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Political Philosophy of Justice Holmes

North Dakota Law Review Associate Editors

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OLIVER WENDELL HOLMES

Our executive committee this month by resolution endorsed House Joint Resolution No. 237 accepting and crediting the residuary estate of former Justice Holmes to the Library of Congress Trust Fund Board: providing for the use of the income from such fund for the building up and maintaining of a collection of legal literature in the Law Department of the Library of Congress to be known as the "Oliver Wendell Holmes Collection."

It is our hope that this resolution may be unanimously adopted by both houses of Congress. A worthwhile memorial to a truly great man, long a progressive and liberal leader in the interpreting of that great document so often under fire in recent years, the Constitution of the United States.

When he resigned from the Supreme Bench early in 1932 the Chicago Bar Association Record said:

Justice Holmes has resigned. Time beckoned and the most youthful mind on the Supreme Court of the United States must needs obey.

In his early professional life he had expounded the Constitution to students; as it closes, the whole nation is listening. Into his opinions have been poured the poetry of his soul, the inspiration of his spirit, the profoundness of his mind. Through them all runs a simple, statesmanlike conception of the structure of our government. His was never the function of passing upon the wisdom of legislative experiments. This he has been content to subject to such gradual tests as the slow progress of time might fashion.

The Constitution is not merely a legal document, it is a vehicle by which people govern themselves. It is now serving a nation whose manners and means of living were undreamed of when it was adopted; it should be preserved to serve a nation whose manners and means of living are now undreamed of. In construing and applying it, courts must see through the written words to the people who stand behind it and sense the invisible generations crowding up behind them. Changing aspirations and convictions must continue to find expression through it. Rigidity is death to it and against rigidity Holmes has struggled—at times alone. "Some play must be allowed to the joints if the machine is to work."

For many years he has carried the light, but now it is falling from his hands. Who will catch it?

In view of political developments of the past five years an article in the March, 1931, Yale Law Journal by Harold J. Laski, visiting professor at the Yale University School of Law, is intensely interesting reading as it was on the—

POLITICAL PHILOSOPHY OF JUSTICE HOLMES

"There is a marked resemblance between the ideas of Bentham and those of Mr. Justice Holmes (Bentham, Principles of

Morals and Legislation). For both, the need for security is paramount; and the enjoyment of individual rights is secondary in every case to that major end. But, with him as the Bentham, once the major end is safe, the protection of the individual from arbitrary control is a sacred obligation. Rights may be born of the law; but their plain intent is to curb the authority of government, and it is therefore peculiarly incumbent upon the judiciary to watch with special care their active exercise.

"One final aspect of his attitude may be noticed. I have already observed that in matters of economic constitution the leanings of Mr. Justice Holmes are towards the classic doctrines of the nineteenth century; some, indeed, of his pronouncements upon socialism have about them a note of acid scorn (Holmes, *Collected Legal Papers*). But that has not meant with him, as it has not seldom meant in decisions of the Supreme Court, an effort to exalt the rights of property into a place of special privilege in the state. So long as a government treats the owner of an acquired title with fairness, he is 'infected with the original weakness of dependence upon the will of the state' (*Western Union vs. Kansas*, 216 U. S. 1). It is impossible to hold that 'all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss' (*Muhlker vs. N. Y. & Harlem*, 197 U. S. 544). A State cannot be prevented from discouraging particular forms of economic activity by special methods of taxation (*Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 389). Property may not be taken without compensation, 'but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions, it is still more obvious that they must be received with a certain latitude or our government could not go on' (*Springer vs. Philippine Islands*, 277 U. S. 189). He has protested on many occasions against an effort to make the Fourteenth Amendment a method for specially protecting the rights of property by reading into it a delusive exactness which is, in sober fact, contrary to its nature. 'By calling a business property', he has urged, 'you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. . . . It is a course of conduct and like other conduct, is subject to substantial modification according to time and circumstance both in itself and in regard to what shall justify doing it harm. . . . Legislation may begin where an evil begins' (*Truax vs. Corrigan*, 257 U. S. 312).

"The last sentence is the key to the whole. The inherent power of the state to meet its problems as they may arise is, for him, the unassailable and primordial postulate of political science. To that end it possesses sovereignty; and the limitations upon the exercise of its power are, in his conception, what may be termed limitations of manner rather than of substance. Judicial prohibitions, therefore, must be aimed not at the object sought for, but

at the way in which the object is sought. Admittedly, manner and substance shade off inextricably the one into the other; 'the great ordinances of the Constitution do not establish and divide fields of black and white' (Springer vs. Philippine Islands). But it is in the recognition that mathematical exactitude is not attainable in social legislation, that, accordingly, unless the individual right is gravely invaded the social interest must prevail, that the criterion of constitutionality must be found. It is difficult not to feel that Mr. Justice Holmes' long emphasis upon this attitude has humanized the jurisprudence of the United States.

"In the proud preface to Montesquieu's last work there are certain words than which none are more fitting to Mr. Justice Holmes' labors. 'When I have seen,' wrote Montesquieu, 'what so many great men in France, England and Germany have written before me, I have been lost in admiration, but without losing my courage; I too, am a painter, I have said with Correggio.' That, as I think, has been the secret of Mr. Justice Holmes' preeminence in his time. It is not only that he has had the scholar's breadth of knowledge. It is not merely, either, that he has realized how the facts call the judge, and especially, perhaps, the American judge, to the tasks of statesmanship. Both these qualities he has had in full measure. But, above all, he has had the great artist's power of penetrating with the vision of genius to the essential, of making the bridge between the little fact of daily life and the sweeping generalization by which a state rises to the consciousness of its purpose. He has done it with singular felicity of expression, and with unvarying integrity of mind. We can only be humbly grateful in the presence of so rare and so distinguished an achievement."

So it is with a keen feeling of sorrow and regret that this great intellect is no longer at the command of our people in this period of stress, that we give the farewell to life embodied in his reply to a tribute paid him on his ninetieth birthday:—

"In this symposium my part is only to sit in silence; to express one's self as the end draws near is too intimate a task. But I may mention one thought which comes to me as a listener in.

"The riders in a race do not stop short when they reach the goal.

"There is a little finishing canter before coming to a standstill; there is time to hear the kind voices of friends and to say to one's self, 'The work is done.' But just as one says that the answer comes:

"The race is over but the work is never done while the power to work remains.'

"The canter that brings it to a standstill need not be only coming to rest, it cannot be while you still live, for to live is to function. That is all there is to living. And so I end with a line from a Latin poet who uttered the message more than 1500 years ago:

"Death clutches my ear and says, 'Live, I am coming.'"