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Panel Discussion: The Supreme Court and States' Rights

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Following the reading of Professor Oberst's paper it was discussed by a panel composed of Mr. Anthony Lewis, of the *New York Times;* Judge John R. Brown of the Fifth Circuit Court of Appeals; and Dr. Clement Eaton of the Department of History, University of Kentucky. Mr. Arthur Krock of the *New York Times,* who was also to participate, was unable to appear due to illness in his family. Professor Jesse Dukeminier of the University of Kentucky College of Law presided. Excerpts from their remarks follow.

MR. LEWIS: I essentially agree with the theme of Professor Oberst that the cry for states' rights has been, historically, largely a misleading one, one designed primarily to protect states' wrongs. I think today it is on the whole unfair to criticize the Supreme Court for impinging on states' rights if you take the broad view. Professor Freund has pointed out that the Court today in very important areas has leaned over backward to recognize state power. It has, for example, conceded the states more power to tax than any previous Supreme Court has done—to tax interstate commerce, and to tax federal instrumentalities, things which past Supreme Courts have barred. It has given the states a very broad power of economic regulation without interfering with that power as past Supreme Courts have done. And so on the whole, I am in agreement.

I do have this reservation, and it seems to me an important one. I still have the feeling that on the present Court there is too often an insufficient sensitivity about state powers on the part of some of the Justices. There is what I regard as an unfortunate tendency to write very broad opinions bringing in all the beauty and truth and poetry of freedom which may not have too much to do with the particular case. This leads to exultation on the part of those who think the Supreme Court's job should be to fix up everything that isn't right, and leads to anxieties on the part of those who think the Supreme Court should leave well enough alone. The notable examples are the opinions in the spring of 1957. The *Watkins* case really held only that before Congress could demand from a witness an answer to

a question before a congressional committee it had to tell him what it was trying to find out. That is all there was to the case, and it is not a very shocking decision. But the opinion was written in extremely broad language and left the impression that the Court might have in mind putting very severe limitations—in addition to that simple procedural limitation—on congressional investigations. We found out two weeks ago that the Court didn't mean that at all, because they upheld the power of the same committee of the House to ask tough questions simply because this procedural requirement of the Court had been met. But the over-broadness of that opinion of two years ago, and what to my view was insensitivity to the requirements of judicial modesty and care, led to much more fuss than there should have been.

I think if there is no better reason for a Court which has a great deal of power to use that power with sensitivity and with concern and care, especially in opinion writing, self-preservation is one. Professor Oberst has indicated that a rather sweeping bill which nobody, including its supporters, understands, came within a vote of passage in the Senate last August. It was beaten 41 to 40, and if I were a member of the Supreme Court I would regard that as a happily gentle piece of advice that self-restraint has some virtue. I think it is very important for the Court to keep in mind the necessity of preserving itself as an institution—not to knuckle under as some would have it, but to be careful to do no more than is necessary in any particular case. That is my only reservation. I thought it was a fine talk and I agree with almost all of it.

MR. LEWIS PRESENTING MR. KROCK'S VIEWS: Now, if I may just say a couple of things for Mr. Krock, reading from notes he typed out: "It seems to me that since the assertion by the Supreme Court of the power of judicial review of acts of the president and of federal and state legislatures, the justices who periodically have restrained or revised the extreme employment of this doctrine by their brethren have been the real and essential protectors of orderly government in the United States. It seems to me also that the presidents and other informed critics of the Court in the periods when it has pushed to the utmost the doctrine of judicial supremacy merit the same tribute from the

American people. But instead of welcoming the informed critics with whom this salutary process of restraint must begin, the tendency exists among some lawyers and law professors to disparage them, to pretend that the judicial review by the Supreme Court never becomes the same thing as judicial supremacy, and to argue that the plain basis of a decision is not the basis at all.

"By way of illustration, I quote the following from Professor Oberst's comprehensive and erudite paper read today: 'I am sure Edmond Cahn is right when he suggests that modern social psychology and the international relations aspects played no real part in the Court's decision of the *Brown* case.' Well, the Court *may* not have been influenced by the international relations aspect. But, since the Court could not cite a statute or a previous construction of the equal protection clause in the fourteenth amendment to support its new discovery that 'separate' could no longer be 'equal' in public education, it had openly to concede that it was obliged to turn to modern social psychology for the basis of the decision. On this wholly philosophical foundation, the Court declared a new public policy of the control of local education, locally financed in reliance on a long series of Supreme Court sanctions of racial school segregation.

"The remarkable turnabouts by the Court, by a percentage so narrow and accomplished in so brief a period, induced me for one to welcome legislation that will make its historical precedents more durable. If the Chief Justice of the present Court and his three brothers in the bond of liberalism can get back a lost recruit, they might conceivably declare unconstitutional legislation by Congress which the Constitution specifically authorizes. I hope they will never get that reckless. If they do, Professor Oberst will have to make large additions to his category of those who will launch an all-out attack on the Supreme Court."

JUDGE BROWN: It is good that I'm here, I think. It is good that some judge is here. You see me. Before I took the oath of office, I was a lawyer. I took the oath of office, and I got a lifetime job. But the fact is that the moment I took the oath of office, I was no smarter than I was the minute before. Merely because I am a judge, and have occasionally to pass upon constitutional questions, I have no special competence. My friend

Mr. John Frank down here, who has made a lifetime study of the "marble palace," is much more qualified to speak.

I do have some very definite reactions, many of which I have gotten as a judge. First, I don't understand exactly what they mean when they talk about judicial restraint. It certainly does not mean, does it, that you ought to fail to decide a case merely because it is going to be disturbing? If your light shows you that this is the way in which the case ought to be decided, are you to abdicate, or must you not speak? That's akin to the question of the criticism of the Court. That's why this is such a timely thing. I share Mr. Krock's view and Mr. Lewis' view, and I disagree with Mr. Oberst in his conclusion that we ought not to criticize the Court. We ought to criticize all courts, and if it can be done with temperate language, that's fine. If it can't, well, that's just a consequence of being human beings. We ought to criticize but in this criticism we ought to be reasonably accurate. My criticism of most lawyers' criticism is that most of the time it is not very accurate and it is not very lawyer-like.

Judicial restraint is akin to the criticism made by the Bar that judges ought not engage in policy-making. I don't think you can adjudicate without determining policy. The *Wolf* decision for example has been criticized. The holding, in brief, was that evidence obtained by state officers in a state prosecution in violation of the constitutional guarantee against search and seizure may be admissible in state trials. Now, you can criticize that holding any way you wish. It may be good, it may be bad, but it is clear. When the Court decided that way, with a divided Court, they announced a policy. On the other hand, they have announced another policy with respect to the use of the same kind of evidence obtained by federal employees, federal agents, either in federal prosecutions or in state prosecutions. Those are policy decisions that are inescapable.

A part of this criticism has to do with an assumed incompetence of the judges, because of the lack of prior judicial experience. There is a great hue and cry because Supreme Court justices are too frequently not elevated from other benches. I have long questioned whether that is a very sound criticism. I made a speech in Atlanta, Georgia, three years ago called "Balm in Gilead" in which I noted the fact that lawyers are the

most immodest people in the world in claiming to be the champions of liberty. But if lawyers have that kind of capacity to be the guardians of real liberty, property and personal liberty and to make this country really free in the Anglo-Saxon tradition, then why aren't they fit to be judges? Of course, there are individual qualifications and personality traits and aptitudes, or the presence or lack of them, that might make a lawyer a poor judge. He might be intemperate, he might be hotheaded, he might be so partisan he couldn't be objective, but that is not because he has not had prior judicial experience.

The second and most important answer to this criticism is that most of the questions that plague the Supreme Court of the United States today and which are the subject of this controversy and this discussion, are not the kind on which prior judicial experience will give too much help. A chief justice of a state supreme court has never dealt with the very perplexing problem of how far you can treat the Communist Party as just another political party. How far can you, as the Court now says in the *Barenblatt* case, treat it as entirely different? And how can you answer Mr. Justice Black's dissent on that? Where do you draw the line? All the judicial experience in the world in trover and replevin of red cows or the damage suits against railroads is not going to qualify that man for that very, very difficult decision.

I've brought here an abridgment of an article by Mr. Arthur Krock that appeared in a Houston, Texas, paper. He makes it so simple; the Court has retreated in the *Uphaus* and *Barenblatt* cases. I read and reread the opinions, and I am at somewhat a loss to understand what has happened except that the Court, a human institution, is conscious of this great criticism. In *Barenblatt* they came back and said that Congress certainly has wide powers to investigate, but then they import some rather questionable doctrine. I'd ask whether you can really balance the interest of the individual in his constitutional rights against the interests of government. I think that Mr. Justice Black makes a pretty devastating attack on that in his dissent, because if the interest of government in the protection of itself against Communism is a thing that allows the government to deprive a person of the effective right of one of his constitutional guarantees, I don't know where it would stop. I don't see really just what the differ-

ence is between *Uphaus* and *Sweezy*. *Sweezy* said they couldn't investigate and *Uphaus* said they could.

I think the undercurrent of this states' rights attack on the Court is a manifestation of a dissatisfaction with substantive results. As Mr. Lewis has pointed out, and as the paper did itself, the Court has been singularly liberal in allowance of almost absolute experimentation on the part of the states. In its heyday up to 1936, on the other hand, it struck down hundreds and hundreds of laws that the states thought were beneficial, but which the Supreme Court in its wisdom under the fourteenth amendment thought were somewhat hazardous.

I don't think that the Supreme Court is consciously an instrument either in asserting a strong national government, or in reducing the effectiveness and power of the states. The conference of the state chief justices said that it thinks that the federal judiciary should refrain from those matters which are primarily of local concern and confine itself to things of national importance and concern. It seems to me that begs the question. We have devised the most complex form of government that was ever known to man—forty-eight states, now forty-nine, and soon to be fifty—and a supreme sovereign national government, each with its set of legislative bodies, executive bodies, and judicial bodies, the judicial bodies having concurrent jurisdiction in many fields. It is bound to be an area of continuous conflict. You can't escape it. There is just no way for that consequence to be avoided. Now, if that is so, and we are citizens of the United States, doesn't it follow necessarily that there are certain rights of national citizenship? That is what the Court is concerned with. Here and there it must make mistakes. I am sure it does, and depending upon your view it may make many, it may make few, in translating so-called rights into those of national citizenship. The paper asked whether education is a matter of national concern. I don't think that is a correct statement of the issue. The correct statement is: Is the right of public education one of those rights which will be protected as a right of national citizenship. I think that is the thing with which the Court is concerned.

These habeas corpus petitions from state convictions create a feeling—on which the Court is unanimous when it comes to a thing that is revolting, and there have been a number of them—

that no citizen of the United States should have had this happen to him. There are cases where state police officers bored holes in a defendant's bedroom, put tapes down, and surveyed him for two or three days and then moved in and convicted him. The problem is, as the Court musters a majority one way or the other, is this thing sufficiently offensive to what we have been taught to believe is fundamental.

Mr. Lewis has criticized the somewhat prolix nature of opinions. As one who writes opinions, and about whom it has been said I never use one word where two will do, it is a somewhat understandable thing. I agree it has gone to extremes. But it's hard to write a short opinion, and when, as Mr. Frank pointed out, the Court has to exert its influence on the general development of jurisprudence by the episodic sort of transactions in 125 opinions, it is going to paint with a broad brush. If it doesn't, it's just a justice of the peace court. While the Constitution says that the Court has power over cases and controversies and there must be a justiciable cause, we know as judges and lawyers that there is something more in it. Here is where there has been a captious sort of criticism on the part of Arkansas, for example. In effect, they said, "Well, the *Brown* decision doesn't apply to Arkansas, because there wasn't anybody by the name of Brown in the Arkansas problem." So they got *Aaron v. Cooper.* But the judicial system doesn't work that way. An opinion is announced, and it lays down very broad principles. Sometimes it is too broad, and you have to eat crow. Every judge has had to do it. Sometimes he makes a mistake and he backs up completely and just changes his tune.

I have two more things to say. One is that I think the criticism against the Court for its intrusion into the supervisory nature of state criminal cases may have some foundation in a mechanical and administrative way. It puts the federal judge, frequently a district judge, in a position of passing on the Supreme Court of Texas or the Court of Appeals of Kentucky. The Judicial Conference is trying to remedy that by a more orderly way in which those things would go to the Supreme Court. In my judgment that is going to be an impossible burden if it ever passes. But again it's to assert and vindicate a federal right. I don't think anyone can

look upon criminal law without feeling, finally, that there has been a vast improvement in the nature of its administration due to the assertion of these national federal constitutional rights by the Supreme Court. Just last week, there was an opinion announced in which a prosecutor in Illinois swore on oath that he had made a deal with a key state witness, and he had not only let him testify, he had led him into testifying that nobody had ever made a trade or made any promises with him. That's a shocking sort of thing, and when the Supreme Court finds out, it says the state cannot engage in that kind of conduct.

In Texas we had another case that was reversed that was the same sort of thing, a pattern where the prosecutor knowingly used perjured testimony. I don't think there is a person in this audience who would think a state with all its power and the advantages that come to the prosecution should in the name of justice try to get perjured testimony. We feel that as a citizen of the United States a defendant ought to be somehow protected against that, and history proves that you cannot leave it entirely to the state courts.

I think it is an unfair criticism or a distortion, really, to attack the Court because they referred to a sociologist in the *Brown* decision. I don't think they could have written an opinion that would not have caused the same amount of criticism that it has. Every time you write an opinion in a controversial case, you wish you had left something out. The problem is so tense and it is so fraught with difficulties and real deep feelings that nothing could have been said that would have satisfied anybody. It is the act that really is the problem. But it is unfair to history and to the Court to think that this is the first time that they have ever made any kind of reference like that. I want to read to you from the opinion in *Munn v. Illinois,* holding that a state could make a public utility out of a grain elevator. Chief Justice Waite, one of the most conservative men that ever sat on that bench, wrote this in 1877:

> It is a business in which the whole public has a direct and positive interest. It presents therefore a case for the application of a long known and well-established principle of social science and the new statute simply extends the law so as to meet this new progress.

Now he didn't have Myrdal's text, and in that day they didn't know about footnotes, but he said just about the same thing.

I will say in closing that the Supreme Court ought to be criticized and ought to be criticized vigorously, and by lawyers and judges and the people. Somehow or another we are still going to have a Supreme Court, and I have no doubt we are going to have a United States of America.

DR. EATON: First, as to Judge Brown's remarks, which are very fine, I disagree with two things—his exposition of the necessity of policy-making by the Supreme Court and his objection to the common criticism of lack of judicial restraint. I should like to read him a statement made by Henry Clay over a hundred years ago, in 1823, when the State of Kentucky was in a condition which Senator John Crittenden described as saying: "Public opinion is a mighty quicksand here in Kentucky, so emotional are the people." It was over the very same thing to which Mr. Oberst referred, namely stay laws, or debt moratoriums. During a violent constitutional struggle in Kentucky, Henry Clay said, and it seems to me a very wise statement, that he did not doubt the right of the court to declare unconstitutional laws invalid, but he thought that the courts sometimes pushed the principle too far, and that, erecting themselves into a sort of tribunal to remedy all—and he underlined "all"—the evils of bad legislation, they have not allowed to operate other probably more efficacious correctives. In the end, Henry Clay said, most of the pernicious acts of legislation would be rectified by the operation of public sentiment. "When so corrected, there is always tranquility and general acceptance, but if during the existence of the excitement the courts interpose, the consequence is that the public disorders are prolonged instead of being healed."

I was fascinated by Judge Brown's description of the way judges act. I think I must feel towards judges like some of my students feel towards professors, that they belong to a different category of human wisdom, but I discover that he doesn't think so.

I would like to turn from criticism of Judge Brown's remarks to Professor Oberst's paper, which is a splendid paper, and I thoroughly agree with its liberal attitude throughout. But Professor Oberst said, in his conclusion, "States' rights has been a shabby

cloak for a variety of unsupportable causes over the years." When I read that, I somewhat cringed, because although I am perfectly willing to say that in a sense it is true, it is only a half truth, and I would like to present the other side of the truth. It seems to me that states' rights has often been used for noble causes, defenses of noble principles, and I for one should not like to see it disappear from American life as a means of defense for a minority that might be right. Otherwise, Professor Oberst would seem to imply that the majority is always right and the minority is always wrong, because it is usually the minority that uses states' rights to defend itself. The first case that I should like to suggest in rebuttal is to refer to the adoption of the Kentucky and Virginia resolutions of 1798. They were, I think, fine documents, very liberal documents in our history that reasserted the Bill of Rights.

In the Virginia Resolutions Jefferson made this statement, which I think is unusually fine, namely that the civil rights are interrelated, interdependent, and whatever destroys or injures one civil right also endangers or impairs other civil rights. Or, to use the language that he himself used, "It overthrows the sanctuary which covers the others."

There was another case which Professor Oberst spoke of that I am sure modern liberals would say, "Here is a case where states' rights were used for a liberal cause." In *Ableman v. Booth*, which involved the Fugitive Slave Act of 1850, the Wisconsin Supreme Court took the position that the act was unconstitutional. The United States Supreme Court reversed the Wisconsin court, and then the Wisconsin legislature gave really as strong a statement of states' rights as any South Carolinian could have given, and yet it was in a liberal cause.

Again, Professor Oberst referred to the disputes between Virginia and Kentucky in 1819-1924, involving the squatter laws, and he says, "Here Kentucky is standing for the noble cause of states' rights, while Virginia, whose economic interest was involved, did not come to Kentucky's aid." But I should like to remind him that at exactly that same time Virginia was taking a very strong stand for states' rights. The great Chief Justice of Virginia, Spencer Roane—whom Jefferson would have made Chief Justice if John Adams hadn't played a sorry trick and appointed John Marshall just as he was about to go out of office—wrote a series of very

good criticisms of *McCulloch v. Maryland* and *Cohens v. Virginia.* Indeed I take issue with Professor Oberst in his implication that an insincere use of the states' rights doctrine is usually made. It is possible that he has been influenced, as I have been, by Professor Schlesinger's very fine essay, "The States' Rights Fetish." But I always think that a student can rebel against the professor, and I think that Professor Schlesinger has overstated the importance of the fetish of states' rights.

Actually, it seems to me that the place to study states' rights is not in times of crises. It is not wise to make deductions solely from the great historic crises such as the nullification controversy, the Hartford Convention, or the defense of slavery before the Civil War. Of course, you should consider these struggles, but it seems to me that also you should study the validity of states' rights on occasions when men are forming governments for the future, offering amendments that will correct faults of a government, or when philosophers and leading statesmen like Jefferson and John Taylor of Carolina are stating their views of the correct government.

I agree with Jefferson that states' rights are a very fine instrument to protect civil liberties. Jefferson was a strong believer in localism and, as you know, he admired the New England town meetings and would have liked to have destroyed the county governments and substituted wards. He called them Ward Republics. We also know that instead of five big states in the Northwest Territory, he would have liked to have had ten small states. In other words, he believed that a strong local government is a protector of liberty. Furthermore, in a large country like the United States, there is a special need for states' rights, it seems to me, because we have a federalism of cultures. The New England people have their culture and it is different. The people of the upper south are really different from the people of the lower south. I am a man of the upper south. But I can respect the man in Georgia who looks at race differently from myself. I can see that the people of the west would have a different view of it. It is very clear in our government that the institution of the Senate reflects the idea that regional interests should be represented. We know that Nevada is a "rotten borough" in the United States Senate, but I wouldn't change it if I could. Nevada, with a popula-

tion of less than Louisville, has two senators, whereas New York with its 12 million people have exactly the same power. But really, we wouldn't want to submit everything to a numerical majority in this country. You may hear the sounds of Calhoun's voice in that statement, but actually it seems to me it is fine to preserve some of the geographical interests of the country. Also we need states' rights in order to experiment. True the states haven't done much experimenting in my opinion, although Judge Brown, I believe, rather indicated differently. But I was thinking of fundamental ways. Here we have fifty laboratories of state government, and it seems to me that we should experiment and that the Supreme Court should respect the experimentation. Judge Brown says it has.

I think, and this may seem strange to you, that one of the troubles of the Supreme Court today is that it doesn't have enough southerners on the Court. I doubt whether Mr. Justice Frankfurter—a brilliant man and I much admire him—can really understand the problems of Louisiana and Alabama. I doubt if a southern Justice could quite understand some of the problems of a highly urbanized area. Presidents in making the appointments ought to give a good deal of consideration to geographical distribution, because after all, the Court is a politically appointed body.

When Mr. Oberst read the suggestion of President Rufus Harris of Tulane University that it was time to consider our national curriculum, I immediately thought that that would be terrible. We need to preserve variety in this country. I wouldn't want the University of Kentucky to have exactly the same curriculum that Williams College has, and I wouldn't want Williams College to have the same curriculum that the University of California has. Again I am arguing for a federalism of cultures. I am also arguing that there is something very good in states' rights. It is not always a shabby thing.

I should say that along with states' rights I advocate what I call the philosophy of the helping hand on the part of the federal government, without the philosophy of control. And I think that things can be worked out. I should favor federal aid for education in areas where the people obviously couldn't support an adequate system of education. I should favor the federal government

helping eastern Kentucky where the situation is appalling. And yet at the same time I think the philosophy of the helping hand is not incompatible with the philosophy of recognizing as much state authority as possible. And I should like to see the judges guided by a certain amount of judicial restraint so that we do have this balanced federal and state government.