

WHAT IS THE FEDERALIST SOCIETY?

OWEN M. FISS*

The embers still burn. Almost twenty years ago, William Shockley, a scientist who achieved national notoriety by claiming that blacks have a lower I.Q. than whites, was invited by some students to speak at Yale. A controversy soon developed over whether he should be allowed to speak. Judge Winter begins his keynote address by recounting the events surrounding that controversy.¹ It was the Shockley incident that first brought Judge Winter together with Gene Meyer, now the Executive Director of the Federalist Society. Judge Winter was then a professor at Yale and Meyer a student.

At the time, Judge Winter and Mr. Meyer were incensed by the University's handling of the Shockley incident and commiserated with each other. Both felt that the University had compromised its commitment to academic freedom. Although Judge Winter and Mr. Meyer had no taste for the substance of Shockley's views, they were adamant about his right to air them, and faulted the University for berating those students who invited Shockley while choosing not to discipline the hecklers who denied him the right to speak.

I have heard competing accounts of the Shockley incident and the University's role in it. While I was not at Yale at the time, and thus have no first-hand knowledge of the incident nor any other basis for choosing among these competing accounts, I can and will attest to Yale's present commitment to free and open inquiry. On Winter's telling, Yale may have once stumbled in its pursuit of that ideal, but that does not mean that the University is not now fully prepared to do all that is necessary to protect academic freedom. We must not dwell on the past, but look to the future.

I sense that such a plea will not fully respond to Judge Winter's remarks or the anger that informs them. More than Shockley is involved. Judge Winter's address focuses on the Shockley incident, but his tone, and the anger it reveals, suggest that his

* Alexander M. Bickel Professor of Public Law, Yale University. I gratefully acknowledge the assistance of Peter Dwoskin and Elizabeth deGrazia.

1. See Ralph K. Winter, *Coexistence and Co-Dependence: Conservatism and Civil Liberties*, 15 HARV. J.L. & PUB. POL'Y 1-2 (1992).

concerns are not wholly historical. He appears equally disturbed about the academic environment at Yale today, and if the audience's reaction to his keynote address is any indication, many members of the Federalist Society share his concerns. For them, the Shockley incident is almost ancient history, yet they resonated to Judge Winter's re-telling of it, as a way of venting the resentment they feel towards the University today. Seeing themselves as victims of a similar betrayal by the University, they claim that Federalists must endure heckling of another variety—hissing and smirks—whenever they dare to disagree.

While much could be said to defend the present academic environment at Yale—I for one do not believe it is coercive—a point sometimes comes when one must simply acknowledge, rather than respond to, anger. If a person feels deeply about an issue, as do many concerning the condition of academic freedom here at Yale, others must sit up and take notice of that person's feelings, regardless of whether those feelings are justified. The very intensity of the anger is evidence of the fact that the academic environment is not what it should be. I also believe that teachers are responsible for everything that happens in their classrooms, including the sense of vulnerability experienced by those who are inclined to disagree. Heckling, even of the subtle variety, might be the exception, even the rare exception, but when it occurs it chills debate, and professors must acknowledge as their failure the anger and resentment it engenders. The ideals of the University have been betrayed.

Over the years I noticed the emergence of the Federalist Society from the corner of my eye but, quite frankly, I did not know exactly what it represented. I always assumed it to be a philosophic discussion group, created because a number of students wanted a forum to explore common intellectual concerns. But Judge Winter's re-telling of the Shockley incident, along with the emotions it stirred in himself and the audience, suggests another mission altogether. I get the idea that the Federalist Society is less a philosophic society than a mutual support group, a therapeutic community in which people who feel aggrieved and alienated can find comfort and support from those with similar feelings. Certainly, mutual support groups can play a worthy role in the life of a university and, if that is the mission of the Federalist Society, I am happy to salute it on

its tenth anniversary. But—and this is probably the most back-handed anniversary greeting anyone could possibly deliver—I must acknowledge my sadness that our students ever needed such an organization. Something went wrong.

While the emotions surrounding the re-telling of the Shockley incident may reveal the Federalist Society's latent purpose, Judge Winter intends something else. He wants to use the incident to define the conservative creed of the Society. Distinguishing between the content of Shockley's ideas, with which he strongly disagrees, and Shockley's right to express them, which he strongly affirms, Judge Winter argues that the conservatism of the Federalist Society is fully consistent with a commitment to civil liberties. He elaborates on this throughout his remarks, and in doing so reduces conservatism, and thus the driving principle of the Federalist Society, to anti-statism.² This view of conservatism and of the Federalist Society's philosophy has been repeated throughout this Symposium; yet it seems troubling.

First, it fails to recognize that strong state action is often necessary to insure the exercise of certain liberties, including free expression. Judge Winter claims that conservatism is consistent with the full enjoyment of our civil liberties,³ but he cannot claim that for conservatism and still reduce conservatism to anti-statism.

Consider the following example, which is suggested by the Shockley incident itself. An individual mounts a soapbox on a street corner. The individual starts to deliver a speech, perhaps denouncing President Bush's campaign in Iraq or extolling the virtues of Shockley's research. A crowd, thoroughly unsympathetic to the view being expressed, assembles and begins to threaten the speaker. A melee is about to ensue and the police are at hand. At this point, most would agree that strong state action is required, if only, as Harry Kalven put it, to arrest the crowd.⁴

I have argued elsewhere that the story of the street corner speaker is no longer the proper paradigm for analyzing free speech issues in contemporary society.⁵ Today, CBS or some

2. *See id.* at 2-3.

3. *Id.* at 2.

4. *See* HARRY KALVEN, JR., A WORTHY TRADITION 89-95 (Jamie Kalven ed., 1988).

5. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

other powerful economic actor is the more representative speaker.⁶ Nonetheless, strong state action is still sometimes necessary to safeguard our liberties. A case in point is the fairness doctrine, which, when it was operative, required broadcasters to give adequate coverage to differing viewpoints on issues of public importance.⁷ Another, and perhaps more important one, is the limitation on campaign contributions and expenses, which Judge Winter fought as a lawyer and law professor and again denounces in his keynote address.⁸

Contrary to Judge Winter, I believe that state measures to limit campaign expenditures and contributions need not be seen as a strategy for improving the position of the poor by limiting the prerogatives of the wealthy. These laws need not be seen as a way of promoting equality. Rather, as Justice White wrote in dissent in such cases as *Buckley v. Valeo*,⁹ *First National Bank v. Bellotti*,¹⁰ and *Citizens Against Rent Control v. City of Berkeley*,¹¹ these measures could be seen as a way of protecting liberty—restricting the speech of some, so others can be heard.¹² As Justice White put it, free speech is on both sides of the issue.¹³

One may reject Justice White's approach on the theory that giving the state the power to limit speech is far too dangerous because that power might, in fact, be used to stifle rather than enrich public debate. Indeed, fear of such abuse may be the majority's underlying rationale in *Bellotti*, which struck down a limitation on corporate expenditures in a state referendum.¹⁴ But even on such a reading, *Bellotti* should not be heralded as a great victory for free speech, but rather accepted as the recognition of a tragic situation: our incapacity to fashion a rule that will promote and protect freedom of speech for all speakers. Invariably someone will be silenced.

Second, Judge Winter's reduction of conservatism to anti-

6. See *id.* at 1410-16.

7. See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 789 (1987).

8. Winter, *supra* note 2, at 3.

9. 424 U.S. 1 (1976) (per curiam).

10. 435 U.S. 765 (1978).

11. 454 U.S. 290 (1981).

12. See *Buckley*, 424 U.S. at 257, 260 (White, J., concurring in part and dissenting in part); *Bellotti*, 435 U.S. at 809-12 (White, J., dissenting); *Citizens Against Rent Control*, 454 U.S. at 308 (White, J., dissenting).

13. *Bellotti*, 435 U.S. at 803-04 (White, J., dissenting).

14. *Id.* at 767.

statism is troubling because it leaves conservatives without the resources to address the most critical issues of contemporary society, issues arising from the fact that the Twentieth Century has witnessed not only the growth of state power, but also a transformation in the state's manner of intervening. The state no longer acts simply as a policeman. The state now acts as an educator, a landlord, an employer, and a patron of the arts.¹⁵

In these situations, we are still concerned with protecting free expression or, speaking more generally, protecting civil liberties. The issue, however, is no longer the presence of the state, but rather the manner of its intervention. We must insure that the state uses its power effectively without treading on free speech or other constitutional values. Conservatism as anti-statism cannot possibly meet this need, for what is required is a set of principles that fully protects freedom of speech and other basic liberties in a context that recognizes the state as an affirmative actor.

For these reasons, Judge Winter's effort to define the creed of the Federalist Society in terms of anti-statism troubles me. He ignores the fact that state power can sometimes secure liberty. He also fails to provide conservatives with adequate guidance to confront the inevitable affirmative exercises of state power. I recognize, however, that his reduction of conservatism to anti-statism might simply be an argumentative ploy intended to bolster his larger claim, namely, that conservatism is consistent with civil liberties. I also appreciate that in advancing this larger claim, Judge Winter may be trying to do more than propound a bold proposition of constitutional law. His speech can be read as an invitation to people on the other side of the aisle—an effort to build bridges to the liberal community.

I am prepared to accept such an invitation. But for the invitation to be genuine, Judge Winter must relinquish the notion that conservatism—in truth, a complex and multi-faceted tradition—is reducible to anti-statism. He must also remember that the Constitution values more than simply liberty: It also embodies the value of equality, a value that is central to today's liberalism. Judge Winter may prioritize a liberty like free speech and rank it above equality; such a position, however, requires a complex argument—it can hardly be settled by sheer

15. See Owen M. Fiss, *State Activism and State Censorship*, 100 *YALE L.J.* 2087-88 (1991).

assertion. In short, Judge Winter's gesture to the other side will remain hollow and empty until he acknowledges the depth of thought and feeling that lies behind the liberal community's commitment to equality. Liberalism is founded on an understanding of the multiplicity of the values and promises in our Constitution: Liberals want both liberty and equality, civil rights as well as civil liberties.

Understanding conservatism and liberalism in their more complex forms may have the salutary effect of building solid and lasting bridges between people now divided. Such an understanding may also elevate the Federalist Society, as it enters its second decade, into something more than a therapeutic community. Only then will some of the feelings and antagonisms that aroused Judge Winter dissolve.