

## OUR CONSTITUTIONAL PHILOSOPHY

### I Origin

The Supreme Court of the United States is a creature of the Constitution. It has its authority only from the four corners of that instrument and cannot properly go outside of that organic law to condemn legislation merely because its members may disagree with the wisdom or desirability of its enactment. But since the Court has been empowered by the Constitution and the Congress to act as the final judicial interpreter of the meaning of the grants and restrictions of the Constitution and their applicability to various situations, there is, of course, the danger that in delimiting their reach, the Court or some of its members will permit their attitudes toward issues to sway their conclusions as to constitutionality. The people's ultimate protection against any deflection from the correct judicial attitude lies in the selection of the judges and, compared with the evolution of social ideas, in their relatively short tenure. More immediately, their protection lies in the Court's own conscious recognition and scrupulous observance of the principle that it proceeds under the limits of the language of the Constitution. As my Court is so broadly concerned with constitutional questions, it seemed appropriate to consider with you this evening some aspects of constitutional philosophy, largely from the historical or descriptive rather than the judicial or political standpoint.

Turning to the formation of the Constitution, it is obvious that declarations of independence and articles of union, adopted in critical periods to secure national existence, are formulated under stress. Their authors enunciate aims rather than the theories that have led to the promulgation of the creative organic instruments of government. These theories exist, however, in the then prevailing concepts of

economics, ethics and politics. For public law is not an insulated compartment of sociology. The background from which the clauses of our organic instruments emerged gave and give the basis for the subsequent rationalization of their meaning, and for an interpretation of their purpose. A contemporaneous appraisal of the Constitution appeared in the Federalist papers that has been added to but not vitiated by later commentators and scholars. While fortune did not give us so complete an exegesis for the amendments, the subsequent opinions of the Supreme Court by justices steeped by personal contact in the objects and forces that brought about their adoption have demonstrated how smoothly the amendments fit into the grand plan of the Founders. Our Constitution is to be interpreted by that background.

The fundamental ideas of our constitutional philosophy came to our shores with the earliest English immigrants. The important structural elements of our social compact--inalienable rights, the separation of powers, the equality of mankind and individual liberty--were recognized in Locke's Treatise of Civil Government, 1690. Our nation grew out of the interplay between the economic forces and the political doctrines of the Revolutionary era. The theory of its origin was well phrased in Texas v. White, 7 Wall. 700, 724-25:

“The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to ‘be perpetual.’ And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained ‘to form a more perfect Union.’ It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

“ . . . The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States.”

The manner of the use of these elements in the Constitution was indigenous to America. The ideas were fused into workable doctrines for a national federation by leaving to the states freedom in their sphere and making federal law the supreme rule for the land. This laid the foundation for our dual system of Government, well adapted to this great area. Its usefulness has been recognized and followed by Canada and Australia with modifications thought to be useful in their situations.

## II Compact

The main factors that shaped our institutions grew in influence with the Enlightenment. The welfare of people rather than of rulers became the purpose of government. Basic to our structure is the right of people to agree among themselves, by custom or by written instruments, as to the first and future form of their government. At the formative period of our nation there was a prevalent theory that governments owed their existence to such social compacts. No one can be named as the originator of this theory. It received great impetus from the popular thought that brought about the two English revolutions of the seventeenth century. John Locke in his *Civil Government*, 1690, put the principle of the social compact into its classical form. Under that view society crystallized first around the family and then around the political group. For such association it was necessary for the individual to surrender something of his complete freedom of action that he might be made more secure through the powers granted to the group.<sup>1</sup> Locke taught, too, that there were inalienable personal rights that even the

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1      Chap. VII

individual could not surrender to the state. They were those of life, liberty and property.<sup>2</sup> When the state trampled upon these rights, it broke the compact and the people had the duty of reclaiming power.<sup>3</sup> Locke's statement as to inalienable rights epitomized the doctrine of natural law.<sup>4</sup>

These ideas the Pilgrims and Puritans brought with them. They were familiar with compacts and believed, as a matter of theory, in individual rights. Ecclesiastical covenants were employed in church governments. The Mayflower Compact and the many colonial charters were early fruits of compact philosophy. But political theory on natural rights did not remain static, for their content changes with the change of popular interests. Unlike documents defining property rights between individuals, Bills of Rights are not rigid, inflexible definitions. By the time of the Revolution, the Levelers doctrine of the equality of all men had become a part of the current philosophy of government. It had been popularized by the French philosophers, particularly Rousseau. These concepts of government formed the background for the documents that were to establish the United States of America. Our Declaration of Independence and Constitution are an adaptation of these theories to our conditions. As Merriam says in his *History of American Political Theories*:

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2 Chap. X

3 Chap. XIII

4 "It will be observed that the spirit of this reasoning was decidedly individualist. The starting-point was the independent and sovereign individual, endowed with a full set of natural rights. He consents to give up a part of these natural rights to form a government by means of a contract. On this basis, political society and the state are constructed, and in this spirit political institutions are interpreted throughout. This was the general character of the revolutionary theories of the seventeenth and eighteenth centuries, and from this tendency America was no exception." Merriam, *History of American Political Theories* (1903), chap. II, *The Political Theory of the Revolutionary Period*, p. 95. See also pp. 48 et seq.

“The Patriots were familiar with this philosophy of their English predecessors and they followed it closely. They referred to these writers, quoted from them, and adopted the substance of their argument, and in some cases the form as well. Locke, in particular, was the authority to whom the Patriots paid greatest deference. He was the most famous of seventeenth century democratic theorists, and his ideas had their due weight with the colonists. Almost every writer seems to have been influenced by him, many quoted his words, and the argument of others shows the unmistakable imprint of his philosophy.”<sup>5</sup>

A comparison of Locke with the Virginia Declaration Rights or the Declaration of Independence shows the parallelism. For example, Section 222 of Locke’s Treatise reads in part as follows:

“Whensoever, therefore, the legislative shall . . . either by ambition, fear, folly, or corruption, endeavour to grasp themselves or put into the hands of any other an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands, for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of the new legislative (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society.”

The Virginia Declaration of Rights:

“All men are by nature equally free, and have inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

The Declaration of Independence:

“We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and

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5 Merriam, History of American Political Theories (1920), pp. 89-90.

organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.”

Today the theory that primitive governments originated in compact has few, if any, adherents. In what variety of ways such governments did originate is not important. The important fact is that written constitutions did eventuate as a means of stating the authority of government in the affairs of man. Each state of the Union has a controlling written statement of the powers of and limitations upon their governments. From the Declaration of the Rights of Man and of Citizens, France (1789), to the most recent post-world war II national constitution, faith in the effectiveness of statements of governmental powers and limitations has shown forth clearly.<sup>6</sup>

### III Liberty

The revolutionary theory of complete liberty to the individual in the pursuit of his own happiness, thought by some of our citizens to have been achieved with the treaty of peace with Great Britain, proved too heady a draught for the practical affairs of life. Disorders in the states and refusal to meet obligations to the Confederation evidenced such an abuse of liberty that the reaction brought a demand for the law and order of a stronger central government.<sup>7</sup>

But the law and order that the Constitution empowered the federal government to enforce was not to be secured by the acceptance of an omnipotent executive or legislature. Bitter experience had taught that danger of tyranny lurks in every unlimited

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6 Modern Constitutions since 1787, John A. Hawgood (McMillan) 1939; French Constitution (1946); Constitution of Republic of China, Jan. 1, 1946; Provisional Constitution of Poland of Feb. 20, 1947, and the Declaration of Rights and Liberties of Feb. 22, 1947; Constitution (Fundamental Law) Union of Soviet Socialist Republics, as amended to Feb. 25, 1947; The Constitution of Japan, promulgated Nov. 3, 1946; Charter of United Nations.

7 Fiske, *The Critical Period*, 119-133, 220-21.

grant of power.<sup>8</sup> The tyrannies of the eighteenth century, which brought about the establishment of our liberties, are not the only tyrannies against which our Constitution protects us.

The general restriction on the central government contained in the concept of limited delegated powers, and the specific restrictions on the state governments, seemed to many insufficient to protect the individual and the Bill of Rights was adopted. The philosophy of God-given natural rights, distinct from those acquired by force, agreement or political grant, may no longer be generally accepted. But the substance of that theory exists in limitations against the abuse of individual liberties. The principles of many of these limitations have, of course, been made applicable to state governments by embodying them in the Fourteenth Amendment.<sup>9</sup> Perhaps this expansion is but the secular evolution of a doctrine that in earlier years had sought to establish a divine source for natural rights. I cannot forbear interjecting an eighteenth century reference to natural rights.

“The sacred rights of mankind,” Hamilton wrote, “are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power.”<sup>10</sup>

Perhaps underlying this evolution is a philosophic rationalization of natural rights in terms of utility, i.e., those which have been found useful.

“The appeal to natural rights, which has filled a noble place in history, is only a safe form of appeal if it be interpreted, as just explained, as an appeal to what is socially useful, account being

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8 Federalist, No. XLVII

9 Adamson v. California, 332 U. S. 46; Wolfe v. Colorado, 338 U. S. 25; 2 Stamford L. Rev. 5; Truax v. Corrigan, 257 U. S. at 332.

10 Works (ed. Lodge), I, p. 113.

taken not only of immediate convenience to the existing members of a particular society, but of the future welfare of the society in relation, so far as possible, to the whole of humanity. If it is argued that such an appeal is at least as ambiguous as a mere reference to natural rights, I answer, No; for in appealing to social utility, we are appealing to something that can be tested, not merely by the intuitions of an individual mind, but by experience. History is the laboratory of politics. Past experience is indeed a poor substitute for crucial experiments; but we are neglecting our only guide if we do not use it. This means no slavish copying of antique models, but trying to discover, from consequences which followed under past conditions, what consequences are likely to follow under similar or under dissimilar conditions now.”<sup>11</sup>

“The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.”<sup>12</sup>

Fortunately the limitations in our Constitution on the power of government are

IV  
Limitation  
of  
Powers

expressed largely in words of general rather than specific proscription. Political philosophy is not enunciated in terms of scientific exactitude. If it were, careful draftsmen would express precisely the then intended application of a limiting principle. As a result, our Constitution would be an eighteenth century straight jacket, withholding any protection of fundamental human rights except as they might be specifically enumerated in the Constitution or Bill of Rights, and making impossible any adaptation of constitutional principles to new social conditions. The Fathers drew an adaptable

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11 Ritchie, *Natural Rights* (1895), p. 103.

12 Holmes, *The Common Law*, pp. 35-36.

Constitution, capable of adjustment to the changing currents of society, so long as its principles were respected.

“It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.”<sup>13</sup>

“Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.”<sup>14</sup>

By the application of their constitutional principles, rather than a set of words, the nation has avoided, generally, the dangers of excessive rigidity inherent in a written constitution. This danger was a real one. This is the view expressed by Ritchie in his *Natural Rights*.

“(2) Ought the constitution of a country to guarantee certain rights to its citizens, and to protect them from legislative interference?”

“The second question is practically the question whether a rigid constitution, like the American, or a fluid constitution like our own, is preferable. Not that is a question which hardly admits of a general or abstract answer. In some cases a written constitution is an inevitable necessity. The stability of the Federal constitution of the United States has been of an undoubted advantage to that country; in the reverence for its written constitution its citizens have found a safeguard against the instability that might have been expected to arise among a people whose independent history began in the violence of a revolutionary war and in a professed breach with the traditions of the past, and whose numbers are constantly being recruited by the fragments and separated atoms of alien societies. On the other hand, the rigidity of the constitution made a war necessary in order to get rid of the institution of slavery, and of

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13 Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 442-43.

14 United States v. Classic, 313 U. S. 299, 316.

the idea that there was a 'right' of secession. And it is possible that other questions may arise in which a conflict between modern needs and the theories of the eighteenth century about individual rights may prove harsher and more terrible because of the barriers placed in the way of change."<sup>15</sup>

Thus, the purpose of the Constitution Makers will survive the stresses and changes of our restless society. The rights of the individual have been reasonably well protected against even the greatest majority. This has been done through recognition of those fundamental rights-- life, liberty, property--that natural right philosophers called inherent in mankind, as Tom Paine said, "wholly owing to the constitution of the people, and not to the constitution of the government."<sup>16</sup>

In the production of the individual and the promotion of public welfare, the determination of the reach of the Constitution has proceeded in the light of the general conviction of the American people as to what are inalienable rights. The problem of the final definition of those rights or due process or equal protection should never be solved; the reach of those words gives the flexibility needed to cope with problems of peace and war in an ever changing society. But always the problems posed can be considered in the context of the principles of human rights that were announced at the organization of this Government and have continued to guide its development.

V  
Judicial  
Review

Since in a Republic, "all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community,"<sup>17</sup> machinery was necessary to adjudge rights. The

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15 Ritchie, *Natural Rights*, p. 115. The British Dominions now have written constitutions.

16 *Writings of Thomas Paine* (Conway, 1894), vol. 1, p. 74.

17 *Penhallow v. Doane's Administrators*, 3 Dallas 54, 93.

seventeenth century philosophers who taught the theory of the inherent rights of man left unnamed the arbitrator whose decision would determine when fundamental rights were invaded by government. Obviously each individual cannot decide that for himself. “Fire burns both in Hellas and Persia; but men’s ideas of right and wrong vary from place to place.”<sup>18</sup> If we are all to have our way each would have a universal war against everyone-- “bellum omnium contra omnes.” Everybody would sit in judgment on everybody. But the nation could not be left to drift like a derelict in the heart of a hurricane. Solution was found in judicial review of statutes challenged as unconstitutional. While the power to declare state and federal laws unconstitutional is nowhere expressly granted to the courts, the expressions in the Constitutional Convention, the explanations of the Federalist, the early and continuous line of decisions by men familiar with the purposes of the Founders and the almost universal acceptance of the necessity for an arbiter puts the question of judicial review beyond the realm of discussion. The alternative is an omnipotent Congress or an omnipotent Executive. Since both of these arms of government have the power to initiate governmental action and originate public measures, the judiciary, that can only interpret and condemn after public hearing, has been accepted as the arbitrator of disputed issues of federal constitutional law. There are those who object. They feel that the power of the judiciary to declare acts unconstitutional is a bar to the popular will rather than a protection to all. In their view the wishes of the representatives of the majority are so much more important than the protection of the individual that no restriction should be placed on their determination of the limits of the Constitution. We hear it said, “We do not care for

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18 Aristotle, Nichomachean Ethics, Book V, chap. 7, §2.

political freedom in the old sense. If the state is the people, what difference if it is absolute.” This is a new contention. Surely it represents a small segment of our people, the frustrated and misplaced. There can be a balance between individual liberty and mass welfare.

The power to consider constitutionality of acts was enunciated early in our national life. Even before Marbury v. Madison, in Calder v. Bull, 3 Dall. 386, a case involving the constitutionality of an act of Connecticut granting a new trial in a will case, Chase, J., said:

“I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State . . . . The nature, and ends of legislative power will limit the exercise of it. . . . An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” Pp. 387-88.

Mr. Justice Iredell said:

“If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; . . . If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.” P. 399.

By Marshall’s later opinion the constitutional balance was made secure by provision for judicial review of legislative and administrative action. A check was put upon majority action that threatens the fundamental rights of the individual. Except in the controversy over the right of a state under the constitutional compact to withdraw from the Union, judicial review has proven a workable political institution.

Under our Constitution, our people have developed a mighty nation. We cannot say it is without fault but we can say there is no better system known. By balancing the responsibilities of government and separating its powers, that compact has protected the individual in his life, liberty and property. The America of today is the handiwork of our forefathers and of ourselves. It is capable of improvement and subject to deterioration. Our country should not be looked upon as a structure, a great building that can be altered quickly by a competent architect for new uses. Government is not such a structure. It is something indigenous to the country it serves. It is like a cultivated farm. It retains its topographical form throughout the ages. It may be enriched, improved, conserved and adorned, or it may be exploited, impoverished, its fertility wasted and its improvements allowed to fall into disrepair. It is capable of proper or improper handling, but not of being razed and replaced by a new building. Government ought to be thought of as a part of the land itself. Such a conception requires a moderation in change that is not too agreeable to extremists. Observing abuses, they imagine everything must go better in proportion as the new differs from the present. They forget that men must change, too, and that men fitted for the new ideals of mass benefit may not exist anywhere in the world, least of all in the United States with our background of individualism. The central problem of modern democracy is the preservation of these liberties, not the maintenance of equality. Equality in theory was declared at the birth of our nation, and as a matter of fact has reached the point that opportunity for achievement in accordance with desire and capacity is, generally speaking, open to all. Opportunities for education, perhaps the most essential element in equality of opportunity, can be said now to be almost a common birthright in our country. The social movement toward further expansion of

equal opportunity continues apace. But we must guard well that our individual constitutional liberties are not lost in a stampede toward mass equality.

VI  
Self-  
restraint

As in perhaps no other nation, our politics, our social science, our method of life, operate within a legal framework in which judicial power may determine not only the constitutionality of governmental acts but the limits of the statutory authority of administrative officials. Our courts must be meticulously careful not to overstep the limits of their powers. As courts are in a position to exceed their rightful authority, they must be doubly careful to stay well within their allotted duties. In the United States the courts have been entrusted by the constitutions, the legislative bodies and the people with greater power than other nations have seen fit to grant or leave to others than legislative assemblies or monarchs. In consequence, it is incumbent upon our judiciary to restrain any inclination to exert those powers to achieve particular results merely because they are agreeable to the judges' conceptions of proper economic or social arrangements. The duty rests upon lawyers and judges alike to take care that manifestations of uncontrolled judicial willfulness do not bring about the collapse of our balanced system--legislative, executive, judicial--and the erection of a dominant legislative branch as in parliamentary government, or of an absolute executive as in totalitarian countries. The balance among the three arms of government stands as the preserver of our liberties from the absolutism of any branch of government. Conceivably our executive might refuse to execute laws he deemed unwise, the Congress might refuse to pass any appropriation or other bills for the maintenance of the government or the courts might refuse to apply laws of which they disapproved. Chaos would result from any such misuse of power with effects no one

need appraise, since good sense of all has brought about an adjustment of different viewpoints for the harmonious working of our system.

The application of these principles to the questions of today? I leave that, gentlemen, to be worked out on the anvil of case and controversy.

The courts are struggling with “just compensation.” Surely a question of law far removed from the tumult of contention. But how difficult to define in a situation where prices are controlled or the rights are temporarily taken. See the General Motors case.

Does the Constitution permit a state to require racial segregation of the type of Plessy v. Ferguson?

How are judges to reconcile the liberties of the First Amendment on the picket line with the states’ power to forbid coercion to act illegally as adumbrated in Giboney v. Empire Ice Co.?

I wish I were as sure of my own answers as the proponents and opponents are of theirs. May the judges have your support in their labors.