THE
Pennsylvania
Magazine
OF HISTORY AND BIOGRAPHY

Observations on Constitutional Liberty[1]

PAST and present, it has often been observed, fade into each other at so many imperceptible points, that any difference between them is a matter of purely arbitrary choice. Enduring issues of great complexity such as those implicit in the word "liberty" have no boundaries of time, but are co-extensive with civil society. Their impact on the student is as challenging in ancient, in medieval, as in modern history. It is this sort of issue that joins present to past, that links current action-programs with former philosophies, that bridges the ages between the "Republics" of Plato and Beard, that motivates the historian and directs his selection of materials, that irresistibly draws his contemplative efforts into the conflict of interests and ideas of his own age. History, said Mr. Justice Holmes, "is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dis-

[1] This general consideration of an involved problem has been evoked by the literature of the last twelve months dealing with judicial review, particularly in connection with the Supreme Court's decisions in the Jehovah's Witnesses cases. The suggestions made here are of a conventional nature, but if they convey what is intended they will cast the problem of constitutional freedom in a larger framework than contemporary opinion seems concerned to utilize. Forthright statements in opposition to judicial review will be found in Commager, *Majority Rule and Minority Rights* (New York, 1943), and Lerner, *Ideas are Weapons* (New York, 1938), and *Ideas For the Ice Age* (New York, 1941).

passionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old."[2]

I raise these issues because I conceive the struggle for liberty to be one of the principal problems in practical politics confronting this American generation, yet one for the solution of which our generally accepted and popularly understood philosophies of politics include only an inadequate theoretical framework. Present political philosophies have been variously described as "creative realism" or "unrestrained experimentalism" or as almost anything between these two extremes, depending upon the taste and intellectual maturity of the critic; but no one, not even the most superficial optimist, would contend that we have developed in this century a new systematic formulation of basic political goals by which separate and special governmental acts may be tested. Our goals are inherited; some think their usefulness outworn, all confess they are derived from cultures with different social patterns and conflicts than our own. Much modification in the ways of moving toward them has been acquiesced in, with the result that political ingenuity and originality have been given a large scope. But when conflicts arise so fundamental as to call for basic value judgments, those upon whom the responsibility of decision lies find themselves in a realm in which they must choose either the philosophical goals of another age, or goals whose validity depends upon so subjective a thing as an inner conviction of morality.

This is not to say that the literature of our age ignores basic problems. The contrary is true. We suffer, not from intellectual poverty, or lethargy, but from lack of direction. We want those gifts of synthesis that former ages have displayed. We need them, not because synthesis can be final or definitive but because it can be helpful in its own terms, for its own time. Wars have the curious effect of enormously stimulating intellectual activity.[3] They also induce greatly expanded governmental activity, sometimes along novel lines. From the overheated incubator of our present will undoubtedly come some new statement of those general principles which we are told do not, though perhaps they should, decide concrete cases—

[2] "Law in Science and Science in Law," *Harvard Law Review*, XII (1895), 443, 452. See *Collected Legal Papers* (Laski, ed., 1920), 225.

[3] Merle E. Curti, "The American Scholar in Three Wars," *Journal of the History of Ideas*, III (1942), 241, ff. William T. Hutchinson, "The American Historian in War Time," *Mississippi Valley Historical Review*, XXIX (1942), 163, ff.

should furnish anyway the norms by which political action may be tested.

The historian's contribution to social philosophy is often indirect. Frequently it depends upon the use others make of his studies, to such an extent that if there are any lessons to be learned from the past it is not the historian who learns them. If he is truly the historian, then he is austerely bound to the evidences of the past which it is his business to discover, verify and interpret. From all sides and at all levels demands assail him to produce useful and usable information to guide present action. If these temptations overwhelm him, and he writes history as a lawyer writes a brief, he is no historian at all, but a politician, perhaps a statesman, and probably a plagiarist.

It is, therefore, as a student of the past that the historian must make his contribution to political philosophy, not as a contender in today's lists arguing for present ends from old records. The past is his bailiwick, and it is enough. But liberty is a problem he shares with others, so the results of his researches are of broad present interest. To any new formulation of political goals regarding liberty there are at least three elements he can contribute. The first is a quantitative element. Liberty is a more or less measurable entity in the real world. How much liberty, and for whom, are questions that historical records help us answer. Thousands of pages of the court reports of Anglo-American jurisprudence unfold chapters in the formulation of the doctrines of freedom and the practices of governments regarding them. The figures concerning factory labor, hours of work, and wages paid in the eighteenth and early nineteenth centuries, and the records of slavery and the slave trade, help define the extent of freedom in another sense. Such a work as Professor Alice Felt Tyler's recent *Freedom's Ferment*[4] dealing with the conscious striving of reform groups before 1860 likewise limns the margins of liberty as a social problem. It is never irrelevant to ask whether the tendency of history is toward greater freedom or less. This is a quantitative problem, which the historian can answer, not

[4] Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History to 1860.* (Minneapolis, 1944). Professor Curti's *The Growth of American Thought* (New York, 1943), has, of course, begun an epoch in historical scholarship not the least important result of which will be a better understanding of liberty as a quantitative entity, measured by the activities of reform groups and social critics of all magnitudes.

fully, to be sure, nor even very satisfactorily, but still better than anyone else.

The second element of his contribution is a qualitative one. The full measure of liberty is never taken by listing the examples of oppression or reciting the boundaries of achievement. The kind of liberty men seek, and the standards by which they judge, are ideals just beyond the horizons of the real. The ideal that is unattainable is nevertheless directive of thought and motivating to action. It is therefore part of the experience of liberty. To say that because slavery existed in America in 1850 we had no liberty would be false, as it would be to say that the measure of liberty in 1850 was the number of slaves held in bondage. The quality of liberty a people has is determined by the concept of liberty it admires.[5] Though circumstances of a moment or of an age govern how near we approach to the ideal, the whole picture of liberty is incomplete without a consideration of what the ideal is. The interactions of theory and practice are the stuff of history; the conflicts among theories in the world of ideas and the world of men are the themes of the historian.

The third element of the historian's part in constructing a philosophy of liberty is, so to speak, taxonomic. For not only is liberty a measurable reality which some people possess and others do not, and a theory which governs or is governed by circumstance; but it may also be thought of as a process in history. Liberty exists, when power is checked. It occurs, when an action is restrained—when the rights of one citizen meet in conflict the rights of another, and one surrenders. It operates in a social framework when society's right to survive limits the nature of the liberties a man can have and still live within that society. It inheres in the interpenetration of the real by the ideal. It lies in the realm between individual will to action and group will to action. The definition of liberty, therefore, can be obtained in part by scrutinizing this historical process of will and frustration of will. The general pattern of frustration is always the same, though circumstances and characters change. The arguments

[5] A.W. Jones, *Life, Liberty and Property. A Story of Conflict and a Measurement of Conflicting Rights* (Philadelphia, 1941), is a study of the growth of social classes in an American industrial city (Akron), and the attitude of each social group toward property. Its findings throw important light upon the relationship between liberty and property in the American mind, a subject germane to this discussion, which has never received the careful attention it deserves.

against liberty have a repetitive tone.[6] History describes the patterns of this process—describes them in such terms that judgment is freed from the excitements of the moment and present conflicts are seen to be part of the past and future of liberty.[7]

Now I do not mean to argue that these are the only contributions the historian can make to the principles of political obligations, but rather I propose them as ones which are likely to be generally acceptable. At its best, the study of the past produces reflective wisdom, poised judgment, and calm impartiality rooted in moral strength. Some of these characteristics of mind are intended when the phrase "historical point of view" is employed. Liberty, moreover, is a subject which stimulates the personal reactions of the critic. Problems of right are problems of human passion. They touch upon the mysterious inherent nobility of man. The scholar's judgments on them are formed by the impact of the many facets of his own intellectual environment upon his scholarly consciousness. Again, the historian is never indifferent to the philosophical postulates of his own subject. The history of today is controlled by certain basic assumptions, that tend to pre-determine judgment on the largest moral issues. The "new idea of history," an outcome of "liberal" revolutions, arose over a hundred years ago, before the American historical profession had begun to take shape. It assumes a general, comprehensive attitude concerning man's position in the stream of

[6] "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified . . . in the name of righteousness and the public good, and few which have not been directed . . . at politically helpless minorities." Stone, J., dissenting in *Minersville* v. *Gobitis*, 310 U. S. 586 (1940), 604.

[7] A few years ago we used to hear it said that government was no longer a threat to liberty, but rather that it was the instrument through which serious threats emanating from economic power could be restrained. The growth of a welfare philosophy is certainly a most wholesome and important addition to our ideals of government. Dr. Beard's *Republic* (pp. 106 ff.), suggests numerous reflections on the relationship of welfare to liberty, a principal issue in modern thinking. But the peoples of Europe, a host of Jehovah's Witnesses in this country, and multitudes of others can testify to the persistence of the issue of political power as a danger to liberty. The *Gobitis* case, in which the Court persuaded itself that democratic experience would not result from judicial review, but would from popular action in repealing laws unjust to minorities, action which would serve "to vindicate the self-confidence of a free people" (310 U. S. 586,600), had the not unpredictable result of setting underway "an uninterrupted record of violence and persecution of the Witnesses. Almost without exceptions, the flag and the flag salute can be found as the percussion cap that sets off these acts." Rotnem and Folsom, "Recent Restrictions upon Religious Liberty," *The American Political Science Review*, XXXVI (1942), 1053, 1068.

time. It dignifies the individual, and regards history as largely the outcome of spiritual activities of free men.[8] Implicit, therefore, in the historian's writing are factors of personal response, of moral judgment, and of currents of historical philosophy. Much of what he writes is technical, in the sense that it emanates from a special point of view. But these are subjective factors, and there is a reluctance among social theorists today to acknowledge the existence of this point of view, or to accept the special conclusions of the historian's technology. The present and its problems, it is said, are a sufficient framework for thought and action.[9] There is little point in arguing the issue, for it is an academic dispute to which a sensible academic answer might be that the roads to valid and helpful knowledge are not confined to a single direction or restricted to a few travelers. But if we lay aside this question of the special competence of the historian, we come back to the other question, of the contributions which are not special, but which are nevertheless susceptible of historical answer, and which give the problem of liberty a quantitative, a qualitative, and a structural aspect.

Philosophies emerge from experience, as aspirations for security and repose arise out of conflict and crisis. The materials for a new philosophy of political freedom will be compounded of old ideas and recent experience, unified by the persistence of classical problems and patterns of problems. Such materials are so abundant that we are plagued with an embarrassment of riches. We have had more experiences of oppression than we can easily use. If one were interested in the quantitative and structural problems of liberty, what its amount and extent are, and how it is attained or frustrated, he might study each episode in the past in which a claim of right was made, and essay a resumé of each field of freedom. Professor Zechariah Chafee's

[8] The "new idea of history," Croce says, had emerged in opposition to eighteenth-century rationalism, "in which history had been degraded and condemned by the light of reason." It had rediscovered the philosopher Vico, who taught that the republic of Plato was nothing but the course of human events. "Man, then, no longer looked on himself as belittled by history or as vindicating himself against it and pushing the past away from him as a shameful memory. Instead, a true and tireless creator, he looked on himself in the history of the world as he looked on himself in his own life. No longer did history appear destitute of spirituality and abandoned to blind forces, or sustained and constantly directed by alien forces. Now it was seen to be the work and the activity of the spirit, and so, since spirit is liberty, the work of liberty. . . ." *History of Europe in the Nineteenth Century* (New York, 1933), 8–9.

[9] See, for example, Robert Lynd's *Knowledge for What* (Princeton, 1939), *passim.*

Free Speech in the United States is a very satisfying and impressive work of this type.[10] It is episodic, and while in general it may be called descriptive, it is descriptive of liberty as a quantitative entity in the real world. No systematic thought on the principles of liberty could afford to ignore it, nor is there any American whose ideals of citizenship would not be elevated by a careful study of the grim record it unfolds. But it is well to read it realizing that it does not describe the whole picture of our democratic liberties, for its theme is the extent to which traditional ideals of freedom are not attained, rather than a restatement of those ideals in new terms, or the formulation of others. One rather feels on finishing the book that eternal vigilance still remains the price of liberty, but that there must be something inadequate about our concepts of liberty or our controls of action that permit the things he has learned of to happen.[11]

Theories of rights are not to be evaluated by pragmatic tests alone. There is toughness and persistence in an idea, which may survive even though it be proved by conclusive evidence to be "unrealistic." The qualitative estimation of liberty will turn us away from pragmatism into another realm. Let us assume that human beings are not perfect, that injustice exists, that the statement of an ideal in a constitutional document is not the achievement of it in the real world. We may still ask, how do the incidents of oppression and frustration affect basic principles by which people live? Every injustice is tragic, yet in constitutional history, as Maitland remarked, it is the results rather than the struggles we are interested in; "the struggles are evanescent, the results are permanent." The long-run issues in any civil liberties case are those aspects of decision that enlarge or contract theories of constitutional freedom. The present significance of the *Civil Rights Cases*, in the perspective of seventy years, is not that they overthrew the Radical Republicans' program for legislation protecting the Negro, but that they prevented the extension of national power into state areas of power, and gave to the fifth section of the Fourteenth Amendment its enduring meaning

10 Cambridge, Mass., 1941.

11 Mr. Walton Hamilton's review contained these words: "The great threat to free speech does not lie in locking up the radicals. It lies in putting the conduct of government out of reach of popular criticism. . . . For all its currency Chafee's book is a great historical document; it reveals an institution suited to its generation trying gallantly to carry on in an alien age." *American Historical Review*, XLVIII (1943), 622.

(which is, that it has no meaning).[12] The importance for us of such cases as *Cummings* v. *Missouri* and *Ex Parte Garland* back in Reconstruction days is not that they made it impossible for ministerial and bar associations to keep former Confederates out of their professions, but that they gave definitions to constitutional spheres of right that brought some greater degree of precision to the public law.[13] The case of the Nazi saboteurs may come to be interesting historically less for what it did to the apprehended spies than for what it did to the doctrines of *Ex Parte Milligan*,[14] and certainly the principal contribution of the Jehovah's Witnesses to American social life thus far has been to secure a further definition of the freedom of religion clause.[15] In the Supreme Court more is decided than an individual case, for the Court is an arena in which greater contests are waged than those between parties to a suit. Though the incident may be trivial which brings the case up, the result is part of our body of law, and hence of our body of liberties.

In the Court the power and effectiveness of ideals are tested by their application to crisis situations. The interweaving of ideal and real may be seen as a dynamic process where theory combats theory and philosophy measures practice. If we wish to regard liberty as a qualitative matter, judged not alone by pragmatic measurement but by the persistence of ideals as well, then the Court furnishes our best materials. Its records are a mirror held up to the country, giving an image distorted perhaps around the edges but in the center a fairly accurate reflection of the opinions of the nation. Dominant philosophies of right are probably better represented by the justices than by any other official body in the nation. Particularly is this likely to be true in our time when legislatures are accustomed to rely upon courts for the judgment of constitutionality rather than to determine the issue for themselves.[16] The cases that the Court hears do not

12 *Civil Rights Cases*, 109 U. S. 3 (1883). *U. S.* v. *Reese*, 92 U. S. 214 (1876). *Baldwin* v. *Franks*, 120 U. S. 678 (1887).

13 4 Wall. 277 and 333 (1867).

14 *Ex Parte Quirin*, 317 U. S. 1 (1942).

15 The latest of the dozen cases involving the Witnesses to be decided by the Court is *Prince* v. *Commonwealth*, 31 January, 1944. Whatever else may result from it, clearly the issues of religious freedom are not yet laid to rest by it or any other of these important decisions.

16 See G. Clark, "Civil Liberties: Court help or Self-help?" in *Constitutional Rights* (H. F. Goodrich, ed., Am. Acad. of Pol. and Soc. Science, Philadelphia, 1938.)

include by any means all the infractions of liberty that occur, but they do represent an interesting sampling, probably one sufficiently adequate so that most of the types of oppression which occur are eventually ruled on by the Supreme Bench. Still more important is the fact that both the specific and general rulings of a Court case become matters of record, and as matters of record are permanently embedded in our jurisprudence. The decisions reveal liberty in quantitative extent and theoretical principle; they express both evanescent struggle and enduring result.

Of course there are serious disadvantages to the study of constitutional liberty through the Court records, for the inaccuracies of this mirror are likely to be matters of considerable moment. Constitutional history and legal history are never quite the same thing, though in America this difference has sometimes been ignored; and many problems of liberty never become "cases" in a justiciable way. There are infractions of liberty, and there are theories of liberty, that do not give rise to litigation at the bar. There are victims of unconstitutional action whose resources and information are inadequate, for whom constitutional liberties mean little more than the right to be patient. There are occasions on which claims of right are determined extra-constitutionally, by administrative rather than judicial action (to the nature of this problem the magazine *Esquire* can speak with some authority). There are abstract rights which have never been effectively translated into practical reality—"A right without a remedy," Mr. Justice Swayne said in another connection years ago, "is as if it were not." Outside the Court much happens that is part of the history of liberty, but not of constitutional limitations. "It is difficult to imagine a work more false to life than a casebook in Constitutional law," Dr. Beard once remarked, and certainly it must be agreed that constitutional liberty is a particular kind of liberty. Yet the Court "is bound to know and notice the public history of the nation."[17] It does not work in a vacuum, nor is it entirely unmoved by the environment of thought and reality about it. It has never represented extremes of opinion, either the most conservative or the most fluid in the nation; and frequently (both before and since the "Brandeis brief") it has responded to the realities of a situation.[18]

[17] Grier, J., dissenting in *Texas* v. *White*, 7 Wall. 700 (1869).

[18] See, for example, *Crandall* v. *Nevada*, 6 Wall. 35 (1867); *Hurtado* v. *Calif.*, 110 U. S. 516 (1884); *Powell* v. *Alabama*, 287 U. S. 45 (1932); and almost any case since 1938 dealing with the commerce clause.

The particularity of liberty as it appears in the Court may be admitted, but it need not be exaggerated. There are more factors always at work tending to bring the Court into positive relationship with the nation than there are tending to isolate it.

More serious than this inadequate connection between law and liberty are certain disadvantages inherent in the nature of the Court's work, which the student must recognize. The Court deals with cases, and cases are ever imperfect representations of issues. Rarely do they present a question singly or simply, yet rarely are the issues presented unimportant. The case must be decided without evasion, but in his ruling the justice is likely to decide either more or less than he intends. Case law is but an approximation of reality, and only a fragment of philosophy. Still, the application of principles of right requires flexibility, and case law is at least that. By the avoidance of rigidity, life, scope, and meaning are imparted to the great areas of the Constitution. Perhaps it is in this very fluidity that the usefulness of the judicial institution lies—not in pronouncing the law without appeal, as Edmund Randolph expected in 1790, but in preserving that malleability in the structure of power that allows theory and practice to join in the determination of the rights men have.

The function of the judiciary is to preserve and define the Constitution. This gives to the Court its characteristic appearance of social conservatism, an appearance that has been much exaggerated because the "legislative" character of the judicial process is not as generally understood as it once was.[19] The function does not necessarily impose upon the justice an inhospitable attitude toward contemporary liberalism, but it is true that the Court is not the place where novel doctrines or basic constitutional reforms get a ready hearing. The liberty the Court is dealing with is a liberty within the confines of a stated and explicit framework of government. That this framework is so broad and general as to embrace almost any philosophical system is plain on the face of the record, for though the structure of the Constitution has remained formally rigid and inflexible since 1789, the substance has altered to such an extent as to

[19] That Jeffersonian partisans understood it in Marshall's day in terms almost the same as those used by "modern legal realists" becomes interestingly clear from a perusal of Warren and Beveridge.

embrace the most fundamental changes of social, economic, political and intellectual nature. The Court's interpretive function, its use of the text of 1787 as a point of departure, has rarely caused it to reject new philosophies because they were new; and it has on the other hand furnished the opportunity to test new philosophies by the measurements of old.

The quality of liberty in America has been molded by the theories of constitutional limitations, in small part derived from English practice but to a very large extent indigenous, that underlie it. The "democratic tradition in America is a tradition of constitutionalism as well as of increasingly popular government."[20] The Constitution has developed through the years as an American technique of liberty; whether or not a satisfactory technique in all respects, or a democratic one in theory, it has been the result of discernible impulses in the thought of Americans regarding democracy. Of the usefulness of the Court's records in revealing valid materials for understanding the experiences we have had of liberty, the concepts that have persisted through crisis and conflict, and the applications of concepts in the real world, we may say that nowhere else in recent experience are the ideas and the quantitative extent of freedom, as well as the character of forces operating upon both, as clearly set forth.

The record is voluminous, the principles it suggests are familiar ones—they are almost truisms—and the changes that have taken place in our time are but the development of a consistent pattern. The value of these principles depends upon the originality of this age, for if the experience of war and peace should not include the experience of formulating new goals of social living, then our refuge will be established judgments and techniques of the past. I believe there are some half-dozen of these obvious principles, which it will do no harm to state in dogmatic form, to give point to the general remarks which have preceded.

Liberty in America is historical liberty. It is the traditional and classical problem of the free man in the free state. There is an unbroken continuum of development from the Protestant Reformation down to the present of the idea-structure of the liberal epoch. It may be that liberalism, as Mr. Max Lerner has vigorously urged,

[20] Benjamin F. Wright, *The Growth of American Constitutional Law* (Boston, 1942), 5.

is not always synonymous with democracy;[21] it may be that the emergence of the common man, of which so much has been written both of historical description and of prophecy, will put an end soon to this epoch.[22] But it is helpful, I think, to realize that the Court in our times has been dealing with problems that are of a piece with those with which Harrington and Locke, Vitoria and Mansfield in their several ways dealt. The Gobitis children do not stand alone in the stream of time, nor the Scottsboro Negroes, nor Amy Lovell nor Professor Macintosh. We know the judgment of history regarding John Peter Zenger, William Penn, and others of the past whose resolute individualism conflicted with the social aims of power. Unless there is a considerable refinement of our historical point of view beyond individualism we may guess that the future will not judge much differently the cause of later complainants before more orderly tribunals than the seventeenth and eighteenth centuries afforded.

Liberty is constitutional liberty. It is comprehended within the general structure of the government, and does not exist apart from the expressed principles of written law and established usage. Though the theory of natural rights and natural law has had a very extensive history and has been productive of much that is fine and enduring in our philosophy of freedom, it can no longer be regarded as a source for specific or even general rights. It is true that the Court has relied upon "general principles of liberty" and similar imprecise phrases in defining the meaning of the due process clause of the Fourteenth Amendment,[23] but there is a long history of exploring and mapping behind this development. "Liberty, in each of its phases, has its history and connotation . . ."[24] so that such words as "essential personal liberty" and "general guaranty of fundamental rights of person and property" do not imply sources of rights beyond the control of human agency. Thirty years ago Mr. Justice Holmes wrote:[25]

21 See, in addition to the works cited above (fn. 1), *It is Later Than you Think. The Need For a Militant Democracy.* (New York, 1938), *passim.*

22 Arthur M. Schlesinger, "What Then is the American, this New Man?" *American Historical Review*, XLVIII (1943), 225, *ff.*, gives depth to the problem Vice-President Wallace has frequently raised, perhaps most specifically in his *Century of the Common Man.*

23 *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Whitney* v. *California*, 274 U. S. 357 (1927); *Fiske* v. *Kansas*, 274 U. S. 380 (1927); *Stromberg* v. *California*, 283 U. S. 359 (1931), and subsequent cases.

24 Hughes, C. J., *Near* v. *Minnesota*, 283 U. S. 697 (1931).

25 *Collected Legal Papers*, 312, 313–314.

The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. . . . It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. . . . If I . . . live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights. But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it. . . . No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a preëxisting right. A dog will fight for his bone.

To conceive of liberty as constitutional liberty is to conceive of it as existing within the body of the law, as ideal susceptible of translation into real. This translation must be accomplished before the real exists. For nearly a hundred years the guaranties of religious freedom in the First Amendment remained abstract principles without reality, not because they were lightly esteemed, but because conviction alone does not make sound law. Before doctrine can become fact, rules, standards, and norms must be developed to give substance and body. Not until 1879 did the Court begin to define the limits of the First Amendment, and therefore it may be said not until 1879 did freedom of religion begin to take on meaning. The source of liberty, in this sense, is responsible constitutional action subject to popular approval or change.

Because it is constitutional, liberty has become in our time national liberty. The federal government has emerged as the guardian of civil rights against the actions of state legislatures and county and municipal boards. The police power that the Court has developed for itself in this connection shows an unmistakable tendency to work toward the removal of local variations in the amount of civil liberty enjoyed. Serious discrepancies among the states will gradually be modified as the doctrines of national control are developed, although, indeed, recent legislative experience with the poll-tax question reveals what formidable stumbling blocks lie athwart the path.

In this process of nationalization, the sphere of liberty has been moving in the same direction as the rest of the bodies in the constitutional orrery. Too often we think of the great subdivisions of public

law as separate, independent entities; yet the truth is that they all respond to the same developments in the fabric of society, and they all participate in the general alterations of constitutional structure. The major impulses in these alterations in the last two decades have been the centralizing and integrating of institutional life. The extension of the commerce power to include activities formerly considered purely local,[26] the expansion of the Court's power over lower federal and state courts,[27] the growth of the functional powers of the government,[28] the enlargement of administrative spheres, and the general increase of the subjects of federal legislation, have all pointed to the end of federalism as it once existed in America and the emergence of new attitudes in constitutional thinking that are responses (however refined in theory) to the economic, social, intellectual and physical unity that is being created in the nation. In the field of civil rights a similar development has taken place. The power of the states to control or restrict individual freedom has been limited by the Court in a constitutional development of the greatest importance. In the early nineteen twenties many states had statutes forbidding the teaching of the German language in the schools. The Court ruled these unconstitutional, on the apparent ground that there was a property right involved in freedom of teaching which a legislature could not invade under its police power, for it was protected by the Fourteenth Amendment.[29] This was the first time for many years that the due process clause had been used to cover other than technical matters of court procedure. In these German language cases was a foretaste of what was to come, for they opened up the vista of a greatly expanded protection for individual rights. The first eight amendments had been for a century traditionally interpreted as Marshall had held them to be, that is, limitations on the federal government only, not upon the states.[30] In the late nineteen twenties, however, following the more general interpretation of "due process of law" in the language cases, the Court in a series of decisions following one another in quick succession boldly interpreted the

26 See, *inter alia*, Frankfurter, *The Commerce Clause* (Chapel Hill, 1937).

27 *Powell* v. *Alabama*, *cit. sup.*; *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Smith* v. *O'Grady*, 312 U. S. 329 (1941).

28 C. H. Wooddy, *The Growth of the Federal Government, 1915–1932.* (New York, 1934).

29 *Myer* v. *Nebraska*, 262 U. S. 390 (1923); *Bartels* v. *Iowa*, *ibid.*, 404.

30 *Barron* v. *Baltimore*, 7 Pet. 243 (1833).

word "liberty" in the Fourteenth Amendment as a term so general as to prohibit the states from doing all those things that the federal government was forbade to do by the first eight amendments.[31] By 1931 the Chief Justice was able to say "it was no longer open to doubt" that the Fourteenth Amendment included free speech and free press. Exactly how many of the liberties of the Bill of Rights were included was not so clear; but the great chapter of nationalized liberty had opened by the time the depression was exerting new and serious pressures on the constitutional structure.

Liberty is social liberty. It is a concept of relationship, particularly of relationship between the individual and the social group—a group which has rights of its own, among which, as has been pointed out on the Court, is the right to survive. "Courts," Mr. Justice Reed has remarked, "no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows."[32] And Justice Roberts, in describing the nature of freedom of religion, remarked that the constitutional protection embraced two concepts: the freedom to believe and the freedom to act. "The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissable end, unduly to infringe the protected freedom."[33]

There is no absolute right in society, for absolutes cannot exist where the fellowship of democracy requires co-operation. ". . . no single principle can answer all of life's complexities. The right to freedom of religious belief, however dissident and however obnoxious

[31] *Supra, n.* 23.

[32] *Jones* v. *Opelika*, 316 U. S. 584 (1942), 593–594.

[33] *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), 303–304.

to the cherished beliefs of others—even the majority—is itself the denial of an absolute."[34] Though perhaps our latter-day understanding has disguised the real intention of language, it does appear that the framers of the Constitution spoke in terms of rights that were entire and absolute—that existed in the individual, incapable of modification or even of nuance of meaning. To maintain this, is to maintain that the eighteenth-century philosophers contemplated a society the ultimate rationalization of which was the assertion of the individual as a political unit of such integrity as to stand against all government and all society. Perhaps there was this elevated anarchy in the spirit of the philosophers. There is plenty of evidence to sustain the argument, not the least of which is the fact that they committed revolution. But the preservation of the traditions of property and power imposed a different philosophy on nineteenth-century leaders of our political life, and left us with a heritage of social constructs that reconciles some liberty with some power. If this heritage is not democratic in the sense that its end is anarchy, at least it is not statistic in the sense that its end is power. Still, the concepts of absolute liberty died hard. Fundamentalists remained upon the bench far into the period of judicial realism. They left moving tributes to enduring ideals of freedom spread upon the records of the Court. One such passage is in an eloquent dissent of Justice Sutherland in 1936. Everything that has happened in the world since he wrote it has only enhanced its power to move:[35]

> Freedom is not a mere intellectual abstraction; and it is not merely a word to adorn an oration upon occasions of patriotic rejoicing. It is an intensely practical reality, capable of concrete enjoyment in a multitude of ways day by day. . . .
>
> Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while there was yet time.

Yet a candid view of Sutherland's language reminds us that the purpose of his unquestionably sincere words was to invalidate a great

[34] Frankfurter, J., in *Minersville* v. *Gobitis*, 310 U. S. 586 (1940), 594.

[35] *A.P.* v. *N.L.R.B.*, 301 U. S. 103, (1937), 141. And see A. T., Mason, "The Conservative World of Mr. Justice Sutherland," *Am. Pol. Sci. Rev.*, June, 1938.

legislative charter of social justice the provisions of which were not unrelated to the liberty of the citizens.

Out of the death throes of nineteenth-century *laissez faire* the concept that individual rights may be enhanced if they are modified to preserve a social organization, without which no rights can persist, emerged as an action program. Much was lost, perhaps, in the altered view of the free man in the free state. But much was gained, too, in the assertion of a national power to protect liberty against local infringement anywhere.

Yet to abandon the absolute is not to abandon the substance or the ideal that lies beneath it. Throughout its recent history in the Court the concept of liberty has remained whole. Cases require the justice to delineate a part, to deal with specific, separate issues; but permeating his decision is the conviction that freedom is more than the sum of listed rights. The language the Court has used, the spirit in which opinions are written, the universals which are everywhere touched by particulars, reveal a doctrine that defies reduction to precise and little boundaries. It is true that modern conditions have required a choice among the liberties listed in the first eight amendments. Some have been selected as essential to a free society, others have been deemed "not of the very essence of a scheme of ordered liberty," and from the selection there "emerges the perception of a rationalizing principle which gives to discreet instances a proper order and coherence."[36] But there is a difference between liberties and liberty. To enumerate liberties is to obliterate liberty. Of this the Ninth Amendment warned: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Enumerating involves discrimination. Some rights may be dispensed with, and liberty may be enhanced by the process. The constitution which guarantees ten freedoms, may provide room for no more; but the constitution in which liberty as a whole concept is preserved, need enumerate none. The one can easily become the instrument of power while preserving the semblance of freedom; the other retains always the possibility of becoming an agency of democracy amid even the most strenuous pressures.

Finally, liberty is judicial polity. The clear tendency of the last two decades has been to lay the problem of liberty in the lap of the

[36] Cardozo, J., in *Palko* v. *Conn.*, 302 U. S. 319 (1937).

Court, which is equivalent, some think, to laying it in the laps of the gods, from which there is no appeal. Certainly when an absolute becomes relative, it becomes a subject for judicial determination. Liberty once placed the citizen above the majority. Now it places the Court on an even higher pinnacle, above the majority, and above the individual as well. There have been many and effective complaints of this result lately, and they have attained such magnitude that the issue of judicial review has become a public question of the gravest importance. From the point of view of the Court it might be enough to say as Marshall did that the judges are bound by the Constitution, and must enforce it as they see it. Such argument would not weigh very heavily in the present Court, where the whole issue has been more squarely and more frankly faced than in the whole of the past century. From a broader point of view, a defense of the Court's position would be that in its deliberations problems of the greatest moment have been brought within the ken of reason. The method of constitutional government, one of the ablest defenders of the Court's position has said, is enriched by judicial emphasis "upon the importance of rational debate and justification. It is this method which enables us to hold before the whole people, majority and minorities alike, the ideal of discussion rather than violence as the only proper reliance in politics."[37]

But the question we are left with is more fundamental than the choice of violent or non-violent means to social ends. It is a question regarding those ends themselves. What philosophies emerge from our experience? In the past twenty years this liberty which is historical, constitutional, national, social, divided in application but whole in spirit, and especially the product of judicial review, has been part of the community life of the nation. It has been as much a part of national experience (though distinguished authority has held otherwise) as if it had been shaped by conscious majority will at every step. It has remained the possession of the people, as much as the Constitution has remained their possession, and as susceptible to change as any other part of that instrument. To what philosophical alternatives does it point? Dean Pound, in an essay addressed to the problem of federalism as a democratic process, proposes three ideals in juristic thought as standards of judgment: the first is individual-

[37] Wright, *op. cit.*, 260.

ism, which regards state and law as existing only "to guarantee the security and development of the individual." The logical extremity of this is anarchy. The second is statism, the end of which is organized society and the result of which is autocracy. The third is a concept of civilization and the values of the civilized life which regards both man and state as comprehended within a transcendent ideal, the end of which is "government according to law, and . . . a federal polity maintaining a balance of nation and state, of state and locality, of politically organized society and individual which can only be assured by law."[38] To some such choice the American people must commit themselves. Intellectual leadership must formulate the alternatives and develop the impulse to choose. The ideals proposed must be subjected to the most rigorous historical analysis, so that a concept of civilization may not become as inimical to the individual, as autocratic and as totalitarian as concepts of the state have become. The ethical problems of individualism, so clear in the Court's cases, must be weighed in the balance with doctrines of progress, social responsibility, and the perfectability of men. And ultimately the most pressing of all problems must be met, that of preserving throughout reconstruction and peace the elevated aspirations for permanent goals that characterize the nation at war—a problem stated four hundred years ago by Castiglione in ever-timely words:[39]

bicause in very deede it is an uncomelye matter and woorthie blame, that in warr (which of it selfe is nought) men shoulde showe themselves stout and wise, and in peace and rest (which is good) ignoraunt, and so blockishe that they wiste not howe to injoye a benifit.

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[38] Pound and others, *Federalism as a Democratic Process* (New Brunswick, N. J., 1942), 28–29.

[39] *The Book of the Courtier* (Hoby trans.), 318–319.