University of Pennsylvania
Law Review
FOUNDED 1852
Formerly
American Law Register

VOL. 116 APRIL 1968 No. 6

INTRODUCTION

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The extraordinary difficulties which characterize the human condition in 1968 present an unmatched challenge to the mind and spirit. This is conspicuously the case with the men and women of the law upon whose ministry of the law, as both a stabilizing and energizing influence, so very much depends.

We could, if we would, make the occasion one for much pomp and ceremony, and engage in no end of celebration. For is not 1968 International Human Rights Year? Is it not the centennial of the adoption of the fourteenth amendment? The blunt answer is that this is no time for easy ceremonial. The problems of society are too great, too urgent. The call is for hard commitment and action, not embellished lip service. The challenge is to the human spirit. Do we have the qualities of heart to make ours a truly just society? It is a time for soul-searching about human rights and social responsibility, a time for massive action.

The papers in the symposium to which these brief remarks are introductory give thoughtful attention to a number of problems affecting human rights. The introduction itself is a general one. The principal authors surely speak for themselves. The introducer essays a broader stance.

It seems fair to say that the fourteenth amendment—combined with the safeguards for the individual against state action which were written into the Federal Constitution in 1787—has become a Bill of Rights for the states. I will not engage in the exercise of cataloguing

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the protections of the first eight amendments which have been made effective against state action through the due process clause of the fourteenth amendment. The protection against state action is now almost as extensive as that against action by the national government. There have been notable developments in recent years, including recognition of the privilege against self-incrimination in the state sphere and application to the states of the guaranty of a right to a speedy trial in criminal cases. Significant developments, applicable in principle to both federal and state action, have taken place in the state framework.

Nor does it appear profitable to pursue the debate over "incorporation" as against the theory that the fundamental fairness exacted by fourteenth amendment due process may assure some of the substantive and procedural rights safeguarded by the first eight amendments. In principle I favor the latter theory. Incorporation could have been rationalized in terms of privileges and immunities of United States citizenship protected by the fourteenth amendment, but that course was blocked in the *Slaughter-House Cases*.[1] The question is still pursued in Supreme Court opinions,[2] but what has come about, cumulatively, is something amounting to piecemeal incorporation of very nearly the "whole works." We have seen state action cases decided not simply on broad principles recognized by one of the first eight amendments, but in terms of interpretation of the language of those amendments. Thus it has been with the establishment clause of the first amendment.

So, in 1968, we have a Federal Bill of Rights limiting state action, brought into being largely by extrapolation from fourteenth amendment due process.

The theoretical case for a Bill of Rights is stronger at the state than at the national level because of the plenary character of state power as contrasted with the delegated nature of federal power. And each state, of course, has its own bill or declaration of rights. Historically, such state provisions have not proved very effective. It is hard to believe that fourteenth amendment development through federal court interpretation is unrelated to this; the federal courts have, in a very real sense, been filling a gap. The unevenness of state safeguards, particularly as interpreted by the courts of the several states, contrasts with the more exacting national limitations authoritatively interpreted by one highest court.

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[1] 83 U.S. (16 Wall.) 36 (1873).

[2] See the concurring opinion of Justice Harlan in Klopfer v. North Carolina, 386 U.S. 213, 226-27 (1967).

This is a period of considerable—but far from pervasive and compelling—interest in state constitutional revision. There has been no serious thought of discarding state bills or declarations of rights. Some changes calculated to strengthen the safeguards have been made and it is clear that a state may cover ground not fully occupied by federal limitations. All things considered, one is moved to say it is good that state constitutional safeguards of individual rights are being retained and strengthened.

It is familiar learning that, in contrast to the extensive resort to the process of amendment in state constitutional development, the evolution of our national constitutional law has come about largely through responsible interpretation, in part through the initiative of the executive and legislative branches, but in larger and more nearly definitive part by judicial exegesis. What has been said about a Federal Bill of Rights for the states speaks to this point. The judicial role which has been played in the national framework has fascinating implications, which go beyond the basic safeguarding of human rights. They relate to the fundamental political elements in American society. They bear upon the distribution of responsibility for decision-making as between the courts and the political branches and as between the national union and the states.

Consider the one-man, one-vote decisions of the Supreme Court with respect to state government. Representation in many state legislatures had become uneven, often without rational basis. This condition had continued for a long time, unrelieved by substantial corrective action through political processes. The major corrective action came, as we know, through a series of Supreme Court decisions, which put the matter under the equal protection clause. I am one who thinks that this is a very good thing as a matter of policy, but I have yet to find solid basis for the one-man, one-vote principle in the fourteenth amendment, viewed as a whole,[3] or in the perspective of American experience with representation in legislative bodies.

What we have in this development is a rather extraordinary instance of judicial attack upon a bad political situation. The assertion of the individual voter's right to equal protection of the laws is the channel through which, by judicial action, the pattern of representation in a legislature is redrawn. In other words, the central policy-making arm of state government is changed by court action in a way to affect everyone in the state in order to accord voter Jones equal protection. I am tempted to draw a limited sort of generalization from this to the

[3] *See* Fordham, *Judicial Policy-Making at Legislative Expense*, 34 GEO. WASH. L. REV. 829, 831-35 (1966).

effect that there is a tendency in our system to look to the courts when the political branches fail in their own spheres. A closely associated point is that the legal profession is a critical factor in this process. Obviously, it must be the lawyer who will press for results in the judicial forum when recourse to the legislature has not been fruitful.

Constitutional evolution through interpretation, of course, has depended upon access to the courts. Where the line of access has been through attack upon federal expenditures, it has long been the assumption, based upon *Frothingham v. Mellon*,[4] that the taxpayer lacks standing to question in court the legality of a federal expenditure from the general fund of the treasury. In view of the readiness of courts to allow taxpayers to make such challenges at the state and local levels, it is hard to believe that the jurisdictional argument is a very serious one.[5] While there was talk in *Frothingham* about lack of jurisdiction, there was also stress on insubstantiality and remoteness of interest. To say that as a constitutional matter there would not be a case or controversy under article III seems remote in itself.

It is of interest that in a 1967 one-man, one-vote case from Florida the Supreme Court rejected a challenge to the standing of Dade County voters who were attacking legislative apportionment even though it was conceded that voters in that county had received constitutional treatment under the legislative plan.[6] The Court allowed the voters to pursue their challenge as representatives of other citizens of the state.

With respect to first amendment clauses relating to religion, the matter of standing has been under consideration in the Congress and is before the Supreme Court at the present time. Senator Ervin's bill was passed by the Senate last year.[7] The pending case is a taxpayer's suit arising in the Federal District Court for the Southern District of New York, in which a three-judge court, with one judge dissenting, ruled that the taxpayers were without standing to challenge the use of federal funds to aid church-affiliated schools.[8]

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[4] 262 U.S. 447 (1923).

[5] *See* Committee on Federal Legislation of the Association of the Bar of the City of New York, *Proposed Legislation for Judicial Review of Constitutionality of Grants and Loans Under Certain Acts*, 22 RECORD OF N.Y.C.B.A. 35 (1967).

[6] Swann v. Adams, 385 U.S. 440, 443 (1967).

[7] S. 3, 90th Cong., 1st Sess. (1967):

> Individual and corporate Federal taxpayers, or groups thereof; . . . and . . . citizens of the United States [shall have] "standing to sue" in litigation which qualifies as a "case or controversy" within the meaning of Article III of the Constitution of the United States.

[8] Flast v. Gardner, 271 F. Supp. 1, *prob. juris. noted*, 389 U.S. 895 (1967). On June 10, 1968, the Supreme Court reversed and granted Mrs. Flast standing to sue. Flast v. Cohen, 36 U.S.L.W. 4601 (June 10, 1968).

A state case involving public textbook aid to church-affiliated schools has just been decided by the High Court. Board of Educ. v. Allen, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967), *aff'd*, 36 U.S.L.W. 4538 (June 10, 1968).

Freedom of Expression—Academic Freedom

One of the most interesting and inspiring things in this country today is the emergence of the younger generation as a great moral and social force. (This statement is by way of welcoming the younger ones into the arena and not of renouncing their elders' responsibility.) There is nothing in our experience quite like the powerful force for good that lies in the concern of young people of this day for integrity and social justice in American life. The hippies express grounded criticism of weaknesses in society by withdrawal. They are a very small minority in comparison with the host of young men and women in and out of college who are strongly committed to positive action through orderly, democratic processes.

Let me cite an example of the quality of student thought and action. In June, 1963, the General Assembly of North Carolina without committee consideration and with less than twenty minutes of floor debate in both houses adopted a so-called "gag" statute imposing restrictions upon speaking by persons of certain classes on campuses of state-supported institutions of higher education. The text of this monstrosity is reproduced in the margin.[9] It will be noted that the statute had no internal sanction. The protest from the affected educational institutions and from other sources resulted, in 1965, in a softening of the statute.[10] Student leaders at the University of North Carolina at Chapel Hill had been among the articulate, responsible voices of protest. At a large meeting at the University in February, 1966, co-

[9] Law of June 26, 1963, ch. 1207, [1963] N.C. Laws 1688:

Section 1. No college or university, which receives any State funds in support thereof, shall permit any person to use the facilities of such college or university for speaking purposes, who:

(A) Is a known member of the Communist Party;

(B) Is known to advocate the overthrow of the Constitution of the United States or the State of North Carolina;

(C) Has pleaded the Fifth Amendment of the Constitution of the United States in refusing to answer any question, with respect to Communist or subversive connections, or activities, before any duly constituted legislative committee, any judicial tribunal, or the executive or administrative board of the United States or any state.

Section 2. This Act shall be enforced by the board of trustees, or other governing authority, of such college or university, or by such administrative personnel as may be appointed therefor by the board of trustees or other governing authority of such college or university.

Section 3. All laws and clauses of laws in conflict with this Act are hereby repealed.

[10] N.C. Laws Extra Sess. 1965, ch. 1. The first paragraph of the act now reads:

The board of trustees of each college or university which receives any state funds in support thereof, shall adopt and publish regulations governing the use of facilities of such college or university for speaking purposes by any person who:

N.C. GEN. STAT. § 116-199 (1966).

sponsored by students, their leaders took a strong and dignified stand against regulations proposed by the administration which provided for administrative censorship of speaking appearances on the campus by student-invited speakers. The protest was unavailing.

Thereafter the student leaders joined in a suit in federal court attacking the statute and regulations as infringements upon freedom of speech. In February, 1968, a three-judge district court sustained the attack.[11] This landmark ruling makes one recall with warm appreciation the wish of one-time University President Edwin Alderman that, at Chapel Hill, there would always be a breath of freedom in the air.

It is appropriate to note several very active current problem areas.

Civil Disobedience

Patently, it may be in order to disobey a law for the purpose of laying the basis for a challenge to its constitutionality. The most likely situations today are those involving (1) laws affecting equality of opportunity and social justice and (2) laws providing for military conscription viewed in relation to a particular war.

Obviously, in either type of case, the individual may disobey on moral grounds and face the consequences. But how can he rationalize subordinating the statute to some higher law not embodied in the constitution itself? Put somewhat differently, in order to prevail in his attack upon the statute, must not the individual persuade the court that the moral element inheres in some identifiable constitutional limitation?

This question is very much with us because the conditions of our society and various commitments of public policy challenge the moral values of many people.

Welfare Rights

Are there constitutional rights to particular public services or benefits? Clearly enough one may challenge effectively discriminatory treatment under a welfare program which the government chooses to provide. Several courts have recently held that a one-year residence requirement for eligibility for public assistance is an unreasonable classification and does not meet the test of the equal protection clause.[12]

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[11] Dickson v. Sitterson, 36 U.S.L.W. 2555 (M.D.N.C. Feb. 19, 1968).

[12] *E.g.*, Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967), *prob. juris. noted*, 88 S. Ct. 1054 (March 4, 1968) (No. 1138); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), *prob. juris. noted*, 389 U.S. 1032 (1968) (No. 813).

It is being urged that there are substantive rights to governmental benefits, which are beyond discretion of government. One might claim a right to shelter, food, water, medical care and one or more municipal-type services, such as garbage collection and removal. The contention would be made, of course, by persons unable to pay for such services. The claim could not be made across the board; in one way or another someone has to pay.

Here again, we see citizens taking major problems of social policy to the courts. This has troublesome implications from the standpoint of the roles of the judicial and legislative branches and is rife with questions concerning effective judicial administration of the principles involved.

Judicial recognition of a right to governmental services (and a correlative obligation of government to provide them) would spread ripples clear across the pond of public business. Public activities and outlay therefore are relative and interrelated; what would be required by higher authority as to one service would condition to some extent what could or would be done as to others. In a given community the claimed service may have been left in the private sector, but the response to this would be that government would have to buy it for the individual.

Doubtless more fundamental is the question whether political morality and the cause of social justice can be advanced in this way.

There are rather deep-running questions of how best to change community values and outlook, and to nurture strong and responsive representative policy-making institutions. How much can we achieve through judicial mandate? The one-man, one-vote decisions do not teach us very much here: they give expression to something that had great public support and, in any event, it remains to be seen how much we are gaining in the quality of state legislative institutions.

Religious Liberty

The focus of attention here has moved from religious practices in the public schools to governmental aid to church-related schools. Cases involving state and federal aid are now pending in the Supreme Court.[13] The extent, if any, to which such aid can be squared with the establishment clause is a question of great educational importance. Parochial schools are a very substantial factor in the total educational effort in many communities. From the perspective of educational policy they must be taken into account. They have, for example, a significant

[13] On June 10, 1968, the Court sustained against constitutional challenge N.Y. EDUC. LAW § 701 (McKinney Supp. 1967), allowing school boards to purchase and lend textbooks to children attending parochial schools. Board of Educ. v. Allen, 36 U.S.L.W. 4538 (June 10, 1968). *See* note 8 *supra*.

potential for racial integration. What can we do by way of public financial support consistently with separation of church and state?

There is no doubt that the gap between the basic promise of our fundamental political documents and judicial and legislative recognition and fulfillment has been greatly narrowed in recent years. We have gone far toward adequate legal recognition of human rights. Current enactment of federal fair housing legislation,[14] and current judicial revivification of a centuries-old statute,[15] are notable measures on behalf of equality of opportunity. These gains are not to be discounted. What must be said is that we yet have a very long way to go in closing the gap between legal recognition of human rights and genuine fulfillment in the actualities of life.

Politically and governmentally there is need of stronger and more responsive legislative institutions to deal in a positive way with social ills. More basic than that is the elevation of the spirit of the citizenry. There is a special burden on the white citizenry to break the old and ugly bonds of prejudice. Genuine acceptance of their non-white brothers is of prime importance. If that is achieved we shall be on a sound footing in pursuing long-range social and economic goals.

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[14] Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-901 (April 11, 1968).

[15] Jones v. Alfred H. Mayer Co., 36 U.S.L.W. 4661 (June 17, 1968). It is perhaps notable, in terms of the importance of state and local responsibility in this area, that the Attorneys General of three states filed briefs supporting the petitioners.