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Recent years have seen a spate of legislation proposed and enacted allegedly designed to protect the civil rights of American citizens. In the next few pages, I should like to analyze some of the attitudes and philosophies behind this legislation, and to show why I consider them constitutionally defective.

I

At the very beginning I must declare my opposition to those who hold that a Senator should pay little heed to constitutional questions; instead, seems the attitude, a Senator should concern himself only with policy, relying on the Supreme Court to supply the judgment as to the constitutionality or unconstitutionality of the legislation. There are several answers to such an argument.

First, I as a Senator take my oath of office by swearing fealty to the Constitution of the United States. Just as Chief Justice John Marshall found the source of judicial review in this oath taken by him, so can a Senator honestly repeat the always timely message that it is the Constitution he is expounding. Moreover, the Supreme Court gives a presumption of constitutionality to any law passed by the Congress. Especially, since 1938 this is true of legislation passed under the commerce clause, a clause now being discovered allegedly to have application to the racial problem. For a Senator to deny himself the responsibility of consideration of the constitutionality of legislation would be to deny the very premise of constitutional presumption—that the Court can presume constitutionality because the Congress itself has fully considered the constitutional issues involved.

Moreover, even if one admits that certain proposals would be constitutional in the narrow sense that they would be upheld by a contemporary Supreme Court, "constitutionality" carries with it a broader meaning than that. Cynics are fond of quoting Mr. Hughes' comment that the Constitution is what the courts say it is. To say this, which is only half-true, and stop, is to distort the

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meaning of the American experience, which attempts, insofar as humanly possible to institute a government of unvarying principles. Alexander Bickel put the issue well in an article in the *New Republic* on title II of "The Civil Rights Act of 1963" (S. 1731);[1] when he said "what the Court will establish as a matter of constitutional power under the Commerce Clause does not necessarily dispose of all issues of principle, either for the Court or for Congress. There may be reasons of principle that should cause Congress not to exercise its commerce power at all, or to the full . . . ."[2] Thus, even though I question seriously even the "technical" constitutionality of the proposed civil rights legislation, should I admit that the Court would uphold them, *ad arguendo,* I would still insist that the "higher meaning" of "constitutionality" would then come into play and would serve to defeat the legislation.

The central, overwhelming defect of proposed civil rights legislation is the abrogation of the principle of federalism involved in all of the proposals. And, it is sadly true that the Supreme Court itself has been one of the chief agents of taking away traditional rights from the states and investing them in an ever more powerful centralized federal government. Thus, it is up to the Congress as a whole and to each individual Representative and Senator to remember his oath and to protect the original meaning of the Constitution.

The men who composed the Constitutional Convention of 1787 comprehended in full measure the everlasting political truth that no man or set of men can be safely trusted with governmental power of an unlimited nature. In consequence, they were determined, above all things, to establish a government of laws and not of men. To prevent the exercise of arbitrary power by the federal government, they inserted in the Constitution of the United States the doctrine of the separation of governmental powers.

They delegated to the federal government the power necessary to enable it to discharge its limited functions as a central government and left to the states all other powers. It was this use of the doctrine of the separation of powers which prompted Chief Justice Salmon P. Chase to make these memorable remarks in his opinion in *Texas v. White*:[3]

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[1] S. 1731, 88th Cong., 1st Sess. (1963) [hereinafter cited as S. 1731].

[2] Bickel, *Civil Rights and the Congress,* The New Republic, Aug. 3, 1963, p. 14.

[3] 74 U.S. (7 Wall.) 700 (1868).

> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[4]

The proponents of current civil rights legislation, many of them undoubted men of good will, would, in an attempt to meet a genuine problem concerning the inflamed nature of relations between the races in this country, trounce upon an even more pressing need—the need to preserve limited, constitutional government in an age of mass bureaucracy and centralization.

Much of the proposed legislation would obliterate our federal system. For example, the so-called "literacy bills" would contravene the specific constitutional assignment to the states to set the qualifications for their voters, limited only by the command of the fifteenth amendment that racial qualifications are unconstitutional. Instead, the proponents of such measures would have the United States Congress arbitrarily impose its own definition of "literacy" upon the states. In addition, the 1963 version of the bill, incorporated as title I of S. 1731,[5] would even allow the federal government to take over the registration machinery from a locality if a judge found that less than fifteen per cent of the members of one race were registered to vote.

Everyone qualified should be allowed to register and vote or else our democratic heritage is trampled in the ground. Prosecution, by the state or federal agencies with jurisdiction, of individuals, who under color of law discriminate, should be vigorous. There are laws already on the books to accomplish this. Federal prosecution is guaranteed under provisions of 18 U.S.C. 242,[6] 18 U.S.C. 241,[7] and 18 U.S.C. 371.[8] In addition, there are the Civil Rights Acts of 1957[9] and 1960[10] which put further laws at the disposal of

[4] *Id.* at 725.
[5] S. 1731, § 101.
[6] 18 U.S.C. § 242 (1948).
[7] 18 U.S.C. § 241 (1948).
[8] 18 U.S.C. § 371 (1948).
[9] 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.).
[10] 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C.).

the Attorney General and his staff. Unfortunately, from the standpoint of some people, these laws all preserve such time-consuming and inconvenient procedures as the necessity for full and convincing proof in individual cases, and the guarantees of trial by jury. Thus, in their haste to achieve the end to any discrimination in voting anywhere, these zealots are willing to trample on traditional judicial guarantees and to destroy the federal system.

The entire "Civil Rights Act of 1963" can be used as illustration of this theme, for every title has the federal government further intruding into state and local affairs. It would be well for our country if the advocates of such legislation would pause and ponder these wise words of Mr. Justice Sutherland:

> Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal Government in the direction of taking over the powers of the States is that the end of the journey may find the States so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.[11]

The most obvious example of such attempts to reduce the states to meaningless zeroes on the nation's map is, of course, the public accommodations section of the act, title II.[12] Hopefully, Congress will correctly recognize that few more blatantly unconstitutional and unwise pieces of legislation have ever been proposed. But, whatever the legislative fate of title II, it is still profitable to examine the philosophies behind it.

We do well to look to the words of an eminent jurist, Mr. Justice Frankfurter, in regard to the interstate commerce clause:

> The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.[13]

[11] Carter v. Carter Coal Co., 298 U.S. 238, 295-96 (1935).
[12] S. 1731, §§ 201-205.
[13] Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 650 (1943).

Now it is true that this same jurist also preached that the judgment regarding the balance between the state and federal governments, especially in regard to the commerce clause, was to be left to the legislative bodies themselves. This points out once again, I believe, the overwhelming importance of the necessity of a Senator or Representative to consider fully the constitutional implications of legislative proposals.

The enactment of title II would open the door for federal supervision over any and every facet of an individual's life. Once we begin using the commerce clause to affect matters that have no rational connection with the free flow of goods, then we have fatally dropped the bar to governmental tyranny that was the purpose of the original framers of the Constitution, who were so careful to construct safeguards against an all-encompassing federal government. Again, it is not a matter of the end served. Progress in voluntary desegregation of places of public accommodations is to be applauded. But law, and especially law emanating from the impersonal federal government, cannot change social customs; only local men of good will of both races, meeting and talking frankly together, can solve those problems which exist between the races.

The attempts being made to erase state lines are not only manifestly unwise, but also clearly unconstitutional. I might refer my readers to the hearings of the Committee on the Judiciary of the Senate on S. 1731[14] held in July, August, and September of this year for a full discussion of the unconstitutionality of the legislation. But even a cursory glance at judicial precedent will indicate the constitutional unworthiness of the bill. It is enough to refer to the *Civil Rights Cases*[15] of 1883, to dismiss the claim that the thirteenth or fourteenth amendments offer sustenance to the provision. One need only quote from Mr. Justice Bradley's majority opinion where he stated: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment."[16] Even those decisions which have extended, and in my opinion, unwarrantably, the concept of "state action," have always been careful to point out the interrelationship between the state and the operation regulated. Thus, for example,

[14] *Hearings on S. 1731 Before the Senate Committee on the Judiciary,* 88th Cong., 1st Sess. (1963).
[15] 109 U.S. 3(1883).
[16] *Id.* at 11.

two controversial decisions[17] both reaffirmed the traditional understanding of the fourteenth amendment. As stated in *Shelley v. Kraemer*:[18]

> Since the decision of this Court in the *Civil Rights Cases* . . . , the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[19]

Justice Clark, writing for the Court in *Burton v. Wilmington Parking Authority*[20] further stated that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[21]

The interstate commerce clause is also a dubious peg on which to hang the public accommodations bill. Never before has the clause been used to regulate that which has absolutely no connection with the manufacture, labeling, or shipment of goods. Here, too, those decisions which apparently go farthest in the opposite direction actually support this view. For example, *Wickard v. Filburn*,[22] which the proponents of title II cite as authority for their position, actually supports my view, in that the decision did nothing more than carry to its logical, if absurd, conclusion the concept that *goods* which affect other *goods* in their flow through interstate commerce are covered by the terms of the commerce clause. Thus, poor farmer Filburn's wheat was held to affect the status in interstate commerce of all other wheat. How one can derive from this case any conclusion that the interstate commerce clause could be used to compel whom Mr. Filburn must hire or to whom he must sell, is beyond my understanding. To destroy the federal system and the liberties guaranteed by that system, with its prevention of centralized tyranny, in order to legislate alleged equality, would be to destroy constitutional government. We should hearken to the words of Mr. Justice Harlan, speaking to the American Bar Association.

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[17] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1947).
[18] *Supra* note 17.
[19] 334 U.S. at 13.
[20] 365 U.S. 715 (1961).
[21] *Id.* at 722.
[22] 317 U.S. 111 (1942).

> Our Federal system, though born of the necessity of achieving union, has proved to be a bulwark of freedom as well. We are accustomed to speak of the Bill of Rights and the 14th Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the Federal Establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between Federal and State authority serves the same ends, and takes on added significance as the size of the Federal bureaucracy continues to grow.
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> . . . .
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> A federal system is of course difficult to operate, demanding political genius of the highest order. It requires accommodations being made that may often seem irksome or inefficient. But out of that very necessity usually comes pragmatic solutions of more lasting value than those emanating from the pens of the best of theoretical planners. Unless we are prepared to consider the diversified development of the United States as having run its course and to envisage the future of the country largely as that of a welfare society we will do well to keep what has been called "the delicate balance of Federal-State relations" in good working order.[23]

As Justice Harlan says, the reason for the preservation of the federal system is that that system is the best guarantor of our fundamental liberties. I concur wholeheartedly in the mordant analysis of Robert Bock of Yale University's Law School, when he says:

> Instead of a discussion of the merits of legislation, of which the proposed Interstate Public Accommodations Act outlawing discrimination in business facilities serving the public may be taken as the prototype, we are treated to debate whether it is more or less cynical to pass the law under the commerce power or the Fourteenth Amendment, and whether the Supreme Court is more likely to hold it Constitutional one way or the other . . . . The discussion we ought to hear is the cost of freedom that must be paid for such legislation, the morality of enforcing morals

[23] Address by Associate Justice Harlan, American Bar Center, Aug. 13, 1963.

through law, and the likely consequences for law enforcement of trying to do so.[24]

Truly, in the midst of the cynical debate on how best can sections of the Constitution be stretched beyond their traditional understanding to encompass the aims of certain social theorists, there is all too little discussion of the immense price in personal liberty and freedom that will be the cost of such so-called reform. Once again we are well advised by Mr. Justice Harlan, who when writing in *Peterson v. City of Greenville,*[25] stated:

> Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the [Fourteenth] Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.[26]

Thus, in summary, the main *substantive* constitutional defect of proposed civil rights legislation is the abrogation of the federal system that would come in the aftermath of choosing equality over liberty and freedom. I have spoken briefly only of two particular items of legislation, the "literacy" bill and the public accommodations act; but both stand for the entire range of proposed legislation, all revolutionizing our traditional understanding of the meaning of liberty within the American federal system.

II

The first section of this article was intended to expose briefly the chief substantive demerit of proposed civil rights legislation—the loss of the traditional liberty guaranteed by, among other things, the federal system, in an attempt to legislate equality. In this sec-

[24] Bock, *Civil Rights—A Challenge,* The New Republic, Aug. 31, 1963, pp. 21-22.

[25] 373 U.S. 244 (1963).

[26] *Id.* at 250 (separate opinion).

tion, however, I should like to consider the chief *procedural* defect of this proposed legislation, a defect so great in itself as to raise serious constitutional questions. I am speaking of the vast amount of discretionary power that would be lodged in various parts of the Executive Department by the proposed bill.

Our ancestors appraised at its full value the everlasting truth embodied in Daniel Webster's assertion that "whatever government is not a government of laws is a despotism, let it be called what it may." Consequently they prized very highly the following concept: that our courts should administer equal and exact justice according to certain and uniform laws applying in like manner to all men in like situations.

Titles I,[27] II,[28] and III[29] of S. 1731 all give the Attorney General of the United States the power to intervene in disputes between the individual and the allegedly discriminating officials or individuals. In the case of title I, dealing with voting rights, the new grant of power merely continues the unwise precedents established in the Civil Rights Acts of 1957[30] and 1960.[31] But the remaining two titles feature entirely new grants of power. Thus, Sec. 204(a) and (b) read:

> Sec. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203 [discrimination in public accommodations], a civil action for preventive relief . . . may be instituted (1) by the person aggrieved, or (2) by the Attorney General for or in the name of the United States if he certifies that he has received a written complaint from the person aggrieved and that in his judgment (i) the person aggrieved is unable to initiate and maintain appropriate legal proceedings and (ii) the purposes of this title will be materially furthered by the filing of an action.
>
> (b) In any action commenced pursuant to this title by the person aggrieved, he shall if he prevails be allowed a reasonable attorney's fee as part of the costs.[32]

Likewise, title III gives the Attorney General the discretionary power to institute suits in behalf of school desegregation.[33]

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[27] S. 1731, § 101.
[28] S. 1731, §§ 201-05.
[29] S. 1731, §§ 301-10.
[30] 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.).
[31] 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C.).
[32] S. 1731, §§ 204(a), (b).
[33] S. 1731, § 307.

By these provisions, the bill proposes to do these two things: (1) to establish a new procedure for the enforcement or vindication of certain supposed civil rights of private persons at the expense of the taxpayers; and (2) to confer upon one fallible human being, namely, the temporary occupant of the office of the Attorney General, whoever he may be, the despotic power to grant the benefit of the procedure to some persons and withhold it from others.

The proposed law is scarcely operative at all unless the Attorney General, acting either with or without reason, so wills. This is not government by law. It is government by the whim of the Attorney General.

It is to be noted, moreover, that the new procedure to be authorized by the bill is to be used for and against such persons only as the Attorney General may select. This being true, the bill is utterly repugnant to the fundamental concept that courts are created to administer equal and exact justice in compliance with certain and uniform laws applying in like manner to all men in like situations. Moreover, section 204(b)[34] requires a successfully prosecuted defendant to pay the costs of his prosecution, whereas if he successfully defends himself, there is no like payment of his costs by the plaintiff. This goes against every canon of equal justice and equal protection and is a particularly glaring example of the fundamental corners some are willing to cut in order to reach allegedly worthwhile goals.

There is always danger that discretionary governmental power may permit the public officer in whom it is reposed to rule arbitrarily without the restraint of law. As a consequence, no legislative body should ever adopt any statute conferring discretionary governmental power upon any public officer unless such statutes satisfies the only valid test of the advisability of legislation of this nature. The test is to measure the evil a bad public officer may do under the proposed law rather than the good a good public officer may do under it.

The above-mentioned titles, in addition to title VI,[35] which would grant the President the uncontrolled power to cut off federal aid to any projects which he, for whatever reason, deemed to be "discriminatory," cannot satisfy this test. If they were enacted, they would vest in the temporary occupant of the office of Attorney

[34] S. 1731, § 204(b).
[35] S. 1731, § 601.

General, regardless of his character or qualifications, absolute power to act or refrain from acting in the premises at his uncontrollable discretion. Thus the proposed laws, especially the one allowing for the arbitrary cutoff of federal aid, would constitute a political weapon of the first magnitude which any administration which happens to believe in pragmatic politics could pervert from their avowed purposes to curry favor with some groups or to browbeat state officials into submission to its will. This is especially true where, as in the case of these bills, the words central to the bills, such as "discrimination" or "racial imbalance," or "substantial," etc., are not defined so as to give anyone a reasonable assurance as to when he might be covered.

This is a despotic power which no good Attorney General or President ought to want and no bad Attorney General or President ought to have.

I happen to adhere to the old-fashioned belief that it is Congress which is responsible for legislating and not the Executive Department or so-called independent agencies. A major defect of most proposed civil rights legislation, is that Congress is asked to make vague declarations of policy and then to cede effective legislating power to administrators or officials within the body of the Executive itself.

Title VI is simply the most glaring instance of this. Here the President would have the absolute, arbitrary right to cripple an entire state or even region should he invoke the in fact legislative power delegated to him by Congress. Title VII[36] is a like piece of both unconstitutional and unwise delegation of legislative power to the Executive:

> The President is authorized to establish a Commission to be known as the "Commission on Equal Employment Opportunity," hereinafter referred to as the Commission. It shall be the function of the Commission to prevent discrimination against employees or applicants for employment because of race, color, religion, or national origin by Government contractors and subcontractors, and by contractors and subcontractors participating in programs or activities in which direct or indirect financial assistance by the United States Government is provided by way of grant, contract, loan, insurance, guaranty, or otherwise. The Commission shall have such powers to effectuate the purposes of this title as may be conferred upon it by the President. The

[36] S. 1731, §§ 701-03.

> President may also confer upon the Commission such powers he deems appropriate to prevent discrimination on the grounds of race, color, religion, or national origin in Government employment.[37]

Thus, Congress is asked for a vague mandate—the prevention of discrimination. But "The Commission shall have such powers . . . as may be conferred upon it by the President." If this is not recognized as an unconstitutional delegation of power, then our view of the alleged separation of powers must undergo a radical change.

In summation then, to effect a good end—the ending of arbitrary discrimination against any American, regardless of his race or color—advocates of civil rights legislation are willing to trample on traditional procedural liberties, among them the freedom from arbitrary discretionary power vested in a powerful central government. I might say that, should such legislation continue to be introduced and passed, then several years from now we will need new civil rights legislation to protect all of us from the abuses of an arbitrary federal government. Then those of us who had fought to preserve the Constitution from the beginning may have a rueful last laugh, as the truth of the old maxims that "the end does not justify the means" and "power corrupts; and absolute power corrupts absolutely" will be recognized.

III

Substantively and procedurally, then, the proposed civil rights legislation suffers from fatal defects, manifesting not only the unwisdom of the bills, but also their unconstitutionality. When all is said, certain provisions of S. 1731 would confer upon officers within the Executive Branch autocratic powers which may befit the office of commissar of justice in a totalitarian country, but which are incompatible with the office of chief law enforcement division of a republic having a government of laws rather than a government of men.

Undoubtedly Daniel Webster had such governmental actions in mind as those proposed by S. 1731 when he uttered these eloquent words:

> Other misfortunes may be borne, or their effects overcome. If disastrous wars should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury,

[37] S. 1731, § 701.

future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen to future harvests.

It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these may be rebuilt.

But who shall reconstruct the fabric of demolished government?

Who shall rear again the well-proportioned columns of constitutional liberty?

Who shall frame together the skillful architecture which unites national sovereignty with State Rights, individual security, and Public prosperity?

No, if these columns fall, they will be raised not again. Like the Colosseum and the Parthenon, they will be destined to a mournful and melancholy immortality. Bitterer tears, however, will flow over them than ever were shed over the monuments of Roman or Grecian art; for they will be the monuments of a more glorious edifice than Greece or Rome ever saw—the edifice of constitutional American liberty.[38]

[38] Address by Daniel Webster at public dinner celebrating Washington's birthday in Washington, D. C., Feb. 22, 1832.