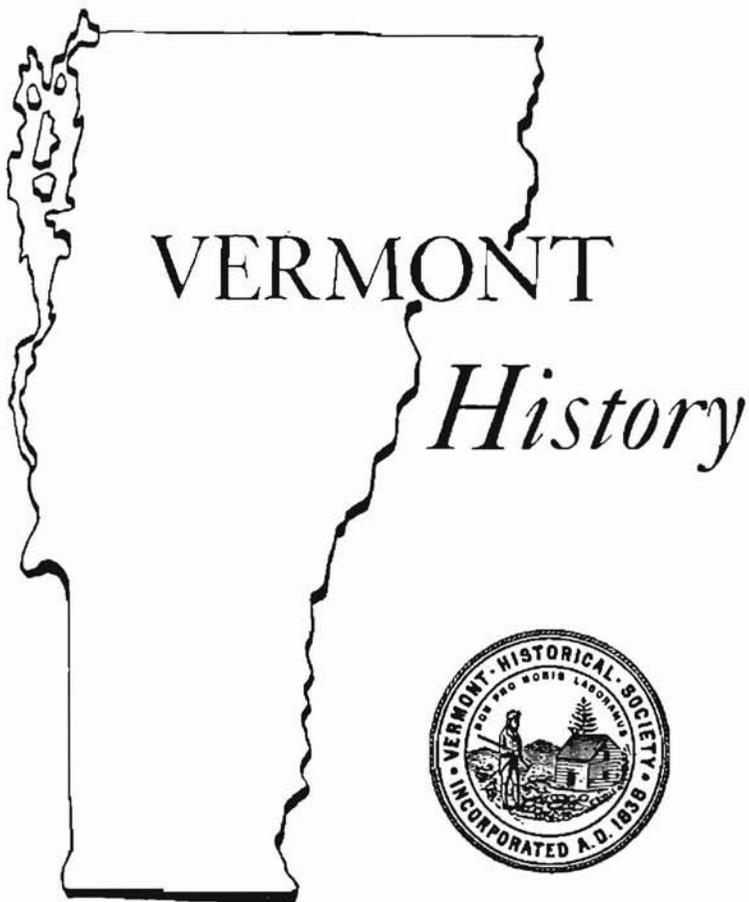


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... it was the constant quest to inform justice that kept him faithful.

The Intellectual Legacy of Justice Thomas Hayes

By SAMUEL B. HAND

Bicentennial celebrations succeeded admirably in promoting historical scholarship and popular interest in our national constitution. Some of that success must be credited to the enthusiasm and thoughtful planning of the National Commission chaired by former Chief Justice Warren Burger. The confirmation debates over controversial nominees to the United States Supreme Court also contributed, although they certainly were not planned for that purpose. More widely reported and discussed than even the 1787 Philadelphia proceedings, these debates provided the American public an extensive constitutional history lesson. A third factor stimulating interest, and particularly significant for legal professionals, was a renaissance in state constitutional jurisprudence. In a reversal of historical trends, jurists and attorneys throughout the nation suggested that state constitutions offered even broader guarantees of personal liberties than the national constitution.¹

Vermont's legal fraternity and the legal fraternities of other states as well focused upon the utilitarian value of history in arriving at this new state constitutional jurisprudence. Historians who claimed to know something about Vermont constitutional or legal history were delighted to discover they had marketable skills. The secretary of state prepared publication of materials on the Council of Censors to assist research on Vermont constitutional amendments. The attorney general's office contracted with an historian-consultant while law firms augmented their expense budgets to entertain historians willing to discourse on arcane but potentially useful points of history.

The most public evidence of this interest were conferences throughout the state involving federal and state judges, lawyers, historians, sociologists, political scientists, and interested citizens. That such conferences were frequently sponsored by the Vermont Bar Association and

attendance earned attorneys continuing legal education credits testifies to the professional importance with which they were regarded. No one participated more enthusiastically than the late Associate Justice Thomas L. Hayes, and no one was more eloquent or unceasing in his advocacy of history and the relevance of the Vermont constitution.

Hayes's talks were invariably elaborations of *State v. Jewett*, an opinion he had written for the Supreme Court in August 1985, and they usually carried a title that was some variation of "Further Thoughts on the Jewett Decision." The talks themselves, however, were anything but technical addenda to a legal treatise. They were eloquent invocations of the potential the Vermont constitution held for protecting "the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow." Justice Hayes cautioned that "our decisions must be principled not result-oriented" and warned against Vermonters looking to their state constitution "only when they wish to reach a result different from the Supreme Court."² Nevertheless, those of us who knew Tom Hayes and his passionate pride in his native state never doubted his confidence that informed, principled, and disinterested research on the Vermont constitution would confirm it as the single broadest guarantee of personal liberties yet designed.

On April 5, 1986, at a Vermont Historical Society conference in Montpelier, "Clio in the Courtroom," Hayes delivered his last such address. Diagnosed as having lung cancer, he subsequently entered the hospital and died on May 5, 1987. This issue of *Vermont History* contains a transcript of that last address. Fittingly, it also contains articles relating to the Vermont constitution by Professor Patrick Hutton of the University of Vermont and Professor Gary Aichele of Norwich University. Professor Hutton is an historian specializing in eighteenth and nineteenth century France; Professor Aichele is an attorney and political scientist whose research has generally focussed on the national scene. It is unlikely that either would have cultivated a scholarly interest in Vermont had they not been exposed to the intellectual ferment that Tom Hayes helped generate. Both Hutton and Aichele attended "Clio in the Courtroom" and participated in constitutional forums. Their research is only a small portion of the intellectual legacy Tom Hayes has willed us.

To appreciate that legacy it is necessary to go back to at least 1965. In January of that year, federal courts ordered the Vermont General Assembly to reapportion or redistrict so that "a General Assembly composed in compliance with the Equal Protection Clause [14th Amendment] of the U.S. Constitution could be elected to govern the State of Vermont in 1965." The fourteenth amendment required both houses of state legislatures be districted by population and not, as the Vermont constitu-

tion directed, by towns and counties. Complying with court orders, Vermont reapportioned and ordered a special election. With those actions the Vermont General Assembly was drawn into compliance with the national constitution and into violation of the Vermont constitution.³

A state constitution continuing to mandate an unconstitutional general assembly that had already voted itself out of existence may have been an embarrassment, but for most Vermonters it provoked no crisis. Instead it generated an esoteric debate over whether it was constitutional to revise the unconstitutional sections of the Vermont constitution before the time specified by a state constitutional provision mandating a ten-year time lock. The forces opposing immediate amendment as unconstitutional prevailed, and the language of the constitution remained unchanged and ignored until 1974.

This Vermont experience was paralleled in other states. Although details differ, federal court rulings mandating state reapportionment served as delayed action fuses igniting state constitutional revision. Most states responded to court reapportionment orders promptly, but constitutional revision inspired less urgency. During the 1950s and 60s, the federal constitution was where the action was; state constitutions were treated as superfluous historic relics.

Chief Justice Earl Warren had a major role in shaping this state of affairs. Under his leadership U.S. Supreme Court decisions blanketed the federal constitution over local affairs, superseding local practices and state constitutions previously assumed sacrosanct. The federal constitution not only mandated state legislatures be apportioned by population, it also controlled school admission policies. It required all states provide counsel to indigents in criminal trials. (Although Vermont provided counsel as a matter of policy, the Vermont constitution is silent on that point.) In the *Miranda* case, one of the Warren court's most controversial decisions, it ruled that the United States constitution required arresting officers to inform suspects of their constitutional rights including the right to counsel and the right to remain silent.

Most liberals applauded Warren Court decisions for expanding individual rights and establishing the national constitution as their ultimate guardian. Conversely, most conservatives attacked the decisions for weighting individual rights too heavily against social needs. The most extreme and vocal elements among the right, by labeling Earl Warren a communist and demanding his impeachment, did little to advance their cause.

A few of the more thoughtful Warren court critics expressed principled concern over the erosion of state and local authority that the decisions prompted. Proponents of what they called "new federalism," they advocated a constitutional balance in which the states and the national

government would play roughly coequal roles. Their assertions that new federalism was similar to the constitutional scheme intended by the framers of the constitution, however, were dismissed as irrelevant or racially motivated. No matter how ardently they insisted they were acting upon intellectual principle their motives were initially suspect. The new federalism's emphasis upon greater state autonomy incorporated precepts popularly associated with racial segregation, and during the 1960s this was sufficient to taint its advocates with constitutional, moral, political, and social disrepute.

Since then the capacity and desire of the national government to move American society further in the direction the Warren Court advocated has eroded, and this erosion has contributed mightily to the current popularity of the new federalism. Melvin Urofsky, along with other constitutional historians, traces the revival of state constitutions from the early 1970s.

Though the Burger court remained activist, it cut back somewhat on the nationalizing trend of its predecessors. At the same time, the states became more active; cutbacks in federal funds forced them to reinvolve themselves in a wide range of activities. In marked contrast to the growing economic problems of the national government, many states proved quite able to live within their means and still deliver required services to their citizens. The election of Ronald Reagan, with his promises to cut federal programs and turn back authority to the states, accelerated these trends.⁴

State courts not only contributed to "restoring the delicate state-federal balance" but when dealing with personal liberties often took the lead.⁵ Justice Hayes details this phenomenon in the article that follows, but it is nonetheless appropriate to outline its supporting doctrine here. State courts are required to uphold the national constitution, but the national constitution merely provides a floor, a safety net for individual rights. No state can do less than the national constitution requires, but the bills of rights of some state constitutions are more extensive than the federal list. States with more extensive bills of rights provide more extensive protections. If, for example, Chapter I, Article XI, of the Vermont constitution required greater protection against search and seizure than the fourth amendment to the United States Constitution, the state standards would apply in Vermont.

In a 1984 *Georgia Law Review* article, "*E Pluribus: Constitutional Theory and State Courts*," Oregon Supreme Court Justice Hans Linde noted the extent to which the national constitution had come to pervade the American psyche.

People do not claim rights against self-incrimination, they "take the fifth" and expect "*Miranda* warnings." Unlawful searches are equated with fourth amendment violations. Journalists do not invoke the

freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the law.⁶

Justice Linde was not writing to celebrate the triumph of nationalism. He was rather describing a perception he had been laboring with some success to change. By 1984, when "*E Pluribus*" was published, Linde was recognized as a leading, if not the leading, advocate of the resurgence in state constitution jurisprudence. Furthermore, Linde was a known quantity whose motives could not be challenged as seeking a reversal of the civil rights movement or a restriction on individual liberties. In the twenty years since *Miranda*, both the political climate and the Supreme Court had changed. As Justice Thomas Hayes noted in *Jewett* and his recorded comments that follow this introduction, since 1970 "state appellate courts issued more than two hundred and fifty opinions holding that the constitutional minimums provided by the national constitution were *insufficient* [italics added] to satisfy the most stringent requirements of state law." By 1985, many state constitutions, Vermont's among them, were presumed to provide possibly larger individual guarantees than those provided by the national constitution.

New federalism breathed life into the Vermont constitution. Attorneys ceased merely asserting federal guarantees and increasingly asserted violations of client rights under the Vermont constitution. *State v. Jewett* is only one such case in point. What makes *Jewett* special, however, is that it called for a redirection of Vermont jurisprudence and stimulated an unprecedented outpouring of legal scholarship.

As a search and seizure case *Jewett* was assumed to involve a major constitutional issue. Nonetheless, the impact of the Vermont Supreme Court's decision was unanticipated. On appeal from district court, the Vermont Supreme Court was asked to decide, among other issues, whether *Jewett* had been "illegally stopped and arrested in violation of his rights guaranteed by Chapter 1, Article XI of the Vermont constitution." In their respective briefs *Jewett*'s attorney asserted that *Jewett*'s rights had been violated and the Chittenden County state's attorney's office countered otherwise. Justice Hayes, writing the opinion for the court, rejected both briefs as inadequate because they fell "short of the mark on the state constitutional claim" and ordered supplemental briefs. "The standard we have set is clear: what is adamantly asserted must be plausibly maintained."

The *Jewett* opinion also included commentary on the court's newly imposed standards. Since "we who have the mind to criticize must also have the heart to help," the court took the occasion "to raise the plane of consciousness of bench and bar about the resurgence of federalism that is sweeping the country." Indeed, so persuaded was the supreme court of the movement's merit that Justice Hayes quoted with apparent approval

the observation that "a lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."

Some would rank this implicit threat, possibly unintended, as important as professional curiosity in attracting attention to the *Jewett* opinion. Whatever the cause, however, the opinion attracted widespread attention and occasioned an immediate flowering of interest in the Vermont state constitution. Furthermore, since the use of "fundamentally historical materials" (Justice Hayes quoted Justice Oliver Wendell Holmes to the effect that "historic continuity with the past is not a duty, it is only a necessity") was an approved approach to constitutional argument, Vermont constitutional history was rejuvenated as well.

This issue of *Vermont History* is testimony to Justice Hayes's persisting influence. We think he would be pleased by this evidence of his continued quickening of research and writing on the Vermont constitution. We believe he could also take pride from authors Hutton and Aichele contributing discussions that are relevant beyond Vermont. Neither author has presented or pretended to present direct proof that some particular provision of the Vermont constitution provides broader guarantees of personal liberties than the national constitution. Justice Hayes might have preferred such proofs; they would avoid his having to allow an accused person to go to jail unnecessarily. But he would embrace all scholarship that contributed to our larger understanding of the Vermont constitution and written constitutions in general. To paraphrase a favorite quote of Justice Hayes, it was the constant quest to inform justice that kept him faithful.

NOTES

¹ For an early discussion of this phenomenon see Shirley Abrahamson, "The Reincarnation of State Courts," *Southwestern Law Journal*, Vol. 36 (1982), 951-974. Justice Abrahamson's article is from the perspective of the Wisconsin Supreme Court. For the view of a constitutional historian see Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York: Alfred A. Knopf, 1988), 952-954, 969.

² *State v. Jewett*, 146 Vt., 221 (1985). All Hayes's quotes are from that opinion.

³ For a convenient source of a Vermont reapportionment chronology, see *Vermont Legislative Directory and State Manual*, 1967, 486-489.

⁴ Urofsky, 953.

⁵ There are significant collateral issues related to the application of this theory. See, for example, *State v. Badger*, 141 Vt. 430 (1982), a contribution by Justice William C. Hill referred to by Justice Hayes.

⁶ Hans A. Linde, "E Pluribus: Constitutional Theory and State Courts," *Georgia Law Review* 18 (1984): 165-200.