

COMMENT

A RESPONSE TO THE CONFERENCE OF STATE CHIEF JUSTICES *

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My assignment is to appraise the Supreme Court's role in recent times in the area of federal-state relations. I have decided to center my attention on the criticism leveled at the Court by the Conference of State Chief Justices last summer.

We can ignore today's emotional and colorful attacks on the Court. Their irrationality destroys their effectiveness. But when the Chief Justices of the State Courts by a vote of thirty-six to eight indict the Supreme Court for failure to exercise "proper judicial restraint" that indictment requires careful examination.

The danger is that an indictment of this kind, coming from a responsible source like the Conference of Chief Justices, tends among the uninformed and irresponsible to be taken as proof of guilt.

What, then, is the indictment?

In the conclusion of their report the Chief Justices deplore what they call "an accelerating trend toward increasing power of the National Government and corresponding contracted power of the State governments." They recognize that with a developing country and changing conditions there will always be problems of allocating power between national and state governments, as matters once mainly of local concern become matters of national concern, and they recognize that the Supreme Court is given power to determine such questions. They point out that the degree of friction that develops in effecting changes depends upon the wisdom of those empowered to alter the boundaries and upon the speed with which changes are made. The Chief Justices then build up to their indictment by saying: "The overall tendency of decisions of the Supreme Court has been to press the extension of federal power and to press it rapidly." Then comes the indictment:

"We believe the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint. We

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feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by virtue of the Fourteenth Amendment.”

My concern is with the indictment that the Supreme Court has “too often” acted “without proper judicial restraint” in the federal-state relations area. In my opinion, this indictment is not justified as applied to the “modern” Supreme Court toward which this criticism was directed. This criticism might properly have been directed to the pre-1937 Court, but not to the Court after 1937.

Let us consider briefly the first area mentioned by the Chief Justices—extent and extension of federal powers. In this area has the court of the past twenty years adopted the role of policy-maker without proper judicial restraint?

There are two divisions in this area: The first relates to the expanding scope of the national powers themselves under congressional legislation; the second, to the restrictions or limitations upon state power arising out of the existence or exercise of national powers.

In the first division the Court has exercised extreme self-restraint. There is no need to spell this out. We all know that for the past twenty years the Court has permitted Congress to make its own policy in expanding the national power, whether under the commerce clause or under the power to tax and spend for the “general welfare” or other clauses. The Court has refrained from interfering as Congress has moved the national government into areas formerly the exclusive domain of the states.

The Chief Justices deplore the rapid expansion of national powers, but they are either criticizing the wrong agency or seeking the wrong remedy. Congress is the agency that has expanded the national powers, and the Court has practiced judicial restraint in leaving these policy determinations to Congress. If the Chief Justices want the Court to check this legislative expansion of federal powers, the Court must exercise less judicial restraint, not more.

In only one respect can it fairly be said that the Court has on its own authority expanded national powers. This is in its interpretation of vague statutory phrases, such as “affecting commerce” in the National Labor Relations Act, where Congress sought to go as far as the Court would find constitutional power. Here the Court could possibly have adopted a more restricted view of national power without thwarting clearly expressed congressional intent. Yet Congress wanted the regulations to extend as far as was constitutionally proper, and there is

no basis for concluding that the Court has carried national power in these areas beyond that contemplated or desired by Congress. Congress is still the basic policy-maker in determining the scope of national power, and has shown no inclination to draw back its regulations in these areas where it used vague phrases for the very purpose of going as far as possible. I think of only one exception, the *Southeastern Underwriters* case, where the Court's 1943 application of the antitrust laws to insurance was later, in effect, reversed by Congress. Here greater self-restraint, with a more thoughtful appraisal of the possible implications of the decision on state regulatory power, might have avoided an unhappy episode.

But these illustrations of expansion by the Court's interpretation of vague statutory phrases are peripheral to the main thrust of expanding national power. That thrust came from Congress, with strong public support; and even Mr. Justice Roberts, after retirement, said that the Court could not have resisted it.

In the second division relating to restrictions or limitations on state power arising out of national power, dormant or exercised, the over-all movement of the modern Court has been toward increasing, not decreasing, state power. Let us glance briefly at the major areas involved.

In intergovernmental immunities the Court has moved toward greater and greater freedom of taxation, both by the states and by the federal government. It has removed this major obstacle to state taxation at least when the immediate taxpayer is a private person, not the federal government itself. Here is an expanding area of judicial restraint, leaving the determination of the tax burden to the political processes. The Court is faced with tougher problems when state regulation has an impact on federal agencies, but in recent years the Court has interfered with state regulation of this nature only when it was found inconsistent with actual federal legislation. On some of these cases there is room for a reasonable difference of opinion, but in my opinion these cases cannot be criticized as demonstrating a lack of judicial self-restraint. Indeed, they are not so criticized by the Chief Justices.

In state taxation of interstate commerce the modern Court has shown more and more liberality toward state taxing power. The Court has given increasing recognition to the state need for tax revenue from interstate business, and has sustained many taxes that would have been held invalid prior to 1937. In some cases the Court has stricken down state taxes on what seem to me purely formal grounds, where I would have sustained the taxes as involving no real threat to interstate com-

merce. Yet this is a difficult field in which the arbiter of our federal system has to weigh many considerations, and I do not believe that the Court can be accused of any lack of appropriate self-restraint in this difficult area. Today there is substantially greater freedom to impose taxes on interstate business than twenty years ago, and the report of the Chief Justices recognized this increasing liberality toward state taxation of interstate commerce.

Similarly, there is less interference in recent times with state regulation of interstate commerce, absent any federal legislation. Increasingly, the Court gives careful consideration and appropriate weight to the state interest sought to be protected by the regulation, though it has not hesitated within the past twenty years to hold invalid state regulation that it considered unreasonably harmful to the national interest in a free commerce. This is its function and duty as the arbiter of the federal system. I think it significant that the Chief Justices aimed no criticism at the Court in connection with cases of this kind.

Similarly, in other areas, the Court has given greater effect, not less effect, to state power during the past twenty years. The Chief Justices recognize this by referring to *Erie v. Tompkins* establishing the reign of the state common law in federal courts in diversity cases, and by noting the Supreme Court's relaxation of its due process rules with respect to in personam jurisdiction in state courts.

Actually, when you reduce the Chief Justices' report to specifics rather than generalities, in only one area is the report critical of actual Supreme Court decisions dealing with restrictions on state power arising out of national powers, as distinct from fourteenth amendment restrictions. This is in the pre-emption doctrine decisions.

The report refers to two lines of pre-emption cases: (1) the *Nelson* case in which the Court held that federal legislation dealing with subversive activity pre-empted the field and excluded state statutes forbidding subversive conduct against the United States Government, and (2) the cases dealing with the effect of the National Labor Relations Act on state jurisdiction to deal with labor relations in industries subject to the national act. The Court cannot justly be accused of lack of proper judicial restraint in either of these areas.

Personally, I think the Supreme Court was right when it affirmed the four to one decision of the Pennsylvania Supreme Court in the *Nelson* case. I do not propose to discuss the decision, though I suggest a reading of the defense of the decision at the Conference of Chief Justices by Chief Justice Jones of Pennsylvania. It is enough to say that this was a difficult and close problem in an emotionally charged area, where the Court was bound to be criticized if it agreed with the

state court that the state was without power to deal with subversion against the United States. Six of the nine justices were firmly persuaded that state meddling in this delicate and difficult area was inconsistent with nationally established programs for dealing with this national problem, which only the national government could adequately handle. Appropriate self-restraint does not require the Court to abdicate its responsibility in such a case, particularly when Congress can remedy the decision quickly if it disagrees.

The labor relations decisions in which the Court has sought to steer a workable line between national and state jurisdiction reveal a careful and studied effort to leave to the states as much jurisdiction as possible without interfering with the congressional plan of regulation. There is nothing lighthearted about the way the Court has struggled with the various aspects of this difficult problem. Had the Court been inclined to cut out for itself an easier task it could have taken the extreme position that Congress has pre-empted the entire field of labor relations affecting interstate commerce. This would have been easy for the Court to administer, but it would have disregarded important state interests. Instead, in my opinion the Court has acted very responsibly to protect state interests in this area, and has brought upon itself many headaches in the process. Of course, I do not agree with all of its decisions in this area, for they are difficult ones on which the most conscientious persons can reasonably differ. For example, I thought the *Guss* decision unnecessarily created a no-man's land, an unfortunate result not compelled by the act. But good lawyers disagree with me on that case. Viewing this whole line of cases, I am satisfied that the Court cannot justly be accused of lack of proper judicial restraint or a tendency to over-extend federal power in disregard of state interests. Indeed, the report of the Chief Justices appears to recognize that the principal cause of difficulty in this area has been the failure of Congress to provide guidance, rather than a lighthearted exercise of policy-making by the Court.

Summarizing my views on the first count of the indictment, I suggest that the Report of the Commission on Intergovernmental Relations in 1955 presents a far more accurate picture of the impact of Supreme Court decisions on the powers of local self-government than does the Chief Justices' report. The conclusions in chapter one of the Commission's report remain accurate in 1958: I mention two:

(1) Limitations on state power arising out of national powers have "only a minimal effect on the capacity of states to discharge their functions." The "trend of judicial opinion outside the civil liberties

field has on the whole been tolerant and accommodating to state policy." The "range of activities that lie primarily within the power of the States by reason of lack of any coercive authority in Congress to deal with them is substantial."

(2) The basic problems of maintaining our federal system today lie in those areas of national and state power where both Congress and the states have real choices to make, and where many alternative courses are open. It is in these areas that practical issues arise, and the legislatures and administrative agencies with their assigned jurisdictions provide the appropriate forums for settling these issues. The current judicial doctrine leaves these issues to be resolved by legislative judgment. They are no longer issues resolved by the Court applying legal criteria but by the legislative bodies, operating within their respective jurisdictions, applying political, economic, and administrative criteria.

This has been the consequence of Supreme Court decisions over the past twenty years. To me this is judicial self-restraint. It may be excessive self-restraint in the eyes of some, but it cannot properly be called lack of proper judicial restraint.

The second count of the indictment is that the Supreme Court has tended to adopt the role of policy-maker without proper judicial restraint in its supervision of state action by virtue of the fourteenth amendment.

Most of us would, I think, agree that the verdict would have to be "guilty" here were we judging the period from 1900 to 1937. During that period the Supreme Court repeatedly substituted its policy judgment for that of the state legislatures on the wisdom and desirability of economic and social legislation. But that is all ancient history. At least with respect to social and economic legislation the Supreme Court of the past twenty years must be acquitted of this charge. The modern Supreme Court has been extremely careful not to substitute its judgment of what is wise or sound for state legislative judgment in social and economic legislation. The same cannot be said of a number of the state courts represented by the Chief Justices who voted to indict the Supreme Court for lack of proper judicial restraint.

Only in two areas has the Supreme Court used the fourteenth amendment to supervise state action to any extent in the past twenty years. In these two areas there has been a considerable degree of interference with state policies—in civil liberties and criminal procedure.

In both areas the Supreme Court has exercised a considerable measure of affirmative leadership. There has been less self-restraint here than in other areas and for that the Court is to be commended, not

condemned. Here is where fundamental rights of the individual to equality under the law, to freedom of expression, and to fair procedures come into conflict with governmental power. Since judicial restraint on most matters of legislative policy has allowed a very broad sweep to governmental power, it is appropriate and necessary that the Court give increasing attention to insuring that these broad governmental powers are exercised in such a way as to respect the basic constitutional rights of individuals. It is safe to give broad sweep to legislative powers only if an independent judiciary will assert itself to protect the rights of individuals and minorities. A high degree of self-restraint here would be an abdication of the Court's major responsibility.¹

Turning now to state criminal procedure the Court has been unusually careful to exercise a reasonable measure of self-restraint. It has deliberately left to each state a great deal of freedom to work out its own criminal procedure, so long as the most basic rights are not denied. Repeatedly, the Court has refused to impose upon the states procedural standards that the Court has found essential to fair administration of justice in the federal courts.

This does not mean that the Court has not interfered with state criminal procedure. It has on a good many occasions, and in some closely divided cases, like the recent *Griffith* decision criticized by the Chief Justices. But the division in *Griffith* did not relate to the desirability of a procedure requiring the state to pay for a transcript when needed to perfect an indigent's appeal. All agreed this was desirable; their division related to whether this procedure was sufficiently fundamental to justify imposing the procedure on the state. In other words, the *Griffith* case itself demonstrates the Justices' constant concern with maintaining a proper balance between insuring fair procedures and leaving with the states independent responsibility for developing their own procedures. The many decisions in which the Court has resolved a difficult question in favor of the state demonstrate to me an unusual forbearance and judicial restraint in this area. Indeed, on a number of occasions the Court has allowed state procedure to stand that I personally would have held to violate due process—for example, its refusal to require counsel for indigents in non-capital cases.

I, for one, believe there is a real need and place for the discreet exercise of power in the Supreme Court to enforce fair standards of criminal procedure in state courts. I recommend the lecture by Justice Schaefer of the Illinois Supreme Court on *Federalism and State Criminal Procedure*, published in the November 1956 issue of *Harvard Law*

1. Here Dean Lockhart commented that the civil liberties aspect of the problem would be discussed by another panel member.

Review. He makes a very strong case for control over state criminal procedure by the United States Supreme Court. In addition to certain practical considerations that give to the Supreme Court a better perspective than the state courts, Justice Schaefer emphasizes that:

“Considerations of federalism . . . must be measured against the competing demands arising out of the relations of the United States to the rest of the world. The quality of a nation’s civilization can be largely measured by the methods it uses in enforcement of its criminal law. That measurement is not taken merely in retrospect by social historians of the future. It is taken from day to day by the peoples of the world, and to them the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States.”

Apart from the real need for some federal control over minimum procedural protections, it should not be overlooked that these procedural standards do not curtail the substantive legislative power of the state. The state still has the power to deal with its problems, but is simply required to do so by procedures that insure adequate safeguards to protect the rights of individuals.

My conclusion then is that in this broad field of federal-state relations the Supreme Court has acted in a very responsible manner in the past twenty years. Its record simply does not support the accusation by the Chief Justices that it has “too often” acted “without proper judicial restraint” in this area. In view of the pressures under which the Court operates, with a heavy case-load and far less time to study the cases than we on the sidelines have to examine them critically, there are bound to be occasional cases where we may believe the Court has not given careful enough consideration to the problem and should, perhaps, have exercised greater judicial restraint before taking action. But its record as a whole does not support the broadside type of attack made by the Chief Justices.

This does not mean that the Chief Justices’ comments can be lightly brushed aside. Even though their conclusions are not well supported by a fair examination of the Court’s actual performance, there is significance in the fact that the vast majority of the state Chief Justices gave their support to this report. This indicates a rather widespread opinion in judicial circles, both North and South, that there is need to urge the Supreme Court to exercise greater discretion and self-restraint in its policy-making roles in our federal system. So widespread an opinion cannot be wholly ignored by the Supreme Court Justices. While I think the report went too far when it accused the Court of “too often” adopting the “role of policy maker without proper judicial restraint,”

we cannot quarrel with emphasis in the report on the need for "careful moderation" and restraint in the exercise of the Court's policy-making role. I think all of the Justices appreciate this need for moderation and restraint, but there may be some value in a forceful reminder from such a representative group of the judiciary in this country.

Still, I would not like to see this report cause any major change in the course of decisions by the Court. In my opinion we are now going through one of the great periods in the history of the Supreme Court. Today the rights of the individual are in the ascendency. Today the Court is giving greater protection than ever before to basic individual liberties, and to procedures that protect the individual's rights. At the same time, the Court is throwing no road blocks in the way of governmental action designed to benefit the individual. When history writes its record of this period, my opinion is that the storm now raging around the Supreme Court will be only one little skirmish in an era in which the Supreme Court will emerge as one of the key factors in the creation of a better American democracy.