University of Pennsylvania
Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 94 JULY, 1946 No. 4

# HARLAN F. STONE*

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It is, indeed, an honor to be the "word-man" of this occasion. Largely unvoiced, running deeply in the inmost centers of our feelings, there is a felt tribute to this great man, who was a goodly one of us and is now a goodly memory. Numbered in this gathering are some who shared his student days, some who were students at his feet, some who were his colleagues on the Faculty of Law at Columbia, some who matched wits and skills with him in practice, some who knew him in person or afar as a member of our highest Court, some who shared the pleasures of his lighter moments and who experienced his good companionship. In all of us, variant as the character of our contacts with him have been, there wells the feeling of a desire to pay tribute. Whether known as fellow student, teacher, colleague, dean, lawyer, adversary, judge or man, he registered as the type of person who made the world through which he passed a better residence for man.

What is said here today can neither add to nor detract from his accomplishments. If, however, the distinguishing features of his greatness can be discerned, stress upon them may well stimulate emulation by those of us who are still in life. Thus his leadership will continue to benefit the profession and the country which he served.

The making of such an appraisal and stress is not an easy task. Each of us knew him in part only. So the knowledge of anyone needs generous supplement. You, as well as I, are greatly indebted to our many common friends who have endeavored to fill out my partial

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* This is the text of an address delivered at the last session of the American Law Institute.

picture of the Chief. To no one of these is more gratitude due than to his and my colleague, Noel T. Dowling. Unable to be here himself because of incomplete convalescence he has done his utmost to enable me to grasp the qualities, accomplishments and personal charm of the late Chief Justice of these United States.

In rethinking thirty-five years of intermittent personal contacts with this man, in recalling his writings and rereading some of his letters, in talking with others who experienced him in ways which I have not, I see three mountain peaks among the high qualities which characterized his life. These three made this man what he was. Stress upon them is our tribute to him. Emulation of them by us can continue his good leadership and assure him of that practical immortality which would have pleased him mightily. Thus the tribute of today in words, can become the more significant tribute of tomorrow's deeds.

What are these three mountain peaks?

*First* in my observation, and, perhaps, basic to his accomplishments, was his capacity for an intense oneness of purpose and devotion to the full performance of the duties which he had undertaken. When he was Dean of Columbia Law School, every fibre of his being and, so far as he could control it, every effort of his staff, was devoted to the upbuilding of that Law School and of its influence. One instance shows this attitude in an extreme form. Hessel Yntema, then of our Faculty, published one of his early and distinguished articles entitled the Lex Murdrorum in the *Harvard Law Review* of December 1922. When Stone saw this excellent product of Columbia, proudly displayed in a Harvard publication, he was for the moment sorely vexed. "That's the sort of thing I am devoting my *life* to prevent," he exclaimed. "Why should one of the best products of Columbia appear elsewhere than in the *Columbia Law Review*?" A narrow viewpoint say some of you, perhaps. But that singleness of devotion meant an intensity of thought, an ardor of work, a concentration of effort which assured results.

An interesting manifestation of the continuance of this loyalty to Columbia happened about a year ago. Throughout his years on the Court his clerks, with one single exception, have been selected from Columbia Law School graduates. On March 26th, 1945, he wrote a friend in these words: "On the second of March I rounded out my first twenty years on the Court, and the following evening all my clerks except Gardner, who is in France, and Morrisson, who is in England, assembled to give me a dinner. We had a very delightful evening, and to me one of the most impressive things about it was the uniform excellence of the men, and the great assistance they have all been to me

through the years. I honestly don't believe that there is any other law school in the country that could have done so well."

With the passage of the years this attitude found different opportunities for application. In less than eleven months as Attorney General of the United States he performed the Herculean task on the stables left by his predecessor. During his twenty-one years on the Supreme Court of the United States, this attitude constantly was manifested. During these past two decades there have been times at which, and persons by which, the Supreme Court has been thought of as an adjunct of the Executive Branch of the Government, its members being subject to draft for the execution of important extra-judicial tasks throughout the world. Constantly on jealous guard of its independence, the Chief was no little pleased that circumstances made it possible for him to take his oath, away from the observing eye of the Chief Executive, while still in the gorgeous, free open spaces of Estes Park. With equal constancy he declined all efforts to divert his energies to other enterprises, whether governmental, political or professional. Whether the enterprise involved so important an economic problem as the rubber industry, or so politically important a matter as the chairmanship of the United States Ballot Commission, or so challenging a problem of the future as the Chairmanship of the mixed commission on the control, development and use of atomic energy, or so professionally important a question as the training of lawyers in the presentation of constitutional questions his answer contained the same substance: "I have undertaken the job of Justice of the Supreme Court. That task deserves all I have to give. In fairness to it I cannot take on this other and extra-judicial task." Sometimes he added in the idea of the impropriety of dealing with matters which might later come before the Court for adjudication. Both of these ideas were incorporated in his response of November 22, 1943 to a courteous inquiry from Senator Vandenberg as to whether he would be willing to accept Senate designation in connection with the administration of the United States Ballot Commission.

In September, 1944, in another letter dealing with another request, he was even more explicit as to his viewpoint. Said he then:

> "I am doing all I can, by way of precept and example, to counteract the unfortunate tendency of Federal judges . . . to dilute their judicial influence and efficiency by engaging in extra-judicial activities.
>
> "Chance and fate have placed me at the head of a great institution which at the moment is in real danger of losing the proper influence and prestige. I think that everything I have should be devoted to avoiding such an unhappy possibility and so I am compelled to forego the opportunity to do many interesting things

which I would like to do; if obligations I have already assumed would permit."

The same substance was included in a letter written in the Fall of 1945 declining the chairmanship of a committee to study and to report upon the control, development and use of atomic energy.

Just as the microscope narrows the area of observation and simultaneously increases the knowledge of the area observed, so this single minded devotion to his assumed task by the Chief made certain a maximum effectiveness in the execution of that task. This quality preeminently possessed by Mr. Stone, is a quality diligently to be cultivated by each of us. Our best tribute to him will be our following of his example, both in the selection of a self-less task and in the giving thereto of all we have.

But that is only *one* of the three lofty mountain peaks among the characteristic qualities of this man. The second I am labelling "constructive statesmanship." I shall not bring to you the flood of illustrations of this quality which can be found in the history of his years as Dean of Columbia. I shall not recount the further evidence of its growth in the brief era spent on the reorganization of the office staff and work of the Attorney General. I shall confine the discussion of this point to the culminating manifestations of this quality in the work of the Chief with respect to the functions of his Court. Here we need to observe, first, his concept of the Court's function; second, his unique methods of approach to the process of decision; and lastly, the resultant constitutional structure evolved under his leadership.

The first act of the new Chief Justice on October 6, 1941, was to announce with profound sorrow the passing of Justice Brandeis. In speaking of his departed colleague, he stressed Brandeis' "ardent attachment to the highest interests of the court as the *implement of government under a written constitution.*" In those words are illustrated the wisdom of Goethe who said "man sees that which he carries in his heart." In those words one finds the root of the Chief's own work on and for the Court. The Court, as he viewed it, had the responsibility, constantly within the limits of conscious self-restraint, to interpose whenever necessary to prevent undesirable encroachment either by nation on states, by states on nation or by nation or state on individuals. A very few months ago Samuel Konefsky published his book on Chief Justice Stone and the Supreme Court. After examining the book the Chief Justice found himself embarrassed by what he called the author's "over-generousness to the subject of the book" but commented thus.

> "I gained the impression in hasty reading that the author had apprehended, with surprising accuracy, what I believe to be my

purposes in doing the judicial job. I wish many of those who are nearer at home had a like understanding."

Having this basic and clear-cut conception of the function of the court as the indispensable preserver of balance in the Federal system, the Chief Justice found useful the John Dewey philosophy of decisions based on the logic of consequences rather than a logic of antecedents. Each problem of a constitutional character must be so resolved that the consequences of the result reached will be good. In this attitude is found the reason for his early, and constantly reiterated, impatience with shibboleths, formulas, and labels. Law school work had convinced him of their inadequacy and of their potentialities of danger. *M'Culloch v. Maryland*[1] announced that the "power to tax is the power to destroy." Holmes had dissented from this view observing that the "power to tax is not the power to destroy *while this Court sits.*"[2] Stone joined in that dissent. Marshall had expressly chosen not to be "driven to the perplexing inquiry" which he characterized as "so unfit for the judicial department, *what degree* of taxation is the legitimate use and what degree may amount to the abuse of the power." Undismayed by this perplexity, unconvinced of the unfitness of the judicial inquiry, in *Metcalf and Eddy v. Mitchell,*[3] a year after he became a member of the Court, Stone insisted that the test of the lawfulness of a federal tax on a state employee is whether this national tax constitutes a *practical interference* with the functioning of the state in question. Facts must be searched for and used. A decision must be reached on their basis and a decision so reached can be applied to other facts only by a reconsideration of the results flowing from the differences of fact. In 1935 as he looked back over ten years of work on this methodology of facts in constitutional questions involving the balance between nation and state he said this:

> "It was very plain to me at the start that whichever end we started from, we would carry the thing, logically, to the destruction of the other [government]. And I tried to write it down in Metcalf v. Mitchell. That is, that somewhere a line has to be drawn empirically and this can be done only by looking very closely at the facts and seeing what the effect is in each case."

The constructive statesmanship of the Chief did not stop with a high ideal of the function of the Court, did not exhaust itself in the developing of a methodology of facts geared to a logic of consequences.

1. 4 Wheat. 316 (1819).
2. Panhandle Oil Co. v. Knox, 277 U. S. 218, 223 (1928).
3. 269 U. S. 514 (1926).

It produced important modifications and new emphases in the constitutional structure of our nation. The opinions of the Chief and their constitutional implications have been explored and explained, in the law reviews of the country. Perhaps the best of these are the 1936 and 1941 articles in the Columbia Law Review and an article which will appear in the issue of the Virginia Law Review now about to come from the press. It must suffice here to say that on the Chief's blueprint of constitutional problems, there were at least two great categories under each of which there were two major subdivisions. The first great category involved the distribution of power between Nation and States. This is necessarily subdivided into the problem of checking the Nation for the preservation of the functions of the separate states and the checking of the several states for the safeguarding of national interests.

On the first of these, the Chief went far towards liquidating the judicial function, holding, in many cases, that the enactments of Congress could validly curtail state power. The idea of lessening the need for judicial review by a reliance on political restraints to prevent abuse of legislative power appears first in the writings of the Chief Justice in a 1938 footnote. In discussing state legislation charged to be burdensome on interstate commerce he said:

> "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those *political restraints* which are normally exerted on legislation where it affects adversely some interests within the state." [4]

The basic idea of political restraints and the resultant proper decrease in judicial supervision was well expressed in a 1920 Australian case. The Australian Court there said:

> ". . . the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. When the people of Australia . . . 'united in a Federal Commonwealth' they took power to control, by ordinary constitutional means, any attempt on the part of the national parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia *as a whole* would ever proceed to injure the people of Australia *considered sectionally,* IT IS CERTAINLY WITHIN the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper." [5]

4. S. C. State Highway Dept. v. Barnwell Bros., 303 U. S. 177 (1938).
5. Engineers' Case, 28 Commonwealth L. R. 129 (1920).

Exactly this position was taken by Stone in *Helvering v. Gerhardt,*[6] which held, in effect that the Federal Congress had power to tax state employees because Congress included the representatives of all the states and so Congressional action was safeguarded by the political reactions of its electorate and needed no judicial supervision for the protection of the states. This theory would justify a completely free hand in Congress for the regulation of commerce. The Chief Justice in 1941 wrote the opinion in *United States v. Darby Lumber Co.,*[7] sustaining the Fair Labor Standards Act. The practical effect of this decision is that the regulation of commerce is a matter "for the legislative judgment [of Congress] upon the exercise of which the Constitution places no restriction and over which the courts are given no control." The *Wickard v. Filburn* decision[8] of 1942 pushed this viewpoint to an extreme. The Chief Justice concurred but the opinion was by Mr. Justice Jackson. This decision established the competence of Congress to impose its regulation on a single farmer in respect to the amount of wheat grown on his own farm solely for consumption there. The Court says, in effect, this is not for *us* to stop. If you, the Public, do not like it *you* must change *Congress* through the exercise of the ballot. The responsibility of Congress has been thus greatly increased. This viewpoint has elicited such acceptance by some of the other Justices of the Court that in *State of New York v. United States,* decided January 14, 1946,[9] the Chief Justice felt it necessary to voice a note of caution. Concurring with the majority in finding valid a federal tax on the bottling of Saratoga Mineral Waters by the State of New York he,—and three Justices were with him—said:

> "we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on *every* class of property and activities of States and individuals alike."

This caution accords with the Chief's distrust of solution by formula or by broad generalization. How much, if at all, it marked a growing doubt of the doctrine of the sufficiency of political restraints can now never be known. Clear it is that Mr. Stone exerted strong and effective influence in the direction of minimizing judicial interference with Congressional action claimed to infringe the power of the separate states.

On the second aspect of the distribution of power between Nation and the States, namely, the checking of the States for the safeguarding of

6. 304 U. S. 405 (1938).
7. 312 U. S. 100 (1941).
8. 317 U. S. 111 (1942).
9. 66 S. Ct. 310 (1946).

national interests, the Chief Justice fought a long and difficult battle for the retention by the Court of a substantial supervisory jurisdiction. Justices Black and Douglas consistently have urged that the Court's function is restricted, in this type of case, to State legislation constituting a *discrimination* against interstate commerce. An Arizona statute prohibited the operation of trains having more than fourteen passenger or seventy freight cars. This was not a statute which *discriminated* against interstate commerce. The Chief searched the record of facts to determine whether the statute promoted or hampered an "adequate, economical and efficient railway transportation system." Concluding that its effect was bad, he wrote the 1945 majority opinion in *Southern Pac. Co. v. Arizona,*[10] holding the statute not enforceable as against interstate commerce. Thus the Court still has a substantial responsibility for the safeguarding of national interests against the embarrassments of State legislation.

So with respect to the distribution of power as between Nation and States, the central government has been greatly strengthened under the Court's leadership by the Chief. The judicial scrutiny of Congressional acts claimed to derogate from state powers has been diminished almost —if not quite—to zero, and those who dislike such legislation have been remitted to political channels for remedy. Simultaneously the Court has made clear its intent to supervise state legislation adversely affecting national interests.

The second great category of constitutional problems—as seen by the Chief Justice—concerned the checking of governmental action—whether by nation or by state—which affected adversely individual interests. In his thinking this category was subdivided into, first, types of action affecting the *economic* interests of individuals and, second, types of action affecting civil liberties or matters of the mind. With respect to the economic interests of individuals the Chief *again* fought long and successfully to narrow the function of the Court with respect to the supervision of the legislative action, and to prevent the Court from assuming to act as a superlegislature. His dissents in the *Tyson* and *Ribnik* cases found fruition in the 1934 opinion of Justice Roberts in the *Nebbia* case [11] which sustained milk price control in the State of New York and the 1941 decision of *Olsen v. Nebraska* [12] which sustained the State power to regulate the fees charged by its employment agencies. These freedoms of State legislation from judicial destruction are reasonable corollaries of his faith in political restraints.

10. 325 U. S. 761 (1945).
11. Nebbia v. N. Y., 291 U. S. 502 (1934).
12. 313 U. S. 236 (1941).

As early as 1938 in a footnote to the opinion of *United States v. Carolene Products Co.*[13] the Chief laid new emphasis on the court's function in certain types of due process cases. Pointing out that there may well be a narrower scope for the presumption of constitutionality with respect to subjects outside the commercial field, he observed that it

> "is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

*If* political restraints are to be accorded reliance as factors in government, lessening the judicial control of legislation, then the freedom to participate in electoral processes, the freedom of the market place of the mind, the freedoms of minorities, must be jealously guarded. The safeguarding of a full and free vote accounts for *Smith v. Allwright* in 1944 [opinion for majority, including Stone, written by Mr. Justice Reed,[14]] dealing with the exclusion of Negroes from the Texas Democratic primary, and overuling the 1935 decision of *Grovey v. Townsend.*[15] The sole dissent of the Chief in 1940 in the *Gobitis* case[16] concerning Jehovah's Witnesses became three years later the majority opinion in *West Virginia State Board of Education v. Barnette.*[17] In this field, again the Chief felt it incumbent upon him to endeavor to restrain the enthusiasm of his brethren for a generalization. In *Marsh v. Alabama,* decided January 7, 1946,[18] he dissented (with Justices Burton and Reed) from what seemed to him too extreme a protection of the liberty of the mind.

In appraising the new ingredients of our constitutional structure attributable to the work of this man, we find his insistence on self-restraint in the exercise of the judicial function and his insistence on continued judicial scrutiny of certain types of legislation *both* alike qualified by his methodology of facts geared to a logic of consequences. Stop court supervision of Congressional legislation affecting state powers, and of legislation, both national and state, affecting the economic interests of individuals, *almost* always but *not* if examination of the facts and consequences shows the need for intervention. Exercise judicial scrutiny of state legislation affecting national interests whenever the examination of the facts and consequences shows injury to

13. 304 U. S. 144 (1938).
14. 321 U. S. 649 (1944).
15. 295 U. S. 45 (1935).
16. 310 U. S. 586 (1940).
17. 319 U. S. 624 (1943).
18. 66 S. Ct. 276 (1946).

the national interests. Exercise judicial scrutiny of legislation, both national and state, affecting the "liberty of the mind" of individuals, unless the specific facts and consequences of the particular case are too extreme. Throughout the whole ambit of constitutional problems it is thus the view of the Chief Justice that the Court, never intrusive, often given to rigorous self-restraint is still the indispensable implement of government, available when the need for its interposition can be shown to exist. The existence of that need is determined by close attention to facts and consequences in each case. His addition to the Constitutional structure of these United States has been evolved in accordance with the best of the common law traditions.

But there is a third mountain peak among the high qualities of this man. It is difficult to describe. Perhaps it can be named as "superlative humanity." Under this I gather together, his enjoyment of food, his love for good wine, his happiness in the meeting of his friends, his abundant humor, his love of beauty, his helpfulness to others, his constant readiness to see and to talk to anyone who sought his ear, his tolerance of all, his simplicity and lack of affectation, the twinkle in his eye, the lovableness of the whole. I put this last becuse I think it greatest. No quality of will or intellect is equal to this aggregate of the soul. I leave it unillustrated, because his life was its constant exemplification. No one who knew him, even slightly, would require proof.

And so, my friends, to this man, strong in the will of purpose and in his devotion to the execution of his assumed duties, outstanding in his intellectual contributions to the ideals, the methodology and the product of our greatest court, superlative in the qualities of his soul, we bring our words of tribute. Tomorrow and tomorrow may we singly and silently bring him the tribute of our lives made better and more useful by his example.