

# HARVARD LAW REVIEW

## THE DEMOCRATIC CHARACTER OF JUDICIAL REVIEW<sup>†</sup>

*Eugene V. Rostow* \*

*It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.*

— Alexander Hamilton<sup>1</sup>

A THEME of uneasiness, and even of guilt, colors the literature about judicial review. Many of those who have talked, lectured, and written about the Constitution have been troubled by a sense that judicial review is undemocratic. Why should a majority of nine Justices appointed for life be permitted to outlaw as unconstitutional the acts of elected officials or of officers controlled by elected officials? Judicial review, they have urged, is an undemocratic shoot on an otherwise respectable tree. It should be cut off, or at least kept pruned and inconspicuous. The attack has gone further. Reliance on bad political doctrine, they say, has produced bad political results. The strength of the courts has weakened other parts of the government. The judicial censors are accused of causing laxness and irresponsibility in the state and

<sup>†</sup> The substance of this essay was originally given in talks before The Club in New Haven and the Yale Law School Alumni Association of Boston during the spring of 1952. While a few references have been added for the sake of clarity, the paper has been left essentially in the lecture form. I am deeply grateful to several friends who criticized a draft.

\* Professor of Law, Yale Law School. A.B., Yale, 1933, LL.B., 1937.

<sup>1</sup> THE FEDERALIST, No. 78 at 509 (Modern Library ed. 1937).

national legislatures, and political apathy in the electorate. At the same time, we are warned, the participation of the courts in this essentially political function will inevitably lead to the destruction of their independence and thus compromise all other aspects of their work.

## I

The idea that judicial review is undemocratic is not an academic issue of political philosophy. Like most abstractions, it has far-reaching practical consequences. I suspect that for some judges it is the mainspring of decision, inducing them in many cases to uphold legislative and executive action which would otherwise have been condemned. Particularly in the multiple opinions of recent years, the Supreme Court's self-searching often boils down to a debate within the bosoms of the Justices over the appropriateness of judicial review itself.

The attack on judicial review as undemocratic rests on the premise that the Constitution should be allowed to grow without a judicial check. The proponents of this view would have the Constitution mean what the President, the Congress, and the state legislatures say it means.<sup>2</sup> In this way, they contend, the electoral process would determine the course of constitutional development, as it does in countries with plenipotentiary parliaments.

But the Constitution of the United States does not establish a parliamentary government, and attempts to interpret American government in a parliamentary perspective break down in confusion or absurdity. One may recall, in another setting, the anxious voice of the *Washington Post* urging President Truman to resign because the Republican Party had won control of the Congress in the 1946 elections.

It is a grave oversimplification to contend that no society can be democratic unless its legislature has sovereign powers. The

---

<sup>2</sup> Many writers have distinguished the authority of the Supreme Court to deny effect to an unconstitutional act of the Congress or the President from its duty under Article VI to declare unconstitutional provisions of state constitutions or statutes, although Article VI declares even federal statutes to be "the supreme Law of the Land" only when made in pursuance of the Constitution. HOLMES, *Law and the Court* in COLLECTED LEGAL PAPERS 291, 295-96 (1920); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 15 *et seq.* (1941); THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law* in LEGAL ESSAYS 1, 35-41 (1908); THAYER, JOHN MARSHALL 61-65 (1901); HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 131-35, 511-12 (2d ed. 1932).

social quality of democracy cannot be defined by so rigid a formula. Government and politics are after all the arms, not the end, of social life. The purpose of the Constitution is to assure the people a free and democratic society. The final aim of that society is as much freedom as possible for the individual human being. The Constitution provides society with a mechanism of government fully competent to its task, but by no means universal in its powers. The power to govern is parcelled out between the states and the nation and is further divided among the three main branches of all governmental units. By custom as well as constitutional practice, many vital aspects of community life are beyond the direct reach of government — for example, religion, the press, and, until recently at any rate, many phases of educational and cultural activity. The separation of powers under the Constitution serves the end of democracy in society by limiting the roles of the several branches of government and protecting the citizen, and the various parts of the state itself, against encroachments from any source. The root idea of the Constitution is that man can be free because the state is not.

The power of constitutional review, to be exercised by some part of the government, is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at the least in cases of conflicting action by different branches of government or of constitutionally unauthorized governmental action against individuals. The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government. British Dominions operating under written constitutions have had to face the task pretty much as we have, and they have solved it in similar ways. Like institutions have developed in other federal systems.

So far as the American Constitution is concerned, there can be little real doubt that the courts were intended from the beginning to have the power they have exercised. The Federalist Papers are unequivocal; the Debates as clear as debates normally are. The power of judicial review was commonly exercised by the courts of the states, and the people were accustomed to judicial construction

of the authority derived from colonial charters.<sup>3</sup> Constitutional interpretation by the courts, Hamilton said, does not

by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.<sup>4</sup>

Hamilton's statement is sometimes criticized as a verbal legalism.<sup>5</sup> But it has an advantage too. For much of the discussion has complicated the problem without clarifying it. Both judges and their critics have wrapped themselves so successfully in the difficulties of particular cases that they have been able to evade the ultimate issue posed in the Federalist Papers.

Whether another method of enforcing the Constitution could have been devised, the short answer is that no such method has developed. The argument over the constitutionality of judicial review has long since been settled by history. The power and duty of the Supreme Court to declare statutes or executive action unconstitutional in appropriate cases is part of the living Constitution. "The course of constitutional history," Mr. Justice Frankfurter recently remarked, has cast responsibilities upon the Supreme Court which it would be "stultification" for it to evade.<sup>6</sup> The Court's power has been exercised differently at different times: sometimes with reckless and doctrinaire enthusiasm; sometimes with great deference to the status and responsibilities of other branches of the government; sometimes with a degree of weakness and timidity that comes close to the betrayal of trust. But the power exists, as an integral part of the process of American government. The Court has the duty of interpreting the Constitution in many of its most important aspects, and especially in those

---

<sup>3</sup> The evidence is reviewed in THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law* in LEGAL ESSAYS 1, 3-7 (1908); BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912); and HAINES, *op. cit. supra* note 2, at 44-59, 88-121. A useful bibliography appears in DODD, *CASES ON CONSTITUTIONAL LAW* 8-18 (3d ed. 1941).

<sup>4</sup> THE FEDERALIST, No. 78 at 506 (Modern Library ed. 1937).

<sup>5</sup> See THAYER, JOHN MARSHALL 96 (1901); THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law* in LEGAL ESSAYS 1, 12-15 (1908); HAINES, *op. cit. supra* note 2, at 518-27.

<sup>6</sup> *Rochin v. California*, 342 U.S. 165, 173 (1952).

which concern the relations of the individual and the state. The political proposition underlying the survival of the power is that there are some phases of American life which should be beyond the reach of any majority, save by constitutional amendment. In Mr. Justice Jackson's phrase, "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."<sup>7</sup> Whether or not this was the intention of the Founding Fathers, the unwritten Constitution is unmistakable.

If one may use a personal definition of the crucial word, this way of policing the Constitution is not undemocratic. True, it employs appointed officials, to whom large powers are irrevocably delegated. But democracies need not elect all the officers who exercise crucial authority in the name of the voters. Admirals and generals can win or lose wars in the exercise of their discretion. The independence of judges in the administration of justice has been the pride of communities which aspire to be free. Members of the Federal Reserve Board have the lawful power to plunge the country into depression or inflation. The list could readily be extended. Government by referendum or town meeting is not the only possible form of democracy. The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed. For judges deciding ordinary litigation, the ultimate responsibility of the electorate has a special meaning. It is a responsibility for the quality of the judges and for the substance of their instructions, never a responsibility for their decisions in particular cases. It is hardly characteristic of law in democratic society to encourage bills of attainder, or to allow appeals from the courts in particular cases to legislatures or to mobs. Where the judges are carrying out the function of constitutional review, the final responsibility of the people is appropriately guaranteed by the provisions for amending the Constitution itself, and by the benign influence of time, which changes the personnel of courts. Given the possibility of constitutional amendment, there is nothing undemocratic in having responsible and independent judges act as important constitutional mediators. Within the narrow limits of their capacity to act, their great task is to help maintain a pluralist equilibrium in society. They can do much to keep it from being

---

<sup>7</sup> *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

dominated by the states or the Federal Government, by Congress or the President, by the purse or the sword.

In the execution of this crucial but delicate function, constitutional review by the judiciary has an advantage thoroughly recognized in both theory and practice. The power of the courts, however final, can only be asserted in the course of litigation. Advisory opinions are forbidden, and reefs of self-limitation have grown up around the doctrine that the courts will determine constitutional questions only in cases of actual controversy, when no lesser ground of decision is available, and when the complaining party would be directly and personally injured by the assertion of the power deemed unconstitutional. Thus the check of judicial review upon the elected branches of government must be a mild one, limited not only by the detachment, integrity, and good sense of the Justices, but by the structural boundaries implicit in the fact that the power is entrusted to the courts. Judicial review is inherently adapted to preserving broad and flexible lines of constitutional growth, not to operating as a continuously active factor in legislative or executive decisions.

The division and separation of governmental powers within the American federal system provides the community with ample power to act, without compromising its pluralist structure. The Constitution formalizes the principle that a wide dispersal of authority among the institutions of society is the safest foundation for social freedom. It was accepted from the beginning that the judiciary would be one of the chief agencies for enforcing the restraints of the Constitution. In a letter to Madison, Jefferson remarked of the Bill of Rights:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity. In fact, what degree of confidence would be too much, for a body composed of such men as Wythe, Blair and Pendleton? On characters like these, the '*civium ardor prava pudentium*' would make no impression.<sup>8</sup>

---

<sup>8</sup> JEFFERSON, LIFE AND SELECTED WRITINGS 462 (Modern Library ed. 1944). This passage, Griswold comments, "suggests that while [Jefferson] relied on the Court to safeguard the Bill of Rights, he was also counting on the bill to ensure a long-run democratic tendency on the part of the Court. History has borne out the acumen of this thought . . . . The Court's vested responsibility for our civil liberties has kept it anchored to democratic fundamentals through all kinds of political

Jefferson, indeed, went further. He regretted the absence in the Constitution of a direct veto power over legislation entrusted to the judiciary, and wished that no legislation could take effect for a year after its final enactment.<sup>9</sup> Within such constitutional limits, Jefferson believed, American society could best achieve its goal of responsible self-government. "I have no fear," he wrote, "but that the result of our experiment will be, that men may be trusted to govern themselves without a master."<sup>10</sup>

Democracy is a slippery term. I shall make no effort at a formal definition here. Certainly as a matter of historical fact some societies with parliamentary governments have been and are "democratic" by standards which Americans would accept, although it is worth noting that almost all of them employ second chambers, with powers at least of delay, and indirect devices for assuring continuity in the event of a parliamentary collapse, either through the crown or some equivalent institution, like the presidency in France. But it would be scholastic pedantry to define democracy in such a way as to deny the title of "democrat" to Jefferson, Madison, Lincoln, Brandeis, and others who have found the American constitutional system, including its tradition of judicial review, well adapted to the needs of a free society.<sup>11</sup> As Mr. Justice Brandeis said, the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.<sup>12</sup>

It is error to insist that no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature has unlimited powers. Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers. In

---

weather." A. W. Griswold, *Jefferson's Republic — The Rediscovery of Democratic Philosophy*, Fortune, April, 1950, p. 111, at 130. Later in life, of course, Jefferson strongly differed with many of the decisions and opinions of the Supreme Court and expressed his disagreement in terms which sometimes seemed to repudiate the constitutionality of judicial review itself.

<sup>9</sup> JEFFERSON, LIFE AND SELECTED WRITINGS 437, 441, 460 (Modern Library ed. 1944).

<sup>10</sup> 6 THE WRITINGS OF THOMAS JEFFERSON 151 (Lipscomb and Bergh ed. 1904).

<sup>11</sup> See, e.g., Lincoln, *First Inaugural Address* in 6 MESSAGES AND PAPERS OF THE PRESIDENTS 5-12 (Richardson ed. 1897); WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES c. 6 (1911).

<sup>12</sup> *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting opinion).

a vast country, of mixed population, with widely different regional problems, such an organization of society is the surest base for the hopes of democracy.<sup>13</sup>

## II

There is another fundamental aspect of the sustained attack on the legitimacy of judicial review. Men like James Bradley Thayer have urged that if the propertied classes come to regard the courts as their protectors against popular government they will neglect government. Local and national government, shorn of power, will be indifferently conducted. The people will fail to meet their political responsibilities.<sup>14</sup> This position is translated by some judges into the doctrine that they serve the cause of democracy by refusing to decide important questions of a political cast, thus forcing the elected agencies of government to settle or postpone them.

<sup>13</sup> See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92-94 (1921):

The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of the restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility, and passed it on to the courts. Such dangers must be balanced against those of independence from all restraint, independence on the part of public officers elected for brief terms, without the guiding force of a continuous tradition. On the whole, I believe the latter dangers to be the more formidable of the two. Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might be otherwise silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs.

<sup>14</sup> See THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law* in *LEGAL ESSAYS* I, 39-41 (1908); HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 500-40 (2d ed. 1932); L. HAND, *The Contribution of an Independent Judiciary to Civilization* in *THE SPIRIT OF LIBERTY* 172 (Dilliard ed. 1952); COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 57-83 (1943), Wyzanski, *Book Review*, 57 *HARV. L. REV.* 389 (1944); Clark, *The Dilemma of American Judges*, 35 *A.B.A.J.* 8 (1949). For other views of the proper extent of judicial review, see M. COHEN, *Constitutional and Natural Rights in THE FAITH OF A LIBERAL* 175 (1946); PEKELIS, *LAW AND SOCIAL ACTION* 194-203 (1950); CURTIS, *LIONS UNDER THE THRONE* 24-34 (1947); FREUND, *ON UNDERSTANDING THE SUPREME COURT* 37-41 (1949); Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L.J.* 571 (1948).

This contention has been belied by the course of history: legislatures today, despite almost sixty more years of considerable pressure from their judicial censors, are a good deal less "belittled" and "demoralized" than they were when Thayer wrote.<sup>15</sup> Nor does it stand up as a persuasive argument even in the terms Thayer and his followers used. The existence of the power of judicial review is hardly an adequate explanation for the lapses of legislatures, then or now. The election of petty and irresponsible men to state and national legislatures reflects cultural and sociological forces of far greater significance and generality. Political apathy and ignorance can hardly be explained by the hypothesis that the mass of non-voting citizens, or the larger mass who accept and support government by bosses, are comfortably relying on the courts to protect them. The reasons for the occasional low estate of legislators and congressmen must be sought in the history and development of American society — the ways in which the population has grown, the deplorable level of popular education, the nature of political tradition, the acceptance of graft, the concentration of American energies in business and other non-political activities. It is certainly not true today, and was not true in 1893, that dependence on the courts leads people to "become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives."<sup>16</sup>

Actually Thayer's papers on constitutional law were written in the setting of different problems from those which face American public life today. It is doubtful whether if applied to the constitutional issues of the 1950's his views would have had the same emphasis that he gave them in discussing those of the last years of the nineteenth century. Thayer was preoccupied with the cycle of cases after the Civil War through which, in Mr. Justice Holmes' phrase, the Court wrote Herbert Spencer's *Social Statics* into the Constitution. He was resisting the practice of declaring all sorts of regulatory legislation illegal as unreasonable in the light of the Due Process Clause of the Fourteenth Amendment or as outside

---

<sup>15</sup> THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law* in LEGAL ESSAYS 1, 39 (1908), originally published in 1893 in 7 HARV. L. REV. 129.

<sup>16</sup> THAYER, JOHN MARSHALL 104 (1901).

the scope of the commerce power. There is little if any reference in his writings to the function of the courts in enforcing the civil rights listed in the Constitution and the Bill of Rights. He quoted with approval Chief Justice Marshall's statement that the Court on which he served "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required." "That," Professor Thayer remarked, "is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; today it is the part which most requires to be emphasized."<sup>17</sup>

In our time, however, the problem has changed. The constitutional revolution which began in 1937 has had its unmistakable impact. There is little or no risk that the present Supreme Court will become again a Third Chamber annulling a wide variety of regulatory legislation. The breadth of the commerce power, the freedom of the states to legislate in the realm of business, the wide discretionary powers of administrative bodies, state and national—these features of the constitutional scene are not the subject of significant disagreement among the Justices. And public opinion has become acutely conscious of the fact that state and national legislatures have enormous powers which are frequently exercised. While the problems of the future may provoke a new constitutional crisis over the powers of government, today the people are well aware that their own political exertions, and not the long arm of the Supreme Court, must be their chief reliance in molding the body of regulatory legislation to their heart's desire.

The risk today, and it is a real one, is that the Supreme Court is not giving sufficient emphasis to the second part of Marshall's "twofold rule." The freedom of the legislatures to act within wide limits of constitutional construction is the wise rule of judicial policy only if the processes through which they act are reasonably democratic. Chief Justice Stone put emphasis on the fact that in many instances legislative acts are directed against interests which are not or cannot be represented in the legislature: out-of-state interests, where the purpose of legislation is local economic protection, or politically impotent minorities, where the thrust of the act is discrimination or repression. This line of thought led him to the arresting conclusion that statutes which affected interests beyond political protection, or which limited the full democratic potentialities of political action, were not to be approached by the Court

---

<sup>17</sup> *Id.* at 106.

with the deference it usually accorded legislative decisions, by way of "presumption" or otherwise.<sup>18</sup>

Chief Justice Stone's distinction brings out an element which cannot easily be dismissed or disregarded in determining the weight to be given the constitutional judgment of the legislature in a judicial decision as to the constitutionality of its action. After all, the form and character of our present legal attack on communism and "disloyalty" is largely determined by the impotence of communism as a domestic political force. France or Italy, confronting communist parties to which one-third of the electorate is loyal, could not consider the kind of direct legal proceedings against communism which we have undertaken. Dealing with an infinitely more serious threat, the French and Italian governments must rely only on police action, in the narrower sense, and on political struggle in the market place of ideas.

### III

The argument that action by the courts in protecting the liberties of the citizens is futile in bad times, and unnecessary in good ones, is fundamentally wrong. Judge Learned Hand has given the contrary view its strongest and most eloquent form. In a speech called "The Contribution of an Independent Judiciary to Civilization,"<sup>19</sup> he reviews the main tasks of judges. In applying "enacted law" — commands of an organ of government "purposely made responsive to the pressure of the interests affected" — he believes that the judiciary should pursue a course of "unflinching" independence in seeking loyally to enforce the spirit of the enact-

---

<sup>18</sup> Building on a suggestion in *McCulloch v. Maryland*, 4 Wheat. 316, 428 (U.S. 1819), and other early cases, Chief Justice Stone contended that the court should give less than the normal weight to the legislative judgment where the normal electoral safeguards against legislative abuse are not present or where the legislative act would itself tend to restrict the effectiveness of "those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 (1940); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 (1945); *Minersville School District v. Gobitis*, 310 U.S. 586, 603-07 (1940) (dissenting opinion); Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases*, 41 COL. L. REV. 1160, 1171-79 (1941); Wechsler, *Stone and the Constitution*, 46 COL. L. REV. 764, 785-800 (1946).

<sup>19</sup> Address on 250th anniversary of Supreme Judicial Court of Massachusetts, Nov. 21, 1942, reprinted in *THE SPIRIT OF LIBERTY* 172 (Dilliard ed. 1952). See also Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 551-54 (1951).

ment as it was made.<sup>20</sup> In a society which makes law by the procedures of democratic and representative government, "enacted laws" are always compromises of competing forces, and "to disturb them by surreptitious, irresponsible and anonymous intervention imperils the possibility of any future settlements and pro tanto upsets the whole system." The power of the judges to legislate in the field of customary law he regards as an anomaly which could not exist in "a pitilessly consistent democracy." Moreover, he points out, modern legislatures can pass laws more readily than ancient parliaments. But so long as the judges live by "a self-denying ordinance which forbids change in what has not already become unacceptable," the old system works out very well as it is, "for the advantages of leaving step by step amendments of the customary law in the hands of those trained in it, outweigh the dangers." As to the constitutional functions of the American judiciary, he makes a distinction. Insofar as the constitution is "an instrument to distribute political power," he would defend entrusting its construction to an independent judiciary, as in the case of interpreting "enacted law." Conflicts over authority are inevitable in a system of divided power. It was "a daring expedient" to have them settled by

judges deliberately put beyond the reach of popular pressure. And yet, granted the necessity of some such authority, probably independent judges were the most likely to do the job well. Besides, the strains that decisions on these questions set up are not ordinarily dangerous to the social structure. For the most part the interests involved are only the sensibilities of the officials whose provinces they mark out, and usually their resentments have no grave seismic consequences.

Judge Hand's use of "ordinarily," "for the most part," and "usually" in the two preceding sentences may be appropriate as a matter of statistics, but it conceals some dramatic exceptions, of which the explosions of 1937 are only the most recent instance.

The next part of his lecture, however, distinguishes another class of constitutional questions and advances to the attack:

American constitutions always go further. Not only do they distribute the powers of government, but they assume to lay down general principles to insure the just exercise of those powers. This is the contribution

---

<sup>20</sup> This and the following quotations, until otherwise indicated, are from L. HAND, *The Contribution of an Independent Judiciary to Civilization in THE SPIRIT OF LIBERTY 172-81* (Dilliard ed. 1952). This is not the occasion to comment on these remarks as the starting point for a theory of statutory construction.

to political science of which we are proud, and especially of a judiciary of Vestal unapproachability which shall always tend the Sacred Flame of Justice. Yet here we are on less firm ground.

In a passage of Browningsque passion and obscurity, he advances the thesis that the judiciary will lose the independence it needs for its other functions unless it resolutely refuses to decide constitutional questions of this order. The general constitutional commands of fairness and equality, which he nowhere identifies in detail, are "moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience. If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent." If the judges are "intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds." The price of judicial independence, he concludes, is that the judges

should not have the last word in those basic conflicts of "right and wrong — between whose endless jar justice resides." You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know — that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

This gloomy and apocalyptic view is a triumph of logic over life. It reflects the dark shadows thrown upon the judiciary by the Court-packing fight of 1937. Judge Hand is preoccupied with a syllogism. The people and the Congress have the naked power to destroy the independence of the courts. Therefore the courts must avoid arousing the sleeping lion by venturing to construe the broad and sweeping clauses of the Constitution which would "demand the appraisal and balancing of human values which there are no scales to weigh." Presumably he would include in this catalogue of forbidden issues problems of freedom of speech, the separation of church and state, and the limits, if any, to which "the capable, the shrewd or the strong" should "be allowed to ex-

pliot their powers." Are we to read the last phrase as encompassing the right of habeas corpus, the central civil liberty and the most basic of all protections against the authority of the state? Would it deny the possibility of constitutional review by the courts for laws denying the vote to Negroes, for searches and seizures without warrant, for bills of attainder or test oaths?

In the first place, the judicial decisions which brought on the storm in 1937 were not in this area at all. They concerned the division of power between the states and the nation,<sup>21</sup> and between Congress and the President<sup>22</sup> — issues which Judge Hand regards as inescapably within the province of the courts and not likely in any event to have "seismic consequences." Further, it is important to reiterate the obvious but sometimes forgotten fact that the historic conception of the Supreme Court's duties, however challenged in 1937, prevailed in that struggle. In the end that idea of the Court's function was sustained, against the reluctant and half-hearted opposition of a Congress which did not really believe in President Roosevelt's proposal and took its first opportunity to abandon it.

The possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. When the Court has differed from the Congress and the President in its notions of constitutional law — whether in the realm of the eternal verities or in interpreting the scope of the commerce power — time has unfailingly cured the conflicts, such as they were. Against that history, should we weigh the chance that Congress would suppress or intimidate the Supreme Court as ominously as Judge Hand does? Is it a reason for denying the Court competence in the broader reaches of constitutional law, or a bogey-man?

If the courts persist, Judge Hand warns, in seeking to impose their ideas as to the Higher Law of the Constitution upon the litigants before them, the end will be the destruction of society. The independence of the courts will be compromised, and social life will "relapse into the reign of the tooth and claw."<sup>23</sup> Is this dire vision justified? If the courts, for example, refused to defend

---

<sup>21</sup> See, e.g., *United States v. Butler*, 297 U.S. 1 (1936).

<sup>22</sup> See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>23</sup> L. HAND, *Chief Justice Stone's Concept of the Judicial Function* in *THE SPIRIT OF LIBERTY* 201, 208 (Dilliard ed. 1952).

the rights of Negroes in the name of the Fourteenth Amendment, or the right of political groups to assemble and make speeches, would the result be more order or more disorder in society? While no statistical answer to such questions is possible, I for one believe that the defense of civil rights by the courts is a force not only for democratic values but for social order. If repressed by those who control the local police, the social and political aspirations of the people would often spill over into rioting or sullen disaffection, which would be worse. Nothing has destroyed the essential solidarity of a people more effectively than policies of repression imposed by the strong on the weak. Such policies, not those of open discussion and political equality, have led modern societies to the rule of the tooth, the claw, and the tommy gun.

It may of course be true that no court can save a society bent on ruin. But American society is not bent on ruin. It is a body deeply committed in its majorities to the principles of the Constitution and both willing and anxious to form its policy and programs in a constitutional way. Americans are, however, profoundly troubled by fears — intense and real fears, raised by unprecedented dangers and by the conduct of perilous tasks unprecedented in the history of the Government. It is difficult for legislators confronting the menace of the world communist movement to reject any proposals which purport to attack communism or to protect the community from it. This does not mean, however, that the President and the Congress would refuse to obey the Supreme Court's rulings on the constitutionality of some of the means with which they have chosen to attack — and often, alas, merely to exorcise — the evil. Ruin can come to a society not only from the furious resentments of a crisis. It can be brought about in imperceptible stages by gradually accepting, one after another, immoral solutions for particular problems. The "relocation camps" conducted during the late war for Japanese residents and for Americans of Japanese descent is the precedent for the proposal that concentration camps be established for citizens suspected of believing in revolutionary ideas.<sup>24</sup> Thus can the protection of the writ of habeas corpus be eroded, and the principle lost that criminal punishment can be inflicted only for criminal behavior and then only after a trial by jury conducted according to the rules of the

---

<sup>24</sup> See Subchapter II of the Internal Security Act of 1950, 64 STAT. 1019, 50 U.S.C. §§ 811-26 (Supp. 1952); see O'Brian, *Changing Attitudes toward Freedom*, 9 WASH. & LEE L. REV. 157 (1952).

Bill of Rights. Thus can we be led to accept the ideas and techniques of the police state.

Nor, more broadly, is it true as a matter of experience that a vigorous lead from the Supreme Court inhibits or weakens popular responsibility in the same area. The process of forming public opinion in the United States is a continuous one with many participants — Congress, the President, the press, political parties, scholars, pressure groups, and so on. The discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar. The prestige of the Supreme Court as an institution is high, despite the conflicts of the last fifteen years, and the members of the Court speak with a powerful voice.

Can one doubt, for example, the immensely constructive influence of the series of decisions in which the Court is slowly asserting the right of Negroes to vote and to travel, live, and have a professional education without segregation? These decisions have not paralyzed or supplanted legislative and community action. They have precipitated it. They have not created bigotry. They have helped to fight it. The cycle of decisions in these cases — influential because they are numerous, cumulative, and, on the whole, consistent — have played a crucial role in leading public opinion and encouraging public action towards meeting the challenge and burden of the Negro problem as a constitutional — that is, as a moral<sup>25</sup> — obligation. The Court's stand has stimulated men everywhere to take action, by state statutes, by new corporate or union policies, in local communities, on university faculties, in student fraternities, on courts, and in hospitals. The Negro does not yet have equality in American society, or anything approaching it. But his position is being improved, year by year. And the decisions and opinions of the Supreme Court are helping immeasurably in that process.

The Court's lead has also been constructive, on the whole, in reforming state criminal procedures — here again in a long series of decisions which year by year are having their effect on the conduct of police officers and on the course of trials.<sup>26</sup> This slow

---

<sup>25</sup> See MYRDAL, *AN AMERICAN DILEMMA* (1944).

<sup>26</sup> See, e.g., Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. OF CHI. L. REV. 266 (1946); Frank, *The United States Supreme Court*,

and evolutionary process requires a good deal of litigation: a single bolt from the blue could not overcome the inertia of long years of bad practice, nor the natural desire of policemen and prosecutors to win their cases. The pressure of the Court's opinions in this area requires thought and action in every state legislature and, indeed, in every court and police station of the land. The Court has not stilled or prevented responsible democratic action on these problems. It has required it. Lawless police action has not yet been banished from American life, but the most primitive police sergeant is learning that third degree methods may backfire.

Other examples, both of action and of inaction, could readily be listed. Even the tortuous and often maddening cases in which the Court considers whether state action unduly burdens or discriminates against the national commerce or conflicts with national legislation in the same field impose some limits on the degree of economic autarchy states can practice, and provide ammunition to those who urge the preservation of the national economy as a single continental market.<sup>27</sup>

In the field of civil rights itself, the libertarian cases of the early Thirties helped prevent during the Second World War many of the repressive and unnecessary acts which distinguished the course of public policy during and after the First World War. Where the Court failed to follow its own traditions, as in the Japanese-American cases, the results were painful. I have elsewhere contended that earlier decisions<sup>28</sup> required new trials, at the least, in the *Korematsu* and *Hirabayashi* cases.<sup>29</sup> Even there, Congress has in part atoned for the weakness of the Supreme Court.<sup>30</sup> And in *Duncan v. Kahanamoku*<sup>31</sup> the Court itself has come some distance towards repairing the rent in its doctrines.

The reciprocal relation between the Court and the community in the formation of policy may be a paradox to those who believe

---

1950-51, 19 U. OF CHI. L. REV. 165, 201-09 (1952), and earlier surveys cited at 165; Comment, 58 YALE L.J. 268 (1949).

<sup>27</sup> See Rostow, *The Price of Federalism*, Fortune, Dec., 1948, p. 162.

<sup>28</sup> Reaffirmed in *Sterling v. Constantin*, 287 U.S. 378 (1932).

<sup>29</sup> *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), discussed in Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

<sup>30</sup> “. . . to redress these loyal Americans in some measure for the wrongs inflicted upon them . . . would be simple justice.” H.R. REP. NO. 732, 80th Cong., 1st Sess. 5 (1947). See 62 STAT. 1231 (1948), 50 U.S.C. APP. §§ 1981 *et seq.* (Supp. 1952).

<sup>31</sup> 327 U.S. 304 (1946).

that there is something undemocratic in the power of judicial review. But the work of the Court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces of American life. The historic reason for this paradox is that American life in all its aspects is an attempt to express and to fulfill a far-reaching moral code. Some observers find this a handicap to coldly realistic policy making.<sup>32</sup> Others see in it the essential greatness and appealing power of America as an idea and a world force.<sup>33</sup> The prestige and authority of the Supreme Court derive from the fact that it is accepted as the ultimate interpreter of the American code in many of its most important applications.

#### IV

The distrust of judicial review has been reflected in several aspects of the Supreme Court's work, but nowhere more clearly than in its consideration of politically sensitive issues. One of the central responsibilities of the judiciary in exercising its constitutional power is to help keep the other arms of government democratic in their procedures. The Constitution should guarantee the democratic legitimacy of political decisions by establishing essential rules for the political process. It provides that each state should have a republican form of government. And it gives each citizen the political as well as the personal protection of the Bill of Rights and other fundamental constitutional guarantees. The enforcement of these rights would assure Americans that legislative and executive policy would be formed out of free debate, democratic suffrage, untrammelled political effort, and full inquiry.

A series of recent cases in the Supreme Court throws doubt on the zeal with which the present-day Court will insist on preserving the personal and political liberties essential to making political decisions democratic. The language and reasoning of the Justices' opinions are full of unresolved doubts about the extent — and indeed the propriety — of their powers. Contradictory and obscure, they represent not the final word, but a hesitant step towards the formulation of a constitutional doctrine adequate to the needs of American society in its present state of siege.

The contradictions and inconsistencies of the constitutional

---

<sup>32</sup> See KENNAN, *AMERICAN DIPLOMACY, 1900-1950*, 95-103 (1951), McDougal, *Book Review*, 46 *A.B.A.J.* 102 (1952).

<sup>33</sup> See MYRDAL, *AN AMERICAN DILEMMA* 3-6 (1944).

ideas which occupy the minds of several of the Justices are clearly presented by Elliot Richardson in a recent article in this *Review* called "Freedom of Expression and the Function of Courts."<sup>34</sup> I find it difficult to be sure of the ultimate position Mr. Richardson takes on the courts' function in protecting freedom of expression. He says he is not against judicial review as such, although he quotes with enthusiasm those who strongly disapprove it. He is against "the interventionist view" but concedes to history that the courts are under a constitutional obligation to strike down "clearly bad laws." "Clearly bad," he repeatedly points out, means "unconstitutional," and not merely "unwise." For it is "plainly untenable," he says, that the Constitution be considered a "source of specific directions for the solution of every issue of political wisdom," even where freedom of expression is involved. Not "every issue," but some issues. For in interpreting the limitations of the First and Fourteenth Amendments the courts must be free to disagree with the legislature and the executive sometimes, since

once having conceded the power of the judiciary to enforce the Constitution, the very meaning of the First Amendment is that freedom of expression embodies values that must not be supplanted by short-sighted surges of bigotry and intolerance, however faithfully reflected by the legislature. The court must, therefore, having so far as possible determined what interests the legislature had in view, accept the responsibility of measuring their long-run importance against the values protected by the First Amendment. The courts have not yet articulated — and it is hardly to be expected that language apt for the purpose can be found — any standards of measurement. The triviality of the interests in un-littered streets, at one extreme, and the major importance of the interest in the national security, at the other, are easily recognized. Judgments in the area between must largely rest on "an intuition of experience which outruns analysis." The question is — whose intuition? <sup>35</sup>

The answer he gives is that in the end, the "intuition" of the judges must and does govern. The judges cannot escape the obligation of deciding matters of this kind, even when they give every degree of deference short of blind submission to the views of the legislature and the executive. Their judgment, after meticulously weighing the conflicting interests involved, will contain a final and decisive element of "wisdom" and even of "intuition" — "consti-

---

<sup>34</sup> 65 HARV. L. REV. 1 (1951). Until otherwise indicated the following quotations are from *id.* at 50-53.

<sup>35</sup> *Id.* at 39-40.

tutional" wisdom and intuition, to be sure, as distinguished from the components of "legislative" judgment, but human choice nonetheless.

What standards are to guide the courts in exercising this extraordinary power, rather grudgingly conceded to exist? While I find much in Mr. Richardson's careful analysis of the elements of decision in this class of cases which helps to clarify the role and the responsibility of the judiciary, I can trace little or no connection between the conclusions of his analysis and his general philosophy of judicial review. Indeed, they seem to be in irreconcilable conflict. For his belief in the democratic character of judicial abstinence is so strong as apparently to overcome even his distaste for decisions which fail to measure up to his standards of procedure in the exercise of the courts' constitutional function.

Whatever the exact nuance of meaning other readers will find in his article, to me the broad argument of Mr. Richardson's paper stands with the view deprecating and seeking to limit the Supreme Court's constitutional function as "undemocratic" and dangerous. The Court is not an elected body, but a bench of judges appointed for life. Therefore, he seems to be saying, it is an undemocratic institution.<sup>36</sup> It would be preferable in a democracy if the courts lacked the power to declare statutes or executive action unconstitutional, even in the area of civil rights. Although the power exists historically, reasons of democratic principle require that its exercise be kept to an irreducible minimum.

Although I believe that unresolved doubts on this score have led Mr. Richardson, and others, to tortured and untenable judgments about the work of the Court, this is not a conclusion he can admit. An inner conflict about the democratic propriety of judicial review is translated into an advocacy of extreme self-restraint in the exercise of the Court's acknowledged powers.

Few people would disagree with Mr. Richardson that in exercising their powers of judicial review, the courts should be as wise and statesmenlike as their capacities and temperaments permit — wise as judges, wise in their concern for the effectiveness of their occasional interventions into public affairs, and wise too in adapting the Constitution to changing conditions over centuries of development. The policy against judicial excess does not derive from an unhappy sense that the Supreme Court is "undemocratic," but from an awareness of the limited but vital historical place it occu-

---

<sup>36</sup> See *id.* at 1, 54.

pies in American public life. These limitations stem in considerable part from the fact that, as a court, it can pass only on issues presented at random in the course of litigation, often long after the action being reviewed has taken place. "The only check upon our own exercise of power," Justice Stone said, "is our own sense of self-restraint."<sup>37</sup> But "self-restraint," he made clear both there and elsewhere, is not an excuse for inaction. It is rooted in a respect for the dignity and high purpose of the other branches of government, and a sympathetic understanding of the problems they must try to resolve.

That the Supreme Court's power is limited is perhaps the key to its extraordinary influence. Of course the Justices should give the utmost consideration to the views of other branches of the Government, in civil rights as in other constitutional cases. Of course the Court should keep its powder dry and avoid wasting its ammunition in petty quarrels. Of course in the end the Court must balance even the policy in favor of freedom of speech against the right of the state to protect itself from mobs, riots in the streets, pornography, espionage, and revolution. It must consider whether means are reasonably adapted to ends; whether the Government could have chosen alternative means which would raise fewer constitutional doubts; whether in fact circumstances justify the means adopted.

But when all the facts and arguments are before a court, in a suitable case and on a suitable record, it must decide, and invariably does decide, since a refusal to do so is a decision in favor of the constitutionality of the action being reviewed. The judges cannot refuse to decide cases because they personally believe the United States would be a more democratic country without judicial review. A preoccupation with the prudent and statesmanlike exercise of their duties can hardly be allowed to deny the existence of those duties. Anxious as they may be not to compromise the Court as an institution, and to avoid when possible the intense political pressures of hard cases, they should recall too that their great power exists to be used at the right times, not lost in atrophy. The Court can be destroyed by the weakness as well as the recklessness of its members. The maxim *justitia fiat* has a place in the history of law at least as honorable as the Fabian counsel of prudence. There are times when the hard, great, politically sensitive cases do come before the bar. In times of crisis they are likely

---

<sup>37</sup> *United States v. Butler*, 297 U.S. 1, 79 (1936) (dissenting opinion).

to come frequently, and in acute form; indeed, if the cases were not hard, there would be little point in bringing them to the Supreme Court. It is not because people expect the Supreme Court to avoid difficult and vital cases that it has gained its peculiar prestige and authority in popular opinion. Visitors to Washington piously bring their children to the Supreme Court because they believe it is a place where vitally important rights are vindicated against all comers — where The Law in some primitive but meaningful sense is supreme even against the mighty forces of society.

Mr. Richardson cannot bring himself to accept Judge Learned Hand's monkish rule of complete abstinence,<sup>38</sup> though he quotes it with approval.<sup>39</sup> The courts cannot avoid some responsibility for enforcing the political and civil rights declared by the Constitution, although he warns that dependence on the courts as protectors of liberty would sap self-discipline, and lead to "suspicion, intolerance, bigotry and discrimination which the sporadic forays of the judiciary are helpless to check." While Judge Hand's statement should not be taken literally, it should serve as a "counsel of moderation" for judges. The transition is difficult to follow. If it destroys the spirit of self-reliance to submit large political issues to litigation, surely a little more or less of the hemlock cup will not make much difference. This is strong poison, fatal in small doses. But Mr. Richardson urges a distinction. "Ten opinions striking down ten doubtfully bad laws," he contends, "surely are not twice as effective in their educational impact as five opinions striking down five clearly bad laws. There is much to be said, in any event, for the educational value of opinions *refusing* to invalidate as unconstitutional what is merely unwise."

Since no one in recent years has revived Jefferson's proposal to make the Supreme Court a third house of the national legislature or advocated the invalidation of "doubtful" laws, this part of the argument strikes at men of straw. The question, and the only question, is what criteria the Court should employ in deciding that a statute or executive action is "clearly" contrary to one or another of the provisions of the Constitution. Unless we are to say that the Supreme Court, like a jury, should not declare statutes unconstitutional save by unanimous vote, the criterion of

---

<sup>38</sup> See pp. 203-05 *supra*.

<sup>39</sup> Richardson, *supra* note 34, at 52-53. Quotations in this paragraph are from *id.* at 52-53.

limiting judicial review to "clear" cases is one for the minds and souls of the justices. Dissenters normally believe the law is just as clear as their brethren in the majority. In cases dealing with freedom of expression the Court sits as the ultimate guardian of the liberties on which the democratic effectiveness of political action depends. Their decisions in this area help to determine whether the citizen, whatever his color or his opinions, can live in dignity and security. Mr. Richardson contends, however, that even on such questions the normal presumptions in favor of the constitutionality of legislation should apply with full force. The Court must decide, he repeats over and over again, not that a statute is unwise, but that its provisions fall outside the area of reasonable judgment: in other words, to paraphrase his text, that the competing considerations resolved by its enactment have been arbitrarily resolved, and that the inferences from the data upon which they rest have been irrationally drawn.<sup>40</sup>

There are alternative ways to define the Court's task in passing on the constitutionality of legislation or official action. The language of "presumptions" is often used. And it is commonly said that the Supreme Court should not invalidate action by other branches of the Government if "any" rational basis for upholding it could be found. Formulae of this kind obscure more than they illuminate. The real problem for the Court cannot be compressed into a "scintilla" rule. The Court must balance competing considerations: rights of privacy against the right to speak; order against freedom; safety against the privileges of political action. In reaching a judgment that must accommodate society to such conflicts, the Court is hardly aided by the proposition that it must uphold the act of government if "any" rational basis for it exists. As Justice Frankfurter has said, "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society" must be given an altogether different weight by the Court than other privileges altered by legislative or executive order.<sup>41</sup> Society is more deeply affected by a statute limiting political action than by a zoning ordinance, however restrictive.

However, even Mr. Richardson's formula for stating the Court's function in judicial review doesn't settle the cases. The difficulty under his rule comes in deciding whether competing considerations

---

<sup>40</sup> *Id.* at 50.

<sup>41</sup> *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (concurring opinion).

have been "arbitrarily" resolved or inferences from data "irrationally" drawn.

When Mr. Richardson applies his general view of the Court's function to the cases, I find a sharp difference between the two halves of his thesis. In the *Dennis* case,<sup>42</sup> the jury had found the defendants guilty under the Smith Act of "teaching and advocating" the doctrine of overthrowing the state by force and of conspiring to teach and advocate such doctrines. There were strong competing interests: the right of the state to protect itself against subversion or revolution and the interest of the state and of the defendants in protecting freedom of speech, of thought, and of political organization and action. Presumably Mr. Richardson would defend the decision upholding the conviction, either as a "doubtful" case which the Court should have refused to decide, or as one where legislative and executive judgment, however unwise, clearly fell within the zone of rationality. Yet the Court had no record before it which could permit a judicial judgment on the final constitutional issue as Mr. Richardson defines it.

There was no legislative judgment that the organized promulgation of these doctrines by the Communist Party threatened the security of the state at the time of the trial. The statute underlying the prosecution was passed in 1940, with a meager and obscure legislative history, in language which has been invoked since 1798, with few variations, whenever American legislatures have become alarmed over seditious doctrines and their effect on public order.<sup>43</sup> The Act was hardly aimed in terms or otherwise at the Communist Party, and in fact its first application was directed against bitter enemies of that Party. While Congress has passed many statutes against the communist threat, it has not declared that membership in the Communist Party is a crime. The decision to try the leaders of the Communist Party under the Smith Act was not a legislative judgment but an executive one. For the period from June 22, 1941, when Germany invaded Russia, until some time after the end of the war, presumably neither the legislative nor the executive branches of the Government would have invoked the statute against the Communist Party. The development of world political pressures and the change in the policies of the Communist Party within the United States, however, led the executive branch of the Government to

---

<sup>42</sup> *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>43</sup> See CHAFEE, *FREE SPEECH IN THE UNITED STATES* 439-46, 462-84 (1941).

proceed against it under the Act, although other statutes could have been chosen as more direct and appropriate bases for the prosecution.

In terms of Mr. Richardson's analysis, the Court's constitutional task should have led it to consider evidence on the probability and gravity of the evil sought to be suppressed and on the "necessity" of restricting speech in order to prevent it. In this case, the Court's examination could hardly have been aided by a presumption in favor of a legislative determination of the danger, and of the necessity for the application of the legislation to the defendants, for no such legislative determinations had been made.

Judge Learned Hand, for the court of appeals, fell back on judicial notice for evidence that restriction of speech was necessary to protect the state against the communist conspiracy. Reviewing the state of world politics in 1948, when the indictment was presented, he found sufficient evidence in the reality of Soviet strength and of Soviet plans for direct and indirect aggression to support the conclusion that the activities of the defendants in organizing and directing the American Communist Party were a "present danger" to the security of the United States. The conspirators did not plan to strike until war broke out or until other circumstances presented them with a favorable opportunity. But in 1948 Soviet-American relations were such that war could break out at any moment. "We shall be silly dupes," Judge Hand wrote,

if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe. Nothing short of a revived doctrine of *laissez-faire*, which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression. We hold that it is a danger "clear and present."<sup>44</sup>

The Chief Justice's opinion, formally accepting the "clear and present danger" test as the starting point of analysis, similarly treated the case as if it were a prosecution for conspiracy to overthrow the Government by force. Since the indictment charged only the organized teaching and advocacy of revolutionary doctrine, however, the court was able to avoid the historic distinctions between criminal "preparations" and criminal "attempts" which might have complicated a direct prosecution for revolutionary

---

<sup>44</sup> United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950).

action. By assuming, on the basis of judicial notice, that the defendants were guilty of a crime for which they had been neither indicted nor convicted, the Court could find that the crime charged was within the limits of what could be done constitutionally. Both the opinion of Judge Hand and that of the Chief Justice are at pains to indicate that the defendants' advocacy of revolution could be made criminal only because the defendants were part and parcel "of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis. . . . It is the existence of the conspiracy which creates the danger.

. . . If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."<sup>45</sup> Yet this crucial element, which seemed to make the "teaching and advocacy" of revolution a crime, was established by the uncontrolled process of judicial notice.

Mr. Justice Jackson, in a typical statement of the fainéant judicial philosophy he sometimes espouses, refused to put judgment on so slender a foundation. A serious application of a "clear and present danger" test, he wrote, would require the courts to assess imponderables "which baffle the best informed foreign offices and our most experienced politicians. . . . The judicial process simply is not adequate to a trial of such far-flung issues."<sup>46</sup> He therefore rested his vote for affirmance on the broader ground that the organized teaching and advocacy of revolutionary doctrine, without particular qualification as to surrounding circumstance, could be made criminal in the name of defending the state.

Mr. Justice Frankfurter, who also concurred in the result, did not go far into the central doctrinal and procedural problems of the case. His opinion passes off the issue with a quip. "Mr. Justice Douglas," he wrote, "quite properly points out that the conspiracy before us is not a conspiracy to overthrow the Government. But it would be equally wrong to treat it as a seminar in political theory."<sup>47</sup> It would be absurd, he said — despite his formal acceptance of the "clear and present danger" test — "To make the validity of legislation depend on judicial reading of events still in the womb of time . . . ." <sup>48</sup> He would not say that a legislature

---

<sup>45</sup> *Dennis v. United States*, 341 U.S. 494, 510-11 (1951).

<sup>46</sup> *Id.* at 570.

<sup>47</sup> *Id.* at 546.

<sup>48</sup> *Id.* at 551.

was beyond the limits of its constitutional powers in concluding that under present political circumstances the "recruitment of additional members for the Party would create a substantial danger to national security."<sup>49</sup> While there was no reliable evidence in the record tracing acts of sabotage or espionage directly to the defendants, a report of the Canadian Royal Commission on the role of the communist movement in Canadian espionage, and the experience of Klaus Fuchs — who, the Justice thought, had been led into the service of the Soviet Union through communist indoctrination — were invoked to help support and justify what the Justice treated throughout his opinion as the judgment of Congress that the statute should apply to the Communist Party:

Congress was not barred by the Constitution from believing that indifference to such experience would be an exercise not of freedom but of irresponsibility . . . Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech . . . Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?<sup>50</sup>

For a variety of reasons drawn from his philosophy of judicial review, he shrinks from such a conclusion.

The transmutation of the "clear and present danger test" in these opinions is quite remarkable. It begins as the principle that since the First Amendment cannot be considered to mean what it says, the Court will decide for itself whether attempted restrictions on freedom of speech are justified by evidence of an imminent and serious danger arising from the speech. Judge Learned Hand finds a present danger of a future coup d'état in the activities of defendants, viewed against the background of world and domestic politics in 1948. The Chief Justice's opinion says that the danger need not be one that the Government will be overthrown; it is enough that an attempt may some day be made. Nor must the danger be "present" in any immediate sense. The injury to the state sought to be prevented by the Act, he indicates, is both the physical and the political damage which may be occasioned by extremist parties and their more extreme activities. Since the "clear and present danger" test in this form permits the Court to

---

<sup>49</sup> *Id.* at 547.

<sup>50</sup> *Id.* at 548-51.

consider not only present but also possible future injuries, the problem of anticipating the future becomes inscrutable; if not insoluble, and the Court says it can find no ground for overruling the supposed judgment of Congress that the teaching and advocacy of revolution is illegal, at least in the case of the twelve leaders of the Communist Party.

To all this Justice Douglas' answer was a powerful one. The record, he urges, contains no evidence on the key factual issue of the case: whether the defendants' conspiracy to teach and advocate the communist theory of revolution constituted a clear and present danger to the nation. While the purposes and capabilities of the Soviet Union in world politics would be relevant evidence on the clear and present danger of the defendants' advocacy of revolution within the United States, they hardly exhaust the issue. The Court could not say that the defendants' conspiracy to teach revolution in the United States "is outlawed because Soviet Russia and her Red Army are a threat to world peace."<sup>51</sup> If it were proper to approach the question on the basis of judicial notice, Mr. Justice Douglas observed, he would conclude that the Communist Party was impotent and discredited as a political force within the United States, that it had been exposed and destroyed as an effective political faction by free speech and vigorous counteraction. "Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful."<sup>52</sup> The weakness of the Communist Party as a political entity is not the end of the matter, however. In determining whether their advocacy of revolution would endanger the Republic, he continued, it would be necessary to examine the extent to which they had infiltrated key areas of Government and of economic life.

But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of

---

<sup>51</sup> *Id.* at 588.

<sup>52</sup> *Id.* at 588-89.

the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the F.B.I.; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.

This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech — the glory of our system of government — should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.<sup>53</sup>

Mr. Richardson is concerned with this phase of the *Dennis* case. He disagrees with Justice Frankfurter, who, he says, supports the supposed legislative judgment by taking judicial notice of facts which the legislature could not have considered when the statute was passed. He argues that

To assure that the facts of which it proposes to take notice are properly subject to notice, the court should give the defendant an opportunity to controvert these facts, although reserving to itself the final determination as to whether they are genuinely disputable. Disregard of the disputed facts may still leave an undisputed residue adequate to fill in the background of inherent probability. If not, there would remain no alternative but to take testimony on the issue.<sup>54</sup>

And he is equally troubled by the failure of the Court explicitly to exercise its own judgment as to the rationality of the Government's view that the defendants' organized advocacy of revolution constituted a danger to the state:

The legislative judgment expressed in the Smith Act could not, any more than that expressed in the New York statute involved in the *Gitlow* case, foreclose the question whether the circumstances justified the sup-

---

<sup>53</sup> *Id.* at 589-90.

<sup>54</sup> Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 30-31 (1951).

pression of any sort of "discourse" teaching or advocating violent overthrow of organized government, no matter how "redundant" and no matter how limited its circulation. Supplementing the legislative judgment in the *Dennis* case, however, in contrast with the *Gitlow* case, were the jury's findings that the conspiracy to teach and advocate embraced a systematic course of indoctrination, not a single discourse, and was to be carried out by a rigidly disciplined organization "as speedily as circumstances would permit." Both the legislative judgment and the jury's findings, moreover, were strengthened in the *Dennis* case by facts subject to judicial notice which bore on the already existing probability of the apprehended evils, while in the *Gitlow* case such facts were insignificant. But the inexplicitness of the *Dennis* affirming opinions, their differences in emphasis, and the very fact that none was able to secure a majority leaves uncertain the weight to be given in future cases to legislative judgments that a certain type of utterance contributes to the probability of an apprehended evil.<sup>55</sup>

The *Dennis* case is by all odds the most important and far-reaching of the recent civil rights cases. In disposing of it, the Supreme Court had several alternatives. It could have reversed for a further trial on the factual justification for a conclusion that the defendants' organized advocacy of revolution gave rise to a present danger of anticipated future action to achieve that end. Such a decision would have put the Court's performance of its own function, in reviewing the constitutionality of a statute outlawing "the teaching and advocacy" of revolutionary ideas, on a more orderly and rational basis. Or it could have held that the statute, as applied to the defendants, violated the First Amendment. A result on this ground would have forced the executive to prosecute the communists on the direct charge that the Communist Party is not a political party, but a conspiracy to subvert the state. No one doubts the constitutionality of statutes making it a crime to attempt the overthrow of the Government, or to conspire to that end.<sup>56</sup> In such a prosecution, the propaganda arms of the Communist Party would be considered as an integral part of a central conspiratorial plan before the Court in its entirety.

As the case was disposed of, however, we are left with a series of paradoxes. Insofar as the Justices' opinions can be brought into a single focus, they declare that the systematic teaching and advocacy of revolution can be made a crime, at least (and per-

---

<sup>55</sup> *Id.* at 35.

<sup>56</sup> See Nathanson, *The Communist Trial and the Clear-and-Present Danger Test*, 63 HARV. L. REV. 1167 (1950).

haps only) if the organization for spreading such ideas is an aspect of a serious and potentially important attempt to attack the Government by other means. The case is confusing, however, because the qualifications of factual circumstance considered decisive of constitutionality were established entirely on the basis of judicial notice. The Court purports to accept the "clear and present danger" test of the Holmes-Brandeis dissents as prevailing law. That approach to the constitutional problem in civil rights cases is designed to give the courts considerable discretion in passing on the constitutionality of legislative or executive action. Yet the Court applies the Holmes-Brandeis formula in a way which makes it extremely difficult to conceive of a successful case against the reasonableness of the Government's decision to prosecute.

In the end, the *Dennis* case is strongly colored — perhaps determined — by the view that cloistered and appointed Justices should not pit their judgment of the Constitution against that of the elected representatives of the people, who have to deal with these difficult problems at first hand. Some of the Justices, indeed, come perilously close to denying that they have any duty to review the constitutional judgment of the legislature and the executive at all. Much of the reasoning in the various opinions, like that in other recent cases, draws strength from the premise that the power of judicial review is somehow tainted, and of undemocratic character, and that the courts should not interfere with the attempts of Congress and the President to deal with wars and emergencies.

## V

When the Supreme Court falters, as I believe it has in this and some other recent civil rights cases, we need not conclude that the Constitution is dead. Mr. Justice Brandeis used to say that no case is ever finally decided until it is rightly decided. The example of the Holmes and Brandeis dissents, and their ultimate acceptance, should encourage the present dissenters on the Court to persevere. Even though all their arguments are not of equal weight, their effort and example are a force which can in time help to restore sounder views. For civil liberties in the United States are in a state of grave crisis, and I venture to hope that the recent decisions of the Supreme Court will not prove to be its lasting position. The problem of security is concededly most serious, and the state has every right to protect itself against attack. But

the Court has the correlative duty to inquire whether repressive acts are reasonably adapted to the end of security. Do we really protect the state against spies and saboteurs by making professors of music take oaths, and by combing through the lives of all Government employees for scattered episodes of sin, enthusiasm, and folly? Is it proper to attack the Communist Party for "teaching and advocating" subversion of the state — a doctrine which could have jailed Calhoun and the participants in the Hartford Convention, and perhaps Thoreau as well — when the Party could have been prosecuted for what it was and undoubtedly is, a conspiracy to overthrow the Government by force? Can the real and pressing danger of the Communist Fifth Column be met by police measures, as some qualified students of the problem urge,<sup>57</sup> or by a general movement to silence heterodoxy, create doubts in the relation of man to man, make universities hesitate to appoint young firebrands, and lead honest men to wonder whether they should continue to visit their friends?

---

<sup>57</sup> PHILBRICK, *I LED THREE LIVES* 299-300 (1952).