

Judicial Independence, A Matter of Morality

At today's Supreme Court Luncheon, in the wake of current events, it is appropriate to reflect on the role of the Judicial Independence. In the last 50 years, particularly during the Civil Rights and Viet Nam Eras, our nation was forced to reconsider traditional moral values. Judicial Independence is at the center of a clash between individual rights and traditional values. At stake is the foundation of morality. Is morality based upon immutable traditional core values or upon the Rule of Law and Judicial Independence that emphasize the fairness and protection of personal rights?

Disparate treatment of minorities, women and the economically disadvantaged were some of the moral issues reexamined by an independent judiciary applying the Rule of Law. Decisions rendered by an independent judiciary recreated so-called traditional, immutable core values of morality. At one time or another, those "values" included slavery and racial discrimination; the exploitation of laborers, including child labor; the denial of suffrage and economic rights to women and religious intolerance. These "values" were rejected and replaced by a morality founded in the Rule of Law.

The process at the forefront of this reexamination included an independent judiciary. *Brown v. Board of Education*, 347 U.S. 483 (1954) and a series of judicial decisions upholding the Civil Rights Act of 1964 created a revolution. It was a continuation of the revolution begun by our founding fathers. After the establishment of our unique system of government, Chief Justice Marshall, with his 1803 decision in *Marbury v. Madison*, established the Independence of the Judiciary and the right of judicial review. Together the process of examination and evaluation so created has overturned many traditional values in our 229 year history.

Historically, traditional morals have failed horribly in the area of minority and women's rights and tolerance. Despite the power and influence of traditional moral institutions, that force was not exerted to condemn intolerance or to create the acceptance and equal rights that define a moral society.

Non-minorities have dim memories of the open intolerance and racial bigotry and hostility that existed fifty years ago. To the minorities among us who were subject to that bigotry and hostility, those memories are not by any means dim. They are vivid and still a reality. They mean still having to defend every gain or right. They mean always fearing that the bigotry and hatred, though less open, will strike again, taking life or property.

Religious tolerance is an area where the persuasive power of religion is particularly important. As was seen in World War II, when Danish churches promoted the moral imperative to save the innocent Jews from the Holocaust, most Jews in that country survived. This was in contrast to the moral abandonment in other countries such as the Netherlands which led to an opposite result. Despite the long-standing moral imperative to exert this leadership, *Lemon v. Kurtzman*, 91 S. Ct. 2105 (1971) reminded us that intolerance is a constant danger: "The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into

the legitimate and free exercise of religious belief.” Justices Douglas and Black, in a concurring opinion, reminded us of our own country’s religious conflicts.

When I started law school in 1967, there were 1% to 2% women and as many or fewer minorities. Half-way through law school I did a tour in the Navy. When I returned in 1972, a remarkable transformation had taken place. Women comprised 10% to 15% of the law school class and rapidly on the rise. The same was true of minorities. A revolution had taken place based in the emerging morality of civil rights and tolerance. Something happened in those years, 1968-1972. There was a recognition that we had to provide opportunity and encouragement for women and minorities to enter the professions.

In *Reed v. Reed*, 404 U.S. 71 (1971) the Supreme Court held unanimously that, pursuant to the Fourteenth amendment, women were entitled to equal protection under the law. The leadership of an independent judiciary, in this and other decisions in championing civil rights, including the rights of women, had created a more integrated, more diverse and competitive environment. The population of women and minorities in professional schools quickly rose. A generation of women and minorities eager to assert their rights and places in our nation’s society boldly stepped forward.

In each case, it was an independent judiciary applying the Rule of Law that produced these significant moral gains over the last fifty years. Minority rights, women’s rights and tolerance for religious and ethnic minorities gained substantial legal and moral approval. We see the differences in our society. While it is clear that the process is not complete, it is a much better, more moral, country and world that we live in today thanks largely to our independent judiciary.

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