THE SUPREME COURT: A TALE OF TWO TERMS

PAUL A. FREUND*

The Shepard lectureship pays homage to a teacher and scholar in the most fitting way, by providing an occasion to bring his steadfast ideals of mind and spirit to bear on the changing issues of the generations. I confess that this thought led me to my subject today, for while I did not have the privilege of knowing Walter Shepard save by his reputation as an extraordinarily humane, vivid, and learned man, this occasion does give an opportunity to share with you some memories of a kindred spirit, Mr. Justice Brandeis, a master with whom I served an apprenticeship many years ago, at the 1932 Term.

Let me begin by describing my introduction to the Justice and some of his working canons at the age of seventy-six when I came to know him. It was arranged that I would meet my predecessor, Henry Hart, and that he would introduce me to the Justice. I called at his apartment, which was on the same block as the Justice's on California Street, about 8:30 in the morning, and I asked the elevator man whether Mr. Hart had come down. He said, "Why, Mr. Hart has just gone up." Mr. Hart had been working all night and had just arrived home at the breakfast hour. That was my introduction to the job.

The first words which greeted me when I was introduced to the Justice were very memorable, as I am sure they were intended to be. He said, "Here you will see a good deal and hear a good deal that is highly confidential. There have been no leaks from this office in the past, and I mean that there shall be none in the future." This was at a time when Pearson and Allen had just published their book, *Nine Old Men.* When a friend of the Justice asked him whether he had read this book, he answered, "Oh, no, there are some things in it that Mrs. Brandeis tells me I should not know."

The job of the law clerk was to assist in the research and drafting of opinions—certainly not in making up the Justice's mind. His character was pretty well formed by that time and I think he would have felt it was an abdication even to have discussed with his clerk how the case should come out. But he welcomed whatever help and suggestions he could get in the way of research and in

* Carl M. Loeb University Professor, Harvard University. These remarks were delivered as the Walter J. Shepard Memorial Lecture at the Ohio State University College of Law on October 19, 1964.

the way of organization and composition and critique of opinion-writing.

There was, however, one stage of the opinions which he always did first, by himself, and in longhand—a full statement of the facts. As any lawyer knows, and any student who has done moot court briefing, particularly if he has had to deal with complicated and messy records, no job is more tedious than the extraction of the facts and their accurate and persuasive statement. This was a chore that Brandeis took upon himself, and it seemed to me—although he never said it directly— that this was a token, a mark of his intellectual scruple, that before either he or his law clerk should set to work expounding the law, the facts of the case should have been thoroughly assimilated, understood, and made part of himself as an earnest that his work would be grounded in an appreciation of the true nature of the controversy before him.

He adjusted very well to the idiosyncrasies of his law clerks, who changed from year to year. It had become the custom by my time for clerks to work at all hours, but some had rather individual habits. One predecessor, who has since become an industrialist, made a practice of going out at night on the social circuit, then coming straight to the office in the early hours of the morning for a stint before returning home. On one occasion, having arrived at the office at one or two a.m., he was overtaken there at five o'clock, which was the Justice's opening of the working day and remained so into his eighties. The Justice entered the office, just above his residence in the apartment building, and greeted his clerk, "Good morning, Page," in a perfectly casual way, as if it were the most natural thing in the world for a law clerk to be about at five in the morning in white tie and tails. So long as the clerk did his work, his habits would be respected, and no encounter, however improbable, would be allowed to distract either the Justice or the law clerk in their common pursuit of legal scholarship.

To turn more directly to my own experience, I recall particularly the first case that was assigned to the Justice that term. It was a very complicated case on federal jurisdiction called *Baldwin v. American Sur. Co.*,[1] which I understand Thurman Arnold later used for a number of years as the subject of a whole course at Yale. Brandeis explained when we first talked about this case that the vote at conference had been five to four, with Justice Van Devanter in the minority; and, said Brandeis, "Justice Van Devanter has a fiendish knowledge of the authorities in this field and so we must be sure that we find everything there is."

Well, we worked on it for several weeks. I found an opinion

[1] 287 U.S. 156 (1932).

of Van Devanter himself which seemed to me tangentially to give some support to the majority position, and so I got Brandeis to work in a passage from it as a grand climax, saying, "Just as in so-and-so (Van Devanter's case) it was said, so here." Finally the draft opinion was circulated and the returns started coming in, and I remember Brandeis' look of pleasure when he called me in and handed me a return signed by Van Devanter which read: "I agree. You have put it in a way that compels assent." Brandeis remarked, "Now the opposition will collapse," and to be sure it did. The case came down as a unanimous decision.

From this episode a number of morals might be drawn, not the least of which is the capacity of members of the Court to be convinced against their initial position. I was struck in the 1932 Term with the number of occasions on which what came down as unanimous opinions had been far from that at conference. I had access to the docket book which the Justice kept as a record of the conference vote—these books are destroyed at the end of each term—and I was enormously impressed with how many divisions there were that did not show up in the final vote. I was impressed with how often Justice Cardozo was in a minority, often of one, at conference, but did not press his position. As far as I could make out, his disagreements—this being his first full term on the Court—derived from the fact that in New York he had been accustomed to a rather different set of procedural rules and substantive rules intermeshed with procedure, so that some things which were decided one way in the federal courts would have been decided differently in New York. I often thought, given Cardozo's great prestige and authority on the New York Court of Appeals, how often cases decided in the Supreme Court would have been decided differently had the Court been sitting in Albany.

I would like to revert to Justice Van Devanter, to whom I referred a moment ago. He is one of the more neglected figures on the Court, one who would repay much further study. As you can infer, Brandeis had very deep regard for Van Devanter. This was confirmed not long ago when, in going through some Van Devanter papers in connection with the history of the Supreme Court, I found a little note in Brandeis' handwriting, written in the spring of 1935. "Dear Van," it said, "I am sorry to learn that you have not been feeling well. Take the best care of yourself. The Court never needed you more." This in 1935 at the height of the New Deal tensions which were besetting the Court. How impossible that may seem to those students and observers of the Court who can see only ideological cleavages!

Now, why would Brandeis say, "The Court never needed you

more," at a time when the resignation of Van Devanter might well have swayed the balance toward the Brandeis position on a great many issues of public law? Why? I think the answer is clear enough. Brandeis set great store by the capacity of the Court to find its way around difficulties. He was a stickler for jurisdictional and procedural observances, and Van Devanter was extremely helpful by reason of his close knowledge of procedure, by reason of his hawk-like grasp of records. He was most valuable in coming up often with a ground of decision which avoided head-on clash and generally in holding the Court to a lawyer-like position when some members might have been inclined to go off on broader or more emotional lines.

Let me recount in connection with this attitude a case which I well remember Brandeis referring to, in the closest thing to profanity that I ever heard him utter, as "that damnable number eight." It was *National Sur. Co. v. Coriell*,[2] number eight on the docket. Although it had a low number and was early argued and assigned to Brandeis, it was a long time in process, and the Chief Justice was pressing Brandeis to say when it would be ready, but Brandeis refused to be hurried.

Why was it damnable number eight? It was a case that involved a receivership of a glove and purse manufacturing company in New York. Those who argued the case thought that it involved a great constitutional issue of the power of a court to approve a plan of reorganization without a judicial sale and without offering cash to dissenting creditors, and many observers felt that—as a lawyer told me while the case was pending—this decision, when it came down, would illuminate the constitutionality of the new section 77-B of the Bankruptcy Act, on corporate reorganizations. I reported this to Brandeis, saying, "The bar seems to think that this will throw great light on the validity of the new bankruptcy law," the case not having arisen under this law, but raising, it was thought, similar problems. I remember Brandeis' answer: "If that is what they expect," he said, "then we must be all the more certain to say nothing whatever that will throw any light on that question."

Compare that with the attitude last term in the sit-in cases[3] where six members of the Court joined in two opinions of three members each, taking issue on the question whether the fourteenth amendment, of its own force, applied to places of public accommodation; one member of the Court outspokenly asked why, when

[2] 289 U.S. 426 (1933).

[3] Bell v. Maryland, 378 U.S. 226 (1964), Bouie v. City of Columbia, 378 U.S. 347 (1964).

the whole country was consumed with the constitutionality of sit-in protests, the Court should remain silent. This would have shocked Brandeis to the roots. There was good reason to remain silent when a constitutional ground was unnecessary for the decision of the case and pending legislation would place the question in a different context.

Brandeis made no public speeches, refused to receive honorary degrees, and opposed the new Supreme Court building on the ground that it might tend to cause the Justices to lose whatever sense of humility they had theretofore possessed. This all seems no doubt very quaint, but one is forced to ask whether it contains some wisdom that might possibly be relevant today.

Now let me turn to a more quantitative comparison of the docket of the two terms. Curiously enough, the total case load was not very different over this thirty-year span, if you exclude the petitions in forma pauperis that have now occupied so many of the docket numbers. Indeed the cases decided with full opinion in 1932 somewhat exceeded in number the cases decided with full opinion in 1963. More interesting, I think, is a comparison of subject matter. An analysis of the 1932 docket shows under the heading "Due Process and Equal Protection": economic matters, six cases; procedure, seven; individual liberties, one. A comparable statistical breakdown for the 1963 Term is hardly necessary, because some things are too obvious even for that ostentatious elaboration of the self-evident by obscure methods that is wont to pass for quantitative analysis in the social sciences.

But the groundwork was being laid in the 1932 Term for a good deal of important doctrine since. *Powell v. Alabama*,[4] the Scottsboro case, laid the basis for right to counsel; *Sterling v. Constantin*,[5] a case against the governor of Texas, holding him subject to federal court injunction for issuing a martial law order in the teeth of a district court decision, set the stage for action against Governor Faubus and Governor Barnett. Although Governor Barnett's case came up last term on a question of jury trial in contempt,[6] the underlying power of the federal court to enjoin a state governor from interfering with federal court decrees was established at the 1932 Term in the case against Governor Sterling.

Still one has to concede that in the general area of what we call civil liberties, in the so-called first-amendment area as applied to the states, and in the field of criminal procedure, despite this groundwork, the two terms present a very marked contrast and I would

[4] 287 U.S. 45 (1932).
[5] 287 U.S. 378 (1932).
[6] United States v. Barnett, 376 U.S. 681 (1964).

like to raise the question, why so limited a development at that stage?

On the subject of speech and press and association and religion, the Supreme Court was just at the beginning of its development. The *Near* case[7] from Minnesota had been decided in 1930, at the outset of Hughes' Chief Justiceship, under a freedom-of-press reading of due process of law and liberty, but you will recall that a good deal of emphasis was placed there on the point that there was a prior restraint, injunctive restraint of future publication. The *Hague* case[8] on freedom of assembly was not decided until 1938, nor the *Grosjean* case[9] on liberty of the press till 1936. The *Hague* case, again, involved prior restraint, and the *Grosjean* case a graduated tax on advertising in newspapers, an aspect of property.

An interesting parallel can be drawn here for the historian of constitutional ideas, between the expansion of the protection of property and the expansion of the protection of individual liberties; the clue to the parallel lies in the notion of procedure. I said that prior restraint figured in both the *Near* case and the *Hague* case, and this can be viewed as a kind of procedural defect. A court or an administrator was acting in advance of further speech or publication. Similarly in connection with the earlier expansion of protection against property, we had the doctrine that due process entailed judicial process as a matter of procedure, and that, therefore, the court itself must decide whether a legislative or an administrative deprivation of property was reasonable. This, it can be argued, was the doctrinal bridgework between procedure and substance in the whole due process field.

In the field of religion, we had the *Pierce* case[10] on parochial schools, but you must remember that as it was decided the *Pierce* case involved what was thought to be a property right, the right to pursue a lawful calling. In a companion case to *Pierce* that involved a purely private non-parochial school, the decision went the same way.[11] It was not the religious element, it was the private property element that was controlling. In 1930, just before the term I am speaking of, a case was decided which might have raised the problem of establishment of religion, since it involved the use of public funds for parochial school textbooks, but that case, as you will recall, was decided without any reference to the church-state

---

[7] Near v. Minnesota, 283 U.S. 697 (1931).

[8] Hague v. CIO, 307 U.S. 496 (1939).

[9] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[10] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[11] Pierce v. Hill Military Academy, 268 U.S. 510 (1925).

guarantee.[12] The only issue raised there by counsel and decided by the Court was whether the expenditure of public monies to furnish textbooks for parochial school children was the use of public funds for private purposes; the Court viewed it as a public purpose and upheld the appropriation. Here is an interesting example of how both counsel and court seemed to be blind at a particular stage to an issue which a generation later appears glaringly to stare them in the face and to be inescapable for decision.

With regard to the equal protection guarantee, the great case in the 1932 Term involved—believe it or not—a graduated tax on chain stores, the rate of the tax rising with the number of counties in which the chain store operated. The majority of the Court held this an arbitrary classification.[13] Justice Brandeis wrote his most extensive dissent of the term in that case.

Curiously enough, there was decided at that term a case which might have produced a great pronouncement on equal protection as applied to legislative districting, the case of *Wood v. Broom,*[14] which, however, like the textbook case, went off without any notice of what would now be taken to be the salient constitutional issue. In *Wood v. Broom,* the Court held that plaintiffs who sued as voters and as potential candidates could not complain of malapportionment of congressional districts; the five-man majority, through Chief Justice Hughes, put the decision on the ground that an act of 1911 requiring districts to be compact, contiguous, and approximately equal had been repealed by implication in 1929; the four-man concurrent minority took the position that the plantiffs lacked standing in equity. Although the constitutional issue had been faintly argued by the plaintiffs, Chief Justice Hughes seemed to feel it called for no attention, because he directed that the suit be dismissed after dealing only with their statutory argument.

I remember the case very vividly because it was the one time during the term when other members of the Court came to Justice Brandeis' home in order to prepare a joint opinion, and I was given the task of typing out a short paragraph that represented the product of this afternoon conference. And who were the four Justices who were insistent that the case go off on lack of equity? They were Justices Brandeis, Stone, Cardozo, and Roberts—surely not the most reactionary group on the Court. And so, when one is asked what Justice Brandeis would have done with the recent

[12] Cochran v. Louisiana, 281 U.S. 370 (1930).

[13] Liggett Co. v. Lee, 288 U.S. 517 (1933).

[14] 287 U.S. 1 (1932).

reapportionment cases, I think it would be fair to point to the decision in *Wood v. Broom* as indicating that he felt—as of 1932, at any rate—that the matter was not one that litigants could ask a court to decide. Want of equity, as I read the short opinion, was a standard form for stating that conclusion.

It is time to consider a little more deeply why there is a notable difference in constitutional concerns in the two terms, both in respect of the provisions which were most active then and those most fertile now, and in the scope and range of meaning given to a particular constitutional guarantee.

Some political scientists might say that it is all explained by the activity of interest groups. I may be oversimplifying, and I beg the forgiveness of my social scientist friends for the caricature of their colleagues, but there are political scientists who write as if the theory of interest groups and pressure groups can be applied whole hog as affording the most significant insight into the judicial process. This seems to me a gross distortion. Certainly it made a difference that in the generation following 1932, the NAACP and the American Civil Liberties Union became active, but those were not isolated phenomena, they were part of a much broader development in the whole climate of opinion both in this country and around the world, and what seems to me significant is not so much that these organizations filed briefs in this or that case, but that a climate of opinion arose in which they were energized. Now, I do not believe in the "great man" theory of history, any more than in the group pressure theory of judicial decision. My text is not "God said let there be light, and Newton was," but Shakespeare's "Ripeness is all."

Of course, it makes a difference, too, that Justice Black came to the Court, and Chief Justice Warren, in the fullness of time, as it made a difference that Hughes succeeded Taft in 1930, but again the climate of opinion explains the men as much as they explain opinion. Certainly Justice Black himself was a different man after coming to the Court than he had been in some of his early and regretted actions, and Chief Justice Warren was a different man as Chief Justice than he had been when he was governor of California and had made speeches critical of the idea of one-man-one-vote for purposes of districting. The general concerns of the times seem to me to explain a good deal of the evolution of constitutional thought in this period as in earlier periods. In Marshall's time, the dominating concern was to cement the Union. In the post-Civil War period, the dominant concern was to protect capital. From the Hughes court onward, the emphasis shifted to procedure, to

first amendment guarantees and their absorption into the fourteenth amendment, and to a wider notion of equal protection in fundamental rights before the law and in access to public facilities; this in a period of assaults on constitutional democracy from the right and the left around the globe.

One could say, without too great a stretch, that the key to this concern, too, as I suggested it was to some earlier transitions, is through procedure: procedure viewed, however, in a very broad sense, as going to the structure and process of government. This would include, for one thing, responsive government, which comprehends freedom of the press, freedom of assembly and association, and fair representation. And so something like the *New York Times* libel case,[15] on the privilege to defame public officials, as well as the reapportionment cases, can be understood together as aspects of one movement toward a judicial role in the securing of more responsive government. At the same time, the Court has manifested a greater interest and concern in the field of responsible government; that is to say, the field of procedure in the narrower sense, criminal and civil procedure, whereby government is obliged to turn square corners in dealing with fundamental human interests of the citizen.

Now, having said all this, by way of trying to explain, describe, and, if you will, commend the general movement which has characterized this contemporary generation, let me hasten to suggest that there are some dangers in any single-minded view of the role of the Court. Even Chief Justice Marshall was not able to establish viable doctrine by great single-minded simplicities. "The power to tax involves the power to destroy" [16] served to bedevil the whole subject of intergovernmental taxation for generations. The idea that the power of Congress over interstate commerce is exclusive—which he at least flirted with in *Gibbons v. Ogden*,[17] if he didn't propose matrimony—that idea again bedeviled and beset the Court and the states for a generation before a more accommodating solution was worked out. The same would have been true had his notion of the absoluteness of the obligation-of-contract clause prevailed.[18]

This word of caution seems to me pertinent in dealing with issues decided over the past years, and in particular at the last term of Court. Let me mention a few. One which is very active now in

---

[15] New York Times v. Sullivan, 376 U.S. 254 (1964).

[16] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

[17] 22 U.S. (9 Wheat.) 1 (1824).

[18] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 271 (1827) (dissent); *cf.* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

criminal procedure is the question of confessions and the relation of the admission of confessions to representation by counsel at the pre-trial stage when the confession was obtained. The Court seems to be moving in the direction—though it has not quite reached the point—where a confession will not be admissible unless there was an opportunity afforded to the prisoner to consult counsel.[19] This would, of course, be a most drastic reform in the whole administration of the criminal law, and the question is whether the protection of the integrity of the individual who is under arrest requires this very sweeping measure, or whether an accommodation could be worked out that sufficiently took account of the individual's integrity while not at the same time and so strongly overriding the concerns of law enforcement. There are alternatives besides the exclusion of such confessions that might be considered. One is the possibility that if a confession is obtained without counsel, the prisoner should immediately be brought before a magistrate who would examine him as to the voluntariness of the confession and get an assurance that the prisoner, at that time, under the protective arm of the magistrate and outside of the jail, outside of police custody, is aware that he need make no statement and is prepared to reaffirm the confession. Another possible solution would be to exclude the confession but not to exclude the fruit of the poisonous tree, not to exclude hard evidence which is obtained as a result of leads afforded by the confession. I am not now speaking of coerced confessions in the conventional sense of involuntariness, but only of confessions which are attacked as inadmissible because given without the advice of counsel. It might be desirable to draft federal rules for the federal courts in which some one or more of the proposed solutions would be tried out before deciding whether to formulate the more drastic rule of exclusion in terms of constitutional law applicable alike to the federal government and to the states.

Another issue on which single-mindedness could very well yield, it seems to me, is that of exclusion of illegally obtained evidence. At the least, one should carefully consider whether it is necessary to apply this rule retroactively, or more precisely whether it is necessary to apply this rule collaterally in post-conviction procedures and not simply on direct review of convictions. Is it necessary to open up all convictions to claims that at some time in the past they were secured on illegally obtained evidence? I raise this question because, as it seems to me, in such cases the quality of the trial itself was not tainted. The exclusionary rule is a collateral rule

[19] Escobedo v. Illinois, 378 U.S. 478 (1964).

to police the police and give some sanction to the guarantee against illegal research and seizure. For that purpose is it really necessary to apply the rule retrospectively to convictions where the appeal time has expired and new trials may be impractical?

In the 1932 Term, in a case that has become fairly well known, the *Sunburst Oil Refining* case,[20] the Supreme Court held that a state court might apply a new rule of law prospectively only, not making it controlling in the case before it, but announcing that as to future events and transactions the rule would be followed. This was attacked as a denial of equal protection. The Court held that, far from being a denial of equal protection, it bore some promise of being a fruitful device for accommodating the needs of continuity in the law with the pressures for change. This device has not been employed by the Supreme Court itself for its own use, on the theory apparently that a court ought not to apply constitutional rights to one group and not to another similarly situated; but surely that oversimplifies the question. The question might be approached more satisfactorily by recognizing that courts are not engaged forever in "finding" the law, that constitutional doctrine does change, and that judicial administration may be called on to accommodate the change. The rule that excludes illegally obtained evidence is itself a rule of judicial administration; and in any event there is no compulsion to apply identically all the constitutional standards of criminal law applicable in the regular course of review to proceedings challenging convictions collaterally long after they have become final.

Finally, how do these cautions against single-mindedness apply to reapportionment? Again, I think the direction taken in *Baker v. Carr*[21] was sound and consistent with the whole evolution of the Court's philosophy, and of the climate of opinion which has given an ever more meaningful content to equality before the law. But does it follow that the one and only guiding principle in reapportionment cases is the numerical equality of distribution? In *Baker v. Carr* the Court was faced with an arbitrary scheme of distribution that was not based on policy but was a distortion wrought by the passage of time. There was no opportunity for a popular referendum free of the participation of the legislature, which had a built-in self-interest against change, and both houses of the legislature were apportioned on an arbitrary basis. There were good reasons for the Court to hold that this presented a justiciable question.

---

[20] Great No. Ry. v. Sunburst Oil Co. 287 U.S. 358 (1932).

[21] 369 U.S. 186 (1962).

But when the Colorado case [22] came before it, the Court seemed to feel that there was no other competing principle than one-man-one-vote. That formula is not only unduly single-minded, it is hardly apt, for in the case of unequal districts everybody voting for the same office in the same district is in fact accorded the same vote; nobody is being counted as one-half or one-tenth of a voter. The disparity is not between individuals but between groups, between constituencies. And when it is asked, how can a majority, as in Colorado, by a mere popular referendum deprive individuals of constitutional rights to equality of voting power, your answer, as so often, depends on your question. You can get out of a major premise all that you put into it, and if you begin with the assumption that this is a personal, individual right, then there is force in the argument that no referendum can qualify that right. But if you start with the proposition that the rights involved are the relative positions of groups, of one constituency as compared with another, then there is room for accommodation, for a test of reasonableness: is there a justifying reason why a less populous county should have the same representation as another, more populous county? Furthermore, the argument that if the rule is good for one house it must be good for both houses again fails properly to state the question. If both houses are malapportioned, in some sense you may not have popular or majority rule, but if one house is based on population and the other house on some other principle, you have not eliminated popular majority rule, you have imposed a principled check on that rule. You have not given the decision to a group other than the popular majority, you have interposed a check on legislative powers, and I see nothing in the Constitution that specifies that our form of state government must be the most efficient that can be devised. In fact, of course, the Madisonian philosophy of our federal government was quite the contrary, and so I would regret that these simplicities have controlled in what are more difficult and complex situations, like the one in Colorado.

Offsetting these examples, I would place the *New York Times* case [23] of last year, where the Court rejected an absolute approach. Some members of the Court did indeed adopt the position that newspapers and individuals have an absolute privilege to publish defamatory matter about men in public office. The majority felt it unnecessary to lay down so broad a rule, to set up so bright a green light for some portions of the press, holding instead that there is a very broad privilege of commenting on public officers,

---

[22] Reynolds v. Sims, 377 U.S. 533 (1964).

[23] *Supra* note 15.

even falsely, provided the defamatory matter was not published maliciously, that is, with knowledge of its falsity or with reckless disregard of its truth or falsity. Here was a case where the Court rejected the absolute—chose amber for a color signal—and, in my judgment, very prudently so.

Those who object, saying that the first amendment reads "no law abridging freedom of the press," overlook two things even as a textual matter. For one thing, the first amendment declares, "Congress shall make no law. . . ." If it is answered that this has been absorbed in or incorporated into the fourteenth amendment, one wonders whether even Thomas Jefferson would have given as sweeping a content to the first amendment as he did if he had assumed that its identical prohibitions were to be applicable against the states. Surely he was not above urging that state prosecutions be brought against certain newspapers, "a few . . . selected" prosecutions, as he wrote in 1803 to the governor of Pennsylvania.[24] It makes a difference in the content of these rules whether you think that the states are free to go their own way, or whether, as now, you are reading into the fourteenth amendment a good deal—if not all—of the content of the first.

And the second textual answer seems to me this: there are other provisions of the Constitution which are similarly absolute in their negative. Consider the provision that no state shall pass any law impairing the obligation of contract. Does this mean that a state minimum wage law cannot affect pre-existing labor contracts? Surely the same judges who are literalistic about the first amendment would be the first to repudiate any such reading of the obligation-of-contract clause.

But I do not want to aim for debating points. What I would like to stress, in concluding this survey of a generation, is something about the nature of the dangers that lie in a failure to use the resources of the law for an accommodation; a danger in the single-minded approach; a danger in what my own teacher, T. R. Powell, used to call tooting just one horn of a delimma. One danger I have mentioned already, that doctrine so laid down is not likely to endure, as a student of Marshall's course must be aware. You can put the Rule Against Perpetuities in a nutshell, but can you keep it there?[25] Can you keep constitutional law nicely encompassed in these simple absolutes? That is the first question.

The second is a somewhat more expedient one—whether the Court must be careful not to dissipate its prestige and authority

[24] Quoted in Levy, Jefferson and Civil Liberties: The Darker Side 59 (1963), and in Mott, Jefferson and the Press 44 (1943).

[25] *Cf.* Van Grutten v. Foxwell, [1897] A.C. 658, 671 (Lord Macnaghten).

needlessly, lest at some time of crisis, when the Court must be obeyed, it will have forfeited so much of popular acceptance that its decision will go unheard. We know what happened after the ill-fated and unnecessary *Dred Scott* decision.

And finally—and this I draw largely from my reading and observing of Justice Brandeis—there is the question of the impoverishment of the functions of the Court as an arbiter, the loss of flexibility and of resourcefulness. Law is, in many ways, like art. It was Valéry who described art as the imposing of a measure of order on the disorder of experience without suppressing the underlying disorder, disarray, and spontaneity. Law is an art in which order must be balanced against disorder, in which goals and principles must be balanced against their counterparts.

I came across recently a passage from a literary critic which seems to me apt for law as well. R. P. Blackmur, a number of years ago, wrote this:

> Surely we have made the best in us the worst when we have either pushed an insight beyond its field or refused when using one insight to acknowledge the pressure of all those insights, those visions of value with which it is in conflict. If we do not see this, we have lost the feeling of richness, the sense of relation and the power of judgment.[26]

And so I end with a plea that we reserve three cheers, to paraphrase E. M. Forster, for the Court's giving of just two cheers. Is this old-fashioned liberalism? Is this archaic? Is this a form of nineteenth-century thinking, lacking the dimension of total commitment called for today, too feeble in an age of total war, ideological confrontation, explosions in knowledge, in technique, in power, over man's mind and over nature? If so, you must remember that I had the indelible experience, for better or worse, of an apprenticeship with Mr. Justice Brandeis at the 1932 Term.

---

[26] Blackmur, "A Burden For Critics," in Lectures in Criticism 187, 190 (Coleman ed. 1961).