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The Revolution in the U.S.A.

The essence of the peril in which Christian civilisation stands is the conspiracy between the richest men in the world—the international financiers—and the Communists. The technique of this conspiracy is the subversive destruction of the traditional institutions of the individual nations, together with the progressive improvement of Communist Russia's total strategic position. At some time, quite possibly in the near future, "Western" civilisation is intended to collapse—either in the light of Russia's strategic position, or as a result of economic catastrophe, and aided by racial disorders and Asian and Arab 'nationalism.'

It is not very generally recognised that this conspiracy is just as much operative in the U.S.A. as elsewhere. But there are masses of evidence of penetration of Government departments and agencies by Communist agents; it is known that the National Association for the Advancement of Coloured People—which actively promotes 'integration' of the Negroes—is a Communist front; and it was the U.S. Supreme Court which over-rode States' rights in the matter of segregation in schools. The Supreme Court has given a number of rulings which have protected Communists.

For its high evidential value we reproduce below some extracts from the "Report of the Committee on Federal-State Relationships as affected by Judicial Decisions," adopted by the 1958 *Conference of Chief Justices.* The extracts are published by *Human Events* in its issue of September 1, 1958, prefaced by the following explanation:

The Conference of Chief Justices of the several states met recently in Pasadena, California. Presented for approval by the ranking jurists of America was a lengthy report analysing some controversial decisions of the U.S. Supreme Court, and criticising the Court for its lack of "judicial self-restraint." Signing the report were ten state Chief Justices, seven of them from outside the South. The report was subsequently adopted by vote of the entire Conference, by the overwhelming margin of 36 to 8. *Human Events* here presents excerpts from this unprecedented document, including discussion of some individual High Court decisions and the state justices' conclusions. Omissions from the text are indicated by asterisks (* * *).

* * * It is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results. We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our state courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it.

* * *

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the divisions of powers between national and state governments.

* * *

The fundamental need for a system of distribution of powers between national and state governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original states and the governments of those states after the Revolution. Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all the states. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

* * *

The outstanding development in federal-state relations since the adoption of the national Constitution has been the expansion of the power of the national Government and the consequent contraction of the powers of the state governments. To a large extent this is wholly unavoidable and indeed is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production. On the other hand our Constitution does envision federalism. The very name of our Nation indicates that it is to be composed of states. The Supreme Court of a bygone day said in *Texas v. White,* 7 Wall. 700,721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible states."

Second only to the increasing dominance of the national Government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic

(*Continued on page* 2.)

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Levelling Down

"It is a ridiculous demand which England and America make, that you shall speak so that they can understand you. Neither men nor toad-stools grow so. . . .

"Why level downward to our dullest perception always, and praise that as common sense? The commonest sense is the sense of men asleep, which they express by snoring. Sometimes we are inclined to class those who are once-and-a-half witted with the half-witted because we appreciate only a third part of their wit. Some would find fault with the morning-red if they ever got up early enough. 'They pretend,' as I hear, 'that the verses of Kabir have four different senses—illusion, spirit, intellect, and the exoteric doctrine of the Vedas;' but in this part of the world it is considered a ground for complaint if a man's writing admit of more than one interpretation. While England endeavours to cure the potato-rot, will not any endeavour to cure the brain-rot, which prevails so much more widely and fatally?" —H. D. Thoreau.

THE REVOLUTION IN THE U.S.A.—

(*continued from page* 1.)

fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy making. * * *

But if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause. More recently the doctrine has been applied in other fields, notably in the case of *Commonwealth of Pennsylvania* v. *Nelson,* in which the Smith Act and other Federal statutes dealing with communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania anti-subversive statute which sought to impose a penalty for conspiracy to overthrow the Government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasises rather than detracts from the wide sweep now given to the doctrine of pre-emption.

* * *

In the field of taxation the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. * * * On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years towards the validity of state taxation than it formerly took.

In many other fields, however, the Fourteenth Amendment has been invoked to cut down state action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State anti-subversive acts have been practically eliminated by *Pennsylvania* v. *Nelson* in which the decision was rested on the ground of pre-emption of the field by the Federal statutes.

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in *Sweezy* v. *New Hampshire,* 354 U.S. 234. In that case, the State of New Hampshire had enacted a subversive activity statute which imposed various disabilities on subversive persons and subversive organisations. In 1953 the legislature adopted a resolution under which it constituted the Attorney General a one-man legislative committee to investigate violations of that Act and to recommend additional legislation. Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the Attorney General, pursuant to this authorisation. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire. He was adjudged in contempt by a state court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion.

* * *

The Chief Justice said in part: "The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been

given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which the petitioner was interrogated."

* * *

In commenting on this case Professor Cramton [consultant to the committee of state chief justices] says: "The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation-of-power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power."

* * *

Konigsberg v. *State Bar of California,* 353, U.S. 252, seems to us to reach the high water mark so far established by the Supreme Court in overthrowing the action of a state and in denying to a state the power to keep order in its own house.

* * *

The majority opinion * * * turned to the merits of Konigsberg's application for admission to the bar. Applicable state statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the national or state government by force or violence. The Committee of Bar Examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court decision in *Dennis* v. *United States,* 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269) would not support such an inference either. * * *

The majority asserted that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions."

* * *

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the Bar Committee which had been called to the Court's attention, suggesting that a failure to answer questions "is, *ipso facto,* a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Whether Konigsberg's "overwhelming" showing of his good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candour is required of members of the bar and, prior to *Konigsberg,* we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

* * *

We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

* * *

We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the state governments. Here we think that the over-all tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of Federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our Government is still a Federal Government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy-maker is also of concern to us in the conduct of our judicial business. We realise that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both the great fields we have discussed—namely, the extent and extension of the Federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment.

In the light of the immense power of the Supreme Court

and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderaton in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seems to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) * We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and state governments, one branch of one government—the Supreme Court—should attain the immense, and in many respects, dominant power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our Nation as a Nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or, for that matter, of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognise the Supreme Court's ruling on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to 75, or even 95 years. (See the tables appended to Mr. Justice Douglas' address on *Stare Decisis*, 49 Columbia Law Review 735, 756-758.) The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional over-rulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the Court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope, which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial, powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow working of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." (Quoted in 31 *Boston University Law Review* 43.)

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable. * * *

* "Hand states that the Court's transformation into a 'third legislative chamber' was 'a patent usurpation' of Governmental power. He cites the 1954 desegregation ruling as an example of such usurpation. In this decision, he states, the Court overruled legislative judgments by making 'its own reappraisal of the relative values' at stake." "—From *Human Events* for March 17, 1958.

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