "a wide spread and long continued belief." These "expressions of opinion" were, the Court said, "significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[24] (Perhaps I need not have said that this was 1908.) As Paul Freund says, "I suppose that the data are offered not for

21. Lochner v. New York, 198 U.S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937 (1905).
22. *Id.* at 72.
23. *Id.* at 76.
24. Muller v. Oregon, 208 U.S. 412, 420, 28 Sup. Ct. 324, 52 L. Ed. 551 (1908).

the truth of the facts asserted but only to establish that responsible persons have made the assertions and hold the opinions which are disclosed."[25]

This was the nadir of our Court's decent respect for the opinions of its own kind, and yet, as I have tried to show, I don't think it was ever quite down to nothing.

THE NEW ROLE OF THE SUPREME COURT

When the political morals of our legislatures, our Congress or our state legislatures, fall below our own, we turn to the courts for leadership into something better. However badly our representatives behave, however they caper, we must never make the mistake of taking what they do or what they say as any indication that our standards or our ideals have fallen as low as theirs. Rather are we stirred. But instead of turning on our representatives, and turning the rascals out, we turn to the Court. It is not to our credit, and yet we do it. The worse our respresentatives behave, the more we want to be told how much better they ought to behave.

This is the demand we make upon the Supreme Court, and it is no wonder that the Justices respond. No wonder they ditch their judicial rules. No wonder the less faith we have in Congress or the state legislatures the less respect the Court owes to them, and the more the Court responds to our advances and our demands. This is what is happening now. Two of the Justices, Murphy and Rutledge, in a burst of enthusiasm, recently went so far as to announce that the Constitution, as they read it, "embodies the highest political ideas of which man is capable."[26]

I am not blaming them. They were answering our call for a braver world. They were victims of our confidence in them and our lack of confidence in ourselves. There is nothing more seductive than what people expect of you. I am blaming us. Not, of course, the litigants who appeal to the courts to redress their own particular grievances—on the wildest, leanest hope of success that counsel will consent to argue. I am pointing the finger at all the rest of us who are content to lie back on the courts for what we ought to get up and do ourselves. What I find fault with is a complacent practice of expecting the judicial process to do the work and take the place of the democratic process. Our liberties are a company; and free, and eager, and angry speech is their captain.

I am finding fault, for example, with the American Bar Association. All it did, so far as I know, about the squalid antics of the Un-American Activities Committee in the Hollywood hearings in 1947 was the decision of the Association's Special Committee on the Bill of Rights "not to inject

25. FREUND, ON UNDERSTANDING THE SUPREME COURT 88 (1949).
26. Oyama v. California, 332 U.S. 633, 663, 68 Sup. Ct. 269, 92 L. Ed. 249 (1948).

itself into the controversy," because the moving picture directors and writers were "quite adequately represented." As if all we need to do to preserve our civil liberties is to make sure that everybody is represented by a lawyer. This, I agree, is quite true if we want no more than our legal rights. But what a meagre portion they would make for people hungry for more. Indeed this Special Committee of the Bill of Rights went on to exhibit how debasing the legal attitude toward the Bill of Rights can be of our political morals by offering the aid of all the Association's "appropriate committees." There are none such. No committee of the American Bar Association, and least suitably of all its Special Committee on the Bill of Rights, could have appropriately gone to the aid of the Un-American Activities Committee in those Hollywood hearings.

However, what I want to show is the way the Supreme Court under the pressure of our expectations is putting self-restraint and abstention into its pocket, abandoning the legal attitude toward the Bill of Rights, and turning it into a modern creed of political morals.

The best way to make this clear is to illustrate it, first by some statements of individual Justices which will show what I have in mind, then by decisions of the Court, which will prove it.

Take the secret ballot. It did not come into our political life until 1888, when it was adopted by Massachusetts, and at that it came to us from Australia. You will find it in the Australian Constitutional Act of 1856. I need not say that it was unkown to our forefathers, or that you will not find it in our Constitution. And yet Frankfurter, in the spring of 1950, said, "I do not suppose it is even arguable that Congress could ask for a disclosure of how union officers cast their ballots at the last presidential election even though the secret ballot is a relatively recent institution."[27] To be sure, he was not speaking for the Court. He was speaking his own thoughts on the oath required of union officers by the Taft-Hartley Act.

In my next example I have three Justices. Illinois, since 1935, has given greater representation to its rural downstate counties than to its cities. A country vote meant more than a city vote. If you took the individual voter as the unit, some were given more political power than others. On October 21, 1948, just before the national election, the Court held this Illinois electoral law constitutional. Why, the Court said, our Federal Constitution itself "protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to population."[28]

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27. American Communications Ass'n v. Douds, 339 U.S. 382, 419, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950).

28. MacDougall v. Green, 335 U.S. 281, 283-84, 69 Sup. Ct. 1, 93 L. Ed. 3 (1948).

But Douglas, Black and Murphy dissented, and here is the way they undertook to get around the fact that the very Constitution on which they relied allowed the very thing to which they objected.

> "The fact that the Constitution itself sanctions inequalities in some phases of our political system does not justify us in allowing a state to create additional ones. *The theme of the Constitution* is equality among citizens in the exercise of their political rights. The *notion* that one group can be granted greater voting strength than another is hostile to *our standards* for popular representative government." [29]

These are my italics. Are not these three Justices substituting their own "theme" and their own "standards" for the constitutional "notion" that the interests of a small group may be protected against a greater by giving it, as in the Senate, greater voting strength? The State of Illinois is composed of counties just as the nation is composed of states. It is then, their "theme" and the "notion" is the notion of the Constitution. Their theme is the way they would improve the Constitution. I don't say it would not be a good amendment, whatever havoc it would do to the United States Senate. All the same, it would take an amendment to make the Constitution consistent with the theme of "equality among citizens in the exercise of their political rights."

Now I offer you two decisions of the Court. My first is the release of school time for religious teaching. It is a good example, because the Court reached a decision which I heartily approve, without, so far as I can see, any justification whatever in what the Constitution says, and even less in what those who wrote it intended it to mean. Indeed I surmise that the First Congress would have rephrased the First Amendment to exclude the release of school time for religious teaching, if it had then been one of the issues of the day.

We need not bother with the exact facts in the *McCollum* case.[30] It was one of the several versions of the released time program in our public schools, time out of school hours for religious instruction by your own or your parents' choice of priest, pastor or rabbi—in this case on the school premises. The Court held this program for the release of school time for religious instruction unconstitutional. I need quote only two sentences of Black's opinion,

> "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or . . . the First Amendment has erected a wall between Church and State which must be kept high and impregnable." [31]

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29. *Id.* at 289-90.
30. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).
31. *Id.* at 212.

The Court was applying, not the words of the First Amendment, but its "premise," what "can best work to achieve" its aims. Or, alternatively, it was applying, not the First Amendment at all, but a metaphor, for the "wall" is nothing more. A good metaphor, one of Jefferson's, but a metaphor.

Frankfurter concurred in a separate opinion, in which he made it clear that he was applying a speech of President Grant, Elihu Root's phrase, "The great American principle of eternal separation between Church and State," and a line from a contemporary poet, Robert Frost, "Good fences make good neighbors."

Frankfurter said,

> "Enough has been said to indicate that we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds. But by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation. In that year President Grant made his famous remarks to the Convention of the Army of the Tennessee:
>
> " 'Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of good common school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate.' . . .
>
> "So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education, such as had been written into many State constitutions. By 1894, in urging the adoption of such a provision in the New York Constitution, Elihu Root was able to summarize a century of the nation's history: 'It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State.' . . . The extent to which this principle was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.' " [32]

And he concluded, "If no where else, in the relation between Church and State, 'good fences make good neighbors,' "[33] which, as I have said, are the words of Robert Frost.

Jackson, too, concurred, and as usual candor itself, said,

> "It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions."[34]

32. *Id.* at 217-20.
33. *Id.* at 232.
34. *Id.* at 237-38.

Black relied on a "premise," Frankfurter on a "presupposition," Jackson on "our own prepossessions." They are what the Court relied on.

Now, before we ask what the Founders meant, let me remind you of the exact words of the First Amendment. So far as it has anything to say about religion, it says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

We have the best and most express reason for knowing what the Founders meant. Reed, who alone dissented, quoted Madison. It was Madison who drafted and proposed the Bill of Rights and who pressed and guided it through the First Congress. There is no better mundane source, and what he said is very much to the point.

In the House, where Madison's proposals were debated, the very same fears were expressed as were at once expressed in some quarters about this decision. First by a Mr. Sylvester of New York, who "feared it might be thought to have a tendency to abolish religions altogether." To this Madison replied, "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[35]

Then Mr. Huntington of Connecticut spoke, and he said, he "feared, with the gentlemen first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia, but others might find it convenient to put another construction upon it."[36]

Isn't it pretty clear that the Court was doing just this, putting another, and much larger, construction on these words, expanding their meaning in the light of their premise and in the light of what later statesmen wished to read into them? Possibly the Court preferred to think of itself as going back to the Remonstrance to the Virginia House of Delegates, which was also Madison's, but it goes very far beyond the First Amendment.[37] It would seem to me that Madison had not dared press the new Congress so far as he had remonstrated with the Virginia House of Delegates.

Now I say that what the Court did was wise and well done. I believe such a use of released time would have a bad effect on our public schools, inculcating, as Frankfurter said, "a feeling of separatism when the school

35. Reed quotes this from Madison, 333 U.S. at 244, but not Sylvester, which you will find in the records of the First Congress. 1 ANNALS OF CONGRESS 730 (1789).

36. 1 ANNALS OF CONGRESS 730 (1789).

37. Compare paragraphs 6, 7 and 11 of the Remonstrance. It is printed in full with Rutledge's opinion in Everson v. Board of Education, 330 U.S. 1, 63-74, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947).

should be the training ground for habits of community."[38] I agree with Agnes Meyer, "The social effects of the released-time program are not happy. . . . It is well to remember that the public school is the one place where the child is not primarily a Protestant, Catholic, or Jew, but an American. . . ."[39] And our personal opinions, whatever their value, are no more beside the point than Grant's and Root's and Frost's. What the Court did was turn from the intentionally specific language of the Amendment, when this had become inadequate, to its premise, and then include within that premise the personal opinion of Jefferson, sound Republican doctrine of the era following the Civil War, the political wisdom of a Root, the attitude toward new states of Congress, the insight of a great contemporary poet, and a number of other pertinent considerations which I have no room to quote.

Good history, all of it, as well as sound policy. What I would point out is that the authority on which the Justices relied, all but Reed, is subsequent to the adoption of the First Amendment. It is history, not the Constitution, which has its mouth at the Court's ear, and Frankfurter, who can be as candid as Jackson, is as well aware of it. A year later, in a case where several state statutes prohibiting closed shop contracts were sustained, Frankfurter said that these were not matters, "like censorship of the press or separation of Church and State, on which history, through the Constitution, speaks so decisively as to forbid legislative experimentation."[40]

What is decisive, then, on great and critical issues is history, and the more recent the better. So the Constitution becomes, not a voice, but the trumpet through which we are constantly speaking to a listening Court.

> "The laws take their authority from our possession of them and our use of them. It is dangerous to trace them back to their origin. They take on dignity as they roll on, like our rivers. Follow them upstream to their source, it is but a little jet of water that's scarcely discernible, which grows in pride and strength as it grows older. Consider the ancient reasons which gave the start to this famous torrent, full of dignity, honor and reverence. You will find them so light and so delicate that people here and now who have to weigh everything and reduce it all to reason, and who will take nothing on authority or on credit, it's no marvel if their judgments are often so far removed from the judgments of the people." [41]

Or, as Goethe said, or very nearly, for I cannot find the quotation: If we are truly to possess our heritage, we must make it our own.

I come to my best example, and here the facts of the case are necessary, for they give some of the political background.

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38. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 227, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).

39. Meyer, *The School, the State and the Church,* 182 ATL. MONTHLY 45, 46 (Nov. 1948).

40. American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 550, 69 Sup. Ct. 258, 93 L. Ed. 222 (1949).

41. *The Apology for Raymond Sebond,* MONTAIGNE, bk. 2, c. 12.

In 1943 we were being hag-ridden by Congressman Dies, as we were later by Congressman Thomas and more recently by Senator McCarthy. Dies made a speech in the House demanding that the government be purged of "irresponsible, unrepresentative, crackpot, radical bureaucrats," and he named 39 government employees. He urged Congress to refuse to appropriate money for their salaries. The matter was referred to the Appropriations Committee, and a subcommittee held hearings, in secret executive session.

It reported against three of the 39, Robert Morse Lovett, Goodwin B. Watson and William E. Dodd, Jr. You can find the kind of man Lovett was, and is, in *Who's Who,* or you can read his autobiography, *All Our Years.*

The House took thought and tacked a rider on an Urgent Deficiency Appropriation Act, saying that no money from this or any other act should be used to pay salaries to these three, except for jury duty or for service in the armed forces. The Senate Appropriation Committee promptly cut this provision out, and the Senate itself then voted unanimously against a conference report that left it in. The House insisted. The Senate yielded. And the President too had to yield. When Roosevelt signed the bill, he said, "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war.

"But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory but unconstitutional."[42]

Watson and Dodd continued to serve without salary for a week or so. Secretary Ickes persuaded Lovett to stay on, but after three months, not to endanger future appropriations, he asked Lovett to resign. Then the three brought suit in the Court of Claims for their salaries for the time they had worked and for which they had not been paid.

The Court of Claims found that the rider, section 304, was "notable for what it did not do, as well as for what it did do. It did not terminate plaintiffs' services."[43] No, its sponsors knew very well what they wanted and what they were doing; and they had gone about it carefully and deliberately. So they did no more than they thought necessary. Anyone, including the Supreme Court, who wanted to block them, would have to go a long way to do it.[44] This is why the rider is notable for what it did not do. It did not terminate the plaintiffs' services. It only stopped their pay.

Black wrote the opinion.[45] He called the rider a bill of attainder. What is involved here, he said, is a congressional proscription of Lovett, Watson and Dodd, prohibiting their ever holding a government job. This rider

42. H. R. Doc. 264, 78th Cong. 1st Sess. 1 (1943).
43. Lovett v. United States, 66 F. Supp. 142, 144 (Ct. Cl. 1945).
44. See 89 CONG. REC. 4482-87, 4546-56, 4581-4605 (House), 5023-24 (Senate) (1943). The *Washington Post,* as usual, was more than well aware of what was going on. Herbert Elliston's editorial is reprinted in 89 CONG. REC. 4548 (1943).
45. United States v. Lovett, 328 U.S. 303, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

"clearly accomplishes the punishment of named individuals without a judicial trial."[46]

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed." [47]

These safeguards include a jury, the right to be represented by counsel, the right to be confronted by your witnesses, and so forth. And so too, he said, they proscribed bills of attainder, and section 304 is just that. "Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here."[48]

Frankfurter's and Reed's dissent shows how far the Court had gone. They agreed that the three should be paid for the services they had rendered, but not that the rider was unconstitutional. "Nothing would be easier than personal condemnation" of the rider, they said, but "Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint."[49] This is no bill of attainder, not, anyhow, as it was understood by those who wrote the Constitution. "Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits."[50]

The Court had certainly gone a long way when it called section 304 a bill of attainder. Having made up its mind to kill this thing for good, by a blow from the Constitution, all it could find was the prohibition against bills of attainder. It was an antiquated weapon, dull and rusty. But who will say that this rider was not the modern equivalent of a bill of attainder?

We shall miss a point if we only applaud, and ignore the risk the Court was taking, quite deliberately taking.

What if Lovett had refused to resign? What if Congress had then tacked another rider to the next Urgency Deficiency Appropriation? It is not at all inconceivable. The Supreme Court had taken a chance. It had reached and saved Congress from itself—always a hazardous thing to do, saving anybody from himself. It had saved us from saving ourselves.

Suppose Congress had not only done the same thing again with another such "bill of attainder," but also at the same time were to take away the Court's jurisdiction to hear the next victim's appeal? Then what? The Con-

46. *Id.* at 316.
47. *Id.* at 317.
48. *Id.* at 318.
49. *Id.* at 318, 319.
50. *Id.* at 321.

stitution gave Congress the power to do just that. The Supreme Court has "appellate jurisdiction, both as to law and fact, *with such exceptions and under such regulations as the Congress shall make.*"[51] The Court had already once acknowledged that Congress had this power, even when a case was pending before it. When the Republican Congress in 1868 saw that the Supreme Court was about to hold the Reconstruction Acts unconstitutional, it prevented a decision by taking away the Court's jurisdiction.[52] No, the Court's power is no more secure than it is divine.

The Court was taking a chance. And so were we. The House of Representatives had made its intention very clear, to purge the government service of "irresponsible, unrepresentative, crackpot, radical bureaucrats." If section 304 were constitutional, the way would be open to cut off the pay of any government employee who offended irresponsible, unrepresentative, crackpot, radical Congressmen, from Cabinet members down to the women who work on their knees in the great paved corridors. Only the judges would be immune. Our forefathers had a considerate eye on judges. Whatever Congress could do to the Court, the Justices individually are pretty well protected. The only way of getting rid of them is by impeaching them, for their compensation "shall not be diminished during their continuance in office."[53] But not the Court. Its appellate jurisdiction could be taken away from it under the express language of the Constitution, much more clearly than Lovett's salary could be taken from him.

CONCLUSION

We appeal to the Court and the Justices listen. It comes hard not to, and their response is more admirable than our demand. It would be an easy conscience that failed to condemn what those Congressmen were doing in the Lovett matter. It was lack of conscience that allowed them to do it. A democracy that is willing to throw the burden of its decencies on its judiciary needs a conscience.

I do not know that any set of rules ever has been, or ever can be, worked out for the successful operation of a conscience.[54] It was easy enough for the Court to work out the simple cautionary rules of self-restraint and abstinence for the judicial review of legislation. If that function is grave and delicate, this new function is majestic. For it is nothing less than the political review of the Constitution itself in the light of a modern world, just as a statute is judicially reviewed in the light of the Constitution.

Such a prodigious and perilous task calls for action, not abstinence. It calls for a response, not restraint. If the Court is to be successful, it must

51. U.S. CONST. Art. III, § 2 (italics added).

52. Act of March 27, 1868, 15 STAT. 44 (1868); *Ex parte* McCardle, 7 Wall. 506, 19 L. Ed. 264 (1869). See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, c. 6 (1938).

53. U.S. CONST. Art. III, § 1.

54. Frankfurter's precepts are intellectual humility and rational standards. See the

act, and act boldly. But I do not suppose there is any need of teaching the Court to be bold. Pride is a judicial as well as an angelic sin, and arrogance is the occupational disease of judges. The old rules are still useful, lest the Court be too bold.

And yet if the Court is to be free to act boldly, we must have some assurance that it will also act warily and thereby wisely. The best way to keep the Court wary is to keep the exercise of this prodigious power dangerous. By all means, therefore, let Congress retain an ultimate control over the Court's appellate jurisdiction.[55] Let the judges sharpen their political wits on the whetstone of political peril. For what we are talking about is the most delicately difficult and dangerous of all government problems, that is, how power can be shared by two equal agencies when there are no words, no phrase, no formula by which we can divide the power between them. The Constitution makes no attempt to say which shall be the master on a showdown. Wisely, because there is no way of saying it. Congress and the President have all the force, if they dare to use it, and the Court has nothing but its power to persuade us.

So, I say, let the Court live dangerously, that it may act wisely. The best way to see to it that the Court will guess right is to make it risky to guess wrong. What the Court must now work out for itself are rules of prudence as well as rules of self-restraint.

These Justices who were so afraid of personal vagaries that they sought refuge in the Eighteenth Century are now as eager as any to bring the Constitution up to date. They were afraid of a mouse, and yet they are willing to move mountains. For, though personal prejudices and private fancies do exist and do indeed lead judges to decisions, they soon spend their small strength in an institution whose decisions depend for their enforcement upon the simple fact that enough of us agree with them. We too often forget that the reason for the great power of the Supreme Court is not that it interprets the Constitution to us, but that it reads our immanent patterns of behavior into our Constitution, and as it reads them into it, the Court explains them to us, and so makes us the more aware of them. And if it stresses the patterns of our better behavior, this is no more than the normative element in any good description. When enough of us kick against the pricks, the Court must save its face as best it can. But when enough of us do agree, or will agree, then the power of the Court is so tremendous that we find it hard to believe that such power is not imposed upon us, that it is only evoked from us, that the Court is only making explicit to us what was already implicit in us, and that it is we who are moving the mountain.

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last paragraph of his concurring opinion in American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 556-57, 69 Sup. Ct. 258, 93 L. Ed. 222 (1949).

55. The American Bar Association wants to take this control away. See the resolution in the House of Delegates in the fall of 1950, 36 A.B.A.J. 957-58 (1950).