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IS STASSEN RIGHT ABOUT THE SUPREME COURT?

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(This article by Mr. Jackson, a well known Constitutional Lawyer of Washington, D. C., was printed in the Christian Century, July 9, 1947. By kindly permission of that publication, it is now reprinted, with the addition of the closing paragraph. Mr. Stassen made his statement first in person at the beginning of his address before the Northern Baptist Convention in St. Louis and subsequently repeated it in a telegram to R. Stanley I. Stuber, Director of Public Relations for the Northern Baptist Convention meeting in Atlantic City.)

Under date of May 22, the Associated Press reported that Harold E. Stassen, avowed candidate for the Presidency, had taken to task the Northern Baptist Convention for discussing critically a recent decision of the Supreme Court - the Everson Case - in which the Court had validated the use of tax funds by the State of New Jersey in reimbursing parents for bus transportation paid by them in conveying their children to religious schools, notwithstanding the fact that New Jersey provided free public schools for the use of all of its children and free transportation thereto. In a telegram to the Convention, Mr. Stassen is reported to have leveled this criticism at the Convention:

"I do not consider it to be in keeping with the dignity or the standing or the teachings of my great religious denomination to attack a decision of the Supreme Court after it is made. * * *"

It is surprising to the point of amazement that a man of Mr. Stassen's cosmopolitan background in public life and service should have fallen into such an egregious error. It is not believed that he could possibly have realized the full implications of what he is saying. To say that a final decision of the Supreme Court, or of any court, is sacrosanct to the extent that individuals or organizations may not discuss it critically, unfavorably, is contrary to the common practice in the development of our system of government and to the precedents and practice in the perfection of our judicial procedure. In fact, it is at this very point when a decision of the Supreme Court becomes final that it is within the undoubted province of individuals and organizations to discuss it fully, critically or favorably, to the end that its constructions and interpretations may be revised and corrected, if erroneous, or that legislation on which it is based may be altered or amended, or that the decision, if correct, may be confirmed in public confidence. In our system, it is axiomatic, of course, that the law is the last decision of the last court, and that a mandate of the Supreme Court is the Supreme Law of the Land and should be obeyed implicitly by individuals and organizations until it is revised or reversed. That is a far cry from saying, as does Mr. Stassen, that it is not in keeping with the dignity and teachings of the Baptist denomination to discuss critically a final decision of the Supreme Court. His position is utterly untenable in the light of our history and judicial precedents.

The question insistently arises as to the respect in which the dignity and teachings of the denomination are violated by discussing critically a final decision of the Supreme Court. The Baptists have been in the forefront of the struggle for religious liberty and separation of church and state since the early part of the seventeenth century. They issued the first declaration in the English language in support of complete religious liberty in 1611. They addressed to King James I an appeal for freedom of worship in 1614. They established the first community based on freedom of religion in Rhode Island in 1638. They secured a charter in 1633 from Charles II that guaranteed "full liberty in religious concerns". They demanded complete separation of church and state in Virginia in 1774. In fact, the historian, George Bancroft, said: "freedom of conscience, unlimited freedom of mind was, from the first, a trophy of the Baptists". They were in the thick of the struggle, in support of Madison and Jefferson, to secure the adoption of the First Amendment providing a wall of separation between church and state. In the light of this long and valiant struggle, it was natural that Baptists should have been deeply interested when the *Everson Case* from New Jersey presented for the first time to the Supreme Court for construction the provision of the First Amendment that "Congress shall make no law respecting an establishment of religion". When the 5 to 4 decision was rendered, the majority opinion was discussed critically by the Baptist denomination, and other organizations, by many of the great newspapers of the country, but by none more vigorously than the dissenting judges of the Court itself. Can it be said in justice that the Baptist denomination, in pursuing this course, - a right generally recognized by the Courts and public opinion - violated its dignity or teachings, as charged by Mr. Stassen? If the dissenting opinions, the press, the law reviews, the lawyers and private individuals may discuss critically a final opinion of the Supreme Court, it follows that the Baptist denomination may do so with the utmost propriety. In fact, such restrained, constructive criticism may be, and often is, a distinct form of public service. A final decision of the Court on the meaning of a phrase in the Constitution often represents the difference between what five learned and patriotic men think it means and what four other equally learned and equally patriotic men think it means. If the interpretation of the five is sealed and sepulchered, immune from criticism and change, then our legal system is lacking in the requisite techniques for self-correction. Fortunately, ours is a living, dynamic law, evolved not revealed, and public opinion has a vital, legitimate place in this evolutionary process. The exercise of this undoubted right of critical discussion does not impinge in the slightest degree upon the dignity, or standing, or teachings of the Baptist denomination, as charged by Mr. Stassen. On the contrary, it but confirms the virility, the consistency and the sincerity of the Baptist denomination in its age-long struggle to keep high and impregnable the wall of separation between church and state.

The history of our highest tribunal is replete with cases in which the minority opinion of yesterday has become the majority opinion of today. Many recognized legal principles, now well established in the decisions of the Court, were once merely the expressions of the minority view. It is one of the crowning glories of the Court that it has not hesitated, on further experience and analysis, to revise or reverse its decision when fully convinced of its previous error. For example, Chief Justice Stone, lone dissenter in the case of *Minersville School District vs. Gobitis* (1940) 310 U. S. 586, saw his dissenting opinion become the law of the land in less than three years. In another case, *Jones v. Opelike* 316 U. S. 584 (1942) the majority opinion was law for less than eleven months. Examples of a revision or reversal of its opinions could be multiplied - all indicative of the fact that its decisions are not to be encased in vacuums as something sacrosanct and untouchable. Mr. Justice Hughes, in his *Columbia University Lectures*, published 1928 page 68, said:

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later

decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed".

What has been the attitude of the judiciary and public officials generally to criticism of final decisions of the courts? The courts generally have held that that criticism after final disposition is clearly privileged, and may not be inhibited.

Mr. Justice Holmes in *Patterson v. Colorado* 205 U. S. 454-463 (1907) said:

"When a case is finished, courts are subject to the same criticism as other people * * *".

Even when a case is still pending the Supreme Court has held (*Bridges v. California* 341 U. S. 252, *Craig v. Harney*, decided May 19, 1947) that the court will not punish for contempt the publication of criticism of a court unless there is a clear and present danger that such criticism will seriously impair the due administration of justice - that is, unless the utterances in question are a serious and imminent threat to the administration of justice in the pending case. In the latter case the court said:

"But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude able to thrive in a hardy climate".

In the *Craig* case, Mr. Justice Frankfurter, in his dissent, said:

"Comment on what a judge has done - criticism of judicial process in a particular case after it has exhausted itself - no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of public opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth".

Abraham Lincoln said in 1858:

"We think the *Dred Scott* decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this".

In 1861, in his inaugural address, President Lincoln said:

"At the same time the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon this court or the judges".

Since the opinion in the *New Jersey* case was rendered by Mr. Justice Black, and has been subject to well nigh universal criticism, it is not without interest to recall an expression by Mr. Justice Black who wrote the opinion for the Supreme Court in the famous *Bridges* case decided December 8, 1941, as follows:

"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of

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American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions. And an enforced silence, however, limited solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion and contempt, much more than it would enhance respect".

No comment on the question raised by the criticism of Mr. Stassen can be finally disposed of without reference to the mandate of the First Amendment to the effect "that Congress shall make no law * * * abridging the freedom of speech or of the press." It is significant that the mandate of the First Amendment with respect to the freedom of religion and of the press constitutes the only "thou shalt not" in the Constitution. While our government under the Constitution is divided into three coordinate branches with the legislative, executive and judicial, there appears to be only one branch whose act is not subject to review. Any act of an executive whether state or national may be held null and void by our Supreme Court, if in conflict with the Constitution. Likewise any act of a state, legislature, or Congress may be declared in a given case as violative of the Constitution of the United States, and hence a nullity. A final decision of our Supreme Court is not subject to review by any agency of the government and one effective approach to overturn such a decision is an appeal to the bar of public opinion.

The Baptist denomination, in its restrained and constructive criticism of the final decision of the Supreme Court, was merely exercising the precious right of the free play of public opinion appealing to the brooding spirit of the living law, to the experience and intelligence of a future day, when a later decision may possibly seal up this first breach in the wall of separation between church and state, restoring it to the symmetry and strength so clearly designed by its architects and so vividly revealed by its generating history. In voicing this hope, the denomination was merely reaffirming its allegiance to one of its most cherished principles.

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MISCELLANEOUS MATTERS

Executive Secretary J. M. Dawson is attending the Baptist World Congress in Copenhagen, Denmark, where he will make an address on the subject, "The United Nations From a Christian Viewpoint." He will return to his office about August 15.

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As this goes to press Congressional action on the pending educational bills seems uncertain. The Senate Committee has reported out S. 472, known as the Taft-Aiken bill, but Senator Taft will make no promise that it will pass during this session, which is expected to end July 26. The House Committee has not reported its bill out for consideration. This does not mean, however, that the proposal is dead. Those who oppose government aid to church schools should realize this and not relax their efforts to get these bills amended.

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There is more likelihood that the bill for Universal Military Training may be enacted into law, though the opposition from educators, church groups, labor, farm and professional organizations is strong, and it remains to be seen whether they are able to withstand the tremendous military pressure behind the bill.

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