

SYMPOSIUM INTRODUCTORY REMARKS

COEXISTENCE AND CO-DEPENDENCE: CONSERVATISM AND CIVIL LIBERTIES

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This year is an anniversary year for the Bill of Rights and for the Federalist Society. I am happy to say that both are alive and doing well. I hope that in another ten years we can still say that, and that the continued well-being of one will have played some small part in the continued well-being of the other. Some might find the latter an odd proposition. The history of the creation of the Federalist Society, however, is a tale with important civil liberties implications.

Gene Meyer, the Executive Director of the Society, led a civil liberties struggle at Yale. As an undergraduate, Gene was a moving force in inviting Dr. William Shockley to Yale to debate Mr. William Rusher. The organizers intended the event to deliver a message that was, as one of them noted, not exactly the coin of the realm at Yale: So long as government overweeningly regulates, people like Dr. Shockley will exist to provide crazy ideas for government to carry out. This message should not have seemed outrageous to any group, but the debate was nevertheless interrupted and broken up by angry students.

Yale officials, alas, were unable to identify the responsible students, so they did the next best thing: They went after the people who invited the speakers. Unfortunately, these officials did not know who these students were, so they rounded up every conservative student they could find on the Yale campus and summoned them before a University disciplinary tribunal.

Gene Meyer was one of those brought before the tribunal as a dangerous revolutionary. I had the honor of representing Gene in this matter and, after some very antagonistic negotiations with University officials, I convinced them not to press disciplinary charges against Mr. Meyer and his colleagues. I wish I could say that I persuaded them with my eloquent arguments on behalf of freedom of expression. I regretfully admit,

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however, that I came away with the strong impression that the threat of a lawsuit, of adverse publicity, and of maybe even losing the lawsuit had a greater effect. More troubling was the attitude of the Yale faculty members: Throughout the confrontation, I heard not even a whispered word of encouragement from the faculty, who were usually quite vocal on issues of freedom of expression.

Some years later, when the Federalist Society was being formed, the social and political situation at Yale was calmer. I still remember vividly, however, when one of the founding students asked me if I thought Yale would somehow retaliate against them. There was no question that Yale still harbored a climate in which conservative views were openly treated as objectionable. Indeed, a considerable amount of hissing (at the law school) was aimed at conservative students who dared to reveal themselves, and the professors appeared to approve silently of this repressive behavior. I am happy to say that when Guido Calabresi became Dean, he met with Federalist Society members to hear their grievances, and the hissing was stopped. It remains shocking, though, to know that many students over the years attended the Yale Law School but felt obliged to conceal their political views. Many such students later worked in the Reagan Administration.

The Federalist Society started at Yale in the oppressive circumstances I have described. I want to say to conservatives, however, that the history of the Federalist Society shows the need for all of us to foster free expression and tolerance. The Federalist Society is a true example of how semi-closed societies can be transformed, at least in part, by allowing new thoughts to be aired and by allowing a free competition of ideas. One of the things of which I am most proud in my career is the advice that I gave the students when they were forming the Federalist Society. Some of the founders wanted the organization to engage in political agitation. I successfully advised against that course. I argued that the students should instead devote themselves to encouraging an exchange of ideas by holding meetings like the present one and presenting a wide spectrum of views.

In truth, there is no inconsistency between conservative ideology and civil liberties. A touchstone of conservative ideology is the fear of government, because government has a monopoly

of power. The Bill of Rights is an attempt to limit government in the exercise of its power and thus reflects conservative ideas. Admittedly, there is nothing in conservative thought that teaches what weight certain rights ought to be given when they conflict with other constitutional values, but it is hardly a departure from conservative ideology or from the Constitution for a judge to view as unconstitutional, for example, certain forms of detention or seizure of property before trial.

The quintessential *laissez-faire* provision of the Constitution is, in my view, not the Takings Clause, but the First Amendment. The greatest danger to the First Amendment today is not the debate over obscenity or flag burning, but the view that speech may be regulated in the name of political equality. Rarely has so sinister a proposition been so attractively packaged. If one limits speech or silences political communication in the name of equality, political communication will sooner or later not be free and will cease. Tragically, this process has already begun in the area of campaign financing with the regulation of political contributions. Worse, the misguided logic that underlies that particular regulation cannot be limited.

Substantial inequalities in political communication are simply ubiquitous in our society. Consider that all issue groups, whether they are on the right or on the left, communicate on matters of public interest in a fashion that enables them to wield far more power than well over ninety-nine percent of our population. The silencing of one powerful voice, however, only makes the voice below it appear stronger. That voice must then be silenced, and a downward spiral has begun. Every person or group engaging in effective political communication becomes vulnerable to the accusation that it holds too much power and must be regulated for the sake of political equality. Of course, the government will decide who must be regulated in such a scheme. The logic of regulating speech in the name of political equality must ultimately be a governmentally-imposed silence.

Political communication is not effective unless unequal. That is why the First Amendment singles out the press for special protection. The press is not given special status because it is weak, but because it is uniquely powerful, uniquely private, and uniquely a counterweight to government, which is the most powerful communicator of all. If government is allowed to regulate speech to achieve political equality, surely the powerful

press will be target number one. Other attacks will follow, and the cherished protections of the First Amendment will vanish.

I urge all of you, conservatives particularly, to consider the importance of civil liberties in our lives, and I wish the Federalist Society and the Bill of Rights a happy anniversary.