



THE AMERICAN POLITICAL SYSTEM

Dr. Paul A. Freund

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Reviewed by: Col Bergameyer

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The American Political System

22 August 1963

CONTENTS

	<u>Page</u>
INTRODUCTION -- Colonel Bradish J. Smith, USA, Member of the Faculty, ICAF	1
SPEAKER -- Dr. Paul A. Freund, Professor of Law at Harvard University	1
GENERAL DISCUSSION	14

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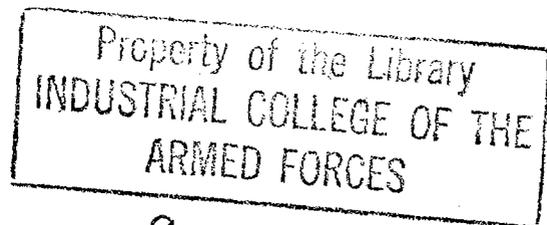
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INDUSTRIAL COLLEGE OF THE ARMED FORCES

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COLONEL SMITH: I don't believe that any expert could contradict me this morning if I say that our speaker is one of the foremost authorities in our country on Constitutional Law. You've read his biography, and I think you'll see that the blend of academic achievement and public service qualify him with almost unique expertise to talk on the subject this morning, "The American Political System," with emphasis on its legal framework. It is an honor to present the Professor of Law, at Harvard University, Dr. Paul A. Freund.

DR. FREUND: Gentlemen, I appreciate this opportunity to talk with you, necessarily briefly, about this very large subject, our Constitutional political system, its origins and evolution. I hope that I won't pitch this at too elementary a level. I will proceed, I confess, on the philosophy of the lecturer who asked his audience whether they understood Latin, and the spokesman said, "Of course, sir, but you may proceed as if we did not.

Well, to go back to the origins, our Constitution is based on both experience and reason. The framers had the experience both of weak government under the Articles of Confederation, and earlier, of strong government under Great Britain. And there were spokesmen for both points of view in the convention. Alexander Hamilton advocated a President chosen for life by electors, and Governors of the States appointed by Congress. If that plan had been adopted there might have been some point in the question that was asked of me a few years ago in England in 1957, at the time of the Little Rock Affair. A Cambridge University student said, "Why doesn't the President remove Governor Faubus; he appointed him, didn't he?"

The theory and practice of Federalism is something that a unitary system has

difficulty understanding. Well, opposed to Hamilton were the spokesmen of the smaller states who, in their New Jersey Plan, advocated a collegial, Executive elected by Congress, and a Congress in which each state would be entitled to one vote; a plan not radically different from the Articles of Confederation. I won't go into the familiar story of the compromises which emerged, the bicameral legislature with a power in Congress over commerce, and yet to protect the Southern exporting states, a prohibition upon exports; a President chosen indirectly by electors, or, in the absence of a majority of electors, a contingency that was regarded as quite likely, election of the President in the House of Representatives, each state having one vote; the separation of powers in the federal system.

It was a Newtonian, 18th Century document, in its balance of forces. The question is often raised whether it marked a counter-revolution, philosophically, whether it was a reaction to the democratic impulses of the revolution itself, as has happened characteristically in revolutions around the world - the French Revolution, the Russian Revolution, etc. And arguments have been made that it was a counter-revolution whose ^{main} object was the protection of vested property rights. Of course, one of the main objects of the Constitution was the protection of property against the recriminatory and retaliatory laws of the several states; the anarchistic pressures that were symbolized in Shays' Rebellion in Massachusetts. But I think the more significant and remarkable aspect of the Constitution is the extent to which it is a democratic document.

Take two major tests of a democratic constitution; one, the placing of the suffrage. If the Federal Constitution had undertaken to define voting rights for federal office it would probably in the fashion of the day have imposed property qualifications on the suffrage. And, indeed, property qualifications on office holding; it did not. Instead, it left the question of suffrage to be settled in

each state. Those citizens who were qualified to vote for the more numerous branch of their state legislature were by that token qualified to vote for Representatives in Congress, from their state. There were no property qualifications on federal office-holding; indeed, there was a prohibition against any religious test for national office.

The second criterion of a democratic constitutional doctrine, the safeguarding of personal rights, is said to have been forced on the National Government by the states in the movement for a Bill of Rights as a condition of ratification. But this overlooks the fact that the principal document itself, which was agreed to in Philadelphia, contains very significant safeguards of personal rights. It contains the guarantee of habeas corpus, prohibition against Bills of Attainder, right of jury trial in criminal cases, and a number of others which, in themselves, were a remarkable production of the time. Well, so much for experience.

To turn to the element of reason, or philosophy, the most influential of the framers were conversant with the philosophy of the enlightenment. James Madison, probably the most influential of all, was a deep student of the English and French liberal writers, and particular, of David Hume, whose skepticism, including skepticism about human nature, greatly influenced Madison's thinking and his contribution to the constitutional document. The Famous No. 10 of the Federalist Papers - by Madison - which is surely an outstanding classic of this or any other nation, has sometimes been said to be a precursor of Marxism, because, in No. 10 Madison says, in discussing what he calls "factions" - what we might call "classes" - "The most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors and those who are debtors fall under a like discrimination" - etc.

"The regulation of these various and interfering interests forms the principal task of modern legislation."

Well, now, this is an insight which is familiar to us now, and yet it seems to me quite superficial and misleading to classify Madison as a premature Marxist, shall we say. For two reasons. In the first place, he does not insist on property differences as the only basis of faction; he refers as well to differences in religious opinion, differences in personal attachments, etc. So, it's a much more comprehensive analysis of divisions in society than the simplistic ones of a class struggle based on property.

And secondly - and perhaps most importantly - when he speaks of factions he includes as a faction which is to be guarded against, the faction of the majority and not simply the minority. "By a faction," he says, "I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." And, it was to deal with this problem of the faction of the majority that he devoted his deepest thought.

His insight here was this; that in addition to what I call the Newtonian structure of the Constitution with its balance of forces - in addition to that - our government would make an ally of size; an ally of geography. And thus, by extending the domain of the national government and the diversity of interests which would be caught up in the national government we would secure another safeguard against the tyranny of a compact majority. He argues that just as diversity and multiplicity of sects is the best guarantee of toleration, so multiplicity and diversity of interests on the broadest geographic scale is the best political guarantee against political or governmental tyranny by a compact, single-minded, single-

interested majority.

Now, of course, this insight which was carried over into the Constitution in our national government, which was in the House of Representatives, particularly, detached from control by state legislatures; this arrangement was threatened early by the rise of national political parties, which surely had not been seen, and which were the kind of faction that Madison doubtlessly had in mind as a danger which government must deal with. Now, the curious thing is that the rise of political parties in a somewhat unforeseen and, I think, subtle way, far from upsetting the calculations of Madison and his colleagues, reinforced their position; through a saving paradox; namely, that the political party itself in America is a coalition organized on a federal structural basis. And I think one cannot really appreciate our federal system without an analysis of the structure of our political parties.

The great prize for each political party is the Presidential Office. And since that office is chosen through our electoral system which is itself based on state block electoral voting, the emphasis is on a national consensus or coalition under the umbrella of the party in order to secure as wide support as possible in a diversity of states to capture the block electoral vote. And so we have a coalition of interests within a party, unforeseen by Madison, but in spirit quite consistent with his philosophy. The result is an ideological fuzziness in the composition of a party, and yet, it seems to me, the kind of fuzziness which is the safeguard against the compact majority of which Madison was so fearful.

I sometimes like to think of a wonderful phrase of E. M. Foster, in one of his novels, as descriptive of the American political system - "A creative mess." One contests this interrelation of the structure of our parties with the structure of our government; particularly the federal system, by supposing that the electoral system were abolished and in its place were substituted direct, popular vote for

the President.

Now, off-hand this may seem to be a rather small change. You may say it wouldn't have made any difference in virtually every election; perhaps two elections would have been effected - Hayes-Tilden and one of the Cleveland elections. But that isn't the point. The point is what the side effects would be of such a change-over to a straight, popular vote. In the first place it seems to me very likely that there would be a fostering of splinter parties, because in contrast to the present situation where a splinter party has no hope of capturing sizeable state electoral blocks - leaving aside possibilities in certain Southern states - in contrast to that, a direct popular vote would stimulate the rise of splinter parties because they could pick up and have counted for them all of the popular individual votes throughout the country; not that they would succeed in winning the Presidency, but they would much more readily succeed in preventing any candidate from achieving a majority and thus throwing the election into the House of Representatives, where, under the present plan, each state would have one vote, and you have then, a coalition, not within a political party, but in the form of deals made on a state basis in the House of Representatives; a weakening, I'm sure, of Presidential authority, and a sharpening of ideological divisions among the parties.

And secondly, in addition to the splintering of parties with all these side effects, there would be, it seems to me, a shift of emphasis and of political concern away from the populous industrial closely-contested states which are the electoral prizes today under the block electoral system; a shift of concern away from them to other political battlegrounds. The Southern states would become more important politically in an effort to pile up a wide margin of popular votes. And so, the interest of minority groups which at present are served in our national elections by the concern of political parties for those states where minorities

hold a balance of power, or close to it, the interests of these minority groups would be less served - as I see it - under a straight popular vote for the Presidency.

Well, so much for theory; the theory of our political system as affected by our political parties. Let me say a few words about Federalism and its asserted values, and the criticisms which have been leveled against it. Federalism is deemed by its sponsors and spokesmen, as a safeguard against tyranny, by the dispersion of power. The answer to this has been offered that in fact, local governments are more prone to tyranny, to despotic rule, than the national government. We've had many more village and local tyrants, I presume you would agree with me, though there may be dissents, than we have had tyrants on the national scene.

And so it is said that this argument for federalism breaks down; that the more power given to the federal government the less powerful will be local despotic rule. I think the rebuttal to this is in what I have tried to say already, namely in the character of our national government; that without the federal structure of our political parties, making of them coalitions and diffusing and burning ideological distinctions within a party - without that we might well have a more tyrannical in the sense of a more single-minded, single-interested national government. And so, one cannot write off federalism merely by comparing the experience of the national government versus the experience of certain localities; one also has to analyze what our national government is in terms of federalism before making the criticism.

Secondly, federalism is argued to be a productive laboratory for progressive legislation which can be tried out on a local scale as a test before it is tried on a nation-wide scale. To this the answer is often made that in fact the national government is much more progressive and experimental in legislation than are states and localities. But, again, the rebuttal to this is, I think, that virtually all

significant national legislation has had its prototype in state legislation. Whether you applaud the New Deal or you deprecate it, the fact is that it was new; it was novel more in the pace and combination of measures than it was in the character of the individual laws that it enacted. I refer to the fact that unemployment insurance has been adopted in states like New York and Ohio. In Wisconsin minimum wage laws have been adopted and in other states. Child labor laws in some states. The Blue Sky Laws were a precursor of the Security Act, etc.

In the third place it is said that federalism is a means of securing the representation of minority groups. And to this the answer is made that in our society minority groups are not found on a geographical basis and therefore federalism is irrelevant to the representation of minority groups. There are exceptions to this, of course, in places like Harlem, or Polish-American communities, but by and large minorities are interspersed geographically, and therefore it is argued the federal arrangement does not represent minority groups. The answer to this - like so many answers I am suggesting - goes back to the structure, again, of our parties, because the parties are concerned to win as many states as possible. They are concerned with minority interests. And so, the federal structure of our political parties, rather than the federal structure of our representation in Congress, is the explanation of how federalism serves the representation of minority groups.

And finally, it is said on behalf of federalism, that it involves a division of governmental problems commensurate with the scope of the problems; smaller problems can be dealt with on a local level; larger problems on a national level. The answer to this has been made that in fact federalism works to provide a kind of escape for some groups from any regulation, or any effective regulation. This was true of child labor for a time, where a manufacturer from one state could ship child-made goods into others; or distributors could import child-made goods from

other states, state law to the contrary notwithstanding, because interstate commerce was involved. And the Supreme Court had held that this was not a proper subject for Congressional legislation under the Commerce Clause. That has been changed with the overruling of the child labor case.

But still there are features of our industrial and social life that seem to escape legislation through the catches of federalism. For example, corporate charters are available in any state - Delaware, New Mexico; wherever, for carrying on business throughout the United States. And so, you can have a kind of Gresham's Law operating with the least severe regulatory system available on a nationwide basis.

Likewise, in the case of migratory divorce; people from New York can go to Nevada, as someone has said, "to be Renovated" and New York can do something about it, but not very much if the parties have been careful that both have made a formal appearance by counsel in Nevada. These are escape hatches of the federal system. But, by way of rebuttal to this, it can be said that there are powers in the national government as yet unused, to cope with these difficulties. It's a question of policy rather than of Constitutional authority. Congress could provide, I'm sure, that a corporation could not do interstate business, let's say, unless it was chartered by a state in which it did a certain percentage of its business.

Congress could provide, in the case of divorce, under the full faith and credit clause, the conditions for recognition of a divorce decree, the conditions of jurisdiction; of residence. But, for rather obvious reasons, I suppose, this is an area where Congress chooses not to enter. I think the fault, then, is not in our federal division of powers, but if there be a fault it would be in the reluctance of legislative policy-makers to enter certain areas where the problem has assumed a national scale.

The truth is that the federal system is not so much a division of power between the states and the nation, as it is a highly flexible and subtle arrangement for the admixture of powers or the use of cooperative powers. The federal system is not so much a layer cake as it is a marble cake. And the opportunities for cooperative federalism - federal legislation in aid of state policy; these opportunities have by no means been exhausted.

Now let me turn to something that is more my own special concern in Constitutional Law, namely, judicial review which assumes special importance in our system because federalism requires some kind of arbiter of the division of powers, and the Bill of Rights requires some judicial enforcement. I would say that there are three main functions of federal judicial review; Supreme Court review of state and federal legislation, or state and federal executive action - three main functions - all of which, of course, have to be performed within the framework of cases and controversy. The Supreme Court does not sit to answer interesting questions of Constitutional Law; it sits to decide lawsuits where someone brings himself within the traditional framework of litigation. But, within that framework there are these functions.

First of all, I should say, to maintain the constitutional order; the distribution of powers; the limitation on powers. The powers of Congress, as of today, under the Constitution, I think we would all agree are as ample as Congress is likely to desire. The problem is whether they will exercise the power or not in a given context.

The controversial question is whether the Supreme Court has unduly restricted the powers of the states. Those who argue that the states' powers have been restricted unduly tend, I think, to overlook certain very important areas where state powers today are more freely recognized by the courts than ever before. I refer to

state economic regulation in reference to interstate commerce. I refer to the taxation of interstate enterprise; such things as use taxes through apportioned gross receipts taxes on interstate business; exercises of the taxing power that a generation ago would have been - to put it mildly - exceedingly dubious, constitutionally.

I refer also to such economic and social regulations as eminent domain for purposes that a generation or more ago would likewise have been exceedingly dubious; eminent domain for esthetic purposes; or even regulation without compensation for esthetic purposes - billboards, ordinances and the like - which go far beyond the 19th Century formula of health, safety and morals.

Inter-governmental taxation is open to the states in new ways. States may tax federal salaries, as this audience is doubtless aware, and federal contractors, in ways that a generation or more ago were held unconstitutional. It is in the realm of procedure that the inroads on the states by the Supreme Court have been most severe and most actual. The requirements of a fair jury; the exclusion of confessions not voluntarily obtained; the exclusion now of evidence obtained by illegal searches and seizures; the right to counsel for indigent defendants in serious cases; all of these are innovations enforced, adopted, announced - if you will - by the Supreme Court.

I think it's worth reflecting that it is just in this area of procedure that courts have their most peculiar and special responsibility. Judges are not, by training, or temperament, particularly qualified to decide whether minimum wages are arbitrary or not, or whether zoning for esthetic purposes is, on the whole, for the general welfare or not; they've largely withdrawn from this area. But in the realm of legal procedure there is no agency more qualified or more responsible than the courts for the setting of standards. And it is here that the invasion, if you will, has largely been made.

Well, I've spoken, now, of this first major function of judicial review, to maintain the constitutional order.

Secondly, it has the function of helping to maintain what we would now call our national common market. Traditionally we talk about this as the protection of interstate commerce from state burdens or barriers. But, I think we speak more meaningfully for ourselves and the rest of the world if we frankly recognize that this is a common market and that our Supreme Court has had a crucial role in its maintenance by examining and, where appropriate, striking down state tax or regulatory measures that discriminate against out-of-state goods or that prevent out-of-state interests from getting access to local raw products.

This is an achievement that observers from abroad - particularly Western Europe - are constantly struck by, and our Supreme Court reports are full of the experience, the pitfalls, and - fortunately, from time to time - the triumphs of the concept and maintenance of a common market.

The third phase; the courts have the responsibility of helping to maintain an open society. Again, I'm using a mid-20th Century term. We have been accustomed to speaking of individual rights or democratic processes, but, again, we connect up with current worldwide movements, I think, if we speak as we honestly can, of the maintenance of an open society. Now, what does this mean? Well, it means a government which is both responsive and responsible. In terms more concretely, of our Bill of Rights, it means on the side of responsiveness a free press, freedom of speech and assembly.

It's interesting, I think, that this development through the courts is not confined to the recent decade or two. I think the turn occurred in the Chief Justiceship of Charles Evans Hughes, beginning in 1930. You may recall that during that period there were two particularly notable or notorious local dictators -

Huey Long and Frank "I am the law," Hague. Each of them got his comeuppance in the Supreme Court. Huey Long had engineered a press-gag law in Louisiana, taxing the press by steeply progressive rates geared to the volume of their advertising. This hit the big city press which was hostile to Huey Long. On its face the tax looked valid; progressive taxation is constitutional; newspapers can be taxed. But the Supreme Court looking behind the form concluded that this was a not too-well disguised attack on the press by a special form of taxation not applicable to other enterprises, and struck it down.

In New Jersey, Mayor Hague had secured the enactment of an ordinance in Jersey City, giving him or the Chief of Police absolute power to decide who could speak in the city square. And they forbade outfits like the CIO, the American Civil Liberties Union, and the Princeton Whig Cleosophic Debating Society, from using what I think is called "Journal Square" in Jersey City. This case came up to the Supreme Court in the '30s and this ordinance was held in violation of the Constitutional guarantees of freedom of assembly.

Responsible government means fairly representative government, and in this context the recent reapportionment decision falls into place as a contribution by the court to the maintenance of what I call an open society.

Now, you see I've exhausted my subject in precisely 44 minutes and I have one minute left for a peroration. I think it can be said that if the formal Constitution and its conception were Newtonian - were 18th Century in philosophy - reflecting a balancing off of forces, that the development of the Constitution - and particularly in judicial review - has been Darwinian, it has been an evolution and a record of continuity with change.

As science acquires more and more power over space - outer space, the galaxies - and inner space, the recesses of the human mind; as science acquires more and

more power over our psychic constitutions; over our genetic constitutions, it may just be possible that we will have reason to be grateful for the strengthening of the safeguards in our legal and political constitution.

QUESTION: Doctor, to what extent do you feel that the area of judicial review has been determined by the personalities and inclinations of the members of the Supreme Court?

DR. FREUND: Well, this reminds me of a question that was put to my former colleague, Robert Bowie, when he was Head of Policy Planning in the State Department. Someone said to him, with a very knowing air, "Mr. Bowie, don't you think that the estimates of the military - the demands of the military - have to be discounted?" He said, "Certainly; by how much?" Well, I'll answer that in somewhat the same way; "Certainly, but by how much?"

Certainly, it makes a difference who sits on the Supreme Court. There is no question about it. And yet, it seems to me that there are secular movements that are more important than the personalities, or the outlook, or the backgrounds of the individual justices. I think if you look over the history of the court in perspective you'll see certain emphases which, to be sure, reflected the outlook of the justices, but perhaps the justices were there because of the secular movements of the time. It's a little bit like asking whether history is made by great men or by impersonal forces. There's a reciprocal relation; a man may be great because he's thrown up by the forces.

It certainly was significant that Marshall was Chief Justice for 30-odd years in a formative period of the Union, and that Chief Justice Rhone (phonetic), of Virginia, who would have been Jefferson's choice, was not. Although, who can say what Rhone would have done if he had been transported from Virginia to Washington?

If you look over the history of the court I think you will see along with these personalities certain developments that transcend the personalities. During the period of Marshall's course the great achievement was to cement the Union. He gave a very expansive interpretation of national powers and a rather strict view of state powers as they impinged on national interests. Without being a historical determinate one can say that this appropriate to the problem of the day.

After the Civil War, into the turn of the century, the Supreme Court was supporting the claim of large-scale business as against experimental legislation by the states. They may have gone too far. I happen to think in many instances they did. And yet, taking a large view of it one can see that this too was part of a natural development. Today, it seems to me, whoever the judges on the court may be, they are bound to be effected, subconsciously at least, by the concerns of the day. I don't mean the pressures of this or that demonstration or this or that editorial. But it seems to me impossible to exclude from the thinking of the Supreme Court Justices in interpreting our basic document, to exclude the experience of the last generation with Fascism and Communism. The demands for an open society, for a common market, are part of the consciousness of the period.

It's a little bit like - and I hope I won't be misinterpreted as advocating judicial free-wheeling - the interpretation of a great literary masterpiece; like Hamlet. After all, "The Constitution," as Marshall said, "was intended to endure for ages to come and to meet the various crises of human affairs." This is true of a great literary masterpiece in the sense that it's intended to endure and to answer the questions and respond to the concerns of future generations. The same would be true of a great religious text like the scriptures.

What does Hamlet mean? It's a revenge play, or so it was thought at the beginning. Today it may be interpreted as a study in mother fixation, and in between

as an analysis of the problem of rational proof versus spectral evidence; or a conflict between conscience and action or passion. None of these is wrong; each is a response to the felt concerns of the time, and that's why a literary masterpiece lives and has meaning. Likewise with the Old Testament. While the Jews were living in ghettos in the Middle Ages they took sustenance from those parts of the Old Testament which emphasize the special, the peculiar, the parochial quality of the Jewish faith. When emancipation came in the 18th and 19th Centuries they emphasized the more universal aspects of the Old Testament - the psalms and the prophets. Neither was wrong; each was a response to the needs of the time.

Now, this is a long answer to a very simple question. Of course, within these large movements there are differences. But the point is, I think, that the differences within the court today are limited differences. If you take a justice today who seems to be the most conservative - to use a word I don't particularly like, but you'll understand what I have in mind - and you transport him and his views to a court of 50 years ago, he wouldn't have seemed conservative. We accept today on all sides, positions that were highly controversial 30 or 50 years ago. For example, whether the 14th Amendment - which is applicable to the states - comprehends liberty of speech and press within the term "liberty," was really not decided until the late 1920s.

Today no one on the court disputes that one of the liberties guaranteed against the state is liberty of speech and press. The area of controversy has moved on the spectrum to the question of the extent of this protection; and there are differences. And so, what you have, it seems to me, on the court, is a moving consensus within which there are differences, but the differences tend to be beyond the range of the controversies of a generation or two ago. So that, I think that differences in personality are important, but they are subsidiary to more secular movements.

QUESTION: Sir, would you discuss federal authority to enact public accommodations statutes assumed to be derived from the authority to regulate interstate commerce?

DR. FREUND: Well, I'm glad to hear that. If you hadn't asked that question I would have emulated General De Gaulle and said, "Did I hear someone ask me about the public accommodations?"

Well, as you know, there is discussion now over two alternative bases - or possible bases - for a public accommodations bill; the power over interstate commerce and the power to legislate under the 14th Amendment. You asked about the commerce power in particular. It is said that this is an inappropriate or invalid use of the commerce power because the aim is a moral aim and not really a commercial aim; that we're not really concerned about the effect on commerce; we're concerned about the moral issue of discrimination on the base of race or color. But actually, the power under the commerce clause is a very extensive power which can be used for moral as well as other purposes. It's a power in Congress quite parallel to the power of the state over domestic commerce.

I think some of the discussion has been unfortunate in that it has centered on the effects of discrimination on commerce. That is to say, whether national conventions are deterred from going to New Orleans because of hotel discrimination; whether negro families making long tours are effected by lack of accommodations, etc. There is this effect to be sure, though in any given instance it would be very difficult to show. It would be very difficult to show that a particular hamburger stand which discriminated, was effecting interstate commerce.

Incidentally, however, the test, it is quite clear is not whether the individual violator effects commerce, but whether in the aggregate such a class of violations would effect commerce. This has been quite well established, for ex-

ample, under the Labor Relations Act. But beyond that, as I say, I think it's unfortunate to concentrate on that aspect. There is another aspect, which is the power of Congress to regulate commerce and not merely the effects on interstate commerce. That is exemplified by such laws as the Anti-Lottery Law of Congress; the Mann Act; the Stolen Automobile Act; the Pure Food and Drug Act. These acts, many of them, are passed in the interest of consumers. This is true of the Pure Food and Drug Act, for example. Congress passed it, I assume, not because it was concerned about the effect on commerce, of a consumer buying a mislabeled package of pills from a retailer; Congress was concerned that goods made in one state, for which the facilities of interstate commerce were employed, should be utilized to injure consumers.

The same is true of the Federal Trade Acts where consumers are protected against their own ignorance or their own gullibility. It isn't a question, although commerce is effected in some sense, that is to say the untruthful label or the shoddy goods create a market which would go to others if these conditions were corrected. There is an effect on commerce. But the important thing, it seems to me, when Congress considers such measures, is not; well, now, let's see what commerce we can deal with today. No, they say, "The problem of consumers being cheated, consumers being poisoned, consumers getting too little for their money, is a national problem; it's a concern of a national market. What can we do about it? Well, we have power over commerce and therefore we have power and responsibility."

The Mann Act; the Lottery Act. Lottery tickets don't contaminate commerce. They don't effect commerce in any significant way, but they utilize commerce to the detriment - or so it was thought - of persons at the end of the line, who needed to be guarded against their own improvidence. Now, it's in that tradition, it seems to me, that the public accommodations bill fits. Discrimination among customers

with regard to products that have come from other states - I'm now thinking of the most controversial features having to do with retail establishments; not hotels and motels; theaters and baseball parks; but the drugstores and the restaurants; perhaps the beauty shops - whatever Congress decides to include or exclude. The problem there, it seems to me, is comparable to that in such instances as the lottery case, the Mann Act case, the Pure Food and Drug Act case, the Stolen Car case.

Merchants are discriminating commercially, and it becomes more profitable for them by virtue of the fact that they have access to an interstate market for their supplies. Now, Congress being concerned that discrimination is immoral - I'm giving the argument now, I'm not personally underscoring all this; I'm giving the Constitutional argument - Congress concluding, if it does, that this is immoral, decides that it can do something about it because these establishments are utilizing the channels and facilities of interstate commerce - directly or indirectly - to the detriment of the consuming public.

The Pure Food and Drug Act applies to retailers who, themselves, are not engaged in interstate transactions. If a retailer buys a package of drugs from a wholesaler next door to him, which is properly labeled - if those drugs came from outside the state to the wholesaler, the retailer himself is subject to the federal Pure Food and Drug Act in the way that he re-sells or re-labels, or removes the label from the product. He is engaged in interstate commerce indirectly in the sense that he is an outlet for goods which have come through interstate commerce. And lest he deceive the public, the federal law applies to him.

And so, to conclude, I would feel that the bill is well within the traditional scope of the commerce clause. I have a great deal more difficulty fitting it within the scope of the 14th Amendment, which is a very complicated problem because the 14th Amendment says, "No state shall," and how are you going to make it apply

to private enterprise? Various theories have been adopted which seem to me not to have been sufficiently thought through. And it's ironic, it seems to me - if I may expand on this a bit - that Senators are clamoring for the 14th Amendment basis rather than the commerce basis in order that the federal power over business will not be unduly excessive. They think this is a moral issue and that therefore the 14th Amendment is more appropriate. They're afraid of the tentacles of federal power over business, and therefore they want to shy away from the commerce clause which somehow has been identified with the New Deal, and they prefer the 14th Amendment.

This seems to me ironic in several ways. In the first place, the fear of the commerce clause is the fear of Congress' own power. Congress need not exercise the power; it's latent; it's a question of policy. And those who object to it ought to object to it on grounds of policy and not on grounds of power. Beyond that, the 14th Amendment would open up quite unexplored vistas of federal power, not merely by Congress, but by the courts, because the 14th Amendment is, in large sense, self-executing. It says, "No state shall," and Congress may enforce these provisions.

Now, if Congress opens up the 14th Amendment to apply to certain forms of private enterprise because it's licensed by the state, what are the limits? Discrimination is only one feature of the 14th Amendment. The 14th Amendment speaks of a new process of law. Does this mean that corporations licensed by the state must as a matter of Constitutional Law observe certain procedures in their elections? And that the courts may enforce this, even without legislation because of the form of the 14th Amendment, which is prohibitive? To use a Presidential figure of another connection, a genie would be let out of the bottle, the dimensions of which I think the sponsors of the 14th Amendment have not sufficiently explored, and that it would be a pyrrhic victory from their point of view - assuming the court would adopt it -

to establish this new dimension of the 14th Amendment applicable to businesses licensed by the state in all the ramifications that are possible under the due process and equal protection clauses of the amendment, enforced not merely by legislation, but directly by the courts.

QUESTION: Earlier you said that the Supreme Court was not there just to answer idle questions to satisfy curiosity. Could you give us a feel for the determining standards or factors of the Supreme Court?

DR. FREUND: Well, I said that the matter must come up in the framework of ordinary litigation. This means, most simply, that the Supreme Court will not give advisory opinions. The government can't ask the court for advice as the legislature can in some of our states - such as Massachusetts. It means, furthermore, that a person challenging a law must show that he is affected by it in a way that gives standing to an ordinary litigant.

For example, in the case of Bible-reading in the public schools the issue was avoided for a time in the Supreme Court because of the way the case came up. The plaintiffs had begun as taxpayers and parents of school children. By the time the case reached the Supreme Court the children of these particular plaintiffs had graduated and the court said in their capacity as parents they have only a moot case; "Nothing that we decide could help in the education of their children. As taxpayers," the court said, "they have not shown any pocketbook interest; they have not shown that their taxes are heavier or will be heavier by reason of Bible-reading, than if Bible-reading were abolished." And therefore, this interesting question which they raised is a moot question, an academic question as far as our court was concerned and so it was dismissed.

Now in the later cases, fortunately the progress of litigation was not quite so slow as to enable the children to graduate before the case reached the Supreme

Court. And their claims were heard as the claims of parents whose freedom of religion and freedom from religious establishment was alleged to be in issue. It's in that sort of case. Or, for example, the validity of public expenditures by the federal government cannot be challenged by federal taxpayers, on the ground that they don't have a sufficient interest.

You or I might find it interesting to have the court consider whether foreign aid to a particular country is an expenditure for the general welfare of the United States; or aid to flood victims in Alexandria is for the general welfare. But we wouldn't get very far by going into court, because the court would say that as a federal taxpayer you cannot trace a sufficiently specific interest in your tax monies into this particular expenditure.

And then, of course, there is a whole set of questions known as "political questions," where the court defers to the judgment of other agencies. For example, what is the recognized government of a foreign country? This is something where the courts will not decide on their own, but defer to the judgment of the Secretary of State.

QUESTION: Do you, as a student of Constitutional Government, see any reason for concern as our federal government grows larger, for government not by law but rather by bringing the full weight of the Executive to bear? I am thinking particularly of the steel price episode.

DR. FREUND: Well, this is a very large subject which I presume you'll be dealing with in your discussions of the Presidency and the Congress. Yes, certainly I think there is cause for real concern. As so often is the case, it is a question of recognizing the inevitable growth of concentrated power and at the same time finding some safeguards against it. I think the immense power of government through the allocation of contracts is a field where legal restrictions are going

to have to be evolved. It's something relatively new, outside the scope of conventional Constitutional Law. It was normally thought of as part of the discretionary functions of the Executive. Whether the best way to deal with it is through the courts is a debatable matter.

Some democratic countries - the Scandinavian countries, as you know, have a device known as the Ambudsman (phonetic) who is a sort of Inspector General for the civilian administration, to whose office complaints are brought and he has large investigatory and recommendatory and reporting powers with regard to such complaints. He is not a judge, but he's highly respected and powerful.

As I say, I'm not sure that the courts are the necessary source of such a safeguard, but I do think this is a challenge very much like the challenge that faced Madison and his colleagues in the recognition of power and at the same time provision for its limitations. Whether this should be done through some specialized tribunal; whether it should be done through a kind of Inspector General's Office; whether it should be done through more accountability to Congress; these are all open to question. As far as accountability to Congress goes, that, of course, can also be overdone. I sometimes in gloomy moments have a feeling that our government has the worst features of the Presidential and the British Parliamentary system in this sense; that our Cabinet Members and their subordinates spend an inordinate and growing amount of time facing Congressional Committees, which is a characteristic of the Parliamentary Cabinet System.

But, they do not have along with it the concentrated authority of the government in power that obtains in Great Britain where the role of the government of the day is to govern, and the role of the other party is to oppose. And when the government in power no longer commands a majority there is an election. What I mean is this; that under the British System practically all legislation is govern-

ment legislation. Private Members' Bills, so-called, can be introduced only on a few days during the term of Parliament. It's a highly controlled, centralized government. The Members of the Party who are in Congress are hand-picked by the Central Executive Committee of the party and frequently represents districts where they don't even reside. Under that system one can tolerate, and indeed, welcome, as an inescapable part of the system - for the sake of checks - the large-scale, extensive questioning of the government - the administration - by the Parliament.

Under our system we seem to be trying to have it both ways. We have an Executive who does not control the Congress. We have parties which are not so highly disciplined - and don't misunderstand me; I think, for my part, in a continental nation it would be a great tragedy if this were changed. But along with that we have what looks like continuous responsibility of the Executive to the Congress in the form of questioning appearances before committees, etc., without the corresponding centralized authority. So that, I'm not advocating more accountability in the way of committee appearances, but I think accountability is one of the pressing issues today. We get it, perhaps, largely through extra-governmental sources - the press - but perhaps we'll have to devise some more formal built-in structure on an Inspector General principle that will give us some further safeguards.

COLONEL SMITH: Gentlemen, Dr. Freund is going to visit some of our sections starting at 10:30 and perhaps you'll be fortunate enough to be able to continue the discussion.

Thank you, sir, very much, for a most interesting morning.

- if this process does yield greater intellectual control, of course, we're for that. We are now in the stage, however, of taking these early steps, and it is extremely important to maintain that critical intellectual attitude in regard to the demonstration of the connection between mathematicalized ways of talk and other ways of talk about the same events. And the problem is to carry out the various comparisons of the two in order to ascertain the degrees to which one needs to modify the several processes in determining them.

Partly because of my own interest in these matters, and my own feeling that any specialized simulation technique has at the present time certain important limitations, I feel that the adaptation of our celebrated chart-room technique is especially important. Because, if you do develop decision seminars in which you present the whole social process with charts in the past and in the future, and then you agree in your seminars, on what kind of mathematical simulation models you're going to play with for the past and the contingent future, then you will subject those to continuous recheck in terms of these charts of the past flow and contingency flow. And you will be certainly liberated from any blind reliance on any one set of assumptions.

On the other hand, you will be equally liberated from a blind rejection of the possibility that these procedures can be relevant to the clarifying in your own mind, about the circumstances in which you must cast the die.

DR. SANDERS: Dr. Lasswell, I want to thank you for a very thought-provoking lecture this morning.