MOVEMENT AND COUNTERMOVEMENT

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It is a distinct honor—and a personal one—to be present in Des Moines at the invitation of the Law School of Drake University this late October afternoon for the opening of the Dwight D. Opperman Lecture Series in Constitutional Law.

Mr. Opperman was in the Drake Law School Class of 1951 and thus graduated 37 years ago. The number of persons here today is a tribute to him.

I understand that Drake is one of only four law schools in the United States to receive funds for the establishment of a Constitutional Law Center. How exciting that is. Why? Because we have in the basic Constitution our blueprint for government. And because we have in the Bill of Rights, the Constitution's first Ten Amendments, our prescription for personal liberty. All this in just a few printed pages. We had better be familiar with it, and we had better be prepared to guard it well.

I presume to suggest two basic, yet obvious, themes for this Lecture Series. The first I take from the opening paragraphs of the late Edmond Cahn's book entitled "The Great Rights." The second I take from Socrates, in Plato, "Gorgias." The first rests in constitutional mandate. The second rests on the need for maintaining our search for true Justice, remaining on the high road of development and expansion, and not on the low road of contentment with present limitations however we may rationalize them.

The First Theme. Cahn observed:

> At the start of our history, there were good patriots to whom [our Nation's] purpose was uncongenial. They saw no need for the new country to adopt new political aspirations. As far as they could see, the conflict that broke out in 1775 was no more than a War of American Independence; the stakes in the war were only the traditional right of Englishmen . . . . All the aims of men like these were good and fair, but far too narrow, too small. The world of the Founding Fathers felt ripe for something bolder than one more England . . . .
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> Something daring and novel was in the wind . . . . To men like James Madison, the war against Britain was only the military aspect of an all-pervasive American Revolution and the question to be decided was

> not whether Americans should regain the right that Englishmen had considered customary but whether for the first time in human history any men anywhere could enjoy the full political dignity to which all men were born. Though English notions of liberty were obviously useful, they were inadequate. What America promised must be nothing less than a new kind of society—fresh, equal, just, open, free, and forever respectful of conscience.
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> The big question, as we know, was how to implement this vision . . . . How does one go about protecting the basic rights that men ought to have in a free society? The answer was certainly not apparent in 1787. All that the Founding Fathers felt sure of was the need for something in writing . . . .
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> Of course, everyone including Jefferson . . . and Madison . . . understood that it would not always prevail over the passion of the people, the arrogance of officials, or the insensibility of both. They knew that the best of texts could present only "parchment barriers" against official aggression. What they observed in England and America was mainly discouraging. Almost without exception, whenever emotions, interests and impulses had mounted high, all the solemn exhortations adopted in sober times had counted for nothing. Magna Carta was a parasol but no umbrella, good on sunny days when few needed it, but useless in a storm.
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> Here came the first momentous breakthrough: . . . the situation called for flat commands. The English Bill of Rights was replete with "oughts" and "ought nots" addressed to the government, moral admonitions doomed to the usual fate of moral admonitions when they clashed with immediate interest . . . .
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> The breakthrough came because Madison believed profoundly that in America the people were sovereign and the officials their mere trustees, agents and servants. He put it neatly. "In Europe," he wrote, "charters of liberty have been granted by power." And in America? "Charters of power granted by liberty." . . . But when the American people in 1789 prescribed the acts that their new Federal Government must either not do or do only in a particular manner, they were entitled to say "shall not," the language of command. Thus, the old flaccid promises and pious exhortations were at last toughened into imperative law.

That is my theme of constitutional mandate.

The Second Theme. Socrates urges:

> I beg you not to suppose that this is a matter which calls for jesting on your part . . . . The subject we are discussing is one which cannot fail to engage the earnest attention even of a man of small intelligence; it is nothing less than how a man should live.

That is my theme of constant development of the concepts of Justice.

Those are my two proposed themes. I, of course, could not even begin to expand on them this afternoon. Entire law school courses are devoted to the former. A two-week summer seminar in which I have participated for a decade now at Aspen, Colorado, is directly devoted to the latter in its quest for

what Justice is and how it is to be attained. I have stated my themes, but I shall only brush against them today. I leave their fuller development to others who follow.

At this point, let me return to Dwight Opperman who honors us all with his generosity and with his presence this afternoon. Let me speak of Dwight as a person, despite the embarrassment my so doing will occasion for him.

He is a man of ability and firmness and he is a pillar of his community of Saint Paul. Yet I find him modest and self-effacing. The current edition of Who's Who in America describes him only as a publishing company executive; born in Perry, Iowa, June 26, 1923; husband and father; graduate of Drake; editor, assistant editorial counsel, West Publishing Company; manager of its Reporter and Digest Departments; vice president 1965; president since 1968; chief executive officer since 1978; a member of Drake's Board of Governors; service with the United States Army, 1942-1945; recipient of the Distinguished Service Award and of the Centennial Award from Drake's National Alumni Association; member of various legal organizations.

That is it, but it does not tell us very much. So I turn to West Publishing Company. It was incorporated on October 22, 1882, 106 years ago this week. It sprang from an idea that emerged from the sales experience of a man named John B. West. It was a good idea, but profiting from it demanded endurance and hard work. The company never has had to be financially reorganized and it never has drifted away from its primary purpose of making available in readable and citable form the full measure of court opinions for the Bar and for the Bench.

There have been only eight presidents of West since its inception over a century ago. Dwight Opperman is the current one. I personally remember four of those eight presidents, and feel that I knew three of them well. Top management consistently carrying out the original idea is probably the key to the success of West Publishing Company. Dwight exemplifies that top management and that success. Specifically, in his 20 years as president, he has updated and modernized its facilities; has developed ultra fiche, the way of preserving its materials in compact form; has entered the college and high school textbook field; and has led the firm into computer-assisted legal research. All these have been successful innovations.

I always have been amused by the fact that the average person, even in the Twin Cities, knows comparatively little about the company. The nonlawyer has small or no direct need of what it produces. And the Company has no reason to advertise in the general media. But the integrity of the organization, its sense of community responsibility, and its high employee morale have been earmarks of the institution over the decades. This is what Dwight Opperman manages. He does it well. He has devoted his professional energies to the good of the Bar and the Bench by making professional life and endeavors for lawyers and the judiciary easier, more accurate, and more effective.

There is even a little more. Did we know that Dwight Opperman en-

tered Drake in 1942 as a student in the fine arts; that he was a pop singer and played the saxophone and the clarinet; that he once intended to be a public school music teacher; that he worked with amputees during World War II; that he was a member of Drake's first law review staff, and a member of the Order of the Coif; that he sold shoes and encyclopedias while at law school; and that he sold his saxophone to buy the second-hand typewriter he needed during his law school days?

We salute Mr. Opperman on this first occasion of the lectureship he has established.

I have chosen the title "Movement and Countermovement" because I feel that it fairly describes constitutional decisions over the two centuries of the Supreme Court's existence, as it has struggled with constitutional mandates and with our developing concepts of justice. The Court moves first in one direction and then it shifts to another as it probes new facts, new legislation, and new theories and the issues that emerge from them.

There are many examples of this that one could explore, but time-constraints limit me to two:

I have chosen as one example the First Amendment and, in particular, the Religion Clauses of that Amendment. Sixteen months ago, in June 1987, at the National Archives, I had occasion to touch upon this subject. I repeat tonight some, but not all, of the observations I made at that time.

One should note initially that the Constitution itself makes no specific mention of religion. It contains only two phrases that at the most are mere references to religion. The first is in the Oath of Office Clause (Art. VI, cl. 3), where any religious test as a qualification for office is forbidden. The second is the phrase "the Year of our Lord" in the document's conclusion.

But with the First Amendment, ratified in 1791, we have something new and specific. Let me read the Amendment slowly:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Forty-five simple words. But what do they really mean? Those few words have led to volumes of decisional law. They contain material that we regard as fundamental to our life as a Nation. If a number were to be said to be important, one must note that this is the *First* Amendment, not the Second or the Sixteenth, but the First. It guarantees religious rights, freedom of speech, freedom of the press, freedom of assembly, freedom to petition. All this in 45 simple words.

The language and its pronouncement, moreover, are specific: "Congress shall make no law . . . ." There is no equivocation. This is the imperative, the mandate, not the permissive. It does not say, "Congress may make some law . . . ." And the First Amendment, through the Fourteenth ratified in 1868, has been held to be applicable to the States as well as to Congress. So

the First Amendment today really says not only that "Congress shall make no law," but also that a State "shall make no law."

Of course, while literally absolute, the words never have been interpreted as fully absolute. Can they be? Should they be? Justices Hugo L. Black and William O. Douglas thought so. Most persons, I suspect, accept the fact—and the law—that, as Holmes said, one may not unnecessarily cry "fire" in a crowded theater. The First Amendment is not that absolute.

Let me now be more specific and turn to the two Religion Clauses of the First Amendment. Why are there two? The first states that Congress shall make no law "respecting an *establishment* of religion." The second says that Congress shall make no law "prohibiting the *free exercise* thereof." At first glance, it all seems so simple and so clear: We shall not have a specific religion formally established by government. (In 1791, five States still had state-supported churches—Massachusetts, in fact, until 1833.) Indeed, we are to have the very opposite—each of us shall be free to exercise his or her own religion if he cares to profess one at all.

But is it really so clear? Is there not tension between the two Clauses, a tension that courts and constitutional scholars and lawyers recognize? Almost everywhere throughout our 50 States, property genuinely used for religious purposes, such as an edifice for worship, is exempt from local real estate taxes. The Supreme Court has said that this exemption is constitutional. Surely, the exemption assists the congregation in the performance of its religious function. But can one also say that a property-tax exemption places the State in the business of establishing religion? With tax exemption, funds of the congregation are not used for taxes; instead, they are available for the religious program. The atheist and the one who wants nothing to do with any formal religious endeavor might well think that the tax exemption equates with establishment. In supporting free exercise, are we not close to establishment?

Another example is the Supreme Court case known as Wisconsin v. Yoder, 406 U.S. 205 (1972). Wisconsin, like most States, has a school-attendance law directing that a child attend school until age 16. Members of the Old Order Amish in that State declined to send their children to school after they graduated from the eighth grade, usually at age 14. That refusal obviously violated the Wisconsin statute. Would a prosecution for that violation be constitutional in the face of First Amendment protections? Would it be, in other words, a violation of the Free Exercise Clause? At the same time, if the Amish were given a discrete exemption from the school-attendance law, would the State not be in the position of contributing to the establishment of Amish doctrine?

A third example is a school board's providing free text books. When I went to school, one bought his own books. Now, a school district usually supplies books to elementary school children. But suppose the board also provides free copies of the same books for every child attending a parochial school within the district. Is that contributing to the establishment of reli-

gion? In 1968, in Board of Education v. Allen, 392 U.S. 236, the Court, by a divided vote, ruled that it was not. But what of the board's providing the parochial school other amenities of school life—a nurse, a microscope, teachers?

Let us look briefly at the background of the Religion Clauses. It is safe to say, I think, that the historical record is ambiguous. There were at least three distinct and recognized approaches that influenced the Framers. The first was the so-called evangelical view, associated with Roger Williams, to the effect, it was said, that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained." The emphasis was on protection of the *church*. The second was the Jeffersonian view that religion ought to be separated from the State in order to safeguard secular interests, that is, the emphasis was on protection of the *State*. Indeed, the "wall of separation" phrase was coined by Jefferson in the celebrated letter he wrote to Connecticut Baptists in 1801. The third was the Madisonian view that religious and secular interests alike would be advanced by diffusing power so as to assure competition among sects rather than domination by any one of them.

These three views, in some respects, surely conflict. Their histories, however, share certain features. First, all three were part of the social background of the late 18th century in which they appeared. Second, they fix the ideas of Jefferson and Madison as the direct antecedents of the First Amendment and as particularly relevant to its interpretation. Third, they accept the postulate that a union between religion and the State inevitably leads to persecution and civil strife. It has been said in recent scholarly literature (*e.g.*, Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986)) that what emerges from all this are two fundamental characteristics of the First Amendment's religion clauses: volunteerism and separatism. The Free Exercise Clause, at the very least, was designed to guarantee freedom of conscience by prohibiting any degree of compulsion in matters of belief. It is offended by a burden on one's religion. The Establishment Clause can be understood as designed in part to ensure that the advancement of religion comes only from the voluntary efforts of its proponents and not from state support. Religious groups are to prosper or perish on intrinsic merit and the attraction of their beliefs and practices.

Religion, of course, has been one of the primary forces in man's struggle with himself. So often we piously speak of the "sanctity of life," and yet history reveals that almost constantly devastating wars have been and are being fought, often in the name of religion. We recall the Christian-Moslem struggle exemplified long ago, I suppose, by the Crusades which on their way also wiped out scores of Jewish communities in Western Europe. The Inquisition. The witchhunt. Polygamy. Hindu and Sikh. The prolonged and seemingly insoluble situation in the Middle East. Most of these, and others, are examples, shall we say, of intolerance for the beliefs of others. And some among us know the unease that often is felt when one lives as a member of a

minority in a culture and in an area dominated by another religious inclination.

It is not possible to cover in detail here the Religion Clause cases decided by your Supreme Court over the years. Were I to do so, it would be a tedious survey. There was little First Amendment case law on religion until the adoption of the Fourteenth Amendment in 1868. Since then, the cases have been many and varied. One might begin with Reynolds v. United States, 98 U.S. 145 (1879), decided more than a century ago, when the Court was faced with the question whether the Free Exercise Clause afforded protection for the then practice of polygamy in the Mormon Church. One might mention Everson v. Board of Education, 330 U.S. 1 (1947), where the Court 40 years ago, in a 5-4 decision, with rather emotional overtones, upheld a New Jersey statute authorizing a Board of Education to use public funds to reimburse parents for the expense of transporting children not only to public schools but to parochial ones as well. This was not, the Court said, a violation of the Establishment Clause. And one might come around to such cases as Marsh v. Chambers, 463 U.S. 783 (1983), concerning the daily invocation over the years by a paid Protestant chaplain in Nebraska's unicameral Legislature, and Lynch v. Donnelly, 465 U.S. 668 (1984), concerning a creche on municipal property in Pawtucket, Rhode Island.

Since then there have been many others: controversies concerning the teaching of creationism in Louisiana public schools; the distribution of religious leaflets in public areas of airport terminals; the right to state unemployment compensation when an employee is discharged upon her refusal to work on the Sabbath of the church she newly joined; the denial to a prison inmate of access to an Islamic Friday service. Then just this last Term the Court decided Bowen v. Kendrick, 108 S. Ct. 2562 (1988), which concerned the Adolescent Family Life Act and its authorization for federal grants to organizations for counseling services in the area of premarital sexual relations and pregnancy. Federal funding under that Act has gone to a wide variety of recipients including organizations with direct institutional ties to religious denominations. The United States District Court in Washington, D.C., granted summary judgment for those who challenged the Act, and declared that on its face, and as applied, the Act violated the Establishment Clause. Our Court reversed that judgment by a 5-4 vote. The majority ruled that the Act had a valid secular purpose and that it did not have the primary purpose of advancing religion or result in excessive entanglement. The case was remanded for further consideration as to whether the statute, as applied, violated the Establishment Clause. What will the result be on remand? For one who feels that *Everson* was wrong, *Kendrick* was a disaster. For one who feels that *Everson* was right, perhaps *Kendrick* was correct. The Court in some of these cases has upheld the challenged practice. In others it has not. Move and countermove.

Yet we must concede that our public life is replete with examples of an ambiguous religion. We pledge allegiance, since 1954, to a Nation "under

God." 36 U.S.C. § 172. We have a National Prayer Day mandated by federal statute. 36 U.S.C. § 169(h). Our Nation's motto is "In God We Trust." 36 U.S.C. § 186. This intersection of the religious with the political is evident in some of our most treasured public texts. Consider Lincoln's moving Second Inaugural Address, and Martin Luther King, Jr.'s "I Have A Dream" speech. There is a host of practices, texts, and symbols readily classifiable in both political and religious terms. We accord them some legitimacy. Is this wrong? Should we do away with all practices of this kind? Or may we live with them, be comforted and strengthened by them, and be legally and constitutionally principled about it?

Let me try to draw tentative conclusions about the moves and countermoves in this particularly litigious area:

1. We operate in the belief—almost the conviction—that in the United States there *is* a wall between religion and the State. Jefferson's influence remains very strong.

2. There are signs in the cases, however, particularly those at the Supreme Court level, that that wall has been crumbling a bit of late. Some would say it has crumbled a lot. Exceptions to complete separation have appeared and been upheld: legislature prayer, the creche on public ground, certain aids to parochial schools, tax benefits.

3. Yet there still is a noticeable urge to keep that wall standing and fairly strong. Is this insensitivity toward religion? There are some who think so.

4. There seems to be an increasing tendency in some areas of current political thought to bring religion into government. What is the effect of the power of the religious right and its presence in the political-party structure of today? Or has it passed its crest and is receding?

5. The Religion Clauses are constantly in litigation. There is nothing quiescent about them. We have a long way to go and a lot to settle before complete stability is attained. But may one not say the same thing about almost all the guarantees in the 45 words of the First Amendment?

What a living charter we have in the Constitution and the Bill of Rights! It is protective, controversial, imperfect, exciting. As Bill Moyers phrased it in his television series of a short time ago, we are constantly "in search" of its meaning. It is a source of strength we would not be without. It is among our primary political roots. But it needs constant care, as precious and valued things usually do.

The First Amendment goes on to speak of other things including freedom of speech. Here two cases this past court year provide grist for comment and reveal moves and countermoves. One is the *Hazelwood* case where the Court, by a 5-3 vote, upheld the ability of a principal and faculty to prevent publication in a high school paper of certain articles prepared by journalism students. Yet, in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court, by a 7-2 vote in a case that originated in this very city, ruled that elementary school children, too, en-

joyed First Amendment protection when they wore in school black armbands protesting our Government's policy in Vietnam. Is there tension between *Tinker* and *Hazelwood*? Is the latter case a step ahead or a step backward?

Then there was Frisby v. Schultz, 108 S. Ct. 2495 (1988), which concerned picketing of the residence of a physician who performed abortions. Is that picketing protected by the First Amendment or did the resident's right to privacy override and tip the balance? The Court, by a 6-3 vote, thought so. Moves and countermoves.

All this First Amendment material is subject matter, indeed, for the Opperman lectures that lie ahead.

My second example of shifting in constitutional approach relates to the division of power between our Federal Government and the States. The example is provided by two cases in which I seem to have played a part.

National League of Cities v. Usery, 426 U.S. 833 (1976), presented the issue of the validity of the Federal Fair Labor Standards Act which, after amendment in 1974, extended its minimum-wage and maximum-hour protections to employees of States and their political subdivisions. An action challenging the Amendments was brought against the Secretary of Labor. The Federal District Court dismissed the complaint for failure to state a claim.

Our Court reversed. It held that insofar as the Amendments operated directly to displace a State's ability to structure employer-employee relationships in an area of "traditional governmental function," such as fire prevention, police protection, sanitation, and the like, they were not within the authority granted Congress by the Commerce Clause. Then Associate Justice Rehnquist wrote the opinion for a 5-4 majority. I filed a short concurring opinion in which I stated: "I am not untroubled by certain possible implications of the Court's opinion." I thought the majority adopted a balancing approach and I said that surely the Court did not outlaw federal power in areas such as environmental protection where the federal interest is demonstrably great and where state compliance with imposed federal standards would be essential.

Of course, the inevitable subsequent case appeared. It was Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). The Authority received federal financial assistance under the Urban Mass Transportation Act of 1964. The Wage and Hour Administration took the position that SAMTA's operations were not immune from the minimum-wage and overtime requirements of the FLSA, as amended. SAMTA responded with a suit in federal court. The District Court entered judgment for SAMTA, holding that municipal ownership and operation of a mass-transit system was a traditional governmental function, and thus, under *National League of Cities*, was exempt from the obligations imposed by the Federal Act.

We reversed that judgment 5-4 and held that in giving SAMTA's employees the protection of the FLSA, Congress contravened no affirmative

limit on its power under the Commerce Clause. *National League of Cities* was overruled. There was nothing in overtime and minimum-wage requirements that was destructive of state sovereignty. The States' continued role in the federal system is primarily guaranteed by the structure of the Government itself. The political process protected that role.

The dissents were rather loud. Justice O'Connor, for example, described the Court as sounding a retreat whereas she would have preferred to hold the field "and, at the very least, render a little aid to the wounded." The petition for rehearing, of course, was a bitter attack on the majority opinion and on me as having provided the deciding vote.

In the years that intervened between the two cases, however, I had become convinced that the "traditional governmental function" test was unworkable. A little reflection demonstrated that mass transportation was not such a function. Indeed, nearly all transportation systems originally were privately owned. They certainly were in my practice days of a half century ago.

These two cases illustrate again how the Court veers from one side to the other or, if one will, takes two steps ahead and one back or one step ahead and two back, depending on the point of view. If the issue were to arise again today, even with facts identical to those of *Garcia*, would the result be the same with the Court as presently constituted?

Still another case decided this last Term in the federal-power vs. state-power area is South Carolina v. Baker, 108 S. Ct. 1355 (1988). It concerned the validity of a federal statute that subjected interest on state bonds to federal income tax unless the bonds were registered. The Court upheld the legislation. I was mildly surprised at the outcome. Moves and countermoves.

There, of course, are other constitutional areas where similar movements are discernible. I might have discussed the Court's capital-punishment decisions if Iowa were a death penalty State. But Iowa abolished that penalty by Chapter 435 of its 1965 Acts.

I suspect, but I have not checked this out, that an Eighth Circuit opinion I wrote in 1962 led to the last execution in the State of Iowa. This was Feguer v. United States, 302 F.2d 214 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962). The defendant had abducted a physician and taken him across the interstate bridge at Dubuque into Illinois. He there killed his victim. The case was tried in federal court in Iowa and resulted in the imposition of the death penalty under a federal statute then in effect. It was not easy.

The Court has struggled with the death penalty. As you know, it is in effect in a majority of the States today. Our problem now is how it may be administered fairly and without arbitrariness or capriciousness by either jury or judge. Some state systems have been struck down as unconstitutional. Others have been upheld. The cases seem to be legion and every one of them comes to us. How is the Court moving?

There are still other areas. I mention only a few: the developing law of the sea and of space; search and seizure; immunity; the nature and extent of

punishment; the right to counsel; homosexuality; abortion.

So I have barely touched upon the two themes—the mandates of the Constitution and the pursuit of Justice. There is much to be done. Your Court and your federal system move as best they can. The system struggles. The Court struggles. They grope. But with the help of the academic community and the Bar and a strong Judiciary, they eventually will come out all right. Sixty-seven years ago, Benjamin Cardozo said that we worry unduly about the consequences of our errors. He indicated that what was proper in decisionmaking would endure and what was bad "will be rejected and cast off in the laboratory of the years." We must do the best we can with these close and emotional issues. They or others like them always will be present. That is what makes the law and particularly constitutional law so fascinating for this generation of lawyers and for generations of lawyers yet to come. That is why the Opperman Lectureship Series in constitutional law always should be rich in content.

Some of us here are old enough to remember a celebrated golfer by the name of Robert Tyre Jones, Jr. He won the Grand Slam of Golf in 1930. The sports media persisted in calling him "Bobbie," a name he did not like very much, for he preferred "Bob." But Bob Jones was more than a golfer: He carved out for himself a distinguished legal career as a member of a prominent Atlanta firm. Ill health plagued him in his final years. But in 1958, when he was confined to a wheelchair, he was invited to return to Saint Andrews in Scotland, its Royal and Ancient Golf Club, and its renowned Old Course, where he had played and won, and which today mean so much in the history of the game. He was there to accept the "Freedom of the City" as an Honorary Burgess. I read from the Provost's remarks on that occasion:

> And at the height of his attainments . . . Mr. Jones retired from major competitive events—to reign forever after in our hearts . . . as the champion of champions to the end of his days.
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> And so we feel that when we welcome back Mr. Jones to St. Andrews, we welcome an old and dearly loved friend . . . .
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> We welcome him for his own sake; we welcome him also as an ambassador in the cause of international understanding and good will . . . . We welcome him moreover not only as a distinguished golfer but as a man of outstanding character, courage, and accomplishment well worthy to adorn the Roll of our Honorary Burgesses. And that an American should once again be entered in that roll may well be thought timely, for it is just one year short of two hundred years ago, in October 1759, that our predecessors welcomed Dr. Benjamin Franklin of Philadelphia and accorded him the privileges of a Burgess and Guild Brother of the city of St. Andrews.
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> What these privileges are now in any tangible sense even the Town Clerk hesitates to suggest—though Mr. Jones may be interested to know that any that are ever mentioned relate specifically to the links—to cart shells, to take divots, and to dry one's washing upon the first and last

> fairways of the Old Course.
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> These are homely terms . . . but they may help us convey to our new Honorary Burgess just what we mean by this Freedom Ceremony—that he is free to feel at home in St. Andrews as truly as in his own first home of Atlanta. One of our own number, officially now, as he has been so long unofficially.

Those are meaningful words. Would we lawyers—at the bar, in the office, in business, in public service, on the bench, in the classroom, wherever we may be—would we have, or deserve to have the "Freedom of the City," that was so eloquently granted to Bob Jones 30 years ago?

- could we individually, or as professionals, ever be described, in any respect, as a "champion of champions?" I doubt it.

- would we be welcomed as an "old and dearly loved friend?" I doubt that, too.

- would we be welcomed even "for our own sake?"

- could we be regarded as "ambassadors . . . of goodwill?"

- could we be entitled to "feel at home" in all the legal Saint Andrews that make up America—its courthouses, its law offices, its marts of commerce, its schools of law, its government services?

Obviously, so far as we lawyers are concerned, the answer to each of those questions is negative, not positive. But I am convinced that so far as Dwight D. Opperman is concerned, at this Law School, he would be given the "Freedom of the City," he would be regarded as an old and dearly loved friend, and he would be welcomed, always, "for his own sake." That is the measure of the man who is honored this day. May his years continue to be warm and happy ones.