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Oakes, Role of Courts in Government Today THE ROLE OF COURTS IN GOVERNMENT TODAY

JAMES L. OAKES*

THE SUBJECT of this Arthur E. Whittimore Lecture was chosen with the late Justice Whittimore's own remarkable career at the Bar and on the Bench in mind. Justice Whittimore participated at the highest levels of government in the Commonwealth of Massachusetts, and was involved in the highest levels of education and conservation in the State of Vermont. This lecture is inspired by the contributions he made to us all, not the least of which was maintaining the courage of his convictions as to what was right and what was wrong, especially during the days of Senator Joseph McCarthy, a time when all too many others lost this courage. He recognized that there is, for those who labor in the fields of the law, a happy middle road between the ideal and the possible and a need for adjustment and compromise which, however, upon confrontation, must yield to the preservation of individual human rights. Arthur Whittimore has been a person who has exemplified for me the best in American law and among American lawyers.

The role of the courts in government today was specifically chosen with the word government in mind. It is a topic that would not even be discussed in England, for there the courts have no governmental, social or political role to speak of. They interpret and apply "the law" as laid down by Parliament or the doctrines of the common law to new fact situations.¹ They assiduously avoid political decision-making; businessmen use arbitration and most administrative law operates outside the courts of law.² The judges in England do not and cannot declare an Act of Parliament "unconstitutional." Not only is there no written constitution or Bill of Rights against which to compare the Parliamentary statute, but it is unthinkable in the British system that the courts would usurp powers traditionally belonging to Parliament. Custom or convention and political and social pressure perform the functions we assign to legal controls.

Here in the United States, however, in addition to deciding private lawsuits between individuals, the courts are involved in a whole range of political, social and governmental activities: the operation of school systems, directing employment of teachers and busing of students³ and sometimes necessitating local taxation to cover its cost;⁴ we see the courts establishing

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¹ See B. ABEL-SMITH & R. STEVENS, *THE LAWYERS AND THE COURTS* 1-4 (1967).

² *Id.*

³ *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), *rehearing denied*, 403 U.S. 912 (1971).

⁴ *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

rules for the conduct of jails,⁵ mental hospitals,⁶ and even, in some respects, the military services.⁷ American courts intervene to keep municipalities from restricting pamphleteers or parades,⁸ to keep states from criminalizing abortions⁹ or the sale of birth control devices,¹⁰ from discharging tenured professors,¹¹ from retaining legislatures that do not follow the principle of one-man/one-vote,¹² from refusing welfare aid where there is a "man in the house,"¹³ or even from lowering flags to half-mast on Good Friday.¹⁴ The courts also prevent the Federal Congress and the Executive Branch from depriving individuals of fundamental rights, such as the right to travel between the states¹⁵ and the right to be free from unreasonable searches and seizures.¹⁶ Why are the courts dealing with these matters which are policy-making, seemingly legislative in nature? What are the historical and philosophical reasons that they do so? Are there limits beyond which they should not tread? Have they gone too far? This lecture will address these questions; the answers you may draw for yourself.

It is elementary constitutional law that American courts have the power of judicial review.¹⁷ While a case can be made (and is still sometimes made by critics of too much judicial intervention) against the courts' power¹⁸ to review federal actions against the Constitution or state actions contrary to the Federal Constitution or statutes, the principle of judicial review is so well ingrained in the American system that it need not be reargued here.¹⁹

⁵ *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *district court ordered to retain juris.*, 505 F.2d 194 (8th Cir. 1974).

⁶ *Wyatt v. Stickney*, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1305 (5th Cir. 1974).

⁷ *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976).

⁸ *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹ *McSherry v. City of St. Paul*, 202 Minn. 102, 277 N.W. 541 (1938).

¹² *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹³ *King v. Smith*, 392 U.S. 309, 334 (1968).

¹⁴ *Brown v. Thomson*, 46 U.S.L.W. 3600 (U.S. Mar. 24, 1978) (order denying stay).

¹⁵ *United States v. Guest*, 383 U.S. 745 (1966).

¹⁶ *United States v. United States District Court*, 407 U.S. 297 (1972) (electronic surveillance in internal security matters); *see also Bivens v. Six Unknown Named Agents*, 403 U.S. 348 (1971).

¹⁷ *See generally* L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* 1-42 (1967).

¹⁸ Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

¹⁹ Frankfurter, *Mr. Justice Cardozo and Public Law*, 52 HARV. L. REV. 440, 443 (1939). Professor Thayer's historical scholarship on this subject, 7 HARV. L. REV. at 129-42 while accurate as far as it goes, does not contain the reference to original sources that permeates, and hence gives greater depth and impact to, B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) [hereinafter cited as BAILYN], and G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969) [hereinafter cited as WOOD]. Both Bailyn and Wood give more historical support to the proposition that the Founding Fathers truly contemplated review of legislative and executive acts by The Third Branch of Government, particularly inso-

Rather I shall examine the principal arguments counseling caution and restraint in the exercise of the power, even though some of these arguments seem to run against the very existence of the power, rather than its over-exercise. I shall also touch upon the forces operating, even where courts recognize the need for restraint, to cast them even further into the vortex that is American government. What has happened is that, rather unwillingly (at least with much reluctance and considerable foot-dragging) the American courts have to a large extent become the crucible in which irresolvable political conflicts are solved, sometimes soon, sometimes long, after the fact.

The courts are what I have called the pressure-cooker of American democracy; the speed of cooking varies with the heat and contents of the cooker. It is nothing new that in this country the courts are resorted to for the purpose of resolving social and political disputes. As early as 1835 Alexis de Tocqueville remarked, "Scarcely any potential question arises in the United States that is not resolved, sooner or later, into a judicial question."²⁰

Professor James Bradley Thayer made the main arguments counseling restraint in judicial review at the turn of the century.²¹ Thayer's arguments have been restated many times since and by many of the legal greats — in different contexts to be sure — Oliver Wendell Holmes, Felix Frankfurter and Learned Hand among the judges, Alexander Bickel and lately Raoul Berger among the law teachers, and at one time Henry Steele Commager among the historians, to name a very few. The arguments derive from some of Jefferson's and perhaps go back to Bishop Hoadley's oft-quoted 1717 dictum, "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver . . ." ²² Any exercise or over-exercise of judicial review is undemocratic, the principal argument runs, since it constitutes reliance on Platonic Guardians, who are politically irresponsible, rather than on the will of the people (or more accurately the will of the majority) as expressed by the people's representatives in Congress and the state legislatures. An overly activist judiciary, the arguments continue, weakens the other branches of government in that it encourages in them irresponsibility; it creates political apathy in the voting public. It also weakens the judiciary itself because it creates public disrespect for the

far as individual rights were concerned. See Bailyn, *id.* at 176-97; Wood, *id.* at 292-93, 409-10, 453-63, and especially 536-43.

²⁰ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Bradley ed. 1960).

²¹ J. THAYER, *JOHN MARSHALL* 103-10 (1901). Professor Thayer conceived judicial review as a "conservative influence," which at the time he was writing it unquestionable was.

²² Bishop Hoadley's Sermon preached before the King, March 31, 1717, on "The Nature of the Kingdom or Church of Christ" (London: James Knapton, 1717). See Gray, *Some Definitions and Questions in Jurisprudence*, 6 *HARV. L. REV.* 21, 33 n.2, (1892).

courts, since any political decisionmaking necessarily subjects the judiciary to the rancor of those on the losing side.

These basic arguments have been pursued much more sophisticatedly than they are stated here;²³ they sometimes distinguish between review of federal and review of state actions, for example.²⁴ The improper or pro-business interventions by the courts before 1937 are typically used as specific illustrations of the abuse of the power of judicial review. You will recall that the pre-New Deal Court struck down state maximum hour and child labor legislation,²⁵ as well as the AAA, the NRA and other New Deal measures.²⁶ Even the school desegregation decisions of the Warren Court in the 1950's, starting with *Brown v. Board of Education*,²⁷ are argued by some advocates of restraint to be outside the "original understanding" of the framers of the fourteenth amendment.²⁸ The principal abortion decision of the Burger Court in the 1970's is said to be a return to natural law thinking,²⁹ a philosophy which has become disrespected in this century, but which was influential in the origins of American thought.³⁰ Government by judiciary has been roundly condemned as a dangerous exercise of power by a "super-legislature."³¹ And, perhaps partially in response to these arguments, the Supreme Court itself has within the last few years taken a few steps to restrict access to the courts,³² to narrow the courts' role³³ and to cut back on the substance of individual rights, particularly in, but not only in, the criminal law area.³⁴

The criticism of the courts' activist role has a certain rationally abstract and historically concrete basis, even if it is inconclusive. In the abstract, there is much to be said for Judge Learned Hand's semi-mystical and oft-quoted statement that in the final analysis the spirit of liberty "lies in the hearts of men and women; when it dies there, no constitution, no law, no

²³ Compare Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), with Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

²⁴ See Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1194 (1977) [hereinafter cited as Sandalow].

²⁵ *Lochner v. New York*, 198 U.S. 45 (1905); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²⁶ *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²⁷ 347 U.S. 483 (1954).

²⁸ Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

²⁹ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

³⁰ See BAILYN, *supra* note 19, at 187-88; WOOD, *supra* note 19, at 293, 301.

³¹ See R. BERGER, *GOVERNMENT BY JUDICIARY* generally (1977).

³² E.g., *Warth v. Seldin*, 422 U.S. 490 (1975) see Oakes, "A Plague of Lawyers?": *Law and the Public Interest*, 2 VT. L. REV. 1, 17-23 (1977).

³³ E.g., *Stone v. Powell*, 428 U.S. 465 (1976) (*habeas corpus*).

³⁴ E.g., *Davis v. United States*, 411 U.S. 233 (1973) (federal grand jury); *Washington v. Davis*, 426 U.S. 229 (1977) (intent required in segregation cases).

court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."³⁵ In the concrete, judicial intervention has in the past sometimes been counter-productive of individual liberty. The late Nineteenth Century decisions commencing with the *Slaughterhouse Cases*,³⁶ which have left the Privilege and Immunities Clause of the fourteenth amendment a dead letter to this day, and extending to *Plessy v. Ferguson*,³⁷ which upheld Southern Jim Crow laws, served to emasculate the civil rights acts and amendments: as Leonard Levy has said, "Congress and the states could not prohibit racial segregation but the states could compel it."³⁸ I have mentioned the judicial intervention of the pre-New Deal Court which was simply preservative of the economic status quo, consisting of free-wheeling laissez-faire capitalism. Thus there is some historical justification for Professor Thayer's critique and his 1908 perspective of the role of judicial review as a "conservative influence."³⁹

Justices Holmes and Brandeis, whom Thayer influenced, were, however, the constitutional liberals of their day. They were willing to give both Congress and the state legislatures freer rein, at least in economic matters, than most of their fellow justices. Holmes, it will be remembered, wrote that the fourteenth amendment did not enact Mr. Herbert Spencer's social statics.⁴⁰ But it is a seeming paradox that their staunchest follower, Felix Frankfurter, and in turn Frankfurter's followers, have been the latter day "strict constructionists" after whom President Nixon wanted to make over the Supreme Court. It is ironic, but understandable, I think, that Nixon both in statement and Supreme Court appointment was a constitutional follower of Frankfurter, although perhaps an unwitting one. What happened to make Frankfurter a conservative? For that is what he became, even though he had been one of the key architects of the New Deal (at least its chief recruiting officer), and surely the New Deal was liberal-progressive in aim and scope. How could a follower of Brandeis and Holmes be a constitutional conservative?

The answer to this seeming conundrum is insightful. The answer, I

³⁵ L. HAND, *THE SPIRIT OF LIBERTY* 190 (I. Dillard ed. 1952). John Adams in another context had said on February 13, 1818, in a letter to Hezekiah Niles:

But what do we mean by the American Revolution. Do we mean the American war? The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments, of their duties and obligations . . . this radical change in the principles, opinions, sentiments and affections was the real American Revolution.

³⁶ 83 U.S. (16 Wall.) 36 (1873).

³⁷ 163 U.S. 537 (1896).

³⁸ L. Levy, *Judicial Review, History & Democracy* in *JUDICIAL REVIEW AND THE SUPREME COURT* 35 (1967).

³⁹ See note 21 *supra*.

⁴⁰ Lochner, *New York, 198 U.S. 45, 75* (1905) (Holmes, J., dissenting).

suggest, is in two parts. The first lies in the logic of the separation of powers clause—freer rein to the legislative branch—the will of the majority, either on a local, state or federal level, especially when coupled with a very healthy respect for the system of federalism, makes for a minimal amount of judicial intervention in economic matters.⁴¹ Logically, the Frankfurter school would argue, why should not the same freer rein be given to the will of the majority in personal matters, social decisionmaking, noneconomic affairs?⁴² Frankfurter (and the large segment of thought then and now for which he stands as the archetype of judicial restraint) for the most part⁴³ stuck to the logic of the thing, the unified, symmetrical view that the judiciary must restrain itself in all matters. That is where Frankfurter parted company with Brandeis and Holmes, each of whom had a vision of government that recognized its abuses of power, so that they could, for example, hold against its wire-tapping.⁴⁴

It is thus not only the logic of the separation of powers clause that made Frankfurter ultimately the archetype judicial conservative but also an unwillingness to interpret the broad concepts of the Constitution as affording limits upon and defining boundaries as to the distribution of governmental power in our society. When the Frankfurter school's thesis is carried to its own logical conclusion, individualism and individual rights, whether in the form of distribution or criminal justice, must yield when the greater good for the greater number is at stake. The Constitution is read then not to incorporate the teachings of Mr. Herbert Spencer but so as to incorporate the teachings of Jeremy Bentham and the Utilitarians. The logic of the Whig doctrine of strict separation of powers makes the Court so interpreting it consistent within itself. It is an inviting secure position for judges quite reminiscent of the English way of judicial life, to which Frankfurter constantly alluded. It draws support from some views of the early Federalists Adams and Hamilton, and from early Jefferson and early James Madison. Madison's perceptive Federalist Paper No. 10, after all, was to the effect that the very pluralism of American society would serve to protect minority needs. He considered a Bill of Rights unnecessary until the harsh political realities of obtaining ratification and some intensive reanalysis of the issues changed his position.

And now we can see where the Frankfurter school parted with the

⁴¹ Except when the national interest is truly preemptive of the given state's.

⁴² Of course, there are some economically-oriented analysts who can measure personal matters in cost—benefit ratios.

⁴³ It would do Justice Frankfurter a grave injustice if his views, say in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting), where he summoned up the restraint called for by the dissent in the AAA case, *United States v. Butler*, 297 U.S. 1, 79 (1935) (Stone, J., dissenting) in a flag-salute case, were thought to be his sole legacy. His opinion in *Rochin v. California*, 342 U.S. 165 (1952), reflecting a "shock the conscience" test for due process tends quite the other way.

⁴⁴ *Olmstead v. United States*, 277 U.S. 438, 469, 471 (1928) (dissenting opinions).

more absolute activists Black and Douglas and with the moderates Stone and later Brennan and others. Stone was the first to recognize the difference, or better to point out a dichotomy, between property or economic rights on the one hand and personal, individual rights on the other. This was in his remarkable footnote 4 to the *Carolene Products* decision,⁴⁵ perhaps the most famous footnote in Supreme Court history, certainly the most productive of constitutional philosophizing. There Justice Stone suggested that there "may be narrower scope for operation of the presumption of constitutionality" when (1) legislation appears on its face to be within specific prohibitions of the Constitution such as some of the Bill of Rights or (2) when courts are called upon to determine the validity "of statutes directed at particular religious . . . or national . . . or racial minorities." In such cases, he explained, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Due process could permit greater judicial intervention to protect individual rights. What a whole train of new thinking and thinkers this helped to spark! The role of the American judiciary was not simply that of the English judiciary, for our government was not a parliamentary one. The judiciary rather was an active third branch protecting minorities and even individuals against legislative invasions of constitutional precepts instigated by the "major voice of the community."⁴⁶ Eugene Rostow, Charles Black and a host of others began to explore the democratic nature of judicial review.⁴⁷ And among many other causative forces post-World War II demands and expectations of the largest "discrete minority" in the United States helped to precipitate this new thinking. With a boost from one of the more original thinkers in Supreme Court history, Mr. Justice Jackson,⁴⁸ real content was given to the long neglected Equal Protection Clause of the fourteenth amendment. What had been a constitutional dead letter for seventy-five years since its adoption became alive, and in a two-tiered analysis very reminiscent of the dichotomy in the *Carolene* footnote, the new wave of constitutional thinking gained momentum in the Fifties and reached high tide in the Sixties. The all too fresh memories of the Rise of the Third Reich, jostled if not jolted by the excesses of Senator Joseph Mc-

⁴⁵ 304 U.S. 144, 152-53 (1938).

⁴⁶ [I]t would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

THE FEDERALIST No. 78 (A. Hamilton) 494 (John Harvard Library ed. 1961).

⁴⁷ Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952) [hereinafter cited as Rostow]; C. BLACK, *THE PEOPLE AND THE COURT* (1960).

⁴⁸ *Railway Express Agency v. New York City*, 336 U.S. 106, 111-13 (1949) (concurring opinion). See TEN BROEK, *EQUAL UNDER LAW* (rev. ed. 1965).

Carthy and his followers, resulted in the Court's strengthening the protections afforded by giving real content to the substantive provisions of Amendments IV-VIII. A "criminal law revolution" first extended protections to individuals accused of crime by the federal government and then to persons accused by the states, by reading those protections into the Due Process Clause of the fourteenth amendment. At the same time the Freedom of Speech and Press Clauses of the first amendment were given greater content. Then, through an overdue reinterpretation, I would say recognition, of Section 1983 of the Civil Rights Act of 1871, the act originally enacted to help protect Southern Negroes against the ravages of the Ku Klux Klan, individuals were given the right to protect their own personal liberties by suing those other than municipalities who "under color of state law" would deprive them of those liberties.⁴⁹ One commentator has said that what was a "cautious suggestion" by Justice Stone in the *Carolene Products* footnote had "ripened into an attitude."⁵⁰ Women, students, servicemen, rebelling against the built-in discriminations of decades or even centuries past, took their cases to the courts. Prison inmates, mental patients, juveniles, all, it seems, had "constitutional rights."⁵¹ Teachers, aliens, consumers, all came forward. It seemed for a while that even the poor for that reason alone might have rights under law—at least indigents could get lawyers if they were accused of crime⁵² or a hearing before their welfare payments were to be terminated.⁵³ Evolving over a period of about three decades, actually thirty-two years after *Carolene Products*, there seemed to come a recognition that no person's freedom may be diminished without diminishing the freedom of all.⁵⁴ We had in a word "the Warren Court." Its critics would say that not only was there judicial solicitude for "particular religious . . . or national . . . or racial minorities" but there was "an open-ended invitation to extend similar protections to an ill-defined assortment of groups that have failed to attain their objectives through the political process."⁵⁵

Can the Frankfurter school's restrained view of the courts' role really satisfy the needs of a rapidly changing, complex, pluralistic society? I suggest that it cannot in all cases, and often has not in the past. The first reason is, of course, that power in the nature of things becomes inequitably

⁴⁹ 42 U.S.C. § 1983 derives from Section 1 of the Civil Rights Act of 1871, Chap. 22, 17 Stat. 13. See *Monroe v. Pape*, 365 U.S. 167 (1961).

⁵⁰ Sandalow, *supra* note 24.

⁵¹ N. DORSEN, *THE RIGHTS OF AMERICANS* (1971); 1 N. DORSEN, P. BENDER, B. NEUBONE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1976), are the two best collections of cases.

⁵² *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁵³ *Goldberg v. Kelley*, 397 U.S. 254 (1970).

⁵⁴ See John Donne, *DEVOTIONS UPON EMERGENT OCCASIONS XVII*, quoted in, B. EVANS, *DICTIONARY OF QUOTATIONS* 352 (1968).

⁵⁵ Sandalow, *supra* note 24, at 1162.

distributed. "[H]ighly organized, wealthy, and motivated groups skilled in the art of insider politics,"⁵⁶ as Judge Skelly Wright has put it, have largely prevailed in the real world of pressure groups, lobbying, campaign contributions, and the abiding necessity of congressional or executive reelection. The weak, the unorganized, the poor, the unmotivated have had their expectations raised, but have not achieved them. It is much harder to pass a bill correcting an imbalance than it is to defeat such a bill because it takes the concurrence of both Houses and the Executive to pass, and the disagreement of only one to defeat.

When Congress or the Executive Branch or an individual state or states have permitted too great an imbalance to last for too long a time, they have invited the judicial branch to step in. Legislatively created imbalances - like the Jim Crow laws - invite judicial intervention.

But legislative inaction also makes for judicial intervention, some of that intervention is not always wise perhaps, but some of it is necessary to remedy long-standing but neglected abuse. Neither the states nor the federal government did anything about segregation in the schools for decades; *Brown v. Board of Education* was, in a sense, therefore inevitable. When *Brown's* requirement of desegregation "with all deliberate speed,"⁵⁷ was resisted in the states, it was necessary for the courts to move again. In very real ways we have a new South and a president who would not have been considered, let alone elected, had he not been receptive to desegregation.

There are many other examples: the courts have intervened where there has been a legislative vacuum to protect individuals and individual rights against the majority will. Many discriminations against women either built into the laws or permitted to continue without legislative action have found judicial disapproval.⁵⁸ I have mentioned others' rights that have been trampled upon without public action: shocking conditions in the prisons of overcrowding, even the use of torture, a total reliance on a spirit of authoritarianism to break an individual's will, have in turn created through the courts a whole body of law giving the inmates rights to communicate with counsel or court, to legal counsel, to minimum standards in terms of prison conditions, and so on.⁵⁹ It was only fifteen years ago that states could prohibit married couples from obtaining contraceptive devices and punish doctors who furnished them, but the courts have now held other-

⁵⁶ Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 789 (1971).

⁵⁷ *Brown v. Board of Educ.*, 349 U.S. 294 (1955). This was the second *Brown* opinion, and it dealt with relief. The first and more famous was 346 U.S. 483 (1954).

⁵⁸ See Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977).

⁵⁹ See note 29 *supra*.

wise.⁶⁰ When the Brattleboro, Vermont High School tennis team was prohibited from playing their team sport because their hair was too long, relief was not to be found with the athletic department or the local school board, but only in the federal court.⁶¹ Are any of these rights too trivial? I will not multiply examples of judicial intervention that have been necessary in any socially realistic view of the situation and have been accepted with considerable public satisfaction, even relief, at the ultimate result.

What is it that these examples tend to prove about judicial intervention or judicial review? That it may indeed be democratic and is so if we consider that we are a representative democracy and that individuals and minorities have rights as such which stand as high in the balance, occasionally even higher, than the majority will, particularly when that will is expressed in uncertain ways or by unrepresentative bodies or after a real lack of legislative consideration. Judicial review may indeed give content, as it has in the field of environmental law, to congressional enactments or administrative agency rules and regulations.⁶² Judicial intervention may be educative to the public, alerting it not only to the issues but to the needs of the minorities involved, as in the case of mental patients or consumers. If public opinion polls are meaningful, the public disrespect for the courts evident in the "Impeach Earl Warren" signs in the South in the Fifties has become throughout the nation a respect that outweighs that afforded to Congress and from time to time the Executive Branch. This has been so because the federal judges — despite their lifetime tenures — have been politically responsible; they have taken oaths to support the Constitution, they come from regions and backgrounds that do give them a constituency (the lower federal judges are usually recommended for appointment by United States Senators); even lifetimes are short, short enough to create a genuine sense of responsibility among many. And why, Eugene Rostow has asked, need all officials in a democracy be elected?⁶³

In short, the arguments against judicial intervention made by Professor Thayer at the turn of the century do not necessarily have the same force today, at least if the intervention of the courts is to exert a liberal influence, that is to say, to exert influence on behalf of the insular and discrete minorities, the weak and the disorganized and to protect their rights, or, put another way, if the intervention is not purely utilitarian but progressively individualistic, bringing a measure of justice to the small as well as the great. The antifederalists who proposed and fought

⁶⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965). (overruling Mr. Justice Frankfurter's *Poe v. Ullman*, 367 U.S. 497 (1961)).

⁶¹ See *Dostert v. Berthold Pub. School Dist.*, 391 F. Supp. 876 (D.N.D. 1976).

⁶² Compare *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

for the Bill of Rights,⁶⁴ who gave the people a charter of rights and assigned the courts as guardians of those rights,⁶⁵ were aware of the danger of too much power in the hands of legislative majorities and the need for its check in the judiciary. Were they right?

I have attempted to draw for you the basic arguments for and against judicial activism and to trace a little of the constitutional history of the role of the courts in American government today. You have observed, I am sure, that not only are there diverse views within the judiciary itself but in the views of commentators and philosophers as to what that role should be, views which I could only touch upon in the broad scope of this subject matter. You have observed that there are times and tides of activism and restraint — you can see the present-day Supreme Court's retreating to the latter — coinciding perhaps with the tides of social and economic change, as well as the political response thereto.⁶⁶ And you have seen a little of the interaction between the branches and arms of government, of which the federal judiciary is but one. I have scarcely hinted at the added complexities imposed by the federal system. I have only suggested the incredibly dynamic, evolving nature of this problem of society and law with which we have been dealing.

But I trust that I have left you with the thought that there is midst all this pluralism a dualistic view of the judicial role: one side cautioning restraint, one promoting activism, a dualistic view that can be traced directly back to the creation of the American Republic, to the asymmetrical thinking particularly of Jefferson and Madison, and beyond them to the ideological origins of our founding forebears. Jefferson expressed it in two sentences in a 1789 letter to Madison, while the latter was coming around to favor and ultimately to introduce in Congress the Bill of Rights:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.⁶⁷

The dualistic view — “if rendered independent” and if “kept strictly to their own department” — is one that is meaningful today, as we seek better to apply our rather marvelously-tuned system of government to the rapidly changing problems we face. Synthesis consists of antitheses. The Constitu-

⁶⁴ See WOOD, *supra* note 19, at 541-74.

⁶⁵ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92-94 (1921).

⁶⁶ F. DUNNE, *MR. DOOLEY ON THE CHOICE OF LAW* 52 (Bander ed. 1963):

[“]But there's wan thing I'm sure about.”

“What's that?” asked Mr. Hennessy.

“That is,” said Mr. Dooley, “no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' illiction returns.”

⁶⁷ Letter of March 15, 1789, in *THE PORTABLE THOMAS JEFFERSON* 438 (Viking Press 1975).

tion, I suggest, is like poems and geodesic domes in the sense that it "maintains its shape and stasis by a complex of forces pulling against each other"⁶⁸ — a tension. One of the peculiar aspects of its genius, I submit, is that it permits of the resolution of the conflict between majority rule and minority or individual rights in particular cases where that tension has broken down even while in general the conflicting forces continue to pull against each other in a constant state of tension that is for the most part creative.

⁶⁸ See J. JEROME, *THE POET AND THE POEM* (1974).