

12-1933

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Recommended Citation

Wilkerson, J. S. (1933) "The Lawyers' Part in Preserving Individual Liberty," *Indiana Law Journal*: Vol. 9: Iss. 3, Article 3.
Available at: <http://www.repository.law.indiana.edu/ilj/vol9/iss3/3>

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THE LAWYERS' PART IN PRESERVING INDIVIDUAL LIBERTY*

By J. S. WILKERSON**

The subject to which I invite your attention this morning represents opinions which have been gradually shaping themselves in my mind. For nearly twenty years I have been watching at close range the work of our government. I have seen the gradual growth of tendencies which I believe seriously threaten our democracy. What I have to say is not a criticism of either individuals or parties. Those tendencies have been the outgrowth of social and industrial forces. Many patriotic men and women in their zeal in what they have believed to be good causes have contributed unwittingly to their growth. They have manifested themselves in such legislation as certain features of the interstate commerce and anti-trust laws, the income tax laws, the white slave and prohibition laws, in regulatory laws for food, agriculture, boards of trade, stock yards and in scores of other fields. They are emphasized in some of the recovery measures recently enacted by the Congress. They have grown to such an extent that we must look at them not from the standpoint of remedying a particular evil or obtaining a temporary benefit. We must look at them from the standpoint of the ultimate effect upon our system of government. The time is at hand when the lawyers of the country are called upon to render as important a service as that rendered by the great group which laid out our plan of government and devised our constitution.

Almost a century ago, a young Frenchman, DeToqueville, in his *Democracy in America* made a searching analysis of our institutions. In one of its chapters he deals with the duty and responsibility resting upon the lawyers of America. In America, he points out, we rely for the protection of rights and liberties upon a government of checks and balances under a written con-

* Delivered before the Indiana State Bar Association at Lake Wawasee July 7, 1933.

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stitution. The liberty of the individual is protected against arbitrary and unwarranted encroachments by a wise distribution of the power of government. The state governments which have authority in matters of local concern are protected against interference by the national government except in specific national fields as to which authority is conferred by the constitution. In both state and national governments power is distributed among legislative, executive and judicial departments, each acting as a check upon the others. In this way liberty is guarded against the excesses of dictatorial tyranny, as well as against the tyranny of legislators who seek to overthrow fundamental rights to serve the will of a temporary majority. DeToqueville emphasizes that, in such a government, the conservation of individual liberty, is, to a large degree, in the hands of those whose life work is the study and practice of the law; and that the preservation of American free institutions against innovations for selfish purposes, against destruction of individual rights in the name of reform, against class clamor and mob rule, depends upon the fidelity with which the lawyers of America accept their responsibility and perform their duty.

It may seem out of order, in the era of philosophers and economists for a mere lawyer to venture to express an opinion upon government. My excuse for so doing is that the study of the development of our system of laws from the standpoint of the lawyer has convinced me that our philosophers and economists, for whom in their proper place we have the highest esteem, have overlooked the most important factor in the whole problem. They try to reduce the problems of government to formulae and equations. They would determine the merits of regulatory laws by mathematical computation of the gains to be derived through organization. They have forgotten the human factor. They have overlooked the spirit of personal liberty which fought its way upward through the dark centuries in Britain, in France, in Germany, and in the Scandinavian countries. That spirit was transplanted in the colonies. Our constitution was devised to preserve it. So long as we remain Americans, that spirit will live. A civilization, with the individual reduced to the status of a card-index automaton, with industry under militaristic discipline, with initiative and ambition destroyed, is unthinkable so long as the old ideals of liberty survive.

In speaking to lawyers, some things must be taken as axiomatic. Governments, we know from a study of the development

of law, really embody the thought of a people. We are not free merely because we have constitutions, bills of rights and popular elections. In a despotism as well as in a republic, the government will not last when it ceases to represent the people's conception of what their government should be. Different civilizations have represented different conceptions of the relation of the individual to government. Some have represented complete domination of the individual by the state. Others have represented undue individual license. The one has ended in despotism; the other in anarchy. Our civilization represents a different conception. Right or wrong, it is our idea. It is the heart of our institutions. When it changes, our civilization will change. It is the old Anglo-Saxon idea, handed down from generation to generation of self-determination under law. It gives to individual effort the widest scope compatible with recognition of equal rights in others. It demands industrial freedom. It is the antithesis of a government controlled industry. It tolerates neither industrial slaves nor industrial soldiers. This idea of liberty under law, of equality of right before the law, is the creative force which animates all of our institutions. Edmund Burke said: "The restraints on men, as well as their liberties, are to be reckoned among their rights." Our government, if it is to endure, must square with this basic force, with this elemental idea of our race.

I think that I may assume another thing. As lawyers who have studied the origin of our constitution and the development of our government under it, we believe that our plan of government is the best that has been devised for fostering and protecting the spirit of individual liberty. We agree, I am sure, that we have not outgrown the constitution. We believe that the preservation of our freedom requires that the division and limitation of the powers of government be maintained substantially as laid out by the framers of the constitution. I do not attempt to defend this proposition any more than I attempt to defend our civilization. If I am wrong in this then I am wrong in everything which follows. If I am right in this, then the supreme duty and responsibility of the lawyers of America is to withstand the forces of reaction which would subvert and destroy the spirit of the constitution.

This is a critical period in our history. Our institutions are being subjected to the severest test since the Civil War. The industrial changes produced by machinery, the appalling de-

struction of the World War and the panic and distress caused by the collapse of inflation after the war have produced problems of the greatest intricacy and difficulty. We are striving earnestly to repair the injury inflicted by the disaster which has overtaken us, to rebuild industry and to find employment for millions out of work. As we contemplate many of the economic proposals of today we find that we must answer this question: Are the old ideas of individual liberty and private property and human rights to survive? Or under the form of the republic are we to have new conceptions of the control of industry and the distribution of property?

Let us look at this situation as lawyers and not as partisans. Let us approach it with the lawyer's view that there can be no permanent relief or genuine progress in any thing which involves a departure from the basic ideas underlying our plan of government. Let us keep in mind that material prosperity is dearly bought if it is at the sacrifice of individual freedom; and that industrial reorganization which is attained by striking down the constitutional limitations upon power, erected as barriers against tyranny in whatever form it may assert itself, will prove to be a delusion and a snare. Let us not forget the lesson of history that the benevolent assumption of unwarranted power, deemed expedient in times of public danger, may become the precedent for aspiring dictators, whose motives are selfish and not benevolent.

It is from this point of view that I wish to emphasize some essentials in our plan of government, designed to perpetuate individual liberty, which in times like these must be kept constantly in mind.

One of the essential features of our system is the division of power between the state and national governments. The dangers of concentration of power in a central government far removed from those over whose acts it exercises control are apparent. Government by functionaries operating at a distance has always been abhorrent to a free people. Home rule, as far as compatible with the safety and welfare of the nation, has been the essence of our liberty. The framers of the constitution realized this and limited the central government to powers essentially national, which were specifically enumerated. That there should be no room for doubt, those who feared the encroachments of centralized power, led by Jefferson, added the tenth amendment, which provided, in terms, that the powers not

delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively or to the people.

In the early days, the real danger was that the national government would not be strong enough, and that the union would go to pieces. Since the Civil War there has been a gradual drift of authority away from the states to the national government. Today the danger is that the government will be centralized in a bureaucracy in Washington and that the spirit of individual initiative and self-help essential in a true democracy will be crushed out. This drift has been gradual and has been strictly nonpartisan. To appreciate it we need only to call the roll of the bureaus and departments and list the increasing multitude of ways in which the national government is attempting to regulate the lives and business affairs of the citizen. The example of prohibition seems to have had little effect. Notwithstanding this demonstration of the dangers and difficulties inherent in attempts to centralize control over local customs or business, the drift toward consolidation goes on. As I am writing this, I read from an address delivered in Chicago by a prominent college economist the following: "All essential powers needed to put economic planning and control into effect must be taken from the states and given to the nation. These would seem to include all control over banking, insurance, credit, transportation and communication, social insurance, the creation of corporations, the regulation of utilities, the major highways, automobile licensing, all control of labor, prices, production and profits and finally taxation, with the exception of real estate."

Of course, the constitution, as it has been uniformly construed by the Supreme Court for more than 130 years stands in the way of any such centralization of power. The Court has repeatedly pointed out the limitations in the power to regulate commerce. "The grant of power to Congress over the subject of interstate commerce," it said, "was to enable it to regulate such commerce and not to give it authority to control the states in their exercise of police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution." And again: "If Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters

may be eliminated, and thus our system of government be practically destroyed."

My appeal, however, is not on constitutional grounds alone. If the constitution is wrong, it can be changed. And decisions of the Supreme Court have been overruled. My appeal is on grounds that are fundamental, if this republic is to endure. The destruction of the states or their reduction to mere departments of the general government would be fatal to individual liberty and to democracy. The drift toward consolidation must be checked. The state governments must be strengthened and reformed and made to resume their true place in our constitutional system. We must be on guard lest power temporarily conferred on the national government that it may carry on war or deal adequately with a great national emergency is not perpetuated after the necessity for its exercise has passed. One great task of the last century was to save the nation. It will be the task of this century to protect the states from destruction in order that an economic machine may be erected on their ruins.

Another element of our system, essential to liberty, is the maintenance of the proper division of power among the three departments of government. It is not necessary among lawyers to dwell upon the evil effect of infirmity in either the legislative, executive or judicial branch. In other times executive weakness has imperiled the Union. Today the danger is in the undue surrender by the legislative branch of law-making authority to the executive. Since the beginning of the century, national concentration of power and executive dominance have marched forward hand in hand. In our national government, Congress has practically a free hand in passing over to executive bureaus, the details of legislation. It may prescribe a general standard and leave to departmental rules the particulars which are to be enforced. If we will but read the arguments of those who devised our constitution we will appreciate that government by bureaucratic proclamation and regulation has gone far beyond all reasonable limits. When the present emergency shall have passed, one of the most important tasks will be to rehabilitate the Congress as a real law-making body. The remarkable delegation of power to the Executive in the present crisis is defensible solely upon the ground that it is not to be taken as a precedent by those economists who seek to put the industry of the country permanently under bureaucratic dictation.

The elements of our constitutional system which I have emphasized are in the field of general politics. But, in all matters

relating to the constitution, the people have the right to look to our profession for leadership. I come now to the field which touches more closely the daily routine of our work—the independence and efficiency of the judicial department.

As preliminary to that let us pause for a moment and reflect upon the guaranties of liberty embodied in the constitution. We recall that the original constitution did not contain specific securities for personal liberty. So strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied by implication, that when the constitution was proposed for adoption it encountered severe opposition. It was Jefferson who led the movement for the first ten amendments, and but for the belief that the constitution would be so amended as to embrace them, it would never have been ratified. It is those amendments which, if enforced, shield individual effort and private property against the aggressions of centralized authority. Speaking of them, the Supreme Court in a famous case decided shortly after the close of the Civil War, said:

“Time has proven the discernment of our ancestors: for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional law would be in peril unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy and despotism.”

The chief function of our profession in the preservation of individual liberty is found in the maintenance of the independence and efficiency of the courts. In times like those through which we are passing, the Courts are put to their severest test. The preservation of equality of right before the law, under

popular government, depends upon the impartial, fearless and effective administration of justice. If the Courts fail, if law is not respected, if life and liberty and prosperity are not protected, the forms of popular government are a travesty. Of what value are bills of rights, constitutions, elections, universal suffrage, if the government fails in those things upon which the existence of our civilization depends. Are our courts adequately performing their part? Are they efficient agencies for enforcing law and protecting rights?

Candor compels us to say that the verdict of those who are studying and analyzing the administration of justice in this country is against us. They cite the increase of crime and the growth of disrespect for law. They point to the looseness and length of our trials and to the latitude accorded to demagogues of the bar, with the resulting miscarriages of justice. They point to justice thwarted by technicalities and delayed by long and laborious appeals on frivolous grounds. They point to thousands upon thousands of volumes of so-called authorities, in which in some one of the forty-eight states precedent can be found for almost every legal vagary under the sun. They point to the confusion resulting from conflicting decisions upon which there should be one rule for the entire nation. And they ask, can this plan of government set up under our constitution endure unless the courts are so reformed and strengthened that they are equal to the performance of their part in our plan of government?

If we examine the forces which have been effective in impairing the morale of our courts I think we will agree in the end upon two things. First: The courts have merely reflected the evil effect of the machine age upon the legal profession. Second: Legislation and reform in legal procedure will not restore the efficiency of the courts as agencies of justice unless there is a return by the lawyers of America to the old standards of professional service and public duty.

The industrial revolution resulting from steam and electricity brought in the era of gigantic corporations and combinations. There was the growth of great private fortunes. There was wealth on a scale of which the world had never dreamed. Laws enacted to curb the concentration of wealth were ruthlessly swept aside. The pursuit of money, the power of money, the dominance of the rich became the controlling force in the new industrial order. If we would seek the beginnings of the existing disrespect for law we must go back of prohibition or the

World war. We must go back to the days of the strong men who defied law to build up the great combinations and amass vast fortunes. From their example has come the popular belief that there is one law for the rich and another the poor and that courts are impotent against the encroachments of lawless wealth.

Aside from the general effect of the new spirit of the mechanical age upon our profession and the courts, I would emphasize one change in particular which has been brought about. For centuries the highest form of legal service was the presentation of causes in courts. From the ranks of lawyers trained in the art of simple, concise and forceful presentation came the judges. Such a combination of bench and bar commanded public respect and confidence.

With the new era came a new species of lawyer. He held a commission to practice law. He was an officer of the court. He owed a duty to the bench and the bar and the public as such. Actually he was a promoter, an organizer, a business director. The great financial rewards for this kind of legal service attracted much of the best talent of the bar. I do not dwell upon this. We know how many lawyers of great ability there are who decline to give their time to the trial of cases or to accept service on the bench because they say that they cannot afford it. The withdrawal of these lawyers of great ability from active court work either on the bench or at the bar is one of the chief causes of the impairment of the efficiency of the courts in dealing with the present condition of disrespect for law and of weakness in the enforcement of law.

I shall not stop to analyze the many excuses which are given for the decline of the courts as agencies of justice nor to examine the many reforms which are proposed as remedies. I shall stick to my central thought, the part of our profession in preserving liberty. And that thought leads to this. Responsibility for the condition of the courts rests squarely upon our profession. Judges alone do not determine the character of courts. Water cannot rise higher than its source. Courageous, able and independent courts are always sustained by a strong, virile, and high-minded bar. If courts are weak, vacillating and ineffective, you will find around them a selfish, mercenary and unprincipled bar. There is but one way in which respect for law and for the courts can be restored. The lawyers of America must undo the effects of fifty years of their own desertion and neglect. They must regain the old conception of their duty to those from whom they have received their commissions as public

officers. The law business must give place to the legal profession. There must be kindled anew an appreciation of the vital importance of our courts in our plan of government. That great body of our profession whose activities have been withdrawn from the courts must take a new interest in raising the standard of the courts. And above all, the officers of the court must surround them and protect and defend them in the performance of their duties. When it is necessary to protect liberty and property against wrongful invasions of right, the courts can not stand up and perform the duties with which they are charged unless they have the militant support of the bar. In short, the lawyers' part in preserving individual liberty, in my judgment, is to stand by the constitution and to strengthen and sustain the courts.

There are those who delight to characterize as ultra legalistic arguments in defense of constitutional rights. In the name of social justice, they arrogate to themselves the description of liberalism in the law. I challenge the right of those who would strike down constitutional guaranties in the interest of economic experiment to name themselves liberals or progressives. All true Americans are for justice in society. But even though the road is rough and dangerous, social justice in a democracy must be achieved according to the principles of democracy. Anything founded upon destruction of individual liberty or the rights of contract and property is not social justice. Social justice cannot be achieved through combinations of powerful organized minorities to advance their own interests, if the welfare of the great unorganized majority is forgotten. Social justice will never take, directly or indirectly, private property for public use without rendering just compensation. A well devised machine for distributing the fruits of modern invention may produce pleasing results for the moment, but unless it preserves the spirit of initiative, self-help and individual ambition, it will grind its inventors to pieces and destroy the republic. It is the history of the world that the benevolent dictator frequently becomes the selfish despot. Many of those today who honestly believe that they represent the forces of liberalism and progress are really the world's worst reactionaries. Economic technique is not sufficient to save for the nation the benefits of modern invention. There can be no progress in this democracy which involves a surrender of individual liberty, protected by the constitution.

The new liberals assert that science has destroyed individualism and brought in an era of collectivism. Invention, they say, has made organization on a large scale necessary and the welfare of society demands that this organization be brought under government discipline and control. Its doctrine is, I submit, erroneous in both respects. Invention has not destroyed individualism. Steam and electricity cannot change the basic fabric of our race. Science will either bring itself into harmony with human nature or the new order founded on it will go the way of everything else which has clashed with that deep instinct which has swept on in the march toward freedom.

Nor does organization necessarily mean that industrial activity must be placed in a government strait-jacket for the welfare of society. The problems of co-operation can be worked out under the constitutional guaranties of liberty. There will be times which try men's souls. Whatever the cost may be, we must save the right of the individual to work out his own career, in an open field, free and fair, under the doctrine of equal rights for all and special privileges for none. The infirmity of government control is the infirmity of human nature. Consider the absurd and farcical brain tests, by which the professors classify in the rank of genius many who prove to be the veriest dunces when confronted by the problems of actual life. Then imagine a society in which a man's place in the world depends not upon his own demonstrated worth, but upon the ukase of a Commisar or the fiat of a commission. I cannot think that to get the benefits of science and invention we must give up the liberty for which we have been struggling through the centuries. I refuse to believe that science has destroyed civilization.

If defense of constitutional rights is legalism, then the contest of today is between the legalist and the doctrinaire. On the one side liberty and property; the constitution and the courts. On the other side, the destruction of the states, the centralization of power, the subjection of individual effort to the tyranny of an economic machine.

And, as I said at the outset, the history of this century depends largely upon the fidelity with which the lawyers of America stand by principles, the importance of which they, above all others, understand.

INDIANA LAW JOURNAL

Published Monthly, October to June, inclusive, by The Indiana State Bar Association

EXECUTIVE OFFICE, 817 UNION TITLE BUILDING,
INDIANAPOLIS, INDIANA
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE, \$3.00 A YEAR SINGLE COPIES, 50 CENTS
Canadian Subscription Price is \$3.50; Foreign, \$4.00

Subscription price to individuals, not members of the Indiana State Bar Association, \$3.00 a year; to those who are members of the association the price is \$1.50, and is included in their annual dues, \$7.00.

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