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THOMAS I. EMERSON: A DEDICATION

*The Honorable Patricia M. Wald**

FORTY YEARS is a long lifespan for any friendship, let alone one that wears as well as Tom Emerson's. Tom became my first guide through the intimidating labyrinth of constitutional law in the fall of 1948 when I was an entering law student at Yale and he a third-year professor. A veteran of the National Recovery Administration, National Labor Relations Board, Social Security Board, Office of Price Administration, Office of Economic Stabilization, and Office of War Mobilization and Reconversion, and a former special assistant to Attorney General Robert Jackson, Tom also introduced me to administrative law, a subject which, although mercifully I had no idea then, would later consume much of my professional life. He was a painstaking, thoughtful, caring teacher, first to me, and then a generation later to my daughter Sarah. He was a courageous but scrupulous fighter for First Amendment freedoms on front-line issues we battled throughout the fifties, sixties, seventies and even into the eighties. He and his wife Ruth, a fellow student at Yale Law School back in prefeminist days, have been warm and supportive friends through all these years. I am privileged to contribute these few words of dedication to this well-deserved issue of the Case Western Reserve Law Review in his honor.

Tom Emerson is a stubborn educator. His nemesis is intellectual sloth. The rigor he imposes upon his own thought compels his students, his readers, his allies and, ultimately his opponents, to toe the same mark. Any student who thought that the way to Tom's heart and grading book was simply to recite liberal ideology, learned differently fast. He was always the master and we the pupils, whether he was pricking a too-pat answer in the classroom with benevolent but surgical precision, assaying with the same precision postures and strategies of ACLU litigation, or limning the nuances and implications of constitutional commandments in his own learned writings. He was respectful, deferential, but as un-

* Chief Judge, United States Court of Appeals for the District of Columbia Circuit; B.A., Connecticut College for Women (1948); LL.B., Yale University (1951).

yielding to the Senators before whom he testified through five decades of constitutional crises, as he was to those callow first-year students who naively thought they had him pegged when they walked into his classroom. A very conservative member of a very conservative administration once told me that Tom Emerson, for whom he worked in the OPA during World War II, was the fairest and toughest boss he ever had as a lawyer. I believed it.

In 1972, Justice Douglas referred to Professor Emerson as "our leading First Amendment scholar."¹ Though the field has widened considerably in the last decade, that ranking is still secure. But Tom Emerson has not just thought and written about the First Amendment, he has fought for it. He appeared in landmark cases like *Griswold v. Connecticut*,² *Yakus v. United States*³ and the *Pentagon Papers*⁴ appeal. He testified before Congress on campaign reform, freedom of information, school prayer amendments and the ERA. He is the twentieth century embodiment of The Federalist Papers' authors—waging his battles simultaneously on paper and in the political arena.

Perhaps the crowning enterprise of Emerson's First Amendment career was his synthesizing work, *The System of Freedom of Expression*.⁵ In it he sought not only to grasp the significance of free expression for this country, but to state its essence through what was then, and remains, a chaos of legal doctrine, and to work towards a framework that would ensure its availability to all citizens. Near the end, Emerson asks whether our system of freedom of expression can survive "the shift from the liberal laissez-faire to a mass technological society."⁶ It is not enough, he says, to echo familiar warnings against government encroachment. Freedom of expression is the core around which most other freedoms cluster. Can and will, he asks, government be mobilized actively to preserve it?

The book had flaws which Emerson would readily admit, but it was a breathtaking leap forward, and a great deal of it has been woven into our jurisprudence since 1970. It has been cited in 19 Supreme Court opinions,⁷ and its progenitor, Emerson's 1963 Yale Law Journal article, "Toward a General Theory of the First

1. *Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 151 (1972) (Douglas, J., concurring).

2. 381 U.S. 479 (1965).

3. 321 U.S. 414 (1944).

4. *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam).

5. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

6. *Id.* at 728.

7. WESTLAW, Supreme Court Database.

Amendment,"⁸ is among the most-cited law review articles ever.⁹ I am not sure how Tom would answer his own crucial question nearly 20 years later, but we are closer to realizing his ideal, or perhaps no farther from failure for his efforts.

Tom Emerson has made his residence the classroom, but for over 40 years he has ventured forth to Washington and wherever his voice would be heard in defense of liberty. In his teaching and his writings, he has provided lawyers, legislators and judges with the stuff of which freedom is made and sustained.

8. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L. J.* 877 (1963).

9. Emerson's influential piece has been cited 54 times in the Federal Court system alone. WESTLAW, Allfeds Database.