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TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW †

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Professor Wechsler, disagreeing with Judge Learned Hand as to the justification for judicial review of legislative action, argues that courts have the power, and duty, to decide all constitutional cases in which the jurisdictional and procedural requirements are met. The author concludes that in these cases decisions must rest on reasoning and analysis which transcend the immediate result, and discusses instances in which he believes the Supreme Court has not been faithful to this principle.

ON three occasions in the last few years Harvard has been hospitable to the discussion of that most abiding problem of our public law: the role of courts in general and the Supreme Court in particular in our constitutional tradition; their special function in the maintenance, interpretation and development of the organic charter that provides the framework of our government, the charter that declares itself the "supreme law."

I have in mind, of course, Mr. Justice Jackson's undelivered Godkin lectures,[1] the papers and comments at the Marshall conference,[2] and Judge Learned Hand's addresses from this very rostrum but a year ago.[3] It does not depreciate these major contributions if I add that they comprise only a fragment of the

† This paper was delivered on April 7, 1959, as the Oliver Wendell Holmes Lecture at the Harvard Law School. It is reproduced without substantial change, except for the addition of the footnotes. The reader is asked to bear in mind that it was written for the ear and not the eye.

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[1] JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).

[2] GOVERNMENT UNDER LAW (Sutherland ed. 1956).

[3] HAND, THE BILL OF RIGHTS (1958).

serious, continuous attention that the subject is receiving here as well as elsewhere in the nation, not to speak of that less serious attention that is not without importance to a university community, however uninstructive it may be.

I should regard another venture on a theme so fully ventilated as a poor expression of appreciation for the hospitality accorded me, were I not persuaded that there is a point to make and an exercise to be performed that will not constitute mere reiteration; and that the point and exercise have special relevancy to the most important of our current controversies. Before I put my point and undertake the exercise it is appropriate, however, that I make clear where I stand upon the larger, underlying questions that have been considered on the previous occasions I have noted, particularly by Judge Hand last year. They have a bearing, as will be apparent, on the thesis that I mean to put before you later on.

I. The Basis of Judicial Review

Let me begin by stating that I have not the slightest doubt respecting the legitimacy of judicial review, whether the action called in question in a case which otherwise is proper for adjudication is legislative or executive, federal or state. I must address myself to this because the question was so seriously mooted by Judge Hand; and though he answered it in favor of the courts' assumption of the power of review, his answer has overtones quite different from those of the answer I would give.

Judge Hand's position was that "when the Constitution emerged from the Convention in September, 1787, the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court, and *a fortiori* of the lower courts, were to be authoritative upon the Executive and the Legislature"; that "on the other hand it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another 'Department,' even of the courts"; that "for centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at

hand"; that it was therefore "altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers"; and, finally and explicitly, that for the reason stated "it was not a lawless act to import into the Constitution such a grant of power." [4]

Though I have learned from past experience that disagreement with Judge Hand is usually nothing but the sheerest folly, I must make clear why I believe the power of the courts is grounded in the language of the Constitution and is not a mere interpolation. To do this you must let me quote the supremacy clause,[5] which is mercifully short:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Judge Hand concedes that under this clause "state courts would at times have to decide whether state laws and constitutions, or even a federal statute, were in conflict with the federal constitution" but he adds that "the fact that this jurisdiction was confined to such occasions, and that it was thought necessary specifically to provide such a limited jurisdiction, looks rather against than in favor of a general jurisdiction." [6]

Are you satisfied, however, to view the supremacy clause in this way, as a grant of jurisdiction to state courts, implying a denial of the power and the duty to all others? This certainly is not its necessary meaning; it may be construed as a mandate to all of officialdom including courts, with a special and emphatic admonition that it binds the judges of the previously independent states. That the latter is the proper reading seems to me persuasive when the other relevant provisions of the Constitution are brought into view.

Article III, section 1 declares that the federal judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

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[4] *Id.* at 27, 29, 14, 15, 29.

[5] U.S. CONST. art. VI, § 2.

[6] HAND, *op. cit. supra* note 3, at 28.

This represented, as you know, one of the major compromises of the Constitutional Convention and relegated the establishment *vel non* of lower federal courts to the discretion of the Congress.[7] None might have been established, with the consequence that, as in other federalisms, judicial work of first instance would all have been remitted to state courts.[8] Article III, section 2 goes on, however, to delineate the scope of the federal judicial power, providing that it "shall extend [*inter alia*] to all Cases, in Law and Equity, arising under this Constitution . . ." and, further, that the Supreme Court "shall have appellate jurisdiction" in such cases "with such Exceptions, and under such Regulations as the Congress shall make." Surely this means, as section 25 of the Judiciary Act of 1789[9] took it to mean, that if a state court passes on a constitutional issue, as the supremacy clause provides that it should, its judgment is reviewable, subject to congressional exceptions, by the Supreme Court, in which event that Court must have no less authority and duty to accord priority to constitutional provisions than the court that it reviews.[10] And such state cases might have encompassed every case in which a constitutional issue could possibly arise, since, as I have said, Congress need not and might not have exerted its authority to establish "inferior" federal courts.

If you abide with me thus far, I doubt that you will hesitate upon the final step. Is it a possible construction of the Constitution, measured strictly as Judge Hand admonishes by the test of "general purpose," [11] that if Congress opts, as it has opted, to create a set of lower courts, those courts in cases falling within their respective jurisdictions and the Supreme Court when it passes on their judgments are less or differently constrained by the supremacy clause than are the state courts, and the Supreme

[7] See 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 104–05, 119, 124–25 (1911), summarized in HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17 (1953).

[8] See, *e.g.*, the position in Australia, described in Bailey, *The Federal Jurisdiction of State Courts*, 2 RES JUDICATAE 109 (1940); WHEARE, FEDERAL GOVERNMENT 68–72 (2d ed. 1951). The slow statutory development of federal-question jurisdiction in our lower federal courts is traced in HART & WECHSLER, *op. cit. supra* note 7, at 727–33, 1019–21, 1107–08, 1140–50.

[9] Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85.

[10] This too I think Judge Hand does not deny, though this concession appears only in the course of his description of the Jeffersonian position. See HAND, *op. cit. supra* note 3, at 5.

[11] *Id.* at 19.

Court when it reviews their judgments? Yet I cannot escape, what is for me the most astonishing conclusion, that this is the precise result of Judge Hand's reading of the text, as distinct from the interpolation he approves on other grounds.

It is true that Hamilton in the seventy-eighth *Federalist* does not mention the supremacy clause in his argument but rather urges the conclusion as implicit in the concept of a written constitution as a fundamental law and the accepted function of the courts as law interpreters. Marshall in *Marbury v. Madison* echoes these general considerations, though he also calls attention to the text, including the judiciary article, pointing only at the end to the language about supremacy, concerning which he says that it "confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument." [12] Much might be said on this as to the style of reasoning that was deemed most persuasive when these documents were written but this would be irrelevant to my concern about the meaning that Judge Hand insists he cannot find within the words or structure of the Constitution, even with the aid of the historical material that surely points in the direction I suggest.[13]

You will not wonder now why I should be concerned about the way Judge Hand has read the text, despite his view that the judicial power was a valid importation to preserve the governmental plan. Here as elsewhere a position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position. To demonstrate I quote Judge Hand:

> [S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer. It may be better to leave the issue to be worked out without authoritative solution; or perhaps the only solution available is one that the court has no adequate means to enforce.[14]

[12] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). (Emphasis in original.)

[13] See HART & WECHSLER, *op. cit. supra* note 7, at 14–16; Hart, Book Review, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954).

[14] HAND, *op. cit. supra* note 3, at 15.

If this means that a court, in a case properly before it, is free — or should be free on any fresh view of its duty — either to adjudicate a constitutional objection to an otherwise determinative action of the legislature or executive, national or state, or to decline to do so, depending on "how importunately" it considers the occasion to demand an answer, could anything have more enormous import for the theory and the practice of review? What showing would be needed to elicit a decision? Would anything suffice short of a demonstration that judicial intervention is essential to prevent the government from foundering — the reason, you recall, for the interpolation of the power to decide? For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.

The duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law, with all that that implies as to a rigorous insistence on the satisfaction of procedural and jurisdictional requirements; the concept that Professor Freund reminds us was so fundamental in the thought and work of Mr. Justice Brandeis.[15] Only when the standing law, decisional or statutory, provides a remedy to vindicate the interest that demands protection against an infringement of the kind that is alleged, a law of remedies that ordinarily at least is framed in reference to rights and wrongs in general, do courts have any business asking what the Constitution may require or forbid, and only then when it is necessary for decision of the case that is at hand. How was it Marshall put the questions to be faced in *Marbury*?

> 1st. Has the applicant a right to the commission he demands?
>
> 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
>
> 3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court? [16]

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[15] See FREUND, ON UNDERSTANDING THE SUPREME COURT 64–65 (1949); Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 787–88 (1957). See also BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 1–20 (1957).

[16] 5 U.S. (1 Cranch) at 154.

It was because he thought, as his opponents also thought,[17] that the Constitution had a bearing on the answers to these questions, that he claimed the right and duty to examine its commands.

As a legal system grows, the remedies that it affords substantially proliferate, a development to which the courts contribute but in which the legislature has an even larger hand.[18] There has been major growth of this kind in our system [19] and I dare say there will be more, increasing correspondingly the number and variety of the occasions when a constitutional adjudication may be sought and must be made. Am I not right, however, in believing that the underlying theory of the courts' participation has not changed and that, indeed, the very multiplicity of remedies and grievances makes it increasingly important that the theory and its implications be maintained?

It is true, and I do not mean to ignore it, that the courts themselves regard some questions as "political," meaning thereby that they are not to be resolved judicially, although they involve constitutional interpretation and arise in the course of litigation. Judge Hand alluded to this doctrine which, insofar as its scope is undefined, he labeled a "stench in the nostrils of strict constructionists." [20] And Mr. Justice Frankfurter, in his great paper at the Marshall conference, avowed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'." [21]

The line is thin, indeed, but I suggest that it is thinner than it needs to be or ought to be; that all the doctrine can defensibly imply is that the courts are called upon to judge whether the

[17] It will be remembered that the Jeffersonian objections to the issuance of a mandamus to the Secretary rested on constitutional submissions with respect to the separation of judicial and executive authority. See 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 232 (1937); Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838); Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287 (1948).

[18] See, *e.g.*, *Developments in the Law — Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957).

[19] Decisions that entail such growth do not always confront the underlying problem. See, *e.g.*, Harmon v. Brucker, 355 U.S. 579 (1958). Compare the opinion of Judge Prettyman below, 243 F.2d 613 (D.C. Cir. 1957).

[20] HAND, *op. cit. supra* note 3, at 15.

[21] Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227–28 (1955), in GOVERNMENT UNDER LAW 6, 19 (Sutherland ed. 1956).

Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation. Who, for example, would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the "sole Power to try" is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension, as Senator Kennedy reminds us in his moving story of the Senator whose vote saved Andrew Johnson,[22] is simply immaterial in this connection.

What is explicit in the trial of an impeachment or, to take another case, the seating or expulsion of a Senator or Representative [23] may well be found to be implicit in others. So it was held,[24] and rightly it appears to me, respecting the provision that the "United States shall guarantee to every State in this Union a Republican Form of Government . . . ." This guarantee appears, you will recall, in the same clause as does the duty to protect the states against invasion; [25] it envisages the possible employment of the military force and bears an obvious relationship to the autonomous authority of the Houses of Congress in seating their respective members.[26]

It also may be reasonable to conclude, or so it seems to me, though there are arguments the other way,[27] that the power of Congress to "make or alter" state regulations of the "Manner of

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[22] See KENNEDY, PROFILES IN COURAGE 126 (1956).

[23] U.S. CONST. art. I, § 5 provides, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . . Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

For a constitutional challenge to the sufficiency of primary irregularities as ground for the refusal to seat a United States Senator, see BECK, MAY IT PLEASE THE COURT 265 (1930).

[24] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

[25] U.S. CONST. art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

[26] *Cf.* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849): "And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority."

[27] See, *e.g.*, Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958).

holding Elections for Senators and Representatives," [28] implying as it does a power to draw district lines or to prescribe the standards to be followed in defining them, excludes the courts from passing on a constitutional objection to state gerrymanders,[29] even if the Constitution can be thought to speak to this kind of inequality and the law of remedies gives disadvantaged voters legal standing to complain, which are both separate questions to be faced.[30]

If I may put my point again, I submit that in cases of the kind that I have mentioned, as in others that I do not pause to state,[31] the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.

The Supreme Court does have a discretion, to be sure, to grant or to deny review of judgments of the lower courts in situations in which the jurisdictional statute permits certiorari but does not provide for an appeal.[32] I need not say that this is an entirely different matter. The system rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court's appellate jurisdiction; it is addressed not to the measure of judicial duty in adjudication of a case but rather to the right to a determination by the highest as distinguished from the lower courts. Even here, however, it is well worth noting that the Court by rule has defined standards for the exercise of its discretion,[33] standards framed in neutral terms, like the importance of the

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[28] U.S. CONST. art. I, § 4.

[29] See Colegrove v. Green, 328 U.S. 549, 554 (1946) (Frankfurter, J.); Professor Freund's comment in SUPREME COURT AND SUPREME LAW 46–47 (Cahn ed. 1954).

[30] For an effort to face these questions, see Lewis, *supra* note 27, at 1071–98.

[31] See HART & WECHSLER, *op. cit. supra* note 7, at 192–97, 207–09; POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936).

[32] 28 U.S.C. §§ 1254–57 (1952). The major steps in the statutory substitution of discretionary for obligatory Supreme Court review are traced in HART & WECHSLER, *op. cit. supra* note 7, at 400–03, 1313–21. The classic detailed account appears in FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT (1927).

[33] U.S. SUP. CT. R. 19.

question or a conflict of decisions. Only the maintenance and the improvement of such standards [34] and, of course, their faithful application [35] can, I say with deference, protect the Court against the danger of the imputation of a bias favoring claims of one kind or another in the granting or denial of review.

Indeed, I will go further and assert that, necessary as it is that the Court's docket be confined to manageable size, much would be gained if the governing statutes could be revised to play a larger part in the delineation of the causes that make rightful call upon the time and energy of the Supreme Court.[36] Think of the protection it gave Marshall's court that there was no discretionary jurisdiction, with the consequence that he could say in *Cohens v. Virginia*: [37]

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

II. The Standards of Review

If courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution, when a case is properly before them in the sense I have attempted to describe, you will not doubt the relevancy and importance of demanding what, if any, are the standards to be fol-

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[34] It is regrettable, in my view, that when the Court revised its rules in 1954 it determined not to attempt an improved articulation of the statement of "considerations governing review on certiorari." *But see* Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 60–63 (1954).

[35] See, *e.g.*, Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 Harv. L. Rev. 1441 (1956).

[36] The present distribution of obligatory and discretionary jurisdiction derives largely, though not entirely, from the Judiciary Act of 1925, ch. 229, 43 Stat. 936, the architects of which were a committee of the Court. See Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 Yale L.J. 1 (1925); Frankfurter & Landis, *op. cit. supra* note 32, at 255–94. For major changes since 1925, see Hart & Wechsler, *op. cit. supra* note 7, at 1317.

[37] 19 U.S. (6 Wheat.) 264, 404 (1821).

lowed in interpretation. Are there, indeed, any criteria that both the Supreme Court and those who undertake to praise or to condemn its judgments are morally and intellectually obligated to support?

Whatever you may think to be the answer, surely you agree with me that I am right to state the question as the same one for the Court and for its critics. An attack upon a judgment involves an assertion that a court should have decided otherwise than as it did. Is it not clear that the validity of an assertion of this kind depends upon assigning reasons that should have prevailed with the tribunal; and that any other reasons are irrelevant? That is, of course, not only true of a critique of a decision of the courts; it applies whenever a determination is in question, a determination that it is essential to make either way. Is it the irritation of advancing years that leads me to lament that our culture is not rich with critics who respect these limitations of the enterprise in which they are engaged?

You may remind me that, as someone in the ancient world observed — perhaps it was Josephus — history has little tolerance for any of those reasonable judgments that have turned out to be wrong. But history, in this sense, is inscrutable, concealing all its verdicts in the bosom of the future; it is never a contemporary critic.

I revert then to the problem of criteria as it arises for both courts and critics — by which I mean criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will. Even to put the problem is, of course, to raise an issue no less old than our culture. Those who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place, will not join gladly in the search for standards of the kind I have in mind. I must, in short, expect dissent *in limine* from anyone whose view of the judicial process leaves no room for the antinomy Professor Fuller has so gracefully explored.[38] So too must I anticipate dissent from those more numerous among us who, vouching no philosophy to warranty, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support.

I shall not try to overcome the philosophic doubt that I have

[38] See Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

mentioned, although to use a phrase that Holmes so often used — "it hits me where I live." That battle must be fought on wider fronts than that of constitutional interpretation; and I do not delude myself that I can qualify for a command, great as is my wish to render service. The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law. If he may know he disapproves of a decision when all he knows is that it has sustained a claim put forward by a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist — he acquiesces in the proposition that a man of different sympathy but equal information may no less properly conclude that he approves.

You will not charge me with exaggeration if I say that this type of *ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics.

Did not New England challenge the embargo that the South supported on the very ground on which the South was to resist New England's demand for a protective tariff? [39] Was not Jefferson in the Louisiana Purchase forced to rest on an expansive reading of the clauses granting national authority of the very kind that he had steadfastly opposed in his attacks upon the Bank? [40] Can you square his disappointment about Burr's acquittal on the treason charge and his subsequent request for legislation [41] with

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[39] See 4 ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 267 (1890): "If Congress had the right to regulate commerce for such a purpose in 1808, South Carolina seemed to have no excuse for questioning, twenty years later, the constitutionality of a protective system."

[40] See 2 ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 90 (1889): "[T]he Louisiana treaty gave a fatal wound to 'strict construction,' and the Jeffersonian theories never again received general support. In thus giving them up, Jefferson did not lead the way, but he allowed his friends to drag him in the path they chose." See also 3 WILSON, A HISTORY OF THE AMERICAN PEOPLE 182–83 (1902).

[41] In his annual message of October 27, 1807, Jefferson said:

> I shall think it my duty to lay before you the proceedings and the evidence publicly exhibited on the arraignment of the principal offenders before the circuit court of Virginia. You will be enabled to judge whether the defect was in the testimony, in the law, or in the administration of the law; and wherever it shall be found, the Legislature alone can apply or originate the remedy. The framers of our Constitution certainly supposed that they had guarded as

the attitude towards freedom and repression most enduringly associated with his name? Were the abolitionists who rescued fugitives and were acquitted in defiance of the evidence able to distinguish their view of the compulsion of a law of the United States from that advanced by South Carolina in the ordinance that they despised? [42]

To bring the matter even more directly home, what shall we think of the Harvard records of the Class of 1829, the class of Mr. Justice Curtis, which, we are told,[43] praised at length the Justice's dissent in the *Dred Scott* case but then added, "Again, *and seemingly adverse to the above*, in October, 1862, he prepared a legal opinion and argument, which was published in Boston in pamphlet form, to the effect that President Lincoln's Proclamation of prospective emancipation of the slaves in the rebellious States is *unconstitutional*."

Of course, a man who thought and, as a Justice, voted and maintained [44] that a free Negro could be a citizen of the United States and therefore of a state, within the meaning of the constitutional and statutory clauses defining the diversity jurisdiction; that Congress had authority to forbid slavery within a territory, even one acquired after the formation of the Union; and that such a pro-

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well their Government against destruction by treason as their citizens against oppression under pretense of it, and if these ends are not attained it is of importance to inquire by what means more effectual they may be secured.

1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENT 429 (1896). The trial proceedings were transmitted to the Senate on November 23, 1807. See 17 ANNALS OF CONG. APP. 385–778 (1807).

Jefferson's conception of the "remedy" not only involved legislation overcoming Marshall's strict construction of the treason clause but also a provision for the removal of judges on the address of both Houses of Congress. See 3 RANDALL, THE LIFE OF THOMAS JEFFERSON 246–47 (1865); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 311–15 (1937).

On the former point, different bills were introduced in the Senate and the House. The Senate bill by Giles undertook to define "levying war" for purposes of treason. The proposed definition included "assembling themselves together with intent forcibly to overturn or change the Government of the United States, or any one of the Territories thereof . . . or forcibly to resist the general execution of any public law thereof . . . or if any person or persons shall traitorously aid or assist in the doing any of the acts aforesaid, although not personally present when any such act is done . . . ." 17 ANNALS OF CONG. 108–09 (1808). For discussion of the measure in the Senate, see 17 *id.* at 109–27, 135–49. The House bill by Randolph defined a separate offense, "conspiracy to commit treason against the United States . . . ." 18 *id.* at 1717–18.

[42] See South Carolina Ordinance of Nullification, 1 S.C. Stat. 329 (1832).

[43] See 1 CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS 354–55 n.1 (1879).

[44] See Scott v. Sandford, 60 U.S. (19 How.) 393, 564–633 (1857).

hibition worked emancipation of a slave whose owner brought him to reside in such a territory — a man who thought all these things detracted obviously from the force of his positions if he also thought the President without authority to abrogate a form of property established and protected by state law within the states where it was located, states which the President and his critic alike maintained had not effectively seceded from the Union and were not a foreign enemy at war.

How simple the class historian could make it all by treating as the only thing that mattered whether Mr. Justice Curtis had, on the occasions noted, helped or hindered the attainment of the freedom of the slaves.

I have cited these examples from the early years of our history since time has bred aloofness that may give them added force. What a wealth of illustration is at hand today! How many of the constitutional attacks upon congressional investigations of suspected Communists have their authors felt obliged to launch against the inquiries respecting the activities of Goldfine or of Hoffa or of others I might name? How often have those who think the Smith Act, as construed, inconsistent with the first amendment made clear that they also stand for constitutional immunity for racial agitators fanning flames of prejudice and discontent? Turning the case around, are those who in relation to the Smith Act see no virtue in distinguishing between advocacy of merely abstract doctrine and advocacy which is planned to instigate unlawful action,[45] equally unable to see virtue in the same distinction in relation, let us say, to advocacy of resistance to the judgments of the courts, especially perhaps to judgments vindicating claims that equal protection of the laws has been denied? I may live a uniquely sheltered life but am I wrong in thinking I discerned in some extremely warm enthusiasts for jury trial a certain diminution of enthusiasm as the issue was presented in the course of the debate in 1957 on the bill to extend federal protection of our civil rights?

All I have said, you may reply, is something no one will deny, that principles are largely instrumental as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time. Politicians recognize this fact of life and are obliged to trim and shape their speech and votes ac-

[45] See Yates v. United States, 354 U.S. 298, 318 (1957).

cordingly, unless perchance they are prepared to step aside; and the example that John Quincy Adams set somehow is rarely followed.

That is, indeed, all I have said but I now add that whether you are tolerant, perhaps more tolerant than I, of the *ad hoc* in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?

Here too I do not think that I am stating any novel or momentous insight. But now, as Holmes said long ago in speaking of "the unrest which seems to wonder vaguely whether law and order pay," we "need education in the obvious." [46] We need it more particularly now respecting constitutional interpretation, since it has become a commonplace to grant what many for so long denied: that courts in constitutional determinations face issues that are inescapably "political" — political in the third sense that I have used that word — in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone.

I should be the last to argue otherwise or to protest the emphasis upon the point in Mr. Justice Jackson's book, throughout the Marshall conference, and in the lectures by Judge Hand. I have, indeed, insisted on the point myself.[47] But what is crucial, I submit, is not the nature of the question but the nature of the answer that may validly be given by the courts. No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I

[46] HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292 (1920).

[47] See, *e.g.*, Wechsler, *Comment* on Snee, *Leviathan at the Bar of Justice*, in GOVERNMENT UNDER LAW 134, 136–37 (Sutherland ed. 1956).

have suggested is intrinsic to judicial action — however much we may admire such a reasoned exposition when we find it in those other realms.

Does not the special duty of the courts to judge by neutral principles addressed to all the issues make it inapposite to contend, as Judge Hand does, that no court can review the legislative choice — by any standard other than a fixed "historical meaning" of constitutional provisions [48] — without becoming "a third legislative chamber"? [49] Is there not, in short, a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts? Does not the difference yield a middle ground between a judicial House of Lords and the abandonment of any limitation on the other branches — a middle ground consisting of judicial action that embodies what are surely the main qualities of law, its generality and its neutrality? This must, it seems to me, have been in Mr. Justice Jackson's mind when in his chapter on the Supreme Court "as a political institution" he wrote [50] in words that I find stirring, "Liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, nor is it the inevitable by-product of technological expansion. It is achieved only by a rule of law." Is it not also what Mr. Justice Frankfurter must mean in calling upon judges for "allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law"? [51]

You will not understand my emphasis upon the role of reason and of principle in the judicial, as distinguished from the legislative or executive, appraisal of conflicting values to imply that I depreciate the duty of fidelity to the text of the Constitution, when its words may be decisive — though I would certainly remind you

[48] HAND, *op. cit. supra* note 3, at 65.

[49] *Id.* at 42.

[50] JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 76 (1955).

[51] FRANKFURTER, *Chief Justices I Have Known*, in OF LAW AND MEN 138 (Elman ed. 1956).

of the caution stated by Chief Justice Hughes: "Behind the words of the constitutional provisions are postulates which limit and control." [52] Nor will you take me to deny that history has weight in the elucidation of the text, though it is surely subtle business to appraise it as a guide. Nor will you even think that I deem precedent without importance, for we surely must agree with Holmes that "imitation of the past, until we have a clear reason for change, no more needs justification than appetite." [53] But after all, it was Chief Justice Taney who declared his willingness "that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." [54] Would any of us have it otherwise, given the nature of the problems that confront the courts?

At all events, is not the relative compulsion of the language of the Constitution, of history and precedent — where they do not combine to make an answer clear — itself a matter to be judged, so far as possible, by neutral principles — by standards that transcend the case at hand? I know, of course, that it is common to distinguish, as Judge Hand did, clauses like "due process," cast "in such sweeping terms that their history does not elucidate their contents," [55] from other provisions of the Bill of Rights addressed to more specific problems. But the contrast, as it seems to me, often implies an overstatement of the specificity or the immutability these other clauses really have — at least when problems under them arise.

No one would argue, for example, that there need not be indictment and a jury trial in prosecutions for a felony in district courts. What made a question of some difficulty was the issue whether service wives charged with the murders of their husbands overseas could be tried there before a military court.[56] Does the language of the double-jeopardy clause or its preconstitutional history actually help to decide whether a defendant tried for

[52] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

[53] HOLMES, *Holdsworth's English Law*, in COLLECTED LEGAL PAPERS 285, 290 (1920).

[54] Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849).

[55] HAND, *op. cit. supra* note 3, at 30.

[56] See Reid v. Covert, 354 U.S. 1 (1957), *reversing on rehearing* 351 U.S. 487 (1956).

murder in the first degree and convicted of murder in the second, who wins a reversal of the judgment on appeal, may be tried again for murder in the first or only murder in the second? [57] Is there significance in the fact that it is "jeopardy of life or limb" that is forbidden, now that no one is in jeopardy of limb but only of imprisonment or fine? The right to "have the assistance of counsel" was considered, I am sure, when the sixth amendment was proposed, a right to defend by counsel if you have one, contrary to what was then the English law.[58] That does not seem to me sufficient to avert extension of its meaning to imply a right to court-appointed counsel when the defendant is too poor to find such aid [59] — though I admit that I once urged the point sincerely as a lawyer for the Government.[60] It is difficult for me to think the fourth amendment freezes for all time the common law of search and of arrest as it prevailed when the amendment was adopted, whatever the exigencies of police problems may now be or may become. Nor should we, in my view, lament the fact that "the" freedom of speech or press that Congress is forbidden by the first amendment to impair is not determined only by the scope such freedom had in the late eighteenth century, though the word "the" might have been taken to impose a limitation to the concept of that time — a time when, President Wright has recently reminded us, there was remarkable consensus about matters of this kind.[61]

Even "due process," on the other hand, might have been confined, as Mr. Justice Brandeis urged originally,[62] to a guarantee of fair procedure, coupled perhaps with prohibition of executive displacement of established law — the analogue for us of what

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[57] See Green v. United States, 355 U.S. 184 (1957).

[58] "Throughout the eighteenth century counsel were allowed to speak in cases of treason and misdemeanour only." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 453 (1883). See also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & NATIONAL LEGAL AID & DEFENDERS ASS'N, EQUAL JUSTICE FOR THE ACCUSED 40–42 (1959).

[59] See Johnson v. Zerbst, 304 U.S. 458 (1938).

[60] Walker v. Johnston, 312 U.S. 275 (1941).

[61] WRIGHT, CONSENSUS AND CONTINUITY, 1776–1787 *passim* (1958). See also CHAFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION (1952). For the suggestion that political consensus has been the abiding characteristic of American democracy, see HARTZ, THE LIBERAL TRADITION IN AMERICA 139–42 (1955).

[62] "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion).

the barons meant in Magna Carta. Equal protection could be taken as no more than an assurance that no one may be placed beyond the safeguards of the law, outlawing, as it were, the possibility of outlawry, but nothing else. Here too I cannot find it in my heart to regret that interpretation did not ground itself in ancient history but rather has perceived in these provisions a compendious affirmation of the basic values of a free society, values that must be given weight in legislation and administration at the risk of courting trouble in the courts.

So far as possible, to finish with my point, I argue that we should prefer to see the other clauses of the Bill of Rights read as an affirmation of the special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of a century long past, with problems very different from our own. To read them in the former way is to leave room for adaptation and adjustment if and when competing values, also having constitutional dimension, enter on the scene.

Let me repeat what I have thus far tried to say. The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are — or are obliged to be — entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive. Otherwise, as Holmes said in his first opinion for the Court, "a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions . . . ." [63]

The virtue or demerit of a judgment turns, therefore, entirely

[63] Otis v. Parker, 187 U.S. 606, 609 (1903).

on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed. The critic's role, as T. R. Powell showed throughout so many fruitful years, is the sustained, disinterested, merciless examination of the reasons that the courts advance, measured by standards of the kind I have attempted to describe. I wish that more of us today could imitate his dedication to that task.

III. Some Appraisals of Review

One who has ventured to advance such generalities about the courts and constitutional interpretation is surely challenged to apply them to some concrete problems — if only to make clear that he believes in what he says. A lecture, to be sure, is a poor medium for such an undertaking, for the statement and analysis of cases inescapably takes time. Nonetheless, I feel obliged to make the effort and I trust that I can do so without trespassing on the indulgence you already have displayed.

Needless to say, I must rely on you to understand that in alluding to some areas of constitutional interpretation, selected for their relevancy to my thesis, I do not mean to add another capsulated estimate of the performance of our highest court to those that now are in such full supply. The Court in constitutional adjudications faces what must surely be the largest and the hardest task of principled decision-making faced by any group of men in the entire world. There is a difference worthy of articulation between purported evaluations of the Court and comments on decisions or opinions.

(1). — I start by noting two important fields of present interest in which the Court has been decreeing value choices in a way that makes it quite impossible to speak of principled determinations or the statement and evaluation of judicial reasons, since the Court has not disclosed the grounds on which its judgments rest.

The first of these involves the sequel to the *Burstyn* case,[64] in which, as you recall, the Court decided that the motion picture is a medium of expression included in the "speech" and "press" to which the safeguards of the first amendment, made applicable to the states by the fourteenth, apply. But *Burstyn* left open, as it was of course obliged to do, the extent of the protection that the

[64] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

movies are accorded, and even the question whether any censorship is valid, involving as it does prior restraint. The judgment rested, and quite properly, upon the vice inherent in suppression based upon a finding that the film involved was "sacrilegious" — with the breadth and vagueness that that term had been accorded in New York. "[W]hether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films" was said to be "a very different question" not decided by the Court.[65] In five succeeding cases, decisions sustaining censorship of different films under standards variously framed have been reversed, but only by per curiam decisions. In one of these,[66] in which I should avow I was of counsel, the standard was undoubtedly too vague for any argument upon the merits. I find it hard to think that this was clearly so in all the others.[67] Given the subtlety and difficulty of the problem, the need and opportunity for clarifying explanation, are such unexplained decisions in a new domain of constitutional interpretation consonant with standards of judicial action that the Court or we can possibly defend? I realize that nine men often find it easier to reach agreement on result than upon reasons and that such a difficulty may be posed within this field. Is it not preferable, however, indeed essential, that if this is so the variations of position be disclosed? [68]

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[65] *Id.* at 506.

[66] Gelling v. Texas, 343 U.S. 960, *reversing per curiam* 157 Tex. Crim. 516, 247 S.W.2d 95 (1952) (ordinance prohibited exhibition of picture deemed by Censorship Board "of such character as to be prejudicial to the best interests of the people" of Marshall, Texas, "if publicly shown").

[67] See Times Film Corp. v. City of Chicago, 355 U.S. 35, *reversing per curiam* 244 F.2d 432 (7th Cir. 1957); Holmby Prods., Inc. v. Vaughn, 350 U.S. 870, *reversing per curiam* 177 Kan. 728, 282 P.2d 412 (1955); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954), *reversing per curiam* 159 Ohio St. 315, 112 N.E.2d 311 (1953); Superior Films, Inc. v. Department of Educ., *supra*, *reversing per curiam* Commercial Pictures Corp. v. Board of Regents of the Univ. of N.Y., 305 N.Y. 336, 113 N.E.2d 502 (1953).

[68] Attention should be called to Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959), decided with full opinions since the present paper was delivered. The Court was unanimous in holding invalid New York's refusal to license the exhibition of a film based on D. H. Lawrence's *Lady Chatterley's Lover*. The opinion of the Court by Mr. Justice Stewart, deeming the censorship order to rest solely on the ground that the picture portrays an adulterous relationship as an acceptable pattern of behavior, held the statute so construed an unconstitutional impairment of freedom to disseminate ideas. Justices Black and Douglas joined in the opinion but in brief concurrences expressed their view that any prior restraint on motion pictures is as vulnerable as the censorship of

The second group of cases to which I shall call attention involves what may be called the progeny of the school-segregation ruling of 1954. Here again the Court has written on the merits of the constitutional issue posed by state segregation only once; [69] its subsequent opinions on the form of the decree [70] and the defiance in Arkansas [71] deal, of course, with other matters. The original opinion, you recall, was firmly focused on state segregation in the public schools, its reasoning accorded import to the nature of the educational process, and its conclusion was that separate educational facilities are "inherently unequal."

What shall we think then of the Court's extension of the ruling to other public facilities, such as public transportation, parks, golf courses, bath houses, and beaches, which no one is obliged to use — all by per curiam decisions? [72] That these situations present a weaker case against state segregation is not, of course, what I am saying. I am saying that the question whether it is stronger, weaker, or of equal weight appears to me to call for principled decision. I do not know, and I submit you cannot know, whether the per curiam affirmance in the *Dawson* case, involving public bath houses and beaches, embraced the broad opinion of the circuit court that all state-enforced racial segregation is invalid or approved only its immediate result and, if the latter, on what ground. Is this "process of law," to borrow the words Professor Brown has used so pointedly in writing of such unexplained decisions upon matters far more technical [73] — the process that

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newspapers or books. Mr. Justice Frankfurter in one opinion and Mr. Justice Harlan in another, joined by Justices Frankfurter and Whittaker, conceived of the New York statute as demanding some showing of obscenity or of incitement to immorality and thought, therefore, that it escaped the condemnation of the majority opinion. In their view, however, the film could not be held to have embodied either obscenity or incitement. Hence, the statute was invalid as applied.

[69] Brown v. Board of Educ., 347 U.S. 483 (1954). See also Bolling v. Sharpe, 347 U.S. 497 (1954), dealing with segregation in the District of Columbia.

[70] Brown v. Board of Educ., 349 U.S. 294 (1955).

[71] Cooper v. Aaron, 358 U.S. 1 (1958).

[72] New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, *affirming per curiam* 252 F.2d 122 (5th Cir. 1958); Gayle v. Browder, 352 U.S. 903, *affirming per curiam* 142 F. Supp. 707 (M.D. Ala. 1956); Holmes v. City of Atlanta, 350 U.S. 879, *reversing per curiam* 223 F.2d 93 (5th Cir. 1955); Mayor & City Council v. Dawson, 350 U.S. 877, *affirming per curiam* 220 F.2d 386 (4th Cir. 1955); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *reversing per curiam* 202 F.2d 275 (6th Cir. 1953).

[73] Brown, *Foreword: Process of Law, The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77 (1958).

alone affords the Court its title and its duty to adjudicate a claim that state action is repugnant to the Constitution?

Were I a prudent man I would, no doubt, confine myself to problems of this order, involving not the substance but the method of decision — for other illustrations might be cited in the same domain. I shall, however, pass beyond this to some areas of substantive interpretation which appear to me to illustrate my theme.

(2). — The phase of our modern constitutional development that I conceive we can most confidently deem successful inheres in the broad reading of the commerce, taxing, and related powers of the Congress, achieved with so much difficulty little more than twenty years ago — against restrictions in the name of state autonomy to which the Court had for a time turned such a sympathetic ear.

Why is it that the Court failed so completely in the effort to contain the scope of national authority and that today one reads decisions like *Hammer v. Dagenhart*,[74] or *Carter Coal*,[75] or the invalidation of the Agricultural Adjustment Act [76] with eyes that disbelieve? No doubt the answer inheres partly in the simple facts of life and the consensus they have generated on the powers that a modern nation needs. But is it not a feature of the case as well — a feature that has real importance — that the Court could not articulate an adequate analysis of the restrictions it imposed on Congress in favor of the states, whose representatives — upon an equal footing in the Senate — controlled the legislative process and had broadly acquiesced in the enactments that were subject to review?

Is it not also true and of importance that some of the principles the Court affirmed were strikingly deficient in neutrality, sustaining, for example, national authority when it impinged adversely upon labor, as in the application of the Sherman Act, but not when it was sought to be employed in labor's aid? On this score, the contrast in today's position certainly is striking. The power that sustained the Wagner Act is the same power that sustains Taft-Hartley — with its even greater inroads upon state autonomy but with restraints on labor that the Wagner Act did not impose.

One of the speculations that I must confess I find intriguing is upon the question whether there are any neutral principles that

[74] 247 U.S. 251 (1918).

[75] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[76] United States v. Butler, 297 U.S. 1 (1936).

might have been employed to mark the limits of the commerce power of the Congress in terms more circumscribed than the virtual abandonment of limits in the principle that has prevailed. Given the readiness of President Roosevelt to compromise on any basis that allowed achievement of the substance of his program, might not the formulae of coverage employed in the legislation of the Thirties have quite readily embraced any such principles the Court had then been able to devise before the crisis became so intense — principles sustaining action fairly equal to the need? I do not say we would or should be happier if that had happened and the Court still played a larger part within this area of our federalism, given the attention to state interests that is so inherent in the Congress and the constitutional provisions governing the selection and the composition of the Houses, which make that attention very likely to endure.[77] I say only that I find such speculation interesting. You will recall that it was Holmes who deprecated argument of counsel the logic of which left "no part of the conduct of life with which on similar principles Congress might not interfere." [78]

(3). — The poverty of principled articulation of the limits put on Congress as against the states before the doctrinal reversal of the Thirties was surely also true of the decisions, dealing with the very different problem of the relationship between the individual and government, which invoked due process to maintain *laissez faire*. Did not the power of the great dissents inhere precisely in their demonstrations that the Court could not present an adequate analysis, in terms of neutral principles, to support the value choices it decreed? Holmes, to be sure, saw limits beyond which "the contract and due process clauses are gone"; and his insistence on the need for compensation to sustain a Pennsylvania prohibition of the exploitation of subsurface coal, threatening subsidence of a dwelling belonging to the owner of the surface land, indicates the kind of limit he perceived.[79] Am I simply voicing my own sympathies in saying that his analysis of those limits has a thrust entirely lacking in the old and now forgotten

[77] See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), in FEDERALISM MATURE AND EMERGENT 97 (MacMahon ed. 1955).

[78] Northern Sec. Co. v. United States, 193 U.S. 197, 403 (1904) (dissenting opinion).

[79] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

judgments striking down minimum-wage and maximum-hour laws?

If I am right in this it helps to make a further point that has more bearing upon current issues, that I believe it misconceives the problem of the Court to state it as the question of the proper measure of judicial self-restraint, with the resulting issue whether such restraint is only proper in relation to protection of a purely economic interest or also in relation to an interest like freedom of speech or of religion, privacy, or discrimination (at least if it is based on race, origin, or creed). Of course, the courts ought to be cautious to impose a choice of values on the other branches or a state, based upon the Constitution, only when they are persuaded, on an adequate and principled analysis, that the choice is clear. That I suggest is all that self-restraint can mean and in that sense it always is essential, whatever issue may be posed. The real test inheres, as I have tried to argue, in the force of the analysis. Surely a stronger analysis may be advanced against a particular uncompensated taking as a violation of the fifth amendment than against a particular limitation of freedom of speech or press as a violation of the first.

In this view, the "preferred position" controversy hardly has a point — indeed, it never has been really clear what is asserted or denied to have a preference and over what.[80] Certainly the concept is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension, as when there is an inescapable conflict between claims to free press and a fair trial. It has a virtue, on the other hand, insofar as it recognizes that some ordering of social values is essential; that all cannot be given equal weight, if the Bill of Rights is to be maintained.

Did Holmes mean any less than this when he lamented the tendency "toward underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for"? [81] Only in that view could he have dissented in the *Abrams* and the *Gitlow* cases [82] and have struggled so intensely to develop a principled delineation of the freedom that he

[80] See, *e.g.*, Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

[81] 2 HOLMES-POLLOCK LETTERS 25 (Howe ed. 1941); see 1 HOLMES-LASKI LETTERS 203, 529–30 (Howe ed. 1953); *cf.* 2 *id.* at 888.

[82] Abrams v. United States, 250 U.S. 616, 624 (1919); Gitlow v. New York, 268 U.S. 652, 672 (1925).

voted to sustain. Even if one thinks, as I confess I do, that his analysis does not succeed if it requires that an utterance designed to stimulate unlawful action must be accorded an immunity unless it is intended to achieve or creates substantial danger of *immediate* results,[83] can anyone deny it his respect? Is not the force of a position framed in terms of principles of the neutrality and generality that Holmes achieved entirely different from that of the main opinion, for example, in the *Sweezy* case,[84] resting at bottom as it does, on principles of power separation among the branches of state government that never heretofore have been conceived to be a federal requirement and that, we safely may predict, the Court will not apply to any other field?[85]

(4). — Finally, I turn to the decisions that for me provide the hardest test of my belief in principled adjudication, those in which the Court in recent years has vindicated claims that deprivations based on race deny the equality before the law that the fourteenth amendment guarantees. The crucial cases are, of course, those involving the white primary,[86] the enforcement of racially restrictive covenants,[87] and the segregated schools.[88]

The more I think about the past the more skeptical I find myself about predictions of the future. Viewed a priori would you not have thought that the invention of the cotton gin in 1792 should have reduced the need for slave labor and hence diminished the attractiveness of slavery? Brooks Adams tells us that its consequences were precisely the reverse; that the demand for slaves increased as cotton planting became highly lucrative, increased

[83] "I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." Abrams v. United States, 250 U.S. 616, 627 (1919). Is it possible, however, that persuasion to murder is only punishable constitutionally if the design is that the murder be committed "forthwith"? *Cf.* HAND, *op. cit. supra* note 3, at 58–59.

[84] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[85] See Uphaus v. Wyman, 360 U.S. 72, 77 (1959), decided after the present paper was delivered: "[S]ince questions concerning the authority of the committee to act as it did are questions of state law, . . . we accept as controlling the New Hampshire Supreme Court's conclusion that '[t]he legislative history makes it clear beyond a reasonable doubt that it [the Legislature] did and does desire an answer to these questions'."

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

[87] Shelley v. Kraemer, 334 U.S. 1 (1948); Barrows v. Jackson, 346 U.S. 249 (1953).

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

so greatly that Virginia turned from coal and iron, which George Washington envisaged as its future, into an enormous farm for breeding slaves — forty thousand of whom it exported annually to the rest of the South.[89] Only the other day I read that the Japanese evacuation, which I thought an abomination when it happened, though in the line of duty as a lawyer I participated in the effort to sustain it in the Court,[90] is now believed by many to have been a blessing to its victims, breaking down forever the ghettos in which they had previously lived.[91] But skeptical about predictions as I am, I still believe that the decisions I have mentioned — dealing with the primary, the covenant, and schools — have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years. It is in this perspective that I ask how far they rest on neutral principles and are entitled to approval in the only terms that I acknowledge to be relevant to a decision of the courts.

The primary and covenant cases present two different aspects of a single problem — that it is a state alone that is forbidden by the fourteenth amendment to deny equal protection of the laws, as only a state or the United States is precluded by the fifteenth amendment from denying or abridging on the ground of race or color the right of citizens of the United States to vote. It has, of course, been held for years that the prohibition of action by the state reaches not only an explicit deprivation by a statute but also action of the courts or of subordinate officials, purporting to exert authority derived from public office.[92]

I deal first with the primary. So long as the Democratic Party in the South excluded Negroes from participation, in the exercise of an authority conferred by statute regulating political parties, it was entirely clear that the amendment was infringed; the exclusion involved an application of the statute.[93] The problem became difficult only when the states, responding to these judgments, repealed the statutes, leaving parties free to define their membership as private associations, protected by the state but not directed

[89] See B. Adams, *The Heritage of Henry Adams*, in H. Adams, The Degradation of the Democratic Dogma 22, 31 (1919).

[90] Korematsu v. United States, 323 U.S. 214 (1944).

[91] See Newsweek, Dec. 29, 1958, p. 23.

[92] See, *e.g.*, *Ex parte* Virginia, 100 U.S. 339, 347 (1880); Hale, Freedom Through Law ch. xi (1952).

[93] See Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

or controlled or authorized by law. In this position the Court held in 1935 that an exclusion by the party was untouched by the amendment, being action of the individuals involved, not of the state or its officialdom.[94]

Then came the *Classic* case [95] in 1941, which I perhaps should say I argued for the Government. *Classic* involved a prosecution of election officials for depriving a voter of a right secured by the Constitution in willfully failing to count his vote as it was cast in a Louisiana Democratic primary. In holding that the right of a qualified voter to participate in choosing Representatives in Congress, a right conferred by article I, section 2,[96] extended to participating in a primary which influenced the ultimate selection, the Court did not, of course, deal with the scope of party freedom to select its members. The victim of the fraud in *Classic* was a member of the Democratic Party, voting in a primary in which he was entitled to participate, and the only one in which he could.[97] Yet three years later *Classic* was declared in *Smith v. Allwright* [98] to have determined in effect that primaries are a part of the election, with the consequence that parties can no more defend racial exclusion from their primaries than can the state, a result reaffirmed in 1953.[99] This is no doubt a settled proposition in the

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[94] Grovey v. Townsend, 295 U.S. 45 (1935).

[95] United States v. Classic, 313 U.S. 299 (1941).

[96] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

The seventeenth amendment contains similar provisions for the choice of Senators.

[97] The Government brief in *Classic* stated with respect to *Grovey*:

> Moreover, what Article I, Section 2 secures is the right to choose. The implicit premise of the *Grovey* decision is that the negroes excluded from the Democratic primary were legally free to record their choice by joining an opposition party or by organizing themselves. In the present case the voters exercised the right to choose in accordance with the contemplated method; and the wrong alleged deprived them of an opportunity to express their choice in any other way.

Brief for the United States, pp. 34–35, United States v. Classic, 313 U.S. 299 (1941).

[98] 321 U.S. 649 (1944). Mr. Justice Frankfurter concurred only in the result. Mr. Justice Roberts alone dissented.

[99] Terry v. Adams, 345 U.S. 461 (1953). See also Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). There is no opinion of the Court in *Terry*. Justices Douglas and Burton joined in an opinion by Justice Black. Justice Frankfurter, saying that he found the case "by no means free of difficulty," wrote for himself. Chief Justice Vinson and Justices Reed and Jackson joined in an opinion by Justice Clark. Justice Minton dissented.

Court. But what it means is not, as sometimes has been thought, that a state may not escape the limitations of the Constitution merely by transferring public functions into private hands. It means rather that the constitutional guarantee against deprivation of the franchise on the ground of race or color has become a prohibition of party organization upon racial lines, at least where the party has achieved political hegemony. I ask with all sincerity if you are able to discover in the opinions thus far written in support of this result — a result I say again that I approve — neutral principles that satisfy the mind. I should suppose that a denial of the franchise on religious grounds is certainly forbidden by the Constitution. Are religious parties, therefore, to be taken as proscribed? I should regard this result too as one plainly to be desired but is there a constitutional analysis on which it can be validly decreed? Is it, indeed, not easier to project an analysis establishing that such a proscription would infringe rights protected by the first amendment?

The case of the restrictive covenant presents for me an even harder problem. Assuming that the Constitution speaks to state discrimination on the ground of race but not to such discrimination by an individual even in the use or distribution of his property, although his freedom may no doubt be limited by common law or statute, why is the enforcement of the private covenant a state discrimination rather than a legal recognition of the freedom of the individual? That the action of the state court is action of the state, the point Mr. Chief Justice Vinson emphasizes in the Court's opinion [100] is, of course, entirely obvious. What is not obvious, and is the crucial step, is that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make. Again, one is obliged to ask: What is the principle involved? Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of law, or is it a sufficient answer there that the discrimination was the testator's and not the state's? [101] May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his ex-

[100] See Shelley v. Kraemer, 334 U.S. 1, 14–23 (1948).

[101] *Cf.* Gordon v. Gordon, 332 Mass. 197, 210, 124 N.E.2d 228, 236, *cert. denied*, 349 U.S. 947 (1955).

clusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law? Would a declaratory judgment that a fee is determinable if a racially restrictive limitation should be violated represent discrimination by the state upon the racial ground? [102] Would a judgment of ejectment?

None of these questions has been answered by the Court nor are the problems faced in the opinions.[103] Philadelphia, to be sure, has been told that it may not continue to administer the school for "poor male white orphans," established by the city as trustee under the will of Stephen Girard, in accordance with that racial limitation.[104] All the Supreme Court said, however, was the following: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment." When the Orphans' Court thereafter dismissed the city as trustee, appointing individuals in substitution, its action was sustained in Pennsylvania.[105] Further review by certiorari was denied.[106]

One other case in the Supreme Court has afforded opportunity for reconsidering the basis and scope of the *Shelley* principle, *Black v. Cutter Labs.*[107] Here a collective-bargaining agreement was so construed that Communist Party membership was "just cause" for a discharge. In this view, California held that a worker was lawfully dismissed upon that ground. A Supreme Court majority concluded that this judgment involved nothing but interpretation of a contract, making irrelevant the standards that would govern the validity of a state statute that required the discharge. Only Mr. Chief Justice Warren and Justices Douglas and Black, dissenting, thought the principle of *Shelley v. Kraemer* was involved when the state court sustained the discharge.[108]

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[102] See Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

[103] Mr. Chief Justice Vinson, dissenting in Barrows v. Jackson, 346 U.S. 249, 260 (1953), urged a distinction between enforcement of the covenant by injunction, the problem in *Shelley*, and an action for damages against a defaulting covenantor by a co-covenantor. He was alone in his dissent.

[104] Pennsylvania v. Board of Directors, 353 U.S. 230, 231 (1957).

[105] Girard College Trusteeship, 391 Pa. 434, 441–42, 138 A.2d 844, 846 (1958).

[106] Pennsylvania v. Board of Directors, 357 U.S. 570 (1958).

[107] 351 U.S. 292 (1956).

[108] Attention also should be called to Dorsey v. Stuyvesant Town Corp., 299

Many understandably would like to perceive in the primary and covenant decisions a principle susceptible of broad extension, applying to the other power aggregates in our society limitations of the kind the Constitution has imposed on government.[109] My colleague A. A. Berle, Jr., has, indeed, pointed to the large business corporation, which after all is chartered by the state and wields in many areas more power than the government, as uniquely suitable for choice as the next subject of such application.[110] I doubt that the courts will yield to such temptations; and I do not hesitate to say that I prefer to see the issues faced through legislation, where there is room for drawing lines that courts are not equipped to draw. If this is right the two decisions I have mentioned will remain, as they now are, *ad hoc* determinations of their narrow problems, yielding no neutral principles for their extension or support.

Lastly, I come to the school decision, which for one of my persuasion stirs the deepest conflict I experience in testing the thesis I propose. Yet I would surely be engaged in playing Hamlet without Hamlet if I did not try to state the problems that appear to me to be involved.

The problem for me, I hardly need to say, is not that the Court departed from its earlier decisions holding or implying that the equality of public educational facilities demanded by the Constitution could be met by separate schools. I stand with the long tradition of the Court that previous decisions must be subject to reexamination when a case against their reasoning is made. Nor is the problem that the Court disturbed the settled patterns of a portion of the country; even that must be accepted as a lesser evil than nullification of the Constitution. Nor is it that history does not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence

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N.Y. 512, 87 N.E.2d 541 (1949), holding state action not involved in racial discrimination in the selection of tenants by the owner corporation, although the housing development involved had been constructed with the aid of New York City which, pursuant to a contract authorized by statute, had condemned the land for the corporation and granted substantial tax exemptions. Certiorari was denied, 339 U.S. 981 (1950), Justices Black and Douglas noting their dissent.

[109] See, *e.g.*, Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 235–38 (1949).

[110] See, *e.g.*, Berle, *Constitutional Limitations on Corporate Activity — Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 948–51 (1952); BERLE, ECONOMIC POWER AND THE FREE SOCIETY 17–18 (Fund for the Republic 1957).

that many thought the contrary; [111] the words are general and leave room for expanding content as time passes and conditions change. Nor is it that the Court may have miscalculated the extent to which its judgment would be honored or accepted; it is not a prophet of the strength of our national commitment to respect the judgments of the courts. Nor is it even that the Court did not remit the issue to the Congress, acting under the enforcement clause of the amendment. That was a possible solution, to be sure, but certainly Professor Freund is right [112] that it would merely have evaded the claims made.

The problem inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned. The Court did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation, though subsequent per curiam decisions may, as I have said, now go that far. Rather, as Judge Hand observed,[113] the separate-but-equal formula was not overruled "in form" but was held to have "no place" in public education on the ground that segregated schools are "inherently unequal," with deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development. So, indeed, the district court had found as a fact in the Kansas case, a finding which the Supreme Court embraced, citing some further "modern authority" in its support.[114]

Does the validity of the decision turn then on the sufficiency of evidence or of judicial notice to sustain a finding that the separation harms the Negro children who may be involved? There were, indeed, some witnesses who expressed that opinion in the Kansas case,[115] as there were also witnesses in the companion Virginia case, including Professor Garrett of Columbia,[116] whose

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[111] See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[112] See Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345, 351 (1958).

[113] HAND, *op. cit. supra* note 3, at 54.

[114] For a detailed account of the character and quality of research in this field, see Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730 (1952).

[115] See Record, pp. 125–26, 132 (Hugh W. Speer), Brown v. Board of Educ., 347 U.S. 483 (1954); *id.* at 164–65 (Wilbur B. Brookover); *id.* at 170–71 (Louisa Holt); *id.* at 176–79 (John J. Kane).

[116] See Record, pp. 548–55, 568–72 (Henry E. Garrett), Davis v. County Bd. of Educ., 347 U.S. 483 (1954).

view was to the contrary. Much depended on the question that the witness had in mind, which rarely was explicit. Was he comparing the position of the Negro child in a segregated school with his position in an integrated school where he was happily accepted and regarded by the whites; or was he comparing his position under separation with that under integration where the whites were hostile to his presence and found ways to make their feelings known? And if the harm that segregation worked was relevant, what of the benefits that it entailed: sense of security, the absence of hostility? Were they irrelevant? Moreover, was the finding in Topeka applicable without more to Clarendon County, South Carolina, with 2,799 colored students and only 295 whites? Suppose that more Negroes in a community preferred separation than opposed it? Would that be relevant to whether they were hurt or aided by segregation as opposed to integration? Their fates would be governed by the change of system quite as fully as those of the students who complained.

I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved. For many who support the Court's decision this assuredly is the decisive ground. But this position also presents problems. Does it not involve an inquiry into the motive of the legislature, which is generally foreclosed to the courts? [117] Is it alternatively defensible to make the measure of validity of legislation the way it is interpreted by those who are affected by it? In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it"? [118] Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male?

[117] Motive is open to examination when executive action is challenged as discriminatory, but there the purpose is to show that an admitted inequality of treatment was not inadvertent. See, *e.g.*, Snowden v. Hughes, 321 U.S. 1 (1944). Even in such a case, invidious motivation alone has not been held to establish the inequality.

[118] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

Is a prohibition of miscegenation a discrimination against the colored member of the couple who would like to marry?

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied. In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess. Does not the problem of miscegenation show most clearly that it is the freedom of association that at bottom is involved, the only case, I may add, where it is implicit in the situation that association is desired by the only individuals involved? I take no pride in knowing that in 1956 the Supreme Court dismissed an appeal in a case in which Virginia nullified a marriage on this ground, a case in which the statute had been squarely challenged by the defendant, and the Court, after remanding once, dismissed per curiam on procedural grounds that I make bold to say are wholly without basis in the law.[119]

But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms — conflicts that Professor Sutherland has recently described.[120] Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.

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[119] See Ham Say Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955), *on remand*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956).

[120] See SUTHERLAND, THE LAW AND ONE MAN AMONG MANY 35–62 (1956).

Having said what I have said, I certainly should add that I offer no comfort to anyone who claims legitimacy in defiance of the courts. This is the ultimate negation of all neutral principles, to take the benefits accorded by the constitutional system, including the national market and common defense, while denying it allegiance when a special burden is imposed. That certainly is the antithesis of law.

I am confident I have said much with which you disagree — both in my basic premises and in conclusions I have drawn. The most that I can hope is that the effort be considered worthy of a rostrum dedicated to the memory of Mr. Justice Holmes. Transcending all the lessons that he teaches through the years, the most important one for me has come to this: Those of us to whom it is not given to "live greatly in the law" are surely called upon to fail in the attempt.