Supreme Court and the People's Will

Eugene V. Rostow

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Towards the end of the war, the German authorities ordered the Vichy Government to build an aircraft factory in a cave near a small and remote French village. The French engineers assigned to the job were as painstaking, as meticulous — and as slow — as they dared be. They constructed elaborate ventilating systems, extensive dining rooms, and other arrangements for the welfare and safety of the working force. At length, when they could delay no longer, they began to make aircraft. Each stage of the project was of course known to the local leaders of the Resistance and reported fully by them to Allied Headquarters in London. As the first machines were at last loaded on trucks and started towards their destinations, they were ambushed in a forest and destroyed. In reprisal, the German army commander ordered fifty villagers picked by lot and had them shot.

A few weeks later, in midsummer 1944, as the tide of war turned, the French underground forces of the neighborhood captured the German garrison. Strong voices urged that at least fifty German soldiers be executed in turn. There were plausible arguments of international law for such a course: that the factory and its work violated the Armistice agreement, and that the shooting of the villagers breached the laws of war. But one of the leaders of the group was a retired colonel of the regular army. After a long night’s debate, his view prevailed. The men of the Maquis, he said, were soldiers of France. And the French Army did not kill its prisoners.

This episode illustrates much of what I propose to say today. It is an instance in which the authority of the law, in some recognizable sense, prevailed over the passionate will of an

* Professor of Law and Dean of the Law School, Yale University.
aroused majority. Democracy was revealed as a process more complex than the taking of a single vote. And the law was vindicated, as it must be finally vindicated in a society of consent, not merely as a command — for here the colonel had no power to command — but as an appeal to what every man knew, at the decisive level of his own consciousness, was his own culture's vision of the right.

In this situation, the normal social machinery of order had almost completely broken down. It was being re-established as quickly as the pride and habits of a people long accustomed to government could put it together. But on that heated summer night in the village square, which had witnessed so much over the centuries, under the statue of some marshal or poet or minister of France, the angry men of the Maquis yielded unwillingly to their own ideal of law. The spokesman for the law was a man whose opinion had some symbolic meaning for his audience by reason of his status. But a retired colonel in his hunting clothes hardly represented either the dignity of a court or the coercive power of the state.

The subject matter of this conference is the function of the Supreme Court of the United States in our system of government. We have come together because we are experiencing another in the long cycle of political attacks on the integrity of the Court — the most serious since the Court-packing proposals of 1937. We are here because we believe that these attacks represent a challenge to the very possibility of survival of our constitutional system as an institution for assuring the free government of free men.

We have heard Mr. McGowan's paper reviewing earlier occasions when disagreement with the Court's constitutional views stirred up significant ripples of political protest. And we have listened to Professor Leflar's essay, in which he squarely faced the fact that in deciding constitutional cases the judges must not only interpret the law and find the law, but make law too, as surely as they make law when they decide cases of tort, contract, or corporations. In a passage often quoted, Holmes once said, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." And one recalls Jeremiah Smith's pungent remark, after he left the Supreme Court of New Hampshire for the Harvard Law faculty: "Do judges make law?

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1 Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion).
Of course they do. Made some myself.” Professor Leflar has shown that there is no tangible meaning in the charge often advanced that the Supreme Court is not interpreting the Constitution but acting as a super-legislature when it changes its views and reverses old cases. The Court’s opinions may be good or bad as constitutional law — good or bad, that is to say, as projections and applications of what the Court conceives to be the purposes and ends of the Constitution. But no valid distinction of kind can be drawn between the interpretive and the creative aspects of the judicial process in constitutional law or in any other branch of the law. This is not to say that the judges arrogate to themselves functions of the Congress or of the people in their creative reading of the Constitution. Such action on their part is an indistinguishable and inevitable part of their work as judges.

The topic assigned to me is the propriety of this activity in a community which regards itself as a democracy. How can a society of majority rule condone the exercise of such far-reaching power by judges who are appointed for life? Is it true, as many have said, that the role of the Supreme Court in construing the Constitution makes it an oligarchic or aristocratic excrescence on our Constitution, to be abolished if possible, or at the least restricted to the narrowest possible jurisdiction?

This issue has been a matter of debate throughout our national history, and it is being vehemently debated today. Anxiety on this score has colored the temper in which some of our best judges have approached their work. Many have found in this issue a paradox impossible to reconcile with their faith as democrats.

I do not propose here to review the earlier stages of the controversy, nor to take an apologetic or a defensive position about the Court’s power — indeed, its duty — to declare statutes or acts of the executive unconstitutional, where such a declaration is necessary to the decision of a case properly before it. Such a power appears to me to be implicit, at the very least, in the Constitution itself. Indeed, I am content to read the supremacy clause as making the power explicit, both with regard to state statutes, and to acts of Congress, which are declared to be the supreme law of the land only when made “in Pursuance” of the

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2 I shall try, insofar as possible, not to cover the ground treated in my Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952).
Constitution. This feature of the Court's authority was accepted by many contemporaries, and asserted in the Federalist papers. It has been exercised by the Court from the beginning, as comparable power had been exercised by colonial courts. And it stands now, whatever the Founding Fathers may in fact have meant, as an integral feature of the living constitution, long since established as a working part of the democratic political life of the nation. On this matter, following Holmes' famous quip, a page of history is worth a great deal of logic.

So notable a doubter as Judge Learned Hand has recently come around to the view that the Court's power is legitimate, even in cases under the Bill of Rights, although in his opinion the power exists only by judicial fiat. The judges properly engrafted the practice of judicial review upon the Constitution, he concludes, by applying the maxim that a document must be construed to assure the accomplishment of its clear purposes. The denial of the power, he contends, would have denied the Constitutional experiment any chance of success. Without an arbiter to construe the Constitution, the system would have collapsed into endless conflicts over the boundaries of authority, otherwise incapable of resolution. And no branch of government other than the Court, Judge Hand says, could have taken on the task with anything like an equal expectation of preventing failure.

There is no substance in the supposed paradox of having appointed judges interpret the written constitution of a democratic society.

Popular sovereignty is a more subtle idea than the phrase "majority rule" sometimes implies.

The Constitution of the United States is the juridical act of the American people, not that of their Congress. It was, and is, a commitment to what the Founders called the republican form of government. Manhood suffrage was not universal in 1789 and equal manhood suffrage is not universal today. Equal manhood suffrage is, however, the ideal of the present stage of our
constitutional theory as the ultimate source of sovereign authority in the American political system: the true base of what we should now identify as the republican form of government.

But universal manhood suffrage does not imply, in theory or in fact, that policy can properly be determined in a democracy only through universal popular elections, or that universal popular elections have or should have the capacity to make any and all decisions of democratic government without limits or delays of any kind. Representative government is, after all, a legitimate form of democracy, through which the people delegate to their elected representatives in legislatures, or in executive offices, some but not necessarily all of their powers, for a period of years. Neither the town meeting nor the Swiss referendum is an indispensable feature of democratic decision making. The object of the men who established the American Constitution, like the object of democratic theorists in all countries, and at all times, was not omniscient popular government, but the freedom of man as an individual being within a free society whose policies are based ultimately upon his consenting will. The Constitution did not give Congress the full powers of the British Parliament. If that had been the Founders’ idea, no written constitution would have been necessary. On the contrary, the Constitution provided for a federal system of divided and delegated powers. Not only the courts, but the desirable friction of contending authority — the President versus the Congress, the states versus the nation — were relied upon to help preserve an equilibrium and thus to enforce the grand design of the Constitution.

For the highest aim of our Constitution is that it seeks to protect the freedom and dignity of man by imposing severe and enforceable limitations upon the freedom of the State. Americans thought then, and their wisdom is confirmed by all our subsequent experience, that man can be free, that political processes can in truth be democratic only when, and only because, the state is not free.

Every plan for democratic government, and every democratic constitution, contains vital elements beyond its ultimate derivation from the will of a majority. The Constitution provides a significant self-limitation upon the amendatory powers of the people — that no constitutional amendment can deny a state its equal suffrage in the Senate without its consent. Every

5 U.S. Const. art. V.
democracy divides issues of policy into several categories, to be settled by different means. Some decisions are made, without violating the principle of ultimate popular sovereignty, by appointed officials to whom important powers are delegated; e.g., to the boards which license doctors and lawyers, innkeepers and chiropodists; to the Federal Reserve Board or the Tariff Commission, the armed forces and the Department of Agriculture. The President has wide authority in the conduct of foreign relations. Other classes of decisions in all systems of democracy are remitted to legislative or judicial bodies, or are reserved for decision to regular or special elections, or to constituent assemblies. Still others, in most democratic societies, are set apart and protected against the risk of hasty decision — issues of policy which are regarded as essential in assuring the division of functions among the branches of government, and the democratic character, over the long-run, of the decision-making process itself. Even a classic Vermont town meeting knows limits on its jurisdiction. The town meeting can fix the tax rate, embark on a school lunch program, or decide to buy a fire engine or a snow plow. But it cannot abolish the town meeting, nor delegate its powers to the selectmen. It cannot deny a resident citizen his right to vote, nor confiscate the land of a Democrat, nor impose a sentence of exile, nor try a law suit over boundaries or the habits of cattle. Any change in the basic procedures through which policy is made requires a longer and more carefully considered series of votes.

This pattern for decision-making is characteristic of all democratic communities, whatever devices they may use for accomplishing the goal. And it is a pattern entirely consistent with their democratic character. Laws fixing different procedures for different kinds of elections do not deny the people their ultimate power. The reason for practices of this kind is a fundamental one. For democracy is more, much more, than a commitment to popular sovereignty. It is also, and equally, a commitment to popular sovereignty under law. Sometimes the precautionary devices to assure the legality of particular classes of decisions by particular elections are declared in a written constitution. Sometimes they are enforced only by the pattern of custom, the weight of tradition, or the influence and the residual powers of institutions of special prestige, like the Crown in Great Britain and Sweden, or the Presidency in France, Germany and other countries.
Under our practice, limitations of this character determine the contours of the Constitution.

We often fall back, as Mr. Justice Frankfurter has recently and eloquently done, upon Chief Justice Marshall's pregnant dictum: "it is a constitution we are expounding." Marshall's comment is usually read, and properly read, to stress the need for flexibility in constitutional interpretation. In this perspective, emphasis is put on the fact that the Constitution provides a plan for government designed to last for centuries. Such an arrangement must bend, we are reminded, if it is not to break. It must give all the elected branches of government wide ranging areas of discretion so that society may, by its own democratic decisions, adapt itself to circumstances and stresses vastly different from those of the isolated agricultural communities which put down their roots along the Atlantic coast during the seventeenth and eighteenth centuries.

All this is true enough. But Chief Justice Marshall's dictum cuts the other way with equal force. It is indeed a constitution we are expounding, a document to assure continuity as well as flexibility, boundaries of power as well as freedom of choice. Congress and the President must have enough authority under the Constitution to govern effectively, and they must be able to exercise their own political judgment in selecting among the alternative means available for dealing with the emergent problems of each new age. But it has never been supposed that elected officials had untrammeled discretion. The Constitution sets limits on their ambit of choice, and some of its limits can be enforced by the Courts. For until the people change it, the Constitution is a document intended to assure them that their representatives function within the borders of their offices, and do not roam at will among the pastures of power; that certain essential values in our public life be preserved, not ignored; and, in government's choice among the instruments of action, that those be selected which advance the cause of human freedom and those eschewed which threaten it. The idea was expressed by Bryce in these terms:

The Supreme Court is the living voice of the Constitution — that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their repre-

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sentatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a Court set high above the assaults of faction.7

We are not so naive as to suppose that the ideas of the eighteenth century survive unchanged, and by their own force fix both the limits of governmental power and the definition of men's political and social rights, privileges and immunities in relation to government. We have all long since agreed that judges are men, not automatons — if indeed, there ever was much doubt about it. Most judges are men who have had a lifetime of experience, or of study, in the world of the constitutional process. They come to their posts from the Senate or the courts, from the bar, or politics, or the law schools, with a considerable exposure to the role of the Constitution as a guiding force in American public life. Inevitably they bring different views to the Court — not differing personal and idiosyncratic views of what the Constitution might have been, but differing views, as Constitutional lawyers, as to what the Constitution is, and what it ought to become, in terms of its own animating premises.

The nub of the present conflict over the Supreme Court concerns certain parts of the Constitution intended to have continuity — its definition of the ends to be sought by government through flexibly adapted means. There are two broad categories of issues in this realm: those of federalism and the division of powers on the one hand, and those dealing with the civil and political rights of persons on the other. While recent years have produced important cases dealing with the first of these two classes of problems, the stress in the current debate is certainly on the second — on the meaning, that is to say, which the Court has given to the constitutional guarantees of due process and of the equal protection of the laws in the relationships between the individual and the state. During the balance of this presentation, my attention will mainly be directed to such problems of civil rights under the Constitution.

It has occasionally been suggested that the reason for the extraordinarily rich and significant development of constitutional doctrine recently in the civil rights area is that wilful judges have been appointed to the Court, bent on legislating their personal opinions into the corpus of the law. The charge

7 The American Commonwealth 273 (1913). I am indebted to Dean Joseph O'Meara, of the Notre Dame Law School, for recalling this passage to my attention.
is unfair, and untrue. By and large the Supreme Court has not
gone past the frontier of its power, nor taken on issues beyond
its duty to decide, in its recent cycle of constitutional cases.

Why then, have there been so many civil rights cases recently,
and why have they been so strongly libertarian?¹

Several basic factors lie behind the current flood of civil rights
litigation. Along with the element of chance in the process of
appointment to the bench, these factors also account for the
character and quality of the trend of doctrine.

The first is that since the thirties, and more acutely since
World War II, the United States has been seeking to deal with
novel and difficult problems of totalitarian aggression. Fifth
column activity was an experience which stimulated anxiety.
The massive and uncompromising threat of communism is a
reality beyond debate. It has caused, and will rightly continue to
cause, grave anxiety as we seek to protect our national security
against the challenging growth of communism as a force in
world politics. Some of the numerous means selected to deal
with problems of internal security have raised serious questions
of constitutional right. It was inevitable, and proper, that these
regulations, directly affecting the status and reputation of thou-
sands of citizens, should be tested in the courts, and ultimately
be presented for adjudication to the Supreme Court. There is
nothing abnormal in this sequence, any more than it should
have been considered abnormal for the Court after the Civil
War to have faced the problems of Ex parte Milligan⁸ and Ex
parte Garland.⁹ In addition, a variety of problems affecting the
personal rights of citizens have naturally arisen out of the con-
duct of the War — like that of the Korematsu case¹⁰ — and the
presence abroad of American troops and their families. It
was to be expected that many cases concerning the relation of
military and civil authority should emerge in a period when we
have more men under arms than ever before in peacetime.

The second general reason for the recent concentration of
cases under the Bill of Rights on the docket of the Court is the
process of social development in the United States, and especially
the changing status of the Negro. The circumstances of world
politics have given an important special accent to that develop-
ment, and have forcibly reminded us that we have been remiss

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⁸ 71 U.S. (4 Wall.) 2 (1866).
⁹ 71 U.S. (4 Wall.) 333 (1867).
in making good the promise of equality for the Negro which we made in the thirteenth, fourteenth and fifteenth amendments to the Constitution. But this cycle of change would have proceeded of its own momentum, even without the stimulus of Soviet propaganda and the emergence all over the world of new and proud nations composed largely of colored peoples. The advance of the American Negro, since the end of slavery less than one hundred years ago, is a story of progress as well as of passivity, of blind resistance, but of inspiring efforts, too, carried on against the pressure of real and deep-seated psychological difficulty. Now the pace of development has quickened. More and more Negroes are receiving educational opportunities, and a larger proportion of the Negro group is being educated. In steadily increasing numbers, Negroes are succeeding in the occupations and professions of the middle class. They are gaining, and keeping, better employment opportunities throughout the nation, helped by periodic shortages of labor, the influence of legislation and the spread of principle. The experience of the War posed the moral dilemma of the Negro’s position with a clarity which has impressed many anew. And Negroes have become a political force in many elections. Changes of this order inevitably carry with them an intensification of the Negro’s rightful demand that he be treated as a citizen of equal dignity in the public life of the United States. There is no brooking, and no blinking, the reality of this tide.

The third general reason for the current importance of civil rights problems in our constitutional law has been the growth of the law itself, and the character of public opinion, public fears and public attitudes at this point in American history. The simple sentences of the Bill of Rights take on new meaning as they are used, case after case, court after court, Congress after Congress, in what is after all the biological process of life itself. These are not dead words on a piece of paper, but the seeds of living plants. And at this moment, the soil strongly favors vigorous growth for the tree of liberty.

The quickened zeal of the American people for the protection of their civil rights is hardly a surprising response to the circumstances of life in this century. Two brutal wars have had their impact. In many areas of the world, fascist and communist tyrannies of great power and influence have ruthlessly destroyed the rights of man, and have degraded and humiliated man himself. The development of huge organizations of business, labor and government has been accelerated by the circumstances of the
Cold War, which requires apparently perpetual semi-mobilization. The fear that man as an individual will be submerged, coordinated, organized and brain-washed into a social robot has been added to the other fears of the time. A mass egalitarian culture carries its own threat, at best. Against this background, it is healthy and natural that our powerful and continuous libertarian tradition has been so strongly reasserted. The spirit of the country has been not only to resist the conformity of a garrison society, but to counter-attack where possible. In that process of thesis and antithesis, the Supreme Court has played a leading part. The great opinions of Chief Justice Hughes, of Justice Sutherland in the *Scottsboro* case, of Justices Brandeis, Holmes, Stone and Cardozo, are yielding now their intended fruit. In our common law approach to the problem of constitutional construction, one case leads to another as lawyers see new vistas opening, and develop new possibilities for their clients within the ambit of evolving doctrine. And the Court has thus been an educational force, along with many others, in helping to mold a state of opinion far more sensitive to civil liberties than that which prevailed in the United States thirty or fifty years ago.

Timid men see danger in this development. They fear that by striking down the decisions of powerful legislators, the courts will weaken their authority and expose the judicial institution itself to attacks which may sweep it away. From time to time, indeed, such attacks have developed, and one is now being mounted. So far, happily, all such threats to the power of the Court have been defeated, on sober second thought, by the historic confidence of the American people in the Supreme Court as a detached agency of the Constitution itself, one remove at least from what Judge Learned Hand recently called "the pressure of public hysteria, public panic and public greed."12

The question remains, however, whether the Court, in its own wisdom, as one among the instruments of democratic American government, should continue on its present course or retreat prudently from the field, leaving the constitutional guarantees of personal and political freedom largely to the discretion of legislatures and presidents.

The beloved and respected Judge Learned Hand has recently expressed himself again to this general effect in his Holmes

Lectures at the Harvard Law School. These lectures modify in important ways the views he had previously advanced on the subject. A few years ago, he seemed to be urging that the broad, general commandments of the Bill of Rights should not be enforced at all by the courts, but should be left as moral admonitions to the conscience of legislators and other public officials. In his recent book, he takes a long step forward. In the realm of the Bill of Rights, as in other realms, he says, the courts should annul statutes or other acts of government which are

... outside the grant of power to the grantee, and should not include a review of how the power has been exercised. This distinction in the case of legislation demands an analysis of its component factors. These are an estimate of the relevant existing facts and a forecast of the changes that the proposed measure will bring about. In addition it involves an appraisal of the values that the change will produce, as to which there are no postulates specific enough to serve as guides on concrete occasions. In the end all that can be asked on review by a court is that the appraisals and the choice shall be impartial. The statute may be far from the best solution of the conflicts with which it deals; but if it is the result of an honest effort to embody that compromise or adjustment that will secure the widest acceptance and most avoid resentment, it is “Due Process of Law” and conforms to the First Amendment. In theory any statute is always open to challenge upon the ground that it was not in truth the result of an impartial effort, but from the outset it was seen that any such inquiry was almost always practically impossible, and moreover it would be to the last degree "political." I am at a loss to understand the Judge's argument. Any breach of his rule, he says, moves the judges across the subtle boundary between the judicial and the legislative function. By seeking to apply the vague and general ideas of the Bill of Rights to concrete situations, and especially by taking one step beyond what he seems to regard as the easy issue of ultra vires, the Court would in effect exercise the suspensive veto of the House


14 The Bill of Rights 66-67 (1958). My colleague Alexander M. Bickel does not read The Bill of Rights as modifying in any substantial sense the views which Judge Learned Hand expressed in his earlier essay, referred to in note 12. I freely admit that there is difficulty in construing the judge's eloquent and elegant, but somewhat impressionistic, non-judicial prose. It is, as always, a delight to read, but hard to parse. Mr. Bickel may well be right, that what Judge Hand seems to concede on certain pages, he takes away on others. But the note of concession is there. See especially, pp. 30, 33, 56, 64.
of Lords. In the face of such conduct, he says, we would lose
the bracing privilege of self-government, and submit to the
overlordship of judges as a bevy of Platonic Guardians, a state
of affairs he finds irksome and repugnant to his staunch demo-
cratic principles.15

Judge Hand would be the first to recognize that in applying a
statute or a clause of the Constitution the judges must often
make the law while they interpret it. Yet the heart of his argu-
ment seems to rest on a deceptively simple distinction between
the judicial and the legislative functions. He defines “A” as not
being “B.” Legislators make certain decisions after weighing
and balancing a series of conflicting interests, including their
own interpretation of the constitutional limitations on their
authority. The judicial function, by his definition, should be non-
legislative in character. The crucial leap in his syllogism is the
passage from this proposition to the thought that the judges
must rigidly exclude from their minds consideration of the
factors which influenced the legislative decision. The only ex-
ception he admits is that the courts may review the legislative
decision on the constitutional question whether the legislature
had the power to act at all in a given realm, and may go further,
along a path whose implications I for one do not pretend to
understand, and enquire whether the legislative decision was
honest and impartial.

As Professor Leflar has shown, the distinction does not corre-
respond to the realities of either the judicial or the legislative pro-
cess. The Court’s function is recognizably different from that of
the legislature or of the executive, even when it must weigh the
same considerations in the scales. The forum is different. The
time is different, so that the pressure of contending interests
appears in a different perspective. And the constitutional issues
are not peripheral, as often must be the case in legislative or
executive decisions, but central to the problem before the Court.
The judges may be foolhardy or prudent, in error or in doubt,
grasping for power or circumspect in the exercise of their duty.
Yet the Court, as a Court, must consider many of the problems
which had previously been evaluated by the institutions of action.
Judge Hand’s attempt to draw a line which would neatly exclude
from the Court’s view all the issues passed upon by the legis-
lature or the executive fails, as all such attempts have failed in
the past. Even in determining whether a given set of circum-

15 Id. at 67-73.
stances sufficiently affects the national economy to justify the invocation of the commerce power, — a function which Judge Hand concedes is proper — the judges cannot escape reviewing some aspects of the substance of Congress’ prior decision. They may call that decision “arbitrary,” or the connection “insubstantial,” or go further, according to Judge Hand, and find it not “impartial.” These various verbal formulae are all unconvincing in identifying what the courts must in fact do in exercising the limited, Handian power of judicial review. That function cannot be distinguished, as a function, from what the judges do in interpreting statutes, some of which are as general as constitutional prescriptions, or in deciding common law cases in the light of what they conceive to be the ultimate social purposes of the received tradition.

The judges do not, of course, have complete freedom to make the Constitution what they say it is, despite the breadth of its language. But they cannot escape this part of their judicial function—their work as lawmakers in applying the words and history of the Constitution to new situations, often unknown in the eighteenth century, in the interest of preserving and protecting the social values the Constitution was designed to assure. In doing this part of their job, Judge Hand says, they should be concerned only with the existence of the legislative or executive power, not with substituting their judgment for that of the legislature or the executive as to whether the power has been rightly used. This is true, but the distinction is not very useful, however often repeated. The trouble with Judge Hand’s test is that it fails to deal with the problem the judges in fact face, and denounces them instead for various crimes they could not well commit. It is rare, indeed impossible, to catch a judge openly “substituting” his legislative judgment for that of the Congress. His problems are in another realm. Many of them arise as slippery verbal issues of qualification or classification. In terms of the record, have the defendants practised coercion or persuasion? Did Congress punish for a crime, or merely regulate foreign affairs? Collisions between the exercise of two conceded powers, or a clash between two clauses of the Constitution which must be reconciled in a given situation, raise most of the remaining difficulty.

Let me propose an example, in the interest of testing Judge Hand’s thesis by the classic maneuver of the case method. The Securities Act of 1933 makes it unlawful for those who issue, underwrite, or deal in securities to use any means of commu-
cipation in interstate commerce, or of the mails, to sell certain kinds of securities unless a registration statement meeting the requirements of the Act is in effect, and unless they duly deliver a formal and approved prospectus to their potential customers.\(^\text{16}\) Comparable restrictions on freedom of speech can be found in the Labor Management Relations Act,\(^\text{17}\) dealing with what employers can say to their employees in the context of a dispute about union recognition, and in certain other statutes dealing with the distribution of securities, proxy fights, and reorganizations. Congress has power to regulate interstate commerce, a rubric which includes a large part of securities transactions and labor relations. And it is under the flat injunction of the first amendment: Congress shall make no law abridging the freedom of speech. Extended investigations, committee reports and legislative debates preceded the passage both of the Securities Act and of the basic federal labor legislation. Presumably Congress weighed the rival claims of freedom and of order in these realms, and took into account the prohibition of the first amendment.

Suppose the issue came before the Supreme Court. The Court is bound by its history to enforce the first amendment. Judge Hand says that the case for wide judicial review is strongest where freedom of speech is threatened, although he disapproves of much, perhaps all, that has been done by the Courts in this area in the name of judicial review.\(^\text{18}\) In such a case, the Court would face an apparent conflict between the policies of the first amendment and that of Congressional action based on the commerce power.

Of what help is Judge Hand's rule in such a case? Can the Court stop by saying that its role is to determine the boundaries of power, and that it will not consider in any way whether the exercise of power is justifiable — whether, that is, the situation calling for legislation was serious, whether the regulation in question was necessary or only incidental, whether the legitimate goal of the legislation could have been achieved without the restriction on freedom of speech, etc.? It could hardly evade the


\(^\text{18}\) Hand, op. cit. supra note 13, at 69.
question by saying that the restraint on freedom of speech is not in fact an "abridgement" of that freedom, or that the first amendment deals only with political speech, not commercial speech. No such loopholes are available. What meaning is there in the charge that the Court would be taking over the "legislative" function and going beyond its role as "judicial" arbiter of the Constitution, if in this case it did what has to be done — to weigh and balance the relative importance of the two considerations equally involved, Congress' judgment that the protection of commerce made it desirable to impose a "prior" restraint on speech, and the apparent absolutism of the first amendment?

Or, alternatively, should we read Judge Hand's approach — although it is not posed in such terms — as implying a special rule for the judicial review of the Bill of Rights, on the ground that in this area the constitutional phrases are so vague that they give the judges no footing sufficiently assured to permit a rational exercise of the judicial method? Is the language of the Bill of Rights so different from that of other clauses in the Constitution, or from the broad language of many statutes, as to make the judicial function here utterly indistinguishable from that of a legislature? The difficulties which the Courts have encountered in construing many, many clauses of the Constitution — those dealing, for example, with treason, with the privileges and immunities of citizenship, the commerce clause, or the taxing powers — cast doubt upon the thought that there is a tenable distinction of kind or of degree to be drawn between the Bill of Rights and the rest of the Constitution on this ground. And of course the weight of history stands heavily against so easy an escape from the burden of duty.

I submit that Judge Hand's formula would not permit the most restrained judge to escape the reality of the Court's task in passing on the constitutionality of the Securities Act, and a thousand comparable cases. Nor, equally, would it help him to see, describe, and understand the problem he does face. To take Marshall's dictum in still another sense, it is a Constitution the Court is expounding, a single document whose various parts must often be interpreted together, like those of other legal instruments, to give effect to the purpose of the Constitution as a whole. I, for one, can see no way on the Court's part to evade the necessity for such an evaluation in a case of this kind, — not as a third chamber, but as the Court charged with responsibility to the people for interpreting their Constitution. The Court may
say that one interest or the other prevails. It may be right or wrong in the eyes of law professors, the Congress or the people. Its decision may be reversed by a later Court, altered by Congress, or overturned by constitutional amendment. But it does not advance clarity or exactness of thought to say that the Court's construction of the Constitution is not an error, but a legislative act.

Mr. Justice Douglas puts the issue faced by the Court in cases of this order more realistically in his recent lectures at Franklin and Marshall College. In his chapter on freedom of expression, for example, he contrasts the opposing claims the Court must weigh in several groups of cases. Even the seeming absolutism of the first amendment occasionally yields, in his survey, despite the weight he gives to the value it represents, in favor of civil order itself. Thus he would permit official restraint of speech where a sensational newspaper threatened the possibility of a fair trial; where picketing was an integral part of a breach of the peace or an antitrust violation; or where an employer's words addressed to his employees sought not merely to persuade but to coerce.19 The results advocated in his survey are not so important, for present purposes, as the method he uses. For he does analyze, as Judge Hand does not, the issues which the Court must determine in situations of this kind: the classification of factual situations with respect to constitutional categories; the delineation of the boundaries of power; and the resolution of conflicts between interests and powers of seemingly equal dignity, in the light of a theory of the Constitution as a whole.

It is on this phase of the problem that Judge Hand's critique of the present Court is most vulnerable. For he would subordinate the Bill of Rights as an effective working part of the constitutional universe. The language of the Bill of Rights, he says, is vague and general. Its application to highly charged situations of conflict is almost always full of political dynamite. Therefore he urges that the Bill be confined to the narrowest possible scope. In the case of freedom of speech, freedom of religion, and the due process clause, review should be limited to one issue: legislation should be upheld if it comes within a granted power, unless the Court is satisfied that the statute or regulation was not the product of an effort "impartially to balance the conflicting

19 The Right of the People, Lecture 1 (1958).
As to the other provisions of the first eight amendments, Judge Hand says,

... except perhaps the last [they] are all addressed to specific occasions and have no such scope as those I have mentioned. Many of them embody political victories of the seventeenth century over the Crown, and carry their own nimbus of precedent. So far as they do, any extension beyond their historical meaning seems to me unwarranted, though that limitation is not always observed. It is true that at times they may present issues not unlike those that arise under the First Amendment and the “Due Process Clause,” and in such cases I cannot see why courts should intervene, unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised.

These prescriptions seem to me to be utterly wrong as maxims of construction for a Constitution designed to help preserve an essential continuity in our legal tradition through long periods of time. They derive, as Judge Hand frankly admits, from his qualified, but still strongly held, conviction that the exercise of the power of judicial review is undemocratic in character, and is therefore to be confined as severely by judicial self-restraint as strong-willed men find it possible to do.

The contrary view seems to me by far the stronger, both in theory, and as an interpretation of our history. The dominance of the popular will through the mechanisms of our system of government is achieved in large part by having the courts enforce limitations on the power of elected officials, in the name of constitutional provisions which only the people can alter by amendment. Those limitations are of peculiar importance where the individual is being protected against the pervasive influence of the modern state. If the individual is to have a considerable scope for personal freedom in the American society of the future, he will have to continue to rely on the courts to see to it that people are treated by the state in ways which conform to constitutional standards of democratic propriety. The weight of one hundred and sixty-nine years of history is evidence that the people do expect the courts to interpret, declare, adapt and apply these constitutional provisions, as one of their main protections against the possibility of abuse by Presidents and legislatures. This history leaves no room, it seems to me, for a thesis like

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20 Hand, op. cit. supra note 12, at 61. See also pp. 37-55. I have never before heard it suggested that the decisions of a political and partisan body like the Congress of the United States could be impeached if a Court concludes that the Congressmen were not “impartial.”

21 Id. at 65-66.
Judge Hand's, that the courts should refuse to exercise their constitutional powers, especially in the area of civil rights.

The Chief Justice's recent answer, somber and simple, perhaps even simplistic, reverts to the position of Hamilton in No. 78 of The Federalist:

[W]e are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.\textsuperscript{22}

Thus I should conclude that there can be no justification for treating the essential canons of the Bill of Rights as more static, more narrowly confined to their eighteenth century meaning, than other clauses of the Constitution — the commerce clause

\textsuperscript{22} Trop v. Dulles, 356 U.S. 86, 103-04 (1958).
or the war power, for example. On the contrary, these aspects of the Constitution are the very soul of the document. As my colleague Charles Black, Jr., has recently said:

There is an even deeper reason for the creative and broad construction of the civil liberties guarantees in the Constitution. Consider the place of these phrases — "equal protection," "freedom of speech," and the rest — in the moral life of our nation. They state our highest aspirations. They are our political reason for being; they are the things we talk about when we would persuade ourselves or others that our country deserves well of history, deserves to be rallied to in its present struggle with a system in which "freedom of speech" is freedom to say what is welcome to authority, and "equal protection" is the equality of the cemetery. Surely such words, standing where they do and serving such a function, are to be construed with the utmost breadth. The proper office of legal acumen is to give them new scope and life, rather than to prune them down to whatever may currently be regarded as harmlessness. Yet, we must not forget that, if they are to be construed broadly, the Court has no choice but to apply them broadly, even against legislation, and if the Court applies them narrowly, its only justification must be that their scope is narrow.23

There is another reason for having the Court approach its problems under the Bill of Rights in the spirit of the common law judges, elaborating certain simple ideas, in response to the pressure of changing fact situations, into the splendor of their full potential. The ideas of the Constitution about the relation of man to the state are positive, as well as negative. There is more to the Constitution than a set of limitations and prohibitions. These rules are not meant merely to confine governmental agencies, but strongly to influence the development of society and of men's ideas.

As the men of the eighteenth century knew well, following Locke and Montesquieu, the law is a continuing force in the process of public life. It has consequences, as well as causes. The changing dispositions of law respond to changing conditions in society itself. But in turn they profoundly influence the character of men, and of their society. The law is not a mere artifact, reflecting the pressure of events. It is and should be a vital element in the movement of society towards its ultimate goals. In this perspective, the constitutional decisions of the Court are more than a factor of continuity in protecting the democratic character of our political arrangements, and in protecting the

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individual against arbitrary action by the state. They are also among the significant forces influencing the evolution of our constitutional ideal itself. Montesquieu defined the ideal of law for each culture as the spirit of its laws — the cultural norm towards which each society aspires in the day-to-day processes of its law making. But, he pointed out, that spirit was not fixed and immutable, even for a given culture. It could and did evolve through time, for better or for worse, towards tyranny or towards the ideal of responsible freedom. And the principal function of law, in his view, is to serve as one of the educational and formative influences of the culture, not merely in bringing the law in action up to the standard of the existing ideal of law, but in perfecting the ideal of law itself. Thus, in construing and enforcing the basic purposes of the Bill of Rights, the Court is a leading participant in the endless striving of our culture to approach the goals of dignity and freedom for the individual whose grandeur dominates our Constitution. To preserve, to enrich, to further these values in the experience of our people is one of the first aims of the Constitution.

It will not do to say that in construing these provisions of the Constitution the Court should be limited to the meaning the terms had when they were written. The broad general purposes of the Founding Fathers abide, as aspirations, as guidelines to the interpreters of the future. But the circumstances to which their words refer are gone. The context is changed. The old perspective cannot be recaptured, because it no longer exists. The scope and meaning of the provisions of the Bill of Rights evolve, like the meaning of other constitutional terms, and other terms in law, as stages in the organic process by which ideas grow, alter, flourish or languish, as new generations find for themselves new and valid meanings for the old words. Our constitutional doctrines do not grow quite so freely as do those of Great Britain, for the written constitution has its own powerful limiting influence. But they grow in the same soil of history. As the Court said in 1914, “the provisions of the Constitution are not mathematical formulas having their essence in their form. . . . Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”24 These words, Justice Frankfurter has well said, are “purposely

left to gather meaning from experience. 25 Each justice of the court meets his highest challenge in seeking to interpret these words in ways which contribute to the advancement of the rule of law, and to the advancement of the law itself. Thus can the Court help in the education of opinion, and play its part in the colloquium through which the ideas of the community about law and justice are formed.

For the people, and not the courts, are the final guardians of the Constitution. The Supreme Court and the Constitution it expounds cannot survive unless the people are willing, by and large, to live under it. And this is the ultimate issue to consider, as we review the relationship between the work of the Court and the state of public opinion. For in a political system resting on popular sovereignty, obedience to the law is not a sufficient rule.

The nature of the problem is most starkly presented by the present reaction of some of our fellow citizens in the South to the opinions of the federal courts in the cases holding racial segregation in various forms a violation of the fourteenth amendment. They find these decisions disturbing, contrary to their customs, and threatening in many acute ways. They believe the decisions represent a usurpation of power by the judges. They realize that these cases could not possibly be reversed by a constitutional amendment. Yet many are resolved to disobey the law of the Constitution as declared by the Court. The potentialities of this conflict are far more serious than those presented by the Jenner Bill and the Butler amendments to it. Law can retain its vitality even though it is not instantly or completely obeyed. But it cannot survive if it is openly and generally defied. In handling the first great public manifestation of civil disobedience, in Little Rock, President Eisenhower put his action squarely and exclusively on the issue of law enforcement: the undoubted obligation of the executive to see to it that court orders are obeyed.

This proposition, however weighty, calls up some disturbing and fundamental echoes in a democratic society, where citizen responsibility goes beyond that implicit in the electoral process itself. A hundred years ago, in the decade before the Civil War, the problem of civil disobedience was debated throughout the land. Thoreau had helped stir up the issue with his writings and his dramatic refusal to pay taxes to a government which toler-

ated human slavery. Emerson and others joined in widely supported movements to deny enforcement to the Fugitive Slave Law. And there was a great debate in Boston between Benjamin R. Curtis, later a Justice of the Supreme Court, and other leaders of the time about the citizen’s duty as juror to vote for conviction in Fugitive Slave Law Cases. The question whether there may be public duties that transcend the duty to obey the law has arisen in other settings: President Eisenhower, as a commanding general, signed an appeal in 1942 to the French officers in North Africa to disobey the orders of the Vichy Government, which we recognized as having authority over them. In some cases before our courts of military justice, superior orders are not necessarily a justification for brutal and inhuman acts on the part of soldiers. Above all, of course, the problem is posed by the Nuremberg trials themselves.

This series of experiences raises an ultimate issue in the moral life of a democracy: the freedom of the citizen to disobey the law, when his conscience is deeply engaged. I do not assert that such a right exists. But there are times in the history of law when the most law-abiding citizen must acknowledge that a conflict exists, and a serious one: when, that is, the positive law seems to be inconsistent with the mores, the purposes, even the objective will of the community. We acknowledge the reality of the problem by exempting conscientious objectors from the military service — an act of grace and civilization with far-reaching implications. Many have claimed that the ultimate difference between democracies and totalitarian systems is that a democracy recognizes the citizen’s ultimate responsibility for the moral content of the law, and for his own moral ratification and acceptance of the law.

The problem can be put in another form: the relative importance of force and consent in law. Is law, as Holmes once remarked, merely what is at the end of the policeman’s stick? Is such apparent positivism an adequate explanation of law? Or must there be acceptance by the community of the rightness of law, as well as the rightness of the procedures by which law is made?

We must start our consideration of the constitutional crisis precipitated by the segregation cases by sympathetically facing the fact that many of our fellow citizens in the South are deeply troubled, and that they believe these decisions are wrong.

I myself would claim that the demands of order against chaos require every government to enforce the law as the judges make it. This is true, at least, in states generally ordered by the procedures of law. But I suggest also that in a democratic society, dealing with a problem like this one, enforcement is not enough. The law must be an educational force as well as a force, and a moral force too. Official enforcement efforts do not meet the full obligation of the executive to the law unless they include something more than the use of the policeman's stick. They must assert with equal power what in this case I believe to be true—that our developing constitutional law of equality for all is right; that it expresses the strongest force in American life, our commitment to the corpus of ideals represented by the Declaration of Independence and the Constitution; and that at some level of consciousness or unconsciousness, silently or openly, all our people, including our brothers of the South, know this, believe it, and will in the end accept it.²⁷

It is a test of our capacity for self-government to resolve this conflict without sacrificing the ultimate dignity of man. Does freedom in a free society ever permit, or require, a citizen to disobey the positive law? At what point might the appeal of conscience be justified against the obligation to obey? In this realm—the conflict of individual freedom and order—we must beware lest action in the name of order lose the power which in this case it so clearly has—of being action also in the highest interests of freedom.

Those who believe that the Supreme Court is right in its course must wrestle with the minds and hearts of those who believe it is wrong, until a national consensus emerges, and prevails. Lawyers, who are officers of the law, and government officials charged with enforcement responsibility, cannot leave the task of persuasion exclusively to the federal judges, who have so firmly led the way. Each should accept his share in the process of education which is indispensable if the law is to be vindicated, in the end, by a willing acceptance by our people of its rightness, not merely by their sullen acquiescence in the principle of order alone.