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Judicial Modesty: Down with the Old - Up with the New

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JUDICIAL MODESTY: DOWN WITH THE OLD!—UP WITH THE NEW?

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Judicial modesty or self-restraint has surely been the pivotal issue of the post-World War II Supreme Court. At its high point in the midfifties, it was practically unassailable as a judicial philosophy. It had for its spokesmen two of the most distinguished of American jurists, Justice Frankfurter and Judge Learned Hand, both of whom were eloquently pushing the doctrine to its logical limits. To refuse to follow Justice Frankfurter's complex arguments, to be impatient with narrow and often quibbling constitutional interpretations, to feel that the Court's job was to right wrongs not build jurisdictional principles, was taken as a sign of fuzzy-minded liberalism lacking legal sophistication and unappreciative of judicial craftsmanship. The Court itself seemed fairly committed to the modest way. Teachers and students of law were busy learning the customs, mores and rhetoric of a self-constraining jurisprudence.

Much of the rhetoric is still with us. But if the observer will pull his mind away from the ongoing debate long enough to take a detached look at the current state of thought about the Supreme Court, some rather startling changes are apparent. Modesty is no longer a self-evident principle. Indeed the talk is less about whether the Court should do nothing or a little bit than about how the Court should complete the great projects it has initiated. Impatience with elaborate legal argumentation leading to the logically inescapable conclusion that the Court cannot act is no longer necessarily taken as a sign of legal naïveté. Indeed, although it is difficult to document this point, the rather snug professional satisfaction of the 1950's with Justice Frankfurter's highly skilled opinions has been replaced by a rather vague unease with a legal scholarship which so often leads to judicial impotence in the face of official wrongdoing. Of course death and retirement have physically removed the two great judges from the bench. But more important, their ideas about courts and government are now increasingly seen as "a" judicial philosophy, not "the" judicial philosophy.

Finally, in several areas the Supreme Court itself has either conclusively rejected or gone very far toward rejecting judicial passivity. Indeed, with the school segregation decision,[1] it had be-

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[1] Brown v. Board of Educ., 347 U.S. 483 (1954).

gun to move toward judicial activism even when the enchantment with self-restraint was at its height. It is students of the Supreme Court who have been particularly concerned with judicial modesty and it is the Court itself which sets the tone of current thought by its recent rejections of at least the most extreme form of the Frankfurter-Hand philosophy.

This article will undertake to outline the doctrinal decline of judicial modesty, the at least partial rejection of passivism by the Supreme Court and the growth of a new modesty which presents itself as a substitute for the old.

I. Judicial Modesty—Old Style

"Modesty," of course, is a shorthand expression for a set of devices designed to prevent the courts from interfering with decisions made by legislative and administrative agencies. The most common of these devices is the presumption of constitutionality which attaches to statutes. Presumption can mean anything from a slight shifting of the burden of proof to an irrebuttable presumption which practically predetermines the judicial decision. The modest tend to push the presumption of constitutionality to the latter end of the scale. Where even such a presumption is not enough, statutory interpretation, no matter how strained, may be used to save the legislation. Reliance on administrative expertise, self-limiting delineations of jurisdiction and the political question doctrine are other methods which are habitually associated with modest courts.

Judicial modesty is derived from two basic considerations or rather problems about the role of the Supreme Court in American politics. The first involves democracy, or majority rule; the second, the balance of power between various government agencies. The Justices hold nonelective, life tenure offices and through the exercise of judicial review wield the power to block majority policies as expressed in the legislation of Congress and the actions of the President. In a democracy then, so it is argued, judicial review must be treated with great suspicion. However, if the Constitution authorizes this power to block majorities, review may be considered democratic at second hand. If the people in adopting the Constitution approved of judicial review, the majority has imposed limitations upon itself; it has approved in advance, so to speak, the antimajoritarian actions of the Supreme Court. Of course the difficulty is that the Constitution nowhere specifically confers the power of review on the Court. The modest conclude, at the most extreme that the Court should exercise almost no review power and, at the least, that it should exercise the power reluctantly and sparingly. Review

when seen as undemocratic and in a sense unconstitutional is at best a dubious power in the context of American politics.

The first problem of the modest then, is legitimacy in a constitutional democratic system. The second, is power in that system. The Constitution grants Congress and the President the lion's share of power in the national government. As the popularly elected branches, they have not only the constitutional authority to wield power but the democratic backing which turns constitutional power into political power. The Supreme Court on the other hand has little strength. It has neither the purse nor the sword. More important, and here the democratic and power problems intertwine, it does not have the people's votes which would arm it with the people's power. Why then is the Supreme Court, or indeed any court, obeyed? The modest reply that courts are obeyed because the people believe that courts arrive at impartial decisions untainted by the personal preferences of the judges. Therefore, to the extent that the Supreme Court is believed to be making impartial decisions, it will have a countervailing power to that of the other branches. Of all the areas of court activity, however, judicial review, particularly the striking down of a statute on constitutional grounds, most clearly shows the judges deciding not impartially but on the basis of their own policy preferences. In other words, judicial review is the most "political" of all the Court's tasks and the more the Court emphasizes this task the more aware the people will become that the Justices are not totally impartial administrators of justice. Paradoxically then, the more the Court exercises its most political power, the less total power it will have because its only real power is the prestige conveyed by the popular myth about its impartiality. Therefore, the modest insist that the Court must largely abandon judicial review in order to maintain the judicial myth so necessary for its success in the many nonconstitutional areas where it performs important functions.

The interlocking problems of power and prestige can be viewed from another angle. In a general way, the Supreme Court is surely less powerful than Congress or the President. The exercise of its power of judicial review potentially puts it into direct conflict with those branches of the government. Therefore, judicial review tends to get the Court into battles it is likely to lose. The more it loses, the less prestige it is likely to have. The less prestige it has, the more it is likely to lose. It would be best then for the Court to avoid the direct challenges to its more powerful governmental neighbors implied by judicial review.

I have oversimplified the argument. There is a whole series of "ifs," "ands" and "buts," some of which we will look at shortly.

There is also a degree of internal inconsistency. Why worry about the nondemocratic nature of the Court if it really has very little power anyway? Why worry about preserving what power it has if it offends your democratic sensibilities? Nevertheless the modest have noticed, or rather been stunned by, the two outstanding, if somewhat superficial, features of the Supreme Court's place in American government. In a constitutional democracy, judicial review is neither wholly democratic nor supported by specific constitutional authorization. In a political system built on the balance and clash of power, the Court's principal power, its reputation as the impartial guardian of the Constitution, tends to be undermined precisely at the point it begins to enforce its particular and necessarily partial vision of the Constitution.

It is not surprising then that most of the recent study of the Court has turned to the issues of democracy and power.

II. THE ATTACK ON THE OLD MODESTY

One approach to these problems has been to admit tacitly the undemocratic position of the Court vis-à-vis other segments of government, but find a constitutional authorization for review. Professor Wechsler took this approach in his now famous Holmes Lectures' reply to Judge Hand.[2] His argument is too well known to require elaboration here. Suffice it to say that on close reading of article III he discovers that the framers intended the Court to exercise review powers. I personally do not find Wechsler's reasoning totally convincing.[3] Nevertheless, it provides a plausible alternative to Judge Hand's discovery in his Constitution of a very minimal review lurking in the interstices of the document.[4]

Professor Black in his recent and "activist" book on the Court[5] has revived the first and best constitutional argument for review, that of Hamilton in Number 78 of *The Federalist* and Marshall in *Marbury v. Madison*.[6] Again no elaborate exposition is necessary here. The ideas are long familiar. The Constitution is law. The Supreme Court is a court. It is the job of courts to administer laws. When two laws conflict, it is, therefore, the unavoidable task of a court to choose between them. Therefore, when a statute and the Constitution conflict, it is the duty of the Supreme

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[2] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[3] See Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175, 180-81 (1962).

[4] HAND, THE BILL OF RIGHTS 14-15, 28-29 (1958).

[5] BLACK, THE PEOPLE AND THE COURT (1960).

[6] 5 U.S. (1 Cranch) 137 (1803).

Court to choose between them and such choice must, of course, be made in favor of the Constitution.[7] Again the argument is not wholly convincing, largely because it assumes what is to be proved—that the Constitution is the same kind of law as that habitually administered by courts and at the same time is the kind of law which takes precedence over subsequent legislative commands.

Even if only partially convincing, however, Wechsler's and Black's arguments are both symptomatic and supportive of a reaction to the jurisprudence of modesty. For if the Constitution commands review, it is not within the power of the Court to grant or withhold it. The modest have been urging the Court to use its discretion in exercising review, using that power only seldom and cautiously. Wechsler and Black are saying that the Court has the constitutionally imposed responsibility of defending the Constitution against statutory and administrative incursions whenever a conflict arises.[8]

Black, of course, has not contented himself with finding a constitutional authorization to "make up for" the antidemocratic nature of the Court. He seeks as well to show that the Court is in reality democratic, largely by showing that review is a popularly approved institution.[9] However, the most intensive grappling with the problem of the Court and democracy has come about indirectly through the work of what might be called the new or political jurisprudence.[10] The political jurist begins with the premise that the Supreme Court is one segment of American government and may be studied within the same framework as other governmental agencies. Many of these studies, such as those on the voting behavior of the Justices[11] or the consideration of the Court as a "small group" for psychological or sociological analysis[12] do not concern us directly here. Other areas, however, bear directly on the issue of democracy and the Court. Group theorists, such as Truman and Latham, have attempted to show that all agencies of government including the courts are subject to group pressures and that most political issues are not decided on the basis of majority versus

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7 BLACK, *op. cit. supra* note 5, at 7-15.

8 Wechsler is quite specific on this point. Wechsler, *supra* note 2, at 5-6. See also Pollak, *Constitutional Adjudication: Relative or Absolute Neutrality*, 11 J. PUB. L. 48, 49 (1962) ("And in the mid-twentieth century, viewed against the main stream of American constitutional development, Hand's premise is simply an anachronism.").

9 BLACK, *op. cit. supra* note 5, at 101, 105, 115.

10 The literature is by now very large. SCHUBERT, CONSTITUTIONAL POLITICS (1960) provides a general introduction to the material and an extensive bibliography.

11 See Schubert, *The 1960 Term of the Supreme Court*, 56 AM. POL. SCI. REV. 90 n.2 (1962).

12 See, *e.g.*, Snyder, *The Supreme Court as a Small Group*, 36 SOCIAL FORCES 232 (1958).

minority but through constantly shifting alliances of various groups.[13] Clement Vose has filled out these generalizations with specific descriptions and analyses of court lobbying by interest groups.[14] There has been considerable concern in recent years for discovering the "constituency" of the Court and the effect of public opinion, or at least that segment of public opinion expressed by Congress, on its decisions.[15] The picture that emerges is not one of an isolated body of lifetime dictators, but of a Supreme Court immersed in the same environment of group pressures and conflicting interests as the rest of American government.

If the Court then is more democratic, or at least more subject to political pressures than is sometimes imagined, it is surely true that the Congress and the President are less democratic than might be. At least since Woodrow Wilson's book on Congress,[16] it has been repeatedly pointed out that Congress is organized less to facilitate majority desires than to placate dissident minorities and that, on the whole, Congress is little more than a name for a collection of semi-independent committees and other power holders who bargain and swap with one another to reach decisions in a way far different from the model of classic democracy.[17] One of the principal tasks of the new jurisprudence, which seeks to deal with the Supreme Court in terms of the overall political situation, is to place the frequently posed problem of Court versus Congress in the context of Congress as it actually operates.[18]

Such an attempt of course involves a direct undermining of judicial modesty. For the greatest strength of the modest is the posing of a false dichotomy between a democratic "voice-of-the-people" Congress and an autocratic Supreme Court. Once the new jurisprudence emphasizes the nonisolated, group-influenced nature of the Court and insists that what we have always known about the real operation of the Congress be brought to discussions of the Court, much of the persuasiveness of a modest position vanishes. The Court simply becomes one part of a government all of whose

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[13] LATHAM, THE GROUP BASIS OF POLITICS (1952); TRUMAN, THE GOVERNMENTAL PROCESS (1951).

[14] VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959); Vose, *Litigation as a Form of Pressure Group Activity*, 319 Annals 20 (1958).

[15] See MURPHY, CONGRESS AND THE COURT (1962); Latham, *The Supreme Court and the Supreme People*, 16 J. POLITICS 207 (1954).

[16] WILSON, CONGRESSIONAL GOVERNMENT (1885).

[17] See GRIFFITH, CONGRESS—ITS CONTEMPORARY ROLE (3d ed. 1961); GROSS, THE LEGISLATIVE STRUGGLE (1953); HOLCOMBE, OUR MORE PERFECT UNION 149-90 (1950).

[18] See MURPHY, *op. cit. supra* note 15; Shapiro, *Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations*, 15 VAND. L. REV. 535 (1962).

elements contain nice balances of democratic and nondemocratic forces.

Moreover, the new jurisprudence tends to destroy the contrast between a strong Congress and Executive and a weak Supreme Court which is a crucial link in the argument for judicial self-restraint. Robert Dahl, in what has become a leading article,[19] indicates that the Court as one of the segments of our national government can sometimes win and sometimes lose, depending on the shifting constellation of political forces in Washington. Professor Murphy in his recent book *Congress and the Court*[20] shows that even when relations between the two seem most hostile, we do not find monolithic and powerful Congress facing quavering Supreme Court, but a complex interaction of forces and issues. The point is not the reverse of that made by the modest. We are not talking about a weak Congress and a strong Court. The difficulty with judicial modesty is that it tends to counsel a complete self-restraint based upon a general and static assessment of the Court's power. Because they assume as a starting point weak Court versus strong Congress, the modest always reach the same conclusion, judicial inaction. The new jurisprudence which seeks to understand the Court in the context of actual day-to-day politics necessarily abandons any oversimplified counsel of restraint in favor of seeking to determine precisely when and on what issues the Court is strong enough to act. In place of a generalized judicial self-restraint comes the counsel of political prudence applicable to all government agencies. In each situation, assess the forces arrayed for and against you and act accordingly.

The new jurisprudence tends to directly attack the modest's views on the Court's power. Professor Wechsler and other proponents of neutral principles[21] have mounted a more subtle attack aimed at the problem of Supreme Court prestige which is, of course, an integral part of the power question. Curiously enough, although Wechsler's reading of article III has always been recognized as a rebuttal to Hand, his comments on neutral principles have rarely been seen in this light.[22] Yet they provide a more politically viable, if not more logical, reply to the arguments of the modest than does the wrangle over the Framers' intentions.

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19 Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

20 MURPHY, *op. cit. supra* note 15.

21 Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81 (1960); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959).

22 For an exception, see Bickel, *Foreword: The Passive Virtues, the Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 48 (1961).

As we have seen, one of the principal points of the modest is that the Court's power depends upon its prestige, and judicial review, by exposing the fact that constitutional judgments are a matter of personal policy preference undermines that prestige. But Professor Wechsler and his cohorts insist that constitutional judgments need not be based on crude individual preferences nor opinions written as simple fiats revealing only the personal desires of the writer. They hold that in constitutional litigation "neutral" principles, not the judges' sympathies toward the litigants, are to be the guiding forces, and that the process of decision making both in conference chamber and as traced in the written opinions themselves should be a reasoned elaboration of those principles through calm contemplation and study of our legal and ethical heritage.

The impact of this line of argument on the position of the modest is very great. First of all it is suggested that Supreme Court decisions concerning constitutionality, if properly arrived at, would show the Court as an impartial discoverer and applier of fundamental and disinterested principles of law. Thus judicial activism would increase, not decrease, the Court's prestige with both the lay public and that particularly significant constituency of the Court, the bar. Just as important, if neutral principles exist, activism or passivism does not lie in the discretion of the Justices. So long as constitutional decisions are viewed as simply the policy preferences of the Justices making them, then the Justices seem to be free to either give or not give an authoritative stamp to their prejudices. But if they have discovered neutral principles imbedded in the law and the Constitution, there would seem to be a strong moral impetus to enforce them.

There has been a great debate over Professor Wechsler's suggestions.[23] The points scored by both sides need not be detailed here. What is important is that at modesty's very climax of intellectual popularity came a reassertion of the Court's constitutional role and a claim that this role could add to, not destroy, the prestige of the Court. For the introduction of neutral principles, like much of the modest's argument itself, is a plea to the Court to mind its myth, but by a carefully phrased activism rather than passivity. Furthermore the very assertion that the Constitution is a set of first principles applicable by the Court to other branches of government bolsters the Court's prestige. Several of the supplementary arguments of the neutralists are aimed at the same result. The bitter rejection of voting and bloc analysis of the Justices' behavior,[24] the

[23] The literature has become very extensive. Most of the contributions are mentioned in the most recent addition, Wright, *The Supreme Court Cannot Be Neutral*, 40 TEXAS L. REV. 599 (1962).

[24] Hart, *supra* note 21, at 124-25.

vision of the Court as a group of reasonable men getting together to find the "correct," "legal" solutions to the problems before it,[25] the emphasis on the scholarly, unhurried and dutiful search for judicial truth,[26] are all motivated by the desire to banish the notion that judges are merely politicians. The aim is to restore enthusiasm for the isolated, insulated and quasi-sacred nature of judicial rites which has been so reduced by the incursions of various forms of legal realism. To put it bluntly, if the Court and Professor Wechsler can convince the lawyers and the public that neutral principles exist, they will have done much to restore judicial prestige whether such principles actually exist or not. The response of the neutral principles adherents to the cautious hand wringing of the modest over the loss of Court prestige is to go out and build up that prestige again.

Thus to the modest's vision of a weak Court constantly surrounded by strong antagonists, the new jurisprudence replies that strength and weakness are constantly shifting political factors, the Court sometimes being strong enough to act, sometimes, but not always, forced to be passive. And to the modest's fears about the Court's prestige, the proponents of neutral principles reply with a philosophy of law designed to actively restore that prestige.

Indeed the disenchantment with the notion that review is undemocratic and beyond the power of the Court is illustrated by the fact that the most vociferous opponents of neutral principles have attacked the doctrine not because it potentially encourages greater judicial activism but precisely because it might not sufficiently encourage judicial action, or does not fully recognize that judicial policy making via judicial review is an essential part of American politics.[27] But it should be remembered that on what he himself proposes as the key test, the school segregation cases,[28] Wechsler criticizes the Court not for acting, but for clothing its actions in an opinion which did not properly elucidate the applicable principles.[29] Surely it is indicative of the basically activist thrust of both sides in the exchange that the debate engendered by Wechsler's criticism of *Brown v. Board of Educ.*[30] has been almost entirely devoted, not to the question of whether the Court should have acted, but to whether the Court covered its actions with a properly prestige-gathering sort of opinion.

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25 Griswold, *supra* note 21, at 91.

26 Hart, *supra* note 21 *passim*.

27 See Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960).

28 Brown v. Board of Educ., 347 U.S. 483 (1954).

29 Wechsler, *supra* note 2, at 31-34.

30 347 U.S. 483 (1954).

The difficulty is that the two schools, political jurisprudence and neutralism, may well be seen as conflicting and mutually self-destructive. The neutral principles doctrines have been not only a reaction to judicial modesty but to the new jurisprudence. In the face of the new jurists' attempts to see the Court as an integral part of the political framework, interacting with all the other parts, the neutralists have reasserted the traditional jurisprudence of law as something set apart and above the clash of politics, a realm of sweet reason and first principles, principles apparently derived not from the clash of social interests but from the quiet purity of the law itself. But whatever their incompatibility vis-à-vis one another, they form a united front against the modest. For the political jurists do not say that the Court is inevitably political in order to conclude that, therefore, it must be as inactive as possible. They say it is inevitably political and conclude that it should therefore accept its political role with good grace and enter into the political struggle to the extent of its power and capabilities. And the neutralists do not say that judges, law, legal reasoning and neutral principles exist apart from and are something more than the rationalization of various conflicting social interests in order to counsel that the Court withdraw from those forms of litigation which most vividly present such conflict. They are arguing that precisely because of the nature of law and courts, the judge can and indeed is morally obligated to bring his peculiar talents to the active solution of social problems which reach the stage of litigation concerning fundamental issues of law and constitutionality.

Indeed the decline in the intellectual vitality of judicial modesty is symbolized by the fact that the raging and central battle among students of the Court today is not between passivists and activists but between political jurists and advocates of neutral principles. The key question is no longer should the Court act, but what kind of explanation and rationale for its actions is most satisfactory.

III. The Supreme Court: Modest and Otherwise

Thus far we have traced the ups and downs of judicial modesty among students of the Court, a kind of sketchy intellectual history of modesty. The doctrine has had similar ups and downs in the Supreme Court itself and it is to these that we now turn. The most convenient way to follow the impact of modesty on the Court is, I think, to examine the Justices' opinions dealing with freedom of speech. For it is in this area that the Court has been most conscious of and divided on the issue of modesty, perhaps because here it is the guardian of a clearly worded constitutional negative aimed at other "powerful" and "democratic" branches of government.

I do not think it would do much good at this point to reopen the long debate over what Holmes and Brandeis really meant by the "clear and present danger" rule. It is enough to say that these primary contributors to the doctrine of judicial modesty in the economic realm apparently were more willing to intervene against statutes and administrative actions infringing on the right of free expression. With the coming of the New Deal Court, this attitude blossomed into a series of opinions invoking judicial protection of speech against repressive state action and a new doctrine—preferred position—which, when the first amendment was involved, revoked the normal and modest, presumption of constitutionality for legislation.

In this period Justice Frankfurter found himself frequently beleaguered by his activist colleagues and his opinions, particularly in the two flag salute cases,[31] became the catechism of judicial modesty. Needless to say, Justice Frankfurter specifically opposed both the clear and present danger rule and the preferred position doctrine. Indeed for some years the Justices could be classified as activist or modest according to their position on these doctrines. Nevertheless, the real debate was not over whether some parts of the Constitution or the Bill of Rights were to be preferred to others or just how clear and present a danger must be offered by speech before it could be punished. The real debate centered on the issue of how bold the Court might be vis-à-vis other parts of government in enforcing its vision of the Constitution.

Feiner v. New York,[32] the great turning point in the speech cases, illustrates this point. Both sides agreed that the clear and present danger test was to govern the case. Yet a Court which only a few months earlier had discovered no clear and present danger in the diatribe of an extremist agitator ranting in a hall besieged by a rock throwing Chicago mob,[33] found such a danger in the soap box speech of a college student who drew a small, murmuring crowd in Syracuse. It can hardly be a coincidence that the first case to use the clear and present danger test as a means of judicially acquiescing in state punishment of speech was decided immediately after two of the Justices least troubled by pangs of modesty left the Court.[34] Nor that the opinion itself is full of the

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31 West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

32 340 U.S. 315 (1951).

33 Terminiello v. Chicago, 337 U.S. 1 (1949).

34 Justices Murphy and Rutledge were replaced by Justices Minton and Clark in 1949, and in that term, all six cases involving the First Amendment were decided against the speaker. See Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 328 (1952).

hallmarks of modesty—respect for administrative expertise, deference to the responsibility of the political branches generally and the states in particular, and doubts about the capabilities of the Supreme Court. *Feiner* marks the beginning of a period in which Justice Frankfurter's ideas, if not his personality, were dominant on the Court, particularly in the area of speech. Some modes of speech were excluded entirely from first amendment protection,[35] others were subjected to wide government regulation on the grounds that not substance but time, place and manner of presentation were being regulated,[36] and others had their first amendment protections balanced away.[37]

It was in the Communist cases, culminating in *Dennis v. United States*,[38] that the Court made its furthest withdrawal. It is in *Dennis* also that the philosophy of judicial modesty, embodied in Justice Frankfurter's concurrence, reaches its highest point.

> The demands of free speech in a democratic society . . . are better served by candid and informed weighing of the competing interests . . . than by announcing dogmas . . . .
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> But how are competing interests to be assessed? . . . [W]ho is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
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> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . .
>
> . . . .
>
> It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. . . .
>
> Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?

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[35] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[36] Poulos v. New Hampshire, 345 U.S. 395 (1953). The use of a reasonableness test in the time, place and manner cases began earlier in Kovacs v. Cooper, 336 U.S. 77 (1949) and Cox v. New Hampshire, 312 U.S. 569 (1941).

[37] American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951).

[38] 341 U.S. 494 (1951).

> . . . . It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in clouds of controversy.[39]

In short the first amendment requires balancing of interests, and Congress, not the Court, is to do the balancing.

Modesty, either the open variety of Justice Frankfurter's concurrence in *Dennis* or the more disguised form of the majority,[40] was also strongly in evidence in the immediate postwar period in several areas other than subversion. Although the Court made some forays into the elections field,[41] it resolutely refused to grant remedies to the underrepresented.[42] Although, often led by Frankfurter, it had tightened federal criminal procedure,[43] it had, also led by Frankfurter, stuck to a vague and widely permissive fair trial rule for state proceedings which allowed conviction without counsel, and on the basis of illegally obtained evidence and confessions.[44] Nor was the Court willing to overthrow the separate but equal doctrine, although it laid some of the ground work for doing so.[45] And while it had spoken boldly of the high wall of separation between church and state,[46] it had acted modestly enough in approving released-time-religious-education schemes in which the school "serves as a temporary jail for a pupil who will not go to Church."[47] In short, by 1952 the Supreme Court had reached a position which could not be called abdication but was about as modest as could be maintained by a Court still pretending to constitutional responsibilities.[48]

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[39] *Id.* at 524-25, 550-52.

[40] The Court in *Dennis* pretends to adopt a constitutional rule, *i.e.*, to actively interpret the Constitution, but it adopts a rule designed by a leader of the modest to reduce the role of the Court as much as possible without openly admitting total surrender as Frankfurter comes close to doing. Indeed, it seems probable that Hand did not reach total passivity in *Dennis* only because as a subordinate judge he felt himself incapable of overtly challenging the previously controlling activist tenets of the Court, such as the clear and present danger rule. See United States v. Dennis, 183 F.2d 201 (2d Cir. 1950); HAND, THE BILL OF RIGHTS 60 (1958).

[41] Smith v. Allwright, 321 U.S. 649 (1944).

[42] See, *e.g.*, Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Cox v. Peters, 342 U.S. 936 (1952); Remney v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barrett, 330 U.S. 804 (1947); Cook v. Fortson, 329 U.S. 675 (1946).

[43] See, *e.g.*, Hoffman v. United States, 341 U.S. 479 (1951); McDonald v. United States, 335 U.S. 451 (1948); McNabb v. United States, 318 U.S. 332 (1943).

[44] See, *e.g.*, Stein v. New York, 346 U.S. 156 (1953); Wolf v. Colorado, 338 U.S. 25 (1949); Adamson v. California, 332 U.S. 46 (1947).

[45] See, *e.g.*, McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents of the Univ., 332 U.S. 631 (1948).

[46] Everson v. Board of Educ., 330 U.S. 1 (1947).

[47] Zorach v. Clauson, 343 U.S. 306, 324 (1952).

[48] There was one exception, a noncivil liberties decision. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

But if 1952 is the year of *Dennis*, 1954 is the year of *Brown v. Board of Educ.*[49] Surely no Court which makes a frontal assault on a cherished regional institution such as the peculiar brand of Negro slavery with option to escape practiced in the South can be called completely modest. The decision of the Court was unanimous. Therefore, we can only speculate on the motives of the Frankfurter wing in joining it. It seems probable that all the Justices concluded in the light of the Dred Scott decision[50] that if the deed were to be done it must be done by all together, with none providing ammunition for enemies of the Court.

Whatever the motives, *Brown* marks the beginning of the end for judicial modesty in the style of Hand and Frankfurter. It rejected what was frequently proposed both before and afterwards as a more cautions solution to the segregation problem, that of gradually extending integration from graduate school to college to trade school, et cetera, by developing the precedents of *Missouri ex rel. Gaines v. Canada*,[51] *Sipuel v. Board of Regents*,[52] *McLaurin v. Oklahoma State Regents*[53] and *Sweatt v. Painter*.[54] It created and was bound to create an open conflict between the Supreme Court and various state governments in an area—education—which is peculiarly that of local government. Even Justice Frankfurter was apparently unwilling that the states be little laboratories for racial persecution. Furthermore, the Court struck a different balance between competing social interests than had been arrived at by those great popular bodies, the state legislatures and Congress.[55] Indeed Supreme Court action here triggered later congressional civil rights action, the autocrats leading the democrats in a horribly immodest way.

Moreover the string of per curiam decisions[56] immediately following the school decision indicates that the Court at the time of *Brown* had already made up its mind to end segregation in all public facilities. Frankfurter's silent acquiescence in these per curiam dispositions again shows him associated willy-nilly with the most sweeping judicial action. Finally in 1962 the Court proclaimed that any

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49 347 U.S. 483 (1954).

50 Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

51 305 U.S. 337 (1938).

52 332 U.S. 631 (1948).

53 339 U.S. 637 (1950).

54 339 U.S. 629 (1950).

55 Congress, of course, had struck a balance in favor of white southerners by not seeking to enforce the fourteenth amendment through legislation.

56 State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959); Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Baltimore Mayor & City Council v. Dawson, 350 U.S. 877 (1955).

state action enforcing public segregation was so clearly unconstitutional as to forbid argument.[57] Justice Frankfurter did not participate in the decision.

In all these instances Frankfurter's silence makes it unclear whether his modesty has simply been silently overborne by the activism of his colleagues or has lapsed sufficiently in this area to allow him to willingly join the majority.[58] But when the Court, having outlawed state action which segregates, goes on to broaden the concept of state action, Justice Frankfurter and his disciple-in-modesty, Justice Harlan, begin to dissent,[59] on the grounds that the Court is trying to push the boundaries of its supervision too far. In other words, here the judicially modest have attempted to reassert their philosophy in the racial area, but modesty has definitely become a minority position. The majority, while approaching the state action question in a gingerly step-by-step fashion, is nevertheless taking steps, and has been unwilling to accept the Frankfurter-Harlan approach.

If modesty had been defeated only in the segregation cases, we might view the defeat as an aberration, one which markedly shifted the role and image of the Court toward activism, but an aberration none the less. Instead we find that modesty has been defeated in several other crucial civil rights areas, areas in which the modest have been peculiarly adamant. The most important of these has been malapportionment. Frankfurter had written the leading opinion in *Colegrove v. Green*,[60] which rang all the changes on the theme of modesty. The area was peculiarly political, and, therefore, beyond the jurisdiction of the Court. The Court had no expertise, no standards of judgment and no means to enforce its decisions. The power over such matters was vested in other, and impliedly more powerful and more democratic, branches of government. The remedy for the evil lay, like most remedies, not in the courts but in popular action through the democratic process, *i.e.*, through choosing the right legislators and requiring them to act. Frankfurter's was not a majority opinion. There was none, and if a majority existed at all, it existed for the proposition that the Court could act.[61] Nevertheless, exploiting an ambiguity in the

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57 Turner v. City of Memphis, 369 U.S. 350 (1962).

58 Frankfurter was also silent in Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Shelley v. Kraemer, 334 U.S. 1 (1948).

59 Burton v. Wilmington Parking Authority, 365 U.S. 715, 727, 728 (1961).

60 328 U.S. 549 (1946).

61 The Court split four-to-four on granting relief, and Justice Rutledge, concurring, believed that the Court had equity jurisdiction, but refused to exercise it because of the short time remaining before the election.

language of equity, the modest managed to write a series of opinions keeping the Court inactive.[62] The Court has now, however, become notoriously active through its decision in *Baker v. Carr*.[63] Frankfurter's brilliant and straightforward dissent, supported by Harlan's more technical and thus more typically modest analysis, dramatically illustrates the confrontation of the activist and modest and the defeat of the latter. I am not suggesting that the majority opinions are models of judicial boldness. Justice Brennan's opinion seems calculatingly ambiguous. Justice Stewart emphasizes how little was decided. But as Justice Frankfurter so clearly told them, the majority has opened the flood gates which the modest have labored so long to keep shut.

Mapp v. Ohio[64] is in a way a minor version of the same story. The fair trial rule had been specifically devised and fostered to relieve the states of the full rigor of the fourth and fifth amendments, or more precisely to give the Supreme Court less power over state courts than full enforcement of the fourth and fifth would have given it.[65] The rule was thus modest both in the sense of reducing the scope of the Court's activities and the bite of the Bill of Rights as judicially enforced law. Reciprocally, of course, it left the states and thus the people with a maximum level of freedom from "autocratic" judicial intervention so that they might democratically meet their responsibilities in the realm of criminal procedures. Nevertheless the rule had not been a mere disguise for Supreme Court passivity. The Court in a multitude of difficult-to-correlate cases has refused to strike down convictions which simply violated the fourth and fifth amendments, but has struck down those in which the trial was found to be fundamentally unfair.[66] It can be argued that such a practice is in fact quite activist since it gives the Court very great discretion. But in fact the discretion given is the discretion *not* to enforce the Bill of Rights against the

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[62] Frankfurter insisted that the Court had consistently refused to exercise its equity jurisdiction in such cases. However, such a statement may mean one of three things: (1) the Court has no equity jurisdiction over such matters; (2) the particular cases have not presented any actual wrong needing remedy; (3) the Court has jurisdiction, a wrong capable of remedy does exist, but since equitable relief is discretionary, the Court does not choose, for some reason, to grant relief in the case. Depending on which interpretation one chooses, the Court either had or had not acknowledged its power to deal with the reapportionment problem.

[63] 369 U.S. 186 (1962).

[64] 367 U.S. 643 (1961).

[65] See Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. PA. L. REV. 608 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

[66] For an attempt to correlate some of these decisions see FELLMAN, THE DEFENDANT'S RIGHTS (1958); Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AM. POL. SCI. REV. 1 (1957).

states. Both *Elkins v. United States*[67] and *Mapp* concerned the delicate problems of federalism created by holding the federal law enforcement system to the rigors of the Bill of Rights while leaving the states more latitude. In both Frankfurter wrote extended opinions along the usual lines that the Court ought to intervene only minimally, leaving the basic problems to the states themselves. In both cases Frankfurter lost, and lost by a considerable margin, and the search and seizure provisions of the fourth amendment, with the teeth of the exclusionary rule, now seem directly applicable to state law enforcement officers and state courts.

Mapp then seems to abrogate the fair trial rule and leads to full enforcement of the Bill of Rights by the Court against the states in the area of search and seizure. The Court has not gone so far in the illegally obtained confession and right-to-counsel cases. Except for the long standing right to counsel in capital trials,[68] it has established no absolute rules. However, the counsel cases show a steady broadening of this right which may very well portend a practical if not formal demand by the Justices that all defendants be provided with legal aid.[69] Moreover, while the Court has never insisted on the exclusion of illegally obtained confessions, it has condemned forced confessions and in recent terms has been willing to go very far indeed in finding an excessive level of coercion.[70] Thus, while the permissive fair trial rule is still formally good law in these areas, the Court has in fact been moving toward more and more active and rigorous supervision of state criminal proceedings.

The freedom of speech and association decisions of recent years have been more complicated. *Roth v. United States*[71] in one sense follows the line of the modest, since it excludes still another category of speech—obscenity—from first amendment protection, and thus technically reduces judicial responsibility for enforcement of the Bill of Rights. However, the activists had become strong enough to demand that the Court supervise the standards by which material was to be judged obscene or nonobscene in order to insure

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67 364 U.S. 206 (1960).

68 Powell v. Alabama, 287 U.S. 45 (1932).

69 See, *e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962); McNeal v. Culver, 365 U.S. 109 (1961); Hudson v. North Carolina, 363 U.S. 697 (1960); Cash v. Culver, 358 U.S. 633 (1959); Crooker v. California, 357 U.S. 433 (1958); Moore v. Michigan, 355 U.S. 155 (1957). Since these lines were written Gideon v. Wainwright, 83 Sup. Ct. 792 (1963), overruling *Betts v. Brady*, and extending the right to counsel to a broad range of state criminal prosecutions, has appeared. Justice Harlan, for the modest, wrote a concurring opinion in which he agreed to the overturning of *Betts* because "to continue a rule which is honored by this Court only with lip service is not a healthy thing . . . ." *Id.* at 800-01.

70 See Gallegos v. Colorado, 370 U.S. 49 (1962); Rogers v. Richmond, 365 U.S. 534 (1961).

71 354 U.S. 476 (1957).

that nonobscene utterances were not wrongly labeled and thus wrongly deprived of their first amendment protection. As the latter-day disciple of modesty, Justice Harlan, pointed out at the time,[72] such a decision did not in fact cautiously withdraw the Court from a passion-laden constitutional area, but rather plunged the Justices actively into the most difficult part of the problem, deciding just what is and what is not obscene. Since *Butler v. Michigan*[73] and *Roth*, the first obscenity cases decided with opinions, the Justices have been involved in one raucous dispute after another.[74] Moreover, the result of these cases has been a marked broadening in the standards of permissible publication and a considerable change in the reading habits of the American public.[75] Thus, whatever its technical modesty, *Roth* joins *Brown* and *Baker* as cases in which the intervention of the Court has had an important, dramatic and liberalizing effect on the American scene.

The Communist cases present quite a different picture. After a brief flurry of activism,[76] the Court, either as a reaction to violent congressional attacks[77] or through changes in personnel,[78] has been extremely self-effacing. First amendment claims of alleged subversives have either been cavalierly dismissed[79] or avoided by heroic feats of statutory interpretation.[80] Loss or denial of employment to alleged subversives have been fairly consistently upheld by the Court against a variety of constitutional claims.[81] It is true that *Deutch v. United States*,[82] *Russell v. United States*[83] and even *Scales v. United States*[84] do contain a certain minimal level of judicial protection for the ideologically suspect, but they hardly

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[72] *Id.* at 497.

[73] 352 U.S. 380 (1957).

[74] See, *e.g.*, Smith v. California, 361 U.S. 147 (1959); Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684 (1959); Sunshine Books Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Oleson, 355 U.S. 371 (1958).

[75] Henry Miller's two *Tropics*, D. H. Lawrence's *Lady Chatterley's Lover*, Mark Twain's *1601*, and Lawrence Durrell's *The Black Book* have been or soon will be widely available in the United States, and *Tropic of Cancer* and *Lady Chatterley's Lover* have become best sellers.

[76] See, *e.g.*, Yates v. United States, 354 U.S. 298 (1957); Watkins v. United States, 354 U.S. 178 (1957); Slochower v. Board of Educ., 350 U.S. 551 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[77] See MURPHY, CONGRESS AND THE COURT (1962).

[78] During his first two terms, Justice Stewart consistently provided a fifth vote against Bill of Rights claims by alleged subversives.

[79] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

[80] Scales v. United States, 367 U.S. 203 (1961).

[81] Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Educ., 357 U.S. 399 (1958).

[82] 367 U.S. 456 (1961).

[83] 369 U.S. 749 (1962).

[84] 367 U.S. 203 (1961).

represent the kind of direct invocation of the Constitution against government action found in *Brown* and *Mapp*.

In other areas relating to national security, the results have also been mixed. The Court, over Frankfurter's objections, has extended its protection to overseas employees and dependents of the armed forces.[85] It has made a short and admittedly relatively modest step in the direction of a right to travel.[86] It has granted the Congress broad powers over denaturalization,[87] but also served notice that it will exercise some supervision over those powers.[88] In the whole Cold War-communism area, the Court refuses to completely abdicate but does seem to have turned to a new type of modesty.[89]

Finally a brief mention of the religion cases. The New York prayer reading case[90] of last term came out much more boldly in the press than it did in the opinions. The immodesty, if any, seems to have come largely from a judicial miscalculation of public reception and interpretation rather than an intent to decisively enter this field. Nevertheless, the decision indicates the Court's, or at least four of its members', willingness to go so far as to consider the problem rather than dodge it. The Sunday Closing Laws cases,[91] also among the last Frankfurter victories, are in many ways a classic exercise in judicial modesty—deference to the legislature's finding that public policy must be pursued even at the cost of infringing the rights of minority groups. But as in *Roth*, the subsequent events show that it is often difficult for the Court to do nothing. In many states Sunday law enforcement had been halfhearted or nonexistent for many years at least partly because of constitutional doubts. The Supreme Court decision led to a wave of renewed and rigorous enforcement. The enforcement led in turn to a wave of outcries from merchants and customers and these to a spate of statutory revisions. In short, the decision of the Supreme Court, while modestly trying to approve the status quo, nevertheless acted as a significant catalyst.

Thus the Court has not put on a totally bold front. But this catalytic quality of Supreme Court decisions makes much of the

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85 McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

86 Kent v. Dulles, 357 U.S. 116 (1958).

87 Perez v. Brownell, 356 U.S. 44 (1958).

88 Kennedy v. Mendoza-Martinez, 83 Sup. Ct. 554 (1963); Trop v. Dulles, 356 U.S. 86 (1958).

89 See text accompanying notes 98-102 *infra*.

90 Engel v. Vitale, 370 U.S. 421 (1962).

91 McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961).

modest talk about the Supreme Court seem quite old-fashioned. We are not now living in the New Deal. We do not have a pre-1937 Court which acts only as a minor irritant opposing social change initiated elsewhere until it can be circumvented by redrafting or restaffing. Nor do we have a post-1937 Court which serves only as a minor addendum to government action by putting the constitutional stamp of approval on what others do. For all the talk about judicial self-restraint and what Justices shouldn't do, we are living in an age in which the Justices emphatically are doing. *Brown* not only set in motion forces which will eventually change the whole pattern of education in the South and created tremendous social conflict, but triggered a whole host of race relations campaigns, statutes, demonstrations, agreements and commissions which are now and will be for some time a very prominent feature of American political and social life. *Roth* has changed or permitted a change in the publishing and reading mores of the nation. *Mapp* may markedly alter the administration of criminal law in the states which had not developed their own exclusionary rule. *Baker v. Carr* has set off reapportionment struggles in at least a dozen states and its eventual consequences are bound to considerably alter this country's political map. There is no use telling judges that they can't do it. They have already done it. And for all the battles fought and enemies made, they have been successful. These cases prove two things. First, much of the discussion of judicial modesty has become academic and second, the Court itself has rejected much of the academic discussion.

In the light of the cases it seems somewhat surprising that we still hear as much as we do about modesty. One minor reason I suspect is that it takes a while for biographers to catch up with heroes. Three laudatory studies of Justice Frankfurter have recently appeared which tend to intellectually preserve, or rather embalm, an already fading judicial philosophy.[92] But the major reason is surely the public and academic preoccupation with communism and the communism cases. For in this area the Court has continued the retreat begun in *American Communications Ass'n v. Douds*[93] and *Dennis*[94] and consistently refused to openly challenge Congress. However, without imputing a conscious intention to the Court which would be impossible to prove, it may well be that future historians may see the judicial pattern of the fifties and

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92 It is to be hoped, of course, that the Justice himself will not fade, and will continue to express his views with all the insight and eloquence of last term. For an earlier and more incisive study see Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357 (1949).

93 339 U.S. 382 (1950).

94 341 U.S. 494 (1951).

sixties as one in which the Court traded its opportunity to protect the rights of alleged subversives for the power to protect the rights of Negroes, urban voters, criminal defendants and avant garde litterateurs. And if such a trade has been made, the Court comes out with a considerable margin of profit, or immodesty if you prefer. For the Court's actions, particularly those in favor of Negroes and urban voters, have and will change the political and social structure of the nation far more than would have even the most active defense of freedom of speech and association for subversives.[95]

Orthodox judicial modesty, the complete self-abnegation of Hand, the slightly more mild but nevertheless pervasive deference to the "political branches" of Frankfurter, is largely disappearing. Its doctrinal bases have been undermined by the new jurisprudence and the neutral principles school. Its political influence has waned as the Court tackles head-on some of the toughest and most important problems of American society. Its victories in the subversive area seem in retrospect little more than means to the end of greater activism elsewhere. The defeats of its champions on the bench are marked by the dissents in *Baker*, *Elkins*, *Mapp* and *Burton v. Wilmington Parking Authority*.[96]

IV. The New Modesty

However, a new brand of modesty has arisen among students of the Court which shares some of the premises and vocabulary of the old. It differs from the old in accepting review as a legitimate judicial power which democratic morality does not necessarily condemn. Nor does it paint the Court as an essentially powerless body surrounded by giants. The new modesty admits that the Court may legitimately have policy goals which it is capable of achieving. Nevertheless, the Court is cautioned to avoid head-on collisions with Congress, the President and the states, and with issues which are "too hot to handle." The new modesty continues to emphasize that the Court's only real power is its own prestige —the judicial myth of the black robed impartial arbiter. But the conclusion is not that the Court must abandon constitutional, *i.e.*, policy, decisions altogether, but only that it must be sufficiently

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95 In this connection it should be remembered that when the Court was conjoining "pro-Communist," "pro-Negro" and "pro-criminal" decisions, there were bitter and nearly successful attacks on the Court which became considerably less vehement when the Court went back to an anti-Communist stand in *Barenblatt* and subsequent decisions.

96 365 U.S. 715 (1961).

circumspect in its exercise of judicial review to avoid serious depletions of its resources.[97]

The new modesty takes several forms. One of the most prominent, and the one to which the Court itself has been most amenable, is the plea for procedural solutions.[98] It is not surprising that this approach arose largely in connection with the subversion cases—one of the few areas in which modesty was and has continued to be the ruling principle of the Court. These cases present a significant dilemma for followers of the older modesty or at least those of liberal temperament. As Professor Black emphasizes, legitimation is a principal function of the Supreme Court.[99] Statutes and other legislative actions which the Court reviews and approves are given the stamp of constitutional legitimacy, a stamp which is often equated with "goodness" by large segments of public opinion. Thus even when the Court is willing to say so in its opinions, it finds it operationally impossible to convey the modest message, "we don't like this statute, we think it infringes on the Constitution, but we modestly defer to the judgment of the legislature and the people." Following the old line of judicial modesty the Justices have been forced to put their imprimatur on many distasteful and hysterical regulations and punishments of political activities which the Court itself has admitted infringe on constitutional liberties.[100]

However, beginning with *Watkins v. United States*[101] the Court rendered a series of decisions, particularly in the investigation cases, which manage to get the alleged subversives off on the grounds of some procedural irregularity at the hearing, indictment or trial stage of the matter.[102] These decisions are still modest in the sense of upholding—or not reaching—the constitutionality of the legislative action and thus still entail the dilemma of judicial legitimation. Nevertheless, letting the actual beleaguered defendants off on procedural grounds seems to give the Court and some of its observers a certain satisfaction. Why?

First of all, there seems to be a healthy dash of judicial realism. If it is what the courts do, not what they say, which is the real law,

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97 For an outstanding example of this approach, see McCLOSKEY, THE AMERICAN SUPREME COURT (1960).

98 See the series of articles by McCloskey in 42 VA. L. REV. 735 (1956); 43 VA. L. REV. 803 (1957); 44 VA. L. REV. 1029 (1958).

99 BLACK, THE PEOPLE AND THE COURT 56-86 (1960).

100 The Court generally employs the balancing doctrine in such cases. It weighs the invasion of the individual's rights against the public interest pursued by Congress, and adds a very large load of deference to the legislative judgment. The balance invariably swings against the individual.

101 354 U.S. 178 (1957).

102 See, *e.g.*, Russell v. United States, 369 U.S. 749 (1962); Deutch v. United States, 367 U.S. 456 (1961). See also McCLOSKEY, *supra* note 97.

decisions favorable to the defendants go a long way toward withdrawing the legitimation given by the formal findings of constitutionality. Second, by demanding rigorous standards of proof as in *Yates v. United States*[103] and *Scales*,[104] or niceties of notice and hearing as in *Watkins* and *Slochower v. Board of Higher Educ.*,[105] the Court may in fact amend or emasculate a statute without the direct challenge to the legislation inherent in findings that the basic exercise of state power was unconstitutional. Third, the Court can claim some special expertise on questions of procedure. Niceties of hearing, evidence and trial are peculiarly within the competence and responsibility of the Court.

This emphasis on special judicial competence is a hallmark of the new modesty. It is, in a sense, borrowed from the old which insisted that the Court must respect the special competence or expertise of administrative agencies, and, therefore, exercise only very limited review. The new presents the reciprocal; where the Court has special competence of its own, it is justified in acting.

Another version of the new modesty may be the insistence on standards discussed earlier. As Professors Mueller and Schwartz have pointed out,[106] the notion that the Court may act only when clear and neutral standards are available is potentially quite modest. For there are few if any areas of constitutional litigation in which precise and undisputed first principles are readily apparent. There is already evidence that "right" and "left" schools of standardists are likely to appear, one developing the essentially activist, anti-Hand side of Wechsler's argument, the other the potentially passivist approach that the Court may only act when neutral principles are clearly violated.[107] There can be little doubt, for instance, that the debate over *Baker v. Carr* will center far less on the Court's direct challenge to the Tennessee legislature than on the availability or nonavailability of standards for distinguishing a constitutionally equal from a constitutionally unequal districting.[108]

Still another facet of the new modesty has been widely and

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103 354 U.S. 298 (1957).

104 367 U.S. 203 (1961).

105 350 U.S. 551 (1956).

106 Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960).

107 *Compare* Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959), *with* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). Of course, the activists are likely to find that neutral principles are available in each instance and the passivists to claim in area after area that no principle exists.

108 The opinions of Justices Clark and Harlan are largely devoted to this question, and much of the ambiguity of the opinion of the Court arises from Justice Brennan's difficulties on this point.

ably presented by Professor Bickel.[109] He takes from the old modesty an acute sensitivity to the dangers run by a Court which directly challenges Congress. But he does not reach the old conclusion that the Court should, therefore, show total deference toward Congress. Instead, stressing that the Court is a political agency, and thus allying himself with the new jurisprudence, he argues that political prudence must be the guiding rule of the Court. He is, therefore, more modest than the activist side of Professor Wechsler since he believes that the Court need not act in every instance where principle is violated. Conversely he is more activist than the modest side of Professor Wechsler since he would allow the Court to act in certain instances where principle could not come into play.

Indeed Bickel is largely concerned with the dilemma presented by Professor Black's notion of legitimation. If the Court must declare every statute either constitutional or unconstitutional, it often must either legitimatize statutes distasteful to it and destructive of constitutional principle or fly directly in the face of the legislature. Professor Bickel finds that the Court has a third alternative; it may decline to exercise jurisdiction and thus totally avoid constitutional commitment. It may do so either by refusing certiorari or through a host of devices concerning standing, ripeness and statutory interpretation.[110] Through such decisions the Court may present reasons for disapproving a given statute or administrative action even when it would be politically dangerous to actually disapprove. Furthermore it can exercise a kind of suspensive veto giving legislators and administrators a chance to mend their constitutional ways before final constitutional judgment is passed.

Again there is a kind of left and right "Bickelism." On the one hand is the insistence that the Court is a political actor entitled to make some contribution to American policymaking and to be more than a constitutional rubber stamp for Congress. On the other, is the suggestion, borrowed from the old modesty, that the Court is after all undemocratic, and the subsequent vision of the Court as simply an agency which gives the democratic branches a chance to

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109 Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961). See also Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). Professor Wellington in several of his own independent articles on labor law has indicated both his approval of judicial review and his reluctance to extend constitutional protection very far because of doubts about the Court's institutional capabilities and political strength. See especially Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961). Since this article was first written an elaboration of Professor Bickel's views has appeared. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS (1962).

110 Bickel, *supra* note 109, provides a complete catalogue.

have second thoughts or forces them to make considered and definite policy judgments.[111]

The new modesty is currently in the developmental stage. It has not hardened or been fully articulated as was the old by Hand and Frankfurter. Nor is it possible to predict with the recent important changes in personnel whether the Supreme Court will act as leader, follower or opponent of the new movement. Legal philosophies, particularly those touching the Court, have a certain chicken-and-egg quality. It is usually difficult to tell whether they are guidance which the Court accepts or rationalizations of what the Court does. In either event an interpretation of the Court's work which is largely at variance with the Court's actions is not likely to survive.

Therefore it is impossible at the moment to offer any final assessment or even finished description of the new modesty. Some critical comments are, however, in order. It may be, in the long run, that the new modesty is not new at all but merely a period of wavering and indecision in the redevelopment of the old. For instance the neutralists want the Court to act only when it can present clear-cut, neutral principles. T. R. Powell long ago indicated that in constitutional litigation what the Court usually does is not propound and apply a clear-cut principle but puts out its hand against something that is "too damned raw."[112] *Baker v. Carr* is a recent example of this phenomenon. None of the Justices was willing to espouse the only neutral principle available, one man—one vote, for the very good reason that it is not a clearly accepted principle of American politics. Most were willing to say that one man—eleven votes was intolerable. Surely most of us can agree that eleven to one is "too damned raw," but we would be rather hard pressed to erect this judgment into a principle.[113]

If the neutralists are simply pleading for more sensitivity and skill in constructing the "rhetoric" which Powell found essential to constitutional judgments of legislative cooking, then they have gone beyond simplistic modesty. If they mean that the Court may not act within the limits of political prudence to correct wrongs which any fool can plainly see unless it can erect a neutral principle good for the ages, then the neutralists run the danger of principling the Court

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111 Bickel, *supra* note 109, at 47; Bickel & Wellington, *supra* note 109, at 38-39.

112 Powell put the matter more elegantly and at greater length in his *Logic and Rhetoric of Constitutional Law*, in ESSAYS IN CONSTITUTIONAL LAW 85 (McCloskey ed. 1957).

113 The Court has subsequently made clear in Gray v. Sanders, 83 Sup. Ct. 801 (1963), that it has not yet settled on standards for apportionment of geographic constituencies. It has, however, chosen the one voter, one vote rule for elections to state wide offices.

into impotence. If we are entitled to expect more from a court than the proverbial train ticket decision good for this day and this train only, we must surely expect less than new additions to the Ten Commandments on each page of *United States Reports*.

The procedural as well as the principled solution runs certain risks of overmodesty. Surely the normal response to Supreme Court reversals on procedural errors is for Congress, the Attorney General and the lower courts to plug the procedural holes and go back to enforcing the same or similar constitutionally dubious statutes and practices. *Watkins* and *Barenblatt v. United States*,[114] *Jencks v. United States*[115] and *Palermo v. United States*[116] and *Slochower* and *Nelson v. County of Los Angeles*[117] tell the story.[118] It is logically true that the Court may not have committed itself on the constitutional issue when it finds procedural error so that it is still technically free to make a finding of unconstitutionality on a subsequent occasion. More practically, however, the second case comes up with legislator and/or administrator in the position of being able to say, "We have now followed the instructions you gave us, so everything must be all right." Such an appeal can be very persuasive.

Furthermore, long inaction on constitutional issues while pouncing on procedural ones is likely to leave the impression that the Court has silently acquiesced in the constitutionality of the measures and is grasping at straws to get a few wretches off. Or even more serious, the impression that there is no constitutional—in America read moral—problem about the statutes, just technical legal problems which we can all leave to the lawyers. A long continued pursuit of procedural solutions is likely to undercut the greatest power of the Court, the power of showing itself as the champion of constitutional rights against legislative wrong. Thus a Court which thinks it is husbanding its review power for tomorrow by reaching procedural decisions today may wake up to find that it has forfeited power in just those areas where it thought that it had been storing it up.

Similar comments may be made concerning Professor Bickel's no-jurisdiction approach. Passing a malodorous measure back to Congress may simply result in a congressional reaffirmation of the smell. The Court is then faced with two congressional decisions

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114 360 U.S. 109 (1959).
115 353 U.S. 657 (1957).
116 360 U.S. 343 (1959).
117 362 U.S. 1 (1960).
118 *Yates*, which imposes strict standards of proof rather than fastening on the forms of procedure, has been relatively more successful in undermining enforcement of a statute without holding it unconstitutional. See 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 390 (2d ed. 1958).

rather than one and cannot even use the old judicial ploy of pretending that Congress could not possibly have meant what it said. *Watkins* and *Barenblatt* can be seen as one of these judicial invitations to Congress to act more responsibly which ended in reaffirmation and continuation by all parties of the very practices which the Court had found distasteful.[119] Such a return to Congress is surely better than outright Court affirmation, but it does not provide a complete solution of the Court's constitutional problems and may in some instances aggravate them. More important, if this suspensive veto approach is counselled as a general solution to the Court's constitutional problems, we are back to the old modest vision of democratic Congress—autocratic Court which serves as a fine base for complete judicial passivity.

However, the excessively passivist tendencies of the new modesty are likely to be held in check by the Supreme Court itself. Just as the old and almost absolutely modest commentary seems to have been replaced by a new modesty which, for the moment at least, counsels action in some instances and passivity in others, the old modesty of the Court has been replaced by selective activism. The Court has first of all probably committed itself to future action in several fields it has already opened. It will surely have future segregation cases, particularly those concerning state action and private property.[120] *Baker v. Carr* has already spawned so much lower court litigation that some of it is bound to reach the highest Court. Having applied both the fourth amendment and the exclusionary rule to the states in *Mapp*, the Court is likely to find itself fielding more and more choices on what constitutes "unreasonableness" under the prohibition of "unreasonable search and seizure." Nor is the Court necessarily yet out of the obscenity business created by *Roth*. All these areas promise to keep up the tempo of Supreme Court intervention in American life.

Several new vistas are also open. The present tendency of cases suggests that the fair trial rule may be on its way out in the right to counsel and self-incrimination fields. If this is true, the Court may become even more active and less modest in the criminal proceedings area than it has previously been.[121] Another area, that of racial discrimination by unions, is more speculative, but worth speculation. The NAACP recently announced that it will begin a lobbying-by-test-case campaign, similar to its successful attack on school segregation. The Court has gone part of the way to admitting that the

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119 See Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315, 329 (1960).

120 See Garner v. Louisiana, 368 U.S. 157, 176 (1961), where Justice Douglas offers in advance his opinion on private property and trespass in sit-in cases.

121 See cases cited notes 69-70 *supra*.

Bill of Rights is applicable against unions.[122] The Justices might, during the almost inevitable broadening of the state action concept, include certain facets of union action, particularly where closed or union shops exist. The Court also has in the fair representation provisions of the Taft-Hartley Act[123] a vehicle for treating union segregation without raising tricky constitutional issues.[124] It might find that union refusal to admit Negroes to membership constituted evidence, sufficient evidence or even established an irrebuttable presumption that the union was not acting fairly in behalf of Negro nonmembers whom it is required to represent at the bargaining table.[125]

There are other areas such as establishment of religion, congressional investigations, double jeopardy and the rights of alleged subversives in general where the Court shows no particular sign of bold adventure. But in none of these fields does the Court's record of recent years suggest anything like utter passivity in the future.[126]

V. Conclusion

In terms of commentary on the Court, judicial modesty old style seems to have had its day, both because the Court itself has rejected it and because new academic rivals have undercut its foundations. A new modesty is arising and tentatively taking shape in the form of advice to the Court concerning when, how and why to act rather than constant urgings not to act at all. It may be that if the when, how and why are too narrowly circumscribed, the new may end like the old, counseling no action at all. But such a development seems unlikely in the immediate future since the new modest do seem to accept as a major premise the proposition that at times the Court ought to act and act purposefully. Finally, the Court itself has, in the last few terms, embarked on several lines of constitutional business which promise to keep it active for the next few terms and there is no indication, so far at least, that it will not begin to open other new avenues as well. In any event there seems to be little excuse for continuing the old debate over whether the Court should or should not exercise judicial review when the Court has conclusively shown that it intends to remain constitutionally active and has made a considerable success of doing so.

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122 International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

123 Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1958).

124 Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

125 See Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

126 See Engel v. Vitale, 370 U.S. 421 (1962); Russell v. United States, 369 U.S. 749 (1962); Deutch v. United States, 367 U.S. 456 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 105-10 (1961); Trop v. Dulles, 356 U.S. 86 (1958); Green v. United States, 355 U.S. 184 (1957).