SPEECH

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THE LIVING LAW

Law, the governmentally enforceable rules controlling the relations of man with his fellows, necessarily changes with the evolution of society. Where law rules tranquillity dwells.

Throughout history legal institutions have developed to meet the new situations. Law is a vital, changing force. The bar, the courts, the administrative bodies, the legislative assemblies, and particularly the law schools face the necessity of conducting their activities with not only an understanding of the law of the present but also with an appreciation of the impending adjustments.

Changes in our law during the last half of the twentieth century will come, as they usually have, more from our experiences with the practical effectiveness of existing law than from major alterations in our political or social institutions. How great are the differences that may evolve! How great may be their effect on our nation's life may be appreciated by recalling the rapid movement of the law since the first Roosevelt. Juristic changes have been as momentous as those in science and the arts. In those years we have traversed a boundary of legal history, passing from where the functions of government were limited largely to the maintenance of order and the enforcement of contracts to where government has

had put upon it the far heavier burden of providing the means and opportunity for all its citizens to improve their condititon materially and socially. For the foreseeable future, our legal institutions will adjust to this later concept of government subject to the overriding necessities of national security.

In the fifty years from the Theodore Roosevelt to the Eisenhower administration we have enacted the Income Tax, the Federal Reserve System, the Agricultural Adjustment Acts, the Labor Relations Acts, the Social Security Acts, cooperated with other nations in systematizing the law of aviation, patents and copyrights, and ratified the Charter of the United Nations with the statute of the International Court of Justice.[1] Workmen's compensation has become a commonplace. National security has assumed predominant importance. The adoption of these legal institutions and interests has shifted the main course of legal development from a prohibition of evils to a positive support of human welfare. Would that some exceptionally talented jurist, neither judge nor advocate but with extrasensory perception, could foreshadow accurately our likely future in legal problems. Such foreknowledge could enable us to support or attack the proposals. These recent changes remind us that their evolution will continue. The interpretations and the statutes of the last half of the twentieth century are obviously of major importance to our immediate future. My generation has learned that society, as we know it, can end. The present status of the law will not continue. Experience will compel modifications to meet new conditions. Changes will continue and our successors will find continued modifications necessary to meet the needs of society.

These changes in the law have followed equally important changes in the American economic and social culture. Growing scientific knowledge and a genius for business administration multiplied production. Increasing urbanization and industrialization brought concentrations of

population and economic power. Transportation and communication multiplied human contacts and the growing press furthered interchange of ideas. Universal education brought knowledge of problems and needs of groups or communities to all. Capital, management and labor struggled for a greater share of the results of American productivity, sometimes fairly, sometimes unfairly. Hard times intensified clashes. Universal suffrage gave an opportunity for each to become an antagonist or proponent of the changes in the law that were expected to further that individual's interest, or that of a particular community, or the Nation. First inquiry, then experiment, then experience, showed there were ways by which changes in the laws could improve conditions in general. Social changes brought the legislation and decisions that were needed to readjust the law to the new circumstances, not the reverse. These legal changes sprang from necessity. They were inevitable. Legislators and judges may have deferred or accelerated the pace of development, but conditions forced adjustments. The general acceptance of the shift of emphasis from prohibition of unlawful acts to welfare supports that statement.

A decision in the Gold Clause case [2] that pre-existing contracts for payment of gold coin were outside the broad power of Congress to regulate the currency would have threatened bankruptcy to debtors with gold obligations and legal tender income. If lack of constitutional power had barred settlement of industrial disputes through such measures as the National Labor Relations Act or the Taft-Hartley Act, our economy would probably not be as well adjusted as it is today.

When we observe the effect of these recent federal enactments on our Federation, the increased exercise of power in the National Government is plain, but is the power to legislate any greater now than when the great cases defined the Supremacy Clause and the Necessary and Proper Clause of the Constitution? [3] I think not.

As long as members of Congress hold state commissions, there will be no serious impairment of state sovereignty. It is not necessary for it to exercise all admitted constitutional legislative power.[4]

Congress has found need for legislation that does minimize the necessity of the exercise of state power in some fields. Authority for such legislation under the General Welfare Clause was established by the decision and opinion of the Supreme Court in the *Hoosac Mills* case.[5] This furnished a constitutional basis for the Social Security Acts.[6] The *Shreveport* case of 1913[7] upheld the power of Congress over intrastate matters affecting interstate commerce. This principle was the constitutional authority for the National Labor Relations Act, the Securities and Exchange Act, and the Wage and Hour Act. Thus it was possible to have the States and the Nation cooperate in furthering opportunities for all as citizens of both sovereignties.

It is true that some of this legislation arose from interpretations of the Constitution that might not have commanded the approval of earlier generations under the conditions of their time. Ours is a written Constitution, adopted to lay down principles of government and to mark the limits of federal power. Foresight could not be so accurate or words so definitive as to assure no disagreement as to the application or construction of the Constitution. So there evolved our American doctrine of judicial determination of constitutionality, a doctrine that has commended itself to other nations with written constitutions. The most recent comparable instance is the Constitutional Council of Title VII of the new Constitution of the French Republic.

While the power to declare state and federal laws unconstitutional when violative of the Federal Constitution is nowhere expressly granted to the federal courts, the expressions in the Constitutional Convention, the explanations in the Federalist, the early and continuous line of decisions by men familiar with the purposes of the

Founders, and the almost universal acceptance of the necessity for an arbiter have settled the question of judicial review for constitutional issues. The alternative is final determination of compliance with constitutional mandates by Congress or by the Executive. Since both of these arms of government have the power to initiate governmental action and to originate public measures in the heat of political conflicts and the height of popular discontent, the judiciary, which can only interpret and condemn after public hearing with reasoned decision, and which is without affirmative power to enact or administer, has been accepted as the arbiter of disputed issues of federal constitutional law.

While certainty as to the meaning of our Constitution is most desirable where grants of powers are in general terms, construction must continue as new situations arise. Chief Justice Hughes, in a memorable opinion for the Court in the 1933 Term, phrased it thus:

> "If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." [8]

Long ago Justice Holmes wrote, no "system of delusive exactness" can be extracted from the Fourteenth Amendment.[9] Justice Brandeis in 1931 and Justice Jackson in 1942 listed numerous cases where the Supreme Court had overruled its earlier constitutional decisions.[10] It would not be practicable to adopt a rule that a judicial interpretation of the Constitution by the Supreme Court could not be modified by a later decision; that such a change could come only by constitutional amendment. The power of the dead over the living would be too far extended. In the light of experience, changes in the application of the Constitution will continue by amendments, new statutes and differentiating decisions.

While my discussion has drawn from federal law for illustrations, the deductions are applicable to state court decisions. The law of the State, except for the limited influence of the Napoleonic Code, is built on the same foundation, governed by the Federal Constitution, and administered by men trained in the same tradition. The duty to see that the law is kept abreast of conditions rests alike upon the Courts, the Bar, and the Legislative Bodies of our dual sovereignties.

These changes in our legal institutions, using the word as covering all phases of law as an "institution," pertain largely to that business of the courts which is usually classified as public. But even in the domain of private law—interpretation of instruments, marriage relations, criminal prosecutions, bankruptcy—there are innovations. Compare the *Williams* cases from North Carolina,[11] pertaining to the effect of a divorce decree in a state not the matrimonial domicile, and *Erie Railroad* v. *Tompkins*,[12] where the law of the courts of the state of trial, rather than federal law, was held to govern. As law is an integral part of our composite society, its changes affect all elements. Fortunately, our essential underlying principles are accepted by all. Law, no matter what changes occur, is directed at maintaining the separation of powers, the sovereignty of the states, law and order, due process of law, equal protection and opportunity, freedom of speech, press and religion, national safety, and other such fundamentals of human relations, so that men may dwell quietly in their habitations. None contests the purpose of such changes, but many and divergent are the roads that are traveled in search for the goals.

Difficulties arise in applying these principles. Agencies for administration of government may go beyond the granted powers. Judicial review of such action is granted in some instances by legislative enactment.[13] In others judicial review is necessary or the citizen may be deprived of rights.[14] Even an Executive Order may be beyond the President's constitutional power.[15] Acts of

sovereign states must meet all federal constitutional tests. In a great majority of cases, judicial review that fails to carry out legislative intention can be readily corrected by redrafting. Congress continuously does this so that the wishes of the legislative body prevail.[16] This power, except for unavoidable constitutional bars, added to the natural deference that the judiciary properly pays to the legislatures as the chief source of our modern legal codes, enables the various legislatures to attain their purposes.[17]

We have been talking of the past. Other developments of the same character must be anticipated in planning for the future. While we may expect the elimination of pitfalls in procedural and substantive law and a continuation of our improved legislative draftsmanship, governmental regulations will necessarily be more rather than less complex. Legislation will grow. More people will be affected in more phases of their life. Lawyers must foresee and prepare for such changes.

The legislatures early realized that many fields of activity—*e. g.*, carriers, communications, power, atomic energy, labor management relations, securities—were each *sui generis* and could not be adequately regulated by *ad hoc* congressional enactments alone. Such activities become so enmeshed in the daily life of the Nation that their starting or stopping, or other activities, could not be left as a matter of individual choice of the private owners. Wholly unregulated public utilities today would be anachronous.

This administrative law development will doubtless continue to expand. The states individually and the federal government in certain interstate commerce matters will probably be compelled to adopt some kind of accident compensation system to assure that the victims of accidental injuries, caused by private parties, with or without negligence, will receive fair payment for their loss of earning capacity. The experience of the United States with its Federal Tort Claims Act is a pioneer effort that may show whether payments should be such amounts as

a jury may fix or whether a fair scale should be adopted. It is time for the hit or miss, delaying, litigation-breeding negligence laws of today to be revised. A more vigorous use of criminal penalties against careless tort-feasors will help, too.

We may well see soon in another field an extension of administrative law. A business under able management needs opportunity to expand both in its own interest and that of the Country. On the other hand, our Nation is dedicated to free enterprise. That system has blocked socialism and socialism's reach for power in the state to determine the destinies of communities and individuals. We have long believed, and there is not the slightest tendency to depart from that conviction, that the foundation of such a desideratum as a free economy is open competition. It is crystal clear from our legislation and our convictions that competition is the authentic rule for American business. But business is often confronted with the problems of uniform industry prices, of action through trade associations on practices, of mergers, of consolidations or of purchases of limited available sources of raw materials, such as bauxite, iron-ore, or pulp-wood. Enlightened self-interest, whatever may seem to be the temporary advantage of monopoly agreements, forces business to accept our laws against monopoly. But how can it be sure of what is the applicable rule of law. Mergers, horizontal or perpendicular expansion may be unlawful. The power of the Federal Trade Commission could be expanded or some other agency created that could determine such problems beforehand.

As far back as 1941, the T. N. E. C. recommended that the Federal Trade Commission be used to forbid mergers of competing corporations over a certain size, unless it was shown to the Commission that such merger was desirable. As late as 1954 Congress adopted a similar plan for certain business licenses under the Atomic Energy Act of that year.[18] We have used prior determination of legality for consolidation of transportation facilities.

Something approaching this suggestion emerges from the growing practice of consent decrees. When specific charges of violations of the antitrust laws come before the Department of Justice or evidences of unfair practices are uncovered by investigations of the Federal Trade Commission, consent decrees can be entered which eliminate objectionable practices or enjoin continuance of corporate structures that promote monopoly.[19] The adoption of the administrative process would offer opportunity for constructive effort to assist desirable business development.

The challenge for imaginative change exists in every domain of the law. Lawyers have led in every phase of legal development, the executive, the legislative, the judicial, the private law field. To see that law keeps current with affairs is our duty. Equal Justice Under Law is our aim. To see that humanity profits from the Law is given into our hands. Sometimes crime or oppression seems in the ascendancy. Be not discouraged. Never dream "though right were worsted, wrong would triumph." We, the students of the Columbia Law School, are proud of its past contributions and confident of the successful continuation of its efforts to promote the improvement of the administration of justice.

NOTES.

[1] 92 Cong. Rec. 10706; 59 Stat. 1031.

[2] *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240.

[3] *Marbury* v. *Madison*, 1 Cranch 137; *Cohens* v. *Virginia*, 6 Wheat. 264; *M'Culloch* v. *Maryland*, 4 Wheat. 316.

[4] *E. g.*, The Commerce Clause: *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533; *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408.

[5] *United States* v. *Butler*, 297 U. S. 1, 66.

[6] *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 587; *Helvering* v. *Davis*, 301 U. S. 619, 640.

[7] *Houston & Texas R. Co.* v. *United States*, 234 U. S. 342, 353.

[8] *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 442–443.

[9] *Louisville & Nashville R. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430–434.

[10] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, dissent 407; *Helvering* v. *Griffiths*, 318 U. S. 371, 401. Also *Smith* v. *Allwright*, 321 U. S. 649, 665.

[11] 317 U. S. 287; 325 U. S. 226.

[12] 304 U. S. 64.

[13] Cf. Administrative Procedure Act, 5 U. S. C., c. 19.

[14] Compare *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, and *Estep* v. *United States*, 327 U. S. 114, 120, with *Stark* v. *Wickard*, 321 U. S. 288, 306.

[15] Steel Seizure Case, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

[16] Cf. Congressional Reversal of Supreme Court Decisions: 1945–1957, 71 Harv. L. Rev. 1324.

[17] Cf. *United States* v. *Butler*, 297 U. S. 1, with *Mulford* v. *Smith*, 307 U. S. 38, 48, dissent 52. See Schwartz, The Supreme Court, p. 368.

[18] S. Doc. No. 35, 77th Cong., 1st Sess.; Atomic Energy Act, 42 U. S. C. § 2135 (c).

[19] *United States* v. *The New York Great Atlantic & Pacific Tea Co., Inc., et al.*, in the District Court for the Southern District of New York, Civil Action No. 52–139; Report of Attorney General, fiscal year 1956, p. 190.