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# The Supreme Court and the Dilemma of Judicial Policy-Making

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To understand the philosophic conflicts in the United States Supreme Court at the present day, one must first go back to the dilemma bequeathed to the Court by its outstanding judicial personality of modern times, Mr. Justice Oliver Wendell Holmes, Jr., on his retirement in 1932 after thirty years of service on the Court. For Holmes' conception of the judicial function (or, at least, so it seems in the light of re-examination at the present day) was essentially two-sided. First, there was a tradition of judicial restraint, or more properly judicial self-restraint—the notion that the Supreme Court (in Holmes' words) should defer to the popular will as expressed in the enactments of legislative majorities:

> "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[1]

—this even though the judges might personally consider the enactment in question unwise and unreasonable. From the viewpoint of constitutional technology this judicial attitude is represented by the judicial "presumption of constitutionality" of legislation. Second, there was a tradition of judicial activism, involving the notion that in certain areas of subject matter, notably the field of political and civil rights, the Court should look with a jealous eye on legislation cutting down or trenching on those rights; on the technological side, this is represented by what amounts, in effect, to a judicial presumption of invalidity (or unconstitutionality).

The first strain, stemming originally from Holmes' classic dissent in the *Lochner* case in 1905, was an intellectual position reiterated by Holmes as a minority judge throughout his career on the Supreme Court in opposition to what amounted to a politically and economically Conservative majority on the Court which persisted in invalidating National and State social and economic planning legislation on the score of conflict with a liberty of contract supposedly guaranteed by the 5th and 14th Amendments to the Constitution. This Court majority—the "Old Court" as it is now customary to call it—was (in the terminology of the present day) attempting to maintain through judicial activism as applied to the

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1. See Lochner v. New York, 198 U. S. 45, 76 (1905) (dissenting opinion by Mr. Justice Holmes).

Constitution an essentially laissez-faire organization for American economic and social life.

Now the Holmes' opposition to the "Old Court" was always expressed as a technical one—an objection in effect to judicial activism, in the name of the new doctrine of judicial self-restraint. The Old Court majority, as is well known, finally yielded in 1937 under pressure of public opinion and a powerful Executive, President Franklin Roosevelt, who was roused to challenge the Court's outright rejection of the main planks of the New Deal legislation. The collapse of the Old Court seems to have been due, essentially, to public reaction to the economic philosophy that the Court majority's decisions maintained; the opposition to the Old Court, however (especially in professional and academic legal circles), was verbalised in terms of Separation of Powers arguments and conceptions of the proper role of the Court vis-à-vis legislative majorities—in a word, the Holmesian notion of judicial self-restraint. Thus, even in the overthrow of the Old Court, something of the same ambivalence that we have observed in the basic Holmesian approach to judicial review seems to be present. On the one hand, there is opposition to the Old Court on political or philosophical grounds, in terms of objections to the particular policies that the reigning majority on the Court is implementing; this type of opposition, however, necessarily rests on the basic premise that the Court has the right (which it should exercise), of passing on legislation—the objection is here not to judicial activism as such but to the particular application of judicial activism (maintenance of laissez-faire) actually being made by the Old Court. On the other hand, there is the more technically based opposition which insists that the Court has no function interfering with the enactments of the legislature, whatever the nature of those enactments—the Court should adopt a hands-off policy. It may be, in this connection, that legislative poyer will be abused on individual occasions, but that is no argument against its existence.

> "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[2]

The defeat of the Old Court majority in 1937 was followed by the rapid departure of its individual supporters from the Supreme Court Bench. Within a space of four years after 1937 only Mr. Justice Roberts and Mr. Justice Stone (the latter, indeed, a consistent judicial supporter of the New Deal programme) remained out of the nine justices who had ruled on the legislative programme of Presi-

2. See Munn v. Illinois, 94 U. S. 113, 134 (1876) (opinion of the Court by Mr. Justice Waite).

dent Franklin Roosevelt; and as these justices retired their seats were filled by men who were known as supporters of the New Deal, and who indeed had frequently led the fight for the adoption of the Roosevelt programme in the political arena—Black and Byrnes as Senators, and Reed, Douglas, Murphy, and Jackson as members of the Roosevelt Administration. Even without the decisive slant given to the Court by this flood of New Deal appointments, it was quite apparent after the landslide victory of President Roosevelt in his bid for re-election in 1936 and after the *volte-face* of the Old Court majority in 1937 which followed so closely and so significantly on that victory, that the New Deal had become accepted majority opinion in the United States. However, the new majorities on the Supreme Court after 1937 proceded to follow up the overturning of the Old Court not merely by upholding the constitutionality of individual pieces of New Deal social and economic planning legislation that were challenged before it, but by developing as it were a general presumption of constitutionality in favor of enactments of the National Legislature (Congress), whatever the subject matter of those enactments. On only two occasions since 1937 have provisions of Congressional enactments been declared unconstitutional by the Supreme Court and those cases presented rather special examples of the user of national legislative power so as hardly to constitute substantial exceptions to the general rule. The major case, *United States v. Lovett*,[3] involved a rider that had been tacked on by Congress to a general appropriation bill as a rather devious device for enforcing the dismissal by the Executive of three civil servants who had been under investigation by a Congressional Committee; President Roosevelt faced with the choice in this situation of either approving the whole bill, or else vetoing it as a whole and so delaying essential wartime appropriations, adopted the former course but noted on the Act his personal view that the rider was "not only unwise and discriminatory, but unconstitutional;" it is perhaps not surprising that the Supreme Court was persuaded to vary its rule in this case, and to step in and invalidate the rider as an unconstitutional bill attainder. The remaining case[4] is of quite limited significance in so far as it has to do with a somewhat infelicitously drafted evidential presumption provision in a Federal Firearms Act.

Yet in spite of the impressive record of the Supreme Court since 1937 in upholding enactments of the National Legislature, it is true

3. United States v. Lovett, 328 U. S. 303 (1946).
4. Tot v. United States, 319 U. S. 463 (1943).

to say that the Court during that same period has been more marked in its internal disagreements than any of its predecessors. This is not the first time, of course, that there have been disagreements on the Court. The Old Court before 1937 was, after all, in terms of the subject matter for which its members voted, split two-ways, with a conservative majority and a liberal minority. The difference between the Old Court and the New Court lies first of all in the nature of the disagreements, with the present Court (as revealed in its practice in opinion-writing) a Court not merely of frequent and sometimes multiple dissenting opinions but of multiple and diverging concurring (that is, majority) opinions too. Speaking metaphorically, an English-type two-party system on the Court before 1937 has now given way to a French multiple-party system in the 1940's and 1950's. The second basic difference between the Old Court and the New is in the area of subject matter in which the internal disagreements on the Court occur—where the Court before 1937 was concerned above all with rights of private property supposedly guaranteed by the Constitution, the Court today is concerned with the rights of man or personal liberty and the disagreements within the New Court's ranks also mark differing degrees of judical tolerance toward legislative and executive action on the part of the States as distinct from the National Government. On the technical side, the disagreement is reflected, in part at least, in a perpetuation of the Holmesian dilemma—judicial self-restraint as opposed to currently revived claims of the need for a policy of judicial activism, though this time with a rather different content than was the case with the pre-1937 Court majority formula. This latter judicial position is most prominently identified today with Mr. Justice Black and Mr. Justice Douglas (and before their recent deaths, Justices Murphy and Rutledge); it claims to derive from Holmes' position as a Liberal judge—as a symbol (for present generations at least), of Liberal thought in the United States. It would, to this extent, identify Holmes' opposition to the Old Court majority less with his technical challenge that the Old Court was usurping the functions of the legislature and acting in effect as a "super-legislature," than with a postulated objection by Holmes to the social and economic values that the Old Court majority was actually implementing in its decisions, the thesis that the Old Court majority was basing its rulings, as Holmes so strikingly expressed it in his *Lochner* case dissent, "upon an economic theory which a large part of the country does not entertain."[5] This latter conception of Holmes as a judicial

5. Lochner v. New York, 198 U. S. 45, 75 (1905).

activist, and in such capacity as the Liberal dissenter on a reactionary Court, claims strength from Holmes' opinions in free speech cases, including his enunciation of the famous "clear and present danger" test as a means of balancing the constitutional guarantee of free speech against countervailing claims of national security.[6] It would trace this Liberal tradition as seen to be established by Holmes, also in the judicial opinions of his colleague and friend Brandeis, in part too in the opinions of Mr. Justice Cardozo, and coming more nearly to contemporary events in the opinions of Harlan Stone who was first of all an Associate Justice of the Supreme Court in the period 1925-1941, and then Chief Justice in the crucial period 1941-1946 when the internal conflicts on the New Court first became marked. As applied by the two leading Liberals on the Court today, Black and Douglas, judicial activism would imply that the Court should assume a watch-dog role to ensure full compliance with the letter and the spirit of the Bill of Rights in the Constitution. Not merely will legislative action that impinges on the area of political and civil rights be cut down and the constitutional guarantees of freedom of speech and religion, of fair criminal procedure, and of equal rights for racial minorities be preserved against legislative invasion; but the Court will take the initiative to ensure that the actual administration and application of National and State laws conforms fully to the spirit of the Bill of Rights. So keen indeed is the scrutiny which the two main activists of the present day, Black and Douglas, apply to the administration of justice by the individual States that at times it seems almost true to say that these judges pursue the States sword in hand. As one further aspect of judicial activism today, reference should be made to an important and distinctive contribution made by Chief Justice Stone to modern American constitutional law. In a judicial opinion written by him in 1938, Stone suggested by way of *obiter dictum* only (and indeed in the form of a footnote to the opinion)[7] that perhaps there might be occasion for departing from the normal presumption of constitutionality for legislation in cases where the action in question by the legislature involved a restriction or curtailment of the ordinary political processes. For the presumption of constitutionality is posited, after all, on the notion that the legislature, and not the Court, represents the people—that is majority will; and that the normal working of the political processes can "ordinarily be expected to bring about the repeal of undesirable

6. See Schenck v. United States, 249 U. S. 47, 52 (1919) (opinion of the Court by Mr. Justice Holmes).

7. United States v. Carolene Products Co., 304 U. S. 144, 152 n. 4 (1938).

legislation." However, if the legislature, through, for example, manipulation of the electrical laws or impeding of public discussion prevents the political processes from operating freely, then the essential premise from which the presumption of constitutionality is derived—the notion of a representative majority—can hardly be said to be present.

Stone's Political Process concept seemed to afford, for his own purposes, something of a solution to the Holmesian dilemma—how to reconcile deference to popular will as expressed through legislative majorities with the desire of judges from time to time to intervene to correct what they might choose to regard as legislative abuses. The Political Process concept thus originated as a special exception to the general judicial approach after 1937 of a presumption of constitutionality in favour of legislative action. As a special category of exceptions, it is clear that the Political Process concept would be somewhat limited in its area of potential application, covering essentially electoral matters and probably too questions of free speech—this latter notion however shading off into the contemporary concept of the Free Speech guarantee in the Constitution occupying a "preferred position."[8] Yet it represented the first doctrinal challenge to the new judicial orthodoxy after 1937 —the presumption of constitutionality—and as such marked the first formal step towards the development of judicial activism among the members of the present Court. But the judicial activists of today go beyond Stone's modest concept. The presumption of constitutionality may remain so far as enactments of the National Legislature are concerned, but no more than this.[9] Wherever issues of political and civil rights are concerned, then laws passed by the State (as distinct from the National) legislatures, the application and administration of those State laws, and even the administration of Na-

8. See, *e.g.*, Kovacs v. Cooper, 336 U. S. 77, 88 (1949) (opinion by Mr. Justice Reed). But the "preferred position" concept of the Free Speech guarantee has been sharply criticised by Frankfurter, J. as a

> "phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity." *Id.* at 90 (concurring opinion by Mr. Justice Frankfurter).

See also Dennis v. United States, 341 U. S. 494, 539 (1951) (concurring opinion by Mr. Justice Frankfurter):

> "Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province."

9. Compare Holmes' remark:

> "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." Holmes, Collected Legal Papers 295-296 (1920).

tional laws, will be subjected to the most rigorous judicial scrutiny.

The principal intellectual opposition to judicial activism on the present Court is afforded by Mr. Justice Frankfurter. Mr. Justice Frankfurter rests firmly on the first head of the Holmesian approach, judicial self-restraint; and at the same time he challenges the claim of the judicial activists that Holmes is their intellectual progenitor. Being closest of all the members of the present Court in terms of personal associations, to Mr. Justice Holmes, Mr. Justice Frankfurter can perhaps claim to speak with some added authority on the Master's inherent philosophic attitudes. But Frankfurter would also buttress his denial of the judicial activists' link with Holmes by recourse to the Holmes' decisions themselves; and indeed a careful examination of Holmes' decisions in the free speech area at least, would suggest that like his colleague Brandeis[10] his approach to judicial review was characterized by a conscious and sustained rejection of judicial sentimentality, an intellectual attitude befitting a sceptic and relativist (as the current Holmes-revisionist school would imply is the case with Holmes, anyway), but certainly not a liberal activist.[11]

But Mr. Justice Frankfurter's approach to judicial review, with its strong rejection of judicial activism, would claim to rest on more substantial ground than the probings of the Holmes-revisionists aimed at dispelling the "legend" of Holmes as the wearer of the Liberal mantle on the Court. The main doctrinal justifications of judicial self-restraint at the present day proceed from judicial acknowledgment of major limitations to the effectiveness of the Court's assuming any activist role. First is a limitation of expertise, stemming from judicial awareness that judicial review is not always a very efficient form of policy-making; judges, in terms of the highly specialized and concentrated education in law and the training in professional practice that they have undergone, are in this view manifestly not the best equipped persions for translating community values into constitutional policies, and the concept of judicial notice anyway it is said, is hardly an adequate tool for the fact-finding necessary to an informed policy choice. A realisation of the limitations on effective judicial fact-finding in constitutional cases gave rise directly to the so-called Brandeis Brief[12] involving as that

10. Compare an evaluation of the judicial philosophy of Mr. Justice Brandeis. See Freund, On Understanding the Supreme Court 66 *et seq.* (1949).

11. See generally, Jaffe, *The Judicial Universe of Mr. Justice Frankfurter,* 62 Harv. L. Rev. 357, 358 (1949).

12. As first employed by Brandeis, as counsel, in Muller v. Oregon, 208 U. S. 412 (1908).

does the direct incorporation of social and economic facts into the briefs presented to the Court by the parties; and no doubt the marked tendency in recent years, in making appointments to the Supreme Court Bench, to look for men of broad experience in public life rather than technical lawyers can be explained in part by the Executive's conclusion that informed policy-making requires intellectual qualities transcending the boundaries of strict professional competence.

A second limitation, which might be characterised as a limitation of techniques, stems from the fact that any policy-making-role of the Court must be expressed necessarily through the medium of case-law decisions. Unlike other Courts exercising Judicial Review, for example the Supreme Court of Canada, the Supreme Court of the United States does not choose to render advisory opinions. It is dependent, therefore, in its jurisdiction upon the existence of an adversary proceeding. Though the artificialities of Court-defined rules as to what is a real adversary proceeding—a case or controversy—have been somewhat ameliorated by the passage of the Federal Declaratory Judgments Act of 1934, it is still true to say that the jurisdiction of the Court in constitutional cases, being dependent on the whims of private litigants, turns on rather arbitrary, casual factors of time and circumstance. As Mr. Justice Jackson has so strikingly pointed out, the decision in the aftermath of the Great Depression as to whether the United States Treasury had power to lower the gold content of the dollar[13] was determined within the confines of a suit between private parties over a few paltry dollars.[14] And Mr. Justice Frankfurter has summed up the problem in a recent opinion:

> "Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution."[15]

It is patent that in comparison with the Legislature and the Executive, the Court lacks the flexibility in timing of announcement and also application of rules essential to a really effective policy-making role.[16]

13. See Norman v. Baltimore & Ohio Railroad Co., 294 U. S. 240 (1935).
14. See Jackson, The Struggle for Judicial Supremacy 103 (1941).
15. See Sherrer v. Sherrer, 334 U. S. 343, 365-366 (1948) (dissenting opinion by Mr. Justice Frankfurter).
16. The writer cannot accept Professor Freund's contention that the power of the Canadian Supreme Court to render Advisory Opinions and also

A third limitation may be labeled a limitation of prestige. If the Court essays an activist role it cannot avoid taking sides in the political conflicts of the age. The end product of this must be to embroil the Court in undignified partisan controversy, and there may be a risk too, as happened with the Old Court majority before 1937, of the Court itself going down with a lost political cause.

> "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies."[17]

But there are further and perhaps more basic objections to the Court's assuming a policy-making role. The so-called limitation of democracy accords with the first strain of the Holmesian conception of the judicial function. It contends that majority rule is denied in principle by judicial review, for in application judicial review means ultimately the imposition of the will of the "nine old men" on the prime representatives of the people, the legislature; the situation tends to arise inevitably, then, as indeed was the case up to the Court Revolution of 1937, that those who are no longer able to control the legislature look to the Courts to preserve their special interests. In counter to these contentions it may be pointed out, of course, that the supremacy of legislative majorities, unchallenged by the Courts, may itself deny democracy, especially where a transient legislative majority should seek to perpetuate itself by manipulation of the machinery of government established for the effectuation and determining of popular will, for example the laws governing the procedure and conduct of elections. This is a restatement of Stone's Political Process concept, of course, but it is to be noted that the Court has been notoriously inactive in this area of subject matter in recent years, justifying its general non-intervention to correct abuses in the electoral system on the affirmative ground that these are "political" questions properly outside the range of competence of the Court—the doctrine of political questions.[18] Again, and especially in a federal system as with the United States, it may be a question of which popular will, or more precisely which legislative majority, is to be deferred to. What if the majority will, as expressed in a particular State or States, runs counter to

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the comparative readiness of the High Court of Australia to concede standing to sue in constitutional cases, have any significant bearing on the relative abstractness of Canadian and Australian constitutional decisions. See Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, 53 Col. L. Rev. 597, 613 (1953).

17. Tenney v. Brandhove, 341 U. S. 367, 378 (1951) (opinion of the Court by Mr. Justice Frankfurter).

18. See *e.g.* South v. Peters, 339 U. S. 276 (1950); Colegrove v. Green, 328 U. S. 549 (1946).

over-all National will, as for example the judicial activists might say is the case in respect to civil rights, matters of public morality, and especially race relations questions? In such instances quite apart from any question of the merits of the State action involved, it may be a matter of cutting down the State legislative action in question in deference to considerations of over-riding National policy. The answer to this type of problem, of course, may be bound up also with one's essential approach to Federal government. Mr. Justice Frankfurter, for example, would appear to base his general inclination to defer to the State legislative action in these cases as much or more on Federalist considerations of the need for a balancing of National legislative powers by State-Rights claims[19] as on the more general notion of the desirability of judicial self-restraint vis-à-vis legislative majorities (whether National or State).

One final limitation has been suggested to the effectiveness of any policy of judicial activism on the part of the Supreme Court judges. Closely linked as it is to the limitation of democracy already referred to, we may perhaps identify it, for want of a better term, as a sociological limitation, being based on a judicial recognition of the socio-ethical limitations to the effectiveness of any legal action. This view, which has undertones of Mr. Justice Holmes and also of Judge Learned Hand,[20] is once again closely associated with Mr. Justice Frankfurter, and as expressed by him in the course of his writings and his legal opinions amounts to an attempted rebuttal to the judicial activists. Its central theme is the idea that a people must make their own salvation and not expect it to be served up to them by the judges:

> "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting . . . abuses."[21]

It is to be noted that this approach manifests something of a distrust in fundamental law guarantees and written Constitutions, at least where these are not rooted in general community attitudes:

> "It is highly significant that not a single constitution framed for English-speaking countries since the Fourteenth Amendment

19. See generally, Jaffe, *supra* note 11, at 381 *et seq.* It is to be noted, however, that in the recent public school segregation decision, Brown v. Board of Education of Topeka, 347 U. S. 483 (1954), Mr. Justice Frankfurter was prepared to abandon his usual deference to State action to be part of a unanimous Court ruling (against the arguments of the States of Kansas, South Carolina, Virginia, and Delaware), that segregation in public education violated the 14th Amendment to the Constitution.

20. See generally, The Spirit of Liberty, Papers and Addresses by Learned Hand (Dilliard ed. 1953). See also Cahn, *Authority and Responsibility*, 51 Col. L. Rev. 838 (1951).

21. See Tenney v. Brandhove, 341 U. S. 367, 378 (1951) (opinion of the Court by Mr. Justice Frankfurter).

> has embodied its provisions. And one would indeed be lacking in a sense of humour to suggest that life, liberty or property is not amply protected in Canada, Australia, South Africa."[22]

It is also an attitude strongly reminiscent of the writings of the great English constitutional lawyer, Professor A. V. Dicey, which reveal consistently a marked distaste for the paper Constitutions of Continental Europe together with a belief that the best guarantee of personal liberties is the self-restraint of legislative majorities operating in a Sovereign, legally uncontrolled Parliament, as in the United Kingdom.[23] This is not the only example of an English influence in Frankfurter's approach. His approach to the States, which we have already examined, with its consciously Federalist impulse, bespeaks a conviction, which had undertones of his close friend Laski's liberal pluralism, as well, of course, (and more obviously) of Jeffersonian Democracy, that in territorial dispersion of authority lies the best insurance of group autonomy and the maintenance of personal liberty. Frankfurter's own personal background as, in his own words, "[o]ne who belongs to the most vilified and persecuted minority in history . . . ,"[24] must make him alive to the merits of a pluralist approach to governmental organisation, even though he may not always appear consistent in applying such a principle.[25] And dominating everything is Frankfurter's belief that American pre-occupation with questions of legality involves the equation of constitutionality with morality and the destruction of any sense of popular responsibility for the Constitution and its working:

> "It must never be forgotten that our constant preoccupation with the constitutionality of legislation rather than its wisdom tends to preoccupation of the the American mind with a false value . . . the tendency of focusing attention on constitutionality is to make constitutionality synonymous with propriety; to regard a law as all right so long as it is 'constitutional.' Such an attitude is a great enemy of liberalism. . . . Only a persistent positive translation of the liberal faith into the thoughts and acts of

22. *The Red Terror of Judicial Reform* (Editorial), 40 New Republic 110, 113 (October 1, 1924). See also Law and Politics 16 (MacLeish ed. 1939). There is perhaps today a certain irony in the reference to South Africa—see McWhinney, *Race Relations and the Courts in the Union of South Africa*, 32 Can. B. Rev. 44 (1954).

23. See, for example, Dicey, The Law of the Constitution (1885); Dicey, Law and Public Opinion in England during the Nineteenth Century (2d ed. 1914). It is clear that Mr. Justice Frankfurter is well acquainted with Dicey's writings—compare Law and Politics 7 (MacLeish ed. 1939).

24. See West Virginia State Board of Education v. Barnette, 319 U. S. 624, 646 (1943) (dissenting opinion by Mr. Justice Frankfurter). These are the opening words of Mr. Justice Frankfurter's opinion.

25. See, *e.g.*, *ibid.*

the community is the real reliance against the unabated temptation to straitjacket the human mind."[26]

The Frankfurterian rebuttal to the judicial activists rests, as we have stated, on the notion of judicial self-restraint. It does not involve however, in Frankfurter's case, a mere mechanical application of the presumption of constitutionality to legislative enactments. Judicial self-restraint, according to Frankfurter, is predicated on the rule of reason — unless the Court can say that reasonable men could not possibly have passed the legislation in question, the Court irrespective of its own views on the legislation, must uphold it. In respect to national legislation, Frankfurter has gone along with his colleagues on the Court in over-ruling challenges to the legislation. In respect to State legislation, the problem as Frankfurter sees it is a rather different one — how to apply the rule of reason criterion in individual cases without yielding to purely subjective considerations and thus falling backwards into judicial activism. To eliminate the subjective elements from judicial decision-making Frankfurter resorts at times to proceduralisms and purports to rest his decision on technical rules; more frequently he seems to base his hopes for objective certainty on what would amount to the formulae for legal relativism. To determine such matters as whether a State can, consistently with the First Amendment free speech guarantee, ban motion pictures on the score of "sacrilege," he resorts to history, lexicographic and general;[27] to determine whether a State may, consistently with Due Process of Law as guaranteed by the 14th Amendment to the Constitution, utilise in a criminal prosecution evidence obtained through an illegal search and seizure, he turns to comparative law and makes a survey of practice in the forty-eight States and also in "the United Kingdom and the British Commonwealth of Nations";[28] or he may look for the meaning of Due Process of Law, as guaranteed by the 14th Amendment, in the "canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ."[29] The difficulty with all these tests

26. *Can the Supreme Court Guarantee Toleration* (Editorial), 43 New Republic 85, 86-87 (June 17, 1925). See also Law and Politics 197 (MacLeish ed. 1939). These remarks are substantially repeated by Frankfurter, J. in his specially concurring opinion in Dennis v. United States, 341 U. S. 494, 555-556 (1951), though without any formal acknowledgment of their original source in the New Republic Editorial.

27. See Burstyn v. Wilson, 343 U. S. 495, 507 (1952) (concurring opinion by Mr. Justice Frankfurter).

28. See Wolf v. Colorado, 338 U. S. 25, 29-30, 39 (Appendix to opinion, Table J.) (1949) (opinion of the Court by Mr. Justice Frankfurter).

29. See Adamson v. California, 332 U. S. 46, 67 (1947) (concurring opinion by Mr. Justice Frankfurter).

seems clear. "History", as the *Adamson* Case indicates,[30] may yield different answers to different judges or may be otherwise quite inconclusive as the examination of the background history of the 14th Amendment in the recent public school segregation cases clearly showed.[31] Recourse to comparative law in search of examples to be applied by American judges, apart from the risk that the examples taken may be selective rather than representative, demands first a demonstration of a certain identity of political, social, and economic conditions before the examples from comparative law can really be regarded as relevant to American experience. Frankfurter seems to assume too easily such an identity of political, social and economic conditions on the part of the United States and the "English-speaking" world; though for one who is acquainted, as he is, with Dean Roscoe Pound's teachings, this is hardly sound sociological jurisprudence.[32] It may be, rather, that by virtue of the homogeneity

30. Adamson v. California, *supra*. Note the conflict manifested in the opinions of Frankfurter, J., concurring specially at p. 59; and of Black, J., dissenting at p. 68. See also the detailed historical Appendix attached by Black, J. to his opinion. *Id.* at 92-123.

31. See Brown v. Board of Education of Topeka, 347 U. S. 483, 489-490 (1954) (opinion of the Court by Mr. Chief Justice Warren):

> "Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868). It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . .
>
> "An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time (footnote omitted). In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. . . . As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."

32. See, *e.g., Pound, Social Control Through Law* (1942). Professor Cahn has commented pungently on this same tendency in Supreme Court and Supreme Law 63 (Cahn ed. 1954):

> "It may appear to you as somewhat peculiar that, in a country which contains such a high proportion of individuals who do not share Anglo-Saxon origins, the only history regarded as relevant, not merely for the purpose of defining specific terms like 'jury' but likewise for the purpose of defining basic national traditions, should be Anglo-Saxon history. It is assumed that the Volksgeist the Supreme Court is supposed to consult is Anglo-Saxon."

33. Compare in this regard Mr. Justice Frankfurter's reliance in his dissenting opinion in Sherrer v. Sherrer, 334 U. S. 343, 356 (1948), on the practice of "the English-speaking world" and also on a "consensus of opinion among English-speaking courts the world over" as to the "domicile" necessary to base jurisdiction in divorce proceedings, as authority for the State of Massachusetts' refusal to accord "full faith and credit" in terms of the Constitution to a divorce decree granted by a Court in the State of Florida.

of their racial and social composition, the "English-speaking" countries (apparently the United Kingdom and the Commonwealth Countries), have frequently much less meaningful lessons to offer the United States than other countries which may more nearly approach the United States' cultural diversity.[33] And what, for example, of the "canons of decency and fairness which express the notions of justice of English-speaking peoples" and for that matter, of the "concept of ordered liberty"?[34] Concepts such as these, indeed, are so vaguely and loosely worded as to allow almost any content to be poured into them.[35] It seems almost that Mr. Justice Frankfurter, in questing after absolute purity from subjective factors, has left the door open for what Holmes himself has called the "inarticulate major premise."[36] Judicial self-restraint insofar as, in the application of the rule of reason, it involves the resort to legal relativism, seems to run the risk of too frequently reducing to an unconscious and therefore (since the weighing of policy alternatives requisite to an informed decision is necessarily absent) rather inefficient form of policy-making.

We have seen that the philosophic division in terms of judicial self-restraint versus judicial activism on the present Court stems from the Holmesian dilemma bequeathed to the Court in the 1930's. The emotional intensity of the division has been heightened during the Cold War period — for the current crisis, in multiplying the occasions for the Court's being called on to balance constitutional guarantees of free speech with considerations of national security, increases, on the one hand, the demands of the judicial activists that the Court should step in to preserve Constitutional liberties, and on the other hand, the arguments of the advocates of self-restraint (the judicial passivists, as we may now call them) that the delicate balancing of interests involved in these cases is properly conducted by the legislature, and that the Court must not interfere with the legislature's resolution of the conflict. The dilemma is by no means yet resolved though since the deaths of Murphy and Rutledge have reduced the ranks of the avowed activists on the Court to only two (Black and Douglas), out of a total of nine justices, the balance on

34. The phrase seems to have been first used by Cardozo, J. for the Court, in Palko v. Connecticut, 302 U. S. 319, 325 (1937); it was adopted by Frankfurter, J., for the Court in Rochin v. California, 342 U. S. 165, 169 (1952).

35. Stone, The Province and Function of Law 185 *et seq.* (1946), classifies judicial concepts such as these under "The Legal Category of Indeterminate Reference."

36. The phrase stems from Mr. Justice Holmes' dissenting opinion in Lochner v. New York, 198 U. S. 45, 74 (1905).

the Court must be regarded as having been tilted rather strongly now towards the passivists. Yet the judicial scales have oscillated violently before this. Judicial self-restraint was a reaction, after all, to a strong Court before 1937 that many people felt had overstepped the limits of wisdom and discretion. The presumption of constitutionality applied by the New Court after 1937 to National legislation was for practical purposes, a switch from a strong Court (in National matters, that is) to a strong Executive or President, the legislative programmes in question all being, of course, sponsored and initiated ultimately by the Executive (President Roosevelt). Now the recent Steel Case[37] has seen both the activists and the passivists on the Court united against the conception of a strong Executive[38] and throwing the weight of the Court toward a strong legislature (Congress), as the end of the cycle of the last generation —from strong Court to strong President to strong Congress. The difference this time is that in the Steel Case the activists and the passivists each voiced their objections to President Truman's seizure action in terms of balance of powers arguments officially subsumed under the constitutional principle of separation of powers between the various arms of government. It is possible in this regard to speculate that we are now to have a new pragmatic solution to problems of the relationship *inter se* of the three main arms of government, in the Cold War period, in terms of a neo-Montesquieuan conception of an avoiding of concentration of a totality or preponderance of constitutional powers in any one set of hands as the means of preserving a liberal democratic society. Does this mean that both judicial self-restraint and judicial activism have by this time served their purpose as rationalisations of differing judicial conceptions of the proper role of Courts in exercising judicial review? The strikingly novel agreement that the judges have shown in the recent public school segregation decision,[39] not merely in returning a unanimous vote on the general principle of ending segregation in public education, but also in refraining from their privilege of writing individual opinions and instead adherng as one to Chief Justice Warren's Opinion of the Court, at least suggests that the polar extremes of doctrinal attitudes among the various judges that characterised the Stone and the Vinson Courts, will be maintained much less dogmatically in the future.

37. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952).

38. Compare, for example, the opinions of Black, J., *id.* at 582 (opinion of the Court); Frankfurter, J ., *id.* at 593 (concurring opinion); Douglas, J., *id.* at 629 (concurring opinion).

39. Brown v. Board of Education of Topeka, 347 U. S. 483 (1954).