12-1-1961

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ON MISUNDERSTANDING THE SUPREME COURT

Wallace Mendelson*

The art of free society consists first in the maintenance of the symbolic code; and secondly in the fearlessness of revision to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision must ultimately decay either from anarchy, or from the slow atrophy of a life stultified by useless shadows.

A. N. Whitehead

There is a tiny island in the South Pacific untouched by the suicidal bent of modern civilization. Its government is simple and above all successful. In the center of a crude stone temple rests the ancient skull of the community’s founding father attended by a bevy of revered priests. When troublesome problems arise which cannot be settled by more mundane means, the priests consult the founder’s skull. There they find the ultimate answers to all difficulties. If this seems crude, it works. The secret, of course, lies in the genius of the priests. Consciously or not, what they find in the ancient skull — or put there — is the conscience of the community. The priesthood is not representative in any modern political sense. Superficially it might be called an oligarchy. Yet it has no force of arms or purse. Its only power is the power to persuade. But its persuasiveness is great because in the long run its edicts reflect not whim or personal bias, but the slowly changing needs and aspirations of the community. The hallowed founding-father symbol satisfies the humanly urgent thirst for stability. The priests provide the indispensable element of growth to meet changing public needs.

The myth of the skull will survive no doubt as long as the priests accurately divine and respect the conscience of the community. Under these conditions the “consent of the governed” prevails. The ruled in fact rule. Were the priests to cling stubbornly to out-worn ideals that no longer satisfied community needs, they would soon be in trouble. So would they be, if they insisted upon “progress” which the people were not yet prepared to accept. In either situation the

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"governed" would begin to see and resent that they were being ruled not by "law" (i.e., something transcendental), but by men.

Like the ancient skull, our Constitution alone provides few, if any, answers to the crucial problems which beset us. When it does we have no need of Supreme Court "interpretation." That Congress shall have two houses, that Senators shall have six-year terms, are matters too clear for litigation. The constant quandary is that for many purposes the old eighteenth century document (including its few subsequent amendments) speaks in quite Delphic terms. It was written by men wise enough to know they could not prescribe all details of government for an unknowable future. Nor were they in complete accord among themselves on vital issues — just as we are not. And so they wrote in large part with calculated generality. That is why the Constitution survives while so many other works of its age — in medicine, engineering, theology — have long since passed away. Each generation's birthright is to find its own wisdom, or the opposite, in the ancient document. Thus, the Constitution lives, despite unforeseen vicissitudes, because it derives vitality from the life about it. To preserve the amenities we call this process "interpretation." Here the Supreme Court plays a vital, but essentially a secondary, part. The crux of its constitutional role is simply that, when properly called upon to do so, it will reconsider prior "interpretations" by other agencies of government. Usually these are sustained. Moreover, judicial "interpretations" in turn are subject to review by the people via constitutional amendment. But even the most criticized decisions find powerful support. After all there are at least two weighty sides to virtually every case important enough to reach the Supreme Court. As a matter of history the community is seldom sufficiently aroused to invoke the cumbersome process of formal amendment. Judicial decisions thus generally stand until modified by subsequent Court action. This suggests that, if the Justices have sometimes misread the Constitution, in the long view they have not grossly misconstrued the conscience of the American people.

A little learning is dangerous business. Many discovered in the Court crisis of the 1930's that judges do not merely find, but sometimes make, the law. We came to see, as Max Lerner said, that judicial babies are not brought by constitutional storks. This secularization of the Court might have been all to the good if we had also understood that lawmaking is an inherent and inevitable part of the judicial process. If judges are to enforce the Constitution, they must fill in its gaps and ambiguities — both those inherent in the document and those which arise because our world is so different from that of the Founding Fathers. If the Constitution presented difficult problems of "interpretation" in John Marshall's day, how can it fail to do so now? After all it was written by Marshall's contemporaries: men familiar with his world — and completely unfamiliar with ours.

The question is not, shall judges make law? They cannot escape it (within the bounds suggested), if they are to do their job. The great problem is where shall they look for guidance? What Samuel Butler called the art of life is also the jurist's art: "to derive sufficient conclusions from insufficient premises." Until we have a better understanding of this Supreme Court function, that
institution will be in trouble. For just so long an important element of free
government will be jeopardized.

At the height of the last judicial crisis in 1936 Mr. Justice Stone posed the
problem with the brevity of genius. The Constitution is largely open-ended; it
leaves us many choices. Where it speaks loosely the ultimate test is reason. But

Whether the constitutional standard of reasonableness ... is
subjective, that of the judge who must decide, or objective in
terms of a considered judgment of what the community may regard
as within the limits of the reasonable, are questions which the cases
have not specifically decided. Often these standards do not differ.
When they do not, it is a happy augury for the development of
law which is socially adequate. But the judge ... must be ever
alert to discover whether they do differ and, differing, whether
his own or the objective standard will represent the sober second
thought of the community, which is the firm base on which all
law must ultimately rest.¹

In stable times interpreting the community’s basic sense of values is apt to
be unconscious and automatic. But in eras of crisis and rapid social readjustment
a judge’s job approaches the impossible. Shall he cleave to old established
values or may he violate them to accommodate new needs? The old Court
failed awesomely in the crisis of the Great Depression by clinging over-long
to “laissez-faire” ideals that had become outmoded in an advanced industrial
society. That problem is now settled. The American people have regain the
freedom to choose their own economic policies without judicial interference in
the name of the Constitution. But another crisis — the cold war — has brought
us to another level in the endless cycle of reconciling the old and the new.
Moved no doubt by the Age of Dictators from Hitler to Khrushchev, the new
Court clings tenaciously to the ancient values of the Declaration and the Bill
of Rights. It insists that “all men are created equal” — including Negroes. It
requires fair trials for all men — including those charged with communism.
Where anti-subversion statutes are less than crystal clear, it resolves the doubt
by protecting individuals from harsh, new penalties (leaving Congress free, if
it sees fit, to “overrule” the Court with clarifying legislation).

Where the “nine old men” strove mightily for the special interests of
businessmen, the new Court is deeply concerned for interests which all men
have in common: the basic civil liberties. There are those, including some in
high places, who see this as abusive “judicial legislation;” blindness to cold-war
needs; or even “softness towards communism.” Others find in it a renewed
sensitivity — in the face of provoking threats — to the enduring American
Dream of human freedom. In due time history will make the final judgment.
Meanwhile a question for conscience’ sake: if America were suddenly to be
swallowed up by the sea, would we want to be remembered for the values
expounded by the Supreme Court, or for those of its detractors?