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IN RE LIBERTY

A Book and Its Critic

By CLARENCE MANION

Most any American boy or girl will glibly tell you that "Liberty" and "Freedom" are the prime characteristics of America. One of the most popular textbooks now used in our elementary schools says to its readers on the frontispiece:

"You young Americans all like to salute the flag. That is well, even if you have no better reason than that it is your flag. But it is finer and better for you to love to salute it because you know with joyous pride that it stands for freedom."¹

"Sweet land of Liberty" is a popular and time-honored synonym for "United States". It seems however, that this "Liberty" (or "Freedom", if you will), has about it all of the illusory concreteness of Santa Claus. It is the golden-horse of the merry-go-round; always pursued, always pursuing, always winning always losing—depending upon the viewpoint. Liberty chained thus undefined to the wheel of popular fancy becomes about as tangible as shadow, and somewhat less valuable. The classical "blindfold test" is supposed to center around the two masked men in a dark room who hunted for the black cat that wasn't there. It seems to me that these masked gentlemen proceeded with a reasonable prospect of success compared with those who debate the recent loss or gain of "liberty" without pausing to define their terms.

¹ The Story of Our Country, by West & West: Allyn & Bacon, Boston.

An interesting book² has just been critically—nay even bitterly—reviewed.³ The author of the book, Mr. Thomas J. Norton of Chicago, and the writer of the review, Professor Robert C. Brown of Indiana University, are most enthusiastically “American”. In their concept of just what “Americanism” is, they are as far apart as the Poles.

The book is the result of obvious, pains-taking research. The author sets out to prove that where government is unlimited (no matter upon what subject or pretext), no person subject to that government can be free. This much is easy. Certain it is, that where the citizen does not possess *some* right which his government is bound to respect (majorities, hysteria, the “public weal”, etc., to the contrary notwithstanding), that citizen is the slave of the state, and slaves are certainly not “free”. The citizen cannot amply protect this “right” at the polls; majorities may override him there, and to sanction majority rule absolutely in all things is simply to put a thick club in the hands of a strong man with the injunction to “Go to it”. (It is unfortunate that this biceptual school of political science survived the ancient commonwealth of the cave, but it is still vocal, and notoriously influential.) As restrictions upon those exercising the powers of government therefore, Constitutions are instituted. What the governing authorities do within the narrow restricted sphere marked out for them is binding upon their constituencies. When the authorities go beyond it, their acts are *ultra vires* and consequently void. The citizen who runs afoul of the *ultra vires* act is hailed into court where the judge is sworn to uphold the constitutional restriction upon governmental authority. The law is declared null and the citizen is released. Thus is liberty asserted. Mr. Norton goes on to say that everything depends upon the view of the court as to the constitutional limits of the governmental pale. If the judges are liberal with the government in their location of the “sidelines”, then the field of liberty is contracted to the extent that the field of government is unjustifiably enlarged. A “liberal” decision becomes precedent for one even more liberal and so on to the inevitable destruction of individual

² *Losing Liberty Judicially*, by Thomas James Norton; The MacMillan Company. 1928. Price \$2.50.

³ *Constitutional Law For Popular Consumption*, by Robert C. Brown, *Indiana Law Journal*, January, 1929.

freedom. This process of enlarging the domain of the government is what the author describes in his title as "Losing Liberty Judicially". It seems that his brief is, in the main, unimpeachable. The unsubstantial basis of *Mugler v. Kansas*, (123 US 623) is demonstrated, and the subsequent citation of this case as a precedent for upholding the act of the Pennsylvania legislature in *Powell v. Pennsylvania*, (227 U. S. 678) shows pretty conclusively that what is originally sustained upon questionable analogy and authority may itself be subsequently cited as settled construction for something even more far-reaching.

Professor Brown is angry with Mr. Norton and suspects that the latter has been motivated solely by hostility to the Eighteenth Amendment. "Many lawyers", says Professor Brown, "would probably have continued to enjoy high reputations as authorities in constitutional law had they not, impelled by personal dislike of Prohibition, clearly demonstrated the contrary by displaying their ignorance in print." Which raises the interesting question as to whether reputational mortality incident to the Eighteenth Amendment has been appreciably greater amongst its foes than amongst the lawyerlike ladies and gentlemen who have essayed to defend it? Professor Brown objects to Mr. Norton's book primarily because the author has assumed that individual liberty is inherent and clearly defined. "Such an assumption is, of course, too ludicrous to be worthy of serious consideration", writes the Professor. Of course there is the little matter of the Declaration of Independence, but that is relatively unimportant in the reviewer's estimation. He tactfully leaves us to infer that after all, the Declaration merely attempted to state the purposes of the American Revolution and was but a poor mask for the "scofflaws" of '76. Besides, Professor Brown refers us to the Hon. W. G. McAdoo as authority for the fact that Jefferson himself later gave up the theory of natural rights which he had embodied in the Declaration of Independence.⁴ Disposing of the

⁴ It would have been informative if Professor Brown had included a citation to Jefferson's works or letters with reference to the latter's alleged repudiation of the "natural rights" doctrine. The following is an excerpt from a letter written by Mr. Jefferson to Francis W. Gilmer, in 1816, less than a decade before Jefferson's death. It is certain that the alleged "repudiation" had not occurred at the time this letter was written: "Our legislatures are not sufficiently apprised of the rightful limits of their power; that their true office is to declare and enforce only our natural rights and duties, AND TAKE NONE OF THEM FROM US. No man has a natural right to commit aggression on the equal rights of another, and this is all from which the laws ought to restrain him. . . . The idea is quite unfounded that on entering into society we give up any natural right."

Declaration of Independence as "discarded theory", Professor Brown hurries on to say that "natural rights, whatever they are, may be restrained in the interest of public safety", and the question of what public safety requires "must be left largely to the legislative bodies". Thus legislatures are "largely" unlimited, in the estimation of Professor Brown. Then why the Constitution? In what then, if anything, does our system differ from that of England where Parliament is unlimited, and where there cannot be such a thing as an unconstitutional law? A constitution is essentially a limitation upon government. If the American legislature is unlimited, as Professor Brown says or implies that it is, then there is really no Constitution in the scientific sense, and there are consequently no constitutional lawyers.⁵ In writing this book therefore, Mr. Norton's reputation as a "constitutional lawyer" is as safe as if he were discussing the theory of limits. "Losing Liberty Judicially" is inept to Professor Brown because in the analysis of his opinion there is not, nor was there ever any liberty to be lost, judicially or otherwise. Mr. Norton is taken to task because he is alleged to assume that the opinion of the framers of the Constitution should be "binding upon posterity forever". The Preamble says something about "posterity", but Professor Brown maintains that the persons who framed the Constitution did not claim omniscience themselves or they would not have provided for amending it. Strange to say, it is about one of these very amendments (and not the Eighteenth either) that Mr. Norton has built most of his argument. The Fourteenth Amendment provides in part:

"—nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is difficult to see how such positive and forbidding language can be reconciled with Professor Brown's theory of legislative omnipotence. In the Fifth Amendment Congress is similarly restricted except that it is not bound by the requirement of "equal protection". Is the word "liberty" in these amendments a

⁵ In the Professor's estimation, Constitutional Law would probably and simply be the science of determining by reference to a document more or less archaic, just which branch or department of the government, State or Federal, has the right to harass the individual citizen in this or that particular. About the reserved natural rights of the individual man or woman he pretends to know nothing at all. The latter is "discarded theory".

meaningless and empty echo of what Professor Brown has termed the "discarded theory" of the Declaration of Independence? Professor Brown refers to prominent decisions of the Supreme Court setting aside State legislation opposed to the 14th Amendment as "reactionary cases". (268 U. S. 510; 261 U. S. 525; 253 U. S. 245; 198 U. S. 45.) Like Mr. Norton, he too has some criticism to offer with reference to recent Supreme Court tendencies, though his criticism is directed to the cases of which Mr. Norton approves. Professor Brown thinks that the stability of the courts depends upon "popular approval", a queer deduction in view of the Constitutional life tenure of Federal judges. If "popular approval" was expected to be the basis of the stability of the judiciary, why were the judges thus removed from the possible effects of popular hysteria, or from the constitutional law of "popular consumption", as the Professor himself says? When the reviewer states that the interest of the public "as a whole" should be the object of judicial construction, he forgets that the Constitution was written for the very purpose of avoiding the legalization of what appears now and then to be the interest of the "public as a whole". It was written to prevent the "debtors as a whole" from repudiating their debts to their "creditors as a whole"; to prevent the "states as a whole" from rifling the coffers, the territory, or the representation in the Senate of any States or State that happened at any particular time to be "in a hole" with reference to "popular approval".⁶ The theory and

⁶ Following is a citation from one of James Madison's own speeches as it is paraphrased in Madison's Journal of the Constitutional Convention, Volume I, page 117. This quotation shows conclusively that there was then a wholesome fear of the "public as a whole", or the majority, and that it was the purpose of the Constitution to restrain this majority in the interest of the rights of the minority. "Interference with these (private rights) had more than anything else, produced this convention. Was it to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States. . . . In all cases where a majority are united in a common interest or passion the rights of the minority are in danger. What motives are to restrain them? (the majority)—A prudent regard to the maxim, that honesty is the best policy, is found by experience to be as little regarded by bodies of men as by individuals. Respect for character is always diminished in proportion to the number among who the blame or praise is to be divided. Conscience, the only remaining tie, is known to be inadequate in individuals; in large numbers, little is to be expected from it. Besides, religion itself may become a motive to persecution and oppression. These observations are verified by the observations of every country, ancient and modern. Why was America so apprehensive of parliamentary injustice? Because Great Britain had a separate interest, real or supposed, and, if her authority had been admitted, could have pursued that interest at our expense. We have seen the mere distinction of color made in the most enlightened period of time, a ground for the most oppressive dominion ever exercised by man over man. What has been the source of these unjust laws complained of? Has it not been the real or supposed interest of the

(Continued on next page.)

purpose of the American Constitution, like the "discarded theory" and purpose of the Declaration of Independence was avowedly individualistic. The integrity of the individual citizen, the sanctity of his property right and the independence of the local community in which he lived were the objects sought to be attained by the framers of the Constitution. "They believed that each individual as a responsible moral being, had certain 'inalienable rights' which neither the State nor the people could rightfully take from him.****They believed in individualism.**** Socialism (Professor Brown's *public as a whole*) was to them abhorrent".⁷ If there was any doubt about the individualistic purpose of the framers, the doubt was dispelled by the Bill of Rights, demanded as a condition precedent to ratification by the most influential of all the ratifying conventions. The Professor's conception of the Constitution is unfortunate because he evidently sees in it no guarantee of any individual liberty whatsoever. Mr. Norton's position is infinitely preferable to this. In his opinion all government in America is limited and consequently man, in some respect at least, is free. When Mr. Norton seeks to describe these instances of freedom he is disappointing. On page 168 we find this: "It should never be lost sight of for an instant that all the Constitution is about is to protect The Man against government and his fellow man. Whenever possible Government is to let him alone. That is the American idea." Fine! But in another place he says: "The enforcement of temperance is not a function of Government, but protection of the *weak* and *erring* is." (italics mine). Will not the Prohibitionist immediately counter with the assertion that one who drinks alcohol is certainly "weak and erring", and therefore properly amenable to the "protection" of Prohibition; that it is not "possible" for the government to leave such a "weakling" alone? There can be little or no mixing of Mr. Brown's idea of the "public as a whole" with any concrete conception of individual right, be it to property

(Footnote No. 6 concluded.)

major members? Debtors have defrauded their creditors. The landed interest has born hard on the mercantile interest. The holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is, that where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a republican government, the majority, if united, have always an opportunity. The only remedy against them is to enlarge the space. . ."

⁷ *The Constitution of the United States*, James M. Beck, pp. 218.

or liberty. When the door is opened to let in the interest of the "public as a whole" liberty goes out ultimately if not immediately. The "public as a whole" may demand the abolition of the horse race and at the same time call for the augmentation of corporate stock-betting facilities. It may establish a blue Sunday while it sets up the ducking stool for Holy Rollers. What Mr. Norton calls the "general cleanness of the community" may, as he says, justify the abolition of the saloon, but it will also justify the ordinance which effectively took \$740,000.00 from Mr. Hadachek when brick making within the city of Los Angeles was prohibited.⁸ If the Supreme Court ultimately considers the "reasonableness" of these legislative acts they are looking into questions of fact. If the protesting minority is small the act is usually held "reasonable" and valid. Such construction means the ultimate death of all liberty. If property is regulated under the guise of the police powers (as in the Hadachek case, or in *Laurel Hill Cemetery v. San Francisco*),⁹ it is as effectively taken for public use as if it were to be used for a jail or a city hall. Where the use of property is restricted by an exercise of the "police power" in the interest of the "public welfare", the owner should have the right to resort to a condemnation proceeding for indemnification. All things seem "reasonable" to the rapacity of a plunderbund intent upon getting something for nothing. The cautionary words of Madison in the Constitutional Convention clearly show the function of the constitution in such a case. Minorities need watchful, vigilant protection; majorities may be depended upon to take care of themselves.

In the field of personal liberty the reestablishment of the "protective" purpose of the law should be fearlessly substituted by the courts for the spineless condonation of "regulations" in "reasonable" relation to the "public good". "Sic utere tuo ut alienum non laedas" needs to be revitalized. When what one does is not the proximate cause of injury to *another* or *another's property* he is not civilly liable in Tort, then why should he be made *criminally* liable for that same act by a regulatory ordinance or statute? Granting that Liberty is something more than "sound and fury signifying nothing", why is not the legislature powerless

⁸ Hadachek v. Sebastian, 239 U. S. 394.

⁹ Laurel Hill Cemetery v. San Francisco, 216 U. S. 358.

to prohibit individual acts that cannot conceivably be the proximate cause of injury to anyone except the actor himself? To protect a person against himself is to examine that person's conscience by majority vote of the legislature; an obviously impossible procedure.

The restrictive craze of American legislators is fast reducing our once virile and individually resourceful population to a race of unthinking automatons. Pedestrians are bumped at street intersections by drivers whose eyes are glued upon the "Go" signal in animal forgetfulness of the fact that the light or sign has anything other than a regulatory significance. The same is true of the average reaction to arbitrary "speed limits", save in Michigan where they have been abolished and the responsibility of "careful driving" at all speeds has been sensibly substituted. Judicially and otherwise, American liberty and individual competence which is its hand-maid are rapidly being lost. Any serious attempt, such as Mr. Norton has ably made, to bring out the facts and suggest remedies is a distinct public service, Professor Brown to the contrary, notwithstanding.