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UNITED STATES SUPREME COURT – EVOLUTION OR REVOLUTION*

JOHN M. DALTON†

In considering the decisions of the Supreme Court, it is of utmost importance that we attempt to place them in their proper perspective and to study them calmly and dispassionately with the sense of history. I say one should attempt to do this, because we are all a part of the world around us and it is impossible for anyone to set himself wholly apart and ignore the excitements and emotions of his own times. Yet, it may cause one to ponder as to what may be the judgment of the future historians when one reads in history of past controversies over Supreme Court decisions and finds the same expressions as one hears today of disagreement, anger, scorn, and even fears engendered by decisions which now are virtually forgotten or are uniformly accepted as having been correct or have been changed by law.

It is all too easy for us to become greatly aroused by, and bitterly critical of, a decision of the court because of the circumstances and the result in the particular case, without having any real knowledge of the principles involved in the decision, and how they fit into the broad pattern of our laws. Thus, for example, the fact that a decision results in freeing of an alleged Communist who has been convicted of some crime may cause much of the public to be up in arms, even though another case involving basically the same legal questions might pass virtually unnoticed and the decision might be generally accepted as correct. This is the thing we must guard against.

It must be remembered that numerous provisions of the Constitution, including some of those which are the most important, are couched in broad general language which expresses basic principles which we accept and think we understand, but which, actually, defy specific definition.

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*This paper discussing the trend of the recent United States Supreme Court decisions was prepared as an address delivered before an audience of students and faculty at the University of Missouri, November 20, 1957. Of necessity, it does not purport to give a comprehensive survey of the cases and is in rather general terms.

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Thus, for example, "equal protection of the law", "due process", "freedom of speech", and similar terms are concepts upon which there is general agreement, but are ones as to which there may be vast disagreement as to their exact meaning and application in the light of particular factual situations. The meaning of these terms necessarily has been developed since the founding of our nation, and will continue to be developed in the future by decisions of the Supreme Court. Too often there is a tendency to think of the Constitution as a document which has a firm, fixed meaning within the limits of which there is no room for differences of opinion. Instead, in many respects, it is a highly flexible document. This flexibility and its adaptability to changing circumstances, without departing from the fundamental principles upon which our nation was founded has, in fact, been an important element in the development of our nation.

We must also remember that the trend of decisions of the Court tends to reflect the circumstances and conditions of the times in which they are rendered. In the first place, the issues which reach the Court may be greatly affected by what is going on outside the judicial system. Thus, for example, in the 1930's, with the enactment of the so-called new deal legislation, much of which was prompted by the conditions of the depression period, it was inevitable that there should come before the Court numerous cases of great moment involving the extent of the powers delegated to the federal government.

Not only are the kinds of cases which come before the Court affected by the circumstances and conditions of the times, but also the opinions of the judges themselves are bound to be affected by them. Seldom do cases reach the Supreme Court unless there is a good basis for argument on both sides, and the thinking of the judges, who after all are only human beings like the rest of us, is bound to be affected by their experiences and enviroment.

To say that the Court is a mere servant of the law, guided solely by established legal precepts and principles, would be naive. From the lawyer's standpoint, it is desirable to have stable guide-posts to aid in advising clients concerning their legal rights. The fact remains, however, that the law is never static, and there is nothing new or novel in our courts making new law by their decisions and changing their concepts of the law through the passing years. The whole body of our English and American common law, which is fundamental in our legal system, is made
up of court-made law. Considering the field in which it operates and the nature of its powers, it is not surprising that the United States Supreme Court perhaps looks less to precedents and is more inclined to develop new ideas and principles with respect to the law than other courts.

Chief Justice Marshall, in 1824, expressed the view that "courts are the mere instruments of the law, and can will nothing." However, from the record, one may doubt that he thought the law was something never changing and that the courts did not play a part in the creating of the law. One may question whether he would have differed greatly from those, for example, Hughes and Holmes, who have evaluated the Court more realistically and recognized that it is a definite participant in the formulation of public policy and, in Hughes' words, concluded that "the Constitution is what the judges say it is." Time Magazine, in the summer of 1956, informed its readers that the present Chief Justice "views his role as 'steering the law' rather than being steered by it."

With nine men on the Court, with differing backgrounds of education, environment and experience, possessing divergent social, political and philosophical views, we cannot hope to find at any given time in our history undeviating paths being followed in the decisions of that body. Rather, the most that we can hope to discover is a trend in a certain direction.

Many writers on the subject have analyzed the decisions of the Court in the period from 1890 to 1937 as reflecting a predominant concern with property rights and the economic institutions of the nation. Beginning with the latter year, there apparently was an awakening to the world situation and the threat of the destruction of the ideal of the individual liberties of man so long cherished in this country. Consequently, the decisions of the Court from that time to the present reflect a primary concern with the protection of what has been referred to generically as the civil rights of the individual and the dignity of man.

The issue of civil liberties has long been the concern of all branches of our government—legislative, executive and judicial. Among the most frequently discussed cases in this area are the segregation cases, decided

2. Hughes, Addresses and Papers 139 (1908).
in 1954 and 1955. This is not the time nor place to discuss the merits of the Court's action, but the cases in this field are an excellent example of the changing views of the Court on a particular subject.

In the Plessy v. Ferguson case, the Court in 1896 established the separate but equal doctrine in transportation which received tacit approval in public education. In 1954, the Court rejected the separate but equal doctrine as applied to the field of public education, and subsequent decisions have rejected the application of the doctrine in other fields, including transportation.

The forerunner of the Plessy v. Ferguson case was an early Massachusetts case, Roberts v. Boston, decided in 1850. It is interesting to note that the decision of the Court in 1954 bears a striking resemblance to the argument propounded in the Roberts v. Boston case by Charles Sumner, counsel for the losing side. In that case, Sumner argued that the separate school is not an equivalent for mixed schools since it brands a whole race with the stigma of inferiority and degradation in violation of equality of all men before the law. Compare this with the language of the Supreme Court in 1954:

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . Separate educational facilities are inherently unequal.

In the 1956 term of the United States Supreme Court there were many cases involving civil liberties, several of which attracted wide attention and caused public concern. Because of the limitations of time only a few of these will be mentioned.

In the Jencks case, the Supreme Court, by a loosely written decision, held that, where undercover agents had testified, the Justice Department would be required to allow the defendants to inspect the reports made by such undercover agents to the F.B.I. The careless language in this opinion led to widespread misunderstanding. Under the urging of J. Edgar Hoover and others, Congress quickly enacted a

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4. 163 U.S. 537 (1896).
5. 59 Mass. (5 Cush.) 198 (1850).
statute setting out with clarity and definiteness what files were to be produced. This restricted the effect of the Jencks case.

In contrast the case of Roviaro v. United States, involving a conviction for violation of the narcotics law was equally as far-reaching but did not cause any unusual clamor.

In the Watkins case the defendant refused to answer questions of the Un-American Activities Committee, and in the Sweezy case the witness refused to answer questions in a state subversive activities investigation. In these two cases, the Court, in reversing convictions for contempt, emphasized the protection given by the first amendment to the individual freedoms of speech, press, religion, political beliefs and association. The Court stated that, before such freedoms can be infringed upon, it must be clearly shown that the government had a legitimate interest in seeking the information which the questions were designed to elicit.

In the Konigsberg case the State Bar of California denied the application of plaintiff to practice law because he failed to show good moral character. The Court held that there was no basis from the facts to find that the plaintiff did not have good moral character and that his refusal to answer questions as to membership in or support of the Communist party could not form a basis for such holding.

In a vigorous dissent, Judge Harlan said:

But what the court has really done . . . is to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.

In the Yates case the defendant was convicted in a federal trial court of the violation of the Smith Anti-Communist Act by advocating the overthrow of the government by force and by organizing the Communist party which advocated and taught the overthrow of the government by force. In a divided opinion, the Court held that the trial court

12. Id. at 312.
erred in allowing a finding of guilt for advocating the overthrow of the
government by force as an abstract principle. Rather, the Court required
a finding that the defendant advocated action rather than an abstract
principle before a conviction could be had.

Caryl Chessman was convicted in California in 1948 and sentenced to
death. Innumerable appeals, writs of error and writs of habeas corpus
have been filed in many courts. His sentence has never been executed.
On five occasions between 1950 and 1954 Chessman petitioned the United
States Supreme Court for writs of certiorari to review various decisions
adverse to him. One of these adverse decisions was the California
supreme court's affirmance of Chessman's conviction. On each occasion,
certiorari was denied.\textsuperscript{14} Finally, however, certiorari was granted, and on
June 10, 1957 the Court held that there was grave question as to the
correctness of the transcript of testimony upon which the appeal of his
conviction had been considered, and that it was a violation of due process
when the lower court, in a hearing on objections to the transcript of
evidence, refused to allow the defendant to be personally present or to
provide for his representation by counsel.\textsuperscript{15}

Whether one agrees with the decisions of these and many other cases
involving civil liberties, they do indicate that the Court desires to em-
phasize its concept of individual liberties guaranteed to all citizens of the
United States by the Federal Constitution, and that, in the thinking of
the times, the rights of individual citizens should be carefully protected,
with the Bill of Rights of the Constitution being given broad meaning and
effect in light of existing social and international situations.

Other widely discussed cases are those involving federal-state rela-
tions. Among these are the cases involving the application of the pre-
emption doctrine. An outstanding example of these cases is Pennsylvania
\textit{v. Nelson}.\textsuperscript{16} Steve Nelson was convicted in the state courts of Penn-
sylvania for subversive activities. The Supreme Court of Pennsylvania
reversed the decision on the grounds that the federal government had
pre-empted the field of subversive activities and superseded state legisla-
tion in the field of sedition, and that therefore the state was without

\textsuperscript{14.} For a complete history of the Chessman litigation, including a full discussion
of the denials and grants of certiorari, see the appendix to Mr. Justice Douglas' dis-
\textsuperscript{15.} Chessman \textit{v. Teets}, 354 U.S. 156 (1957).
\textsuperscript{16.} 350 U.S. 495 (1956).
jurisdiction to proceed against the defendant under the state's sedition act. The United States Supreme Court affirmed this and pointed out that the enforcement of state laws in this field would present a serious threat of conflict with federal activities in regulating sedition. Four justices dissented in an opinion stating that the facts of the case did not call for application of the principles relied on by the majority opinion and that, under the facts, the doctrine of pre-emption did not apply.

The area of state authority in labor-management relations has also been singularly affected by the application of the pre-emption doctrine. In the exercise of its power to regulate commerce among the states, Congress has enacted the National Labor Relations Act of 1935, and later the Labor-Management Relations Act of 1947, popularly known as the Taft-Hartley Act. While recognizing that those enactments leave "much to the states, though Congress has refrained from telling us how much,"17 the Court has attributed to Congress an exercise of judgment "in favor of uniformity"18 in labor-management relations in industries engaged in or affecting interstate commerce and has held invalid numerous state efforts at regulation which it found to invade a field which federal legislation has pre-empted.

Thus, in Hill v. Florida19 the Court struck down a Florida statute imposing numerous conditions and restrictions upon the right of labor to organize and to bargain collectively. In the case of Bethlehem Steel Co. v. New York Labor Relations Board20 the Court rejected the idea that concurrent state and federal action in the area of labor relations is permissible. A Michigan statute requiring a majority approval of strike action was held invalid as applied to industries subject to federal legislation21. A Wisconsin statute prohibiting strikes by employees of public utilities and providing compulsory arbitration of labor disputes between utilities and their employees was held invalid by the Supreme Court because of its conflict with federal legislation.22

At its most recent session, the Supreme Court again extended the application of the pre-emption doctrine in the regulation of labor-management relations. In three cases,23 the Court held that, in matters of unfair labor practices in industries subject to federal law, exclusive jurisdiction has been conferred upon the National Labor Relations Board. The Supreme Court held that state courts and administrative agencies were precluded from affording relief in such matters, although the National Labor Relations Board had declined to accept jurisdiction of the controversies. These decisions have left a broad no-man's land in the regulation of labor-management relations in industries which are subject to the federal acts but which fail to meet the jurisdictional standards promulgated by the National Labor Relations Board for its exercise of the exclusive jurisdiction conferred upon it. Thus, there is no forum for adjudication of disputes in some areas of labor relations.

The cases involving the application of the pre-emption doctrine show that the Court has construed the legislation as evidencing Congress' intent to pre-empt the field to a considerable extent for the sake of uniformity in the enforcement of laws pertaining to subversive activities and labor-management relations. It has been suggested that Congress express its intention in each of these enactments and thus remove this from the Court's consideration.

We here in Missouri are directly concerned by the decisions of the Court in the field of labor relations. In 1947, the Missouri General Assembly enacted a law, generally known as the King-Thompson law,24 which has as its object the prevention in public utilities of strikes and lockouts which jeopardize the public interest, health and welfare. Since its enactment, the state has seized and operated numerous public utilities where strikes had been threatened or had occurred. Under the King-Thompson law, Missouri has had no prolonged strikes by employees of public utilities.

The validity of the Missouri statute has, however, been challenged by labor unions involved in disputes with Missouri public utility employers. At the present time, litigation is pending in the state and federal

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24. §§ 295.010-210, RSMo 1949.
courts in which the validity of the King-Thompson Act is strenuously challenged on the grounds that it attempts to operate in the field of labor-management relations in industries in interstate commerce and that the federal legislation has pre-empted such field to the exclusion of the states.

Many scholars believe that the trend of pre-emption cases and others involving federal-state relations is toward a strong federal or central government with consequent infringement and encroachment upon the sovereignty of the several states. Opposition to such encroachment is popularly referred to as state's rights, a much bantered, abused and broadened term.

Historically, we must recall that the United States Constitution was a delegation of powers to a federal government by a group of sovereign states who reserved for themselves all powers not expressly granted to the federal government.

State's rights has been a subject of recurring debates over our nation's history. Certainly both great political parties have stressed it time and time again, with quick reversals of position. Contrary to what most people believe, the doctrine of state's rights is not sectional, but is well supported in every portion of our country.

Many responsible people are concerned about the "nibbling away" of the rights of various states, particularly when functions of our democracy are transplanted to Washington, with less guidance and control by our people; and that trend would, if unchecked, cause all petitions for redress to be transferred to a central government, far removed from local scrutiny. The great danger is that we disregard such encroachment on the rights of the state in order to secure a temporary advantage on some current issue and overlook the fundamental dangers of the loss of those rights.

Our Constitution divides our government into three divisions: the legislative branch, which sets the policy by enactment of laws; the executive branch, which administers or executes the laws; and the judicial, which interprets the laws.

A frequently mentioned suggestion is that these decisions are the consequence of a contest between the three historic branches of our government; and that a strong judiciary is asserting policy through its interpretation of the Constitution and laws, and that actually this is an invasion of the prerogatives of the legislative branch. Certainly strong
individuals in one branch may, by power, intelligence, or fortitude, transgress on the rights of another branch. Perhaps the founding fathers anticipated this because of the elaborate system of checks and balances in our Constitution to safeguard against encroachment. There is reason to believe that, in due time, the pendulum will swing the other way, as it has more than once in the past.

An independent judiciary is an essential part of our form of government. Without it, a written Constitution would become meaningless and wholly unenforceable. The Bill of Rights contained in the first ten amendments to the Constitution would be just a set of moral standards to be followed or disregarded at the whim of the legislative and executive branches of the government. Without it, there would be no one to draw the line between those powers which have been delegated to the national government and those which have been reserved by the states. In a sense, the Court occupies the position of an umpire—its decisions may frequently be unpopular and, inevitably, it may make mistakes, but it is essential that we have such an institution and when its decisions are made that they be followed. The alternative is anarchy.

This does not mean that the decisions of the Court should never be criticized. A fair discussion of the Court's action and the action of all branches of our federal and state government is a part of our democratic system. Discussion and criticism of the Court's decisions which may be deemed erroneous or unfortunate may lead to corrections through constitutional amendments, new legislation, and even the modification of the opinions of the Court as future cases involving similar situations come before it.

It should be borne in mind that many of the decisions mentioned have been by a divided court (5-4, 6-3, 7-2), and that a change of personnel may well change the decisions of the Court.

Perhaps decisions which may be considered revolutionary at the time may well be accepted as evolutionary steps which are necessary in light of changing social and economic conditions.

In conclusion, may I say that ordinarily the trends which appear to be so controversial will, in due time, right themselves without great harm. I have great faith in our Constitution and in the future of America, and in the virility of our democracy and democratic institutions.