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Judicial Review: A Tri-Dimensional Concept Of Administrative-Constitutional Law

FRANK R. STRONG

In the pages of Volume 44 of the West Virginia Law Quarterly, Professor Kenneth Culp Davis, then a young law teacher in this College of Law, found in certain decisions of the supreme court of this State and of the Supreme Court of the United States the paradox that "Separation of powers, the cardinal principle upon which the federal and all the state governments are founded, a great American contribution to the science of government, violates the due process clause!" To Professor Davis this result seemed exceedingly absurd, and in this adverse judgment he has had with him the great weight of scholarly authority.

1 This article, and one to follow in a subsequent issue of this Law Review, constitute the tenth Edward G. Donley Memorial Lectures, given at the West Virginia University College of Law, October 27 and 28, 1966.

2 Professor of Law, University of North Carolina; Dean and Professor of Law Emeritus, The Ohio State University.

3 The writer-lecturer desires to record his appreciation of the honor paid him by the invitation to follow distinguished predecessors in the Donley Lecture Series, and of the many courtesies shown him during his visit to the host institution for presentation of the Lectures. He also desires to record his indebtedness to a former colleague, Professor Charles C. Callahan of Ohio State, for assistance in the early development of some of the basic concepts in this analysis.

4 "Such an absurd result surely proves the unsoundness of either the United Fuel Gas case or the Ben Avon case, or both." Davis, supra note 1.

5 In the Fuel Gas case the Supreme Court of West Virginia was of the opinion that the doctrine of separation of powers prevented it from substituting its judicial judgment for the administrative judgment of the State Public Service Commission. The Ben Avon case is one of the four decisions of the Supreme Court of the United States which is given extensive attention in the course of this article.

The agreement with Professor Davis is implicit if not explicit in the great mass of writing critical of Ben Avon and two of its three judicial companions, Crowell v. Benson and St. Joseph Stock Yards Co. v. United States. The general familiarity with this critical writing precludes the necessity of citation at this introductory point.
Acting on the assumption that in the academic world no statute of limitations operates to foreclose reconsideration of a legal problem at any later date, it is my purpose: first, to offer a resolution to this seeming paradox and to pursue the ramifications of the distinction in constitutional theory which provides the basis for clarification; second, to tackle a related judicial enigma which also has troubled Professor Davis and other scholars, pursuing the implications of the proffered explanation for a more sympathetic attitude toward the much-maligned concept of "constitutional fact."

I. JUDICIAL REVIEW OF CONSTITUTIONALITY UNDER DIFFERING THEORIES OF CONSTITUTIONAL LIMITATION

The paradox found and condemned by Professor Davis, that the doctrine of separation of powers is violative of due process, is satisfactorily resolved through a realization that American constitutions, federal and state, embrace two distinct political theories which in their application can produce seeming conflict. One of these is the familiar political theory of the separation of governmental powers; the other, for which there appears to be no agreed-on label, would seem most accurately described as the political theory of the legitimacy of governmental powers. Scholarship traces each well back of the time of Christ: separation of powers to the Greeks; 4 legitimacy of powers to Israel of the Old Testament.5

The theory of separation of powers originated in a division of social classes designed to fractionalize the totality of government power, thereby mitigating its full impact upon the individual. This was the theory of mixed government developed by Greek philosophers. "But only the western Christian world," observes an able student of separation of powers, "undertook to analyze political processes from a functional point of view and in so doing hit upon the distinctive features of certain basic functions or 'powers'." 6 John Locke identified the three functions of government: the legislative, the federative, and the executive. It is also familiar learning that Montesquieu, "primarily interested in the problem of securing an

5 TRUEBLOOD, THE PREDICAMENT OF MODERN MAN 78-79 (1944); TRUEBLOOD, FOUNDATIONS FOR RECONSTRUCTION 18-19 (1949).
6 Friedrich, Separation of Powers, 13 ENCYC. SOC. SCI. 663 (1934).
independent status for judges,” refashioned Locke’s federative power into what we recognize as the modern executive power, and transformed Locke’s executive power to execute the laws into the judicial power of the courts. Influenced by Montesquieu, Blackstone also emphasized the independence of the judiciary in a separation-of-powers context. “Montesquieu and Blackstone had of course great authority with our American Fathers.” Finally, legal historians agree with Professor Friedrich that “It was of the greatest moment that these constructions happened to fit the constitutional experience of most of the American colonies, where a governor, a distinct colonial legislature and a fairly independent judiciary had come to constitute the essential organs of government and where after the Declaration of Independence a brief experiment with legislative supremacy leading to a major tyranny had made the people ripe for a practical application of the celebrated theme.”

Never has the theory of separation of powers been more succinctly stated than by Mr. Justice Brandeis in the course of his classic dissent in *Myers v. United States.* Taking issue with Chief Justice Taft as to the scope of Presidential removal power, Justice Brandeis declared that “The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” Protection of the individual through segmentation of total governmental power is without question one of the political theories upon which the American constitutional system is rested.

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7 Sharp, *The Classical American Doctrine of the “Separation of Powers,”* 2 U. Cin L. Rev. 385, 393 (1935). This is the classic article on the doctrine in this country.
8 Friedrich, *supra* note 6, at 664.
9 272 U.S. 52 (1926).
10 Id. at 293.

Professor Sutherland in his recent volume, *Constitutionalism in America* (1968), treats “The principle of form, that government should be segmented,” as one of five basic elements of American constitutional theory. “Government must not be monolithic lest it be too strong for our liberties.”
The second political theory incorporated into American constitutions, that of the legitimacy of governmental powers, finds its origins in the development of moral law among the Hebrews. Professor Elton Trueblood cites the familiar Old Testament accounts of David and Bathsheba and of Naboth's vineyard, as most revealing of the doctrine, "perhaps the most disturbing that the human mind can hold... that king and commoner are equally subject to the moral law." Carried over "into the Christian tradition" this conception that "the king is as much subject to the moral law as is the humblest subject, because he did not make it... has been at the base of countless revolutions."

The eminent constitutional historian, Charles McIlwain, found the basic idea "expressed at Rome, under the Principate and afterward, in the lex regia by which the people conferred on the Emperor an authority in very broad terms, yet certainly defined." While the concept disappeared as an operative principle of government in the centuries that followed, nevertheless "the basic conception of a fundamental law is never entirely absent, and in the legal sources it survived the encroachments of despotism and the fall of the Empire, eventually to influence new races for centuries to come."

A major point of influence was feudal law, for, to quote Professor McIlwain again, "one of its most striking features is the prominence of the negative check on government inhering in the rights of feudal vassals, which no lord, not even a king, may lawfully in-

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*Id.* at 5. Professor Kauper, reviewing this volume, stresses the close theoretical kinship between separation of powers and federalism.

The principle of the segmentation and diffusion of power had a double aspect. Understood to mean the separation of powers, it developed in England as a matter of practice rather than of theory, and it remained for the colonists and constitution makers in this country, under the influence of Montesquieu's thinking, to identify it as a fundamental constitutional principle. Its second aspect is found in the principle of federalism, fundamental to the American constitutional system and clearly a response to the situation faced by the thirteen colonies in their attempt to achieve unity amidst diversity. Kauper, Book Review, 79 Harv. L. Rev. 1324, 1326 (1966).

12 Trueblood, loc. cit. supra note 5. The Old Testament passages are to be found in II Samuel 11-12 and I Kings 21, respectively.


14 Ibid.

15 McIlwain, Constitutionalism and the Changing World 248 (1936).

16 Ibid.
fringe." The confrontation between John and his barons at Runnymede stemmed from the former's alleged violation of the latter's feudal rights. The concept of the illegitimacy of certain governmental acts is underwritten by Magna Carta, from which we of this nation inherited it by rather direct succession. Necessarily a feudal document, Magna Carta was as a whole destined to lose its force with the decline of feudalism and the rise of the nationalist States. But Chapter 39, renumbered 29 in the 1225 reissue of Magna Carta which "became the final Magna Carta of the English law," had a flexibility that enabled it to adapt to new political conditions. Through seven and a half centuries of fateful history and broadening interpretation, this Chapter, rechristened by Lord Coke as the due process provision, has served as the central embodiment of the theory that excessive powers of government are ultra vires.

It is essential to an understanding of the American constitutional system to perceive that the objective of each of these two political theories is precisely the same, viz. achievement of protection of the individual against the more aggravated thrusts of governmental action. But while the objective is identical, the method differs. With the theory of legitimacy of governmental powers there is a direct assertion that some acts of government have no legal validity. Because the principle of limitation on governmental powers is thus directly asserted, this political theory can appropriately be dubbed the theory of direct limitation. With separation of powers, per contra, the theory is that by the forced separation of the several distinctive powers of government there will occur a friction in their exercise such that the severity of the impact of government upon the individual will be mitigated. Inasmuch as this protection inures to the benefit of the individual as a by-product of the friction among the separated departments of government, this political theory can be described as the theory of indirect limitation.

19 See Dean Pound and Justice Black, both *supra* note 11, for a clear grasp of this fundamental political proposition.
20 Professor McIlwain differentiated between the two types of limitation through use of the terms "positive checks" and "negative checks." This usage appears to be common among political scientists. Functionally, the McIlwainian terms are preferable to those suggested in the text. Nevertheless, the terms "direct limitation" and "indirect limitation" will be used in the present article because they are more expressive of the singleness of purpose of the two methodologically different political theories.
Incorporation into American constitutions of both of these political theories of limitation, the direct and the indirect, unquestionably made for constitutional complexity. The abstractness of the concepts involved justifies graphic illustration, even if crude. Illustration 1 depicts the application of the theory of separation of powers, together with that of the functionally related theory of federalism; Illustration 2 portrays the application of the theory of direct limitation; Illustration 3 reveals the complexity arising from the superimposition of one upon the other. In all three Illustrations the area of the larger circle represents the total of all conceivable governmental power.

In Illustration 1 the vertical lines effect the allocation of governmental power, not only as among the three principal departments but within each department as well (bicameralism in the legislative branch, division of executive function in the States, trial and appellate courts within the judiciary); the horizontal line denominates the division between federal and state power. The area of the smaller concentric circle in the second Illustration measures the total of the powers of government which can validly be exercised in view of the direct limitations expressed in the controlling constitution; the difference between this area and the greater area of the larger circle constitutes the limbo of ultra vires action by government. Note
in Illustration 3, where the two theories are combined, that in each segment there is a shaded area depicting powers of government, which, although lawfully exercisable under the theory of separation of powers, are unlawful to government under the theory of direct limitation. In a sense, then, the principle of separation of powers can "violate" the due process clause. Yet this is neither paradoxical nor absurd; rather, it is the necessary consequence of American adoption of both theories of limitation. Such action may have been unwise—more of this hereafter—but the result should be clearly understandable.

Subsequent discussion will disclose that, just as direct limitations will in some contexts foreclose governmental action entirely proper under indirect limitations, so it is true that in other situations indirect limitations will operate to invalidate acts of government which do not offend direct limitations. This "political fact" can be read from Illustration 3, although not with the clarity possible in the converse situation; a challenged act may fall within the smaller circle, thus escaping indictment under direct limitation, yet it may lie within a segment of that inner circle other than that from which a governmental department asserting its authority to act in a given instance derives its constitutional power.

Numbers 47 to 49 of the Federalist Papers disclose Madison in search of an effective and satisfactory device for providing "some practical security of each [class of governmental power], against the invasion of the others." Each of the methods tried or proposed in that great experimental period after Independence he found wanting. Although at this time of writing Madison treated the council of censors, the oath, and other such devices as techniques for enforcing the separation-of-powers principle of the proposed federal constitution, they were equally adaptable to the implementation of direct limitations and well may, like the New Jersey oath required of legislators, have been so intended. In Number 80 of the Federalist, Hamilton rejected the direct negative in favor of the courts for enforcing upon the States the observance of all constitutional limitations proposed for them, federalistic and direct. A year later, in the first Congress, Madison cited the "independent tribunals of justice" in answer to the contention there would be no effective way to enforce the proposed Bill of Rights.21

21 1 Annals of Cong. 439 (1789).
American constitutions were thought of as fundamental law, and for centuries courts had been the accepted interpreters of law, it was inevitable that the use of the courts for this function would be suggested.\\footnote{22}

There is, consequently, little to support the thesis that judicial review of constitutionality was in any way an act of judicial usurpation. On the other hand, any attempted demonstration that the Constitution provides for it is fraught with difficulties. Much debated has been the question whether the text can be read clearly to recognize the power.\\footnote{23} Less debated, but far more fundamental, is the issue of the instrument's consistency with the necessary predicates of judicial review of constitutionality, in light of the co-ordinate character of the three departments of government so clearly postulated by it. Marshall's opinion in Marbury v. Madison\footnote{24} satisfactorily explained judicial refusal to give effect, in litigation before a court, to a governmental act inconsistent with the Constitution, but not why such a determination of unconstitutionality binds the other branches of the government. This power, which is the es-

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\footnote{22} Professor Walter F. Dodd explained the ultimate resort to "the court as a body to enforce constitutional restrictions" in terms of the differing nature of the judicial function, as contrasted with the legislative and executive functions. Dodd, Judicially Non-Enforceable Provisions of Constitutions, 80 U. PA. L. Rev. 54, 55 (1931). But when the beginnings of judicial review of constitutionality can be traced back to 1139, McLain, op. cit. supra note 15, at 250-51, it would seem more realistic to find the explanation in a tradition that courts construe the law.

\footnote{23} Professors Hart and Wechsler are satisfied that "The grant of judicial power was to include the power, where necessary in the decision of cases, to disregard state or federal statutes found to be unconstitutional." Hart & Wechsler, The Federal Courts and the Federal System 17 (1953).

\footnote{24} Per contra, Learned Hand was of the opinion that "when the Constitution emerged from the Convention . . . the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court . . . were to be authoritative upon the Executive and the Legislature." Hand, The Bill of Rights 27 (1958). Professor Corwin could not find in constitutional text authority for constitutional judicial review, but was certain the Framers intended it. Corwin, Marbury v. Madison and The Doctrine of Judicial Review, 12 Mich. L. Rev. 538 (1914). Dean Rostow has expressed the view that "Whether or not this was the intention of the Founding Fathers, the unwritten Constitution is unmistakable." Rostow, The Democratic Character of Judicial Review, 69 HARV. L. Rev. 193, 197 (1952). Professor Kadish takes the same view as did Judge Hand so far as the instrument is concerned, but is of the same opinion as Dean Rostow regarding the unwritten practice. Kadish, Judicial Review in the United States Supreme Court and the High Court of Australia, 37 TEXAS L. Rev. 1, 5 (1958). Professor Kadish observes that "The establishment of judicial review in Australia was accompanied by none of the travail which marked its reception in the United States." Ibid.

\footnote{25} U.S. (1 Cranch) 137 (1803).
sentential element of judicial review of constitutionality, is difficult to reconcile with the theory of the judiciary as a coordinate branch of government, which is so clearly the theory of the Constitution of the United States and of all the State constitutions. No attempt at reconciliation has ever satisfactorily met Mr. Justice Gibson’s analysis in *Eakin v. Raub.* The basis of judicial review of constitutionality must be found in the unwritten, rather than the written, Constitution.

Very possibly this is one explanation of the fact that the full development of judicial review of constitutionality was a much slower process than is almost universally assumed. *Marbury v. Madison* claimed this power for the United States Supreme Court only in the defensive sense of safeguarding the Court’s original jurisdiction from congressional enlargement. A clearer case of defensive judicial review of constitutionality for the protection of the judicial power against legislative tinkering had been *Bayard v. Singleton,* the decision of the supreme court of North Carolina which is generally acknowledged to have been the strongest precedent for constitutional review prior to the Philadelphia Convention. Of *Bayard v. Singleton* Louis Boudin wrote with rare insight, “Not only did this case not involve the confiscation laws as such, but it did not even involve the question of trial by jury, which it is commonly alleged to have involved. For the question was not whether a trial ought to be with or without a jury, but whether there should be a trial at all—i.e., whether the judges had a right to hear the cases. And one need not be a supporter of the Judicial Power in any of its formulations in order to believe that the Judiciary have a right to hear and determine cases.”

If Mr. Boudin had no quarrel with the North Carolina case, what made his two-volume work on *Government by Judiciary* so severe

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22 12 S. & R. 330, 334 *et seq.* (Pa. 1825). Dividing the powers of the judiciary “into those that are political and those that are purely civil,” Mr. Justice Gibson insisted that the former, “by which one organ of the government is enabled to control another,” may not be exercised in the absence of an express constitutional grant, which the constitution of Pennsylvania did not contain. This distinction between two very different types of judicial power undergirds the second Lecture. Its significance in the present context is well developed in the sympathetic evaluation of Gibson’s views by Kutler, *John Bannister Gibson: Judicial Restraint and the Positive State,* 14 *J. Pub. Law* 161 (1965).

26 1 N.C. (1 Martin) 48 (1787).

a condemnation of what he called the Judicial Power? The explanation lies in the extension of constitutional judicial review to acts of Congress; to separation-of-powers conflicts between legislative and executive branches, which are of no such concern to the courts as are those conflicts involving the courts' own powers; to federalistic questions; and to direct limitations on the powers of government. These several forms of extension occupied a considerable portion of the nineteenth century; the end of the full development can be dated as late as 1890, the year in which Chicago, M. & St. P. Ry. v. Minnesota subjected rate regulation to the rigors of substantive due process. That the great portion of the development of judicial review of constitutionality, measured at least in terms of significance, postdates Marbury v. Madison is the insight of a commentator on the development of American constitutional law. Observed he: "It is with Fletcher v. Peck [1810] that the unforeseen possibilities of judicial review begin to appear."

As judicial review of the constitutionality of governmental acts expanded to embrace all aspects of both major forms of constitutional limitation, American courts inevitably became involved in the complexities of the American constitutional system. Professor Davis, in that portion of his 1938 article in the Quarterly from which he was quoted at the outset, was concerned with a situation where the due process clause of the fourteenth amendment, as interpreted by the Supreme Court of the United States, had seemed to invalidate the West Virginia pattern of finality of utility rates administratively fixed which the supreme court of the State had found to be required by its interpretation of the State constitution's provision for the division of governmental power. We are now in a position to understand how it can be that one type of constitutional limitation, here the direct, imposes restrictions on governmental power not resident in the other, here the indirect.

Contemporaneously, Professor Walton Hale Hamilton was struggling with the paradox of Mr. Justice Bradley in dissent in the Chicago, M. & St. P. case which I have suggested can be used to close the period of developmental expansion of constitutional judicial re-

28 134 U.S. 418 (1890).
30 The two cases are those cited by Professor Davis in the quotation supra note 2.
The seeming paradox lay in the fact that, whereas Mr. Justice Bradley had been with the dissent in the Slaughter-House Cases, he later entered dissent in the Milwaukee case wherein the constitutional views of the former minority were to attain majority status. Reasoning logically from the principle-of-separation of powers, Mr. Justice Bradley concluded that the Minnesota legislature had but exercised legislative power and hence had committed no constitutional rape. What for the decisive moment he failed to see was that, while no indirect limitation had been exceeded by the legislature of Minnesota, there was presented by the litigation the distinct question as to whether the relatively new direct limitation of federal due process did nevertheless invalidate the statute. If commentators of the brilliance of Professor Hamilton have had difficulty with differences in result in judicial enforcement of direct, as compared with indirect, constitutional limitations, Mr. Justice Bradley can be excused the confusion in his mind at a time when the Supreme Court of the United States was still relatively new at direct constitutional judicial review. For until after the Civil War the major experience of American courts, federal and state, had been with the implementation of indirect constitutional limitations.

Cases of the above type are not the only ones wherein the two different theories of limitation lead to contrary results, thus producing confusion in a constitutional system which has seen fit to employ both and to use the courts as the enforcing agency for both. In some situations the state of development of the theory of separation of powers, as contrasted with that of ex post facto, due process, freedom of speech or similar provision, will result in invalidity of governmental action valid under direct limitation. Two major decisions of the Supreme Court of the United States, divided in time by 167 years, are illustrative of this converse possibility.

Calder v. Bull involved the challenge of a special act of the Connecticut legislature which after setting aside a probate court’s refusal to admit a will to probate, had granted a new hearing despite the running of the statutory time limit for appeal. The will having been admitted on the second hearing, the heir appealed to the su-

32 33 U.S. (16 Wall.) 36, 111-24 (1873).
34 3 U.S. (3 Dall.) 386 (1795).
premier court of errors of Connecticut for relief. That appeal was unavailing, for the Connecticut Constitution of 1776 continued, as "the Civil Constitution of this State," the Charter of Charles Second under which legislative grants of new trials had become accepted usage. Had there been available to the Supreme Court of the United States a constitutional prohibition on State blending of governmental power, it seems entirely likely that invalidation of the Connecticut law would have followed. The sitting Justices regarded the legislative act as judicial in nature and expressed themselves as committed to the invalidation of legislative action in conflict with express constitutional provisions.Invalidation was the early fate of similar acts of States incorporating separation-of-power restrictions in their constitutions. But there being in the federal constitution no such indirect limitation on the States, the Court was thrown back on the \textit{ex post facto} guaranty. Some scholars have since challenged the Court's interpretation of this clause as restricted to \textit{criminal} legislation, yet the restriction has held. Although Mr. Justice Chase was barely restrained from "anticipatory invalidation" on grounds later available through adoption of the fourteenth amendment, \textit{viz.} that this was a taking of the property of A for the benefit of B, the courts have not found, in analogous facts, that quality of property right which offends due process. Incensed as he was at the injustice done the heir, even Mr. Justice Chase had his doubts that the heir possessed "property" by virtue of the first action of the probate court and the running of the statute. If such a statute as Connecticut's is unconstitutional, it is so by reason of a separation-of-powers requirement in the State Constitution.

The quite recent decision of the Supreme Court of the United States in \textit{United States v. Brown}\footnote{Holden v. James, 11 Mass. 396 (1814); De Chastellux v. Fairchild, 15 Penn. St. 15 (1850). Contrast the long continuation in Connecticut of legislative grants of new trials. \textit{E.g., Wheeler's Appeal}, 45 Conn. 306 (1877).} is even more instructive. The statutory provision replaced by section 504 of the Labor-Management Reporting and Disclosure Act of 1959, section 9h of the Taft-Hartley Act, had been sustained by the Court against attack as violative of the first amendment.\footnote{Field, \textit{Ex Post Facto in the Constitution}, 20 Mich. L. Rev. 315 (1922).} It is true that section 504, although having the same purpose as section 9h, directs its sanction

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\item \footnote{Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945); Note, 25 Colum. L. Rev. 470 (1925); Ostrander v. Freeze, 129 Ohio St. 625, 196 N.E. 670, \textit{appeal dismissed}, 295 U.S. 543 (1935).}
\item \footnote{381 U.S. 437 (1965).}
\item \footnote{American Communications Ass'n v. Douds, 339 U.S. 382 (1950).}
\end{itemize}
against the union official, not the union; and on this basis the great majority of a United States court of appeals, sitting en banc, held the later provision unconstitutional under the first and fifth amendments.\textsuperscript{40} Despite this differentiation, \textit{Brown} is difficult to reconcile with \textit{Douds} on the issues of direct constitutional limitation on which decision turned in the court of appeals. Nevertheless, the court left in doubt the question whether Section 504 is inconsistent with the direct-type limitations of the Bill of Rights. But the Court left no doubt, against sharp challenge by a minority of four Justices, that the legislative sanction offended the bill of attainder clause, which as the Chief Justice observed constitutes "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature."\textsuperscript{41}

It surely is significant that at least a majority of the Court has quite recently felt that in the circumstances of \textit{Douds} and \textit{Brown} an indirect constitutional limitation effects a clearer protection of the individual than does a direct limitation. The latest relevant action of the Court provides further reinforcement for this view. In \textit{Dennis v. United States},\textsuperscript{42} an attempted challenge of Taft-Hartley's section 9h itself, the question dividing the Court was whether petitioners had position to dispute the constitutionality of the older statutory provision; but for the entire Court the constitutional issue itself involved bill of attainder and not Bill of Rights.

In not all situations do the two basic theories of constitutional restriction produce divergent results in one direction or its converse. Analysis suggests, and Supreme Court decisions confirm, that application of the theories will at times produce the same result. Where this is so no confusion arises, although this fact may unwittingly serve to enhance confusion when results differ. Again, two celebrated Supreme Court decisions are illustrative. \textit{Fletcher v. Peck}\textsuperscript{43} is Exhibit A. Today we treat it as Marshall's generative decision on the contract clause. So it was; yet even a cursory reading of his opinion makes it clear that to Marshall and his Court the Georgia law was unconstitutional on a multiplicity of grounds, some expres-

\textsuperscript{40} Brown v. United States, 334 F.2d 488 (9th Cir. 1964).
\textsuperscript{41} Brown v. United States, 381 U.S. 437, 442 (1965).
\textsuperscript{42} 384 U.S. 855 (1966).
\textsuperscript{43} 10 U.S. (6 Cranch) 87 (1810).
sive of direct constitutional limitations and some of indirect. Note his conclusion:

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.44

Marshall’s reference to “the particular provisions of the constitution of the United States” is clearly to the bill of attainder, ex post facto, and contract prohibitions of article I, section 10. To Marshall the Georgia act violated all three of these constitutional restrictions! But more than this he doubted the act’s validity even in the absence of such constitutional provisions. For, after stating the facts of the case, a friendly lawsuit if ever there was one, he launched immediately into the following discourse:

It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.45

44 Id. at 139.
45 Id. at 135-36.
By contrast, neither theory of constitutional limitation availed in Murray's Lessee v. Hoboken Land & Improvement Co.,[46] decided toward the close of Taney's Chief Justiceship. The issue was again title to land, plaintiff claiming under a levy of execution and defendant under sale by a United States marshal pursuant to a distress warrant issued, and seizure made, under a congressional act of 1820. That act authorized summary procedure against United States collectors of revenue found on audit to be owing the United States treasury. Inasmuch as plaintiff's judgment and levy postdated the action of the federal marshal, a favorable decision for plaintiff depended upon successful challenge of the constitutionality of the administrative process by which defendant set up his title. The Court's opinion is unusually interesting for the way in which consideration of direct and of indirect limitation is interrelated. In order to demonstrate this, it will be necessary to quote rather liberally from the case.

The Court first considers plaintiff's assertion that the summary process provided by the act of 1820 violated article III of the Constitution which defines and locates the judicial power.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. . . .

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law"; and therefore is in conflict with the fifth article of the amendments of the constitution.[47]

"Taking these two objections together," the Court examines the meaning of due process against the background of English and early American understanding of this equivalent of the "law of the

[47] Id. at 275.
"land" chapter of Magna Carta. Its conclusion some five pages later is that:

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings.\(^{48}\)

With this the Court returns to the argument of plaintiff based upon separation-of-powers:

That the auditing of the accounts of a receiver of public money may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. . . . But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. United States v. Ferreira, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the constitution. We do not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of congress, a judicial controversy. And we are of the opinion it is not.\(^{49}\)

Without much doubt, the majority attitude of constitutional historians, of political scientists, and of constitutional lawyers is re-

\(^{48}\) Id. at 280.
\(^{49}\) Id. at 280-281.
flected in the incisively expressed views of Professor Charles McIlwain. He had no use for the "positive checks" of indirect limitation, insisting that the Framers failed to heed "the lesson of all past constitutionalism" when they added separation of powers to the "express negative checks of the bill of rights" and regretting the demand he found "for the restoration of all our former 'checks and balances'" as protection against regimentation. A friction theory of constitutional limitation is likely to have little appeal in an age that emphasizes efficiency; a direct approach to the problem of bounding governmental power seems preferable. We ought not to be using a horse-and-buggy theory in an air age, the reasoning goes.

Some there are, of course, who have remained unconvinced. A notable exception has been Professor Carl Friedrich of Harvard, whose sympathetic treatment of the doctrine of separation of powers in the Encyclopedia of the Social Sciences insists that "there is a strong indication that some sort of separation of powers remains the only effective guaranty of government according to law." One may surmise that his own personal European experience raised serious doubts in his mind regarding the ability of direct limitation to withstand strong legislative or executive pressures. Yet it remained for Learned Hand to set off a wave of reconsideration of the relative merits of direct and indirect limitation at least as concerns the desirability and effectiveness of the use of constitutional judicial review in their vindication. His celebrated address in commemoration of the 250th anniversary of the Supreme Judicial Court of Massachusetts, although now an event of over twenty years ago, continues to carry a powerful impact. Here are three of his classic passages:

A constitution is primarily an instrument to distribute political power; and so far as it is, it is hard to escape the necessity of some tribunal with authority to declare when the prescribed distribution has been disturbed. Otherwise those who hold the purse will be likely in the end to dominate and absorb everything else, except as astute executives may from time to time

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50 McIlwain, op. cit. supra note 15, at 246.
51 Friedrich, supra note 6, at 665.
check them by capturing and holding popular favor. ... I do not mean that courts should approach such constitutional questions as they approach statutes, and they have never done so when they knew their business; constitutions can only map out the terrain roughly, inevitably leaving much to be filled in. The scope of the interstate commerce power of Congress is an ever present instance. It is impossible to avoid all such occasions, but it was a daring expedient to meet them with judges, deliberately put beyond the reach of popular pressure. And yet, granted the necessity of some such authority, probably independent judges were the most likely to do the job well. Besides, the strains that decisions on these questions set up are not ordinarily dangerous to the social structure. For the most part the interests involved are only the sensibilities of the officials whose provinces they mark out, and usually their resentments have no grave seismic consequence.

But American constitutions always go further. Not only do they distribute the powers of government, but they assume to lay down general principles to insure the just exercise of those powers. This is the contribution to political science of which we are proud, and especially of a judiciary of Vestal unapproachability which shall always tend the Sacred Flame of Justice. Yet here we are on less firm ground. It is true that the logic which has treated these like other provisions of a constitution seems on its face unanswerable. Are they not parts in the same document? Did they not originally have a meaning? Why should not that meaning be found in the same way as that of the rest of the instrument? Nevertheless there are vital differences. Here history is only a feeble light, for these rubrics were meant to answer future problems unimagined and unimaginable. Nothing which by the utmost liberality can be called interpretation describes the process by which they must be applied. Indeed if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism. The answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh. Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their
powers? When does utterance go beyond persuasion and become only incitement? How far are children wards of the state so as to justify its intervention in their nurture? What limits should be imposed upon the right to inherit? Where does religious freedom end and moral obliquity begin? As to such questions one can sometimes say what effect a proposal will have in fact, just as one can foretell how much money a tax will raise and who will pay it. But when that is done, one has come only to the kernel of the matter, which is the choice between what will be gained and what will be lost. The difficulty here does not come from ignorance, but from the absence of any standard, for values are incommensurable. It is true that theoretically, and sometimes practically, cases can arise where courts might properly intervene, not indeed because the legislature has appraised the values wrongly, for it is hard to see how that can be if it has honestly tried to appraise them at all; but because that is exactly what it has failed to do, because its action has been nothing but the patent exploitation of one group whose interests it has altogether disregarded. But the dangers are always very great. What seems to the losers mere spoliation usually appears to the gainers less than a reasonable relief from manifest injustice. Moreover, even were there a hedonistic rod by which to measure loss or gain, how could we know that the judges had it; or—what is more important—would enough people think they had, to be satisfied that they should use it? So long as law remains a profession (and certainly there is no indication that its complexities are decreasing) judges must be drawn from a professional class with the special interests and the special hierarchy of values which that implies. And even if they were as detached as Rhadamanthus himself, it would not serve unless people believed that they were. But to believe that another is truly a Daniel come to judgment demands almost the detachment of a Daniel; and whatever may be properly said for judges, among whom there are indeed those as detached as it is given men to be, nobody will assert that detachment is a disposition widespread in any society. . . .

Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis. They are the precipitates of "old forgotten far off things and battles long ago," originally
cast as universals to enlarge the scope of the victory, to give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience. If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them, if they learn to trim their sails to the prevailing winds. A society whose judges have taught it to expect complaisance will exact complaisance; and complaisance under the pretense of interpretation is rottenness. If judges are to kill this thing they love, let them do it, not like cowards with a kiss, but like brave men with a sword.53

The intellectual plight which has been caused for many by this notable address, casting in masterly prose the convictions of one of America's greatest jurists, is illustrated by the writings of Charles Curtis. Author of a stimulating volume on the Court, Mr. Curtis originally urged the desirability of direct judicial review in the area of civil liberties.54 Yet, although at first he stubbornly resisted the Hand reasoning, he finally yielded to a view which he could not rebut to his own satisfaction.55 Unconvinced, on the other hand, is Professor Chester Antieau; he is sharply critical of those "eminent jurists today who oppose the use of the Bill of Rights in examining into the constitutionality of legislative enactments—who would, in effect, for these purposes carve the Bill of Rights out of our Constitution."56 Further illustrative is the exchange of views in the Harvard Law Review fifteen years ago between Mr. Elliot Richard-

53 Id. at 176-81.
54 Curtis, Lions Under the Throne ch. 16 (1947).
55 Curtis, Law as Large as Life 102 (1959).
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son and Dean Eugene Rostow, wherein the former came near to embracing the Hand position while the Dean stoutly rejected "Judge Learned Hand's monkish rule of complete abstinence" in issues of direct limitation.58

The debate on the relative merits of direct and of indirect limitation must go on inside the Court, as it does outside. There is significance in the resurgence of the bill of attainder prohibition, first in United States v. Lovett59 and now recently in United States v. Brown,60 following the demise of any significant Supreme Court limitation on Congressional power either under federalism61 or in the delegation of legislative power to the Executive and the Administrative.62 The Steel Seizure Case63 also suggests that life still remains in judicial enforcement of some indirect limitations.

Clearly, the Court shows no sign of retreating from the exercise of constitutional judicial review with respect to direct limitations protective of civil and political rights. Indeed, its activism in this regard, lately illustrated by its apparent success in the great venture into the political thicket of reapportionment,64 suggests the paradoxical possibility that this form of constitutional judicial review may be metamorphosing into what is in effect a mechanism for

57 Richardson, Freedom of Expression and the Function of Courts, 65 HARV. L. REV. 1 (1951); Rostow, supra note 23.
58 In his BILL OF RIGHTS (1953), Judge Hand's criticism of judicial review was not as clearly responsive to the direct-indirect dichotomy; yet because most of the open-ended constitutional provisions are of the direct type, his line of attack was not greatly different. It was this last volume of Learned Hand's which spurred Professor Wechsler to his classic challenge of the Judge in Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959), wherein he insisted that the Court could continue its full engagement in judicial review of constitutionality, yet avoid becoming a super-legislature, by resting its decisions upon neutral principles. Despite the criticism brought down upon his views, Professor Wechsler has not changed his mind. Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001, 1011 (1965).
60 381 U.S. 437 (1965), cited and discussed in the text at note 38.
64 See the writer's evaluation of this (ad)venture in Toward an Acceptable Function of Judicial Review, 11 S.D.L. REV. 1 (1966), constituting the 1965 Dillion Lecture at the University of South Dakota.
reshaping the thrust of indirect limitation. Under indirect limitation, the fractionalization of the totality of governmental power strengthens the free play of institutional oppositions which in turn effect the continuing accommodation of conflicting forces in the society. Constitutional judicial review of Bill-of-Rights type limitations, if means and end were to become inverted, could transform itself into a potent weapon for judicial employment in the dynamics of institutional oppositions.

Such metamorphosis, by stripping the Court of its protective armor of apparent detachment and thrusting it unreservedly into the very vortex of politics, might well come at a high price. A generation ago two quite different students of the Court warned of their respective concerns. Professor Corwin felt that the result of emancipation of judicial review “from all documentary and doctrinal restraints” was “to obliterate the frontier between Constitutional Law and policy; and without a definite boundary to defend, Judicial Review itself becomes an instrument of policy, and thereby exposes itself more and more to political criticism.”65 Charles Curtis put the matter this way: “...the harder the Court tugs at the words and the meaning of the Constitution, the farther it gets from the Constitution and the basis of its prestige and power.”66 The warnings of yesterday’s generation would seem to hold equal validity for today’s and tomorrow’s. One may follow Dean Rostow in rejection of Learned Hand’s advocacy of Court abandonment of direct constitutional judicial review, yet hold to the view that that form of review must be exercised with the severest intellectual detachment of which Justices are capable. Power politics is not a game the Court should play.

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66 Curtis, Wringing the Bill of Rights, 2 Pacific Spectator 361, 373 (1948).