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WHAT HAS THE SUPREME COURT TAUGHT?

Part II

James Audley McLaughlin*

In a dusty corner of my attic I recently discovered on an old yellowed manuscript, which was printed in rather new letters, a little parable that seems relevant to an understanding of the role of the Supreme Court in our democracy and, moreover, seems a fitting starting point for a discussion of, and a search for, a legitimate role for the Court, i.e. one that is compatible with democracy. This discussion and search include criticism of the role the Court has actually played in the recent past and the “faulty teaching” that has resulted, all of which will bring us back to Lance v. Board of Education of Roane County, discussed in Part I.

— A Parable —

Adam is a man of indeterminate age. He has been sitting in his study, in sober and reflective contemplation as to how he will live his life. His old servant, Samuel, has just entered.

Adam: Samuel, my good and faithful servant, I have just written a resolution as to how I shall live my life. It is a list of precepts, worked out through reason, here in the quiet of my study, although, Lord knows, with much fevered debate with myself. I think, if I keep to them, they give me the best assurance I could want of a long and happy life. (Hands Samuel the Resolution.)

Samuel: I see, yes, well very commendable.

Adam: Now these precepts, by which I hope to govern my future conduct, are a list of things I cannot do. Of course being a reasonable and experienced man, I know that under stress and momentary passion, such resolutions are often broken even by the most resolute of men. But I’m most determined to avoid such lapses and that’s why I’ve called you in. I have made you a sort of guardian of my Resolution. In fact I have provided for it as part of the Resolution, itself. You know I think of you as my wisest old servant. You’re very learned in the law, which I have a particularly great respect

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for, and you have often been my advisor and even, as you know, my inspiration.

Samuel: (mildly puzzled) That's very flattering but what does this Guardianship entail?

Adam: Well you know by long habit and custom I frequently turn to you to effect many of my actions.

Samuel: Yes, go on.

Adam: In the future you are to refuse such cooperation when in your opinion you feel my action violates my Resolution. You are absolutely to refuse such cooperation for thirty days and if at the end of that time I have not reformed or amended my Resolution, you should persist in refusing cooperation. All that I have written into my Resolution.

Samuel: I see, and I suppose you want me to write out my reasons for refusing cooperation, as has always been my custom in other matters.

Adam: Exactly, that "writing out" your reasons is one of the chief reasons you're so respected. You see, a lot of the language in my Resolution I learned from you, and I'll be frank and admit I have a less sophisticated understanding of its meaning, implications and ramifications than you, my great teacher.

Samuel: (smiling patronizingly) Yes, I suppose.

Adam: The thirty days will allow me time to return to the quiet of my study, to reevaluate my Resolution calmly and dispassionately in the light of my own experience and what you have taught me. I can take stock of my life and how I want to live it. If I have reformed or amended my Resolution, then you must be guided by such changed Resolution, and determine its meaning for future cooperation.

Samuel: But if you haven't amended it I'm to persist in my refusal.

Adam: (now seeming to note the patronizing smile) You do realize, of course, that they are my resolutions — even though learned from you. (rather emphatically) And if I should persist, despite your teaching, in a course of conduct you say is proscribed by my Resolution I should expect you, being wise as well as learned and good (Adam gives Samuel an imploring but vaguely threatening look), to reexamine your own interpretation in light of my contrary one as manifest by my persistence. I know you're subtle enough to understand that.
Samuel: (musing) Hmmm.

Adam: But I do want you to be objective and disinterested in your judgment. In fact, as part of the Resolution itself, I've appointed you Guardian of my Resolution for life and with pay not to be diminished.

Samuel: But Adam, my boy, what power will I have to refuse cooperation or to keep you to your past practice as to the need for my cooperation? In short, how can I keep you to your Resolution when you have never given me a gun or made me privy to your bank account?

Adam: I've no intent of making you my master, Samuel, but only to retain you as my servant — with a special, perhaps even exalted, role.

Samuel: (still perplexed) Ah, but what a puny guardian you make of me; most of the real Resolution-keeping depends on you. How can I save you from yourself?

Adam: You can't. But you think me a reasonable man, don't you, Samuel? I mean generally and usually. You often told me so in the past — that's why I decided I could be master. (now quietly cajoling, perhaps afraid he will lose his esteemed servant) But you've always been my most trusted teacher and now even more so. Why, you can teach me what I meant by some of my precepts. I've used words that you have taught me. Certainly you'll know best what they mean in some future situation. Why, I've learned lately that words sometimes change meaning over time. And the ideas, the goals, that my precepts embody? I learned them from you — or at least a good many of them. I mean these precepts to last a lifetime. They're fairly general — only guides — some general "can't do". And I don't claim my reason to be perfect — even in the quiet of my study. Perhaps you'll think it best to ignore some — I'll trust you in this — but please make me understand why. Maybe — (and then Adam reflects for a moment) why maybe sometime you'll tell me — that a "cannot do" is a "must do". I suppose it is possible though I can't conceive of it — considering you only cooperate with my doing. And you are my servant.

Samuel: (his face has been slowly brightening and now has a confident glow) Why certainly. Sometimes when you do something — I'll say, "But if you want my cooperation — you'll have to do it such and such a way consistent with your Resolution." And that's a sort of "must do".


Adam: See, you’re teaching me already. You know, Samuel, your cleverness and ingenuity sometimes frighten me. I’m glad you are too weak to lift a gun and a total loss with money. In any event you’re certainly not clever or strong enough to get either guns or money. In that regard you’re certainly the least dangerous of my servants.

Samuel: But I can protect you from those overweening other servants and agents of yours.

Adam: Nonsense, Samuel, I’ll protect you from them if there’s any protecting to be done, and don’t you forget it. (Raising his eyebrows wryly) That is, as long as I want to; (warming more to the taunt) as long as you make me want to — wise old friend.

Samuel: (muttering half-aloud) Some Resolution. A bunch of “cannot do’s.” How can I keep him good and make him great? They should be plain “do’s” and “don’ts.” “Cannot do’s” without “must do’s” is feckless and fatuous.

Adam: Stop that muttering, old man. The idea of “must do’s” is fevering your brain. The idea of what I shall do I purposely left to day-to-day consideration. Maybe some day I’ll sit down and think it all through again and put it in some “must do’s.” And I’ll decide when and where. And I’ll get a better guardian for “do’s” than you, my poor, weak old fellow. Do you understand?

Samuel: (Getting up — somewhat crest-fallen, preparing to leave — muttering to himself) This poor Adam — always was slow — doesn’t understand about “do’s” and “don’ts”. How can I ever make him great?

Adam: Great? Just keep me good, Samuel, I’ll become great on my own. You can teach me a little about greatness but that’s all. Hold me to my Resolutions as best you can — others will help me to greatness. Having your hoary old head shake “no” and your weathered old finger point me to the quiet of my study from time to time — that’s all I ask of you. If I go crazy it’ll be on my own. If I become completely lost to reason, you are much too puny to save me. I’ll throw you and all resolutions out.

Samuel: And if you are not — you have no real need of me.

Adam: No. No. I love and venerate you, my dear, learned old hand. You’ve long been my teacher and guide. You were once my friend and interceder. You, more than anyone, raised me to be master. That I won’t let you undo. But I want you to continue as my teacher, my trusted servant, and now as Guardian against my
momentary lapse from reason. Respect my Resolution; remind me of it; teach me more about it; give me time to reflect. And that's all you can do.

Samuel: Well I guess that's a good deal. That should tax even my resources.

Adam: Ah, my most civilized servant, you're beginning to see the sublety of your position.

Samuel: Yes, I guess.

Adam: (looking at him with great veneration) Ah, Samuel, you wise, learned, good ... puny old man.

This little tale leaves off where the dialogue really just begins. It sounds, I confess, much like Professor Alexander Bickel's explanation with one exception. Professor Bickel does not believe Adam called Samuel in and had their little talk. Samuel was simply there, learned his role from practice, and Adam from long deference to Samuel's judgement, learned not only to live with him as "guardian" servant but to like it — and about on the terms the dialogue suggests. The difference between "willing" the guardian role, and passive, but "liking", acceptance, may, on cursory observation, appear to make little difference in determining the role Samuel can legitimately play in Adam's life. However, as will be pointed out below, the distinction may run deeper and may rest in part on a different concept of man or the law. But it may rest, I must be quick to add, on nothing more substantial than semantics.

Students of the history of judicial review might also find it passing strange that Adam's other servants (called "servants and agents" for some reason) were not more prominently mentioned, for an important aspect of judicial review in its role in the interrelationship between the three branches of government. In fact, formerly this was thought to be the only role of judicial review. The view once universally obtained that judicial review was a necessary

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3 For example the very difficult problem of defining the areas of cooperation between Adam and Samuel. Who shall determine its limits: Adam in the resolution? Adam by usage after the resolution? Adam by separate grant or definition after the resolution? Or all three? Samuel by interpreting the resolution? And so forth.

Another obvious additional problem is the relationship between Samuel and Adam's other servants or agents— alluded to only briefly in the dialogue (See note 10 infra).


5 Id. at 21.

6 Id. especially at 23-28.
method of protecting the people, both individually and collectively, from the government they had set over themselves. The protection was afforded by enforcing the limitations contained in the basic charter or social compact — limitations aimed primarily at the lawmaker and law enforcer.

The premise of the former view was that we are governed by our elected officials. The view of Professor Bickel, which is typically modern, is that we are governed through our elected officials. That is why Bickel sees the limitations imposed on government through judicial review as undemocratic. They are limitations on the people acting collectively, i.e. on democracy. Bickel can dismiss Hamilton's explanation of the democratic basis of judicial review because it was based on the premise of the former view — that we are governed by our elected officials. Ultimately it is that premise that Bickel is rejecting. Hamilton, Chief Justice John Marshall, and others with Hamilton's assumption would either not

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"See The Federalist No. 78. (A. Hamilton). It is, of course, a view still held by many. See, e.g., Rostow, The Supreme Court and the People's Will, 33 Notre Dame Lawyer 573 (1958).

Perhaps this view is foreshadowed by James Madison. For example take the following passage in a letter to Thomas Jefferson dated October 17, 1788:

What use then it may be asked can a bill of rights serve in popular Governments? . . . 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho it be generally true . . . that the danger of oppression lies in the interested majorities of the people rather than in the usurped acts of the Government, yet there may be occasions on which the evil may spring from the later source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.... 5 Writings of James Madison, 269, 271-74 (Hunt ed. 1904) (as cited in Barrett, Bruton, and Honnold, Constitutional Law 590 (3d ed. 1968)).

But note that Madison saw the Bill of Rights as being really effective only against governmental excesses and not popular ones. Thus he basically differs from Bickel and the Parable.

A. BICKEL supra note 8, at 16-17.

Id. at 18.

I make this inference from Bickel's statement at 17 that when the Supreme Court exercises its power of judicial review "it thwarts the will of representatives of the actual people of the here and now: it exercises control not on behalf of the prevailing majority, but against it." This seems to show that Bickel has assumed at least a rough identity between legislative will and popular will, whereas Hamilton's whole premise (which Bickel had juxtaposed) was on their contrariness. It is on such identity that the "one man, one vote" rule in legislative apportionment is predicated. Such rule is itself a manifestation of this evolution from the Hamiltonian assumption (more compatible with the pure trustee theory of representation) to the Bickel assumption (compatible only with the pure delegate or reflector theory of representation). See Part I of this article, 72 W. VA. L. Rev. at 23-32.
understand the "Adam-Samuel" dialogue or think it grossly misconceived." It was based on the Bickel premise. However, there was some ambiguity in the parable about "other servants and agents." I would guess that the parable writer had some ambivalence about the premises himself.

As will be pointed out below, there still is vitality to one aspect of the Hamiltonian Premise that we choose not law in elections, but lawmakers and law enforcers, i.e. that we are governed by, (not through), our elected officials. This still vital aspect is the idea of political leadership, an idea which is still premised in part on Platonic notions of aristocracy. As I hope to show, it adds weight and color to the assertion that judicial review is democratic, since it demonstrates that judicial review is only different in degree, not kind, from other democratic decision-making.

But the parable suggests another answer to the charge that judicial review is essentially undemocratic. It assumes the Bickel premise but nonetheless baldly asserts — if the metaphor is to be taken literally — that the people would choose (are choosing in the quiet of their study) the institution of judicial review. That answer is that we, the people, and as a People, have two wills: the will to the immediate practical solution to a pressing problem or the attainment of an immediately desired end, and the will to live the good life and to become the great society.18

18 With the Hamiltonian premise the dialogue would go something like this:

Adam: Samuel, since I trust your judgement in reading and applying plain words and since you lack force or will on your own and thus are yourself no threat to me, I am entrusting into your keeping this compact with all my servants which specifically sets forth their powers and limitations in acting on my behalf. Anytime they need your cooperation in taking care of me, refuse it unless in your opinion their action is authorized and not prohibited by the compact. And to assure your independent judgement in this I appoint you for life, etc.

Samuel: And shall I determine the occasions in which cooperation is necessary.

Adam: No, I've specified those. In general, the occasions for your cooperation are those of custom and past usage. Of course, (with a wry smile) custom and usage are vague enough terms to require some judgment in interpretation. I'll leave that to the three of you to work out.

Samuel: Well traditional cooperation leaves some wide areas in which the others can run amuck.

Adam: I know, but I picked my servants and I can unpick them too. That's enough control for many purposes. In any event it will have to do. The alternative would require a complete change in your personality.

And then you would be no good for anything, (and so forth).

A. BICKEL, supra note 3, at 24, talks of this same bifurcation but calls it the "two aspects" of "actions of government." But he apparently does not feel that the second aspect (the long-run, "good society" aspect) can be thought of as "popular will."
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Two more general caveats on translating the parable too literally:
Adam appears to personify a monolithic popular will. The assertion that there is a monolithic popular will is, of course, a gross oversimplification. But to the extent that popular will is translated through popular elections into positive law, it is monolithic. The law has one voice. It is Adam's act. The single nature of Adam. Moreover, since Adam's precepts are all "thou shalt nots" he appears to be the embodiment of popular will as manifest through both federal and state politics. But the problems of federalism need not detain us here; they are of a different genus, and would only cloud the effort of the parable writer to set forth through metaphor the justification for judicial review in a democracy.

I will now turn to the effort of fleshing out the ideas adumbrated in the parable — as a friendly critic of mine says, "to make a short story long" — to cite specific examples of the present Court's deviation from its "legitimate role"; the effects, of such deviation and; some proposals for change.

THE LEGITIMATE ROLE OF THE SUPREME COURT

I.
THE BASIS OF JUDICIAL REVIEW AS A DEMOCRATIC INSTITUTION.

The technical basis of the Supreme Court's power of judicial review has been much mooted. It needs no further elaboration here. The opinions or theories have run from those like that of Professor Wechsler which find express authority for judicial review in the Constitution (Article III and Article VI, § 2) to those like that of the late Judge Learned Hand which find the power implied but only "to prevent the defeat of the venture at hand." Suffice it to say that long usage and general acceptance have sanctioned the power and have made it a hallowed institution in our American form of government.

But the little parable was not merely a way of expressing what might have happened but was really aimed at beginning the effort to "justify [judicial review] as a choice in our own time." Adam is man today as well as man yesterday. The parable writer does not conclude, with Bickel, that judicial review is a "deviant institution" which, "if the process is properly carried out," may result in a "tolerable accommodation with the theory and practice of democracy." Rather he contends that it is an institution which, when properly carried out, fully accords with the theory and practice of democracy in America — without in the least depreciating either "the central function" of the electoral process in such theory and practice or "the policy-making power of representative institutions, born of the electoral process, [as] the distinguishing characteristic of the system." Put in starkest terms, I contend that we, the present people, would, through the electoral process, overwhelmingly endorse judicial review when judicial review is properly carried out. The only condition would be that the election must be held in the "quiet of our study." Of course no such election has been or will be held. No empiricial proof of the assertion can be offered. But ask yourself this: Is not the idea of the Supreme Court's function so woven into the fabric of our democracy, and into the pattern of expectations of the people and how we view ourselves as a nation, that the outcome would be obvious? But aside from the bald assertion that judicial review would be endorsed by a national referendum, our democracy, as it has evolved, has three general attributes which make most plausible the assertion that judicial review is a democratic institution, albeit one of a special nature. These are the dual nature of the "will of the people," the leadership or "aristocratic" element that inheres in democratic decision making at all levels, and the general nature of democratic leadership as teaching through public dialogue. What has been referred to as the dual nature of "willing," i.e. the "will" to the present act and the "will" to keep one's resolution, was the special point of the parable. The other two attributes remain to be discussed.

* A. BICKEL, supra note 3, at 16.
** Id. at 28.
*** Id. at 19.

It might be some proof, however, that despite the hue and cry over the deviant practice manifested by the Dred Scott Case (Dred Scott v. Sanford, 50 U.S. (19 How.) 393 (1857)) and by the early New Deal Court and by the Warren Court, there arose no politically viable movement to end or even weaken the Court.
The Aristocratic Element in Democratic Government

"A bevy of Platonic Guardian" the people probably do not want without it being clear that they are "guardian-servants." But there is a strong element of the aristocratic (in the Platonic sense) running throughout our democratic institutions both in the political branch and in the courts. I do not mean aristocratic in the sense of a "power elite" or an autonomous Establishment or anything like an aristocracy of the ancien regime. Such aristocracies are not compatible with democracy. Rather I mean aristocratic in the sense of trusting a large part of government, including leadership in basic policy, to a responsible, constantly changing, amorphous group of the most competent public officials that can be found. Of course it is the general public's understanding of competency that is the criterion, and such understanding may be viewed as wanting by many individuals in the public. But the point is that the people choose, by their own best lights, those who they think are best qualified to lead, not those who they think are most like themselves. Though "the heart of the democratic faith is government by the consent of the governed," and this consent is manifest through the electoral process, the people nonetheless choose to be governed by the officials elected as well as to govern through them.

The premise is that a representative democracy is more than a mere expediency. It is also a deliberate choice of leaders based on the aristocratic principle defined above. People choose a representative not only because he reflects their own views on the probable issues to be decided but also because they trust his judgment to decide issues for them — issues they either do not know of or do not feel competent to judge. They no doubt trust his judgment partly because he reflects their general attitudes and interests and they

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33. L. Hand, supra, note 15, at 73.
32. See The Republic.
30. See N. Thomas and K. Lamb, Congress, Politics and Practice (1965). Edwards, The Theoretical and Comparative Aspects of Reapportionment and Redistricting with Reference to Baker v. Carr, 15 Vand. L. Rev. 1265, 1272-73 (1962) cites "empirical studies on both sides of the Atlantic." He concludes, . . . that there may be few positive correlations between the action of the representative and the combined will of his district — or at least less positive correlation than generally supposed. This is because of alleged superior qualities of the house member, his relative freedom to exercise independent judgment, and also the conditioning process of group dynamics in legislative bodies directed by institutionalized elites, not to mention the restraining impact of other chambers and branches.
29. A. Bickel, supra note 3, at 27.
want his expert application of their attitudes and their interests to issues as they arise. But more than that, they want his expert definition of their own attitudes and interests. Madison spoke of the capacity of representative government "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."?

As a corollary to this, the people want their public officials to carry on a dialogue with them as to what is in their interest and what their attitude should be. In other words, teaching is done by all branches of government—political as well as judicial. As Mr. Justice Brandeis so eloquently stated in Olmstead v. United States, government is "the potent, the omnipresent teacher." The point here, however, is that the political branches of government also teach by means other than their example. They teach, like the school master, through lecture and reasoned dialogue. And more importantly (both to the nation and to the point being made here) this dialogue concerns not only the course to be taken to solve pressing needs, but additionally includes the basic ideals and goals of the nation — what we are and where we are going as people.

For example, the American people probably would not by referendum approve of certain civil rights legislation such as open housing. Nonetheless, Congress and many states have passed such legislation. On the other hand, the American people, the great present demos, would probably overwhelmingly approve of the ideal that open housing legislation is thought by its proponents

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26 This hypothesis will have to be tested in the laboratory of your own experience. Two suggestions: (1) Do not let your feeling of general popular apathy and ignorance on political issues color your judgment as to whether or not people generally want at least some information and inspiration from their political leaders even at the local level, and also keep in mind that people generally, even the so-called Silent Majority, give feed-back to which they want response. (2) The higher the political office the greater is the desire for inspirational as opposed to informational interchange. Various political science studies show that the process of opinion making and decision making is too complex and variegated to be amenable to any but the grossest of measurements. See, e.g., Dexter, The Representative and his District, reprinted in New Perpectives on the House of Representatives 3, (1963); R. Dahl, Who Governs? Democracy and Power in an American City (1961).

27 277 U.S. 438, 482 (1928).

to help actualize. Moreover, one ventures to guess that most of the people would acknowledge that they have no precise understanding of what “equal protection,” “due process” or “badges and incidents of slavery” mean, except in terms of equally vague ideals such as fairness or justice. Moreover, they would be quite diffident about applying such ideals to particular situations. Most people would say: “That’s for courts and legislators to decide — they are trained for it and devote all their time to it”— in short, that’s their job. But their job is yet more, for the people want and need a sense of participation in the precise application of the ideal to concrete situations. They want to know what an deal held with abiding conviction — but vague sense — means in this or that situation. The conviction is probably symbolized by a phrase (e.g., “equal protection of law,” “freedom of speech,” “a man’s home is his castle”) or ritual (e.g., singing “America” or saluting the flag). But, no matter how vaguely understood, or how mute and inarticulate, it is the conviction of a truth which thrills, a physically felt, emotional thing. And they want to participate by being told in such a fashion, with such articulation, that they may see the “ideal which thrills” come to life and be thrilled anew. And this articulation should be no pandering to the irrational. That the People are basically rational is the faith of democracy. It is the faith of Brandeis concurring in Whitney v. California — “Believing in the power of reason as applied through public discussion . . . .” Rather this articulation is a process of education, and “[e]ducation is a ‘drawing out’ and its business is not merely to confirm a man in what he already knows and to exalt his own immediate preferences and predilections.” And what of the “thrill” from this education in ideals? Professor Harry Kalven, Jr., in a footnote concluding an article on New York Times v. Sullivan quotes Professor Alexander Meiklejohn of Harvard who, when asked what he thought of the new articulation and definition of Freedom of Expression in New York Times, said: “It is an occasion for dancing in the streets.” There is the thrill from participation in the rearticulation of an abiding ideal — the feeling that is “an occasion for dancing in the streets.”

274 U.S. 357 (1927).
Id. at 375.
There are two sorts of "basic ideals" which "thrill" when freshly articulated and exemplified. First, there is the ideal image of our present selves: the image of what we ought now to be — the national conscience; that nation in the "quiet of its study." It is analogous to an individual's resolution to live a good and moral life. Second, there is the ideal image of the nation we want to become, what we want to progress to — our own vision of the great and happy nation. It is analogous to an individual's ambition to be great or rich or famous. Both ideals are elusive, overlapping, a mixture of half-conscious abstraction and vague but profound emotion.

To recapitulate — from the above discussion the following three premises emerge. First the people have two often contradictory wills: (a) the will to the immediate end and (b) the will to the ideal (also twofold). Second, choosing men as "leaders" as well as "reflectors" is of the essence of our democracy. Third, leadership in a modern democracy must be by teaching through reasoned dialogue and through articulation of shared ideals as applied to concrete situations, such that there is a public sense of participation in any decision made so that it can be truly said: "it is the People's decision."

Based on those three premises one can make a defense of judicial review as democratic and can begin to see at least some of the limitations on the institution. Since democracy is defined by the above premises as that system of government in which governmental policy is a manifestation of the will of the people through their leaders, then, if there are ideals which the nation wills to actualize, and if such ideals (1) are felt to be immutable and fundamental to the society it thinks it is and wants to continue to be, (2) and are seen to be sometimes threatened by the nation's will to the immediate end, and (3) are framed in terms of positive law, it follows that the people can best realize these ideals through a body of leaders which is at once: (a) as immutable as practical human institutions can be; (b) as removed from the pressure of the people's other "will" (i.e., the will to the immediate end) as is consistent with the people's choosing its members at all, but which body likewise will not unnecessarily interfere with or endanger such other "will", and; whose members are (3) trained and practiced in the interpretation and application of positive law. There are such ideals: the precepts of the Constitution — immutable, fundamental, supreme positive legal commands — the People's
Resolution. There is such a body of leaders: The Supreme Court of the United States and its extension, the federal (and to an extent the state) judiciary. Its members are appointed for life sans diminishment in pay and are chosen by those leaders who are themselves chosen for their leadership as opposed to their mere reflective qualities. Thus, as a body and as individual members the court is as apolitical as is consistent with choosing it at all. Its members are judges in a court of law and thus are experienced in interpreting positive law. And, finally, as a body, it is only a court of law and thus cannot unnecessarily interfere with or endanger the People's other will.

Constitutional Ideals As Positive Law

A final word on "ideals" before discussing the limitations on judicial review: The ideals of the Constitution are framed in the fashion of positive legal rules and their purport is to establish minimum standards of behavior for collective conduct (through government) below which such collective conduct can not fall and still participate in our broadly shared notion of ourselves as a good society. As that notion changes so must the interpretation of the constitutional norms change, and just that much. But since these norms are framed like positive law, the pouring of new content into the words must seem natural, not forced; otherwise the felt immutability of the norm will be damaged. Thus, as with the interpretation of any rule, the interpretation must appear to proceed from the rule itself and not from the interpreter.

For example, the words "to have the Assistance of Counsel for his defence" no doubt originally meant the accused had the right to bring his own counsel into court in a criminal trial. But education over many years taught most Americans that expert assistance is absolutely essential to holding one's own in the esoterica of a trial. Affluence made the cost of providing counsel for the poor seem immaterial. Couple this with the gradual evolution in egalitarian ideals, and it eventually becomes unthinkable that an accused should stand trial for a major offense without counsel just because he

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[1] U. S. Const. amend. VI.
[2] "Originally, in England, a prisoner was not permitted to be heard by counsel upon the general issue of not guilty on any indictment for treason or felony." See Betts v. Brady, 316 U.S. 455, 466-68 (1942). See also, Wechsler, supra note 14 at 18.
cannot afford one." Thus the words "to have the Assistance of Counsel..." came gradually to "mean" the absolute right to counsel regardless of ability to pay and therefore to mean a correlative duty of the state to provide counsel. The gradual enforcement of such standard by most state polities through positive law was concrete evidence of this new meaning. Moreover, the right to court-appointed counsel was by 1963 thought to be so fundamental to a fair trial that it had become part of the idea of "due process." *Gideon v. Wainwright* was simply an announcement of that fact.*

**Constitutional Ideals Versus Other Ideals**

Constitutional ideals are different in kind from the ideals mentioned above as the "goals of society", i.e., the ideal society we want to become, that we are (hopefully) in constant progress toward. For example, the Four Freedoms of President Franklin Roosevelt* were hopes for a future world, but the first two — freedom of speech and freedom of religion — were, for Americans, present reality enshrined in the Constitution.* That is, they participate in the idea of what we think we are. The second two — freedom from want and freedom from fear — were goals for the future, even for Americans. They participate in the idea of what we want to become. For the former, the constitutional ideals, the Supreme Court is the paramount teacher but, of course, not the only teacher. For the latter, the ideals as "goals for the future", the President and Congress are the primary teachers.

Constitutional ideals are different in degree from other values that participate in our ideal of the society that is. The ideal "is" can be represented by a hierarchy of values from, say, taxation based on real ability to pay, through public relief, security for those out of work for economic reasons, security for the aged and disabled, to secret indictment by grand jury, to freedom of speech. Only the heights of such hierarchy are in the Constitution — only those values which are so widely shared as to be felt part of the "common-
sense of humanity" and so deeply learned as to be felt immutably part of the nature of society as it ought to be. Hence the phrase — *natural rights of man*.

At the top of the hierarchy of articulators of constitutional ideals is the Supreme Court. But, of course, many voices, from the President's, on through other elected officials, to newspapers, school teachers, parents, etc., articulate, criticize, inform and form those primary ideals and shape and reshape the hierarchy of societal values.

The limits of the Supreme Court's role now concern us.

II.

LIMITS INHERENT IN JUDICIAL REVIEW AS A DEMOCRATIC INSTITUTION.

Although it would be silly to suggest that the Supreme Court's role can be simply and neatly defined and thus limited, its three chief characteristics can be broadly seen as limiting its role. If the limits which inhere in its attributes are not observed, the Court to that extent loses its legitimacy as a democratic institution and to that extent also loses its effectiveness as a guardian-teacher of constitutional ideals. As was stated above, the Court is legitimately democratic because the nature of the people's primary or "over will," as manifest in its constitutional resolution, needs protection from its will to the immediate end. It needs such protection from a court of law composed of judges not subject to political recall. Thus the Court's three primary characteristics, which by definition limit its role are: (a) It is a court of law; (b) It is an independent judiciary; (c) It interprets the People's Resolution framed in the form of positive legal rules. These limits are taken up below in the order given.

A. Limits to the Court's role arising from its character as a court of law.

The Supreme Court's role is defined by the Constitution as extending only to certain "cases" and "controversies," *i.e.*, it is to be a court of law in the traditional sense. Although there is much merit in determining difficult constitutional issues in the context of concrete cases, it also substantially limits the legitimate role

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*U.S. Const. art. III.*

*Poe v. Ullman, 367 U.S. 497 (1961) (Frankfurter, J).*
the Court can play in democratic policy-making. In making this point in 1941, at the tailend of the resurgent criticism of judicial review caused by the "old guard" "new deal" Court, the late Robert H. Jackson (later Mr. Justice Jackson) said:

Judicial justice is well adapted to ensure that established legislative rules are fairly and equitably applied to individual cases. But it is inherently ill suited, and never can be suited, to devising or enacting rules of general social policy. Litigation procedures are clumsy and narrow, at best; technical and tricky, at their worst.\(^{a}\)

A court of law is limited in its fact-gathering to the particular incident involved in the case before it. Any evidence beyond such dispute is irrelevant. Therefore, the evidence gathered lacks generality. Just the opposite obtains in legislative fact-gathering for policy making. Thus in cases in which the decision turns on accepting or rejecting a rule made after legislative fact-gathering, and where the rule is integral to a scheme for general regulation pursuant to a political policy decision, a court should be chary of rejecting such rule based on its limited inquiry. It should in any event pay special deference to the legislative decision. Moreover, this consideration should in some kinds of cases absolutely preclude tampering with the legislative decision. Such cases are those that can be classed either (1) under the rubric of federalism when congressional or presidential action is questioned, or (2) under the rubric of "substantive due process" or "equal protection of the laws," provided that no specific constitutional rule prohibiting the governmental action can be asserted, or that even from the limited fact-gathering of a court proceeding the legislative determination patently appears to be either purely arbitrary or manifests a clear legislative purpose which is contrary to a constitutional ideal.

The emphasis here is on the fact-gathering limitations of a court hearing — its "hit and miss" nature, tendency to hard cases, and quantity of facts relevant. For example in \textit{Railroad Retirement Bd. v. Alton},\(^{4}\) \textit{Carter v. Carter Coal Co.},\(^{5}\) and \textit{United States v. Butler}\(^{6}\) the Supreme Court, on the meager record of a law suit laced with elaborately unstated judicial notice reversed the findings of Congress as to what affected interstate commerce and what

\(^{a}\) R. Jackson, \textit{The Struggle for Judicial Supremacy} 288 (1941).
\(^{5}\) 296 U.S. 238 (1936).
\(^{6}\) 297 U.S. 1 (1936).
was in the general welfare. True, it enlisted the legalese of determin­
ing "power" and simply brushed aside the legislative findings as irrelevant, since questions of "power" are questions of law. But the question of power ultimately turned on the gathering and examina­tion of a myriad of facts about our economy and the inter­re­lationship of its parts. Courts are simply unsuited for such work. The same problem obtained in *Lochner v. New York* and the cases which struck down welfare legislation on "substantive due process" grounds. The court talked in terms of protecting the right of "freedom of contract" (which was simply assumed to be a basic right and to be relevant), but resolved the issues on its own assessment of social and economic reality. One is struck on reading these cases by the utter presumptuous­ness of judges. I stress here their presum­ing to substitute their version of reality (based on evidence from a law suit and the judges' own experience) for that of the legisla­tive fact-gatherer. Their presuming also to impose their values on society will be spoken of later.

The United States Supreme Court has long since abandoned this presumptuous­ness in the area roughly delimited by the words "economic" or "property" rights, but the lesson has not been "un­learned" by state courts. Today, however, the same presumptuous­ness is in full vitality if the talismanic label, human rights, can be pasted on the interests of the asserting litigant. Last term, for example, the Supreme Court in *Shapiro v. Thompson* substituted its assessment of reality for that of Congress and 40 to 46 state legisla­tures in compromising the interest of individuals in interstate travel and the interest of state governments in providing adequate welfare for its citizens on a sound fiscal basis. The Court did this by the process of declaring the right to interstate travel as fundamental (which no one would deny) and saying therefore that a compelling state interest must be shown (by the state, apparently) to justify any classification which serves to penalize that right. But how com­pelling the state interest is and to what degree the classification penal­izes the right to interstate travel are questions of broad social and economic fact. The decision of the Supreme Court was, in effect, the substitution of its assessment of social and economic reality,

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1906 U.S. 45 (1906).


arrived at in the cloister of a court of law, for assessment made over a period of some 30 years by the branch of government specifically suited to gather such legislative facts and make such assessment of broad social and economic reality. As is typical of such adjudication, the parties to the litigation were examples of those most harshly treated by application of the general rule. This cannot be conducive to an objective assessment of the total picture.

The inquiry of the Court would have been more appropriately confined to determining whether the legislative policy clearly ignored proper consideration of the right to travel. The fact that Congress had imposed a one year upper limit on state residency requirements certainly manifested its concern for such rights.

The decision goes a long way toward forcing complete federal control of a matter that through long tradition has been primarily of local concern. Perhaps a correct assessment of the reality of highly mobile modern America would demand federal control. But such “correct assessment” has not been written in the sky or discovered in the basement of an ancient temple. Fallible men must grope for it. What men should they be? Congress, with all its resources for informing itself, or nine men in a court of law?

Is it any wonder, then, that the Supreme Court of Appeals of West Virginia presumed to establish the policy for the state in determining the proper majority for lifting property tax ceilings in order to aid public schools? If an individual’s interest can be elevated to constitutional heights and placed under a rubric commanding wide acceptance (e.g., right to travel, free speech, one man-one vote), then despite the inherent limitations of a law suit the Court will itself make the legislative judgment, weighing that interest against others of society. Such examples of judicial hubris by the recent Court are too numerous to catalogue. Some of the more visible are Baker v. Carr, Mapp v. Ohio, Loving v. Louisiana, In re Gault, and Miranda v. Arizona. The decisions listed are simply

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387 U.S. 1 (1967).
384 U.S. 436 (1966). Of course, it was not legislative policy which was upset by Miranda, but rather state administrative and judicial policy in the area of criminal law enforcement. Such policy had been worked out through long, close, daily experience with the exigencies of local law enforcement. The absence of legislative decision correcting the “abuses” found by the Supreme Court may well be no more than evidence that the state legislative fact gathering
examples of judicial intrusion into broad policy making, but each decision is not necessarily outside the pale of proper constitutional adjudication. The policy involved in In re Gault was at least partially within the peculiar expertise of judges since it involved court procedure for juveniles. It also involved examination of the premise underlying the relaxation of ordinary due process protection—the supposed non-punitive nature of juvenile correction. The myth of such premise had long since been rather conclusively exposed. The evidence of this, in sources easily available to the court, and on a subject that judges are qualified to evaluate, made the Court a not inappropriate policy-maker. Nonetheless, the example in Gault of broad policy-making adds to the overall pattern of the image of the Court as intrusive. When a pattern is established, examples apparently comporting with it strengthen its appearance, even though the example is supportable individually.

Another limitation inherent in the Supreme Court's being a court of law is its ability to give remedy. The traditional remedies of fine, imprisonment, damages, injunction and declaratory judgment are effective only when the number of people affected is relatively small. Since it has neither the power of sword nor purse, as Mr. Justice Frankfurter was wont to point out, the Court can effect injunctions or declarations that really "run to the world" only through moral suasion.

When the Court acts in areas where its traditional remedies are unavailing, it must either have the cooperation of those enjoined or enlist the support of those who do command the broadly coercive powers of the state, i.e. the political branches of government. Only to the degree that such cooperation or support is forthcoming is the decree that runs at large effective. The two primary examples of this are the reapportionment cases and the school desegregation cases. In the former there has been more or less willing cooperation indicated that no general change in administrative policy was warranted. For a general criticism of the Court's role in this area of broad public policy see, H. Friendly, The Bill of Rights as a Code of Criminal Procedure (1967), 235, and A Postscript on Miranda, 266 BENCHMARKS (1967).


In the latter there has been some willing cooperation and some support from political government. But further desegregation must now be a function of further such support. And such support is a function of the moral persuasiveness of the Court. Such moral persuasion comes both from the felt rightness of the decision and from the prestige of the Court. So far as the latter must be relied on, just that far must the moral capital, built up from long tradition, be spent.

Thus the Court has always recognized that it must be very chary of making, with its decisions, promises that must be countersigned by others. The risk of so doing ought to be undertaken only when the constitutional ideal is so compelling and so flouted that the denial of the ideal causes a sickness in the nation's soul and we, as a people, in the quiet of our study, deeply ashamed. And then only once in a lifetime. That once in our lifetime is school desegregation, and for that time the Court needs all its "moral capital". The Court can lose that "capital" in other ways, for it can make unpopular decisions. This the Court has done, and done needlessly and wastefully. For this reason alone Engel v. Vitale and its progeny were improvidently decided. They were not important enough to be worth the loss of "capital". Mere unpopularity is not sufficient grounds for holding the other way. It is, however, a reason for not deciding at all, if there is a principled ground for avoidance and the interest protected approaches de minimis. But unpopularity especially gross unpopularity in periods of relative public tranquility, should cause the Court to give pause, and such pause will be discussed below, shows Engel to be an unfortunate piece of constitution-teaching.

A final word on judicially unenforceable decisions: If the Court lacks sufficient moral persuasion, either through the force of the

U.S. 877 (1955) (public beach); Holmes v. Atlanta, 350 U.S. 879 (1955) (public golf course). All the above decisions were unanimous, involving nineteen justices altogether.

See Part I of this article, 72 W. VA. L. Rev. 1, 29-30 (1970).


Lack of standing was the ground for avoidance that could have been invoked. In fact much doctrine on standing had to be ignored to reach the merits. See Brown, Quis Custodet Ipsos Custodes? The School Prayer Cases, 1965 The Supreme Court Review, 1, 15-33; Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 23, 41-45 (1962); Kauper, Prayer, Public Schools and the Supreme Court, 61 Mich. L. Rev. 1031, 1056-1064 (1963).

See, Sutherland, supra, note 63.
ideal articulated or through its prestige, to induce either willing albeit begrudging, cooperation or governmental support, then its edict goes unobeyed. If the acts of disobedience are open, and the edict well known, then the law is flouted. If the flouting is by responsible public officials, so much the worse for respect for law and courts of law. All these conditions obtain to some extent in school prayer cases. True the “edict” did not literally run to the world, but the language and obvious implication of the opinions is that all prayer in public schools is forbidden, if a part of regular classroom activity. To the extent that prayer continues, disrespect for law and the Supreme Court is fostered. Thus (be prepared to gawk at this) the Supreme Court has “taught” that law can be broken with impunity and its commands ignored.

B. Limits arising out of the Court’s character as an independent judiciary.

In order that the People’s Resolution as to fundamental precepts could be better kept, the Supreme Court was given the entire judicial power and made an independent and coequal branch of government. It was given independence so it could be above politics — above the storm of transient emotion, above stress and momentary passion, above the tug and pull of faction, interest, and party. It was made coequal that it might better have the power to refuse cooperation with acts of physically powerful and popular arms of the government whenever it should feel they violate the People’s Resolution. The Court’s power is rooted in the respect that English speaking peoples have long held for law and courts of law. This respect for law is manifested by the viability of our political institu-

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*Reed v. Van Hoven, 237 F. Supp. 48 (W. D. Mich. 1965). This case represents a successful effort by a district court judge to work out an accommodation with Engel v. Vitale, 370 U.S. 421 (1962) for parents who wanted their children to pray. This was accomplished without straining the facts or the law. But see DeSpain v. DeKalb County Community School District, 255 F. Supp. 655 (N.D. Ill. 1966) where both facts and law were strained. The court seems to be saying to parents who wanted a federal court to enjoin a kindergarten teacher from requiring their daughter to say a simple grace (with the word “Cod” deleted): “Ask a silly question, you get a silly answer.”

* One may only guess the extent to which prayer is still a daily activity in American schools. Nonetheless I “guess” that while there is very little daily prayer left that is rigidly enforced by supervising authority, there is still substantial prayer initiated at the teacher level. For a study of one community’s reaction to the Prayer Cases see W. Muir, PRAYER IN THE PUBLIC SCHOOLS — LAW AND ATTITUDE CHANGE (1967).
tions — institutions relatively free from revolution violent either in form or substance. This respect for courts of law is manifest in our unique, largely judge-made, common law system. Yet, even though such respect is necessary to such power, equally necessary is the status of "coequal branch." For in Great Britain there is such respect, but there is no such power. The American Supreme Court was given coequality despite its being independent of popular recall or other direct pressure, because it was, after all, only a court of law exercising only judicial power and thus had "neither FORCE nor WILL but merely judgment." Thus it should be seen that the Court's independence, coequality and judiciality are interdependent qualities. The Court can be independent because it is only judicial. But since it is judicial, it must be independent. It must be coequal so it can be truly independent, and it can be coequal even though independent because it is only judicial. Each is a predicate for the other; each must be maintained for the other to be legitimate. It is largely the people and the political branches acting conjointly under felt constitutional compulsion who have maintained and continue to maintain the Court's coequality and independence, but it is for the Court to maintain its judiciality which justifies such other maintenance. It is limitations inherent in the Court's maintenance of its judiciality that concern us here.

For purposes of neatness, if not accuracy, the limitations can be seen as (1) the "power" to settle only judicial disputes, (2) the "right" to answer only judicial questions, and (3) the "duty" to give only judicial answers. Both the "power" and the "right" relate to the Court's jurisdiction, although the second limitation, lack of the right to decide non-judicial (i.e. political) questions, may, and often does, occur in a dispute which is judicial and thus otherwise within the Court's jurisdiction. But if the Court lacks the right to answer a particular question and if the question must be answered to settle the dispute, then the Court effectively lacks the authority to settle the dispute. To say a court lacks authority to settle a dispute is the logical equivalent of saying it lacks jurisdiction. All three, "power", "right", and "duty", are constitutional limitations. Thus if a court lacks the right to answer a question necessary to settlement of the dispute, it really has no power to settle the dispute, i.e. its jurisdiction given in one way is ousted in another. As I admitted, the trichotomy of power, right and duty is, in this context.

convenient but not entirely satisfactory. Moreover, a jurisdictional analysis can be applied to the "duty" in some circumstances, for it is a constitutional duty to give only judicial answers. If an apparently judicial question cannot be given a judicial answer, a court cannot answer it, and, perforce, it becomes a non-judicial (i.e. political) question; for, if one is asked (say) "Is it A or B?" and if it is one's duty either to answer "A" or to answer "B" and thus one has no right to give another answer, then if one perceives that the answer should be "partly A and partly B", one has the duty to say, "that is a question I cannot answer." Again, if the question is crucial to settling the dispute, then though the power to settle appears, and the right to answer also, but the question cannot be answered in a way consistent with constitutional duty, then there is no right to answer and no power to settle. Thus, inability to give a judicial answer is the logical equivalent of lack of jurisdiction. But to call this "duty" a jurisdictional question would do violence to received

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"The problem of the constitutionality of the so-called "benign quota" in public housing and public schools is a good illustration of the Court's being unable to give a judicial answer to an admittedly judicial question. So far the Court has simply avoided the issue by refusing to review lower court decisions. See, Dalaban v. Rubin, 14 N.Y. 2d 196, Ctrt. denied, 379 U.S. 881 (1964); School Comm. v. Board of Educ. 352 Mass. 699 (1967), appeal dismissed, 389 U.S. 572 (1969). See generally, Goldman, "Benign Classification: A Constitution Dilemma," 35 U. CINN. L. REV. 349 (1966); "Developments in the Law — Equal Protection," 82 HARV. L. REV. 1065 (1969); Bittker, "The Case of the Checkerboard Ordinance: An Experiment in Race Relations," 51 YALE L. J. 1387 (1962); Navasky, "The Benevolent Housing Quota," 6 HOWARD L. J. 30 (1960). The "benign quota" cases involve a political compromise which attempts to realize the goal of racial integration while recognizing the social reality that when more than a certain percentage (say about 30%) of blacks move into a housing project or neighborhood all the whites move out. Thus following the strict constitutional principle of legal "color blindness" does not achieve the real ideal of the fourteenth amendment which is total integration or societal, as opposed to simply legal, "color blindness." The fourteenth amendment embodies the ideal of what we are now but is more deeply premised on an ideal of what we want to become, an ideal "goal" for the future. As was stated above, such goals are for the political branches to articulate and attempt to actualize. Thus "benign quotas" create a conflict between the present ideal and the future ideal goal. Since "benign quotas" help actualize the latter, and the latter is the real premise of the former, "benign quotas" should be upheld. But no neutral principle has been articulated for an exception to the constitutional rule of legal "color blindness"—"benign quota" are a matter of political expediency. Thus the correct constitutional answer to the question of integrating housing is not one a court bound to announce its decisions only in neutral principles can give. It therefore, is duty bound to announce that there is no judicial answer to the constitutional issue and the political answer must stand. See Bickel, supra note 3, at 60-65. But Prof. Bickel suggests a solution to the judicial dilemma of benign quotas which is rooted in his notion of the Court's "passive virtues." Bickel, supra note 3, 111-198. That such "virtues" are really "vices" is the leitmotif of this entire section B.

"However, as is shown below, the duty is breached most commonly not because no "judicial answer" could be given, but because no "judicial answer" is
ways of talking about jurisdiction. When a court finds a question that it cannot both dutifully and correctly answer, it usually holds either that it is a "political question" or that the answer given by the political branch must stand, thus affirming such branch’s answer.

To analyze more fully each limitation and to discover its observance and non-observance by the Supreme Court, and to adumbrate what the Court thereby teaches, they are taken up serially under their familiar rubrics: "power" as "case and controversy" non-justiciability; "right" as "political question" non-justiciability; and "duty" after Professor Wechsler, as "neutral principles" of decision.

(1) The case and controversy limitation

"Case and controversy" is the rubric under which the federal judiciary’s constitutional jurisdiction is discussed and, unfortunately, analyzed. Of course, the reason is plain if not sufficient—Article III states that the "judicial power" shall extend to "all cases" and certain "controversies". This was early assumed to mean only to "all cases" and certain "controversies." The words "arising under [etc.]" are helpful for they suggest that "all cases" was meant to convey the idea of cases in the traditional common law sense. Justice Frankfurter suggested that "cases" means: "Generally speaking the business of the colonial courts and the courts of West-

given. Even here the Court is, in one sense, acting ultra vires but it is in the same sense that a servant acts negligently for his master, which acts, for purposes of common law liability, are said to be authorized.

Bickel, supra note 3 at 114-115.

" U.S. Const. art. III, 2. The full paragraph reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority: — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between Citizens of different States — between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
minister when the constitution was framed." This definition would include, of course, those matters for which the legislative authority of the state authorizes judicial remedy, whether or not the particular remedy was part of the "Law and Equity" at the time the Constitution was adopted. But Frankfurter's dictum has never been adopted by the court as its guideline. Moreover, the recent case of *Flast v. Cohen* suggests that the rubric "case and controversy" has given way to the word "standing" as the operative language by which to examine the threshold constitutional-jurisdictional issue. And, contrary to what Juliet might have thought, there is something in a name, at least for abstractions if not for roses and young men. In fact the "name" may be the "thing". In any event, *Flast v. Cohen* was a sharp break with tradition; it typifies the present Court's attitude toward itself, the other branches and the Constitution; it is illegitimate; and it teaches attitudes that are both undemocratic and corruptive of the respect necessary to the authority of the elective branches. In order to demonstrate that *Flast v. Cohen* is all of that, a fresh analysis of the "case and controversy" limitation may be useful.

As suggested above the limitation called "case and controversy" could be better described as the power to settle "only judicial disputes." Both words, "judicial" and "disputes," have a distinct constitutional derivation and meaning. "Judicial" comes from both the Article III language "judicial Power" and the notion that certainly obtained in 1789 and still largely obtains today that "cases in law and equity" describes judicial, as opposed to political, disputes. Moreover the words "case and controversy" suggest a "dispute", not merely a legal "question." I have suggested that in this context there is something in a name and am now suggesting that the better name to describe the threshold constitutional-jurisdictional issue in a federal court is "judicial disputes." Thus a "case and controversy" is a "judicial dispute", nothing more nor less.

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8 Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 149, 150 (1951) (concurring opinion); to the same effect see Coleman v. Miller, 307 U.S. 435, 460 (1939) (concurring opinion).
11 Of course this change did not just suddenly happen; it has been in progress for at least thirty years. See Coleman v. Miller, 307 U.S. 435, 460 (1939) (concurring opinion of Frankfurter J.). It is of some significance that the word "standing" is not used in *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923) to characterize the taxpayer's suit not being a "case or controversy."
What then are judicial disputes? Well, to begin with a tautology, the settlement of judicial disputes is the governmental function of courts of law, and a court of law is that part of government that settles judicial disputes. A "dispute" as opposed to a "question", as the term is used here, involves the problem of whether or not some governmental action be taken—coercive or non-coercive—regulatory, proprietory, or defensive. Traditionally, judicial disputes are those disputes that involve coercive action against particular, named individuals. By contrast, legislative disputes over coercive action involve the use of coercion against generally defined individuals. Such legislative action is more commonly referred to merely as "regulative" since actual coercion is almost solely a judicial function. In fact, in common law countries almost all domestic use of the coercive power of the state is channeled through judicial tribunals where the particular facts calling for coercion are developed and the law calling for coercion is interpreted with particular reference to the developed facts. An even broader generalization can be made: a politically civilized society is at least a society in which all normative violence is channeled through the state, and all state violence through courts, and all non-normative violence is punished by the state.

But, traditionally, courts have not cooperated in the non-coercive actions of government. For instance, the government has the power to spend from the general revenue, to acquire and manage property for general use and to raise and maintain armed forces for
defense. These functions of government are not lawmaking in the regulatory sense, although to be sure, when the legislature exercises them, they do so by the same mode of action as when they are regulating behavior, i.e. by legislative act. Of course, in certain ways the non-coercive functions of government demand coercive help and therefore are often exercised with the cooperation of the judiciary. For instance, spending demands taxing and the coercive power of tax collection is channeled through the courts. When a tax is tied to a particular spending program and the courts are asked to cooperate in coercing payment of the tax, the constitutionality of the spending program can be challenged by way of challenging the tax legislation of which it is inextricably a part. A taxpayer is even permitted to do this in an action for declaratory relief where the coercion of payment is imminent. Likewise, the acquisition of property often involves coercing a sale, and this power of eminent domain is channeled through the courts. In either instance, getting money or property, the state is empowered to coerce and a judicial dispute, i.e. a “case”, arises because of the need, stemming from long, deeply embedded tradition, to channel the coercive authority of the state through the courts. But the legislative spending or taking is challenged only incidentally to such suits to coerce. They are simply instances where the courts have traditionally been asked to cooperate in governmental coercion and will refuse such cooperation if in the court’s opinion the action would violate the people’s resolution.

A case like Baker v. Carr raises the further question of whether or not the legislature can enlarge this area of cooperation, i.e. whether Congress can make a “case in law” that was not one traditionally. For instance, courts have not traditionally been asked to cooperate in legislative apportionment. However, a federal jurisdictional statute authorized, to put it in language used here, the federal courts to cooperate in coercing protection of interests guaranteed by the federal Constitution against state action. It did so by authorizing suits against “persons” acting “under color” of state or territorial law and not by direct suit against the sovereign state. Nonetheless, actions under the Civil Rights Acts are in reality

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“Or soldiers,” it could be added.

actions to coerce the state government to act or refrain from acting. Moreover, the judicial machinery of coercion can be invoked by private citizens. Traditional notions of a private law suit are maintained by requiring that the individual seeking to invoke the judicial machinery have a "private right" violated or some "personal stake" in the outcome, i.e. some interest in the coercion that is different from the public's interest generally. Of course, this is now called standing to sue. Moreover, the fact that the suit is brought against "persons" (usually those charged with executing the law) has the distinct ring of a writ of mandamus.

A Baker v. Carr type case does not, therefore, present any "case and controversy" problem. The judicial machinery of coercion is provided and authorized by the lawmaker. The problem concerns who should invoke such machinery and that is purely a question of standing. Nonetheless the Civil Rights Acts, when all the paraphernalia of a private law suit is stripped away, allow a private citizen to sue a government in the name of a higher law. There is also a higher law over the federal government. Thus it is natural to ask: Why should it not also be coerced into compliance with the higher law by the judiciary? If some governments can be enjoined to do their constitutional duty, why not all governments since they are all under the Constitution? At least, ought not the issue be examined the same way the Civil Rights jurisdiction is examined, i.e. in terms of "standing" to invoke the judicial machinery? Furthermore, this reasoning goes, the Bill of Rights is a limitation on the federal government and gives us "personal rights" against certain of its actions. Moreover, in the area roughly delimited as "administrative law", strictly public interests can be vindicated by strictly private persons invoking the judicial machinery of coercion. If public interests can be so protected against violations by non-governmental action (usually in the person of large corporation), then why cannot public interests (identified and enshrined in the Constitution) likewise be protected against governmental action? Therefore, by analogy to either Civil Rights or administrative law, the standing issue also is resolved in favor of allowing (say) a federal taxpayer, vindicating his own "right to freedom from establishmentarianism" or the public's interest in non-establishment, to challenge a Congressional spending program financed by appropriation from the general revenues. And if the suit is not against Congress but against an executive officer who will administer the spending act, why then all
the more obviously it is just another lawsuit like mandamus or injunction. And there you have *Flast v. Cohen.* And this despite the square holding to the contrary by a unanimous Court in *Frothingham v. Mellon.* But wait, there the "right" or the "public interest" for which vindication was sought was in the tenth amendment, not the Bill of Rights, so the analogies to standing from the civil rights cases and the largely later developments in administrative law did not obtain. Thus it could be distinguished. Or so it seemed.

However, the Court in *Flast* misconceived the problem and talked about the wrong issue. First, the Court's holding in *Frothingham v. Mellon* was squarely rooted in the separation of powers. Second, the Court in *Flast* equated the "dispute" aspect of the case and controversy limitation with the appropriateness of "issues" for judicial resolution. Clearly the constitutional "issue" raised in *Flast v. Cohen* is meet for judicial resolution, as was the constitutional "issue" raised in *Frothingham.* They were both also meet for resolution by the political branches and had there been resolved. Now, if a "judicial dispute" arose which raised those "issues," then, of course, the Court would be duty bound to render its own independent judgment on the constitutional issue in resolving the dis-

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80 392 U.S. 83 (1968).  
81 262 U.S. 447, 486 (1923).  
82 "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials." Id. 488.  
83 The reference to the "merely ministerial duties of officials" is of great significance. The Court is here referring to the function of the writ of mandamus or the analogous use of injunction in the federal courts to command executive action. Of course, the traditional use of such remedies was not to control discretion but to command action of the executive clearly enjoined by law. It is this power to enjoin executive action which, I would guess, persuaded the Court in *Flast v. Cohen,* 392 U.S. 83 (1968), to assume (apparently unconsciously) that there existed judicial machinery of coercion, and to skip to the question of who could invoke it. But the court in *Frothingham* did not at all assume it existed. In fact, the Court in *Frothingham* quite as casually assumed it did not exist as the Court in *Flast* assumed it did exist; at least, that seems a fair inference from the casual language: "We are not speaking of the merely..." (from the above quotation). But as pointed out in the text, the broad use of the federal injunction to control state governments and the use of the word "standing" with connotations borrowed from administrative law have entirely changed the perspective of the Supreme Court as to what the issue is in "case and controversy" questions.
pute. But by equating “issue” with “dispute” the Court slipped right by the cornerstone of the holding in *Frothingham*, and into the more commodious doctrine of standing, civil rights and administrative law style. But the latter cases can be seen as not truly raising the case and controversy issue for, as pointed out above, each involved a judicial dispute, *i.e.* in an authorized application of governmental coercion to particular entities. The issue was only as to who could invoke the judicial application. If the civil rights cases are examined, it is seen that the organ, the Constitution, announcing the “civil rights” did not itself create any remedy for their coerced vindication. To be sure, in most instances, such rights are self-executing in that they can be raised as defenses in state suits to coerce compliance with some state policy. Thus if a positive legal right is seen as an interest coupled with a governmental remedy, then the three Civil War amendments created, full blown, positive legal rights which could be ultimately policed by the Supreme Court with its appellant supervision over state courts. But all three amendments also empower Congress to enforce each amendment by appropriate legislation. By virtue of such power, Congress authorized the federal courts to enforce such rights by affirmative law suit. In other words the federal government, under its constitutional authorization, channeled, in time-honored fashion, its coercive activity through the courts. Only here the coercion was directed at state government. The existence of a judicial dispute is even plainer in the administrative law cases. There the organ, legislative act, announcing the remedy also identified the interest to be protected. Thus the whole right (*i.e.* interest coupled with the judicially channeled coercion) came from one source; there was no constitutional right and no government to be coerced and thus no confusion as to the nature of the “case in Law”: it was a traditional one.*

* A further word must be added here as to the “administrative law” influence on the decision in *Flast*. Professor Louis L. Jaffe is, with little doubt the nation’s foremost authority on judicial control of administrative action. He is very much in favor of allowing what he calls “non-Hoeflidian” plaintiffs to invoke the judicial machinery to protect public interests against private persons who are regulated by the great federal administrative agencies. Traditionally, public interests have been protected by public attorneys or agents invoking the judicial machinery. The reasons for this are twofold: (1) by channeling the invocation of the court’s powers through public agents, a multiplicity of suits is avoided, and an initial responsible screening is assumed, and; (2) the conceptual difficulties with received notions that a private lawsuit demands a personal “right” or personal stake in the litigation in order to state a cause of action.
Now in *Flast v. Cohen*, it was the Bill of Rights which created the limitations. It contains no authorization to a superior government to coerce an inferior government to comply. Again these limitations are usually seen as individual rights because they can be raised as defenses in a government suit to coerce compliance with some federal policy. As was stated, all such governmental coercion, not only by tradition but through constitutional command, must be channeled through the courts, therefore all governmental action that directly affects individuals is judicially supervised. If a constitutional issue is thereby raised the judiciary must pass on it unless the issue itself is appropriate only to political resolution (see below). But when there is no governmental coercion present or threatened, there can be no "judicial dispute." And that is what the Court meant in *Frothingham* when it said:

"We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question can be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court en-

In many administrative-regulatory schemes Congress has authorized the initiation of lawsuits by private persons who have little more than the public interest at stake. Thus Congress has authorized a sort of "private attorney general" (Judge Jerome Frank's phrase) to bring suit, simply ignoring the two traditional reasons for not doing so. Of course, Congress had every right to do this. See FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965). However, sometimes, the motive for sticking with tradition appears to stem mainly from the judge's predisposition against the particular private litigants. See FCC v. Sanders Brothers Radio Station, *supra*, at 20-21, (dissenting), opinion of Douglas and Murphy J. J.) Professor Jaffe has waged a continuing battle against such tradition-bound thinking, his latest effort aimed primarily at the second, or conceptual, traditional reason for not allowing private standing. *Jaffe, The Citizen as Litigant in Public Actions: The Non-Hoffeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1053 (1968). But the traditional reasons for public attorneys are simply not relevant to the case and controversy limitation, and Jaffe's advice on the latter matter is misconceived and has misled.
joins, in effect, not the execution of the statute, but the acts of the official, the statute not withstanding. Looking through the forms of words to the substance of their complaint, it is merely that officials of the executive department of government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

If there be talk of standing in the above, it is standing to raise constitutional issues when the government is currently coercing or is threatening immediately to coerce the one seeking relief. But "direct injury" must mean, when taken in conjunction with the words "the court enjoins ... the acts of the official, the statute not withstanding", that the government is about to take one's life, or to take (or withhold) one's property or one's physical liberty in some way. If "one's physical liberty" gives pause, then realize that if it is other than physical liberty, the limitation is gone. For if liberty means merely options for action, then nearly every act of government—regulatory, proprietary, or defensive—cuts down those options and interferes with liberty. Of course deprivation of physical liberty includes being banished from the country as well as imprisonment or detention. Nearly every regulation of government, in order to force compliance, carries with it a threat to physical possessions or physical liberty. All actualizations of the threatened deprivation give rise to judicial disputes. It is not the liberty that the regulation, or tax, or spending deprives one of that creates the judicial controversy, it is the imminence of the coercion to comply—"not the execution of the statute, but the acts of the official, the statute, notwithstanding." The deprivation of liberty in the broad sense may well be, and probably will be, the subject of the constitutional "issue" raised in the "judicial dispute" but it does not create the dispute.

Therefore, there was no more a judicial dispute in Flast v. Cohen than there was in Frothingham v. Mellon. Therefore, there was no jurisdiction, and therefore, the Court was unlikely, under the Frothingham standard, ever to have an opportunity to pass on the constitutionality of the act of Congress which, incidentally to its main provisions, gives financial aid to Catholic schools. This the
Court could not abide. Now it is undeniable that such an act is constitutionally suspect; but it is a question about which reasonable men could differ. Congress had scrupled over the constitutional issue with special care, and, as Mr. Justice Holmes observed, "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But no matter to the present Court: Why, if Congress could pass an unconstitutional act immune from Supreme Court revision, Congress would, like a bunch of children when the teacher’s gone, run wild!

This same Court in another era carried such judicial hubris to the brink of self destruction and prompted the following outburst by Justice Harlan Fiske Stone in dissent:

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless Congressional spending which might occur if courts could not prevent — expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have the capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction, is far more likely, in the long run, to obliterate the constituent members of an indestructible union of indestructible states than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relive a nationwide economic maladjustment by conditional gifts of money.

*Flast v. Cohen, 392 U.S. 83, 98, 111 (concurring opinion of Douglas J.), 116 (concurring opinion of Fortas J.), 133 (dissenting opinion of Harlan J., referring to "Court’s unarticulated premise").

*See Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1968) and compare with Board of Educ. v. Allen, 392 U.S. 236 (1968) and Drinan, Does State Aid to Church Related Colleges Constitute an Establishment of Religion — Reflections on the Maryland College Cases, 1967 Utah L. Rev. 491.

*Missouri, Kansas, & Texas R. Co. v. May, 194 U.S. 287, 270 (1904).

*Flast v. Cohen, 392 U.S. 83, at 98 & n. 17; and id. at 107-114 (concurring opinion of Douglas J.).

To reiterate, the Court can be independent and coequal because it is "only a court of law exercising only judicial power." But if the idea of "cases and controversies" can be expanded and contracted by the judges' subjective definition based on their idea of the necessity of intervention, then the basis of allowing independence and coequality is destroyed. Rather, the definition of "cases and controversies" must be independent of the judges. Of course, any standard that is independent of the judges must itself be interpreted by the judges - but the word "independent" implies this much, at least, that is useful: the focus of the Court's interpretation must be on ascertaining what the creator of the standard intended by the words when viewing the "ordinary" usage of the words in the context of their use. And that is something entirely different, as a cognitive process, from deciding purely by one's own standard the appropriateness of judicial intervention.

I have suggested that focus on the phrase, "in Law and Equity" provides some guide to the meaning of the words "cases" and "controversies" intended by the writers of the Constitution. But even Frankfurter did not use the phrase "in Law and Equity." It is worthy of note that the opinion of the court in *Flast v. Cohen* dismissed Frankfurter's dictum, quoted above," by asserting that at the time the Constitution was drafted "the power of English judges to render advisory opinions was well established." However, this is entirely irrelevant to Frankfurter's statement. Nobody ever contended that "advisory opinions" are rendered in "cases". In fact, the very words "advisory opinions" import an opposite meaning. Advisory opinions lack *finality* - they bind no one, whereas no one can doubt that a case at law or equity, by definition, does. Thus Frankfurter was not saying jurisdiction is limited by the entire practice of judges in colonial times, judicial and extrajudicial, but rather by the judicial practice in colonial times. In neither *Coleman v. Miller* nor *Joint Anti-Fascist Committee v. McGrath* does Frankfurter make this entirely clear. Perhaps the phrase "in Law and Equity" would have helped.

Moreover, it was not restraint in allowing enlargement of their own power that prompted Chief Justice Jay, Chief Justice Taney, Mr. Justice Gray and others to decline the invitation to give advisory opinions. Nor was it the "lack of concreteness" that "sharpens
issues”, etc. Rather it was jealousy to protect the judicial power. In *Muskrat v. United States*, and the cases it relied on, it was the lack of finality, *i.e.* the fact that the advice need not be taken, that prompted the refusal. The British law lords gave advice when asked, but they have never had the power to review the acts of King or Parliament. The British judges are underlings. Advisors are perforce underlings. Sovereigns give orders, not advice. But once a “commander” begins to give more advice, as John Jay surely sensed, the authority of his commands is weakened. The habit of obedience gives way when obedience need not always be given. Of course, that was one fear voiced above (Section A) in regard to the Court’s giving orders to which it could not command obedience. Courts in America always settle disputes by giving orders, some of which are commands that the order of another and coequal branch of government shall not be obeyed. But surely a corollary to that power, else the power cannot be reconciled with its grant (and thus with democracy), is that it be used only to settle judicial disputes.

All this is to say that the definition of “cases and controversies”, as an objective jurisdictional limitation, is purely a function of the separation of powers and the continuing justification of the Court as a coequal branch. In *Flast v. Cohen*, the Court skirted the real issue when it shifted emphasis from standing as a way of expressing limitations on the kind of dispute it could settle, to one of limitations on the appropriate disputants, which led to considerations merely of “concreteness”. The reliance in *Flast* was then placed on cases where jurisdiction to settle the kind of dispute was arguably given by special grant of Congress and the issue was standing in what Bickel calls the “impure” sense. The inquiry in these “impure” standing case is properly focused not on jurisdiction, but on the discretionary question of appropriateness of the suitor in terms of “personal stake” and appropriateness of the issues in terms of “ripeness” or “mootness”.

It is significant that the two cases closest in point to *Flast* were each squarely decided in terms of jurisdiction. These cases were disingenuously distinguished in *Flast* by carving a rule around them having nothing to do with separation of powers, which was their basis. If *Frothingham v. Mellon* “talks” in certain places about the policy behind the Court’s decision in terms more appropriate
to non-jurisdictional standing, that does not change the clear holding or the main thrust of its rationale. Nor should it create doubts about the "true" nature of the holding. What it does show is the tyranny of words and the confusions engendered by forcing one word, here "standing", to signify several concepts.

Perhaps it is too late in our history to resurrect the phrase "in Law and Equity" (never much used anyway) and ask it to do service in a cause apparently already lost. Marshall's philosophy of deciding a constitutional issue only if the Court happened to get it in the course of its regular judicial duties has given way, apparently, to one of taking jurisdiction if the Court thinks the constitutional issue is important. The most discouraging thing about Flast is that the lone dissenter, Justice Harlan, did not predicate his opinion on want of jurisdiction.

And what does Flast v. Cohen "teach"? It teaches the idea that constitutional issues must be decided by the Supreme Court if at all possible; that the other branches of government cannot be trusted with any part of this sacred task. Because of the esoteric nature of standing and jurisdiction, Flast is bench-and-bar-focused teaching. But the Flast example cannot help but mightily reinforce—at least for what Professor Dahl calls the "political stratum"—the pattern of judicial ubiquity and potency. If you lose in the legislature, go to the courts. The legislatures are staffed with children anyway.

Did Flast not help teach the losers in Roane County where to go? Did it not add to the impression the West Virginia Court received, that it ought to let them in? And did it not help teach the court to presume to decide the political issue involved? Adam, of the Parable, might have said:

Samuel, we never cooperated in that area before and I didn't specially provide for it here, though I thought of it. I worried within myself very long and hard because I knew I would not have your guidance. Now without my say so you volunteer your advice and dain to make it a command. My rule was: My servants each in their place, none master of the other, none master of me. Perhaps Guardian was too large a word for you. You have become proud and arrogant — and you spoke of "overweening other servants."

(2) The "political question" limitation.

Since the Court has only judicial power it cannot answer political questions. Moreover since its having only judicial power is a
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constitutional predicate of its being independent and coequal (i.e. of the Court's having the power of "judicial review"), it has no constitutional right to attempt to answer political questions. As was pointed out above, that means it has no power to settle disputes that turn on the resolution of political questions, i.e. jurisdiction initially given, assuming a "case or controversy", is lost. In the usual case, then, existence of a crucial political question is not a matter of self-restraint, it is a question of power. This does not avoid the hard question of what a non-justiciable political question is. And to answer that question requires a high order of judgment because the standard is so elusive and vague. But just because broad discretion must be exercised to answer the question, the question itself should not change. But it has. And this change in the underlying question from one of jurisdiction to the appropriateness of its exercise has changed the answer—for, if you will pardon the expression, "ask a flabby question, you get a flabby answer."

For example, would it not have made a difference in Baker v. Carr that Colegrove v. Green had been decided squarely in terms of jurisdiction? In other words, if the Court in Baker had approached the "political question" issue as one of jurisdiction, would it not have viewed that issue differently? Would it not have constrained the Court to carve out a narrow rule? Such constraint should come from the corollary to viewing justiciability as jurisdictional. In Marshall's famous words: "We have no more right to decline jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

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"The Court in Baker v. Carr, 369 U.S. 186 (1962), begins its discussion of the political question doctrine by stating that it has "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness." Id. at 210. But the Court does conclude with the following "test":"

"Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Id. at 217. I do not undertake here a general discussion of the political question doctrine—ground heavily plowed in legal literature.

"Id.

"228 U.S. 549 (1918).

"Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)."
a Baker v. Carr type case is found to be within the Court’s jurisdiction, all such cases must be taken unless distinguishable, and such taking would be entirely a function of the standard by which the prototype was let in. Thus rigor in defining the jurisdictional standard will be compelled or else the Court will find itself embarrassed into taking cases it really does not think appropriate, for any one of the various “discretionary” reasons given in Baker v. Carr for not getting involved in the nation’s politics. Such a rigorous and narrow rule could have been fashioned in Baker v. Carr and it would have avoided both the flabbiness of the present justiciability standard and the narrowness and simplicity of the rule on the merits, “one man, one vote”, which rule was a betrayal of the original thrust, rationale and aim of Baker and grossly oversimplified a complex problem.10

Because Baker so clearly illustrates the lesson of judicial over-reaching, it must again be reiterated that “one man, one vote” as a rule for apportioning legislative representation implies a particular kind of republican government and one which is not reflected by the way the national republic is constituted. The result of over-reaching in the resolution of the “political question” issue in Baker led ineluctably to that standard which is premised in the resolution of as clear a Guaranty Clause issue as could be framed. The premises and conclusion were not “given 'republican government' and 'equal protection of the laws'” then a particular type of republican government is implied, i.e. representatives as pure delegates.” That would be defensible as not a Guaranty Clause decision. Rather the premises and conclusion were “given a particular type of republican government” called “pure delegate” and given “equal protection”, then “one man, one vote” follows.11 But the Court got to that pro-

10 See discussion in Part I of this article, 72 W. Va. Rev. 1, 23-31.
11 Remember, all that “equal protection of the laws” means ordinarily is rational classification for different treatment. Such classification is performe not rational if based on invidiousness, i.e., on prejudice which is nearly always assumed to be irrational. No such invidiousness can be found or has ever been found in the apportionment cases. The Court as much as admitted in Baker that there are many rational plans for apportionment. The issue was whether or not the Tennessee appointment scheme under attack in the underlying “merits” case in Baker “reflects no policy, but simply arbitrary and capricious action”. Baker v. Carr, 369 U.S. 186, at 226 (1962) (emphasis in original). Thus republican government and equal protection demand only a rational plan, and which of several “rational plans” is to be the plan is a question to be decided in the political arena. Only if a particular theory of “republican government is adopted as the only allowable “meaning” of republican government, and that theory is pure delegate or pure “reflector”, does the conjunction with equal-protection-rationality demand mathematically equal population districts.
position backwards and have yet to acknowledge even that they got there at all. By not having a clear standard to justify their intervention and by using a standard for non-justiciability stated in terms of negatives, one of which (and apparently the only one of immediate relevance for the Court) was “lack of judicially discoverable and manageable standards for resolving it”, the majority was impelled toward finding a manageable standard for resolving the constitutional issue. Thus to prove, after the fact, that the issue was justiciable, they found the only standard a court could both manage and discover, “one man, one vote”, and that standard implies a particular theory of republican government or it makes no sense as a standard for apportionment. In a nutshell, the felt exigencies of justiciability as enunciated in Baker and not in the equal protection clause, drove the Court to “one man, one vote”. “One man, one vote” as a rule for apportionment implies pure-delegate-type representation and that in turn implies a Guaranty Clause decision. Thus the exigencies of justiciability led inexorably to a decision the Court still says is non-justiciable. If this is correct, then Holmes was indeed right: “The life of the law has not been logic; it has been experience.”

Besides violating the limitations on power that inhere in the interdependence of the attributes of judiciality, independence, and coequality, and making for vague, almost non-standard, standards, the discretionary political question doctrine has another failing. For it is one thing to be able to define the limits of one’s own power; it is another thing entirely to determine that one has the power but one chooses to refrain from using it because of this or that reason which is solely within one’s own discretion. Some theologians define God’s power in these terms: “He could do anything but He is letting you muck around to test you”, or for some other reason, perhaps known only to Him. What is suggested here, if a little too flatly, is that the Court’s exercise of a broad discretion to abstain or intervene is the attribution to itself of a far greater power than the power to determine its own jurisdiction. And this cannot help but teach, as it apparently did in Lance v. Board of Education, very subtly to be sure, a sort of judicial omniscience and omnipotence, a sort of “we-will-answer-your-prayer-if-only-you-pray-fervently-enough” attitude. The only difficulty with this is that courts have neither of these two godlike attributes and that this type of “prayer” stultifies needed self-help through democratic persuasion.
For example, the problem of air and water pollution fairly shouts for solution. Yet many of the leaders, the potential persuaders and political consensus-makers, talk about finding a constitutional right to clean air and water, probably somewhere in the ethereal confines of the ninth amendment. "If we only pray long and ardently, sincerely and plaintively, the Court will sooner or later answer our prayer". What remedy the Court could fashion, what standard it could invoke, seems to be beside the point. After all, in Baker the Court cavalierly announced: "Beyond noting that we have no cause at this stage to doubt that the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial." Quite frankly, to add a personal note, the doomsday ecologists have frightened me. Pollution should be the burning issue of our day. One that should easily arouse that "popular conscience that sears the conscience of the people's representatives." By looking to the courts for federal judicial solution, the reformers not only waste breath in the wrong forum, but tend to frame the issues in absolutist terms — the rhetoric of "constitutional rights." Such rhetoric, tending to the dogmatic, puts off the as yet unpersuaded and impedes the formation of a politically workable consensus. The sweet voice of reason is required to form political majorities, passionately voiced reason perhaps, but altogether in a spirit of modernation, of listening as well as talking, urgent but patient. Exposing and illucidating the problem in terms of quantity and the people's interest, exploring the costs of solution, and balancing the two, that is what must be done. And until that is done no court will have the tools to solve

367 See e.g., Paul Ehrlich, Eco-catastrophe (1969). * No pun intended.
369 It would be immoderate of me not to add that much of the anti-pollution rhetoric is informed by the "spirit of moderation". For example the very popular book The Population Bomb by Dr. Paul Ehrlich is full of "passionately voiced reason", "urgent but patient." But, it is worthy of note that Dr. Ehrlich, in a chapter called "What can you do", lists 15 "inalienable rights" to answer someone who says he has "an inalienable right to have as many children as one wants." Dr. Ehrlich includes "the right to eat meat" and "the right to silence" in his tongue-in-cheek list, which he feels one must make "as long as the invention of inalienable rights is in vogue." (p. 187) Dr. Ehrlich's little joke is that the best way to answer nonsense is by counter nonsense or "a silly argument deserves a silly rebuttal." But the publisher, whose business it is to sell books, and who therefore is expert at measuring and knowing the "in" vogue, took the list of rights, culled out the obviously facetious, and printed it on the back of the paperback publication as Mankind's Inalienable Rights.
the problem, nor ought to attempt to exercise its otherwise feeble powers.

To return to Baker v. Carr, a narrow rule could have been fashioned to solve the genuine political impasse that the Court saw through the narrow lens of the case at bar. Moreover, such rule follows from a strict reading of the then obtaining political question doctrine and is principled, i.e. it is reasonable, neutral, and can be consistently applied. That rule is:

If a suitor claiming the denial of equal protection of the laws under a federal jurisdictional statute [here 42 U.S.C. § 1983 or § 1988] is a member of an identifiable class of citizens who are denied equal treatment, and such denial is based on no identifiable state policy but is in fact in defiance of identifiable state policy and rests on inertia or engrained abuse of political power, then even if the inequality of treatment is a political question (and thus perforce not a judicial question) it becomes a judicial question if and only if the inertia or engrained abuse of power are convincingly demonstrated both by history and the intrinsic nature of the problem to be not amenable to political solution; and it is a judicial question only to the extent that it is not so amenable and remains one only until such political problem is made amenable to political solution.

Such a predication of jurisdiction follows from a premise that there is a constitutional right here, a right from the equal protection clause to a reasonable classification and a second premise, the premise of necessity, a premise that is consistent with coequality. It is that constitutional rights must have some governmental remedy. Then if the governmental remedy is ordinarily and properly for the "political" government because it involves a political question and if the political remedy for the political question is, as a practical matter (as defined in the rule), unavailable, then it is meet for judicial remedy and thus becomes a judicial question, only to the extent that a judicial remedy can do this. This still allows a political solution to the basic political question concerning the constitutional right. In Baker, the basic political question was: which of a myriad of possible "reasonable" apportionment plans based on various definitions of "republican government" (which definitions are admittedly political) was to be the basis of the apportionment plan under attack? Under the rule I suggest, the Court could order only that either the
state adhere to its own policy, long ignored, or develop some plan that has an appearance other than randomness.

Had the Court done this, it could have broken the political logjam but still allowed the ordinary political processes to solve the problem of which particular apportionment plan was most in accord with the polity's idea of a just government. Thus it would not have set an example reinforcing the pattern of judicial self-apotheosis: the seeming omniscience which in the long run is, as Frankfurter said, but "sounding a word of promise to the ear, sure to be disappointing to the hope."

(3) The "neutral principle" limitation.

A court of law, by definition, has no force or will of its own, but only judgment. It follows, of course, that a court in exercising its jurisdiction to resolve controversies cannot make the law to cover the case, except, as Holmes suggested, interstitially. It interprets the law given by the lawmaker. In the constitutional context, the lawmaker is the people and the law made is the written constitution. In common law countries, where much of the private law (at least until recently) is unwritten, the function of a court as law interpreter and not lawmaker is often blurred and sometimes confused. For, as legal realists are wont to point out, when one has to discover the law without the aid of any writing, one appears to be left much more at large to declare as rules norms emanating from one's personal notion of justice, and that, of course, is what lawmakers do, i.e., enact as laws that which the collective will (assuming democracy) asserts is the collective will's notion of justice. Perhaps the realization that a judge is left too much at large with his own predilections where there is no written law has created the unique respect of common law courts for stare decisis. At least old decisions are written. In civil law countries the problem of separating the functions of legislators and judges has been obviated to a large extent by elaborately written codes. Likewise, in interpreting a written constitution, this distinction between interpreting and making law ought to be fairly obvious and therefore faithfully kept. It was on the faith that it could be kept that the Court was made coequal and independent, for it had no "Will but only judgment."

But in a common law country with a written constitution two factors work counter to seeing this distinction. One is the common

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law judicial tradition, mentioned above. The other is that a written constitution is not an elaborate code but a set of fairly general precepts. As Marshall said, it is a writing "intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs." "We must never forget," Marshall seminally intoned in the same opinion, "it is a constitution we are expounding." Thus the interstices are great. Nonetheless the Constitution is written law and interpretation of the Constitution must come from interpretation of the written word. Professor Freund, in the best defense that can be made of Justice Black's absolutist dogma, refers to Black's insistence on giving the written word its "natural meaning". "Natural meaning" is a better phrase than "plain meaning" for characterizing the process of interpreting the general words of the Constitution. "Plain meaning" has something of old-fashioned platonic idealism about it, suggesting, perhaps, that there is a perfect form, say, of "freedom of speech", independent of the context or particular use of the phrase. This rankles those schooled in more modern philosophy or in modern psychology. "Natural meaning", on the other hand, implies the common sense understanding of the words, what to the vast number of people is the "natural" usage of the words. It suggests the idea that any interpretation of written words must seem to the ordinarily intelligent person to be natural, not forced or, to put it figuratively, the interpretation must appear to come as if "spontaneously" from the written word.

Thus, possessing only "judgment" and no "will" of its own, a court of law as a predicate of its grant of power, is limited to the "natural meaning" of the words in the Constitution. Yet, something more is implied in the idea that the Supreme Court is a court of law. The quality of a court's interstitial particularization of a vague precept must have about it the distinct flavor of law, as opposed to fiat. As Professor Wechsler summed up his famous lecture on "neutral principles":

In [exercising the power to review the action of the other branches in the light of constitutional provisions] they are bound to function otherwise than as a naked
power organ; they participate as courts of law. This calls for
countering how determinations of this kind can be asserted to
have any legal quality. The answer, I suggest, inheres pri­
marily in that they are — or are obliged to be — entirely
principled. A principled decision, in the sense I have in
mind, is one that rests on reasons with respect to all the
issues in the case, reasons that in their generality and their
neutrality transcend any immediate result that is involved.
When no sufficient reasons of this kind can be assigned for
overturning value choices of the other branches of govern­
ment, or of a state, those choices must, of course, survive.
Otherwise, as Holmes said in his first opinion for the Court,
"a constitution, instead of embodying only relatively funda­
mental rules of right, as generally understood by all Eng­
ish-speaking communities, would become the partisan
of a particular set of ethical or economical opinions . . . ."

No doubt this is itself a laudable, even a necessary, principle for
a court of law to follow in announcing the rule for the case. If a
court's decision is to appear to flow from law and not from idiosyn­
cratic notions of justice that fit a specific case alone, then it must
make "an intellectually coherent statement of the reason for a result
which in like cases will produce a like result, whether or not it is
immediately agreeable or expedient."

However, this principle is much easier to state than to apply.
Professor Bickel, in explicating Professor Wechsler, cites Shelton v.
Tucker as an example of the Court's failure to follow the rule of
the neutral principle. At the same time he criticizes Mr. Wechsler's
citing of the school desegregation cases as such an example. However,
I think Professor Bickel is wrong about Shelton. On careful
reading of Shelton one is struck by two things: (1) It takes no
imagination to see that an affidavit requiring the disclosure of all
associational activity within the past five years by a public school
teacher hired on a year-to-year basis is violative of the fundamental
constitutional ideal of freedom of association. (2) Mr. Justice
Stewart's opinion for the majority is not a model of articulate explica­
tion of the ideal as applied. I would guess the case was too easy
for Justice Stewart and as a result he too glibly set forth the Court's

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371 Wechsler, supra note 14, at 19.
372 Bickel, supra note 3, at 59.
373 364 U.S. 479 (1960).
374 Bickel, supra note 3, at 51-55.
375 Id. at 56-58.
rationale of decision. In fact, by certain statements, he almost creates a non-rule, i.e., one without intellectual coherence.\textsuperscript{16}

Despite the obvious blemishes in the opinion, one can induce from it a principled rule: when a state makes an inquiry of any of its public employees, which inquiry will necessarily interfere with the right of free association, a right which "lies at the foundation of a free society", then the inquiry must be limited to that which can reasonably achieve whatever legitimate purpose or purposes the state might have for its inquiry. Such a principle has nothing to do with Shelton, the particular plaintiff, or the NAACP, the particular association that would by the inquiry be interfered with. Now the principle in application requires determination of these material facts: (1) Will the particular inquiry necessarily interfere with free association, and; (2) What legitimate purposes might the state have for such inquiry, and; (3) Were other less restrictive alternatives available that could reasonably achieve such legitimate purpose or purposes? The majority concluded that an inquiry which seeks disclosure of all organizational associations within the last five years where some associations may perforce be extremely unpopular and where the inquiring authority can discharge the public employee from valuable employment without notice, charges, or an opportunity to explain, then such lawful but unpopular associations will, in any common sense understanding of human nature, necessarily inhibit such association.\textsuperscript{17} It also concluded that the legitimate purpose a state could have for such inquiry was to ascertain whether or not the time taken up by such associations might interfere with the employee's having ample time properly to discharge

\textsuperscript{16} For instance, the opinion states that a state may inquire of some teachers, all associations, and of all teachers, some associations; but not of all teachers, all associations. But he never explains how one is to discover the "some teachers" of whom unlimited inquiry can be made. His explanation that not all teachers can have all associations inquired into is premised on the conclusion that "many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." Shelton v. Tucker, 364 U.S. 479, 487-488 (1960). That premise does not help explain "some teachers, all associations" unless one assumes he meant either that (1) some teachers will belong only to groups about which inquiry is permissible, or (2) after initial screening some teachers will have disclosed matter which would allow a further complete screening, or (3) the state could pick some teachers at random to make the "all associations" inquiry, like the Internal Revenue Service's random audit policy. (1) and (3) run from silly to absurd, so (2) is elected. The problem is that one has to "assume" his meaning and without such explanatory assumption the opinion is incoherent.

\textsuperscript{17} Id. at 486-487.
his employment and whether or not the employee had improper associations. It further concluded that the inquiry was far broader than was necessary reasonably to achieve either of these purposes— which by implication means that the state could have achieved these purposes by asking the number of outside associations, the time spent with each and whether any were illegal or "illegality-teaching." The latter question can be asked either by defining various unlawful categories and asking if any organization associated with fits the definition, or by listing the taboo groups (as the federal government does) and asking whether the employee belongs to any of them.

This examination of Shelton v. Tucker illustrates two points: First, inarticulately written opinions are not necessarily unprincipled decisions. They border on the unprincipled, because the opinion itself lacks intellectual coherence. But if a principled reason for the decision can be evolved and is fairly implicit in what is written, including the cases cited in support thereof, then some stumbling, seeming contradictions (or is it counter dictions?) should be overlooked. I will admit that this explanation is not entirely satisfactory. We expect from courts of law (and think we have a right to expect in every instance) clear, logical, generalized rules to explain their holdings. But, of course, this does not obtain and never has obtained. Any lawyer who has stumbled through the common

110 Id. at 487. "[The question] is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity."

111 Id. at 485 (reference to "right of state to investigate competence and fitness" of teachers because teachers work in a "sensitive area" and they shape "the attitudes of young minds"). "Improper associations" would be those relevant to such "fitness" "to shape young minds" and such relevance would be limited by the constitutional standards gleaned from such cases as NAACP v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952). It would probably include organizations set up for illegal purposes or that advocate or teach illegal means of accomplishing their purposes. Membership itself need not be illegal or the organization unlawful, since the state, as an employer, has broader discretion as to whom it hires to mold its young people's minds than it would as to direct control of speech or organizations. Thus organizational membership that would bear a substantial nexus to showing the kind of "ideas" a teacher might teach about illegal conduct would be relevant. But since the Court in Shelton quotes (at 487) Sweezy v. New Hampshire, supra, that "[t]eachers and students must always remain free to inquire, to study and to evaluate..." and Wieman v. Updegraff, supra, to the same effect, the Court seems to imply that such illegal or illegality-teaching organizations would be the only ones about which the state could make specific inquiry.


113 See note 119, supra.
law precedents in a particular jurisdiction to ascertain the controlling principle for his case has almost instinctively used such a rule as here outlined for inferring principles from opinions. Not to do so would not only make the process of using precedents extremely difficult, it would make it absurd. Most judges often fail to be logical or clear, and even the best sometimes do — even Homer sometimes nods. We expect and generally get a better performance from the Supreme Court than from our other courts. But even with this highest Court, the requirement of principled decisions must be mitigated to allow for human fallibility.

The second point is that if intuition (or some such non-verbalized cognition) tells one that the particular result in a case is in accord with (say) “liberal” notions of justice, but notions that are vague, almost “feelings”, and no articulate explanation is made, one is inclined to conclude, as Bickel did with Shelton v. Tucker, that the decision is merely the result of the court’s desire to get a particular just result without the application of a generalized principle. In Shelton, an implicit inference could be attributed to the majority. It is that Arkansas’s primary motive for requiring the disclosure affidavit was to ferret out members of the NAACP in order to fire them or at least to discourage, by an implied threat, membership by teachers in Negro rights organizations. If this had been the avowed legislative purpose, or the only conceivable purpose for such disclosure, the case would have been easy. But it was not and the Court recognized this. Nonetheless, the Court reached the result it would have reached had it been able expressly to find such sole purpose and its articulation of a principled ground for the result was muddled. Therefore, one is tempted to conclude that individual justice based on the judge’s intuition was being dispensed, not principled line-drawing. Now if the Court had simply said, “justice in this case requires that Mr. Shelton not have to file the affidavit”, that conclusion would be warranted. Or it would be warranted if the Court had said or implied, “despite our holding in such and such, and despite our inability to distinguish that case, and despite its being the law, we know what’s going on here and will not tolerate it.” In either event, the Court would have been acting like

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320 So Hand said of Holmes to characterize the creation by Holmes of the “clear and present danger” test. Hand, *Bill of Rights*, 59 (Athenaeum ed. 1965).
persons exercising certain executive functions, such as a prosecutor deciding which crimes not to prosecute, or like a legislature passing a bill granting special aid to certain people (e.g. war veterans, flood victims) or deciding to put a road or park in this place and not another: decisions based on no discoverable or articulatable principle but seemingly demanded by vague notions of justice, exigent circumstance, political compromise or the like. But such was not the case in the Shelton opinion and the temptation to the easy reading should have been resisted.

On the other hand, a case that seems to me to violate Mr. Wechsler's rule, and was therefore not an authorized answer to the constitutional question posed, is the opinion for the Court by Mr. Justice Douglas in Griswold v. Connecticut. I am not here quarreling over whether or not the "right of privacy" is a constitutional ideal either in its fundamentalness or in its being attributable to the text of the Constitution. Rather my quarrel is with the "rule" announced to govern the case and dictate the result. All of the opinions struggle to find the "right" (i.e. the constitutionally protected interest) purportedly violated by the Connecticut statute. All of them acknowledge that such interest is not absolute. That is, the interest can be invaded by state regulation to protect other interests of the public. But the Douglas opinion makes only a cryptic finding that the Connecticut anti-contraceptive statute sweeps too broadly and thus has a constitutionally impermissible "impact" on the right. In effect he announced that there is a right at large in this land, fundamental, but not absolute, any invasion of which must give pause for careful scrutiny but "if you want to predict beforehand what the result of our scrutiny will be, better read biographies of the judges to discover their prepossessions because we have no rule for such examination." Had the Court said, as Justice Goldberg's opinion comes close to saying, that the state may never

[381 U.S. 479 (1965).]

There are five opinions in addition to Douglas': supplemental concurring opinion by Goldberg joined by Brennan and Warren; separate, "concurring in the judgment" opinions by Harlan and White; and reciprocating dissenting opinions by Black and Stewart.

Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Justice Goldberg's separate opinion does state that the individual interest can be overbalanced only by a "compelling" state interest and that the law must be "necessary" to the protection of such interest and "not merely rationally related" to its protection. Griswold v. Connecticut, 381 U.S. 479 (1965). But he concludes with the statement: "Connecticut cannot constitutionally abridge this fundamental right (to marital privacy) . . ." This statement would seem to make the right absolute.
pass a law interfering with marital privacy, a principle would be apparent. It does not matter that a principled reason could have been given, if in fact none was given or fairly implied. To say that a law has an impermissible impact on a right is to give no guidance, no rule for legislatures to follow. It is like a prosecutor saying, "Well, taking into account all the circumstances here, I am not going to prosecute the perpetrator of this particular crime." Such decision may give insight into the particular sense of justice of the prosecutor, perhaps into his "personality", which may help predict how he feels and will behave in the future, but it yields no standard to govern his future behavior.

Nor does the "compelling interest doctrine" suggested by the Goldberg opinion yield a guiding principle. Under this doctrine, the purported principle for balancing interests is that when a litigant's interest is found to be fundamental (i.e., constitutionally protected) then the state's countervailing interest must be compelling. But compelling to whom is the question. The answer apparently is "compelling to us judges." But no guidance is given as to what will appear to be compelling to the judges. If the Court traces from the roots up the value of the individual's asserted interest, but then fails to demonstrate why the state's interest is not compelling, there is no principle—there is only subjective judgment.

What has happened, I will be so bold as to suggest, is that the Court feels the compulsion to pass on the substance of legislative action, but has rejected so thoroughly the substantive due process doctrine that balanced individual against state interests, that it no longer can "talk" in language that might even suggest that "abhor-

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\[\textsuperscript{10} \textit{See note 127, supra.}\]

\[\textsuperscript{11} \text{Justice Douglas does hint at a principle in saying "[s]uch a law cannot stand in light of the familiar principle, so often applied by this court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Griswold v. Connecticut, 381 U.S. 479, at 485 (1965). Is that a principle? If so, is it more than the "principle" that a state cannot pass unconstitutional laws? Does it also say that when a law invades constitutionally protected interests it can do so only so far as (a) absolutely, (b) reasonably, (c) arguably necessary to achieve a (a) vital, (b) necessary, (c) laudable but not necessary, (d) merely legitimate) state purpose? Or does it say simply that the state may not in any way "invade the area of protected freedoms," i.e., may not, no matter how vital the interest, interfere with marital privacy? I am suggesting that not only is the quoted statement equivocal on its own terms, but that since the opinion does not even casually examine the state's interest, it gives no help in tightening the loose language.}\]

\[\textsuperscript{12} \textit{See note 127, supra.}\]
rent" doctrine. No one will gainsay the past abuse of that doctrine. Nor is there any argument that much of the abuse came from an overly subjective conclusion as to which "liberty" or individual right was sufficient to overturn the legislative or public interest and a too cavalier treatment of the initial legislative balancing. So a salutory shift in emphasis took place with the advent of the Roosevelt majority. The new emphasis on finding an objective fundamentalness of the challenging litigant's interest led some, most acutely Mr. Justice Black, to the Bill of Rights as that objective sign of fundamentalness. Since the language of most of the Bill of Rights, with the possible exception of the fourth amendment, does not appear to yield a balancing principle, once the right is located therein the state's interest has to give way. "Rights analysis," as opposed to balancing, is perfectly acceptable in the area of procedure. If one has a "right" to a certain prescribed procedure before something else can happen to one, then the question is simply: Did the state do what it was commanded to do? However, it is not nearly as acceptable when the substance of the law is being challenged, as is evidenced by the great and continuing debate over "balancing" in the first amendment area. When substantive law is challenged as (say) an abridgment of the freedom of speech, then analysis of the words "abridgment" and "freedom of speech" make necessary an examination of the purpose of the law claimed to interfere, the nature of the speech interfered with, how much it is interfered with, and how it is interfered with. Any conclusion as to whether or not there is an "abridgment of freedom of speech" requires balancing: privacy, reputation, truth or morality, versus pure speech (libel and obscenity cases); order versus pure speech (incitement cases), etc.

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376 See text accompanying notes 49-50, supra.
377 See text accompanying notes 51-57, supra.
378 Those "duties" are given only in a "thou shalt not" context. They are not sole affirmative commands to government, e.g., that the state must provide welfare. Rather they are conditional commands, i.e., if the state does X, then it must do Y. For example, if the state punishes for crime, then it must give notice, hearing, etc.
379 There are some cases that can be put hypothetically which seem to require no balancing. For instance, if Congress should pass a law saying, "in the interest of law and order, no one may make a speech on a college campus that criticizes the President's war policy or the war in Vietnam," clearly it would abridge freedom of speech. No balancing needed--obviously! Now imagine that Congress passes another law: "no one shall make a speech which urges individuals to assassinate the President, or which teaches the propriety of killing or of blowing up buildings to bring about reform." Clearly, this is a limitation on
Of course there is no nice clean dichotomy between judicial review of procedural and substantive law. But it is suggested that in general when governmental action is challenged for failure to do something, it is sensible to focus on the “right” to have it done, and while the process of determining the right requires a kind of balancing, such balancing does not require an examination of the “quality” of what the government is doing—that is, of the values served by the governmental action or the public interest protected—but rather with the quantity of the interference with the individual. Professor Bickel points out that procedural decisions “deal with the ‘how’ of governmental action, whereas substantive decisions go to ends, dealing with the what.” And in determining the “how”, the only balancing is as against the “how much” on the other side. The examination of the “what” of governmental action (i.e., the determination of whether or not it can be done at all) necessarily involves weighing competing values, examining competing interests. The first amendment helps to identify the individual’s interests, it helps establish a hierarchy of values, but despite speech. But is it unconstitutional? Is it an “abridgment” of “freedom of speech”? See Dennis v. United States, 341 U.S. 494 (1951) (first paragraph of dissent by Douglas). At least, it should give pause, a pause to consciously weigh the interests involved. I suggest that there was balancing in the first hypothetical as well but that it was over in the twinkling of an eye. The balancing was between the interest in order and the interest in free speech. While the governmental purpose is legitimate, in the name of order all speech could be suppressed; that is the standard excuse in dictatorships. Therefore, the quantity of disorder that will be caused must be weighed against the quantity of the interference with speech. In the first hypothetical case, the quantity of disorder that will be caused is obviously problematical, as is the causal link itself. The quantity of the interference with speech, on the other hand, is so large and direct that to state its magnitude would require resort to truisms about a free society. The imbalance here is so obvious we don’t even think about it.

The current rule for applying the ideal freedom of speech, to concrete situations is the “clear and present danger test.” See Brandenburg v. Ohio, 395 U.S. 444 (1969). That is, of course, a balancing test. In a world in which speech is such a powerful goad to action, in which life, bodily integrity, and property are so highly valued, and where men are practical enough to get through the day, some such balancing test is simply inedible. If one knows that N act will cause X destruction, and knows that A is about to do N, as an ordinary human problem-solver, one stops A. If N is “speech” which will cause X destruction, what is the difference? If the causal link is really certain, only monkish idealism would allow the speech. Ours is a practical nation, which presupposes a practical particularization of ideals. (See text below in Section C (2). See, 72 W. Va. L. Rev. 117 (1970).


Bickel, supra note 3, at 223.

Compare the procedural rights afforded an accused charged with a capital felony with those afforded in cases of non-capital felony, misdemeanor, minor offense.
its absolutist language, it is no simple mechanical rule in anything like the sense of (say) "the right... to be confronted with the witnesses against him" in any criminal prosecution.

This balancing is not unlike the examination of a statute for reasonableness under the old substantive due process standard. The judges most committed to throwing out substantive due process also refused to "balance away" first amendment rights.\(^{18}\) Thus, when reviewing state action under the fourteenth amendment, these judges will not only not talk in terms of reasonableness, but will also insist on finding a very fundamental human right (hopefully from the Bill of Rights) on the individual litigant's side, and if it is found, refuse openly to consider countervailing state interests. Couple this with the felt need to strike down "uncommonly silly"\(^{19}\) state laws, and two things occur which violate the limitation discussed here under the rubric "neutral principles": (a) the insistence on finding the individual interest enshrined as an absolute—in other words, as if specifically put in first amendment-like language—but without the insistence that the natural meaning of the language of the Constitution yield such individual right;\(^{20}\) and (b) either failure to examine the state's reason for passing the law or dismissal of such interest with a verbal flick of the wrist, incanting the phrase, "not compelling." These violations teach an attitude toward "rights," even toward the idea of law, that is inimical to democracy or any free society—an attitude of thinking of all rights in terms of uncompromisable absolutes and an attitude that the source of rights is no consensus but natural justice.\(^{21}\)

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\(^{21}\) Whether or not there is "natural justice" or "natural rights" is a metaphysical question not relevant here. For assuming there is "natural justice" which can be discovered through reason, the question remains: Discovered through whose reason? The answer is that in a democracy it is discovered through the reason of the people as manifested in the collective life of the nation. In a constitutional democracy such "discoveries" are enshrined in words in a constitution or basic resolution of government. In an absolute monarchy, the king discovers the principles inhering in natural justice through his own reason, helped, no doubt, by his advisers, much as the people in a democracy are helped by their leaders, including the Supreme Court. Whether or not one believes in natural justice, there is no way to avoid the question of the human source of law. Reason is no Mount Sinai. And unless one is an absolute monarch,
In *Griswold*, where only the "right" is analyzed, the natural principle (or at least the commonly imported one) is that the right is absolute. For, and this may be crux of the error in unprincipled decisions, we tend to import principle into judicial decisions (i.e., we tend to think they are principled just because a court made the decisions). The court in *Griswold*, the inference goes, did not bother to articulate how it struck the balance for there could be no real balancing away of this absolute. Moreover, and surely this is the danger that Justices Black and Stewart were concerned about, the interest, the right, the liberty or whathaveyou, is not expressed in words the "natural meaning" of which yields "right to marital privacy." This encourages an attitude of seeking, in the name of constitutional rights, judicial vindication of whatever interest seems paramount to a concerned individual — clean air, clear water, abortion, 25¢ subway fare, etc. — without first generating in the

one cannot say that the natural justice my reason has discovered is the Law even if most others whom I respect have reached the same conclusion through their reason. Unfortunately, there are many today who act like absolute monarchs in this respect. The faith of democracy is that if one's "discoveries" are "true," then one will be able to convince the people to convert them into positive law. Until that happens, one's discoveries are not proven and are not Law. If one does not believe that, he is no democrat. For those who believe in "natural rights" and democracy, the statement to which this is a footnote would more accurately read: "an attitude that the source of law is not popular reason but rather my reason or the reason of others like me or the reason of the best of us, some 'natural aristocracy.'"

The growing practice of using the "right of privacy" to attack and strike down abortion laws exemplifies my point. In *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied 397 U.S. 915 (1970), the California Supreme Court in obiter dictum that seemed to reassure the majority in a decision holding the "old" California anti-abortion law void for vagueness, declared, in effect, a constitutional right to abortion, relying mainly on *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also United States v. Vuitch, 305 F. Supp. 1092, 1095 (D.C.D.C. 1969), prob. juris. noted — U.S. — (1970). Then in *Babitz v. McCorm*, 310 F. Supp. 295 (E. D. Wisc. 1970), a three-judge district court in Wisconsin struck down the Wisconsin anti-abortion law expressly because it violated the "right of privacy" of the ninth amendment. What is arresting about these decisions is the casual way in which the courts assume this new "right to abortion" and the utterly cavalier treatment given to the countervailing state interest. The value promoted by anti-abortion laws is the same as that promoted by anti-euthanasia interpretations of murder laws—human life. Human life is so sacred that no human being has the right ever to take another's life, and in the past, abortion was allowed only when the choice was between two human lives. Moreover, human life is so sacred that the state will not tolerate any human discretion as to when a piece of protoplasm becomes in fact a human being: so the limit was pushed all the way back to conception, the moment when the pieces of protoplasm become a discrete cell that will become a human being. Ah, "become a human being" there's the rub. For how is it to be determined when the becoming is complete? Is it at conception, three months, six months, birth, one year, four years, seven years? Many answers are possible. Now, I applaud the recent state legislature relaxing the standards for abortion. I
political marketplace the national consensus necessary to enshrine the interest in the Constitution through amendment. And that teaches something about basic rights not being consensual, as well as sapping the persuasive energy necessary to give important interests consensual protection. If the idea gets too much at large in this country that basic rights, basic law, is not consensual, the spirit of compromise and the spirit of persuasion will be gone and with them democracy and free society.

It should be noted here that I have no quarrel with Mr. Justice Harlan’s approach to discovering the meaning of “liberty” in the due process clause, for this approach, like Mr. Justice White’s more frankly old-fashioned “substantive due process” approach, contains within it both balancing and a deep commitment to the broadly consensual ideal. Harlan did not seek to find another “right” for the Bill of Rights panoply—with all that implies in the way of absolutism; no free-floating right to give false hope to those who would skip politics. His focus was on whether or not this particular Connecticut law violated basic values implicit in a scheme of ordered liberty as to these litigants such that it could be confidently said

think a pre-three-month-old fetus can safely be defined as “not a human being,” but I am not sure that it is entirely safe. Might it be a step toward “Brave New World”? I would at least want to be able to repeal the experiment if it failed. But to declare the option to abort an unquickened fetus a fundamental right is to preclude such repeal as well as to fly in the face of history. If the Griswold opinion had been written in the language of Justice Harlan’s dissent in Poe v. Ullman, 367 U.S. 497, 522, 539-555 (1961), the doctrine under discussion, which presages a new era of officious judicial intermeddling in the efforts of the People to solve their problems, would never have gotten started. Item: Harlan, after ten pages of opinion carefully weighing the countervailing interests, declared, “But conclusive, in my view, is the utter novelty of this enactment . . . .:1 no nation . . . has seen fit to effectuate that policy by the means presented here.” Id. at 554-555. Concerning abortion laws just the opposite is true. (See Section C, below.) Daniel Callahan, in ABORTION: LAW, CHOICE AND MORALITY (1970), may shed some light on this issue. I have not read the book, but in a review of it in Newsweek (June 8, 1970, p. 65) Kenneth Woodward concludes: “His [Callahan’s] pointed refusal to sound any trumpets is a mark of the finely tuned moral discrimination that informs this definitive work.”

244 In his opinion in Griswold, Harlan relies on his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 522 (1961), in which he makes his best statement of his view of the function of judicial review of state action under the fourteenth amendment.

245 This “liberty” is not a series of isolated points pricked out in the terms of the taking of property; the freedom of speech, press, and religion; . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Id. at 545 (emphasis added).
that it deprived them of liberty without due process of law.\(^{38}\) What is the principle in that? The principle is that no law can be arbitrary, lawless, if you will, devoid of reason as it applies to the individual litigants and others like them.\(^{39}\) In short, Harlan was saying that this Connecticut law is clearly unreasonable as applied to these litigants. Unreasonableness implies balancing. Balancing necessitates weighing competing interests.\(^{40}\)

Striking the balance in the \textit{Griswold} case called for a painfully careful inquiry such that a decision to strike down this particular political act of a co-sovereign was manifestly one that We, the People, in the quiet of our study, knew to be a particularized instance of our resolved-to precept to be ruled by law, not caprice. The ideal of "the rule of law" symbolized in the words "due process of law" enshrined in our resolution comes thrillingly to life through such decision and we are reinforced in our resolve. The process of "ideal" articulation and teaching remains to be examined in terms of its effect on the options in judicial review.

\section{C. Limits arising as a result of the Sovereignty of \textit{We the People}.}

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . . The people made the Constitution and the people can unmake it. It is the creature of their will, and lives only by their will.\(^{41}\)

The limits on the great power of judicial review adumbrated in sections A and B could all be called formal: its institutional

\(^{38}\) Id. at 545-555.

\(^{39}\) "Thus the guaranties of due process, though having their roots in \textit{Magna Carta}'s 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny' have in this country 'become bulwarks also against arbitrary legislation.'" Id. at 541.

\(^{40}\) Due process has not been reduced to any formula. . . . The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this Country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke Id. at 542.

\(^{41}\) Both statements were made by Chief Justice John Marshall: the first in \textit{Marbury v. Madison}, 1 Cranch 137, 175-176 (1803); the second in \textit{Cohens v. Virginia}, 6 Wheat 264, 389 (1821).
limits as a fact finder and remedy giver; as a coequal branch of
government and law interpreter; as a non-political branch above
the storm of partisan and factional strife. True, these import
limitations on the nature of the substantive law declared and thus on the
constitutional ideal articulated but that is only incidental to the
limitation. The limit I now speak of is a direct limitation on the
substantive constitutional law that can legitimately (and, ultimate-
ly, effectively) be promulgated by the Court. That limitation comes
from the fact that the People are sovereign in a democracy and that
the Constitution is ultimately what the People say it is. From this
flow two closely related substantive limitations on the power of the
Court to announce controlling constitutional principles. One, the
principle has to be rooted in broadly shared ideals — ideals admi-
tedly held at a high level of abstraction but which are nonetheless
deeply felt. Two, the principle must not violate the “commonsense
of humanity.”

Roscoe Pound asserted that it is “appeal to the conscience of
the citizen, appeal to his reason, [which is] the foundation of the
authority of the legal order and so of the precepts of a body of law.
Habits of obedience give way unless they have this support in rea-
son.” This is of paramount importance in articulating the funda-
mental law - the People’s Resolution. Appeal to the People’s con-
science, the People’s reason, is appeal to man “in the quiet of his
study.” But is there enough stuff there to actually guide judgment
to constitutional decisions that are “at once widely acceptable and
morally elevating . . .” — those decisions that are “an occasion
for dancing in the street.”

To examine this “stuff” of value and reason, I have artifically
separated the ideas for analysis into “consensual ideals” and “the
common sense of humanity.”

(1) Consensual Ideals.

How does one identify that vague, unarticulated ideal held
with abiding conviction, which being part of “the nation’s con-
science,” will cause the nation, “on sober second thought,” to realize
that the governmental act struck down was wrong — in short, that
it was unconstitutional?” Mr. Justice Frankfurter helps us toward the
answer. “[T]he inescapable judicial task in giving substantive
content, legally enforced, to the Due Process Clause . . . must rest,”

188 R. POUND, THE FORMATIVE ERA OF AMERICAN LAW, at 28 (1938).
189 Bickel, supra note 3, at 243.
he said, “on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed.” Professor Bickel after quoting the above says:

Fundamental presuppositions are not merely to be alluded to . . . or even merely intoned, but are to be traced and evaluated from the roots up, their validity in changing material and other conditions convincingly demonstrated, and their application to particular facts carried to the last decimal . . . Only through this effort, prescribed by this craft, can the conscientious judge himself be assured that he is not at sea, buffeted by the wavelets of his personal predilections. And only thus can he hope for the ultimate assent of those whom otherwise he governs irresponsibly.

Of course, this process, or something closely akin to it, of finding “fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed,” applies as well to determining the seemingly more precise precepts of the Bill of Rights.

But Mr. Justice Black objects to all of this. In Adamson v. California he concluded:

This process [of striking down legislative enactments which violate the Constitution], of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of the constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of “natural law” deemed to be above and undefined by the Constitution is another. “In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.”

Black’s indictment includes two interdependent premises which should be more closely examined, i.e.: that interpreting the Bill of Rights is a different kind of thing than interpreting the “due pro-

387 Bickel, supra note 3, at 236-237 (emphasis added).
cess" or, implicitly, the "equal protection" clause; and that the "Palko-Adamson", "Cardozo-Frankfurter" approach to the fourteenth amendment is the importation of "natural law" deemed to be above the Constitution, leaving judges "to the limitless area of their own beliefs." I think it not too presumptuous first to inquire why Justice Black might feel impelled to such premises — and then to examine their validity. Justice Black came to the Supreme Court in the wake of the storm over the "New Deal-vetoing" Court and he came directly from the Senate where he had championed much of the New Deal legislative program. The judicial veto was exercised in the name of due process, a practice begun in the late nineteenth century of judicial examination of the substance of a legislative enactment to determine if it unreasonably interfered with a right subsumed in the word "liberty" in the fourteenth amendment. At first the focus was on the "rights" in "liberty" but such rights were imported quite casually, without examination of their societal fundamentalness. The focus shifted gradually to the reasonableness of the legislation, as in the classic formulation of "substantive due process" by Chief Justice Hughes in West Coast Hotel Co. v. Parrish.30

Roscue Pound, speaking in 1936, said:

Discredit of natural law in this generation is due chiefly to its effects in our constitutional law. In the last of its phases it lead to a notion of the Constitution as declaratory of natural law and so of an ideal of the common law as in its main lines and characteristic doctrines an embodiment of universal precepts running back of all constitutions. Thus certain common-law doctrines and traditionally received ideals of the profession [such as "freedom of contract" and "fault"] were made into a super-constitution by which the social legislation of the last decade of the nineteenth century and of the first third of the present century was to be judged.31

This natural law theory of constitutional rights was attacked with the weapons of epistemology and psychology from Kant through Freud and beyond to Skinner and Watson. In that same lecture referred to above, Pound said:

"A psychological realism is abroad which regards reason as affording no more than a cover illusion for pro-

30 900 U.S. 379, 391 (1937); "[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."
31 Pound, supra note 149, at 26-27.
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cesses judicial and administrative which are fundamentally and necessarily
unrational."

Thus Black, armed with the assumptions of the new realism (although certainly not an articulator of that philosophy), attacked that which had frustrated his own efforts in the Senate to bring about social and economic reform. But Black was also concerned with "democratic" and "human" values. He was able to reconcile his seeming dilemma (choice between natural rights and not enforcing "preferred liberties" on state action) by fastening on the admittedly more code-like Bill of Rights and evolving a theory based on historical evidence that the original framers of the fourteenth amendment intended through its general provision to make the Bill of Rights applicable to the states. Thus he could have his cake, or most of it, and eat it too; for the Bill of Rights (coupled with the fifteenth amendment) on a reasonable interpretation protect most of the "preferred liberties". But his abhorrence of the "natural rights" theory moved him to see the Bill of Rights as more code-like in precision (e.g. like the U.C.C. or Bankruptcy Act) than any other Supreme Court judge or professional commentator has ever seen it. Anyone who has ever struggled to give precise content to such phrases as "freedom of speech" or "establishment of religion" in order to apply them to a particular set of facts realizes they are neither yardstick, slide rule, nor pharmaceutical prescription. The Bill of Rights mentions no freedom of association ("assembly" is far from "association"), yet few have found difficulty in seeing it as implicit in the ideal symbolized by "freedom of speech" — including Mr. Justice Black. The words "bill of attainder" have historically a most precise meaning, yet Mr. Justice Black was willing to have them cover a situation which clearly their "plain meaning" did not cover. That there is a "plain meaning" or "precise boundaries" in the Bill of Rights which obviates definition, interpretation, or judgement is pure illusion — benign illusion if the "plain meaning" of today comports with one's own ideal; but baleful illusion when tomorrow's judge sees a new "plain meaning". For, as Professor Bickel points out, viewing words in a constitution as absolutes both stifles needed change with changing conditions and hides the

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process of definition that inevitably goes on. The former does not comport with the viability of constitutions, and the latter eliminates the very process judges are most valued for, the articulation of the reasons for the judgment of what is "the law of the case".

But if the process of discovering the particular application of a constitutional ideal, including the ideals of the Bill of Rights, requires particularized judgment with no absolute guide to be found solely in the written Constitution or its history are we left then in the "limitless area of the judges' own beliefs"? Of course, the answer that Cardozo and Frankfurter and Pound gave was an emphatic "no". The judge must find the answer in as dispassionate and objective a search into the nation's culture, its history and traditions, as is possible, while still recognizing that even at best prepossessions color the vision. To turn to Professor Bickel again:

"The function of the Justices... is to immerse themselves in the tradition of our society of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in the thought and vision of the philosophers and the poets. The Justices will then be fit to extract fundamental presuppositions from their deepest selves, but in fact from the evolving morality of our tradition..."

And to hold the discovered ideal gingerly, warily; distrustful one's own vision, seeking myriad concrete signs that it is that to which "widespread acceptance may fairly be attributed"—signs in the common law of the states, in their legislation, and so forth. One "knows", for example, that the right to confront the witnesses against one in a criminal trial participated in the ideal called "due process of law", held with deep conviction, because it has deep roots in the common law of evidence, is uniformly the rule in the states and is enshrined in the Bill of Rights. The "right to travel" is found nowhere expressly stated in the Constitution, but are not the Constitution, our history and traditions pregnant with its implication? But they nowhere tell us it is absolute.

On the other hand, is the ideal, freedom of religion, violated by a state promulgated prayer for school children which says in essence "In God We Trust?" Assume further that the child is "forced" to entone such prayer, not by law, but by the same kind

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30 Bickel, supra note 3, at 96-97.
31 Id. at 256.
of social pressure that causes a businessman to wear a suit and tie, a college student to join a social club, a woman to look her best, a little boy to pretend to hate little girls, a judge to be sober. Is there anything in our history, culture and traditions that tells one that widespread acceptance can fairly be attributed to the idea of the outlawing of such a prayer by invoking the "freedom of religion"? What is there in the culture of "a religious people whose institutions presuppose a Supreme Being" that tells one that the People, on sober second thought in the quiet of their study, when musing with their conscience, will soon realize that such a prayer, so compelled, violates their resolution to freedom of religion? Does not such a blind reading of our society not teach the People something that is very pernicious indeed? That it is not their Constitution after all? That the Constitution is something alien? That the Constitution is what nine judges say it is, nothing more or less? That the Constitution does not embody their fundamental precepts of the good society? Or does it teach that minority rights are sacred no matter what the push of the majority? And is even that an entirely benign lesson? I suggest that the Constitution is too deeply embedded a symbol of nationhood and of the free people we are resolved to be to be shaken much by the prayer cases. Rather the Court is the loser, in prestige and in confidence. Its role as teacher of the fundamental ideals of democracy and freedom felt to be enshrined in the Constitution was severely damaged.

The prayer cases are only the most glaring example of the Court's failing to keep within the legitimate bounds of judicial review. Paradoxically the prayer cases fulfill the dire prophecy of both those who fear the natural rights reading of the Constitution and those who fear the absolutists.

(2) The "Common Sense of Humanity."

While the framing of ideals focuses on fundamental values, their particular application focuses on rationality — what I have called the common sense of humanity. They are not really separable but can be examined separately. For instance, the framing of ideals by the Supreme Court is done in the particularized setting of cases.  

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387 [Zorach v. Clausen, 343 U.S. 306, 313 (1952) (opinion for the Court per Douglas J.).]

388 [Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963). The prayer which was the subject of Engel v. Vitale read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."
The general framing of the ideal is done by the Constitution itself. What the Court adds is the application of that abstract value to real life and shows how individuals and society are concretely affected. This brings the abstraction to life, makes it breathe. A living, breathing ideal that is felt to participate in the ideal that thrills and, thus, thrills anew, thereby reinforces the conviction and teaches the ideal. A good bit of the determination of whether or not the particular application will actually have this effect is whether or not it appears reasonable. If the ideal is invoked in a setting that seems to violate common sense then not only will it not have the effect of reinforcing the deeply felt conviction to the ideal, it will have the opposite effect.

For example, in the case of *Mapp v. Ohio*, the conduct of the police, which was the subject of the appeal, was, to say the least, enough to shock the conscience of most Americans. But instead of invoking the ideal of fundamental fairness, fairly implicit in due process, the Court invoked the ideal of privacy — or as more familiarly recognized "a man's home is his castle." There is little question that the latter is "a fundamental presupposition, rooted in history, to which widespread acceptance may fairly be attributed." Nor was there much question that this ideal was not lived up to when the police invaded Mrs. Mapp's home. Nonetheless, no one thought to brief this point, as the precedents (and I think common sense) told the attorneys that the Court had no remedy for such violation available to it. Nonetheless the Court found a remedy, and declared that henceforth evidence gathered, no matter how incriminating, by violating the fourth amendment "right of privacy" was to be excluded from any subsequent trial. The reasoning was this: the right of privacy is of paramount importance; this right is frequently violated by the police; the states have provided no effective remedy to redress such wrong or deter its occurrence; the Court will therefore use the only remedy it has and exclude the evidence from trial. This will of course preclude the state from having a fair chance of conviction but it will, reasoned the Court, have the outweighing salutory effect of deterring the police from violating the right of privacy of innocent folk who have no effective personal remedy. It has this deterrent effect because the police, zealous to get people actually convicted and not just arrested awhile, will not do things to hurt their chances. About half the

*367 U.S. 643 (1961).*
states had a similar rule based on similar reasoning — as did the federal government. Of course, half the states did not have such a rule and some prominent jurists have felt it a rather silly remedy for an admittedly worrisome problem.389

The exclusionary rule, which uses the rules of evidence for an end incompatible with their truth-finding function, only makes sense, even on its own terms, if it can be demonstrated that it will, in fact, deter the invasion of the rights of innocent members of the public by the police. Moreover, it can only be reasonable if such deterrence is greater than the loss in effectiveness of the criminal law in deterring the invasion of the rights of innocent members of the public by other members of the public. Striking the balance would require a factual investigation entirely beyond the means of a court of law. But at least, the Court's premises for its deduction of deterrence can be examined. In the first place for a proscriptive rule to be effective and fair it must give sufficient guidelines to the potential violator that he can know what conduct is expected of him. There is certainly no precision inherent in the fourth amendment language (freedom from "unreasonable searches") and very little has been added by judicial gloss.390 Moreover the deterrent effect of the exclusionary rule is predicated on the premise that the aim of police work is to obtain convictions of the guilty. Ideally, this is the ultimate aim for the police, although for the criminal law itself the ultimate aim is to prevent crime and insure order. This ultimate aim of the law is often obtained by the police in ways short of obtaining a conviction. The local police officer is often called a "peace officer" and for good reason. He regularly breaks up fights, quells disturbances, and quiets the apprehensions of the neighborhood by arresting "suspicious persons" or telling them to move on. In short, he is a direct agent of the community for maintaining order, extrajudicially. Moreover, he sometimes must act fast to remove a perceived source of danger, though this perception is grounded in inarticulate intuition - i.e. a sixth sense gathered from experience and training. If he "knows" there is imminent danger of crime or a cache of dangerous contraband (e.g. drugs) soon to be removed, and also realizes he does not have probable

389 See, e.g., People v. DeFore, 242 N.Y. 13, 150 N.E. 585, cert. denied 270 U.S. 657 (1926) (opinion by Cardozo J. with the famous "constable blundered" line); Friendly, supra note 57, at 260-262.

cause (i.e. he will later be unable to articulate the various sensations that make him "know", so as to make an absent person believe he "knew") he will nonetheless usually opt for immediate intrusion because his real aim is to keep the peace, here and now, and to prevent crime — the ultimate aim of the law anyhow. The loss of a later conviction will disappoint him but not dissuade him from repeating his conduct. Thus the premise of the Supreme Court in Mapp, that the exclusionary rule will remove "the incentive, [convictions], to disregard [fourth amendment] rights" is largely false. The peace officer's "incentive" is not "convictions", rather it is to prevent crime and maintain order.

The Court's reference to the F.B.I. experience with the exclusionary rule as bland assurance that it will not hamper effective law enforcement does not make good sense. The F.B.I. has a different character and function from local police. The F.B.I. is an elite force, whose training and skill prepare them to deal with sophisticated standards in an articulate manner. Moreover, their function is almost solely to gain convictions. They are usually called in to investigate a particular crime or episode after it is over. They walk no beats, patrol no neighborhoods, etc.

This analysis shows at the least that there should have been substantial doubts as to whether or not the exclusionary rule of Mapp made good sense, even on its own terms. Add to this the problematical nature of the "deter police, loss of deterrence of crime" equation, and the rule, as a nearly immutable, funda-

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cause (i.e. he will later be unable to articulate the various sensations that make him "know", so as to make an absent person believe he "knew") he will nonetheless usually opt for immediate intrusion because his real aim is to keep the peace, here and now, and to prevent crime — the ultimate aim of the law anyhow. The loss of a later conviction will disappoint him but not dissuade him from repeating his conduct. Thus the premise of the Supreme Court in Mapp, that the exclusionary rule will remove "the incentive, [convictions], to disregard [fourth amendment] rights" is largely false. The peace officer's "incentive" is not "convictions", rather it is to prevent crime and maintain order.

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392 It should also be noted that applying the rule to federal agents also makes more sense because they have, and regularly employ, sophisticated methods of intrusion, such as electronic eavesdropping devices, which have about them the spectre of 1984. This is especially true when these devices are used "officially" as deliberate policy by high government officers. For example, see United States v. Coplon, 185 F.2d 629, 640 (2nd Cir. 1950) (opinion by Learned Hand J.); cf. Omstead v. United States, 277 U.S. 438 (1928) (dissenting opinion per Brandeis J.).

393 In Law and Order Reconsidered, A Staff Report to the National Commission on the Causes and Prevention of Violence, Chap. 17, "Securing Police Compliance with Constitutional Limitations: The Exclusionary Rule and Other Devices," prepared by Dean Paulsen, Professors Whitebread and Bonnie (1969). While strongly in favor of the exclusionary rule, it is admitted therein that "whether the exclusionary rule actually does effectively deter the police is a question without a firm answer. No solid research has put the issue to rest." But there is one defense of the rule made in the article that is solidly credible: "We know that the rise and expansion of the exclusionary rule has been accompanied by many efforts at police education." This report suggests several other remedies for police illegality (none of which has been often implemented) and suggests further that the best remedy would be a "hybrid of the ombudsman and
mental rule, is likely to offend the public's common sense. Tack onto this the different vantage point from which the public views crime and enforcement, and, it becomes well nigh certain that the Mapp rule would offend the common sense of the great majority. For through the news media (the public's eyes and ears) the public sees the crime and its details, and not the details of apprehension and arrest. The courts and especially the Supreme Court see the record of the trial court with its focus, in this context, on apprehension and arrest. I have read enough records to know that the "constable often blunders" and often in a most egregious way. Moreover, the process of review culls out the worst examples for the Court's close attention. One must take into account too the likelihood that the general public live in private circumstances, in the main, much less free from crime than an upper middle class judge. Thus the average citizen feels much more threatened by private crime than by official crime. And the latter, even when aggravated, is much less violative of his personal integrity (his "privacy" if you will), than, rape, murder, robbery, burglary, assault, etc.

In short, to most of the public the "right of privacy" is felt to be threatened much more by "criminals" than by peace officers. The Court should have perceived this. "[J]udges must have something of the creative artist in them; they must have antennae registering feelings and judgment beyond logical, let alone quantitative, proof."

The Court labors from afar, so it can perceive with dispassion the intimate workings of society. But it cannot be blind to how its view from such a distance can distort its vision of society. It must immerse itself in society's perceptions as well as its history and traditions in order to plumb the common sense of its humanity.

And what is the "common sense of humanity" and why is it important? There is no wholly articulate answer. The late Howard Lowry said:

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the external review agency." (Pp. 393-396.) But such programs that promise genuine control of police illegality have had rough political sledding. I suggest that the gross unpopularity of the exclusionary rule has greatly hurt political efforts at reform. The police advertise themselves as victimized and hamstrung by "bleeding heart liberals," who imposed the exclusionary rule on them. Since, as pointed out, the exclusionary rule does not make good sense to the average man, the police argument is credible. Any other reform is tarred with the same brush of softness on crime and thereby doomed to defeat.

[F. Frankfurter quoted in Bickel, supra note 3, at 239.]
What makes for living ideas, ideas really adequate for life? How can we increase our chance of having them? We can do this in many ways—first of all, by relating the ideas we do have to the common sense of humanity. For the common sense of humanity, whatever its faults may be, has a deep regard for ultimate fact. For that matter, it has a deep regard for education. It does not join in the vicious anti-intellectualism of our time. But it does not lightly suffer educated fools. It has disdain for posturing and conceit. It does not wish to be taken in. It can be temporarily fooled and follow many a vain show, but it has a built-in capacity for returning to what is so. It has its own salty test for truth. The lanky old fellow in “Abe Martin’s” drawings used to remark that when you hear a fellow say that it isn’t the money but the principle of the thing, “it’s the money.” Some sense of this deep human reservoir informed the idealism of Emerson. This is why he preferred the true scholar or Man Thinking to the book-worm—the pedant, the art-for-art’s-sake aesthete, or the professional highbrow, whom A. P. Herbert once defined as “the person who looks at a sausage and thinks of Picasso.” The true scholar, says Emerson, “loses no hour which the man lives.”

When common sense man sees a guilty man go free, he sees a criminal let loose. He wonders, “What are trials for if not for seeking truth?” He sees an example for other potential malefactors that says, “even if you are caught for crime, you may go unchastened, unrehabilitated, unbanished—let loose possibly to prey on me.” If you ask him, “what of the abuses of power, the official violation of rights of innocent citizens?” He will answer, “punish the violator, banish him, and redress the wrong to the innocent!” If you protest that even the guilty were presumed innocent when the violation occurred, he will reply, “Hindsight shows us the presumption was wrong—though the presuming was not—besides if his right ought to be vindicated, punish the police, not the public.” If you protest that courts have no smaller whip but exclusion with which two punish he will reply, “Then go to someone else.”

Other exclusionary rules fashioned by the Court to serve ends other than truth-finding are somewhat less violative of common sense but, on the other hand, seem to vindicate rights less deeply imbedded in constitutional ideals. The right not “to be a witness against himself” was bolstered in Miranda v. Arizona, by conjoin-

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32 Lowry, supra note 31, at 114-115.

ing it with the right of privacy and the right to counsel. But these
cases seemed to strongly reinforce the example of the Court's setting
the apparently guilty free in the name of "constitutional rights"—
an example serving, in the public view, more to belittle the name
"constitutional rights" than to reinforce the ideal from which the
rights extend.

But there is a subtler lesson taught by the example of the
Court's persistence in enshrining as constitutional immutables that
to which "wide spread acceptance can not fairly be attributed".
For, "Liberty lies in the hearts of men and women", and "[n]o
constitution . . . no court can save it," admonished Learned Hand.
The Constitution is, however, the external deposit of the spirit of
liberty. And by interpretation of that Constitution, that spirit can
be nourished. And what is that spirit? Learned Hand best epitomized
it as the "spirit of moderation." "It is the temper which does not
press a partisan advantage to its bitter end, which can understand
and will respect the other side, which feels a unity between all
citizens . . which recognizes their common fate and their common
aspiration — in a word, which has faith in the sacredness of the
individual." It is "the spirit which is not too sure that it is
right." It is
not the spirit that makes "non-negotiable demands" no
matter how righteous the cause is felt to be. It is not the spirit that
in the name of a righteous cause would bypass the market place of
democratic persuasion and coerce a result in spite of, indeed abso-
lutely not concerned with, the wishes of the majority. And this
spirit of "immoderation" is abroad today among a small but very
important segment of our people.

It is always the temptation of those whose work focuses very
closely on one person, group or institution to exaggerate their
subject's importance in causing whatever joys or sorrows they think
beset the world. But one has to wonder whether the Supreme
Court's example has not fostered the "spirit of immoderation."
Providing an ever-expanding forum for the decision of public dis-
putes where the will of the majority is not considered; announcing

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ADDRESSES OF LEARNEID HAND, at 143-144 (1959).
26 Hand, "The Contributions of an Independent Judiciary to Civilization",
supra note 173, at 125.
26 Hand, "The Spirit of Liberty", supra note 173, at 144. This was said of
the "spirit of liberty," but to Hand the spirit of liberty and the spirit of
moderation were one and the same.
in terms as absolutes, rights that are still fairly debated in society, protecting rights in ways that offend the common sense of practical men—surely these lessons do not encourage a spirit that seeks to persuade in the democratic arena; or a spirit that holds its truths tentatively, willing to listen, to be persuaded, to compromise; or a spirit willing to make practical adjustments, halting steps, willingly restrained in the pursuit of ideals.

Persuasion and compromise are the only absolutes necessary to democracy. Willingness to try patiently to persuade others of those matters we are most convinced of, and holding action in abeyance until the “convincing” forms a political majority, that is the spirit essential to democracy. The Court has often not acted in that spirit and the Court is our great teacher.

III.

CONCLUSION

This has been a criticism of the performance by the Supreme Court of its vital role as “teacher to the citizenry.” Therefore it has focused on what I think are shortcomings—and although I think they are valid and important shortcomings, they are not the whole picture. Much of what the Court has done has been within the bounds of legitimate judicial review—much has been “at once widely acceptable and morally elevating.” The ideals of equal treatment for all, of a broad and equal suffrage, of an open forum for all ideals, have been steadfastly taught.

But the shortcomings are too glaring to go unnoticed, or for long, uncorrected. These shortcomings not only teach counter-democratic habits, but the Court by losing prestige is less potent to teach constitutional lessons. And they will be largely corrected if our system is essentially healthy, and it is. The change that must and will occur is not a return to something once held and now lost. The Court has never in its 180 year history stayed very long within the limits outlined here to describe its legitimate role. The prestige of courts and especially of the Supreme Court in the American tradition is too strong for the judges to resist the use of their apparent power for very long. But if the teachings and spirit of the great judges of the recent past—Holmes, Brandeis, Cardozo, Stone, Hand and Frankfurter—were more closely heeded, a better perspective of the Court’s real power would be gained, and the temptation to use the seemingly greater power resisted.
A few, more specific, suggestions can be made as to what might be done in the near future to bring about this adjustment—some of the suggestions are merely predictions of what will be done. Most specifically the Court could (1) overrule *Mapp v. Ohio*; (2) modify and limit *Miranda v. Arizona*; and (3) limit the prayer cases.* Mapp v. Ohio* was clearly experimental. It was also clearly legislative. Thus, like experimental legislation which has failed or which later wisdom tells us was misconceived in the first place, it should be overruled. Mr. Justice Brandeis’ words are especially appropriate here: “[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”

Of course, with reference to *Mapp v. Ohio*, special care need be taken to avoid seeming to give the police license to ignore the fourth amendment. Perhaps it should be overruled in a case where the local authority has adopted other effective means of curbing police lawlessness. Dicta in preliminary cases might suggest this possibility and thus have the additional salutory effect of encouraging such adoption. *Miranda v. Arizona* might be similarly limited and modified in a case where the police have adopted some other safeguards to the integrity of pre-trial interrogation. An invitation, through dictum, to the same end might be made concerning *In re Gault*.

The prayer cases might be limited by taking in a case where the prayer is frankly teacher-initiated and then upholding the teacher’s action. If this had been done in a companion case with *Engel v. Vitale* one ventures to guess that all the criticism and attendant loss of prestige could have been avoided. Since it was the tendency to establishmentarianism that the Court sought to nip in the bud in *Engel*, it is clearly a matter of degree and the line between sufficient and insufficent tendency can be rationally drawn between school board and teacher initiation.

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*367 U.S. 643 (1961).*
*384 U.S. 436 (1966).*
*387 U.S. 1 (1967).*
*370 U.S. 421 (1962).*
The suggestion of limiting the prayer cases by a holding on the other side suggests a general way in which the Court could improve its performance. This is by a sort of "ping-pong" method of drawing constitutional lines. Since most of the Court's decisional rhetoric goes unconsumed by the general public and is often ambiguous anyway, whereas its holdings are headlined and unequivocal, the best way to limit a holding is with another holding. Thus if the constitutional line is figuratively an invisible net, its approximate location can be best indicated by holdings bouncing first on one side, then on the other, each getting progressively closer to the unseen net, to the point, hopefully, that one can actually "see", even "feel", the "net".

Another more general suggestion is the return to frank substantive due process standards for reviewing the validity of state substantive law. Thus, the Court could review "uncommonly silly laws" without the dangerous teaching of the Griswold rhetoric. Of course, the lesson of abuse of the due process standard in the first third of this century must not be forgotten, and will not be, if the limitations inherent in the Court's being "a Court of law" are observed. (See Section A, supra). Mr. Justice White's opinions presage such reform. Moreover, Thayer's rule of the "clear mistake" should become the principle by which "hard cases" are reversed."

Finally, the Court should decide most questions as to whether or not it will exercise its great power of judicial review in terms of jurisdiction, never forgetting that issues of "concreteness" (i.e. standing in the "impure" or non-constitutional sense, ripeness, and mootness) can give a legitimate reason for temporary avoidance, but not for either permanent avoidance or discretionary intervention.

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It is hoped that this discussion has not been read as a psalm for conservatism, but as a hymn to liberal democracy and to the Court's great and continuing role as the principal teacher-guardian of its basic precepts. Our Constitution is a great bible of liberty but it is no manifesto for change. It must be made relevant for each era, but should reflect rather than initiate evolving fundamental ideals. Most constitutional issues that directly affect individuals in our society ultimately reach the Court because of our tradition of channeling the awful power of state coercion through the judiciary.

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396 See Bickel, supra note 3, at 35-46; Friendly, note 57, at 263-265.
Thus, the Court is the primary guardian of constitutional ideals for the short run. On the other hand, it is the primary teacher of its ideals for the long run. In order to remain that great teacher it must become the true scholar. Learned Hand surely sensed this, though he would deny the primacy of the Court's teacher-rule; his exhortation to the scholar rings true for the Court:

I am thinking of what the scholar imposes upon himself; of those abnegations which are the condition of his preserving the serenity in which alone he can work; I am thinking of his aloofness from burning issues, which is hard for generous and passionate natures, but without which they almost inevitably become advocates, agitators, crusaders, and propagandists.

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. . . . I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused. If he is fit to serve in his calling at all, it is because he has learned to serve in no other, for his singleness of mind quickly evaporates in the fires of passions, however holy.