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# JUDICIAL MODESTY, POLITICAL REALITY, AND PREFERRED POSITION\*

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## INTRODUCTION

Since its traumatic experiences of the thirties, the Supreme Court of the United States has been faced with two great problems to which it has not yet found adequate solutions. The first is the difficult task of defining its role in modern American government. The other has been the more substantive problem of dealing with a kind of case which is, if not new, at least newly injected with popular emotion and international significance. The "subversion" cases, often involving first amendment questions, have certainly led to more backing and filling and more clearly expressed judicial anguish than any others recently before the Court.

The two areas are, of course, closely interrelated. In spite of the recent demonstration by the Warren Court of the possibilities of marginal adjustments through statutory construction in civil liberties cases,<sup>1</sup> the extent to which the Justices are willing to protect the speech and other liberties of alleged "subversives" must largely depend on their own conceptions of the general powers and responsibilities which the Supreme Court may properly exercise. Put another way, both of the Supreme Court's great problems are basically political, not legal. They are not so much questions of statutory or narrowly constitutional interpretation as disputes over the power of one segment of a government vis-à-vis other segments of that government and the public.

Granted the American tradition of discussing such questions of political power and influence in legal or pseudo-legal terms, it would nevertheless seem profitable to look at politics from the point of view of politics. This article attempts to combine what we know of the politics of American national government with what we have so often heard of the legal and constitutional debate in order to shed some further light on the problem of judicial modesty particularly as it relates to freedom of speech.

## THE GREAT DEBATE

We begin with the great debate over modesty itself. Fortunately, that debate has recently inspired two clear statements by leading members of the opposing schools, the late Judge Learned Hand and Professor Charles Black of the Yale Law School.<sup>2</sup>

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† See contributor's section, masthead p. 248, for biographical data.

<sup>1</sup> See Hand, *The Bill of Rights* 73 (1958).

<sup>2</sup> Hand, *supra* note 1; Black, *The People And The Court* (1960).

Judge Hand finds in his Constitution a system of separate and coequal departments, each a "Leibnizian monad." Judicial review, which breaches the walls of separation, is contrary to the whole design of the document,<sup>3</sup> which omits any specific authorization for review.<sup>4</sup> The supremacy clause, while admittedly allowing a measure of supervision over state acts, is so limited and specific that it undermines rather than supports the claim to a general power of review.<sup>5</sup> The analogy frequently drawn between the necessity for judicial assessment of a supposed conflict between two statutes and the alleged power of the Supreme Court to examine conflicts between the Constitution and a Congressional enactment is improper. In the former instance, the conflict is merely between an earlier and a later legislative judgment. Since the legislature is not bound by its own previous judgments, a judicial finding of conflict merely implements the later will of the legislature.<sup>6</sup> It might be added, although Hand does not say so here, that the legislature in this situation, is perfectly free to reinstruct the courts by new legislation if it feels that the judges were in error. However, when the Supreme Court invalidates a statute, it perforce substitutes its choice among competing values for that of the legislature.<sup>7</sup> This usurpation will inevitably result in the general recognition that judges inject their own judicial predilections into law. That knowledge will destroy the principal source of judicial prestige, for the real judicial sanction is the notion that the courts enunciate the will of the public not the sentiments of the judges.<sup>8</sup>

But Hand's objection to judicial interference with legislative decision does not rest primarily on a judge's self-interest in preserving the judicial myth. It is derived instead from his basic conception of the Constitution and American democracy. The Constitution neither embodies natural law in the sense of an emanation from the Divine Will nor consists of substantive instruction as to the ends of governmental activity. In other words it is not a code of abstract rights and wrongs, but simply a blueprint for the distribution of the people's political power among the several departments of government. Since this plan confides the determination of the substance of governmental policy to the Congress and the President, the only possible role for the Court is to determine whether these departments are operating within the confines established by the blueprint. If the Court attempts to decide whether other departments

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<sup>3</sup> Hand, *supra* note 1, at 4, 10-11 (1958).

<sup>4</sup> *Id.* at 10-11.

<sup>5</sup> *Id.* at 5, 28.

<sup>6</sup> *Id.* at 28-29.

<sup>7</sup> *Id.* at 37-39.

<sup>8</sup> *Id.* at 71-72.

are "right," a judicial oligarchy "unaccountable to anyone but itself" usurps the task of the "popular assembly" and thus, violates "the underlying presuppositions of popular government."<sup>9</sup>

Professor Black's reply to this plea for self-restraint is primarily based on a simple line of logic. The Constitution is law. Courts apply and interpret law. Therefore, courts apply and interpret the Constitution.<sup>10</sup> article III defines the jurisdiction of the Court in terms of cases arising under the Constitution. Therefore, when a statute conflicts with the Constitution, the Supreme Court must decide between the two laws. It cannot avoid the issue, for refusal to look to the Constitution in fact decides the case in favor of the statute and against the Constitution.<sup>11</sup> As to the legal nature of the Constitution, Black argues that the Constitution looks like law (it has a preamble, etc.), states that it is law (article VI), was thought by the founders to be law (FEDERALIST PAPERS), and has been considered law ever since.<sup>12</sup>

In short, although disagreeing with Chief Justice Marshall on particulars,<sup>13</sup> Professor Black finds that *Marbury v. Madison*<sup>14</sup> reflected both the views of the framers and the sentiment of the times, as well as the natural conclusion to be drawn from the concept of constitutional democracy. The people desired to limit themselves and chose judicial review as a practical means to that end,<sup>15</sup> and the historical evolution and acceptance of review indicate popular confirmation of the original choice.<sup>16</sup> Therefore, according to Black, those who oppose review are both illogical and immodest—illogical in seeking to upset the choice of the people in the name of popular sovereignty and immodest in wishing to effect a major alteration in the basic framework of our government through the judicial process.<sup>17</sup>

So far as Black is concerned, they wish to do so for insufficient reasons. Their principal fear is that judicial review is undemocratic and allows excessive judicial policy-making. But it is widely known that judges are compelled to make policy decisions in all areas of law. The fact that they do so in the field of constitutional law is, therefore, neither unusual nor prejudicial to their continued prestige.<sup>18</sup> Nor is review undemocratic. Many appointive officials make important decisions in our governmental

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<sup>9</sup> Id. at 3-4, 73-4.

<sup>10</sup> Black, *supra* note 2, at 6, 14-15, 115 (1960).

<sup>11</sup> Id. at 8.

<sup>12</sup> Id. at 7.

<sup>13</sup> Id. at 26-27.

<sup>14</sup> 1 Cranch 137 (1803).

<sup>15</sup> Black, *supra* note 2, at 106, 115.

<sup>16</sup> Id. at 7, 105.

<sup>17</sup> Id. at 101, 105, 107-08.

<sup>18</sup> Id., Ch. VI *passim*.

process. Popular control of the judiciary is accomplished through public opinion, the amending process, and the powers of Congress over the Court's jurisdiction and enforcement machinery.<sup>19</sup>

There are of course internal difficulties with the positions of both contestants. Certainly, Hand is guilty at the very least of overemphasis when he speaks of Leibnizian monads. It is hardly necessary to cite authorities for the proposition that the relations between the three branches of the federal government have involved a considerable degree of overlapping. The phrase, "checks and balances," serves to remind us that this was precisely the framers' intention. Indeed, Judge Hand seems to assign the Court one of the most difficult possible functions when he asks it to set out the boundaries between the various spheres of governmental authority. One can hardly imagine an area more fraught with judicial policy-making than that of jurisdictional surveyor in a governmental system which tends to translate most of its policy questions into disputes over operational boundary lines.

Professor Black attempts to disarm his critics in advance by admitting that his argument is not logically infallible. Nevertheless, his basic argument—the Constitution is law, courts deal with law, therefore the Supreme Court must look to the Constitution—rests on logic. If his rivals poke holes in his logic, he turns to history to demonstrate that his argument has been proved by experience. However, when it becomes apparent that the historical picture is not entirely clear, he reverts to his logical argument as a guide to the most reasonable interpretation of history. The point is that Black's conclusion is neither logical nor empirical, but simply verbal.

All in all, when following the struggles of the champions of modesty and activism, one gets the curious impression that for all the blows and counterblows there is really no solid contact, and this impression persists largely because the modest seem to have no very firm position so that they roll easily with the punch but cannot deliver a knockout blow themselves. In fact, the modest seem to have no more than a set of problems and hesitations which mark a dilemma rather than a solution to the problem of judicial activity.

The problems begin at the beginning, with the Constitution itself. The Constitution must in some way be a law. As Black points out, it even says it is. But a document which paints in such broad strokes is obviously not law in the same sense as the Federal Rules of Civil Procedure. Nor is it just a law in the sense that a later lawmaker may

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<sup>19</sup> *Id.* at 178-82, 209.

modify or replace the work of an earlier. Its elaborate amending provisions and its extraordinary origin in a series of *ad hoc* representative bodies set it apart from most law. Thus, the American Constitution is not so lawlike in terms of detail and precision that it can automatically and naturally be applied by the courts as they do the bankruptcy statutes; but, at the same time it is not so imprecise that the courts can in good conscience ignore it in the face of subsequent Congressional legislation which seems to contravene its provisions.

Other clues from the nature of the Constitution are available. Its appeal to and obvious derivation from the theory of popular sovereignty have led to the suggestion that it was conceived of as a law emanating directly from the people. It would thus displace the sovereignty of the ordinary legislative bodies and subject them to the controlling popular will as enunciated in the document.<sup>20</sup> The extensive research indicating the higher or natural law content of the Constitution is too familiar to require parading here again.<sup>21</sup> The difficulty is that the commanding position of the Constitution, whether expressed in popular sovereignty or natural law terms, does not necessarily demonstrate the validity of review. Indeed, this very conception of the Constitution suggests that enforcement by all branches of the government and/or directly by the people through their right of revolution would be more appropriate than the rather narrow and technical enforcement available through the courts.

However, when such eminently modest judges as Justice Jackson, Justice Frankfurter, and Judge Hand all conclude that review is logically and realistically immanent in the notion of a written constitution,<sup>22</sup> we might expect finally to have arrived at some unquestionable support for judicial review derived directly from the Constitution; but, alas it is the activists who reject this argument, insisting that its writtenness is the least important characteristic of our Constitution and has no connection *per se* with review.<sup>23</sup>

Nor does the specific wording or the intentions of the drafters solve the problem raised by the unique nature of the document taken as a whole. Judge Hand was probably too cavalier in dismissing the supremacy clause as looking more against than toward review,<sup>24</sup> but his

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<sup>20</sup> Dumbauld, "Judicial Review and Popular Sovereignty," 99 U. Pa. L. Rev. 197, 204 (1950).

<sup>21</sup> See Corwin, *The Higher Law Background of American Constitutional Law* (Great Seal Books ed. 1955); Haines, *The American Doctrine of Judicial Supremacy* (1959).

<sup>22</sup> Hand, *Spirit of Liberty* 274, 277 (1952); Jackson, *The Supreme Court in the American System of Government* 26 (1955); Frankfurter, "John Marshall and the Judicial Function," 69 *Harv. L. Rev.* 217, 219 (1955).

<sup>23</sup> Dumbauld, *supra* note 20; Black, *supra* note 2, at 26.

<sup>24</sup> Hand, *supra* note 1, at 28.

tone of indecision seems properly chosen. However, Professor Wechsler,<sup>25</sup> seconded by Professor Black,<sup>26</sup> has made a brave effort to derive review from the supremacy clause. He argues that since the clause requires state courts to decide the constitutionality of state statutes<sup>27</sup> and since article III gives the Supreme Court jurisdiction over all cases arising under the Constitution, it was obviously intended to give the Supreme Court appellate jurisdiction over the state courts. If the Supreme Court was to exercise such jurisdiction, it must have had the duty of examining the same range of issues as the lower courts whose findings it was to review. Thus, it must have been empowered to determine the constitutionality of statutes. Since the Constitution does not require the creation of any inferior federal courts, all constitutional issues might have arisen in the state courts so that the Supreme Court must have been intended to review all such issues, and it could hardly have been the purpose of the framers to give the Supreme Court less authority over the lower federal courts than over the state courts. Therefore, the establishment of lower federal courts could not reduce the scope of the Court's appellate jurisdiction.<sup>28</sup>

This argument, while ingenious, hardly seems decisive. In the first place the Constitution does not specifically give the Court appellate jurisdiction over state proceedings. In fact, Wechsler must rely on the Judiciary Act of 1789, and his argument may be turned on its head to suggest that the Act of 1789 was itself unconstitutional, for how can a court which has not specifically been given access to the Constitution review the work of courts that have? But more fundamentally, the problem is that the supremacy clause only concerns conflict between state statutes and the federal constitution. Therefore, if Wechsler's argument is given the fullest play, it can only prove that the Supreme Court was intended to decide the constitutionality of state statutes. Given the combination of a strong central government and the separation of powers favored by many members of the Convention, this is not an unreasonable conclusion. The presence or absence of lower federal courts is, of course, irrelevant. Wechsler's argument that their absence would have thrown all constitutional issues to the state courts, and thus to the Supreme Court for review, merely assumes what is to be proven, that conflicts between federal law and the federal constitution were conceived as proper

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<sup>25</sup> Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959).

<sup>26</sup> Black, *supra* note 2, at 6-7.

<sup>27</sup> Judge Hand agrees that state courts were intended to decide the constitutionality of state statutes. Hand, *supra* note 1, at 28.

<sup>28</sup> Wechsler, *supra* note 25, at 2-5.

issues for the courts, and certainly the creation of lower federal courts could not give the Supreme Court any more power to declare federal statutes unconstitutional than it originally had. The actual wording of the Constitution thus leaves us exactly where we began, with a strong suggestion of review but no clear-cut case.

The intentions of the framers have been so dissected and centrifuged that it hardly seems worth while to perform the laboratory work again here. Suffice it to say that no one has made out an absolutely clear case for review on these grounds, but most authorities agree that some kind of review was intended by some members of the Convention.<sup>29</sup> In short, the Constitution itself, the theory behind it, and the intention of the framers all suggest some sort of judicial review, but are neither clear nor decisive enough to comfort the modest.

If the modest experience some tension over the initial authorization for review, they are even more disturbed by the problem of its compatibility with the democratic system. As we shall see a little further on, much of the trouble here stems from a rather naïve view of democracy and particularly of the democratic character of legislatures. Nevertheless, Supreme Court Justices are not directly responsible to the people in the sense that elected officials are, and quite obviously government by nine specialists, appointed for life and at least theoretically insulated from the political process, smacks of something other than democracy.

However, the nagging fear of the modest is less usurpation by the Court than abdication by the people. Ever since Thayer set down the original canon,<sup>30</sup> the modest have cautioned that excessive activity by the courts would reduce the responsibility of the people for their own affairs and thus weaken democracy. Since the Congress constitutes the people working out their own salvation through the political process, the Supreme Court must leave it the widest possible responsibility. There is a good deal more to say on this subject and we shall return to it later. However, it must be admitted that reliance on the judicial process to complete exclusion of the political process would greatly change our

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<sup>29</sup> Professor Crosskey, of course, has absolute and overwhelming proof that the Convention did not intend review. The trouble is that this evidence has not overwhelmed most of the authorities who have considered it so that at most his researches add to the ambiguity of the problem.

In general see Wagner, *The Federal States and Their Judiciary* 88-90 (1959), and authorities cited therein. Cf. Cahn, "The Doubter and the Bill of Rights," 33 *N.Y.U.L. Rev.* 903 (1955) with Mendelson, "Cahn on Jefferson, Commager and Learned Hand," 37 *Tex. L. Rev.* 721 (1959). On Crosskey see his *II Politics and the Constitution* 982-85, 1006-07 and Hart, *Book Review* 67 *Harv. L. Rev.* 1456 (1954). Ketcham, "James Madison and Judicial Review," 8 *Syracuse L. Rev.* 158 (1957) deals at length with the inconsistencies in Madison's writings on review which have served as one of the principal bases for Crosskey's thesis.

<sup>30</sup> Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129 (1893).



system of government. Therefore, this rationale of the modest contains at least a kernel of truth.

Of course, the problem of the democratic nature of review is finally and decisively affected by our first area of discussion, the nature and origin of the Constitution itself. First of all, if any constitutional authorization for review can be found, and there does seem to be some, then the courts can hardly deny in the name of deference to the people a task bestowed upon them by "We the people. . . ." And, more basically, if the Constitution suggests, as it most certainly has to most authorities, that the founders wanted something less than pure and unlimited democracy, it hardly behooves the Court under the guise of modesty to espouse an unbridled democracy.<sup>31</sup> So finally, the modest cannot totally reject review because of their democratic scruples. Nor can they, in view of those scruples, rest content with judicial activism.<sup>32</sup>

The proponents of review have made much of the historical acceptance of that institution by the American people, and the modest would, I think, be the last to deny the traditional role of review.<sup>33</sup> But, as Judge Hand's work clearly shows, they are troubled by the suspicion that the popular purchase was the result of fraudulent advertising, and it is not necessary to dredge up a theory of Marshallian usurpation to justify this suspicion. If the people have been led by the Justices themselves, or for that matter by Fourth of July oratory, into believing that the Supreme Court merely puts the Constitution on top of the statute and lops off whatever sticks out over the edges, they have accepted the form not the substance of review. This is not to say that popular acceptance means nothing, but only that it cannot mean too much. It can hardly soothe the democratic conscience to employ a history of popular support in defending a policy-making function which the people never knew they were giving away. Yet, the judge who feels that review has been unavoidably thrust upon him by a long-continued error in popular understanding may, like Judge Hand, seek to limit the error and point out the misunderstanding. Again, it is not that the modest abandon review; it is that they cannot in good conscience fully accept it.

It is precisely this policy-making element in review that is the real sticking point for most of the modest.

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<sup>31</sup> See Konefsky, *The Legacy of Holmes and Brandeis* 292-93 (1956).

<sup>32</sup> Witness Justice Frankfurter dissenting:

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse.

*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 650 (1943).

<sup>33</sup> See e.g., Frankfurter in *Rochin v. California*, 342 U.S. 165, 173 (1952).

Although it is all very well to say, as Professor Black does, that policy preferences are an inevitable part of all legal decision-making, to the modest, already uncertain as to the democratic authorization and constitutional legitimacy of review, this argument is less likely to be comforting than to drive them completely from the field. Yet the Court does not, in the light of history, feel justified in making such a retreat, and therefore remains of necessity in the policy-making realm, while engaging in endless self-flagellation for its unavoidable sin.<sup>34</sup>

Thus, the modest find that the Constitution is law but not only or quite law, that the intentions of the founders and subsequent history justify review somewhat but not entirely, that the Court and review are neither wholly compatible nor incompatible with majoritarian democracy, and that judicial policy-making is an unavoidable but not completely laudable element of constitutional adjudication. To all this Professor Black for the activists replies that the Constitution is law, the Court is democratic, review has the sanction of the founders and of history, and the Court must make policy decisions. To the modest it can only seem that the activists deal with the dilemma of review by firmly impaling themselves on one of its horns.<sup>35</sup>

#### JUDICIAL MODESTY AND POLITICAL REALITY

If the hosts of the modest are to be delivered from their dilemma, some role and rationale for the Supreme Court must be found which will

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<sup>34</sup> "Every justice has been accused of legislating and every one has joined in that accusation of others." *Supra* note 22 at, 80. Perhaps the Justices can console themselves with Professor Freund's aphorism: "If anything more is needed to assure a disinterested judgment than a bias against bias, it is perhaps a bias against bias against bias." But one suspects this is just a more elegant repetition of T.R. Powell's notion that the Court would not invalidate a statute unless it were "too damned raw." And this leads directly back to the personal prejudice which is the bete noir of the modest. The point is that unless the policy-making function of the Court can be linked with some special justification for review, there is not much comfort in stressing the inescapability of personal judgment. A recognition of the inevitability of sin has not proved a particularly successful means of tranquilizing the transgressors.

<sup>35</sup> It is little wonder, then, that what we find among the modest is not a direct attack on the proponents of review but a kind of intellectual schizophrenia. Judge Hand denies that any specific provision of the Constitution, and most particularly the Bill of Rights, justifies review and then drags it back in by a rule of statutory construction which is admittedly a lawyer's artifice. Professor Thayer approves review by fashioning a rule of administration which could be logically met by any statute passed by any but a totally insane or guileless Congress. Justice Jackson attacks the cult of judicial activism while writing the Second Flag Salute opinion. And Justice Frankfurter writes his dozens of "the Constitution is important and the Court must protect it but . . ." opinions typified by the Dennis concurrence, while dissenting alone in the Lincoln Mills case. And he tops it all off with the following eulogy of John Marshall. "The courage of *Marbury v. Madison* is not minimized by suggesting that its reasoning is not impeccable and its conclusion, however wise, not inevitable. I venture to say this though fully aware that, since Marshall's time and largely, I suspect, through the momentum of the experience which he initiated, his conclusion in *Marbury v. Madison* has been deemed . . . indispensable. . . ." Frankfurter, *supra* note 22, at 219.

preserve review but limit it sufficiently, and give it the proper amount of special justification to meet the qualms and suspicions which have been aroused. More particularly, if the Court is to continue in the free speech area, some formula must be derived that will ease the tension between libertarianism and modesty which is so striking a characteristic of the contemporary constitutional scene.

It might be argued that this approach takes for granted the desirability of continued judicial action in the speech field. Indeed it does. But, who does not consider such activity advisable? Walter Berns, in one of the foremost attacks on libertarianism,<sup>36</sup> prefers virtue to freedom, but says he wants both and favors review. Justice Frankfurter intervenes in the case of academic freedom<sup>37</sup> and, even while insisting that the First Amendment is not absolute, holds in reserve the power of review.<sup>38</sup> Professor Latham, who has vigorously represented that camp of the modest which preaches that salvation must be found in the legislature,<sup>39</sup> nevertheless concedes that the Court should keep trying.<sup>40</sup> We are left with Learned Hand, who has said the Bill of Rights was merely an admonition to Congress.<sup>41</sup> However, even Judge Hand is obviously caught between the advantages of review in the speech cases and his general democratic objections to it.<sup>42</sup> His view of the Bill of Rights is thus another sign of the modesty dilemma. After trying to strike a balance, he simply chooses to impale himself on the opposite horn from Professor Black.<sup>43</sup>

In short, everybody talks about free speech, but the modest don't know what to do about it. The great irony of constitutional law today is that the very group which is most concerned with the preservation of freedom and the democratic process has thought itself into near paralysis. The problem is to find some means of helping those who favor free speech to overcome their qualms about exploiting judicial support.

The first step, it seems to me, is to reunite two bodies of data which are separated with the most amazing perversity in the structure of constitutional discussion. While the political role of the Supreme Court is widely, albeit often shamefacedly, recognized, all real knowledge of politics seem to disappear as soon as the discussion turns to constitutional

<sup>36</sup> Berns, *Freedom, Virtue and the First Amendment* (1957).

<sup>37</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 255-56 (1951) (conurrence).

<sup>38</sup> *Dennis v. United States*, 341 U.S. 494, 517-56 (1951) (conurrence).

<sup>39</sup> See his "Supreme Court's Crusade For Freedom," 28 *Commentary* 108 (1959).

<sup>40</sup> Latham, *The Theory of the Judicial Concept of Freedom of Speech*, 12 *J. Politics* 637, 650 (1950).

<sup>41</sup> Chief Justice Stone's *Conception of the Judicial Function*, 46 *Colum. L. Rev.* 696, 697 (1946); see also *Daniel Reeves Inc. v. Anderson*, 43 *F.2d* 679, 682 (1930).

<sup>42</sup> Hand, *The Bill of Rights* 69, 71-73 (1958).

<sup>43</sup> *Id.* at 73-74.

law. It is not that many of the modest do not know better. Judge Hand has spoken of the legislature as a vehicle for group struggle.<sup>44</sup> Certainly, Professor Latham is the last person who could be accused of political naïvete;<sup>45</sup> but, the former, nevertheless, insists on talking about the democratic legislature and the undemocratic Court, and the latter contributes to the endless discussion of whether the Court has historically thwarted the will of the majority without pointing out that nearly every interest in society is a group and, therefore, a minority interest.<sup>46</sup> Even among the activists there is much talk about democracy and free government and majority rule without any awareness of the political complexities which lie behind the tags.<sup>47</sup>

We must take a closer look at the "democracy" with which the modest, in revulsion to judicial activism, have armed the "political" branches.<sup>48</sup> It might be best to begin with the favorite son of the modest, Congress. The major problem is, of course, that judges and others who should know better keep talking about Congress as if it were a unified body. However, even when Woodrow Wilson wrote that "Congressional government is committee government,"<sup>49</sup> it could hardly have been news that Congress rarely acts as a whole. Congressional policy is today largely made in the crosscurrents of clashing committee jurisdictions.<sup>50</sup> Nor can this dominance be considered as simply a routine division of labor, for the committees are not microcosms of the Congress as a whole. They have distinct and separate characters to match their independent power. For example, the seniority rule insures that chairmen will come from those particular geographic areas where one party or the other is permanently in the majority. More important, since committee assignment is now largely a matter of personal preference, at least once a minimum of seniority has accrued, many of the most important committees tend to be packed by particular interests. Thus, the agriculture and interior committees are comprised almost entirely of representatives from farm constituencies and Westerners. This means that committees tend to establish and maintain a point of view far different from Congress as a whole, and these special viewpoints combined with the great power of

<sup>44</sup> *Op. cit. supra* note 41 at 697.

<sup>45</sup> See his *The Group Basis of Politics: A Study in Basing-Point Legislation* (1952); *The Politics of Railroad Coordination* (1959).

<sup>46</sup> Latham, "The Supreme Court and the Supreme People," 16 *J. Politics* 207 (1954).

<sup>47</sup> See, e.g., Rostow, "The Democratic Character of Judicial Review," 66 *Harv. L. Rev.* 193 (1952).

<sup>48</sup> See Dietze, "America and Europe—Decline and Emergence of Judicial Review," 44 *Va. L. Rev.* 1233, 1268 (1958).

<sup>49</sup> *Congressional Government* (1956) (preface to the original edition reprinted in the Meridian edition).

<sup>50</sup> See Carroll, *The House of Representatives and Foreign Policy* (1958); Gross, *The Legislative Struggle* (1953).

the committees turns Congress into a feudal domain with various special interests glowering at each other from their own strongholds.

The party leaders are thus placed in something like the position of the feudal monarch, but they rarely penetrate very deeply into the committees' business<sup>51</sup> so that they tend to get problems which have already been stamped with the views of the special jurisdictions. Nevertheless, it is probable that committee chairmen and other representatives of special groups can rarely hope to attain their legislative ends without at least the passive approval and often the active intervention of the leadership.<sup>52</sup> However, this leadership tends to act interstitially so that its responsibility for any particular decision is difficult to trace. Moreover, it attains its position not by direct popular election, but by the complex internal politics of the two Houses. Once established it can normally maintain itself no matter what the state of public opinion. Here again, it is not just the independent power and lack of responsibility to the nation as a whole which puts the party leadership outside the democratic clichés; it is the mode of their accession to the throne, for only those reach the top who have the staying power of a safe constituency. Therefore, when we look for the national leaders of Congress, we are likely to find a Texas dynasty.

On this complex Congressional power structure is applied constituency pressure. But what could be more democratic than representatives heeding the view of their constituents? The difficulty is that because Congressmen hold widely unequal positions of power which vary from issue to issue, particular constituencies hold immensely disproportional influences on certain questions. For example, the Georgia constituents of Senator George and Representative Vinson must have been for some years among the most powerful voters in the nation. Thus, the democratic vision of equal voters exerting their influence through equal representatives is an illusion so far as Congress is concerned. It is equally illusory when the voter's position vis-à-vis one another is considered. Malapportionment and gerrymandering seem a permanent feature of the American electoral scheme.<sup>53</sup> Therefore, Congress, even without the complex power structure which warps and twists the legislative process, is undemocratically skewed even before it gets down to business.

One last horrible might be added to the parade, lobbying. The point here is not that economic, social, and other groups seek to influence legislators and occasionally use shady means; there is nothing un-

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<sup>51</sup> *Supra* note 50, at 261.

<sup>52</sup> Truman, *The Congressional Party* 99-133, 245-47 (1959).

<sup>53</sup> See Baker, *Rural Versus Urban Political Power* (1955).

democratic about putting one's case to a legislator. What is instructive for our purposes is that lobbyists tend to exercise their influence selectively. They concentrate on those Congressional fiefs and fief holders who are either most powerful in the area of their interest or in some other area which can be traded off at a profit to the special interest involved.<sup>54</sup> The lobbyist thus recognizes, and re-enforces by whatever influence he wields, the fragmentation of Congress' power and the dominance of the specialized committees.

Constituency pressure, lobbying, considerations of personal power and the sincerely held sentiments of the legislators combine to establish what are essentially clientele committees with vast powers over Congress as a whole. Moreover, the positions of essentially irresponsible power to which individual Congressmen accede under this system allow further distortion of the democratic process, for they may exploit their strongholds in one field to gain concessions in another.

If we are to place the Court somewhere in the structure of American government, we must also consider the Presidency and the executive branch generally. At first glance, the President seems to fit the democratic myth. He is elected by and represents the people of the United States, the majority that the judges are not supposed to thwart. But, when we look at the nominating conventions which actually determine who the people get to choose, we again find a complex structure of political powers and the occupation of key positions by individuals who represent narrow interests rather than the people of the nation. The convention has been vigorously defended as the necessary arena in which various groups and interests can compromise their differences and carry on the political process which might otherwise fly to pieces under the pressure of American diversity.<sup>55</sup> This defense is valuable in showing that here again the process is meaningless in terms of the voice of the people and majority rule. Because no majority is clearly evident, smoke filled rooms are necessary.

Certainly the electoral college was not inspired by pure democratic majoritarianism. Its existence tends to favor certain kinds of candidates and emphasize the claims of certain constituencies, *e.g.*, the key cities in marginal states, and, conversely, to effectively disenfranchise many citizens, *e.g.*, Southern Republicans. Therefore, certain groups gain tactical advantage over others in still another complexity of government.

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<sup>54</sup> For examples of the selective efforts of lobbyists see Bailey, *Congress Makes a Law* (1950); Cohen, *The Political Process and Foreign Policy* (1957); Schattschneider, *Politics, Pressures and the Tariff* (1935).

<sup>55</sup> See Herring, *Politics of Democracy* 225-39 (1940).

The Presidency itself, then, can hardly be understood in simplistic, majoritarian terms. It does not even provide the comfort of direct responsibility to the people, the absence of which so often troubles the Supreme Court. Not only is the President secure for four years—a time period in which he could do immeasurably more damage to the nation than could the Supreme Court in fifteen—but we have been recently reminded that in many instances he may also wield dictatorial powers.<sup>56</sup>

When we turn from the Presidency itself to the executive branch, even less of the voice of the people comes through. Many of the great executive departments are, and were frankly intended to be, clientele agencies representing not the majority of the nation but special interests.<sup>57</sup> They not only find themselves captured by special interests but fling themselves willingly into the traps in order to gain the independent grass roots political support which makes their life vis-à-vis Congress and the other departments so much easier. Where no special interest group exists, the departments may feel compelled to create one as the Department of the Army recently did in organizing the Association of the United States Army to counter the power of the Navy League and Air Force Association.

It must be re-emphasized that it is these interest-wedded departments and the independent regulatory commissions, whose tendencies to be captured by the industries they regulate is notorious,<sup>58</sup> which are the major source of law today. They provide the bulk of legislative proposals which get before Congress, and they create and administer much of the vast system of administrative law, value of which allegedly lies in the expertise, *i.e.*, the specialized and interest-oriented activities, of the bureaucrats.

The parochialism of the executive branch naturally is not confined to the department level. One of the most distinctive features of American government is the close relations between bureaus and their equivalent Congressional committees which one commentator has called government by whirlpool.<sup>59</sup> Since the bureau generally drafts initial legislation and the committee has paramount powers over the bill once it reaches Congress, these alliances are of tremendous importance. They tend to protect subordinate, and frequently group-dominated, segments of govern-

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<sup>56</sup> See Rossiter, *Constitutional Dictatorship* (1948).

<sup>57</sup> See Fenno, *The President's Cabinet* 20-29 (1959).

<sup>58</sup> It is interesting to note that seemingly the only solution to this capture problem is for the regulating agency to go out and build an independent power base of its own by recruiting other interest groups to support it. See Latham, *Politics of Railroad Coordination 1933-1936* (1959).

<sup>59</sup> Griffith, *Congress, Its Contemporary Role* 37 (1956).

ment from whatever democratic and broadly popular control one might expect from Congress as a whole and from the President.<sup>60</sup>

Both the clientele aspects of the departments and the phenomenon of government by whirlpool lead to the same kind of selective lobbying in the executive branch as in the legislature. Groups desiring particular goals seek out those agencies which are best equipped and most willing to help. In other words, executive policy is made not so much through general debate over major premises by politically responsible officials as by the interaction of interest groups and bureaucratic subdivisions.

Thus, what really emerges from an examination of Congress and the Presidency is not a picture of democratic, majoritarian bodies, voicing popular will and responsible to it, but an elaborate political structure in which groups seek advantage through maneuvering among the various power centers. The results are not the enunciation of the will of the majority of the American people but compromises among competing interest groups. Professor Truman, in a widely known study of American government, has characterized the system as one of "political interest groups" with "shared attitudes toward what is needed . . . observable as demands or claims upon other groups . . . through or upon . . . the institutions of government," and "potential" or "unorganized" interest groups representing widely held interests and expectations about the "rules of the game." The political process then proceeds through the "access" of organized interest groups to the various organs of government roughly within the boundaries set by the general values of society.<sup>61</sup> However, these groups cannot be conceived as simply portions of the population acting on the elected or appointed officials. Government agencies in order to further their programs, or the programs of the groups they represent, themselves seek to create support among other governmental and nongovernmental groups. In this process of building, rebuilding, trading, and borrowing political strength, clear questions for majority decision simply do not emerge.<sup>62</sup>

The decisive question then is not one of majority rule or democratic legitimacy but of what role and relative weight the Supreme Court has in the national government as it actually operates today. It has been a curious feature of the debate over the Court that some of the modest

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<sup>60</sup> The most thorough documentation of such an alliance, that between the Corps of Engineers and the Public Works Committees is to be found in Maass, *Muddy Waters* (1951).

<sup>61</sup> Truman, *The Governmental Process* 33-34, 264-65, 510-14 (1951). The literature on the group nature of politics is by now immense. See Gross, *The Legislative Struggle* (1953); Bailey, *Congress Makes a Law* (Intro. 1950), and especially the works of Latham, *supra* note 45.

<sup>62</sup> See, e.g., "Toward a More Responsible Two-Party System," 44 *Am. Pol. Sci. Rev.* (Supp. 1950) whose blueprint for reform illustrates rather neatly what we don't have now.



have been arguing that it is too strong to leave unrestrained<sup>63</sup> while others have been warning that it is too weak to rely upon. Careful examinations of the Court's actual accomplishments do not yield much support for the hypothesis that review is an extremely strong power in our system of government.<sup>64</sup> Thus, if the Court is weak, why worry about whether it exercises self-restraint or not? A helpless "undemocratic" body should not bother the majoritarians very much. Friends of the Court may worry that it will overestimate its strength and take on opponents too big for it, but, in fact, the Court has not historically suffered emasculation.<sup>65</sup> Judge Hand contends that no court can save a people who have lost the desire to defend their own liberties and none is needed to protect the rights of those who feel responsible for their own defense.<sup>66</sup> Professor Freund has pointed out that this argument is based on the false dichotomy between a people lost beyond saving or secure beyond the need of help. There are no such people. The question is not whether the courts can do everything, or nothing. It is whether they can do something.<sup>67</sup>

In a broader sense the whole debate over strength and weakness is based on an abstract evaluation of the Supreme Court that ignores political reality. Fear of the Court's strength and the accompanying complaints about democracy seem to stem largely from a view of the Court as one of three independent and equal branches. If the President and Congress are elected and the Supreme Court is not, and all three have an equal voice, then the Court must abdicate in the name of democracy. But, of course, there are not three equal branches of government but many centers of decision-making.

Thus Judge Hand's plea for modesty seems to be derived from an overly formalistic approach to government. He fears that the defenders of freedom will ignore Congress when hospitably received by the courts. If the Supreme Court is not equal, neither is it separate. No one is confronted with the choice of the Court or Congress. There is no more reason to assume that a group interested in freedom of speech will, when confronted by the whole panoply of government, stop with the Supreme Court than that the railroads will stop with the Interstate Commerce Commission. Furthermore, if some groups are overly naïve about politics, the answer is to instruct them, not narrow the available avenues of approach.

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<sup>63</sup> See, e.g., Konefsky, *Legacy of Holmes and Brandeis* 287 (1956); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 *Colum. L. Rev.* 311, 318 (1952).

<sup>64</sup> See Frank, "Review and Basic Liberties," and Hurst, "Review and the Distribution of National Powers" in *Supreme Court and Supreme Law* (Cahn ed. 1954).

<sup>65</sup> See Rostow, *supra* note 47, at 210-17.

<sup>66</sup> Hand, *The Spirit of Liberty* 272 (1952).

<sup>67</sup> Freund, "The Supreme Court and Civil Liberties," 4 *Vand. L. Rev.* 533, 552 (1951).

Abstract calculations of the Court's democratic responsibility cannot get us very far. Much of the current thinking about the Court has its base in the New Deal experience, and the principal complaint arising out of that experience was the alleged lack of democratic restraints on the Court. The consequences of the New Deal fight tend of course to prove just the reverse, but we need not stop there. The average post-Civil War Justice has sat only thirteen and a half years.<sup>68</sup> Since a President has the opportunity of appointing a new Justice on the average of every twenty-two months, it seems unlikely that the Court could hold out very long against entrenched majority sentiment.<sup>69</sup> President Roosevelt's problem was thus exceptional and the sudden and radical shift in the Court's position in 1937 simply represents a variation in the more gradual change to be statistically anticipated.<sup>70</sup>

With a bow to Mr. Dooley it should be said here that, even aside from the high turnover of the Justices, the Court does follow the election returns at least in terms of broad responses to popular desires.<sup>71</sup> Paradoxically enough, the nonelective and formally nonpolitical character of the Court accentuates its sensitivity to public opinion. We have noted that other institutions of the central government tend to rest upon relatively independent and cohesive clienteles. The Court does not have the opportunity to control continuously the kind of active bounty-creating programs which serve to develop grass roots support. Thus, without a unified body of special supporters, the Court lacks an anchor against the shifting winds of national political sentiment.

Several commentators have pointed out that the Court's duty to square its decisions with reason and authority is the key to its accountability and responsibility to the public.<sup>72</sup> In other words, the Justices' work might well be viewed as a continuous attempt to convince the public that the Court's decisions are constitutionally legitimate. It may be naïve to believe that the Court can be wholly limited by a self-interpreted Constitution.<sup>73</sup> However, it is certainly equally naïve to believe that the Justices are totally unrestrained by provisions to which they must continuously and publicly pay homage. Also, when the Court decides a specific case, its opinion is a specific document, and that document records the position of nine specific men.<sup>74</sup>

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<sup>68</sup> Black, *The People and the Court* 180 (1960).

<sup>69</sup> Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *J. Pub. Law* 279, 284-86 (1957).

<sup>70</sup> *Id.* at 285.

<sup>71</sup> Swisher, *The Supreme Court in Modern Role* 179-80 (1958).

<sup>72</sup> Mason, *The Supreme Court from Taft to Warren* 212 (1958); Curtis, *Law as Large as Life* 99-100 (1959).

<sup>73</sup> Roche, *Judicial Self-Restraint*, 49 *Am. Pol. Sci. Rev.* 761, 763-64 (1955).

<sup>74</sup> If the complexities of Dixon-Yates are recalled or an attempt made to locate the

The greatest restraint on the Court is of course the judicial process itself. It has become a truism that case-by-case determination limits the Court to occasional and negative intervention in the governmental process and excludes many vital areas entirely.<sup>75</sup> Even when the Court does exercise review, it does so largely on the sufferance of Congress. The amending process is always available and a determined Congress has rarely found that it cannot, by deft and persistent redrafting, eventually accomplish its end. Professor Peltason has concluded after an examination of the place of courts in the political process that "judicial interpretation of the Constitution is not necessarily any more final than interpretation of a statute."<sup>76</sup>

If the problems of the Court's power and responsibility are not so simple as they are sometimes made to appear, neither are its relations to Congress. Since Judge Gibson's day<sup>77</sup> the opponents of review have argued that Congress can make determinations of constitutionality as well as the Court, but Judge Gibson's argument is an early specimen of the formalistic approach which seems to plague examinations of review. The decision-making process in Congress is so complex and fractionalized that even if the members of Congress sincerely desired to make a final and "official" determination of constitutionality, they would find it difficult to do so. Congressional statutes, as we have noted, are the product of a series of marginal adjustments and compromises among various semi-independent groups. It is nearly impossible to interject black and white questions like constitutionality into the early stages of such a process. Moreover, when the bargaining has been so nearly completed that a bill reaches the final debate and voting stage, so many commitments have been made that the interjection of a constitutional issue would not only be futile but in many instances appear to be a traitorous repudiation of pre-established agreements. It is, therefore, highly probable that considerations of constitutionality could only take their place among the multitude of other considerations which acquire various weights at various stages of the negotiations depending on how important they appear to any given legislative power holder. This not only means that constitutional questions would be given relatively little

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exact who, where, or when of any given decision on weapons systems or foreign policy, or for that matter rivers and harbors improvements, the point should be clear. Who is held to a higher standard of democratic responsibility, the Supreme Court or the Chief of the Fish and Wild Life Service preparing a program proposal which will pass through and be altered by the Bureau of the Budget, two legislative committees, two appropriations committees, a conference committee, and the President before the new fish hatchery gets built.

<sup>75</sup> See Rostow, *supra* note 47, at 197-98.

<sup>76</sup> Peltason, *Federal Courts In The Political Process* (1955).

<sup>77</sup> See *Eakin v. Raub*, 12 Serg. & Rawl. 330 (Pa. 1825).

weight but that, on the few occasions they were decisive, the constitutional decision might well be made by something less than the whole Congress. If some people find it undemocratic and irresponsible to allow the Supreme Court to decide constitutional questions, I fail to see how their desires will be satisfied by transferring that function to the Chairman of the Committee on Small Business or the Minority Whip.

Now the above discussion has even assumed, in order to make the inherent problems of the legislative process clearer, that something called a constitutional issue can clearly and independently exist. However, the modest have taught us that questions of policy inevitably are intermingled with questions of constitutionality. Therefore, even when a Congressman has sincere constitutional misgivings, his complaints are likely to appear to his colleagues as simply part of the rhetoric of political debate, a holier than thou mode of pushing his policy preferences. Furthermore, it is hard to resist the temptation of suggesting, in spite of the paucity of evidence, that nine times out of ten his colleagues will be right. In any event, the policy content of constitutional questions must inevitably tend to push them back into the mainstream of the legislative process. Therefore, it may be concluded that the nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes.<sup>78</sup>

Furthermore, developments since Judge Gibson's day have made his position totally untenable in terms of the real operation of our government. The most important of these has been the work of the modest themselves. They have evolved a large body of doctrine, such as the rule of reasonableness, to be applied to calculations of constitutionality. These formulas implicitly, and often explicitly, rest on the fact that it is the Court, not Congress, which has been doing the calculating. However, they have become so much a part of American lore that they now seem to adhere to the process of constitutional determination itself. Even if Congress took over most or all of the responsibility for formal constitutional review, we would undoubtedly find that debates on constitutionality would ring with citations of Thayer and Holmes proving that a bill was not unconstitutional unless no reasonable man could find it otherwise. The result, given the pressures of politics, would probably be that Congress would bind itself with the very chains which the modest forged for the Court, and the Constitution would indeed become simply a pious hope.

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<sup>78</sup> Professor Donald Morgan of Mt. Holyoke College is now gathering materials for a forthcoming study of congressional treatment of constitutional issues which may allow more definite conclusions on this subject.

We cannot, after all, make arrangements *de novo*. The Congress has traditionally decided on the merits and left the final constitutional issues to the Court. It has for a very long time enjoyed the relative freedom of decision-making which comes with such a shift of final responsibility.<sup>79</sup> There is no reason to believe that Congress will give up the freedom just because the court divests itself of the responsibility, particularly if Justices' resignation is accomplished not by a formal transfer of authority but a series of modest proposals in judicial opinions which Congress is free to ignore.<sup>80</sup> Reviewing both the historic role of Congress and its actual mode of operation, it seems impossible to transfer to it a constitutional task which it has not, cannot, and will not undertake.

Thus abstract arguments about the power of the Court and the constitutional duty of Congress simply becloud the picture because they fail to place the Court in its actual political environment. Since it operates as an institution within the complex of institutions which make up the central government, we might expect that the Court would in fact be similar to other such institutions. There have recently been several discussions of the Court's role in the political process. Professor Dahl, for instance, finds that the Court is usually a part of the general political alliance, that is, the relatively long-term coalition of cooperating interests which dominates the government at any given time. Therefore, it cannot normally expect to oppose the alliance on major issues with any hope of permanent success. But, as one of the affiliated power groups, it can influence subordinate decisions within the established general policy orientation. The Court can only hope to intervene successfully on major questions when the alliance is unstable on a key issue and if the Court's actions represent a

widespread set of explicit or implicit norms held by the political leadership; norms which are not strong enough or are not distributed in such a way as to insure the existence of an effective lawmaking majority but are, nonetheless, sufficiently powerful to prevent any successful attack on the legitimacy powers of the Court.<sup>81</sup>

In the simplest terms, the Court is least likely to block a real legislative majority on a major issue and most likely to succeed against a fragile or transient majority, or on a minor issue.<sup>82</sup>

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<sup>79</sup> Curtis, *Lions Under the Throne* 28-29 (1947); Freund, *On Understanding the Supreme Court* 116 (1949).

<sup>80</sup> The result is what one commentator called the "circular pass" in which Congress throws the constitutional issues to the Court and the Court laterals them back to the Congress, and the result of this game might be the disappearance of that constitutional awareness in American political life which judicial review has done so much to create and constantly re-enforce. Frank, *supra* note 64, at 134; Rostow, *supra* note 47, at 208.

<sup>81</sup> Dahl, *supra* note 69, at 294.

<sup>82</sup> *Id.* at 283-86, 293-94; See also Dietze, *supra* note 48, at 30.

Professor Latham, in a historical survey, has found that the Court has traditionally aided minority groups—the Federalists, the defeated states after the Civil War, big business, and the judges themselves. He concludes that the Court “has been in a strategic position to cast its weight this way and that when the balance could be tipped.”<sup>83</sup> Of course, the value of judicial review to minorities is widely attested.<sup>84</sup>

Finally, it has become practically a truism that one of the Court’s principal functions is to act as the “conscience of the American people”<sup>85</sup> and make audible the ideals which might otherwise remain submerged.<sup>86</sup>

It is evident then that the Court, like other participants in the policy-making process, does in fact generally make only marginal contributions. The degree of its influence on any given matter depends on the constellation of other forces acting on that issue. Indeed, the similarity of its problems and techniques to those of other agencies is striking. Over a large range of its activities it is bound closely by statutory authorization and finds its discretion largely in interpretation. Even in its narrow area of policy initiation, the Court can be largely checked by the later actions of Congress. The problem of “access,” which Professor Truman finds crucial to group relations with all governmental agencies, takes up a large part of the Court’s time, and its discretionary *certiorari* powers allow the Court to take as much tactical advantage from this problem as do the legislative committees of Congress. Like the committees, the Court’s expertise within its specialized field can be used to influence other segments of government. To be sure, it lacks some of the opportunity which other agencies have of direct access to its fellows, but it compensates for this through its greater access to the public and particularly to the legal profession which carries its messages swiftly to the governmental bodies it wishes to reach.

Furthermore, the Court does seem to represent certain groups, in other words, to have a clientele. Dahl and Latham agree that the Court may be viewed as defending groups or “minorities.”<sup>87</sup> But, precisely what groups make up the clientele of the Court, that is, what interests find that the Court can provide them with influence and services which they cannot find in as great a measure elsewhere in the government?

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<sup>83</sup> Latham, “The Supreme Court as a Political Institution,” 31 *Minn. L. Rev.* 205, 227-28 (1947).

<sup>84</sup> See, e.g., Jackson, *The Supreme Court in the American System of Government* 79, Dietze, *supra* note 48.

<sup>85</sup> See Roche, *supra* note 73, at 771.

<sup>86</sup> See, e.g., Curtis, *Lions Under the Throne* 197 (1947); Konefsky, *Legacy of Holmes and Brandeis* 295 (1956); Mason, *The Supreme Court from Taft to Warren* 213 (1958).

<sup>87</sup> If the central government is conceived as a system of groups, then most groups are, almost by definition, minorities, and the terms group and minority may be used interchangeably.

Here we must return briefly to Professor Truman's concept of "potential" or "unorganized" groups. Groups by definition are based on a shared value. Some of these groups are organized, with a high degree of interaction among their members, formal instrumentalities, et cetera. Others, although based on a relatively specific and strongly held value, are for various reasons not organized. A particularly significant variety of unorganized groups is that based on a widely shared interest or expectation about the rules of the game which has been described in terms of "systems of belief," "general ideological consensus," or a "broad body of attitudes and understandings regarding the nature and limits of authority." These interests may be loose and ambiguous. Nevertheless, sufficient disturbance to them will call forth political action and, more immediately, the expectation that those government functionaries who are violating the rules will be restrained by other agents of government.<sup>88</sup>

It seems to be precisely these potential groups which Dahl is talking about when he says that the Court may only intervene on major issues in behalf of widely held but politically unfocused norms. The notion of the Court as the conscience of the community also makes sense in this light. It is true that Latham tends to see special-interest minority groups as the Court's clientele, but Professor Peltason finds that it is not the specific nature of these minorities but their general interest in obtaining representation denied them by the legislature which turns them toward the courts.<sup>89</sup>

Therefore, the Court like other governmental agencies does have a clientele, consisting of precisely those interests which find themselves unable to obtain representation from other agencies. There are of course various reasons for this inability. "Potential" interest groups generally lack the impetus for organization because the values they espouse are too amorphous to promote a high rate of personal interaction. Thus, a group built on the value of a tuna fish tariff is likely to enlist a higher degree of immediate political activity than one proclaiming the desirability of fair trial. The tuna fish group is, therefore, much more likely to have available to it the financial and personal resources necessary to gain successful access to a Congressional committee or executive bureau than is the fair trial group.

The Supreme Court is peculiarly fitted to represent these potential groups. Of course, if the value is completely amorphous, the courts can be of no help. But, in a complex society such as ours, there will almost always be some marginal-organized group—the American Civil Liber-

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<sup>88</sup> Truman, *The Governmental Process*, 511-14 (1951).

<sup>89</sup> Peltason, *Federal Courts in the Political Process* 11 (1955).

ties Union, the Jehovah's Witnesses, et cetera—to champion actively any widespread social sentiment if only as an incident to its main purpose. Such groups, however, are not likely to have much success with Congress or the Executive, either because the constituencies they represent are too unfocused to swing much political weight, or because their main lines of activity make them politically unpopular.

Here, the modest's dilemma of a Court which is both political and nonpolitical ceases to be a dilemma and becomes a unique contribution to American government. The Court's *proceedings* are judicial, that is, they involve adversary proceedings between two parties viewed as equal individuals. Therefore, marginal groups can expect a much more favorable hearing from the Court than from bodies which, quite correctly, look beyond the individual to the political strength he can bring into the arena. The Court's *powers* are essentially political. Therefore, marginal groups can expect of the Court the political support which they cannot find elsewhere. Thus, through a judicial-political court, the potential interest group, via the marginal group, can achieve the political representation which makes a practical reality out of the value it espouses.

Highly organized groups may also turn to the Court, not because they are unsuited to gain access to other agencies, but because, having gained access along with other groups, they lost the political battle. If the Court is to make its maximum contribution to the governing process, it should probably devote its major energies to those groups which have no other access to government. It need not act as the last resort of forum shoppers who have been defeated elsewhere. In fact, just this emphasis would seem to accord with the actual power situation. For the Court can at most offer only minor advantages to organized interest groups which have already failed in their more proper sphere. If the Hughes' Court is to be criticized, it is on exactly these grounds. It attempted to make a major intervention against the governing alliance in favor of an organized pressure group which had been defeated in its own customary arena precisely because it was acting contrary to widely held popular sentiment.

However, even the comparative abilities of different potential interest groups in capturing Congressional or executive support may vary widely. Certain broad values are likely to be overrepresented and others underrepresented in the legislative and administrative processes. Congressmen and bureaucrats, whose everyday concerns are likely to be highly attuned to the welfare and security values which are at the heart of most governmental programs, naturally tend to be most responsive to those general values. The immediate problems and the need to provide positive govern-



mental programs to solve them inevitably tend to outweigh long range values such as individual freedom. The potential groups oriented to more national security or more public welfare are likely to find sufficient satisfaction in Congress and the Executive without help from the Court.

Here again, the Court exhibits the characteristics of other agencies of government. It is subject to lobbying by a wide range of groups, some of whom find it an essential, others merely a supplementary, source of representation. It will, on occasion, give marginal assistance to nearly any interest, but if it wishes to act effectively in the long run, the Court must reserve its major effort for its particular clientele.

If the Court is similar to other clientele agencies, we would expect it to create and reinforce its own supporting interests. Here, the widely held notion that the Court acts as an educator, particularly in the civil rights field,<sup>90</sup> begins to make sense in a political context. Professor Swisher notes that the Court's power "depends on its ability to articulate deep convictions on the part of the people in such a way that the people who might not have been able to articulate them themselves will recognize the judicial statement as essentially their own."<sup>91</sup> In other words, the Court's opinions must be designed to bring widespread sentiments or, as we have put it, certain of the potential groups in society, to the fore. And from this strengthened position, these groups support the Court.

Moreover, other agencies have learned that they must not only support the values of their supporters but tout the particular ability of the agency to serve those values. These two factors become inextricably mixed in agency enunciations so that it becomes impossible, for instance, to separate the desirability of flood control from the necessity of an active Corps of Engineers, and this is a politically if not logically sound mixture. The strength of the agency, or at least some agency, is essential to the satisfaction of the group interest.

Judicial modesty poses a particular threat to this process of interacting support between agency and clientele. For the more the Court announces its impotence, the less group support it receives and the more impotent it becomes. Conversely, the less agency protection the group interest receives, the less capable it becomes of politically meaningful action. Thus, modest professions of lack of judicial power ignore the real world in which political power comes to those who seek and construct it. We have long since tired of Presidents who proclaim a program but refuse to engage in the cultivation of political support which can

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<sup>90</sup> See, e.g., Brogan, *Politics in America* 355-56 (Anchor ed. 1960); Mason, *supra* note 86, at 213; Freund, *supra* note 67, at 552.

<sup>91</sup> Swisher, *The Supreme Court in Modern Role* 179-80 (1959).

make that program a reality. It is time we lost patience with the Justice who proclaims his faith in the values of freedom but cannot bring himself to face the political realm in which those values must be protected.

There is something to the argument that the Court must profess some limitations for fear that intervening always and everywhere will result in dribbling away its power.<sup>92</sup> In so far as this view means that the Court should not exert itself excessively in the interest of groups on the margins or outside its clientele, it represents sound political counsel. However, it must be borne firmly in mind that the building of a clientele is a continuous process. The Justice who retreats case after case, husbanding his strength for the really big one, may find when the time comes that he has retreated right off the battlefield, for the Court like other political instrumentalities cannot expect to retain its strength without the constant and routine recruiting of support which other politicians call fence-mending. The Court has only one means of mending its fences, the opinions it issues. If these opinions do not continuously demonstrate the Court's willingness to act in favor of its supporters, it cannot expect to find much support left when it finally does act.

A similar difficulty arises when the Court uses procedural or technical devices to protect rights rather than making a broad constitutional attack.<sup>93</sup> If all constitutional questions are translated into technical questions of interpretation and procedure, the popular reaction is likely to be that constitutional law must be left to the technicians, that is the lawyers. Narrowly legal opinions are likely to interfere with the Court's ability to enlist outside support and thus with its long term capacity to act successfully.

The concern of the judicially modest has been to differentiate what the Supreme Court might properly do from the legitimate functions of other branches of government. Their difficulty, it seems to me, is that the differentiation has been based on an abstract and artificial view of the American governing process. The Court must indeed attempt to perform its own not some other institution's tasks. But, what is and is not its own must be determined in the light of actual political arrangements. In that light, the Court can best define its special function as the representation of potential or unorganized interests or values which are unlikely to be represented elsewhere in government.

This approach should release the modest from the dilemma which has

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<sup>92</sup> Curtis, *Law as Large as Life* 100-02 (1959).

<sup>93</sup> See, e.g., *Watkins v. United States*, 354 U.S. 298 (1957); *Cole v. Young*, 351 U.S. 536 (1956); *Jencks v. United States*, 353 U.S. 657 (1957); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

led to their hesitations about judicial activity. Whether the Constitution is or is not law is not so important when judicial review rests not on the equation of law and Constitution but on the role of the Court as one clientele agency among many. That review has, and perhaps has not, been historically accepted is less significant than the historical acceptance of a system of national government in which power is fragmented among many agencies including the Court. That the Court is democratic but not entirely so is largely meaningless in a system of government in which there are many power holding institutions each varying somewhat from the others in the degree of democracy used in their selection and in the directness of their responsibility to the people. That the Court deals with law but also with policy is hardly a critical point in a situation where the judicial, administrative, and legislative processes are carried on simultaneously within many of the agencies of government.

In short, the problems of the modest are not so much a dilemma as a set of outer limits within which all American government, not just the Supreme Court, operates. Therefore, that dilemma need not paralyze the Court any more than it paralyzes the rest of the government.

#### PREFERRED POSITION AND THE POLITICAL ROLE OF THE COURTS

More specifically, the dilemma need not prevent those interested in freedom of speech from using the Court just as they would any other government agency particularly when it is one of the means best suited to their purpose. There is no reason why one interest group should deny itself the advantages offered it by a political system which is fully exploited by all other interest groups. A realistic assessment of American government leads to the conclusion that neither the defenders of free speech nor the Supreme Court should have any qualms about undertaking as much activity as the current constellation of political forces allow them.

It is in this light that the balancing-of-interests formula which has been vigorously urged as a replacement for the traditional approach to speech regulation must be examined. This formula requires that the Court survey all the clashing interests involved in a given infringement on speech and decide on the basis of whether the interests protected by the infringement outweigh the interests in the speech. The technique is subject to two major objections. In so far as it is derived from judicial reluctance actively to protect speech,<sup>94</sup> balancing is based on a mistaken

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<sup>94</sup> See *Niemotko v. Maryland*, 340 U.S. 268, 275 (1958) (Frankfurter concurring); *Dennis v. United States*, 341 U.S. at 494 (1951) and Frankfurter's concurrence in that case at 524-25 and 542; *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

concept of modesty. By diluting the strength of judicial activity represented by the clear and present danger rule, the balancing formula takes the Court out of precisely that area in which it is particularly suited to operate, the protection of potential interest groups and, more specifically, the potential group clustered around the free speech values.

The second objection to balancing is that it not only moves the Court out of an area in which it is especially competent, but into one where the burden on the judges is much too heavy. The balancing and accommodation of group interests is the task of the whole system of American government, not the Supreme Court alone. If the Court attempts a complete and impartial balancing of all claims, it is likely to underrepresent its own clientele. While the Court remains within a political process where all other agencies push particular claims, such underrepresentation means that the final product of the political calculus will be especially unfavorable to the groups depending on the judiciary. In other words, too much balancing by the Supreme Court is likely to upset the balance of the political process as a whole.

A politically realistic approach also does much to clear up the difficulties over the preferred position doctrine without retreating to a balancing standard. This doctrine simply requires that the normal presumption of constitutionality need not be entertained when legislation curbs political liberties, particularly those of minority groups.<sup>95</sup> The employment of this technique as a protection for minority groups disturbed majoritarians because, in the abstract, it seemed to imply minorities using the Court to thwart majority will. Once the doctrine is placed within the context of the group nature of politics, it becomes evident that the Court acts not for a minority against a majority, but for one group against other groups. Indeed, if the Court tends to defend potential groups against organized groups, it is protecting the broader interests.

Similarly, the notion that the preferred position doctrine serves to withdraw some issues from the democratic process has frequently proved unpalatable. It requires the proponents of preferred position to argue at one and the same time that the Justices must protect the democratic

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<sup>95</sup> The doctrine was largely the work of Justice Stone, who suggested it in his *Carbone Products* decision (See note 96 *infra*) and who first used the actual words in *Jones v. Opelika*, 316 U.S. 584, 600 (1942) (dissent). See Mason, *The Core of Free Government, 1938-40*; "Mr. Justice Stone and 'Preferred Freedoms,'" 65 *Yale L.J.* 597 (1956). The doctrine was used in majority opinions in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The strongest statement of preferred position is that by Justice Rutledge in *Thomas v. Collins*, 323 U.S. 516 (1945). The doctrine is also to be found in *Saia v. New York*, 334 U.S. 558, 562 (1948); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Follett v. McCormick*, 321 U.S. 573, 575 (1944). See also the compilation of cases in the concurrence of Justice Frankfurter in *Kovacs v. Cooper*, 336 U.S. 77, 90-94 and the comment by Justice Rutledge at 106.

process and that they must not allow all decisions to be made by it. Confusion is, therefore, inevitable when the democratic process yields a limitation on the democratic process as it does, for instance, when legislation restricting speech is passed. However, the difficulty largely disappears, I think, when attacked in the political terms used here. In the actual political process some groups seek to limit speech and use certain agencies of government to reach their goal. Other groups seek to protect speech and use other government agencies for their purposes. The political process is continuous so that a victory by the former groups, in the legislature, for instance, simply calls forth renewed efforts by the latter groups and vice versa. When the Court strikes down a law limiting speech, it is not obstructing democracy in the name of preserving the democratic process. It is participating in that process, as it exists in the United States, by representing groups which are not sufficiently represented elsewhere. Furthermore, the Court's action is not final. It is simply another event thrown into the continually turning political hopper.

The larger problem of whether the preservation of the free market place of political activity will in the long run yield freedom or slavery is more serious, but its importance to the Court has been overinflated by considering the Court as a separate entity. The Justices are, after all, neither Plato's Legislators nor his Guardians. They are a part, not the whole, of the political process. As such they cannot make the cosmic decisions nor enforce them if they do. Thus, the Court cannot institute either a wholly free or a wholly controlled market. The evolution of the intellectual economy is determined by the political process as a whole. The Court can content itself with making its contribution to the freedom of that process and, considering the strength of the restrictive forces at work, it need hardly fear that its influence will yield a liberty so extreme that it turns to chaos. For the same reason, the arguments that the first amendment should not be preferred to other constitutional provisions is not very helpful. The preferred position doctrine need not be understood as a universal ranking of values. It is a statement about what interest the Court should represent given the contemporary political circumstances.

Preferred position then refers not to the special importance of certain values to society as a whole but to the representational role of the Court. It should be remembered that the original formulation of the doctrine in Stone's *Carolene Products* footnote<sup>96</sup> offered just this emphasis on preferred position in terms of the Court's functions. The footnote has been criticized for inconsistency,<sup>97</sup> but it seems to make quite good sense in

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<sup>96</sup> *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

<sup>97</sup> See Braden, "The Search for Objectivity in Constitutional Law," 57 *Yale L.J.* 571, 580 (1948).

terms of politics if not logic. One paragraph stressed the need to protect minorities, which usually turn out to be the marginal groups representing potential groups. Another notes the special role of the Court in keeping open the democratic process. The specific wording of the first amendment is the main point of the third. What this all comes down to is that the Court, because of its special position and special constitutional authorization, is an instrument of government particularly suited to represent the claims of those groups interested in free speech.

All this does not mean that the aura of special importance which surrounds the preferred position doctrine is an unjustified inflation of a routine political function, for the Court does, after all, have a rather special clientele and a rather special role. Professor Truman notes that the ability of potential groups to contribute to the political process is largely determined by "the character of the society's means of communication, . . . the adequacy of the information available to them concerning the events."<sup>98</sup> Therefore, the Court's concern with free speech, expressed in the preferred position doctrine, not only furthers the interests of the potential group clustered about that value but provides the necessary foundation for the effectiveness of all such groups. The Court's special preoccupation with the continuity and long range evolution of constitutional development, combined with its real political power, make it a peculiarly suitable instrument for interests lacking immediate power, but vitally concerned with the general evolution of American government. Here again, the modest's dilemma of a Court which is in day to day politics, but not wholly so, proves to be a peculiarly helpful feature of American government.

#### CONCLUSION

Indeed, once the multiple dilemmas of the modest have been dissolved by the application of a little political realism, there seems to be no particular reason why they should not accept the preferred position doctrine. It still retains some foothold on the Court.<sup>99</sup> Judge Hand finally came very close to accepting it.<sup>100</sup> In fact, it seemed implicit in some of his earlier writing, for he had based his faith on a legislature which expressed the common will and then defined the common will in terms of the availability of political means for peaceful change.<sup>101</sup> The seeds of the doctrine may even be found in Thayer who criticizes judicial law-making

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<sup>98</sup> *The Governmental Process* 517 (1951).

<sup>99</sup> Mason & Beaney, *The Supreme Court in a Free Society* 301 (1959); Miller, "Introduction to a Symposium," 6 *J. Pub. Law* 275, 278 (1957).

<sup>100</sup> Hand, *The Bill of Rights* 69 (1958).

<sup>101</sup> Frank, "Some Reflections on Judge Learned Hand," 24 *U. Chi. L. Rev.* 666, 700 (1957).

precisely because it prevented free discussion.<sup>102</sup> Both Hand and Thayer are, then, concerned with the maintenance of free access to the instrumentalities of political power and this is the heart of the preferred position doctrine. Professor Freund, who is in good standing with those who oppose "rigid" formulas, has proposed something very like preferred position.<sup>103</sup> The wording of the first amendment and the continued acceptance of the political philosophy it represents must provide some comfort for those of the modest who have objected to the importation of outdated economic philosophies into vague constitutional provisions.<sup>104</sup> The Court has recently been willing to use even less precise constitutional language as the basis for a finding of unconstitutionality.<sup>105</sup>

The preferred position doctrine is an adequate description of the actual role of Supreme Court. It has the added advantage of providing the Court with a rhetoric of minority rights, democracy, and constitutionalism which can serve as an efficient weapon in recruiting and protecting a clientele. And this rhetoric undoubtedly does represent a fundamental set of American beliefs which are entitled to constitutional protection. The preferred position doctrine allows the Court to act politically while preserving what now remains of the judicial myth and to direct its political activity in the interests of groups which desperately need a source of support in the national government.

It may strike the reader that I have abandoned here one of the principal arguments which has led to continued support of preferred position, the vision of a Court above and beyond the political process and able to protect it impartially. It seems to me this approach raises more problems than it solves. If the Court is outside the process, then it is undemocratic. If it is outside the process, chances are it lacks the power to do the job. If it is supposed to be outside the process, then it should not make policy decisions. In short, the whole modesty dilemma. Instead, the Court is inside the political process. We have no Olympian judiciary. If it is to do anything, it must do where the doing gets done, in the give and take of politics. It is in this sense that the modest are right. The corrective for abuses of the democratic process must be found within that process. That is why the Court must fulfill its role by acting politically within the democratic process as we know it in the United States.

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<sup>102</sup> *Id.* at 691.

<sup>103</sup> Freund, *On Understanding the Supreme Court* 108; *supra* note 67, at 550. See also Latham, *supra* note 40, at 641-42.

<sup>104</sup> See Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 *Harv. L. Rev.* 121, 124 (1927); Rodell, *Comment: Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment*, 47 *Geo. L.J.* 483 (1959).

<sup>105</sup> See *Trop v. Dulles*, 356 U.S. 86 (1958).