Foundations of Freedom

Honorable Thomas E. Fairchild
United States Court of Appeals for the Seventh Circuit

Near the end of October 1984 ceremonies were held at Madison, dedicating a new building to house the United States District Court for the Western District of Wisconsin. While the District embraces counties covering considerable more than half the area of Wisconsin, Madison is the principal place within the District in which sessions of the court have been held. And as the size of the court's workload increased and the number of judges assigned to it expanded—there are one senior and two active District Judges these days—facilities in the old Post Office Building on Monona Avenue became sorely inadequate.

The new Federal Courthouse is colorful (a strong blue dominates its exterior) and a striking building. And to listen to the District Judges who are using it, the new facility has been welcomed enthusiastically.

Judge Thomas E. Fairchild (LL. B. '38)—whose remarks at the dedication of the new courthouse are reproduced below—has been a close and long-standing friend of the Law School. He has, however, earned the vast respect with which he is regarded not from his U.W. Law School connections alone but from a life that has been primarily devoted to public service, both in professional and private, personal terms.

Like his father before him, Judge Fairchild served as Attorney General of Wisconsin and as a Justice on the Wisconsin Supreme Court. In between those two roles, he took on a challenge in 1952 to Wisconsin Senator Joe McCarthy—and as the Democratic Party candidate in a year that General Eisenhower and the Republican Party swept the statewide elections, Tom Fairchild gave Joe McCarthy a close and hard run, though McCarthy returned to the Senate, soon afterwards to stub his toe on the events which led to his downfall.

Judge Fairchild left the Wisconsin Supreme Court in 1966 when President Johnson appointed him to the Court of Appeals for the Seventh Circuit. Honored from his days at the U.W. Law School forward for his very special intellectual abilities, he was among the first of a new generation which was to elevate the Seventh Circuit from the cellar (or close to it) among the federal Circuits to a position of respect that for a time was unsurpassed. (U.S. Supreme Court Justice John Paul Stevens—who arrived somewhat after Judge Fairchild—was among the illustrious band who raised the Seventh to pre-eminence).

Judge Fairchild's remarks at the dedication of the Federal Courthouse at Madison follow.

In this courthouse the federal courts of this district will enforce and apply federal law. There will be prosecution of offenders, disputes between private persons, and cases where individuals seek redress against state and federal authorities. In all these proceedings, the courts will protect and implement rights which reflect the foundations of American freedom. Thus the courts, and this building, will be symbols of these rights.

Most Americans deeply believe in the dignity of the individual and the importance of personhood. Privacy, freedom from invidious discrimination, liberty of conscience—we want these for ourselves. We give at least lip service to preserving them for others. And it is our good fortune that our Constitution secures these interests from interference by government.

Some of our needs can be fulfilled only by collective, community action, and to this end government must exist. But we are mindful that limitations on government power are essential if individuality is to be preserved. A principal enforcer of these limitations is the judiciary, federal and state—remarkably independent of the other branches of government, and thus able to take, when necessary, the unpopular course of protecting the minority from the occasional tyranny of the majority.

When our forbearers wrote the original federal Constitution, they provided mainly for the structure of the new national government, and the types of power delegated to it. But so strong was the popular commitment to individual freedom and dignity that the Bill of Rights was immediately added, forecasting the types of assault upon individual liberty which might be feared from the new government, and prohibiting or limiting its impact in those fields.

In matters of faith, expression, and thought, the First Amendment flatly prohibited the government from concerning itself with whether particular things of the mind or spirit were or were not in the public interest.

Several other Amendments dealt with the procedures by which the national government might call offenders to account. No unreasonable search or seizure, no one compelled to be a witness against himself, the accused shall have the right to assistance of counsel, to summon witness in his own behalf, know the accusation, confront the witnesses against him and speedy, public jury trial. These stipulations were the product of experience with tyranny.

Following the Civil War federal constitutional limitations were placed on the states as well. Doubtless, the principal purpose of the Civil War Amendments was to guarantee equal status to those who were freed from slavery. In any event, the Fourteenth Amendment created federal constitutional limitations on the impact of state action upon personal liberty. It has proved to be a major adjustment in the relationship between the national government and the states. New developments in this area continue to be pronounced by the Supreme Court.

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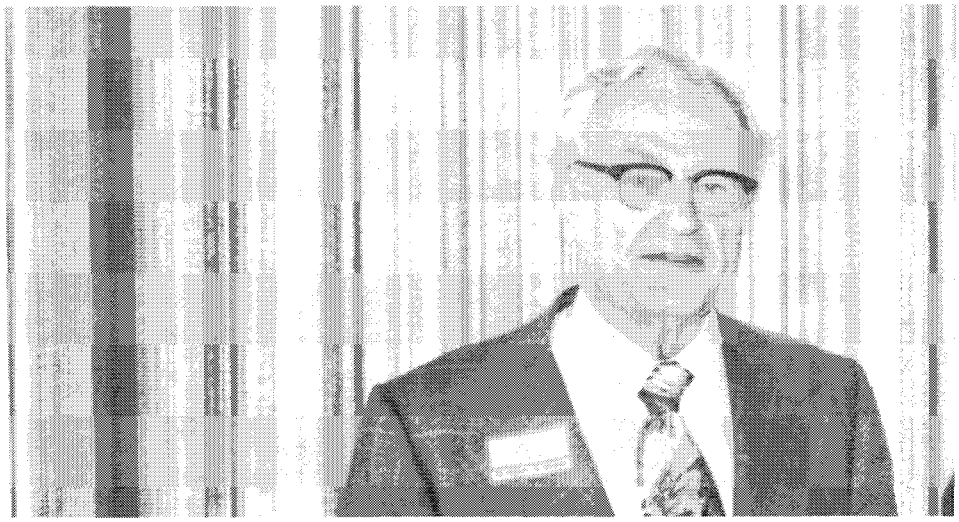

Two phrases in the Fourteenth Amendment, "equal protection of the laws" and "due process of law" have been the principal bases for the adjustment.

Only twenty-two years ago the Supreme Court discarded the doctrine that there was no judicial remedy for unequal representation in state legislatures. Ultimately the Court decided that the "equal protection clause demands no less than substantially equal state legislative representation for all citizens." As a result of the new thinking, substantially equal representation in state legislatures and the federal House of Representatives, enforceable by the courts, became the rule.

The Fourteenth Amendment arose largely out of a demand for protection of the rights of Black Americans. Accomplishment of that goal has taken many generations. By 1896 the Supreme Court had decided that it was enough if "separate but equal" public facilities and services were provided to Black people. Almost 60 years later, and only 30 years ago, the Supreme Court decided that separate educational facilities are inherently unequal and outlawed racial segregation in public schools. Still later the Court held that separation by race in other public facilities denies equal protection.

Here again the thinking of the justices in 1954 was different from the majority view in 1896, but the intervening years had demonstrated the nation's failure to accord first class citizenship to Black Americans.

We need to acknowledge progress in erasing invidious discrimination, but shortcomings remain. Full integration of schools is prevented by housing patterns which have been produced by social and economic forces. Central cities suffer from flight to the suburbs. Real freedom and equality of opportunity are often frustrated by inferior schools. Where a metropolitan community embraces a number of separate municipalities, and the minority group is concentrated in one, should the legal duty to correct the situation be shared throughout the community? The larger community is integrated in its economy and reason for existence, but socially and politically segregated. There is logic in requiring the entire community to join in the solution, but a Supreme Court decision, dealing with schools, reached a negative answer. If this is to be the final answer as to federal constitutional power, the solution will be left to state action and the slow process of change in social attitudes.

Congress, by using its full commerce power, has outlawed discrimination in employment on the basis of race, religion, ethnic origin, sex and age. The Supreme Court some years ago discovered a fresh interpretation of old civil rights statutes, creating civil liability for refusal, on the basis of race, to employ or to sell real estate. These rights will be enforced here.

Discrimination has not been limited to the relationship between Whites and Blacks. Discrimination and second class citizenship appeared in the earliest days in Massachusetts when the authorities persecuted the Quakers. Asians, Indians, Irish, Italians, Germans, Poles, Catholics, Jews, and Women, as well as Blacks, have all felt at some time or other the badge of inferiority placed upon them as groups in the minds of those who happened to be dominant.

An advance in freedom for one group inevitably brings greater freedom for all. President Kennedy was elected within the memory of most of us. His time as President, unhappily, was cut short. But if he had accomplished nothing else, his very election disproved an old political adage that a Catholic could not be elected President. His election and able performance struck a devastating blow against bigotry. More recently Blacks have been elected mayors of some of the greatest American cities. In 1984 a woman is a serious contender for Vice President. Everyone of us, of whatever faith, race, or sex lives more freely today because these things have happened.

Supreme Court decisions have at times discerned other rights so fundamental as to be entitled to constitutional protection, although not expressly described in the Constitution. The right to travel, to marry, to choose the education for one's children, are examples. The Court has also discerned rights with respect to the use of contraceptives and abortion which are protected under some circumstances from interference by the state.

Through the years, the Supreme Court has decided that the due process clause of the Fourteenth Amendment requires the states to observe most of the procedural guarantees of the Bill of Rights in state Criminal proceedings. Other decisions have spelled out rights for those convicted of crime and serving sentences in prison.

This protection of individual rights, written into our Constitution, accepted to a high degree by the people, and diligently enforced by the courts, has distinguished our society from authoritarian systems.

One of the most important rights of the individual is the right to dissent—the right to be different in thought, belief, and speech. It is guaranteed in the First Amendment.

The Fourteenth Amendment was early deemed to have made the First Amendment binding on every state. In case after case, courts have found statute and ordinances void and have enjoined official acts where they would limit the exercise of First Amendment rights. Opposition to the Viet Nam War and the struggle of Black Americans for equal

rights are examples of mass movements against the establishment and the status quo. They were rocky roads at best, but were sometimes made easier by court decisions upholding First Amendment rights.

We can be sure that freedom of thought, conscience, and expression was strong in the hearts of Americans before the words were put in the First Amendment.

Apart, however, from government action, our society at times creates social pressure towards conformity of faith, thought, and expression. The phenomenon of equating dissent with disloyalty or immorality is the most formidable weapon in this arsenal. One who expresses a minority view may escape with being termed an oddball. When he is called pink or a communist dupe, the welts begin to appear. The persecution of dissenters is often generated among community majorities or vigorous pressure groups before it is manifest in government activity. The paradox is that protagonists of freedom can prevail only by reason and persuasion, and must fully accord unstinted freedom of expression to their antagonists.

The enforcement of First Amendment rights often puts the courts in the role of protecting unpopular people. The cases where religious freedom is protected by a court often involve small groups with beliefs or practices which appear strange to those who deem themselves in the mainstream. Free speech cases often involve people who express unorthodox ideas, or books which people may find offensive. Persons accused or convicted of crime, but claiming their rights, are often unlovely characters. The significant thing , however, is not the popularity or attractiveness of the individual or faith or idea protected, but the truth that this protection of rights for anyone protects them for everyone.

We search for the real foundations of our freedom in our willingness to respect the rights of others, in our tradition that the courts enforce these rights for all, and in our willingness to support that kind of enforcement.

As we dedicate this building, we cherish the rights which will be vindicated by the courts which sit here. We are indeed fortunate people, and must be grateful for our system. May I, however, express two thoughts today in counsel against complacency?

Many of the significant principles of constitutional law and rights which we enjoy today are not described in exact terms of the Constitution. Rather they represent fresh interpretations by the Supreme Court of the United States, often significantly different from some earlier interpretation. As the process goes farther and farther from the literal text, it is evident that the perception and philosophy of each justice on that Court must ultimately determine that justice's choice of interpretation. Although the relative stability of the judicial process exists because the process is in evolution, and only very rarely direct overruling of what has been decided before, many of the principles we know today will change with time, often by the closest of votes among the members of the Court. Given the significance of individual perception and philosophy, I think it has been correctly observed that a most significant outcome of the upcoming election will be the choice of the new justices who may come to this Court in the next few years. Their perceptions and philosophies will have profound effect on the direction of changing constitutional doctrine.

I offer one other thought which militates against complacency in a very different way.

It is a truism that today's powerful governments are capable of destroying mankind and the world as we know them. Nuclear destruction can be unleashed by mistake, accident, or miscalculation, even if we accept the proposition that intelligent leaders with reasonably accurate information would not deliberately turn it loose.

Twenty years ago there were people who could solemnly predict that by now, 1984, the United Nations would evolve into a limited world government, capable of preserving world peace through law. I am appalled at so little movement toward world peace and justice and that we still rely on a balance of terror and the absence of accident to prevent the holocaust. It is wonderful to seek to build a better American internal system, but these thoughts haunt us all.

We Americans are the fortunate ones, both in the well being and the constitutional system we enjoy, but an island of plenty cannot permanently survive in a world where there is so much destitution. We cannot escape the challenges of the modern world. Our American fine machinery of government, with its judicial protection of individual freedom, cannot exist in isolation. Humanity must somehow solve the problems of adequate food for all God's children, create an ordered world .

Chief Judge Crabb, and ladies and gentlemen, may this courthouse and those who function here, long continue to be the symbols of the best in the American System.