

Freedom and Federalism

“Words”—says Joseph Conrad, at the outset of the novel in which he sought “to capture the very soul of things Russian”—“are the great foes of reality.”¹ That is certainly true of the word “democracy.” It is also true of another abstract political term that must be confronted with equal resolution—“freedom.”

Precision is the more necessary because these two vague words are so often closely associated. It is commonly asserted that the more democratic a system of government, the more free will be those whom it governs. The assumption is baseless. If democracy is at variance with federalism, and if federalism is conducive to freedom, it would follow that, far from maintaining freedom, democracy is inimical to it.

The first part of this hypothesis has been established. By its very nature a federal system is an impediment to

¹ *Under Western Eyes.*

that unrestricted triumph of the majority will which is the essence of political democracy. The distribution of power characteristic of a federation is an obstruction to any "general will" in all matters reserved to the control of the autonomous localities. In the federation of the United States this obstruction is intensified, because the Constitution reserves certain specified rights to the people and prohibits any governmental infringement of these rights, whether by the national or by the State authorities. But to prove that democracy is at odds with federalism is not to demonstrate that federalism is conducive to freedom, the nature of which must now be explored.

Our officials constantly assure us that we are a "free nation," joined with like-minded Allies in "the Free World"—meaning that part of the planet which is not subservient to Moscow and Peiping. Such assertions have little reality at best and are the more suspect because they seek to make freedom collective. Political government can certainly discourage or encourage the condition of freedom. But, in the deeper sense, men are not free unless they make their own decisions, for themselves.

It has already been remarked that there is a subtle difference between what we mean by "freedom" and what we mean by "liberty," even though the dictionary seems to sanction their interchangeable use. It has also been pointed out that "freedom" has come to be used where "security" is meant, a corruption much more difficult in the case of "liberty," which more clearly implies the element of choice and the uncertainty that frequently goes

with it. In this final chapter we endeavor to isolate the abstract quality which both freedom and liberty seek to define. The effort is imperative because this quality is the very heart and substance of what we seek to defend against communism. And if the quality cannot be successfully defined it is most doubtful that it can be successfully defended.

We start from the simple fact that “freedom” is a noun of Anglo-Saxon origin, while “liberty” is derived from the Latin. It is a fair assumption that any difference in meaning traces to the different social concepts held by the Romans and by the northern “barbarians” whom their legions were never able to subdue. Since the Romans were much the more civilized people one would expect the word they used to have the more refined conception.

This expectation is substantiated by considering the customary verbal use of the two words. One may free a house from a mortgage, a boat from a sandbar or a pole from a log-jam. One would not “liberate” these inanimate objects. Release from physical restraint is in both cases the objective. But we think more naturally of *people* as being liberated; of *things* as being freed. For wild animals, however, either verb seems appropriate. Also, in this intermediate area on the scale of life, we use either the personal or the impersonal pronoun. To free a vixen from a trap is to liberate her—or it.

The associated prepositions are also suggestive of a transition from the impersonal to the personal. We obtain freedom “for” or “from” something—a preliminary con-

dition which is confirmed by the dictionary definition of “free” as being “*at liberty*.” If freedom is essentially an absence of external restraint, liberty stands forth as a more positive condition, involving a measure of personal choice which is less inherent in freedom.

The more the evidence accumulates, the more a strongly individual flavor in liberty is indicated. It is a condition of the mind rather than the body, so that Byron could properly speak of the Prisoner of Chillon as having liberty while confined by chains in a dungeon. Alternatively, one may be largely free from any physical coercion—as Patrick Henry certainly was when he declaimed “give me liberty, or give me death!”—and still feel deeply that some quality essential to a desirable life is lacking. This higher quality, however, implies a form of restraint as clearly as the lower form of freedom implies its absence. When we say that “liberty is not license” we mean that it involves self-denial as well as self-assertion. Certainly in most American political thought it has been agreed that, as Daniel Webster put it, “Liberty exists in proportion to wholesome restraint.”²

The most wholesome restraint, from any ethical viewpoint, is that which the individual applies to himself. And it is because of this necessary element of self-control that spiritual overtones, largely lacking in the case of freedom, creep in whenever we speak of liberty. In the words of St. Paul: “Where the Spirit of the Lord is, there is Liberty.”³

² Speech at Charleston Bar Dinner, May 10, 1847.

³ II Cor. 3:17 (King James Version).

This means that liberty is something far more elevated than the mere condition of mundane freedom. And this is not disputed by the beautiful phrase in the Collect for Peace which defines the service of God as “perfect freedom.” Liberty is depicted by these definitions as earthly freedom perfected by faith in values which are not of this earth.⁴

We are now in a position to examine more closely the opinion of the late Chief Justice Vinson: “Nothing is more certain in modern society than the principle that there are no absolutes. . . .” The assertion, in the first place, is logically fallacious. If there are no absolutes then there is no such thing as truth and consequently there are no principles, which do not exist without some truth to give them backing. Therefore, it is a contradiction in terms to speak of “the principle that there are no absolutes.” It is tantamount to proclaiming “the truth that there is no truth.”

But disagreement with this observation by a former Chief Justice goes very much deeper than mere logic-chopping. Our whole system of government is based on the assumption that there *are* certain absolutes, referred to in the Declaration of Independence as “the Laws of Nature and of Nature’s God.” This maintains that there *is* a God, not less so because we may not fully appreciate His laws, nor fully understand His *logos*. If there are no absolutes, then the concept of God must be merely rela-

⁴ The Latin original of this phrase in the Collect is *quem servare est regnare*—“to serve Whom is to reign.” Service implies restraint. The translator was obviously well aware that perfect freedom (or liberty) must be restrained.

tive, which is precisely what the communists maintain. If there are no absolutes then Americans, identically with the communists, have no firm basis whatsoever for either their political or their religious faith.

Furthermore, to say that "there are no absolutes" and that "all concepts are relative" is to affirm, in so many words, the unlimited power of political government. It is to say that the definition of freedom is to be determined by the spokesman for the "general will." Therefore it is to deny any valid case for free enterprise as against governmental regimentation. And it is additionally to suggest that habeas corpus, trial by jury and even the right to counsel are mere political luxuries, to be eliminated if they become inconvenient to political authority.

Of course this doctrine was not original with Chief Justice Vinson. It stems back to Justice Oliver Wendell Holmes and before him to the "positivist" school of philosophy, chiefly promoted in this country by Professor John Dewey. That philosophy, like Marxism, discards faith in favor of observable phenomena and mathematically demonstrable facts. It is probably helpful to scientific achievement, as the communist success in this field strongly suggests. But positivism is toxic to the traditional concept of freedom. And precisely because of the success of positivism it is essential to emphasize that there is a quality, distinct from freedom, which cannot possibly be packaged and dispensed by government bureaus. That is the quality which we are calling "liberty."

When Sir Isaac Newton first used a prism to break sun-

light into its component colors, there was considerable overlap in the resulting spectrum. Yet only the color-blind can fail to observe the difference between the violet, at one end of the scale, and the red at the other. Similarly, there is overlap in that spectrum which shades from the mere absence of physical restraint up to the voluntary acceptance of moral prohibitions. But this does not mean that freedom, at the former end of the scale, and liberty, at the latter, are indistinguishable. Liberty has a religious association which freedom lacks. And because of this religious association individual liberty has long been a most deeply prized concept, a valuation that extends down to generalized freedom because it is difficult to locate the boundary between the two. Any damage done to the liberty of one may prove to be an infringement on freedom for all.

The Common Law, in English-speaking countries, has long recognized this close association between liberty and freedom. And by protecting liberty, in countless individual cases, the Common Law has operated, and continues to operate, in behalf of freedom. Judicial unwillingness to differentiate between the two is doubtless one reason why the distinction remains shadowy. But the tremendous growth of statutory and administrative law, progressively cutting into the discretion of Common-Law judges, has steadily tended to put first the protection and now the control of freedom back into the hands of the executive branch of government, which is precisely what Patrick Henry and his fellows rebelled against. It is this process

of centralization which adds emphasis to the importance of our written Constitution, as a last bulwark for the liberty of the individual. In a number of recent cases the Supreme Court has strongly defended this redoubt, incurring sharp criticism for being tender to communists in so doing. But the defense has been weakened by the "no absolutes" conception, since without absolutes there is no substantial basis on which to defend liberty.

Nor can liberty be defended, no matter what the form of government, nor how independent and enlightened the courts, unless the citizen himself is willing to give it value. He may not know the truth in any particular issue, but he must be sure that absolute truth exists and that to it, and not to any mundane authority, his ultimate loyalty is due. Indeed the transition from generalized freedom to individual liberty may be said to come at that point on the moral scale or spectrum where a person decides that certain absolute values, which may run contrary to the laws of his land, mean more to him than life itself. He will have the Crucifixion to justify him. And long before that, witness the Hebrew prophets, men were seeking to make the formal laws conform to higher spiritual values which they, at least, considered absolutes. "Truths of the spirit are true always. The greatest teachers of the Old Testament understood them as no men have more, and in their pages we can find ourselves."⁵

⁵ Edith Hamilton, *Spokesmen for God*, W. W. Norton & Co. (New York 1949) p. 237.

As Dean Roscoe Pound so cogently reminds us, the English language slurs the clear distinction which is made in French between *droit* and *loi*, in German between *Recht* and *Gesetz*, and similarly in other tongues. We can only distinguish between law and a law, which fails to point the contrast between the ethical conception of what is right and the legal conception of a right established by statute or decree. Our need to differentiate between liberty and freedom is the greater because the former cannot possibly be promoted by a law and the condition of freedom can be so advanced. Law as such, on the other hand, is not merely "reason unaffected by desire."⁶ It is also further concerned with the moral element which characterizes liberty.

The Romans, under the Republic, also made clear distinction between *ius* and *lex*, the Latin nouns from which we derive justice and law. And by far the greater part of their law, to which we owe so much, was magisterial rather than legislative. It is helpful to realize that until recent years no connection was drawn between the conception of justice and that of democratic action. Justice was a divine conception. It was the natural law, to which all man-made laws should conform. In Cicero's words: "Law is neither a thing contrived by the genius of man nor established by any decree of the people, but a certain eternal principle which governs the entire universe, wisely

⁶ Aristotle, *Politics*, Bk. III, Ch. 16.

commanding what is right and prohibiting what is wrong.”⁷

This means that if liberty is good, which we hold to be a self-evident truth—an absolute, in spite of Chief Justice Vinson—then it has nothing to do with any decree of, or in the name of, the people. *Vox populi* is not *vox dei*, and may indeed be its very opposite. Alexander Hamilton brought the point into the context of the American Constitution when, quoting Montesquieu, he said: “There is no liberty if the power of judging be not separated from the legislative and executive powers.”⁸

But this separation of powers merely facilitates, and cannot create, the spirit of liberty, which comes to men from sources outside human control. The mechanical perfection of a political system cannot compensate for the loss of spiritual values among those whom it governs. Undue reliance on mechanism, however, is less likely with realization that law is something much more than the composite of all the laws currently in force. It is, rather, the

⁷ *The Laws*, quoted by F. R. Cowell, *Cicero and the Roman Republic* (Pelican Books No. A-320) pp. 354–5. Cf. also Bertrand de Jouvenel, *Sovereignty*: “As I see it, the Rule of Law is a natural phenomenon. Men are inhibited from doing certain things, and offended when such things are done, by reason of shared feelings as to what is right and proper. Upon those feelings, the content of which changes over time but the nature of which is unchanging, rests the possibility of social cooperation . . . enacted laws themselves are subject to these deep-lying convictions. That such convictions should be held strongly, and that they should be shared, constitutes the essence of the Rule of Law, which is actualized by the expression of moral approval or disapproval.” J.F. Huntington trans., Univ. of Chicago Press (Chicago 1957) p. 298.

⁸ *The Federalist*, No. 78.

body of at least relatively constant principles and permanent values that underlie the social contract and hold a society together by reason rather than by force. Law is even more basic than a written constitution, which after all can be no more than a heroic endeavor to set forth these underlying values and principles in an enduring codification. In the somewhat metaphysical language of Oswald Spengler: "In every healthy state the letter of the written constitution is of small importance compared with the practice of the living constitution, the 'form' (*Gestalt*) . . . which has developed of itself out of the experience of time, the situation, and, above all, the race-properties of the nation."⁹

"The beginnings of law," says Dean Pound, "are in custom," whereas "the beginnings of legislation are in police regulation."¹⁰ Here, from another angle, we see the separate forms of restraint that help to differentiate liberty from its lower form which we have called freedom. In primitive societies there is little of either. The restraint necessary for cooperative life is enforced by superstition, which is the prototype of both law and laws, of *ius* and *lex*, of *droit* and *loi*. The word itself tells the story, since *superstition* is simply that body of customary belief that "stands over" men and thereby commands submission.

In due course, though not contemporaneously in dif-

⁹ *The Decline of the West*, Geo. Allen & Unwin Ltd. (London 1928) Vol. II, p. 369.

¹⁰ "Why Law Day?" *Harvard Law School Bulletin*, Vol. 10, No. 3, Dec. 1958, p. 5.

ferent places, superstition divides into two more highly developed branches of restraint. One of these continues to be spiritual, confronting the mysterious forces of nature with the import of which a priesthood is assumed to be most familiar. The other branch of restraint becomes temporal, dealing with social problems under a leadership which is called aristocratic because it has the "monopoly of legal knowledge."¹¹ In many places, and for a long time, there is no clear distinction between the prophetic and the political authority. After Rome loses the latter it continues to hold the former, among most Christianized peoples. The struggle between Empire and Papacy is bitter, in spite of Christ's explicit statement: "My kingdom is not of this world." The boundary between the restraints of spiritual and temporal authority are not defined until the rise of the modern nation-state, and the consequent breakdown of the universal church. Then, instead of balance between them, the temporal restraint comes to dominate the spiritual, which loses its once freely accepted influence.

Well before the establishment of the United States, however, the issue had been resolved, and nowhere more in the interest of stabilizing balance than in the American colonies. After the Revolution, spiritual authority was here accepted as the dominion of independent churches;

¹¹ Sir Henry Sumner Maine, *Ancient Law*, World's Classics Edn., Oxford Univ. Press (London 1950) p. 12. See also Sir James George Frazer, *The Golden Bough*, *passim*.

temporal authority was a matter for civil government. Willing obedience to religious authority had been far too important in the American story to let it be jeopardized by political encroachment. And it was logically reasoned that politics should be equally immune from religious encroachment. The Declaration of Independence naturally cited every conceivable grievance, justified or not, against a king pilloried as “unfit to be the ruler of a free people.” But it made no reference whatever to any objectionable action by the Anglican Church; nor to any interference with any American church on the part of the British government.

When they came to draft the Constitution the founding fathers therefore had a great advantage which they utilized to the full. They could rely on the self-restraint in which an independent and influential clergy had trained their parishoners. This in turn meant that the Constitution could dispense with those centralized governmental restraints which are necessarily an encroachment on the condition of freedom. Though often lawless in regard to man-made laws, Americans were for the most part loyal to law in its fundamental, moral, Ciceronian sense. Madison says as much in No. 39 of the *Federalist*, where he speaks of “that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.” And the evidence is confirmed by De Tocqueville, who as late as the Jacksonian era said: “The Americans combine the no-

tions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other."¹²

Indeed, the political import of religious faith was emphasized by nearly all of the founding fathers, and by none more earnestly than that stalwart old free-thinker, Ben Franklin. Asking that the sessions of the Constitutional Convention should be opened with prayer, and addressing George Washington as its president, Franklin said: "I have lived, Sir, a long time, and the longer I live the more convincing proofs I see of this truth: that *God* governs in the affairs of men . . . without His concurring aid we shall succeed in this political building no better than the builders of Babel."¹³ And the originally Christian character of the American government was more than perfunctorily embodied in the original Constitution by the statement, just above the signatures of the signers, that this was: "Done in convention . . . in the year of our Lord one thousand seven hundred and eighty-seven. . . ."

Religious conviction, however much it may have waned in recent years, was certainly at the beginning a part of the "living constitution" of the United States. And since religious conviction demands the element of faith, it is clear that faith is inextricably associated with those "blessings of liberty" which our federal form of government

¹² *Democracy in America*, Vol. I, p. 306.

¹³ Ferrand, *Records of the Federal Convention*, Vol. I, p. 451. The word "God" is twice underscored in the original ms., now among the Franklin papers in the Library of Congress.

originally set itself to secure. Faith brings to the condition of freedom that spiritual quality which gives life and animation, and which alone justifies us in using the words freedom and liberty interchangeably.

Conversely, when the element of faith is withdrawn the condition of freedom is devitalized, being cut from its stimulative connection with the Kingdom of God. And with this debasement comes an almost chemical change in the character of freedom. In place of a moral idea comes identification with material condition. A man is not free unless his circumstances are prosperous. And he feebly believes that even though that prosperity stems from deficit government spending, he still is free! Thus the unity of a quality is denatured into a divisible quantity—four or some other number of “freedoms”—to be extended or withheld as the political leadership may deem expedient. Separation of church and state becomes subordination of church to state. With us, too, the concept of a balance of power is lost. And so freedom, divorced from faith, ceases altogether to be the absolute value as which it was once regarded, and with the change loses both constant meaning and intrinsic permanence.

This decay of a concept means that freedom can no longer be regarded as the clear-cut opposite of slavery. Indeed, the two ideas are perceptibly beginning to merge, as anticipated in George Orwell’s horribly prescient *Nineteen Eighty-Four*. There (or then) the Party Slogan inscribed “in elegant lettering” on the huge building of the Ministry of Truth was: FREEDOM IS SLAVERY. Orwell

explains the purpose behind this prostitution in his appendix on *Newspeak*, “the official language . . . devised to meet the ideological needs of Ingsoc, or English Socialism.”

Its vocabulary was so constructed as to give exact and often very subtle expression to every meaning that a Party member could properly wish to express, while excluding all other meanings and also the possibility of arriving at them by indirect methods. . . . The word *free* still existed in *Newspeak*, but it could only be used in such statements as “This dog is free from lice” or “This field is free from weeds.” It could not be used in its old sense of “politically free” or “intellectually free,” since political and intellectual freedom no longer existed even as concepts, and were therefore of necessity nameless.

A comparable, if less deliberate, procedure is being followed in the United States as we move towards 1984 and the presumable triumph of Amlib, or American liberalism. It was a long step backwards so to degrade freedom as to equate it with security. This degradation permits the nationalization of freedom, so that official pronouncements now no longer refer to the United States as “a free people” but almost invariably as “a free nation.” Yet there is still a difference between the Oceania and the Eurasia of Orwell’s biting satire. The Western socialist believes that security, miscalled freedom, can be obtained from the state without the surrender of individual liberty. This the communist categorically denies. To him dependence on the state is really and wholly that. When the state supplies freedom it necessarily denies liberty. The latter is indeed

only a captious claim to the non-existent right of opposing the general will. To the communist, in short, individual liberty is treason.

Thus we see that to distinguish between freedom and liberty is no mere semantic exercise. The differentiation is forced upon us by the claim of centralized government that it can provide freedom, and the all too reasonable expectation that what officials provide they will soon begin to define selectively. Indeed President Franklin D. Roosevelt said as much in his "Four Freedoms" message, when he denounced "trouble makers" and asserted that "a free nation has the right to expect full cooperation from all groups." That is exactly what Rousseau meant in stating that "whosoever refuses to obey the general will . . . is forced to be free."

But if the meaning of freedom has been debased into a commodity now dispensable by a bureaucracy, in return for good behavior, the same cannot be said of individualized liberty. That quality cannot be allocated by any Ministry of Truth or by any Department of Health, Education and Welfare. On the contrary it is an elusive flame, continuously rekindling, in unexpected places and among all sorts of "trouble makers," regardless of the will and generally contrary to the wishes of Big Government. And to seek the source of this flame is to find it, with Saint Paul, "where the spirit of the Lord is."

Far from being an intellectual tour de force, the distinction between freedom and liberty accurately locates the highwater mark of totalitarian democracy. That murky

tide may rise to submerge the rock of freedom. But it can never overwhelm the wingèd spirit of liberty.

A truth now disagreeably self-evident is that the authoritarian state can, and is prone to, extend its physical control over every aspect of a free society, of course including free enterprise. Slowly but surely, in less than a century, Americans have witnessed first the nationalization of rights, then the nationalization of power, now the nationalization of the concept of freedom itself. With such a well-established trend it is futile to expect that a mere mechanism like the free market will remain immune. For all the volumes that have been written about free enterprise it is, after all, only one of many emanations from the basic concept of freedom. Therefore it will disappear if its source is eliminated. Once freedom itself has been nationalized, it is only mopping up to nationalize a particular industry.

In this context, the value of federalism, in preventing the prostitution of freedom, becomes more clear. It has, first, the negative advantage of blocking the thoughtless extension of national power. The word "no," used as a direct restraint on government, occurs twenty-six times in the original seven Articles of Constitution, five times more in the Bill of Rights. Had President Truman been living in 1787 he could quite reasonably have called it a "Do-Nothing" Constitution. But to do so would be to forget that the founding fathers put restraints on government so that the governed might be free.

In addition to limiting governmental power, the Con-

stitution most delicately balances its exercise. And the balance of power, like the limitation of power, has worked admirably. In the course of this survey we have seen the Congress dominant under Thaddeus Stevens; the Executive dictating under F.D.R.; the Judiciary in the saddle under Chief Justice Marshall and, very briefly, under Chief Justice Warren. Yet always, so far, balance has been restored; fortunately so, since without balance there are only the alternatives of anarchy on the one hand or autocracy on the other.

That is why it is plain absurdity to talk of democracy as though unhampered majority rule could ever be itself an objective of good government. The aim must be balance, which is achieved when local affairs are handled locally, and lost when government becomes so omnipotent as to turn the citizen to a mere ward of a unitary state. Democracy, in the social sense of the brotherhood of man, can only be maintained, as Aristotle said, in local groupings. Interpreted in national terms, as the triumph of Rousseau's *volunté générale*, democracy becomes perverted and as such perverts freedom.

And finally, the Constitution, while "the supreme law of the land," was in its original form and still essentially remains a valiant attempt to reflect the even more fundamental Natural Law which men will endeavor to observe as long as they believe in those enduring moral values without which civilization would be impossible. Our organic law seeks to harmonize all governmental action with the talent of a truly free people for self-government. They

remain free only as long as they maintain this spiritual aspiration. Without faith, the Constitution falls.

Whether or not our Federal Republic will be maintained is therefore at bottom a moral issue. It depends as much on the churches and the synagogues as on the legislatures and the law courts. The growth of Big Government goes hand in hand with the loss of Big Conviction.

When Caesar stood on the banks of the Rubicon, deciding whether or not to strike down the sadly corrupted Roman Republic, he argued to himself that the issue was really already settled. "It is nothing," he said, "to be a republic, now a mere name without substance or character."¹⁴

If that is the way we have come to feel about federalism, then is our Republic also, in less than two centuries of history, on the way out.

¹⁴ "Nihil esse rem publicam, appellationem modo sine corpore ac specie." Suetonius, *Vitae duodecim Caesarum*.