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Foreword

Erwin N. Griswold

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The Burger Court and American Institutions

Foreword

*Erwin N. Griswold**

The editors of the *Notre Dame Law Review*, and the several authors who participate in this symposium, have undertaken a very large task in putting together the essays which make up this issue. It is difficult enough to write, or to edit, a single article in the vast field of constitutional law. To bring together eight substantial articles, together with a number of thoroughly competent student notes, is an astonishing accomplishment.

The materials which follow, which include discussions of the role of the church, the family, the states in a federal system, and the practice of the Supreme Court itself, are timely, thorough, and enlightening. They should be of great assistance to any practitioner or scholar who is concerned with these problems in the area of constitutional law. As a one-time editor, and long-time reader, I find myself with the feeling that they are too long, and that tougher editing, while removing some detail, would have made most of them more effective, and even more understandable, without incurring any serious loss. But I know the reaction of authors to any suggestion of change in their creations, and particularly to proposals to shorten what they have written so as to make their article more concise, and more sharply focused. In this case, I think that both authors and editors have done good work within the commonly accepted rules and practices.

Perhaps the size of this issue reflects a certain trend in the methods of constitutional analysis—a trend which troubles me in the long-run. I will attempt to illustrate it by a rather far-fetched analogy. In a storage room in the library of my college, where there was once a school of theology, there are thousands of volumes, nicely printed and bound, containing eloquent and tightly reasoned expositions on religious issues—sermons and papers, produced during the nineteenth century. These were commentaries and interpretations on the Scriptures, as then understood, and they were the fruits of deep thought, long hours of work, and great scholarly effort. They went on for many pages, of great learning, often with power and grace; but they also became quite rarefied and attenuated. I have once or twice taken a volume from the shelves and,

* Partner, Jones, Day, Reavis & Pogue, Washington, D.C.; U.S. Solicitor General, 1967-73; Dean and Langdell Professor of Law, Harvard University Law School, 1946-67.

from the viewpoint of another century, marvelled that any author could write so much, and say so little, while all the rules of grammar, syntax, and rhetoric were faithfully followed.

Constitutional commentary has not yet reached that state. But is there some risk that it may be moving in that direction? Could it be that the Supreme Court itself is leading this development, with its long and multiple opinions, with numerous, exhaustive and erudite footnotes? These are questions which sometimes occur to me, and worry me, as I watch the development of constitutional law in these later years of the twentieth century.

In the nineteenth century, and before, it was the Scriptures which provided the chief text for extensive analysis and explication. Long words of Greek origin, such as epistemology, hermeneutics, and exegesis were used to organize the process of commentary, and to divide it into segments.

In the twentieth century, the Scriptures have come to play a more literary and less literal role. Can it be that the Constitution has taken the place of the Scriptures as a new focus for the expenditure of erudite and expanding intellectual efforts, based closely, in one way or another, on the text handed down to us by the Founding Fathers, and their occasional successors, who, from time to time, and in a smaller way, became Constitution makers?

It was more than a century ago that Oliver Wendell Holmes, Jr. referred to Christopher Columbus Langdell as "our greatest legal theologian."¹ And more than fifty years have passed since an early iconoclast, Thurman Arnold, compared legal treatises of his time to nineteenth century theological works.² More recently, a number of articles have drawn attention to the extent to which the Constitution has become "a sacred symbol, the most potent emblem (along with the flag) of our nation itself."³ There is no doubt that the Constitution is a fundamental document, of great importance to this country and one of the moving forces of this society. It is surely not a contract; nor is it a statute.⁴ It is equally clear, though, that the Constitution is not Scripture, and should not be treated as

1 Holmes, Book Notices, 14 AM. L. REV. 233, 234 (1880) (reviewing C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879)).

2 Arnold, *Apologia for Jurisprudence*, 44 YALE L.J. 729, 737-51 (1935).

3 Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 3 (1984). See also Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1984); Cover, *Foreword: "Nomos" and Narrative*, 97 HARV. L. REV. 4 (1983); Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123; Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); Corwin, *The Worship of the Constitution and The Constitution as Instrument and Symbol* in 1 CORWIN ON THE CONSTITUTION 45-55, 168-79 (R. Loss ed. 1981).

4 For nearly a century our neighbors in Canada encountered great difficulty in the development of their Constitution, because the Privy Council, then the court of last resort for Canada, did not comprehend the fact that the British North American Act was not just another statute.

the fruit of revelation. Great as was the outcome from Independence Hall, it was not Mount Sinai. The Constitution is a human document, produced by men for a secular purpose. It is the appropriate subject of great thought and effort, both by the courts and by scholars and other commentators. It may be, though, that for a number of reasons, we are at risk from too much microanalysis, too extended discussions of constitutional details. Could it be that our successors in the twenty-first century, when looking at the massive outpouring in the constitutional field today, will wonder why we used so many words and established so few accepted principles?

This symposium covers a wide field, ranging from substantive problems like the commerce clause, and the first amendment, to lawyers' law like conflict of laws, to Supreme Court law like "state action," justiciability, and the Court's case selection. Each of these is a timely and recurring subject. Indeed, one of the lessons which may be drawn from this series of articles is the extent to which almost any dispute on a wide range of subjects can quickly find its way on the road to the Supreme Court—though its chances of getting heard by the Supreme Court may be, for one reason or another, rather slim.

Dean Norman Redlich's discussion of the establishment clause fully measures up to the high standard which he has long set for his scholarly work. It is, in fact, a comprehensive analysis and comparison of the decisions of the Supreme Court on the questions of law and religion which have developed from the first amendment over the past forty years. The article does much to clarify the problems in this difficult area, and, indeed, to show how difficult the area is, with the Court closely divided on many questions.

Dean Redlich's review of the Court's most recent decisions in the area of church/state relations does much to increase understanding of the sharply divided opinions. As the author points out in his conclusion, "The continued pressure to enlist government support for religion guarantees a steady flow of establishment clause cases in the years ahead"⁵ As those cases develop, Dean Redlich's penetrating and dispassionate discussion of the issues and opinions in the cases already decided should be of great value. This article surely deserves to take its place along side the recent comprehensive book on this subject by Leo Pfeffer.⁶

Richard S. Myers's article dealing with "The Burger Court and the Commerce Clause" begins with a thoughtful discussion of a trilogy of cases involving difficult questions in the field of federal-state

5 Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1147-48 (1985).

6 L. PFEFFER, *RELIGION, STATE AND THE BURGER COURT* (1984).

regulations—*Maryland v. Wirtz*,⁷ *National League of Cities v. Usery*,⁸ and last Term's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.⁹ The author shows that the demise of *National League of Cities* was not entirely unexpected, and he concludes that "the Court reached the proper result in *Garcia*."¹⁰ But he shows how narrow the line is and how difficult it is to draw when he observes that "*Garcia* may not be the last word. The Court may again revive *National League of Cities*."¹¹ This is an area of shifting sands, which clearly illustrates the inevitable give and take of constitutional litigation.

Mr. Myers then turns to another area of commerce clause adjudication, the "Market Participation Doctrine," focusing on the Court's recent decision in *South-Central Timber Development, Inc. v. Wunnicke*.¹² Mr. Myers points out the close relation of the problem involved to that which is presented by state subsidies. Here again, commerce clause analysis finds itself on a slippery slope.

The final topic discussed by Mr. Myers is that of state action immunity in the field of antitrust law, stemming from the Court's decision in *Parker v. Brown*.¹³ His conclusion is that the state action doctrine is essentially a rule of statutory construction, under which "the Court has refused to apply federal legislation to certain state actions absent clear congressional intent."¹⁴ As he observes, this approach is "clearly superior to the balancing approach advanced in some judicial decisions and by certain commentators."¹⁵

Professor Arthur D. Hellman's discussion of "Case Selection in the Burger Court," a topic on which Professor Hellman has already made a number of substantial contributions, is a subject in which I have long had an interest.¹⁶ This is a problem of surpassing importance in our system for the administration of justice, both in the federal and state courts. It is a problem which will some day have to be resolved, and we are all greatly indebted to Professor

7 392 U.S. 183 (1968).

8 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

9 105 S. Ct. 1005 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

10 Myers, *The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty*, 60 NOTRE DAME L. REV. 1056, 1072 (1985).

11 *Id.* at 1075.

12 104 S. Ct. 2237 (1984).

13 317 U.S. 341 (1943).

14 Myers, *supra* note 10, at 1090.

15 *Id.* at 1091.

16 Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U.L. REV. 787 (1983); Griswold, *Equal Justice Under Law*, 33 WASH. & LEE L. REV. 813 (1976); Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975); Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615.

Hellman for the thought and effort he has devoted to it. But perhaps Professor Hellman has too closely adhered to his title, "*Case Selection in the Burger Court.*" (The italics are, of course, mine.) Professor Hellman is surely entitled to write about case selection if he wishes to do so, and he has done very well. He considers and classifies the decided cases, and points out that about half of them are, in a broad sense, civil liberties cases.

My observation, for consideration, though, is that "case selection" is not the really important aspect of the problem. It is the cases which are *not* selected which are the heart of the increasing failure of our system. Professor Hellman has shown his great talent in this area and I wish that he would now devote his energies to a study of the cases which seek acceptance from the Supreme Court, and are not admitted.

Let me observe, first, what we all know: The Supreme Court undertakes to decide all of the cases that it can, and cannot be expected to decide more cases on the merits. Indeed, it would be better if its workload could be reduced. Nothing that I write here is intended in any way to be critical of the Supreme Court, or to suggest that the justices of that Court should review on the merits more cases than they do.

But recognizing this fact is not enough. If there are cases which fully merit review, but which the Supreme Court simply cannot review, then we surely have a problem. I believe that that is the present situation, and that there are at least one hundred cases a year which the Supreme Court cannot review, but which ought to receive review on a national level if our system is to work properly. Perhaps there are more than one hundred. And the number is surely growing.

Our present system for administration of justice in the federal courts has two major defects, both of which keep us from having a real "system" of judge-made law, a system by which the law is established with some clarity, so that lower courts may, in a great many cases, know what the appropriate rule is, and practitioners may advise their clients with some certainty, both to minimize prospective litigation, and to aid in intelligent settling of litigation which has commenced.

The *first* of these defects is that our system of federal courts is a truncated pyramid. Cases come to the Supreme Court after being filtered through fifteen United States courts of appeals (including the Emergency Court of Appeals and the Court of Military Appeals), more than ninety district courts, state courts in fifty states, and some commonwealths and territories.

Under the common law, judge-made law depends upon precedent. The fact that the Supreme Court can review only a limited

number of all these decisions means that the final binding precedents are limited. That is what makes the pyramid truncated. There are, in fact, many important cases decided in these lower courts—at least I think so—which do not achieve the kind of finality which a well working system requires simply because the Supreme Court is unable to review them.

The *second* difficulty with our present system is that even in the lower courts, particularly the United States courts of appeals, there is no stability. In many ways, it is a misnomer to call them courts. A hundred people sit on the bench of our courts of appeals during a year—retired judges from the same circuit, judges from other circuits, retired judges from other circuits, district judges from the same circuit or other circuits, active or retired. Any lawyer knows that there is a considerable amount of lottery in any case heard before a court of appeals—as there is, too, with respect to the assignment of judges in the district court. Often the make-up of a panel is not announced in advance, and a lawyer does not learn who will hear his case until the curtains part.

In saying this, I want to make it plain that I make no reflection on the courts of appeals, or on any of their judges. In many ways, they are the major victims of the problem. They are confronted by a backbreaking caseload, with which they have done wonders. And they have to work with a system which provides them with very few really binding precedents, but with a flood of court decisions on many questions which they can regard as persuasive or not, in accordance with the individual judgment of each judge.

Moreover, from the practitioner's point of view, judges are not fungible. Anyone will recognize that a bench made up of clones of Justices McReynolds, Van Devanter, and Butler will decide many cases differently from a bench which carries the genes of Justices Holmes, Brandeis and Stone. Striking as this contrast may be, something very like this happens almost every day in our courts of appeals. We ought to find a better way. We badly need both (1) more stable courts, and (2) a system which will develop more precedents which are binding on a national basis.

We all know that the answer to this problem is far from clear. My own view is that we need a greater appellate capacity on a nationwide basis, which means some sort of an intermediate court of appeals, and we need some way to achieve greater stability in the make-up of our courts of appeals, and thus in their decisions.

Some day we will get this. We have to have it. Our failure to provide it burdens the courts, and although it may make an interesting life for practitioners, to say the least, it may indeed be one of the major causes of popular dissatisfaction with the administration of justice in this country.