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MUCH of the pattern of division in the present Supreme Court is traceable to basic differences of opinion regarding the proper role of a judge in the process of constitutional adjudication. Some students of the Court, yielding to the current fashion of reducing even intricate problems to capsule terms, have tried to explain the controversy by classifying the justices as either "liberals" or "conservatives."[1] A second school poses the disagreement largely in terms of judicial "activism" as opposed to judicial "restraint." It is this view that has the greater relevance for the present discussion. C.H. Pritchett, one of the leading exponents of this view,[2] says that the judicial activist "appears to experience a deep sense of personal responsibility for the immediate consequences of his judicial decisions."[3] He feels that the Court has a range of discretion, that there are alternatives available to him, and that "he must make the choice which will give the right result."[4] The activist does not pretend to exercise the power of judicial review in accordance with standards imposed by the legal system; he will apply formal legal concepts only if they assist him in reaching a desirable goal. On the present Court, Pritchett suggests, Justices Black and Douglas best reflect this "goal-orientation" of the activists.[5] The proponents of judicial self-restraint see a justice at his best when he exercises the judicial power with restraint and prudence. This "functionally-oriented" view sees the Court "not as crusader or advocate but as one of the instruments of political and social accommodation and adjustment in a complicated governmental system."[6] Its stress "is not on securing a result conforming to the jurist's own scheme of values but upon adherence to appropriate judicial standards and proper manipulation of judicial techniques."[7] Justice Frankfurter, Pritchett submits, is the modern leader of the restraint school, and his views are subjected to close scrutiny.[8]

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1 See, for example, MCCUNE, THE NINE YOUNG MEN (1947).

2 PRITCHETT, THE ROOSEVELT COURT, c. 10 (1948); and the same author's more recent CIVIL LIBERTIES AND THE VINSON COURT, cc. 10, 11 (1954).

3 PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 198 (1954).

4 Id. at 199.

5 Id., c. 10.

6 Id. at 201.

7 Ibid.

8 Id., c. 11.

While Pritchett's approach is basically sound, it does have the effect of obscuring the constitutional views of Justice Robert H. Jackson, who often seems to be regarded as a mere intellectual appendage of Justice Frankfurter. In contrast to his elaborate analysis of Frankfurter's conception of the judicial function, Pritchett, writing before Jackson's death,[9] summarized Jackson's judicial philosophy only briefly and then concluded, "The unpredictability of Jackson's performance leads one to question whether he has developed any systematic theories about . . . the judicial function."[10] This cursory conclusion suggests the need for a deeper penetration into the general writings and judicial opinions of Justice Jackson to discover if he had an integrated philosophy concerning the judicial function, and to appraise the extent to which he was an advocate of judicial self-restraint. This study is an attempt to fill that need. Its intent is not to summarize Justice Jackson's political and judicial career; it is rather an inquiry into his conception of the judicial function as applied to certain basic types of review situations. If we can determine this, we may have the key that will enable us to interpret his Supreme Court experience.

The Limitations on Judicial Review

Shortly before his elevation to the Supreme Court in 1941, Jackson presented his conception of the proper role of the Supreme Court.[11] Those views reveal a general devotion to the theory of judicial self-restraint. In describing the position of the Court in the American system of separation of powers, Jackson said that the Court has no function except to decide "cases" and "controversies," and its very jurisdiction to do that was left largely to the control of Congress. It has, he continued, "no force to execute its own commands . . . . Its Justices derive their offices from the favor of the other two branches by appointment and confirmation, and hold them subject to an undefined, unlimited, and unreviewable Congressional power of impeachment."[12] Given this vulnerable, dependent position, the Court should avoid overt clashes with the political branches whenever possible. This belief in the propriety of restraint was strengthened by the conviction that the Court is an institution of distinctive characteristics that tend to

[9] Jackson died in Washington on October 9, 1954, at the age of 62.

[10] PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 228-229 (1954). At another point, Pritchett stated that "the rather erratic nature" of Jackson's opinions made it difficult to catalogue him. Id. at 18.

[11] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

[12] Id. at ix.

make it anti-democratic.[13] To avert the external adoption of a formula for limiting judicial pretensions, Jackson would have the justices themselves work out a "corrected pattern of judicial restraint."[14] To him, it was an awesome thing to strike down acts of the legislature, and deference to the Executive was as compelling as deference to the legislature.[15] To clinch his argument, Jackson contended that time has proved the judgment of the Court wrong "on the most outstanding issues upon which it has chosen to challenge the popular branches."[16] It was this set of conceptions that Robert Jackson brought to the Court.

Jurisdictional Limitations. We can learn much of the philosophy of a justice by examining his attitude regarding the scope of the jurisdiction of the Court. The Constitution limits the judicial power to "cases" and "controversies,"[17] and the rules developed by the Court in interpreting this limitation govern both the extent of the judicial power and the power of the federal courts to entertain jurisdiction.[18] From the outset, the Court has held that it can act only when the subject is presented in a case, and a case arises only when there are adverse litigants.[19] The parties to the dispute must have a substantial interest, not merely the general interest of a citizen in government by law.[20] It follows that jurisdiction will be taken only where the issue is real as opposed to abstract, contingent, hypothetical, or moot, and that the Court will not render advisory opinions. So runs the theory; but the generality of the terms permits some latitude in their application to specific cases. The loose interpretation given the terms by the activist widens the area of justiciable issues, while the stricter view taken by the advocate of restraint narrows the capacity of the Court to receive jurisdiction.

Justice Jackson's attitude on this question of standing to sue was made clear in the series of cases where separation of church and state was at issue. In the first of these, *Everson v. Board of Education,*[21] Jackson dissented but did not raise the issue of standing. In a later case, Jackson said that the Court had found a justiciable controversy in

[13] Id. at 311.
[14] Id. at vii.
[15] Id. at 323.
[16] Id. at x.
[17] Art. III, §2.
[18] See CORWIN (ed.), THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. 170, 82d Cong., 2d sess., p. 538 (1953).
[19] Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 737 (1824). See also Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911).
[20] See Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597 (1923).
[21] 330 U.S. 1, 67 S.Ct. 504 (1947).

the *Everson* case because Everson "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of."[22] But what of a case where the expenditure of funds was more difficult to cull out from general disbursements? This question was presented in *McCollum v. Board of Education*[23] which involved the released-time program of religious instruction in the Champaign, Illinois, public schools. In this program, public school children having parental consent attended classes in religious instruction during the school day and in school buildings. The interest asserted by Mrs. McCollum, who challenged the program, was that of a resident taxpayer and of a parent whose child was enrolled at the time in the public schools. In his opinion for the Court, Justice Black ruled that Mrs. McCollum had sufficient standing to maintain the action. Jackson, in a concurring opinion, said that it was doubtful whether Mrs. McCollum as a taxpayer had shown any substantial property injury, since the cost of the program to the taxpayers was "incalculable and negligible."

Two 1952 cases afford better insight into Jackson's ideas concerning standing to challenge constitutionality. In *Doremus v. Board of Education*[24] the Court avoided a decision on the validity of a New Jersey statute providing for the reading, without comment, of Bible verses at the opening of each public-school day. Two plaintiffs sought a declaratory judgment that the statute violated the First Amendment establishment of religion clause. Both claimed an interest as taxpayers and citizens, with one further alleging that he had a seventeen-year-old daughter in school. Before appeal was taken to the Supreme Court, however, the daughter had been graduated from the public schools. In speaking for a six-justice majority, Jackson held that the graduation of the daughter had rendered the claim of her parent a moot question. The Court, said Jackson, did not sit to "decide arguments after events have put them to rest." Moreover, the parent lacked substantial interest even before the question became moot, since there was no claim that the Bible-reading offended or injured the daughter. In disposing of the taxpayer's aspect of the case, Jackson ruled that a taxpayer's action can meet the test of a case or controversy "only when it is a good-faith pocketbook action." To Jackson, the case involved a religious difference, not a "direct dollars-and-cents injury." It was not enough that the plaintiff "suffers in some indefinite way in common with people gen-

[22] Doremus v. Board of Education, 342 U.S. 429 at 434, 72 S.Ct. 394 (1952).
[23] 333 U.S. 203, 68 S.Ct. 461 (1948).
[24] 342 U.S. 429, 72 S.Ct. 394 (1952).

erally."[25] The appeal, therefore, was dismissed without reaching the constitutional question. The second case, *Zorach v. Clauson*,[26] involved New York City's released-time program, which differed from the Champaign plan in that the religious instruction was held outside the public schools. In this instance, however, the Court held that no problem of jurisdiction was posed, since the appellants were citizens and taxpayers and were parents of children currently attending schools subject to the released-time program.[27] In his dissenting opinion, Justice Jackson did not question this view.

Thus it is apparent that Jackson, in dealing with the general area of cases and controversies, believed in the wisdom of the traditional cautionary rules dictated by the restraint philosophy.[28] While few would object to the Court's refusal to render decisions on moot questions or to give advisory opinions, there are those who feel that the Court has been too zealous in applying the "pocketbook" test of standing to sue, especially when civil liberties are at issue.[29] But Jackson's concern for jurisdictional limitations was not as great as that of Justice Frankfurter, the "keeper of the Court's jurisdictional conscience."[30] In *Adler v. Board of Education*,[31] for example, Jackson did not join Frankfurter's dissenting argument that the teachers and parents who attacked the New York Feinberg Law dealing with teacher loyalty lacked sufficient interest to warrant the Court's receiving jurisdiction. Frankfurter had also objected to the adjudication of claims before the statutory scheme had been set in motion. To him the issue was abstract and speculative, but Jackson apparently thought not.[32]

[25] Id. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447 at 488, 43 S.Ct. 597 (1923).

[26] 343 U.S. 306, 72 S.Ct. 679 (1952).

[27] Id. at 309, note 4. In Fahey v. Mallonee, 332 U.S. 245 at 255, 67 S.Ct. 1552 (1947), Jackson, quoting Brandeis, said: "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." In Dixon v. Duffy, 344 U.S. 143 at 147, 73 S.Ct. 193 (1952), Jackson said in dissent, "Doubt of our jurisdiction is no justification for exercising it; quite the contrary is the rule."

[28] Speaking of advisory opinions, Jackson said that the Court "early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive." Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 at 113, 68 S.Ct. 431 (1948).

[29] See Bischoff, "Status to Challenge Constitutionality," in CAHN, SUPREME COURT AND SUPREME LAW 26 (1954).

[30] PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 220 (1954).

[31] 342 U.S. 485, 72 S.Ct. 380 (1952).

[32] In Albertson v. Millard, 345 U.S. 242, 73 S.Ct. 600 (1953), Jackson and Frankfurter agreed that the Michigan Communist Control (Trucks) Act should not be reviewed because it had not yet been interpreted by the state courts. Although this case involved exhaustion of state remedies rather than standing to sue, it does illuminate Jackson's views on jurisdictional problems.

In keeping with the philosophy of self-restraint in assuming jurisdiction is the doctrine that the Court is by nature incompetent to decide questions of a "political" character.[33] While there are no simple definitions of political questions, Corwin has supplied one that should prove satisfactory. They are questions, he says, "relating to the possession of political power, of sovereignty, of government, the determination of which is vested in Congress and the President whose decisions are conclusive upon the courts."[34] In each of the important political questions cases in which he participated,[35] Jackson put himself on the side of restraint by refusing to evaluate decisions of the political branches of government.

In *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*[36] the issue was whether orders of the Civil Aeronautics Board which grant or deny applications to engage in foreign air transportation were reviewable by the courts. The Civil Aeronautics Act provides that such orders are subject to the approval of the President. Speaking for a five-justice majority, Jackson said that, in the past, the courts have refused the opportunity to enlarge their jurisdiction by "self-denying constructions" which exempt from judicial control orders which, "from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review." In his view,

> "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of government, Executive and legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[37]

That the termination of wars is a political question is a principle of long standing,[38] and in 1948, in *Ludecke v. Watkins*,[39] the Court reiterated

[33] See Frank, "Political Questions," in CAHN, SUPREME COURT AND SUPREME LAW 36 (1954).

[34] CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. 170, 82d Cong., 2d sess., p. 547 (1953).

[35] Jackson did not participate in Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198 (1946), or in In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946).

[36] 333 U.S. 103, 68 S.Ct. 431 (1948).

[37] Id. at 111.

[38] See Commercial Trust Co. of New Jersey v. Miller, 262 U.S. 51, 43 S.Ct. 486 (1923).

[39] 335 U.S. 160, 68 S.Ct. 1429 (1948).

that rule. Under a law of Congress, the President, through the attorney general, was given power to deport enemy aliens in time of war without judicial review. Although the *Ludecke* case arose three years after the cessation of hostilities with Germany, the five-justice majority, Jackson included, held that the determination of the cessation of a state of war was a question for the political branches, not the courts, to decide. In *South v. Peters*,[40] in a per curiam opinion (Black and Douglas dissenting), the Court ruled that the validity of Georgia's county-unit vote system for nominating candidates in primaries was a political question. By this holding the Court evaded the difficult question of whether the system denied equal protection of the laws to voters in the more populous counties.

The 1952 case of *Harisiades v. Shaughnessy*[41] affords deeper insight into Jackson's views on political questions. Here the Court was asked to decide whether the government may deport an alien because of Communist Party membership which terminated prior to the passage of the statute which authorized such deportation.[42] In his opinion for the majority, Jackson said that any policy toward aliens "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations. . . ." Such matters are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." It was "not necessary and probably not possible to delineate a fixed and precise line of separation" between political and judicial power, but Jackson saw nothing in the Constitution that would require the Court to equate its political judgment with that of Congress. Reform in the field of aliens had to be "entrusted to the branches of the Government in control of our international relations and treaty-making powers."

Post-Jurisdictional Limitations. Once the Court has assumed jurisdiction in a case, the formal theory of self-restraint puts additional limitations on the judicial power.[43] One of these requires that the Court decide the constitutional issues presented only if "strict necessity" demands it. Before coming to the Court, Jackson called the avoidance of constitutional issues the "first principle of constitutional adjudication."[44] The Court, he said then, "has a philosophy that while it has a duty to

[40] 339 U.S. 276, 70 S.Ct. 641 (1950).
[41] 342 U.S. 580, 72 S.Ct. 512 (1952).
[42] The Alien Registration Act, 54 Stat. L. 670 (1940).
[43] The best formulation of these self-limitations is that of Justice Brandeis in his concurring opinion in Ashwander v. T.V.A., 297 U.S. 288, 56 S.Ct. 466 (1936).
[44] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 114 (1941).

decide constitutional questions, it must escape the duty if possible."[45] In a recent case, Jackson revealed his consistent support of the doctrine of strict necessity, and explained why he regarded it a sound limitation. The relevant passage speaks for itself:

> "The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. . . . This is not because we would avoid or postpone difficult decisions. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress or the powers reserved to the several states. To withhold passing upon an issue of power until we are certain it is knowingly precipitated will do no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question."[46]

A second precept of self-restraint requires that legislation be presumed constitutional unless shown otherwise beyond all reasonable doubt. Jackson early subscribed to this view of the judicial power when, in 1940, he declared that the power to strike down acts of Congress was an awesome thing and that "power so uncontrolled is not to be used save where the occasion is clear beyond fair debate."[47] That he did not depart from this basic position is evident again in the 1953 case of *United States v. Five Gambling Devices*,[48] where he said it was not a "mere polite gesture" for the Court to accord a strong presumption of constitutionality to acts of Congress. It was, he felt, a deference due to deliberate judgment of Congress that an act was within its power.[49]

A further logical limitation on judicial review, in the past at least, has been a rather strict adherence to the principle of stare decisis, which

[45] Id. at 305.

[46] United States v. Five Gambling Devices, 346 U.S. 441 at 448-449, 74 S.Ct. 190 (1953). See also United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330 (1947). In United States v. C.I.O., 335 U.S. 106, 68 S.Ct. 1349 (1948), Jackson voted with the majority in upholding a Taft-Hartley Act provision that appeared to prohibit comment on national elections by newspapers financially supported by unions. The majority avoided the constitutional issue by holding that the provision was not intended to outlaw political comment by union newspapers, even though the act's legislative history suggested the opposite conclusion.

[47] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 323 (1941).

[48] 346 U.S. 441, 74 S.Ct. 190 (1953).

[49] Jackson felt, however, that the presumption could have little practical force when congressional leaders, in managing a bill, "have told Congress that the bill will not reach that which the act is invoked in this Court to cover." Id. at 449.

Jackson has defined as "the doctrine that a court will give a word or phrase in a contract or statute the same meaning tomorrow that it did yesterday, that it will resort to the same principles to fashion future judgments that it employed in past ones. . . . [I]n its absence . . . there is no law but that day's opinion of the judge who perhaps accidentally gets the case."[50] On the one hand, judicial respect for precedent is a guarantee of stability and certainty in the law; on the other, refusal to break with precedent can place the law in a strait-jacket. The resulting conflict between the claims of stability and progress has been productive of much constitutional controversy.

In a discussion of stare decisis before his elevation to the Court, Jackson said that he would like to see the Court overrule "offending precedents," that is, cases where the Court had caused unnecessary friction by translating its own economic philosophy into constitutional dogma.[51] He emphasized, however, that stare decisis was so important that no lawyer or judge should depart from it lightly.[52] Broadly speaking, Jackson persisted in this view while on the Court. In the realm of constitutional construction, he accorded deep respect to the principle of stare decisis.[53] When the Court, in the first of the Williams divorce cases,[54] abandoned the 36-year old rule of *Haddock v. Haddock*,[55] Jackson protested. "This Court," he declared, "may follow precedents, irrespective of their merits, as a matter of obedience to the rule of *stare decisis*. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it." But, he went on, the Court could break with established law, overrule precedents, and start a new cluster of leading cases to define what it meant, only as a matter of deliberate policy. And in such a break with precedent there should be some hint of "countervailing public good" to be served by a change.

[50] Jackson, "The Law Is a Rule for Men to Live By," 9 VITAL SPEECHES 664 at 665 (1943).

[51] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, xvii (1941).

[52] Id. at 314.

[53] In testimony given to the Senate Judiciary Committee in 1937, Jackson approved Justice Stone's dictum: "The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law." REORGANIZATION OF THE FEDERAL JUDICIARY, Hearings before the Committee on the Judiciary of the United States Senate on S. 1392, 75th Cong., 1st sess., part I, p. 51 (1937). In evaluating this statement, however, it should be kept in mind that Jackson was then speaking for the Justice Department, not as a Supreme Court justice.

[54] Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207 (1942).

[55] 201 U.S. 562, 26 S.Ct. 525 (1906).

In like fashion, Jackson dissented in the *South-Eastern Underwriters* case[56] in 1944, when the Court upset a 75-year old holding that the business of insurance could not be regulated by Congress under the commerce power.[57] Were the Court considering the question for the first time, Jackson argued, he would have "no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce." As a matter of "fact" insurance is commerce, but for constitutional purposes a "fiction" has been established that it is not. Therefore, the Court was duty bound to consider the practical consequences of its sharp revision in constitutional theory. Jackson concluded that to use his office "to dislocate the functions and revenues of the states and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance businesses" was more than he could reconcile with his view of the function of the Court.[58]

The extent of Jackson's respect for stare decisis was again revealed in the *Magnolia Petroleum Co.* case,[59] where Jackson concurred in the result even though it meant applying the rule of the *Williams* case which he had criticized the year before. In announcing his intention to abide by a rule he disliked, at least until it was taken off the books, Jackson said that overruling a precedent "always introduces some confusion and the necessity for it may be unfortunate. But it is as nothing to keeping on our books utterances to which we ourselves will give full faith and credit only if the outcome pleases us."[60] That he would be willing, however, to take part in overruling what he felt to be a wrong construction of the Constitution is best illustrated by his opinion for the Court in the second flag-salute case,[61] where the Court reversed a decision of only three years standing.[62]

For the most part, Jackson preferred a rigorous application of the principle of stare decisis in cases involving statutory interpretation. In

[56] United States v. South-Eastern Underwriters Assn., 322 U.S. 533 at 586, 64 S.Ct. 1162 (1944).

[57] Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1869).

[58] Jackson suggested that, instead of overruling Paul v. Virginia, the Court could apply the principle, already applied in other fields, that, even if the business of insurance is not commerce, the antitrust laws could apply to the manipulation of insurance to restrain interstate commerce.

[59] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S.Ct. 208 (1943).

[60] Id. at 447.

[61] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943).

[62] Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (1940).

Helvering v. Griffiths,[63] for example, he declared that "a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." On the other hand, where serious mistakes were made, Jackson would have the Court reverse. In *United States v. Bryan*[64] he said that the principle of stare decisis was only the "normal principle of judicial action," and that it was "not well served by failing to make explicit an overruling which is implicit in a later decision." It was, he said, embarrassing to confess a blunder, but it could be more embarrassing to adhere to it.[65]

These examples indicate that, like most jurists of our time, Jackson found it difficult to develop a consistently-applicable formula for deciding between the conflicting claims of stability and progress in the law. But the cases cited reveal his fundamental respect for the principle of stare decisis, and at the same time demonstrate his awareness that overemphasis on the principle would produce an intolerable rigidity in the law. He deplored a false consistency, and when faced with difficult situations he realistically weighed the practical consequences of a decision to abandon a precedent. He seemed to feel that stability *with* progress in the law was not a contradiction in terms. In all probability, he would have endorsed Cardozo's view that the "victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned."[66]

In recent times, with the constitutionality of federal legislation in the economic realm all but assured, the attention of the Court has focused on the interpretation of that legislation and on the review of statutory interpretations by administrative agencies. That the task of giving effect to statutory provisions in specific cases is vital is generally agreed, but getting consensus on a method of approach has proved more elusive.[67] Jackson's record on this point suggests that he preferred a narrow and literal construction of legislative acts, provided the result squared with the obvious intent of the legislature. It was his view that

[63] 318 U.S. 371 at 403, 63 S.Ct. 636 (1943).

[64] 339 U.S. 323 at 345-346, 70 S.Ct. 724 (1950).

[65] In the Bryan case, the Court distinguished its holding from that in Christoffel v. United States, 338 U.S. 84, 69 S.Ct. 1447 (1949). Jackson concurred in the result, but he felt that the Christoffel decision had been repudiated and should have been "forthrightly and artlessly" overruled.

[66] CARDOZO, THE GROWTH OF THE LAW 143 (1924).

[67] See United States v. Henning, 344 U.S. 66 at 79, 73 S.Ct. 114 (1952), where Jackson posed the problem by quoting a revealing statement of Judge Learned Hand.

all other rules of statutory construction are subordinate to the doctrine "that courts will construe the details of an act in conformity with its dominating general purpose, will read the text in light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[68]

That he believed it improper for the Court to add to or to take away from a statute by construction is apparent in *United States v. Walsh*,[69] where he objected to the Court taking too many liberties in expanding the meaning of statutes. In *Western Union Telegraph Co. v. Lenroot*[70] he declared that "it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process." To Jackson, it was beyond the fair range of interpretation to translate an Act of Congress "into an equivalent of the bills Congress rejected."

In *I.C.C. v. Mechling*[71] Jackson criticized the Court for "legislating out" of the Transportation Act of 1940 two provisions included by Congress. "Whether the Congressional law or the Court's amendments," he wrote, "are the better for the country is a complicated problem of policy which, in my conception of our judicial function, I am not privileged to decide." In his last pronouncement on the subject, Jackson pointed out, "Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms, what today the Court excludes."[72] On the other hand, Jackson believed that statutory construction should not be so strict as to defeat the obvious intent of the legislature, and that the Court should not "deflect what seems to be the course of practical and obvious justice" by resort to "metaphysical speculations."[73]

[68] SEC v. Joiner Leasing Corp., 320 U.S. 344 at 350-351, 64 S.Ct. 120 (1943).

[69] 331 U.S. 432, 67 S.Ct. 1283 (1947). In New York v. United States, 331 U.S. 284, 67 S.Ct. 1207 (1947), Jackson favored a similar strict construction.

[70] 323 U.S. 490 at 508, 65 S.Ct. 335 (1945).

[71] 330 U.S. 567 at 584, 67 S.Ct. 894 (1947).

[72] United States v. Harriss, 347 U.S. 612 at 635, 74 S.Ct. 808 (1954).

[73] Pendergast v. United States, 317 U.S. 412 at 422, 63 S.Ct. 268 (1943). See also Jackson's dissents in United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943), and United States v. Henning, 344 U.S. 66, 73 S.Ct. 114 (1952). In dissent in Massachusetts v. United States, 333 U.S. 611 at 635, 637, 68 S.Ct. 747 (1948), Jackson said that the majority's interpretation of the Social Security Act was "unnecessarily ruth-

Despite his general preference for a narrow and literal construction, Jackson did on occasion sanction broad statutory interpretations, as in *Wickard v. Filburn,*[74] where he wrote the opinion for a unanimous Court sustaining the Agricultural Adjustment Act of 1938. The holding of the case was the broadest to that time on the scope of congressional power under the commerce clause and it suggested that limits to that power were almost non-existent. Admittedly, the chief point at issue was the constitutionality of the act itself, but to hold it constitutional as applied to crops that would never leave the farm was hardly narrow construction.[75]

Judicial Review and Constitutional Principles

In its exercise of the judicial review function, the Court is confronted with the necessity of interpreting the Constitution in three broad types of review situations: (1) enforcement of limitations arising out of the federal system, (2) enforcement of limitations arising out of separation of powers, including review of administrative agency decisions, and (3) federal and state civil rights questions. The design of the present section is to examine Justice Jackson's views on these three limitative concepts of the Constitution.

less" and "so inconsistent with the purposes of the . . . Act that they could not have been intended by a reasonable Congress."

Another controversial problem in the area of statutory interpretation concerns the value of a resort to legislative history as a guide in cases where the intent of Congress is not wholly clear from the words of the statute. In Packard Motor Car Co. v. NLRB, 330 U.S. 485 at 492, 67 S.Ct. 789 (1947), Jackson said that, in the absence of ambiguity in the statute, the Court should not resort to legislative history to determine its meaning. In United States v. Public Utilities Commission of California, 345 U.S. 295 at 319, 73 S.Ct. 706 (1953), Jackson concurred in the result, but caustically scored the majority for its use of legislative history in support of its decision as amounting to a "psychoanalysis" of Congress rather than an analysis of the statute. "Never having been a Congressman," he said, "I am handicapped in that weird endeavor."

[74] 317 U.S. 111, 63 S.Ct. 82 (1942).

[75] In Hunt v. Crumboch, 325 U.S. 821, 65 S.Ct. 1545 (1945), Jackson protested against a narrow construction of the Sherman Act as applied to labor union activities.

Another fundamental tenet of judicial review is that "not the wisdom or policy of legislation, but only the power of the legislature, is a fit subject for consideration by the courts." JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 81 (1941). This limitation is so basic to the restraint philosophy that Jackson seldom mentioned it specifically, but whenever he felt that the Court had speculated on the political factors that may have motivated Congress his reaction was characteristically brusque. In De Zon v. American President Lines, Ltd., 318 U.S. 660, 63 S.Ct. 814 (1943), he said that whether the legislative policy was wise was "not for us to say." And in the Packard Motor Co. case he again warned the Court that the unwisdom of a statute was not adequate grounds for judicial veto. In Harisiades v. Shaughnessy, 342 U.S. 580 at 590, 72 S.Ct. 512 (1952), Jackson said, "Judicially we must tolerate what personally we may regard as a legislative mistake."

Federalism. Is judicial strategy in the realm of federalism limited by the same rules of restraint that operate in other fields? In *The Struggle for Judicial Supremacy* Jackson said that the Constitution entrusted to the Court the preservation of the equilibrium of the Federal Union,[76] and that the power to strike down state legislation that conflicts with the Constitution "rests on quite different foundations than does the power to strike down *federal* legislation as unconstitutional."[77] Despite this difference, state statutes were entitled to the same presumption of constitutionality accorded federal statutes.[78] In Jackson's view, any wise national system would create states if they did not already exist, and there is no place for hostility to the states or rivalry with them.[79] Not only are they necessary for local government purposes, but "the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment."[80] More instructive for present purposes, however, are Jackson's views on the operation of the restraint doctrine with respect to two important federalism issues that frequently confront the Court.

The first of these issues concerns cases that come up on appeal from state courts. In *Herb v. Pitcairn*[81] Jackson explained why he regarded deference to state court determinations a sound judicial limitation. The reason, he said, is found in the partitioning of power between the state and federal judicial systems and in the limitations of the Court's own jurisdiction. He felt that the only power of the Court over state judgments was "to correct them to the extent that they incorrectly adjudge federal rights," not to revise state court opinions. A year earlier, in *Ashcraft v. Tennessee,*[82] Jackson declared that in determining issues of fact "respect for the sovereign character of the several states always has constrained this Court to give great weight to findings of fact of state courts."[83] The Court, he added, should not lay down rules of evidence for them or revise their decisions merely because it felt more confidence

[76] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 9 (1941).

[77] Id. at 15.

[78] Jackson, in Davies Warehouse Co. v. Bowles, 321 U.S. 144, 64 S.Ct. 474 (1944).

[79] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 19 (1941).

[80] Connecticut Light and Power Co. v. FPC, 324 U.S. 515 at 530, 65 S.Ct. 749 (1945).

[81] 324 U.S. 117, 65 S.Ct. 459 (1945).

[82] 322 U.S. 143 at 157-158, 64 S.Ct. 921 (1944).

[83] In Brown v. Allen, 344 U.S. 443 at 533, 73 S.Ct. 397 (1952), Jackson deplored the failure of federal judges to wield their power responsibly "according to lawyerly procedures" and with "genuine respect for state court fact finding."

in its own "wisdom and rectitude." In *Stein v. New York*,[84] however, Jackson made clear that respect for state courts was not synonymous with abdication. The Court, he said, could not allow itself to be completely bound, "else federal law could be frustrated by distorted fact finding." But in the event of "miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice," the Court would intervene to review the weight of evidence supporting a state court decision.[85]

A second type of federalism issue concerns state measures of taxation and regulation that are alleged to interfere with interstate commerce, and to Justice Jackson this was one of the areas of judicial review that was not controlled by doctrines of judicial abstention or deference. To him, it was in the great tradition of the Court and one of its vital functions to prevent "local parasitic endeavors from profiting at the expense of the nation's trade."[86] In his first term on the Court, Jackson gave effect to this belief by joining in the Court's action in striking down a state law that unduly burdened interstate commerce.[87] In an opinion for the majority, Jackson observed that it was "a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce." But since these restraints were "individually too petty, too diversified, and too local," to attract the attention of a hard-pressed Congress, the practical result was that in default of action by the Court the states "will go on suffocating and retarding and Balkanizing American commerce, trade and industry." The freshman justice then added a word of caution: "If the reaction of this Court against what many of us have regarded as an excessive judicial interference with legislative action is to yield wholesome results, we must be cautious lest we merely rush to other extremes."[88] This was but the first of the warnings against

[84] 346 U.S. 156 at 181, 73 S.Ct. 1077 (1953).

[85] For Frankfurter's views on respect for state court determinations, see PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 213-215 (1954).

[86] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 284 (1941).

[87] Duckworth v. Arkansas, 314 U.S. 390 at 400-401, 62 S.Ct. 311 (1941).

[88] Id. at 401. Jackson elaborated on these views in a majority opinion in Hood & Sons v. DuMond, 336 U.S. 525 at 533, 539, 69 S.Ct. 657 (1949), where he admitted that the state could "shelter its people from menaces to their health or safety and from fraud," even when these dangers emanated from interstate commerce. But the states could not retard or obstruct the flow of commerce for their own economic advantage; such regulation could lead only to "fantastic rivalries and dislocations and reprisals."

It is interesting to note that Jackson did not always rely on the commerce clause to prevent state restraints on interstate movement. In Edwards v. California, 314 U.S. 160, 62 S.Ct. 164 (1941), the Court used the commerce clause to invalidate California's famous "Anti-Okie" laws, but Jackson, in a concurring opinion, advocated using the "privileges and immunities" clause instead.

extremism that were to become typical of Jackson in later years. In 1949, he summarized succinctly his philosophy concerning state interference with commerce: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[89]

Separation of Powers. Much of what has been said thus far lends support to the view that the doctrine of judicial restraint is largely a product of the system of separation of powers imposed by the Constitution. Consequently, Jackson's views concerning separation of powers are basic to his conception of the judicial function. He expressed some of those ideas in numerous cases,[90] but he reserved his most comprehensive statement for the recent Steel Seizure Case.[91] The case is too complex to review in detail here, but it is enough to point out that the question presented to the Court was whether, in an "emergency" situation, the President, independently of an express congressional grant of authority, had the power to seize certain steel mills threatened by a work stoppage, in order to prevent discontinuance of production.[92]

It has been suggested that a strict application of the restraint philosophy would require avoiding the constitutional issue,[93] but the Court majority,[94] Jackson included, elected otherwise and met the constitutional issue four-square. This done, the doctrine of self-restraint dictated a decision favorable to the President unless the case against him was clear beyond a reasonable doubt. Chief Justice Vinson, in dissent with Justices Reed and Minton, took this position. The President, he argued, had a choice of several statutory remedies, and that after ex-

[89] United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460 at 464, 69 S.Ct. 714 (1949). Another barometer revealing the extent of Jackson's willingness to apply stricter rules to state taxation and regulation cases is provided by Pritchett's statistical analysis. Jackson participated in twenty of the thirty-seven non-unanimous cases in this area during the 1938 through 1946 terms. In state taxation cases he voted for the validity of the action in 50% of the cases, but in commerce cases he favored the state only 7% of the time. In contrast, the comparable figures for Justice Black were 100 and 88%, and for Justice Frankfurter 100 and 68%. PRITCHETT, THE ROOSEVELT COURT 89 (1948).

[90] See the cases involving political questions and presumption of constitutionality, cited above. See also Eisler v. United States, 338 U.S. 189, 69 S.Ct. 1453 (1949); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143 (1952); and the Waterman Steamship Corp. [333 U.S. 103 (1948)] and Harisiades [343 U.S. 580 (1952)] cases.

[91] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (1952).

[92] For a fuller discussion of the Steel Seizure Case, see CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. 170, 82d Cong., 2d sess., pp. 489-499 (1953).

[93] Paul A. Freund suggests what might have been done to avoid judicial intervention in "The Supreme Court, 1951 Term: Foreword, The Year of the Steel Case," 66 HARV. L. REV. 89 (1952).

[94] Justice Black wrote the opinion of the Court, in which Justices Frankfurter, Douglas, Jackson and Burton formally concurred. Justice Clark concurred in the judgment of the Court.

hausting the one chosen he was not exceeding his power by seizing the steel mills, especially since, as President Truman had explained, the action was a temporary expedient intended "only to save the situation until Congress could act."

Justice Jackson, in a well-reasoned opinion concurring with the majority, rejected the dissenters' version of self-restraint and voted to invalidate the action of the President. In support of his decision, Jackson presented a modest, but thorough-going, interpretation of the complex doctrine of separation of powers that was in many respects superior to the interpretations of his fellow justices. To Jackson, an analysis of the President's powers could not be based on isolated clauses or even a single article removed from context. The Constitution, he said, "enjoins upon its branches separateness but interdependence, autonomy but reciprocity," and the President's powers are "not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress."[95] Jackson then pointed out that the Executive has only delegated powers under a Constitution that has as its purpose "not only to grant power, but to keep it from getting out of hand." He did not advocate a niggardly construction of these powers; they should be given the scope and elasticity afforded by practical implications, instead of the "rigidity dictated by a doctrinaire textualism." But while the military powers of the President as Commander-in-Chief were broad, they were not meant to "supersede representative government of internal affairs." The appeal to inherent or emergency powers, long "a persuasive dialectical weapon in political controversy," Jackson thought similarly unwarranted by the Constitution. The executive power of the President is not a "grant in bulk of all conceivable executive powers thereinafter stated." In Jackson's opinion, the Constitution makes no provision for the exercise of extraordinary presidential authority because of a crisis. Moreover, the Constitution could not be "amended" by the courts to give the President inherent powers to meet an emergency.

[95] 343 U.S. 579 at 635. At this point in his opinion, Jackson distinguished three practical situations in which the President might doubt, or others challenge, his power. First, when the President acts pursuant to an express or an implied authorization of Congress, "his authority is at a maximum," and there is a strong presumption of the validity of his action. The seizure did not meet this condition, because it was conceded no such congressional authorization existed. The second situation arises when the President acts in the absence of either a congressional grant or denial of authority. In this situation, he can rely only on his own independent powers, but that did not apply in this case, since Congress had enacted several statutory policies inconsistent with the seizure. Thirdly, when the President takes measures incompatible with the express or implied will of Congress, his power is at its "lowest ebb." This, in Jackson's view, was the type of situation presented by the seizure.

With the office of President already powerful, Jackson did not see how it could be harmed if the Court refused to supplement it further. From this review it is apparent that Jackson had succeeded, in his own mind at least, in equating a decision circumscribing executive action with his belief in the efficacy of judicial restraint. It is equally apparent that, faced with a situation that prevented deference to both political branches simultaneously, Jackson would have the Court seek a solution that would preserve the equilibrium implicit in the doctrine of separation of powers.

Another separation of powers issue concerns the extent to which the courts should review determinations by administrative agencies. While attorney general, Jackson argued that the courts should look upon these agencies not as interlopers but as partners in achieving the objectives set forth in the statutes.[96] These fact-finding tribunals, he contended, were created to perform diverse tasks for which the courts were ill-suited. If the two were to be partners, the courts should limit themselves to defining the scope of authority granted in the statute, to preventing arbitrary procedure, and to examining the record to ascertain whether the evidence was adequate to sustain the agency's findings of fact. Otherwise, judicial deference meant bowing to the expertness of the agencies in economic and social matters and acceptance of their findings where sustained by the evidence. Jackson seemed to realize that refusal to grant a certain degree of finality to their decisions would render administrative agencies superfluous or destroy their effectiveness.

As an associate justice, Jackson did not substantially alter his earlier position.[97] In 1942, in dissent in *United States v. Carolina Freight Carriers Corp.*,[98] he said that the Court should not substitute its "own wisdom or unwisdom" for that of administrative officials who have not exceeded their powers. And in a 1944 case,[99] he declared that the Court should not substitute inferences of its own for those drawn by the I.C.C.[100] On the other hand, Jackson protested against excessive

[96] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 267-268 (1941).

[97] For statistics suggesting that Jackson was more favorable to the I.C.C., and less favorable to the S.E.C., than to the other agencies, see PRITCHETT, THE ROOSEVELT COURT 190 (1948).

[98] 315 U.S. 475 at 495, 62 S.Ct. 722 (1942).

[99] Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. United States, 322 U.S. 1, 64 S.Ct. 842 (1944).

[100] Jackson expressed similar views in ICC v. Jersey City, 322 U.S. 503, 64 S.Ct. 1129 (1944), and in Webre Steib Co. v. Commissioner of Internal Revenue, 324 U.S. 164, 65 S.Ct. 578 (1945). In New York v. United States, 331 U.S. 284 at 359, 67 S.Ct. 1207 (1947), however, Jackson said he was unwilling to allow the ICC to reshape the national economy.

cooperation with administrative agencies. In the second *Chenery* case,[101] where the Court sustained an S.E.C. order it had rejected earlier,[102] an irritated Jackson said that the administrative process warranted fostering as a good way of applying law in specialized fields, but that its effectiveness was threatened when it was used "as a method of *dispensing with law* in those fields."[103] Obviously, Jackson's conception of the partnership between court and agency would not leave the Court a silent or junior partner. This is decidedly less judicial restraint than that advocated by Justice Frankfurter in reviewing administrative agency decisions. In a 1940 opinion, Frankfurter said that "Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[104]

Civil Rights. Unquestionably, the most significant constitutional issues that confronted the Court during Jackson's incumbency were those relating to civil liberties, where the record of the Court demonstrates that radically different judicial values operate.[105] Hence, Jackson's conception of the judicial function as applied to civil liberties problems forms a vital part of his judicial philosophy. In *The Struggle for Judicial Supremacy* Jackson asserted that the presumption of validity which attached to legislative acts was "frankly reversed" in cases of interference with free speech and free assembly. By intervening here, the Court "restores the processes of democratic government; it does not disrupt them."[106] In 1943, when the compulsory flag-salute issue came up for the second time, in *West Virginia v. Barnette,*[107] Jackson was given an opportunity to put his earlier views to the test, and he responded by writing an eloquent defense of freedom against legislative encroachment. In his opinion for the majority, Jackson declared that it was the very purpose of the Bill of Rights "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." It was a "commonplace" that sup-

[101] SEC v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575 (1947).

[102] SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454 (1943).

[103] 332 U.S. 194 at 218. See also FPC v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1944).

[104] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 at 146, 60 S.Ct. 437 (1940).

[105] For a detailed discussion of these issues, see the two works by Pritchett, cited in note 2 above.

[106] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 285 (1941).

[107] 319 U.S. 624, 63 S.Ct. 1178 (1943).

pression of opinion was constitutional only "when the expression presents a clear and present danger of action of a kind the state is empowered to prevent and punish." To sustain the compulsory flag-salute, Jackson continued, the Court was "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." Freedom to differ, he concluded, is not limited to things that do not matter much. The test of its substance is the "right to differ as to things that touch at the heart of the existing order."

Although he gave unqualified support to the freedom of religion claims in the *Barnette* case, Jackson objected when the Court extended the protection of the Constitution to the secular activities of the Jehovah's Witnesses.[108] In *Prince v. Massachusetts*[109] he said that the basic difference of opinion revolved around "the method of establishing limitations which of necessity bound religious freedom." His own view was that the limits began to operate whenever religious activities began "to affect or collide with liberties of others or of the public." Money-raising activities on a public scale are "Caesar's affairs" and may be regulated by the state; such cases do not even present issues of freedom of religion.[110]

Jackson's sincere and realistic attempts to balance liberty and order in practice forced him into numerous other dissents from what he regarded as too absolutistic interpretations of First Amendment freedoms. In *Terminiello v. Chicago*[111] he sharply rebuked the Court for reversing the conviction of Terminiello for breach of peace. The Court, he said, seemed to regard liberty and order as enemies, and "to be of the view that we must forego order to achieve liberty." But the choice is not between order and liberty; it is "between liberty with order and anarchy without either." There is a danger, he warned, "that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." Dissenting in *Kunz v. New York*[112] Jackson again voiced concern for the ability of the local community to preserve order. Should emergen-

[108] See Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943); Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943); and Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877 (1943).

[109] 321 U.S. 158 at 177, 64 S.Ct. 438 (1944).

[110] To Jackson, the local regulation of sound-trucks was also a police matter, rather than a problem of free speech. See Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148 (1948), and Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949).

[111] 337 U.S. 1 at 14, 37, 69 S.Ct. 894 (1949).

[112] 340 U.S. 290, 71 S.Ct. 312 (1951).

cies arise on the streets and the situation threaten to get out of hand, he saw no reason why the police could not require a speaker, "even if within his rights, to yield his right temporarily to the greater interest of peace."[113]

In the field of state criminal cases, two judicial values influenced Jackson's attitude. One of these, discussed above, is the deference he felt was due to the judgments of state courts; the second concerns his views on the relation between the due process clause of the Fourteenth Amendment and the guarantees of the Federal Bill of Rights. The traditional position has been that the "liberty" protected by the Fourteenth Amendment due process clause against state action included the rights protected by the First Amendment against federal action, but that it did not include the rights guaranteed in the remainder of the Bill of Rights amendments.[114] In 1947, in *Adamson v. California,*[115] the Court, in a five to four decision, held that the due process clause did not draw all the rights of the Federal Bill of Rights under its protection.[116] As a result of this ruling, the Court, in deciding state criminal cases, has to fall back on its conception of fundamental principles of liberty and justice. But why include the First if not the Fourth through Eighth Amendments? Even if historically sound, this position appears short on logic, and it seemed to bother Justice Jackson. In the *Barnette* and *Terminiello* cases, he did not object to the inclusion of the First Amendment guarantees, but in 1952, in *Beauharnais v. Illinois,*[117] he deserted that position. Although he admitted that the Fourteenth Amendment was "enigmatic and abstruse," he was nonetheless convinced that the "Fourteenth Amendment did not 'incorporate' the

[113] Id. at 301. In the opinion for the majority in Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725 (1952), Justice Frankfurter held that the Illinois legislature had reasonable grounds to pass a group libel law. Justice Jackson, however, adopted the position that criminal libel laws were "consistent with the concept of ordered liberty," only if surrounded by adequate safeguards to prevent invasion of freedom of speech. Because he felt the law as applied to Beauharnais lacked these safeguards, Jackson dissented from the majority ruling.

[114] For related cases, see Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925), and Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937).

[115] 332 U.S. 46, 67 S.Ct. 1672 (1947).

[116] In his scholarly opinion in the Adamson case, Justice Frankfurter attacked as historically invalid the notion that the Fourteenth Amendment incorporated the Bill of Rights. Justice Black felt that "history conclusively demonstrates" that the Fourteenth Amendment intended a full incorporation of the Bill of Rights. For evidence showing Black's position to be historically untenable, see Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," and Morrison, ". . . The Judicial Understanding," 2 STANFORD L. REV. 5 and 140, respectively (1949). Professor Crosskey upholds Black's view in his POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, vol. 2, 1381, n. 11 (1953).

[117] 343 U.S. 250 at 288, 72 S.Ct. 725 (1952).

First," and that "the powers of Congress and of the States over this subject are not of the same dimensions. . . ."

The extent of Jackson's deference to state court judgments in criminal cases is best illustrated by the confession cases, where the chief problem has been to determine the point at which the questioning of suspects becomes coercive. In *Ashcraft v. Tennessee*[118] Jackson contended that interrogation per se is not an "outlaw," and that all questioning is inherently coercive. And in a 1949 case,[119] he said that, if the right of interrogation be admitted, then the Court should leave to trial judges and juries to decide individual cases, unless they show some want of proper standards of decision. He did not think the Court should "increase the handicap on society."[120]

Each of the preceding cases came to the Supreme Court on appeal from state court decisions and, as suggested, this is one type of case governed by the restraint doctrine, provided the states observed the standards embodied in the concept of ordered liberty. But what of federal legislation alleged to violate individual rights? In *American Communications Association, C.I.O. v. Douds*,[121] the Court sustained the "non-Communist affidavit" provision (section 9h) of the Taft-Hartley Act, against claims that it violated the First Amendment. In his excellent partial dissent, Justice Jackson reviewed at length the aims, methods, and nature of the Communist Party. From this, he concluded that Congress had reasonable grounds for requiring labor union officers to disclose membership in, or affiliation with, the Communist Party. But the additional requirement of section 9h, that labor union officers must swear that they do not believe in overthrow of government by force or other illegal means, was a different matter. In Jackson's opinion, Congress had no power to proscribe any opinion or belief "which has not manifested itself in any overt act." The law may lay hold of a citizen when he acts illegally, but "we must let his mind alone."

In *Dennis v. United States*[122] Jackson concurred in a majority opinion upholding the validity of the Smith Act of 1940 and of the convictions under it of the eleven Communist leaders in New York. A full

[118] 322 U.S. 143, 64 S. Ct. 921 (1944).

[119] Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949).

[120] Id. at 62. Since 1949, the balance on the Court has shifted closer to Jackson's views that society was being handicapped by the excessive protection given to criminals. See Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141 (1951), and Stroble v. California, 343 U.S. 181, 72 S.Ct. 599 (1952).

[121] 339 U.S. 382, 70 S.Ct. 674 (1950).

[122] 341 U.S. 494, 71 S.Ct. 857 (1951).

review cannot be attempted here, but the case is important for the clues it offers concerning Jackson's civil rights philosophy, particularly with respect to the "clear and present danger" doctrine. That test for deciding free speech cases was first announced by Justice Holmes in 1919[123] and was embraced whole-heartedly by the liberal Court after 1937. In 1943, in the *Barnette* case, Jackson called the clear and present danger test a "commonplace," but he emphasized that it meant that suppression of opinion is tolerated only when the speech creates a clear and present danger *"of action of a kind the State is empowered to prevent and punish."*[124] The failure of the majority to apply the latter half of the doctrine in later cases began to disturb Jackson. In the *Terminiello* case, he argued that the Court had not only abandoned the correct use of the clear and present danger test, but the "fighting words" concept of the *Chaplinsky* case[125] as well, and had replaced them with "a dogma of absolute freedom for irresponsible and provocative utterance. . . ."[126] Shortly before the *Dennis* case, in *Kunz v. New York*,[127] Jackson rejected altogether the application of the clear and present danger doctrine and advocated using the "fighting words" concept instead.

In his concurring opinion in the *Dennis* case, Jackson said that the "clear and present danger" test was an "innovation" by Justice Holmes for use in cases arising before the "subtlety and efficacy of modernized revolutionary techniques" had been revealed. It was "a test for the sufficiency of evidence in particular cases," which Jackson said he would save "for application as a 'rule of reason' in the kind of case for which it was devised." This included "hot-headed speech on a street corner, or circulation of a few incendiary pamphlets . . . or refusal of a handful of school children to salute our flag." But he felt that the approach to the problem of a nationwide and well-organized conspiracy had to be more realistic. No doctrine could be sound that would require the Court to make prophecies about the probability of success of the Communist movement. The judicial process "simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own

[123] Schenck v. United States, 249 U.S. 47 at 52, 39 S.Ct. 247 (1919). There Holmes said: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

[124] West Virginia State Board of Education v. Barnette, 319 U.S. 624 at 633, 63 S.Ct. 1178 (1943). Italics added.

[125] Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

[126] Terminiello v. Chicago, 337 U.S. 1 at 28, 69 S.Ct. 894 (1949).

[127] 340 U.S. 290, 71 S.Ct. 312 (1951).

political predilections and nothing more." The clear and present danger test, then, was inappropriate for cases of this kind.[128]

In cases involving aliens, the restraint philosophy, as Jackson pointed out in the *Harisiades* case, requires a presumption in favor of the political branches. But Jackson did not permit his deference to legislative and administrative policy to produce harsh or absurd results. When the Court upheld the exclusion, without hearing, of Ellen Knauff on the ground that her admission would be prejudicial to the interests of the United States, Jackson dissented.[129] In protesting the action of the attorney general, Jackson said he did not feel Congress had meant to authorize the "abrupt and brutal exclusion of the wife of an American citizen without a hearing." The *Mezei* case[130] was not too dissimilar, except that, after the exclusion order, Mezei had been unable to gain admission elsewhere and had remained in detention for twenty-one months. The lower courts had ordered release through a habeas corpus proceeding, but the Supreme Court reversed. In dissent, Jackson admitted the right of administrative detention, but to detain an alien without a hearing or fair notice of charges was a denial of due process of law.

In federal criminal prosecutions, the chief source of judicial disagreement has been the searches and seizures provision of the Fourth Amendment, and some unusual alignments have resulted.[131] Justices Black and Douglas, for example, are often unmoved by civil liberties claims arising under the Fourth Amendment, while Jackson's sensitiveness on that score virtually elevated protection against unreasonable searches and seizures to a "preferred position." In the light of his views on state law enforcement, Jackson's position on Fourth Amendment cases is a little difficult to fathom. But, as he reasoned in *United States v. Di Re*,[132] the forefathers designed our Constitution "to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."[133]

Although brief, this review of civil liberties cases discloses that Justice Jackson was neither doctrinaire nor extremist in his views. He

[128] Dennis v. United States, 341 U.S. 494 at 567-570, 71 S.Ct. 857 (1951). Since the statute outlawed conspiracy, Jackson thought the law of conspiracy appropriate for cases of this kind.

[129] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S.Ct. 309 (1950).

[130] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625 (1953).

[131] See Table XVII in PRITCHETT, THE ROOSEVELT COURT 141 (1948).

[132] 332 U.S. 581, 68 S.Ct. 222 (1948).

[133] Id. at 595. See also Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098 (1947).

believed that the Court's day to day task was "to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression."[134] Neither a mechanical application of the preferred status doctrine nor an indefensible hostility to individual rights would do. And a Court governed by this sense of self-restraint, Jackson contended, "does not thereby become paralyzed. It simply conserves its strength to strike more telling blows in the cause of a working democracy."[135]

The Court and the Living Constitution

When Jackson became an associate justice in 1941, the Court had already worked out the "corrected pattern of self-restraint" proved so necessary by the constitutional history of the preceding decade. The "struggle for judicial supremacy" had entered a new era. With the war and its aftermath came new conditions, so that today the fundamental question has become: what should be the role of the Supreme Court and judicial review in a democratic nation functioning under "cold war" conditions? A justice's answer to that question is in large measure the sum of his judicial philosophy. To those firmly convinced of the anti-democratic character of judicial review, the answer might be that the restraint philosophy logically requires judicial abdication in favor of majority rule. Others, such as Charles P. Curtis, contend that the function of the Court is to "interpret for us and declare to us the immanent component in our constitutional law . . . [and] to mediate between this immanent component and the other component which is imposed upon us by the rule of a sometimes hasty, occasionally hysterical, and too often selfish majority."[136] A Court actuated solely by the restraint doctrine is patently incapable of playing this statesmanlike role advocated by Curtis. What was Justice Jackson's conception of the utlimate role of the Supreme Court in the middle of the twentieth century?

In *The Struggle for Judicial Supremacy* Jackson said he recognized "that constitutional law is not a fixed body of immutable doctrine."[137]

[134] American Communications Association, C.I.O. v. Douds, 339 U.S. 382 at 445, 70 S.Ct. 674 (1950).

[135] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 285 (1941).

[136] Curtis, "Review and Majority Rule," in CAHN, SUPREME COURT AND SUPREME LAW 184 (1954).

[137] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, xiv (1941).

He felt then that it was the right of his generation "consciously to influence the evolutionary process of constitutional law, as other generations had done."[138] And future generations should give the precedents of his time "only the respect due to the deeds of men who with earnest heart and troubled mind have sought gropingly but honestly for what was best for their day."[139]

During his tenure on the Court, particularly in later years, Jackson continued to search with a troubled mind for what was best for the times. To him, there were hosts of compelling reasons for exercising the judicial review function with restraint and caution, but he did not permit his respect for the political branches to become judicial abdication. There were still relevant and vital tasks to be performed by the Court in composing conflicts arising out of the federal system, separation of powers, and the relations between the government and its citizens. The notion that the Court should abdicate its function in preserving these equilibriums was unacceptable to Jackson. That he frequently refused to defer to the political branches is clearly evident in the cases involving state interference with interstate commerce, in the Steel Seizure Case, and in numerous cases in the field of civil liberties. His insistence on the validity of judicial restraint has alienated some, but his application of the doctrine was less dogmatic than that of Justice Frankfurter.

On the other hand, Jackson objected vigorously to the activist's unconcern for fixed principles and for "lawyerly procedures." In *Brown v. Allen*[140] he criticized "*ad hoc* determination of due process of law issues by personal notions of justice instead of by known rules of law." He admitted that considerable uncertainty was inherent in decisions which purport to interpret "cryptic and vagrant" constitutional provisions, but he thought it regrettable that interpretation of the Fourteenth Amendment had become "more or less swayed by contemporary intellectual fashions and political currents."

But what of those parts of the Constitution, such as the establishment of religion clause, where the legal propositions are less concrete than procedural due process? In his concurring opinion in the *McCollum* case, Jackson admitted that these imprecise propositions presented greater problems. "It is idle to pretend," he said, "that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in

[138] Ibid.
[139] Id. at xvi.
[140] 344 U.S. 443 at 532, 73 S.Ct. 437 (1953).

education. . . . It is a matter on which we can find no law but our own prepossessions." In objecting to the sweeping nature of the Court's holding, Jackson's own prepossessions induced him to attempt to balance the equities of the situation. In his opinion, the Court should "leave some flexibility to meet local conditions, some chance to progress by trial and error," and not lay down a rigid, "unchanging standard for countless school boards."[141] This effort to avoid extremes and to work out pragmatically solutions for problems as they are presented to the Court suggests that moderation lay at the heart of Jackson's judicial philosophy.

Conclusions

The most striking feature of Justice Jackson's judicial philosophy is that it can only with great difficulty be made to conform to any of the neat and currently-popular classifications of Supreme Court justices. There is considerable evidence that Jackson was, along with Frankfurter, a strong supporter of judicial self-restraint. But conclusions drawn from this must of necessity be tempered by substantial evidence to the contrary, for his reaction to some classes of cases was distinctly "activist." The view that he was a conservative has to gloss over his many liberal opinions; while the charge that he was anti-libertarian cannot be sustained, if by that it is meant to suggest he was fundamentally hostile to the rights of individuals. To classify him as "less-libertarian" is to ignore the complex of factors that color the adjudication of most civil rights claims that get as far as the Supreme Court. Fortunately, the dilemma is more seeming than real. The way out is to abandon attempts to squeeze the justices into these deceptively precise categories.

Jackson was an advocate of caution and prudence in the exercise of the judicial review function, but he was decidedly not a doctrinaire crusader. His approach to the international Communist conspiracy, to problems of law enforcement, and to civil liberties was pragmatic, clear-headed and realistic. Through it all, he rarely permitted himself to forget his conception of the obligations that weighed on him as a judge. His genuine efforts to compose the conflicting claims of liberty and order, his deference to the political branches (when warranted by the facts), and his deference to state courts (imposed by his notions as to the nature of federalism) often made him appear less-libertarian than

[141] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 at 237-238, 68 S.Ct. 461 (1948).

Justices Black and Douglas. But his concern was more for the facts of a case than for a decision that might give results pleasing to him.

The classification of Supreme Court justices as advocates of either judicial activism or judicial restraint, and the use of statistical devices to facilitate the process, can be a helpful approach to some problems of constitutional law. But it is inadequate to the task of determining the judicial philosophy of a particular justice. Jackson, for one, cannot be so readily pigeonholed. The statistical devices usually unveil him as both a conservative and an advocate of self-restraint; yet when all is said that such devices can say, Jackson remains erratic and unpredictable to the disconcerted score-keeper. But why should unpredictability be suspect? In times of overshadowing change, a justice can ill-afford to champion a single, inflexible set of values. If Jackson's judicial philosophy was not always fully integrated and consistent, if he sometimes expressed uncertainty about the best way to apply the constitutional law of a free society, one can feel much sympathy for him. Only the ideologist has ready-made solutions for novel and complex problems.

To maintain with Justice Jackson that the Court should restrain itself rather than engage in affirmative policy creation is not to assign the Court a lesser role. Just as Congress is probably at its best when it succeeds in achieving an equilibrium of conflicting interests, so may the Court be at its finest when it preserves the equilibriums of our system of government. Perhaps this is the highest judicial statesmanship. If this be so, then membership on the Court calls for a sense of sober responsibility, humility of judgment, and moderation of viewpoint. Justice Jackson's judicial career demonstrates that he possessed all of these qualities.