THE HISTORICAL SIGNIFICANCE OF JUDGE LEARNED HAND: What Endures and Why?

Edward A. Purcell, Jr.*

The 100th anniversary of Judge Learned Hand's opinion in *Masses Publishing Co. v. Patten*[1] invites us to look back on its author's long career and to consider his contributions to American law and his significance in the nation's history. Spanning more than fifty years from the presidency of William Howard Taft to the presidency of John F. Kennedy, Hand's judicial career presents an exceptionally rich subject for such reflection.

INTRODUCTION

As Gerald Gunther's massive biography[2] and Constance Jordan's edition of his letters[3] make clear, Learned Hand's life merits scholarly attention for any number of reasons. An unusual personal psychology, friendships with major historical figures, social and political involvements, extensive law reform efforts, highly regarded essays and speeches, insightful and controversial ideas about democracy, and valuable contemporaneous commentaries on the people and events of his day all warrant general interest.[4] In revealing ways Hand's life and activities track the course of the nation's history through the first half of the twentieth century. Richard Posner surely betrayed the narrowest of professional, and perhaps judicial,

* Joseph Solomon Distinguished Professor, New York Law School. I thank the participants in this symposium for comments on a shorter oral presentation and my colleagues at the New York Law School Faculty Colloquium for comments on an earlier and much longer version of this paper. I also thank Jethro K. Lieberman for his careful reading, Michael McCarthy for his invaluable help in obtaining source material, and research assistants Hyun-Soo Lim at the Yale Law School and Daniel Martorelli at New York Law School for their research assistance.

1. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).
2. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).
3. REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND: 1897–1961 (Constance Jordan ed., 2013).
4. As Kathryn Griffith showed more than forty years ago, for example, Hand deserves serious attention as a theorist of democracy. *See* KATHRYN GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 119, 201–27 (1973).

viewpoints when he declared that it "is only by virtue of his work as a lower-court judge that Hand merits a biography."[5]

Still, Posner was right in pointing to Hand's judicial career as the most obvious, and surely most widely recognized, basis for his claim to historical importance.[6] From 1909 to 1924 Hand served as a judge in the United States District Court for the Southern District of New York, and from 1924 to his death in 1961 he was a member of the United States Court of Appeals for the Second Circuit. On the latter bench, he served for twelve years as Chief Judge and for the last ten years as a "retired" judge who nonetheless continued to hear cases.[7] Most important, with near unanimity his peers proclaimed him one of America's greatest judges.[8] "Learned Hand's opinions are the best Federal Court opinions that come before us for review," Justice Louis D. Brandeis wrote.[9] Judge Charles E. Wyzanski declared that Hand was "the master craftsman of our calling,"[10] and Judge Henry Friendly agreed. "No oracular gifts are required," he believed, "for the prophecy that when the history of American law in the first half of this [twentieth] century comes to

---

5. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L.J. 511, 532 (1994) (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)). Posner continued: "and neither his neurotic personality nor his constitutional view are either terribly interesting or explain his judicial performance." *Id.*

6. "The most important ingredient of Hand's mounting renown was clearly his work on the bench." GUNTHER, *supra* note 2, at 345.

7. *Id.* at 503, 639.

8. "During the last twenty-five years of his life [Hand] was universally acclaimed as America's greatest living judge." THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND 1 (Hershel Shanks ed., 1968). "[S]o long as we shall continue to conceive of law not as the disguised manifestation of mere will but as the effort of reason to discover justice, the body of his opinions will be an enduring source of truth-seeking and illumination." Felix Frankfurter, *Judge Learned Hand*, 60 HARV. L. REV. 325, 326 (1947). Charles Alan Wright concluded similarly that a "major reason for the high regard in which Judge Hand was and is held is the quality of his opinions." Charles Alan Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 MICH. L. REV. 1841, 1845 (1995). Richard Posner offers empirical support suggesting the exceptionally high regard in which the profession held Hand's opinions. *See* Posner, *supra* note 5, app. at 534–40 (showing that Hand was more frequently cited, often by a large margin, than his colleagues on the Second Circuit who were, themselves, judges generally held in high regard). For a rare and somewhat qualified view, see MARVIN SCHICK, LEARNED HAND'S COURT 155–57, 187–91 (1970) (questioning the grounds for the consensus about Hand's "greatness" though seeming to acknowledge some degree of "greatness").

9. GUNTHER, *supra* note 2, at 272.

10. Charles E. Wyzanski, Jr., *Judge Learned Hand's Contributions to Public Law*, 60 HARV. L. REV. 348, 348 (1947). "Hand's most significant contribution to the [Second Circuit] was his application of the philosophy of American pragmatism to the art of judging." James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 393 (1995).

be written, four Judges will tower above the rest—Holmes, Brandeis, Cardozo and Learned Hand."[11]

I do not wish to challenge such a nearly universal judgment, especially one supported by so many august figures, but I will offer a mild—if perhaps controversial—qualification: Hand's numerous accomplishments on the bench do not stand as his strongest claim to enduring historical significance. By "enduring historical significance," I should hasten to add, I mean a continuing and substantial relevance to the concerns of later generations. On that basis, I suggest that as extensive and admirable as Hand's achievements on the bench may be, they are—perhaps sadly and even unfairly—too obscure, transient, technical, and narrowly limited in their appeal to command broad and enduring significance.[12]

Instead, I propose that Hand's enduring historical significance rests on two other grounds: his First Amendment jurisprudence expressed in *Masses* and *United States v. Dennis*[13] and his constitutional jurisprudence set forth in his book *The Bill of Rights*.[14] Those are well-known achievements of recognized

---

11. Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOK. L. REV. 6, 6 (1962); *accord* RONALD DWORKIN, LAW'S EMPIRE 1 (1986) (Hand was "one of America's best and most famous judges"); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 141–42 (1990) (Hand was one of the great judges in American history and was, in particular, better than another "great" judge, Justice Benjamin N. Cardozo). Such tributes would have pleased Hand immensely, for above all he prized what he termed the "job" of judging and the art of fine judicial craftsmanship. Late in life he declared that "the joy of craftsmanship" was "the most precious and dependable of our satisfactions." LEARNED HAND, *At Fourscore*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 192, 198 (Irving Dilliard ed., Vintage Books 1959) [hereinafter HAND, *At Fourscore*]; *accord* LEARNED HAND, THE BILL OF RIGHTS 77 (1958) [hereinafter HAND, THE BILL OF RIGHTS]. "For Hand, the element of craftsmanship was the reward of serving as a judge." Oakes, *supra* note 10, at 391–92. In a 1957 interview Hand declared that "I think the real salvation of mankind rests in what I like to call the craftsman spirit . . . . Doing something well, something that's in himself, that he's succeeded, by God, in putting there." GUNTHER, *supra* note 2, at 25.

12. Hand's career was confined to the lower federal courts where he heard barely a handful of constitutional cases and relatively few others of national importance. *See* Posner, *supra* note 5, at 515. Most of a judge's time, he wrote, "consists of activity which seems to have small value and small bearing on the greater issues of the community in which he lives." LEARNED HAND, *To Yale Law Graduates*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 65, 65. Lawyers and judges were merely "workers in the hive; we shall not be missed, nor shall we be able to point at the end to any perceptible contribution." *Id.* at 69. For a brief itemization of Hand's most influential opinions on criminal, common law, and statutory issues, see Posner, *supra* note 5, at 513–14, and for a fuller, though highly selective, treatment of Hand's judicial efforts, see GUNTHER, *supra* note 2, chs. 3, 7, 12.

13. 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

14. HAND, THE BILL OF RIGHTS, *supra* note 11.

importance,[15] of course, but I suggest that their broadest and most truly enduring significance rests on grounds not commonly attributed to them, grounds that are fundamental to—and deeply problematic for—American constitutionalism. Those achievements exemplify the theoretically awkward and challenging facts of change and subjectivity in even the most careful, admired, and "timeless" of constitutional thinking. Suggesting the unavoidable nature of change and subjectivity supports the claim that establishing "a value free-mode of constitutional adjudication" is something that simply "can't be done."[16]

My argument proceeds in four stages. Part I introduces *Masses* and *The Bill of Rights*, noting the sound, if quite different, reasons why they have been justly regarded as important.[17] Part II considers and challenges Hand's seemingly well-established reputation as a constitutional theorist whose ideas about free speech and judicial review remained consistent over his whole career. It argues, to the contrary, that his constitutional thinking evolved in response to developments in his own life and the affairs of the nation and, more particularly, that as the years passed his constitutional thinking became narrower, more rigid, and in some ways harmful to an understanding of American constitutionalism. Parts III and IV explore the ways that the narrowing and rigidification of his constitutional thinking altered his ideas about both free speech and judicial review. Part III argues that his opinion in *Dennis* was inconsistent with the free speech values he proclaimed in *Masses* and that—in contrast to his innovative opinion in *Masses*—it restricted speech rights more sharply than Supreme Court precedents required. It shows that Hand's constitutional thinking had changed significantly in the three-plus decades between the two cases. Part IV argues that *The Bill of Rights*—in spite of its closely reasoned and ostensibly timeless pose—was a time-

15. Any discussion of Hand's career and significance must inevitably address *Dennis* and *The Bill of Rights*, Charles Alan Wright explained, because they are "two things in the record that have troubled even some of Hand's greatest admirers." Wright, *supra* note 8, at 1849.

16. Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 142 (1981). "For those who would choose a constitutional theory, ultimate questions of political morality therefore cannot be avoided." Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 579 (1999); *accord* Arthur S. Miller & Ronald H. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960).

17. Posner would largely disagree. Regarding *Masses*, he noted fairly that it was "unclear" whether Hand's opinion had any influence on the Supreme Court in its famous free speech decision in *Brandenberg v. Ohio*, 395 U.S. 444 (1969). Posner, *supra* note 5, at 516. In *The Bill of Rights*, his judgment was harsh. "Were Hand to be judged by his contributions to constitutional law, he would be considered derivative, undistinguished, and out of the mainstream." *Id.* at 515. Ultimately Posner "would rate Hand's contribution to constitutional thought slight." *Id.* at 520. My argument for the importance of Hand's constitutional jurisprudence is based on grounds different from those Posner applied.

bound product suffused with arbitrary and subjective judgments. It shows that both historical context and personal values underwrote Hand's evolving constitutional thinking.

In conclusion, I suggest—given Hand's reputation for both judicial "greatness" and jurisprudential consistency—that the broadest reason for the enduring significance of his constitutional contributions is that they illustrate the pervasive and unavoidable impact of context, change, and personal values on constitutional thinking.

I. THE RECOGNIZED SIGNIFICANCE OF HAND'S CONSTITUTIONAL JURISPRUDENCE

A. Masses

Upon American entry into World War I Congress passed the Espionage Act of 1917, prompting the Postmaster General to order *The Masses*, a small radical magazine, banned from the mails. The magazine responded by asking the Southern District of New York to enjoin the order, and Hand received the assignment.[18] In *Masses Publishing Co. v. Patten*[19] he issued an opinion declaring free speech "a hard-bought acquisition in the fight for freedom," stressing that its suppression was "contrary to the use and wont of our people,"[20] and granting the magazine's requested injunction. Only hours later the Second Circuit stayed Hand's injunction, and four months after that it rejected his reasoning and reversed his decision on the merits.[21] Two years later, when the Supreme Court heard its first appeals involving prosecutions under the act, the Justices ignored Hand's views on free speech, rejected defendants' First Amendment defense, and upheld their convictions.[22]

Although the courts rejected Hand's *Masses* opinion immediately and for decades thereafter, it eventually and rightfully became "celebrated" as a

18. GUNTHER, *supra* note 2, at 151–52.

19. 244 F. 535 (S.D.N.Y.), *rev'd,* 246 F. 24 (2d Cir. 1917). Defendant Thomas G. Patten was the postmaster of New York City, and under orders from Postmaster General Albert S. Burleson he issued the order banning *The Masses* from the mail. *See* James Weinstein, *The Story of* Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet*, *in* FIRST AMENDMENT STORIES 61, 67–68 (Richard W. Garnett & Andrew Koppelman eds., 2012).

20. *Masses*, 244 F. at 540.

21. *See* Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917). On the case and Hand's role in it, see Weinstein, *supra* note 19, at 66–73; GUNTHER, *supra* note 2, at 151–61.

22. *See* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

landmark in First Amendment jurisprudence.[23] First, it constituted an act of considerable courage, a fact that Hand fully realized at the time and for which he suffered professionally.[24] American entry into the war unleashed both governmental campaigns and widespread private abuses against those suspected of "disloyalty" on even the most trivial and silly grounds, and the federal courts by and large failed to protect the hysteria's thousands of victims.[25] *Masses* and a bare handful of other similar decisions could not stem the wartime fervor, but they came to symbolize one of the noblest functions that the federal courts are supposed to play.[26]

Second, Hand's opinion was also an act of intellectual boldness. Although it rested on statutory grounds, it nonetheless challenged the established law that allowed the government to punish speech that had a "bad tendency,"[27] and it proposed a rigorous new limitation—one that seemed to imply a constitutional foundation—on governmental power to suppress political dissent.[28] Words could not be punished for any "bad tendency" they might

---

23. MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 114 (1991).

24. Hand told his wife that "I may have to suffer" for what he knew would be an unpopular decision, GUNTHER, *supra* note 2, at 155, and the consequent hostile reaction contributed to his initial failure to receive a promotion to the Second Circuit in 1917 and likely to his failure to be nominated for the Supreme Court in 1922. *Id.* at 152, 270–71, 274–75.

25. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920, at 255–61 (1997); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 153–58 (2004). "[F]ederal judges within and outside the Second Circuit, anxious to demonstrate their loyalty and to aid the war effort, were 'highly immoderate' in passing on Espionage Act cases and in imposing sentences." JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT: A HISTORY OF THE UNITED STATES COURTS IN NEW YORK, CONNECTICUT AND VERMONT 115 (1987). On government suppression efforts, see, for example, WILLIAM H. THOMAS JR., UNSAFE FOR DEMOCRACY: WORLD WAR I AND THE U.S. JUSTICE DEPARTMENT'S COVERT CAMPAIGN TO SUPPRESS DISSENT (2008); HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES: 1917–1921 (1960).

26. *See* RABBAN, *supra* note 25, at 261–69; STONE, *supra* note 25, at 160–70. The few other relatively protective decisions "came too late and too infrequently to make any difference in most cases." RABBAN, *supra* note 25, at 269. Weinstein paints Hand's position most starkly: "Standing virtually alone among the federal judiciary against this onslaught on civil liberties during World War I was Learned Hand." Weinstein, *supra* note 19, at 62.

27. For the dominance of the "bad tendency" test in both federal and state courts at the time, see RABBAN, *supra* note 25, at 132–47.

28. Hand based his decision in *Masses* on a narrow construction of the Espionage Act, but he adopted that narrow construction on the ground that it was required by principle and practice that seemed of constitutional stature. To limit the statute, for example, he invoked "the normal assumption of democratic government," and "the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority." Masses Publ'g Co. v. United States, 244 F. 535, 539–540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). Hand understood his opinion as setting out "a constitutional standard." GUNTHER, *supra* note 2, at 158.

have, Hand maintained, but only if they expressly advocated the commission of an unlawful act.[29] Thus, his opinion added a critical new idea to the developing law of free speech, the principle that words should be punishable only if they constituted a direct "incitement" to actual law breaking.[30]

Third, Hand's ideas about the importance of free speech gradually, if unevenly, seeped into the legal profession's First Amendment thinking. It inspired important scholars and free speech advocates, and it most likely helped inform the evolving views of Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis whose subsequent First Amendment opinions became classic statements elaborating the free speech values that Hand's opinion outlined.[31] Eventually, something close to Hand's "incitement" test worked its way into the nation's constitutional law. In 1969 the Court adopted a version of it in *Brandenburg v. Ohio*, its towering and highly protective free speech decision.[32] There, the Court adopted a double limitation on government power to suppress or punish speech, joining a kind of "incitement" test to a particularly demanding idea of "clear and present danger."[33]

---

29. *E.g.*, Words would not be protected if they had "no purport but to counsel the violation of law." *Masses*, 244 F. at 540. Hand's "incitement" test had been suggested earlier by others, particularly Professor Ernst Freund of the University of Chicago. *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA 217, 268 (2008). When Hand wrote *Masses* he was apparently unaware of Freund's earlier work. *See* Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Ernst Freund (May 7, 1919), *in* REASON AND IMAGINATION, *supra* note 3, at 74.

30. *See, e.g.*, RABBAN, *supra* note 25, at 264–65. Subsequently, Hand explained that he wanted to articulate a test that would avoid difficult fact issues and jury questions, developing "a qualitative formula" that was "hard, conventional, difficult to evade." *Id.* at 333–34. He also described it as "an absolute and objective test" applied to the meaning of language. GUNTHER, *supra* note 2, at 168.

31. For the initial example of Hand's influence, see ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920) and DONALD L. SMITH, ZECHARIAH CHAFEE JR.: DEFENDER OF LIBERTY AND LAW 22–35 (1986). For a critical view of Chafee's scholarship on the point, see, for example, GRABER, *supra* note 23, at ch. 4. On the process of "seeping," see, for example, RABBAN, *supra* note 25, at chs. 7–8; GUNTHER, *supra* note 2, at 161–70; Weinstein, *supra* note 19, at 78–94; Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1. For Holmes, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Homes, J., dissenting) (Brandeis, J., joining.). For Brandeis, see, for example, *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

32. Brandenburg v. Ohio, 395 U.S. 444 (1969). Hand's *Masses* opinion "was vindicated by the Supreme Court" in *Brandenberg.* GUNTHER, *supra* note 2, at 603. Weinstein qualifies Gunther's judgment, noting certain differences between *Masses* and *Brandenberg*. *See* Weinstein, *supra* note 19, at 78–81.

33. *See, e.g.*, STONE, *supra* note 25, at 522–24; Weinstein, *supra* note 19, at 79–81; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments from History*, 27 STAN. L. REV. 719, 754–55 (1975).

B. The Bill of Rights

Some thirty years later, in 1958, Hand gave the prestigious Holmes Lectures at the Harvard Law School which were immediately published under the title *The Bill of Rights*. There, Hand issued sweeping constitutional prescriptions calling for extreme limitations on the power of judicial review.[34] The book embraced majoritarian principles, affirmed the policy-making supremacy of the political branches, denied that judicial review had any constitutional foundation, and warned incessantly of the dangers of judicial subjectivity in construing vague constitutional provisions, particularly the Bill of Rights and the Fourteenth Amendment.[35] Courts should invalidate the acts of the other levels and branches of government, he argued, only as a last resort—only when judicial intervention was necessary to prevent the failure of the constitutional enterprise itself.[36] Applying any standard broader than the minimalist one he advanced, Hand maintained, would turn the Court into a "third legislative chamber"[37] fully empowered to reconsider and redo legislative policy judgments.[38]

Although immediate reaction to the book was generally negative,[39] it has nonetheless merited enduring significance for three reasons. One was that it

---

34. GUNTHER, *supra* note 2, at 652–62.

35. HAND, THE BILL OF RIGHTS, *supra* note 11.

36. *See id.* at 14–15, 29–30, 56. "The test of the proper scope of judicial review of a statute being, as I have said, only to set the ambit of what is legislation and not to redress any abuses in the exercise of power." *Id.* at 37; *accord id.* at 66. "Judge Hand's prescription of judicial restraint is very strong medicine. Indeed, it is the therapy of nearly total abstinence." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 48 (1962).

37. HAND, THE BILL OF RIGHTS, *supra* note 11, at 42, 55, 68–69. *See id.* at 70.

38. "[I]f what I have said is true of those choices that any statute imposes, I do not see how a court can invalidate them without putting itself in the same position and declaring whether the legislature's substitute is what the court would have coined to meet the occasion." HAND, THE BILL OF RIGHTS, *supra* note 11, at 39. A court's choice would be "an authentic exercise of the same process that produced the statute itself." *Id.* The "appraisal of values," he insisted, was "the essence of legislation." *Id.* at 70.

39. Reviews "proved almost universally negative." GUNTHER, *supra* note 2, at 662. Posner, for example, called the book "a bust," dismissed it as "derivative, undistinguished, and out of the mainstream," and concluded that "I would rate Hand's contribution to constitutional thought slight." Posner, *supra* note 5, at 515, 520. The principal exception at the time of its publication came in the welcoming response of Southern segregationists and their allies who immediately approved Hand's minimalist theory of judicial review and his rejection of the Court's reasoning in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See id.* at 518. They invoked his name in support of their efforts to discredit the Court and retaliate against its desegregation decisions by cutting its jurisdiction. *See* GUNTHER, *supra* note 2, at 659–62. In subsequent letters to the Senate, Hand carefully but clearly separated himself from their effort. *See id.* At the end of the day, "Hand stood, then, virtually alone." *Id.* at 664.

embodied the mature, probing, and carefully articulated views of an experienced and brilliant legal mind addressing a central issue in American constitutionalism. Such an effort, by its nature, commanded attention.

Second, the book presented a truly distinctive theory of judicial review, a defense of extreme judicial minimalism that was deftly structured and elegantly argued. It stands as a kind of monument in American constitutional thinking, carrying on and extending a tradition of constitutional argument over the proper role of the judiciary that began with the founding and that will continue as long as the Constitution itself remains in force.[40]

Third, *The Bill of Rights* not only resonated with the political controversies of its day[41] but, far more important, had a broader impact on subsequent constitutional thinking. From Herbert Wechsler and Alexander Bickel through Ronald Dworkin and John Hart Ely to their many successors in the present day, Hand's book forced American constitutionalists to grapple with its extreme challenge to judicial review and to seek convincing ways to justify the practice and identify its proper scope.[42] Unlike *Masses*, *The Bill of Rights* enlisted few converts, and its major impact came, ironically, in spurring developments that strengthened rather than weakened the judicial power that Hand sought to severely limit.[43]

---

40. Hand will "be remembered and honored for restructuring the dialogue about restraint and activism in judicial review so that both must be defended on the basis of the fundamental assumptions about the American democratic system." GRIFFITH, *supra* note 4, at 232.

41. *See* GUNTHER, *supra* note 2, at 659–62.

42. *See* BICKEL, *supra* note 36, at 46–49; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 140 (1978); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1–7 (1959). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

43. In recent decades the Supreme Court has become ever more confident in asserting its authority as "the ultimate expositor of the constitutional text." United States v. Morrison, 529 U.S. 598, 616 n.7 (2000). That, together with the increasingly "conservative" nature of its decisions, has spurred new criticisms and attacks on the Court's power of judicial review, though most fall short of Hand's extreme position. *See* James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 216–218 (2000) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1343 (2005). For a review of much of the post-Hand literature on theories of judicial review, see, for example, ELY, *supra* note 42, at 43–72; Brian Boynton, Note, Democracy and Distrust *After Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 398–414 (2000).

II. RE-APPROACHING HAND'S CONSTITUTIONAL JURISPRUDENCE: THE UNAVOIDABLE SWAY OF HISTORY

A. The Legalistic View: Hand as a Consistent Constitutional Theorist

Understandably, constitutional lawyers and theorists tend to focus on the logic of legal arguments, and this often leads them to minimize or ignore both historical context and the fact of change. Useful for purposes of theoretical clarity and formal legal advocacy, such a practice comes with costs. In Hand's case, those costs have been substantial.

Commonly, legal scholars studying Hand have stressed the consistent elements in his jurisprudence.[44] Gunther, for example, highlighted the basic consistencies that he saw running through Hand's career: his skeptical philosophical outlook, commitments to individual liberty and popular government, advocacy and practice of "judicial restraint," opposition to judicial review, and belief in free speech and intellectual freedom.[45] Though acknowledging that Hand's "doubts about judicial activism had increased during his last years,"[46] Gunther nonetheless emphasized Hand's overriding consistency. "As a judge and as a private citizen committed to freedom of expression," he declared, "Hand clearly had not changed in the four decades since the *Masses* ruling."[47]

Many others have issued similar verdicts. *The Bill of Rights* was "grounded on a half-century of advocacy of judicial restraint," Marvin Schick explained, and Hand's views in the book "should not have come as a surprise to anyone familiar with his decisions and extrajudicial writings."[48] The views expressed in the book, another scholar declared, "simply—and fairly—represent the unwavering consistency of Hand's views from law school until

---

44. In contrast, a few historians have noted the importance of context and change in Hand's career. *See, e.g.*, Morton J. Horwitz, *Commentary*, 70 N.Y.U. L. REV. 714, 714 (1995); Jack Van Doren, *Is Jurisprudence Politics by Other Means? The Case of Learned Hand*, 33 NEW ENG. L. REV. 1, 5 (1998).

45. Gunther does recognize some changes in Hand's thinking over the years. *See, e.g.*, GUNTHER, *supra* note 2, at 384 (loss of "reformist zeal" in 1920s); *id.* at 444 (evolving attitude toward New Deal); *id.* at 664 (increased doubts about judicial review).

46. *Id.* at 664. "Hand's provocative message of 1958 did resemble, even if it exceeded, those he had articulated earlier." *Id.* at 665.

47. *Id.* at 664. "Hostility to judges' tendency to pour their personal preferences into vague constitutional phrases was Hand's most consistent, deep-seated feeling about courts . . . ." *Id.*

48. SCHICK, *supra* note 8, at 156. Hand was "a more consistent proponent of judicial restraint than Frankfurter." *Id.* at 161.

his death."[49] The "views Hand expressed in *The Bill of Rights*," Posner maintained, "were the same ones he had expressed throughout his professional life."[50] Such statements suggest that time and context made little or no difference to Hand and his constitutional thinking.

B. A Historical View: The Fact of Change

Although Hand may have been unusually consistent in articulating certain views and values, he nonetheless did change over time, and those changes helped reorient his constitutional thinking in significant ways. Although generalized ideas about judicial restraint, the values of free speech, and the policy-making authority of the political branches appeared repeatedly in his writings, the meaning and implications of those ideas shifted over the decades, taking on new and different shadings as Hand and the times changed.[51] Mere consistency in repeating certain words, phrases, and generalized ideas reveals little about a speaker's specific understanding of their meanings and applications in different real-world contexts.

From a young small-town lawyer unconcerned with politics in the 1890s,[52] Hand turned into an enthusiastic Progressive activist in the first decade of the twentieth century. With a new and "passionate commitment" to reform,[53] he became a close friend and ally of the Progressive theorist Herbert Croly, whom he admired as "noble" because of his intense and inspiring "sense of justice."[54] He sharply criticized the Supreme Court's conservative decisions and—while remaining on the federal bench—worked closely with Theodore Roosevelt in his 1912 "Bull Moose" campaign for president. Then the following year—still remaining a federal judge—he stood for election as the Progressive Party's candidate for chief judge of the New York Court of Appeals. In 1914 he helped Croly found *The New Republic* and thereafter wrote regularly for Progressivism's new national voice. In an article in 1915,

---

49. Marc M. Arkin, *The Tenth Justice*, NEW CRITERION, May 1994, at 79 (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)).

50. Posner, *supra* note 5, at 519.

51. The same words and phrases can often take on numerous and quite different meanings for different people, especially those living at different times and in different places. *See, e.g.*, JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE 1 (2013).

52. "Hand's alienation from politics began to fade when the Spanish-American War broke out in 1898." GUNTHER, *supra* note 2, at 62.

53. *Id.* at 190.

54. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 88 (Harlan B. Phillips ed., 1960).

for example, he denounced the Court's anti-Progressive decisions in particularly blunt terms. "Are we not finally driven to the conclusion that such decisions come from the prejudices of that economic class to which all the justices belong," he asked.[55] In private, he was even harsher, referring to the anti-Progressive Justices as "mastiffs" and condemning their decisions as an "accumulated mass of rubbish."[56] "For once in his life," Gunther concluded, "he was a true believer."[57]

Most revealing, in 1916 Hand published an essay in the *Harvard Law Review* entitled *The Speech of Justice* where he gave voice to his vaulting Progressive hopes.[58] The "pious traditionalism of the law" is valuable, he declared, but

> with this piety must go a taste for courageous experiment . . . . It is in this aspect that the profession of the law is in danger of failing in times like our own when deep changes are taking place in the convictions of men . . . . Only as an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present, can [lawyers] continue in the course of the ancestors whom they revere.[59]

On that bold Progressive premise, Hand rejected judicial passivity and accepted the need for a focused and reform-oriented judicial activism. "Conservative political opinion" held that the judge was only a "passive interpreter" of the law, he declared, but that "opinion is not disinterested."[60] It was, rather, "framed for the most part for the protection of property and for

---

55. GUNTHER, *supra* note 2, at 249.

56. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y, to Felix Frankfurter (Oct. 9, 1914), *in* REASON AND IMAGINATION, *supra* note 3, at 54–55. Hand scorned "the fatuous floundering of the Supreme Court," calling its opinions "pitiable" and its work a "solemn farce." *Id.* at 54–55; *accord* GUNTHER, *supra* note 2, at 248.

57. GUNTHER, *supra* note 2, at 190. For Hand in the Progressive Era, see *id.* at 190–269.

58. *See* Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916). It is important to note that at the time he wrote *The Speech of Justice* Hand, born in 1872, was in his mid-forties. His commitment to Progressivism and judicial activism, then, was hardly a product of either naive youth or political inexperience.

59. LEARNED HAND, *The Speech of Justice*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 10, 12–13 [hereinafter HAND, *The Speech of Justice*]. Hand's comments seemed to echo some of the criticisms he had made in *The New Republic* the previous year. There he charged that the conservative Court had "failed to comprehend the hopes and aspirations of hundreds of thousands of living men" and shown their "blindness to the beliefs of certainly half the economists of the present time." GUNTHER, *supra* note 2, at 249 (quoting Learned Hand, *Normal Inequalities of Fortune*, NEW REPUBLIC, Feb. 6, 1915, at 5).

60. HAND, *The Speech of Justice*, *supra* note 59, at 10.

the prevention of thoroughgoing social regulation."[61] Although judges had only limited power, he asserted, "the judge has, by custom, his own proper representative character as a complementary organ of the social will."[62] Consequently, he continued, the judge also has a "free power by interpretation to manifest the half-framed purposes of his time."[63]

Although on the bench he sought to apply existing law conscientiously, when opportunity offered he jumped to serve as the "complementary organ of the social will" that he praised.[64] In 1913 he enforced established obscenity law but went out of his way to defend a novel depicting the harsh social plight of poor young women.[65] Disdaining established law as representing "mid-Victorian" morality, he urged that it be changed "to answer to the understanding and morality of the present time."[66] The next year he took an even bolder step, construing a state statute with an expansive breadth that went significantly beyond established law and allowed an injured worker to prevail over a company's well-founded legal defense designed specifically to deny such recoveries.[67] Then, of course, he wrote *Masses*.

Indeed, as late as 1919 Hand retained a belief in the necessity and propriety of an activist judiciary. "It is of course true that any kind of judicial legislation is objectionable on the score of the limited interests which a Court can represent," he wrote to Brandeis in 1919, "yet there are wrongs which in fact legislatures cannot be brought to take an interest in, at least not until the Courts [*sic*] have acted."[68]

Although strains of Progressivism remained in Hand's thinking into the 1920s, his enthusiasm for reform—like that of so many other Progressives—began to fade rapidly after the war. By 1920 he had not only abandoned Theodore Roosevelt and the Progressive Party but had also split with Croly and his old allies at *The New Republic*. By the next year he seemed to look back on his Progressive aspirations with a sense of nostalgia and loss.[69]

---

61. *Id.* at 11.
62. *Id.*
63. *Id.*
64. *Id.*
65. *See* United States v. Kennerley, 209 F. 119, 120 (S.D.N.Y. 1913).
66. *Id.* at 120; *see* GUNTHER, *supra* note 2, at 148–51.
67. *See* Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552–53 (2d Cir. 1914) (Hand, J., sitting by designation), *cert. denied*, 235 U.S. 705 (1915); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 376–78 (1947).
68. ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 579 n.* (1946).
69. "I can have the hope that in America time may at length mitigate our fierce individualism," he told the Association of the Bar of the City of New York in 1921. GUNTHER, *supra* note 2, at 148. Future years, he continued, "may teach us the knowledge we so sorely lack

As his Progressivism withered and then disappeared, Hand's constitutional thinking began to narrow and rigidify. The process was long, complicated, and multi-factored.[70] His deep personal insecurities, painful and humiliating marriage, and continuing disappointment over the rejection of his prized *Masses* opinion stoked his personal fearfulness and instinctive deferential tendencies, while his shifting relationships with Walter Lippmann and Felix Frankfurter led him to seriously rethink some of his earlier ideas. Then a series of political developments—cynical new critiques of "public opinion," the spread of "realistic" theories of democracy, and the distressing rise of fascism in his beloved Italy and then Nazism in Germany—combined with a number of concurrent changes in his personal situation—growing recognition by the elite bar, sharpening fears about threats to the judiciary, and the satisfying but constraining reputation he was earning as a master of statutory construction—combined to accelerate the process. In 1942 his final and anguished failure to gain a seat on the Supreme Court seemed to complete the transformation.[71] By the end of World War II, Hand had essentially resigned himself to the social and political status quo and to a highly restrictive view of the courts as institutions operating in a harsh, shallow, endangered, conflict-ridden, and all-too-frail American democracy.[72]

---

that each of us must learn to realize himself more in our communal life whose formal expression is and as I believe will continue to be the law." *Id.*

70. The following paragraph is based on the analysis in Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 903–18 (1995). On the delicate and intimate subject of Hand's unusual marriage, see GUNTHER, *supra* note 2, at 77–85, 95–98, 183–89.

71. Eight years later Hand confessed his feelings about the failure in a private letter. "I can say it now without the shame that I suppose I should feel—I longed as the thing beyond all else that I craved to get a place on it." GUNTHER, *supra* note 2. at 569. Hand's letters reveal how he "was bitterly disappointed in not having had the one achievement he most wanted: his own seat on the Supreme Court." Ronald Dworkin, *Preface* to REASON AND IMAGINATION, *supra* note 3, at xi; *see* Purcell, *supra* note 70, at 914–16.

72. *See, e.g.*, LEARNED HAND, *Democracy: Its Presumptions and Realities, in* THE SPIRIT OF LIBERTY *supra* note 11, at 70, 74 [hereinafter HAND, *Democracy: Its Presumptions and Realities*]. "[M]en often answer for reasons quite alien to the issue; they seldom have anything that can truly be called an opinion." *Id.* "The common will as the official sees it, is not common at all; it is a complex of opposing forces, whose resultant has no relation to the common good . . . ." *Id.* at 75. "In any society, I submit, the aggressive and insistent will have disproportionate power," and "the stronger have always had their way." *Id.* at 76. The virtue of American democracy was that "at least it gives a bloodless measure of social forces" and provides "a means of continuity, a principle of stability." *Id.* at 76. "Nor will I forsake the faith of our fathers in democracy, however I must transmute it, and make it unlovely to their eyes . . . ." *Id.* at 77. "Liberty is so much latitude as the powerful choose to accord to the weak." LEARNED HAND, *Sources of Tolerance*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 51, 55 [hereinafter HAND, *Sources of Tolerance*]; *accord* LEARNED

The change in his thinking was express. In 1915 he denounced the conservative Supreme Court for enforcing "the prejudices of that economic class to which all the justices belong."[73] A decade later he wrote that judges "are almost inevitably drawn from the propertied class and share its assumptions. Perhaps it is on the whole better so."[74] More striking, in 1916 he had declared that the judge was "a complementary organ of the social will" and held the "free power" to implement "the half-framed purposes of his time."[75] In 1942 he declared that the "price of [the judge's] continued power must therefore be a self-denying ordinance which forbids change in what has not already become unacceptable."[76]

C. Touchstone and Milestones: Hand, Brandeis, and Thayer's "Rule of the Clear Mistake"

When Hand was in law school at Harvard, he took constitutional law from James Bradley Thayer whom he came whole-heartedly to admire. "Hand's deep convictions about the limited role of judges in curbing legislative choices," Gunther explained, were "first formed at the feet of his influential Harvard law professor James Bradley Thayer."[77] Hand identified Thayer as "the teacher who counted most with me,"[78] and he often proclaimed him his constitutional mentor and guide.[79] Over the years he repeatedly invoked his teachings to support his own ideas about judicial review.[80]

HAND, *Is There a Common Will?*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 36, 41 [hereinafter HAND, *Is There a Common Will?*].

73. GUNTHER, *supra* note 2, at 249.

74. LEARNED HAND, *Mr. Justice Holmes at Eighty-Five*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 18, 19 [hereinafter HAND, *Mr. Justice Holmes*].

75. HAND, *The Speech of Justice*, *supra* note 59, at 11.

76. LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 118, 121 [hereinafter HAND, *Contribution of an Independent Judiciary*].

77. GUNTHER, *supra* note 2, at xvi. Gunther characterized *The Bill of Rights* as presenting Thayer's ideas "in their most extreme form." *Id.*

78. *Id.* at 50.

79. *Id.* at 51. Hand's notes from Thayer's class are preserved in the Hand Papers, and they show "how carefully LH recorded his lectures." *Id.* at 700 n.71.

80. GUNTHER, *supra* note 2, at 51–52, 119, 373. In his letters to Felix Frankfurter, "Hand was at once a dedicated exponent of the legal philosophy of James Bradley Thayer." REASON AND IMAGINATION, *supra* note 3, at xvi. Praising one of Hand's circuit court opinions, Frankfurter gave him the highest compliment: "J. B. Thayer would have been very proud of you." Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit (Oct. 21, 1935), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frame 758 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School

In 1893, Hand's first year in law school, Thayer published his famous essay on *The Origin and Scope of the American Doctrine of Constitutional Law*,[81] propounding what came to be known as the "rule of the clear mistake." Courts should not invalidate a legislative or executive act, Thayer argued, unless its unconstitutionality was "so clear that it is not open to rational question."[82] Two years later Hand took Thayer's class in constitutional law and found his teacher's ideas compelling. In *The Bill of Rights* he surely echoed Thayer's "rule of the clear mistake" when he declared that "courts might, and indeed they always do, disclaim authority to intervene unless they are sure beyond doubt that the [legislative] compromise imposed is wrong."[83]

The fact that Thayer "influenced" Hand, however, was far from the whole story. Hand was, in fact, quite conscious of pressing Thayer's ideas in his own distinctive ways, and the year after he published *The Bill of Rights* he questioned whether he had taken his teacher's theory to unwarranted conclusions. "I have often asked myself," he wrote, "how far [Thayer] would recognize as legitimate descendants my own views about constitutional law."[84] The likelihood was that Thayer would have balked, for Hand constitutional thinking diverged notably from Thayer's.[85]

Most apparent, in his Progressive enthusiasm before the war Hand adopted a sweeping version of the "rule of the clear mistake." Thayer had explicitly

---

Library). For his part, Frankfurter believed that "no man has thought more profoundly on constitutional law than J. B. Thayer—I do not exclude Holmes or Brandeis." Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Wiley Rutledge, Assoc. Justice, Supreme Court of the U.S. (May 2, 1944), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frame 332 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library). It was, he wrote, "one of the tragedies of my life that [Thayer] was gone by the time I entered the Law School." Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit (Oct. 21, 1940), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frame 849 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library).

81. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

82. *Id.*

83. HAND, THE BILL OF RIGHTS, *supra* note 11, at 39. Earlier Hand had also echoed Thayer when he declared dramatically that "a society so riven that the spirit of moderation is gone, no court *can* save." HAND, *Contribution of an Independent Judiciary*, *supra* note 76, at 125. In his essay on the "American Doctrine," Thayer had written that "[u]nder no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere." Thayer, *supra* note 81, at 156.

84. GUNTHER, *supra* note 2, at 52.

85. For example, Hand parted with Thayer to serve his "Bull Moose" Progressivism when he accepted the dormant Commerce Clause, GUNTHER, *supra* note 2, at 448, a doctrine that Thayer seemed to reject. *See* Sanford Byron Gabin, *Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test*, 3 HASTINGS CONST. L.Q. 961, 980–83 (1976).

made the rule applicable to judicial review of the work of "co-ordinate" departments,[86] that is, federal judicial review of federal executive and legislative acts, not federal review of state acts.[87] In the latter case, according to Thayer, the federal courts had a different and higher responsibility, for they were charged "in all questions involving the powers of the general government to maintain that power as against the States in its fulness."[88] Consequently, when the federal courts reviewed actions of states, they were to apply a more rigorous standard and construe the Constitution "in its true and just proportions."[89] The purpose of Thayer's "rule of the clear mistake," in other words, was to prevent the federal courts from applying the stricter "true and just" standard to acts of the national legislative and executive branches. When the federal courts reviewed state actions, in contrast, that "true and just" standard, not the "rule of the clear mistake," properly applied.[90]

Hand, however, accepted the interpretation of Thayer's rule that leading Progressive legal thinkers, including Brandeis and Frankfurter, were advancing.[91] Severely limiting Thayer's "true and just" standard,"[92] they

86. Thayer, *supra* note 81, at 150, 153–55.

87. Thayer stated that his discussion of the rule of the clear mistake was addressed to the standards applicable to judicial review by the federal courts. "I have been speaking," he explained, "of the national judiciary." *Id.* at 155.

88. *Id.* at 154.

89. *Id.*

90. *Id.* at 144, 153. *Compare id.* at 153 (federal court review of federal actions), *with id.* at 154–55 (federal court review of state actions). In *The Bill of Rights* Hand seemed to reassert the Progressive interpretation of Thayer, assuming that authority to construe the Constitution must rest with the national government but that the same standard of review should apply to the judicial review of both federal and state actions. *See* HAND, THE BILL OF RIGHTS, *supra* note 11, at 10–15.

91. Purcell, *supra* note 70, at 884–96. For Thayer's influence on Progressive legal thinkers, see, for example, GUNTHER, *supra* note 2, at 51–52, 373; Wallace Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 71–74 (1978). Frankfurter embraced Thayer and his "rule of the clear mistake" and wrote that Thayer had also "influenced Holmes, Brandeis, the Hands [Learned and his cousin Augustus, also a judge on the Second Circuit]" and other progressives. FRANKFURTER, *supra* note 54, at 299.

92. Progressive legal theorists construed the "true and just" standard as applying only to state actions directly threatening the power of the national government and not to state actions challenging individual constitutional rights. Frankfurter stated this interpretation clearly and explicitly in his dissent in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646 (1943). There, opposing the Court's invalidation of a state flag-salute law, he declared that the proper "analysis is that of James Bradley Thayer" and explained that judicial intervention in the case was improper because "in a question like this we are not passing on the proper distribution of political power as between the states and the central government." *Id.* at 667–68. Thayer's rule, however, did not have to be construed so rigidly and narrowly. In his *American Doctrine* essay, Thayer stated generally that the "true and just" standard applied whenever an issue involved "the

insisted that the "rule of the clear mistake" applied equally to federal judicial review of state as well as federal actions. By making the rule an all-encompassing limit on the judiciary, they hoped to restrict the anti-Progressive federal courts and give the states wider latitude in enacting and implementing the reform measures they favored.[93]

The reason for the difference between Thayer's original theory and Hand's Progressive interpretation was apparent. Thayer, born in 1831 in Haverhill, Massachusetts, was a Yankee Unionist whose ardent nationalism was forged in the heat of the Civil War and whose "American Doctrine" was designed to protect the "paramount authority" of the national government.[94] Hand and his fellow legal Progressives—generations removed from the slavery-based crises of the mid-nineteenth century—were middle-class professionals confronted by the social turmoil of the early twentieth century. Driven by the challenges of a new industrial age, they were inspired not by past conflicts between nation and states but rather by the ever-widening reformist upsurge that repeatedly pitted the increasingly active legislatures of both nation and states against the relatively conservative courts.[95] Consequently, they

---

supreme law of the land" and the question was "whether State action be or be not conformable to the paramount constitution." Thayer, *supra* note 81, at 154. Arguably, then, the "true and just" standard could apply whenever state actions challenged "supreme" federal law or any rights established by "the paramount constitution." Thayer was focused on the different legal issues of a different age, and he did not directly address free speech issues as such. His collected essays did not even mention the First Amendment. *See* JAMES BRADLEY THAYER, LEGAL ESSAYS (1908).

93. In equating the standards applicable to judicial review of federal and state acts, Hand passed over the point that his judicial idol, Justice Oliver Wendell Holmes, had made. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void," Holmes had declared. "I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." OLIVER WENDELL HOLMES, JR., *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 295–96 (1920).

94. Thayer, *supra* note 81, at 154; *see* Purcell, *supra* note 70, at 887–90.

95. Purcell, *supra* note 70, at 890–96. Legal Progressives were also animated by different values that gave their jurisprudence a different orientation. Whereas Thayer stressed the argument that courts should be restrained to protect democratic decision-making, Thayer, *supra* note 81, at 131–32, 149; GUNTHER, *supra* note 2, at 700 n.71, the Progressives both strengthened and qualified Thayer's emphasis by arguing that courts should give legislatures the broadest leeway because legislatures were able to conduct scientific studies of complex new social problems and draw on the knowledge of experts. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 335 (1984). They believed that the courts, in contrast, lacked both the training and resources necessary to deal wisely with those pressing new problems. GUNTHER, *supra* note 2, at 121; Purcell, *supra* note 70, at 893–94. In spite of his intellectual skepticism, Hand continued to believe throughout his life that science offered the only possibility for improvements in the human condition. *See, e.g.*, Letter from Learned Hand, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Julian Huxley (Aug. 8, 1950), *in* REASON AND IMAGINATION, *supra* note 3, at 295; LEARNED HAND, *The One Condition*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 169, 170; HAND, *Sources of Tolerance*, *supra* note 72, at 64.

construed Thayer's rule to apply not only to federal judicial review of "co-ordinate" departments but to review of state actions as well.

In the 1920s, however, the legal and political context changed, and Hand had to make another critical choice in interpreting the meaning and application of Thayer's rule. As more issues involving free speech and other "personal" rights came to the Court, they began to divide legal Progressives. This time, however, Hand proved surprisingly inflexible.

Understandably, when the conservative Court expanded due process doctrine to protect certain family and parental rights, Hand rejected the innovation.[96] Sounding his old Progressive values, he criticized the Court for subjective decision-making and argued that its new doctrine would further encourage anti-progressive judicial activism and provoke more political attacks on the judiciary.[97] On due process issues he remained firm and insisted that the power of judicial review should be exercised "only in the extremest cases."[98]

Far less understandably, however, Hand showed himself curiously erratic and ultimately inexplicably rigid in addressing contemporaneous First Amendment issues. In spite of his repeated and ardent praise for the values of free speech, he refused to accept the implicit reinterpretation of Thayer's rule that Brandeis was developing as a justification for greater judicial protection for speech rights. No less than Hand, Brandeis had been "influenced" by Thayer, and he was equally an advocate of the "rule of the clear mistake."[99] As a law student at Harvard Brandeis had also taken Thayer's constitutional law class and, moreover, had developed a close personal friendship with Thayer, closer than Hand enjoyed with their shared mentor.[100] In spite of his Thayerian roots, however, Brandeis had interpreted

---

96. The key cases were *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). "Meyer was a watershed," and "the split in *Meyer* among the liberal justices was soon echoed throughout the civil liberties community." GUNTHER, *supra* note 2, at 377. *See generally* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016).

97. For Hand's reaction to the due process decisions, see GUNTHER, *supra* note 2, at 373–86.

98. Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Walter Lippmann (June 10, 1925), *in* REASON AND IMAGINATION, *supra* note 3, at 136; *see* GUNTHER, *supra* note 2, at 383.

99. LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES 25–26 (1983); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 109, 477 (2009); Mendelson, *supra* note 91, at 73–75.

100. Thayer "was my best friend among the instructors at the Law School and we have been quite intimate ever since. When he went abroad in 1882–1883 I undertook his course on the Law of Evidence at his request." Letter from Louis D. Brandeis to Alice Goldmark (Oct. 13, 1890), *in* 1 LETTERS OF LOUIS D. BRANDEIS 92 (Melvin I. Urofsky & David W. Levy eds., 1971). On

the "rule of the clear mistake" expansively during the pre-war years to protect Progressive reforms at the state level, and after the war he began, in effect, to interpret Thayer's rule once again, this time to justify greater judicial protection for speech rights.[101]

Brandeis did so by shifting focus from the rule's limitation on judicial review to its animating constitutional purpose which was to protect the open and well-informed operations of democratic government.[102] Accordingly, Brandeis began to insist that freedom of speech was "essential to effective democracy."[103] It guaranteed the "fundamental right of free men" to bring reason into the public forum and enabled them to "strive for better conditions through new legislation and new institutions."[104] Participation in "public discussion is a political duty," he declared, and that "should be a fundamental principle of the American government."[105] Serving the same democratic purpose that underwrote the "rule of the clear mistake," Brandeis's developing free speech jurisprudence could be understood as an implicit

---

Brandeis's relation with Thayer, *see* STRUM, *supra* note 95, at 20; UROFSKY, *supra* note 99, at 37, 78–79.

101. For Brandeis's early opinions urging greater judicial protection for First Amendment claims, see *Gilbert v. Minnesota*, 254 U.S. 325, 335 (1920) (Brandeis, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 270 (1920) (Brandeis, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting). Judicial restraint remained a central component of Brandeis's constitutional thinking, but his thinking also changed over time. UROFSKY, *supra* note 99, at 477–78; EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 117–24 & 345 n.10 (2000); Edward A. Purcell, Jr., *The Judicial Legacy of Louis Brandeis and the Nature of American Constitutionalism*, 33 TOURO L. REV. 5, 29–32 (2017).

102. Thayer explained that courts exercising judicial review "will always assume a duly instructed body" composed of "competent, well-instructed, sagacious, attentive" individuals who were "intent only on public ends" and thus "fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs." Thayer, *supra* note 81, at 149. "The rationally permissible opinion of which we have been talking," he continued, "is the opinion reasonably allowable to such a person as this." *Id.*; *see id.* at 131–32, 156. The notes Hand took as a student in Thayer's constitutional law class "reveal how much emphasis Thayer gave to the proper role of courts in a democratic society." GUNTHER, *supra* note 2, at 700 n.71.

103. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "Brandeis's particular contribution to the development of speech law within this societal context was his drawing on thinking by himself and others to connect the need for speech with the requirements of democracy." PHILIPPA STRUM, SPEAKING FREELY: *WHITNEY V. CALIFORNIA* AND AMERICAN SPEECH LAW 124 (2015). In addition to making the connection between free speech and democracy, Brandeis also incorporated other arguments that free speech advocates had developed, including the utility of free speech in promoting truth finding and protecting individual liberty and autonomy. *E.g.*, *Whitney*, 274 U.S. at 375–78 (Brandeis, J., concurring).

104. *Pierce*, 252 U.S. at 273 (Brandeis, J., dissenting); *see Gilbert*, 254 U.S. at 337–38 (Brandeis, J., dissenting).

105. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

development of Thayer's constitutional thinking and an affirmation of his most fundamental constitutional principle.

Indeed, others were able to discern the logic that connected Thayer's principles to special judicial protection for speech rights.[106] Perhaps the most noticeable was Ronald Dworkin, Hand's law clerk when he wrote *The Bill of Rights*. Maintaining that Thayer played a "decisive role"[107] in shaping Hand's thinking, Dworkin argued that Thayer had inculcated in Hand an implicit "civic republicanism" that prized free speech and privileged the participation of everyone "in the community's deepest and more important decisions about justice."[108] On that Thayerian premise Dworkin developed an argument for greater judicial activism in defending individual rights and deployed it in an effort to mitigate the extreme judicial minimalism that Hand advocated in *The Bill of Rights*.[109]

Hand's refusal to accept Brandeis's First Amendment reasoning was particularly arresting because the Justice in effect issued him a special invitation to embrace his approach. In his powerful concurrence in *Whitney v. California* Brandeis celebrated the relationship between free speech and democracy, and his reasoning sounded in places very much like Hand's in *Masses*.[110] Brandeis began his opinion by expressly stating that defendant was not charged with "incitement,"[111] and he seemed to incorporate Hand's

---

106. Most explicitly, Jerome Frank identified the pro-free speech potential in Thayer's rule and argued that Justice Harlan Stone had such an understanding of the rule's implications. Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 691–93 (1957). Speaking of the doctrine that judicial deference is based on "the availability of political means for peaceful change," Martin Shapiro noted that "the seeds of the doctrine may even be found in Thayer." MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 115 (1966); *see id.* at 16. For a rejection of such claims, see Gabin, *supra* note 85, at 975–77, 992. The great majority of First Amendment scholars seem to ignore if not reject the idea that Thayerian principles offer support for judicial protection of speech rights. *See, e.g.*, Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2244–48 (2014).

107. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 342 (1996).

108. *Id.*

109. *Id.* at 340–47.

110. When he turned "to the practical task of distinguishing among admittedly risky forms of speech," Brandeis's analysis bore "an arresting resemblance to Judge Hand's opinion in *Masses*." HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 161 (Jamie Kalven ed., 1988). Brandeis's "*Whitney* opinion emphasized the impossibility of maintaining a democratic society in the absence of free speech." STRUM, *supra* note 103, at 124.

111. "Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation." Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

Masses test in his broader analysis.[112] Then he went out of his way to cite *Masses* favorably—even though it was only a district court opinion that had been quickly overruled—and, in a highly unusual reference in a Court opinion, identified Hand by name as the opinion's author.[113] Finally, Brandeis went the extra mile. He solicited Hand's support by personally sending him a copy of his *Whitney* opinion.[114] Still Hand refused to accept Brandeis's speech-protective logic.[115]

Throughout his life Hand insisted that questions of values were matters of individual choice, and sometime between the late 1920s and the early 1940s he chose not to accept Brandeis's interpretative move or his general First Amendment jurisprudence. That choice was hardly a necessary one. Far more, it was deeply puzzling.

First of all, Brandeis and Hand shared a commitment to free speech that seemed equally important and compelling to both of them. In *Masses* Hand spoke as passionately about its value as Brandeis did in *Whitney*.[116] Both, moreover, were involved with overlapping groups of legal thinkers who were formulating legal defenses for speech rights, and all of them were methodically testing and drawing on one another's ideas in an effort to

---

112.

> But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Whitney, 274 U.S. at 376 (Brandeis, J., concurring).

113. *Id.* at 376 n.4. Brandeis also cited an opinion by another Progressive federal district court judge, Charles Amidon, whom he also identified by name. *Id.*

114. Letter from Louis D. Brandeis, Assoc. Justice, Supreme Court of the U.S., to Felix Frankfurter (May 21, 1927), *in* 5 LETTERS OF LOUIS D. BRANDEIS 285 (Melvin I. Urofsky & David W. Levy eds., 1978).

115. As he declared flatly in *The Bill of Rights*, "I do not think that the interests mentioned in the First Amendment are entitled in point of constitutional interpretation to a measure of protection different from other interests." HAND, THE BILL OF RIGHTS, *supra* note 11, at 56.

116. Hand's "commitment to free speech was even deeper than Holmes's, a commitment springing from the depths of his skepticism about dominant truths and his fierce allegiance to keeping open the channels of debate." GUNTHER, *supra* note 2, at 281.

strengthen their arguments.[117] "All of that," Philippa Strum noted, "lay behind Brandeis's opinion in *Whitney*."[118] The 1920s was no time for legal theorists committed to free speech to be unduly picky or excessively demanding in rejecting strong and principled arguments that supported judicial enforcement of the fundamental right they sought to defend.

Second, as Vincent Blasi and others have pointed out, Hand's *Masses* opinion was itself based on the idea that there was a vibrant connection between free speech and democratic government.[119] Indeed, when he wrote *Masses*, Hand could well have been thinking about Thayer's insistence that the role of the courts should be determined by the requirements of American democracy. In explaining the importance of free speech, *Masses* invoked the "normal assumptions of democratic government" and stressed that "public opinion" was "the final source of government in a democratic state."[120] Most striking, it declared that "tolerance of all methods of political agitation" was essential as "a safeguard of free government."[121] Brandeis's opinions elaborated a similar logic linking free speech to democratic government, and his basic argument supported the ideas and values Hand had expressed in *Masses*.[122]

Third, only two years before *Whitney* Hand had welcomed Holmes's dissent in *Gitlow v. New York*.[123] There, Holmes had rejected the criminal

---

117. In addition to Brandeis and Hand, those involved in varying ways included Holmes, Chafee, Walter Nelles, Ernst Freund, and lawyers involved with the new American Civil Liberties Union. *See, e.g.*, STRUM, *supra* note 103, at 120–21.

118. *Id.* at 120.

119.

> Hand's view, most fully elaborated in his great opinion in *Masses Publishing Co. v. Patten*, was that under democratic theory incitements to law violation fall outside the ambit of the freedom of speech as a matter of principle, irrespective of whether the context indicates an imminent danger of illegal conduct by persons exposed to the speech. Hand held that view because he considered incitements to law violation not to be among the 'exclusive' means laid down by a democratic society 'by which its laws can be changed.'

Blasi, *supra* note 31, at 36; *see also* Gunther, *supra* note 33, at 725, 727; Weinstein, *supra* note 19, at 71.

120. Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

121. *Masses*, 244 F. at 539–40. For classic discussions of the relation between free speech and democratic government, see, for example, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–86, 955 (1963); and the essays collected in *Virginia Law Review Symposium on Free Speech*, 97 VA. L. REV. 477 (2011).

122. In *Masses* Hand was "[a]nticipating the position that Brandeis would arrive at ten years later in the *Whitney* case." STRUM, *supra* note 103, at 92.

123. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

conviction of a leading socialist and urged a more demanding version of his "clear and present danger" test.[124] Hand defended the dissent and declared that he would have joined it had he been on the Court.[125] If Hand agreed with Holmes's dissent in *Gitlow*, he should also have accepted the free speech reasoning that Brandeis was developing in his own virtually contemporaneous opinions.[126] Surely Holmes and Brandeis, in spite of their differences,[127] were closely identified in urging stronger judicial protection for speech rights. Brandeis had joined Holmes's path-breaking dissent in 1919 in *Abrams*,[128] and over the following years Holmes commonly agreed with Brandeis's separate dissents urging greater protection for speech rights.[129] Indeed, Brandeis joined Holmes's dissent in *Gitlow*,[130] and Holmes joined Brandeis's concurrence in *Whitney*.[131]

Finally, even though Hand disagreed with Brandeis's claim in *Whitney* that some incitements to unlawful acts might nonetheless qualify as protected speech,[132] his refusal to accept the basic thrust and conclusion of Brandeis's

---

124. *Id.* at 672–73.

125. GUNTHER, *supra* note 2, at 280–81; Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Charles Merrill Hough, Judge, U.S. Court of Appeals for the Second Circuit (July 9, 1926), *in* REASON AND IMAGINATION, *supra* note 3, at 141.

126. Brandeis had consistently joined Holmes's opinions developing a more demanding "clear and present danger" standard beginning with *Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting), and in 1920 he began writing separate dissents in defense of broader free speech rights. *See* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting); Gilbert v. Minnesota, 254 U.S. 325, 335 (1920) (Brandeis, J., dissenting); Pierce v. United States, 252 U.S. 239, 270 (1920) (Brandeis, J., dissenting); Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting). His efforts reached their fullest statement in 1927 in *Whitney*.

127. *See, e.g.*, FELDMAN, *supra* note 29, at 281–85; RABBAN, *supra* note 25, at 355–59; Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1988).

128. 250 U.S. at 631.

129. Holmes joined Brandeis's dissents in *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting), and *Pierce v. United States*, 252 U.S. 239, 270 (1920) (Brandeis, J., dissenting), and in a separate dissent in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 436 (1921) (Brandeis, J., dissenting), Holmes stated that "I agree in substance" with Brandeis's dissent. The single exception was *Gilbert v. Minnesota*, 254 U.S. 325 (1920), where Holmes joined neither the majority's opinion nor Brandeis's dissent and concurred without opinion only in the result. *Id.* at 334. On Holmes's separate action in *Gilbert*, see FELDMAN, *supra* note 29, at 281–85.

130. Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (Brandeis, J., joining).

131. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (Holmes, J., joining).

132. *Id.* at 376. "Going beyond Learned Hand, Brandeis argued [in *Whitney*] that even advocacy of law 'violation, however reprehensible morally, is not a justification for denying free

reasoning still remained hard to fathom. Most obviously, Hand could easily have rejected that particular point while still accepting Brandeis's broader and powerful democratic justification for judicial protection of First Amendment rights. More to the point, Hand harbored serious reservations about Holmes's "clear and present danger" test,[133] yet he nonetheless embraced Holmes's dissent in *Gitlow* that employed that standard. Thus, mere disagreement with some element of Brandeis's free speech opinions should not have prevented him from accepting their basic reasoning. Perhaps most telling, Hand defended Holmes's *Gitlow* dissent not on the ground that he agreed with its doctrinal analysis but on the highly pragmatic ground of practical necessity. Without some such protective judicial theory, even the flawed one Holmes proposed, Hand wrote, "the whole doctrine of free speech goes by the board."[134] He insisted that he would not let that happen because he was "all for keeping the flag flying."[135] To whatever extent Hand disagreed with anything in Brandeis's reasoning, *Whitney* and Brandeis's other First Amendment opinions were quite obviously and prominently "keeping the flag flying." Still, Hand was unable or unwilling to accept them.[136]

---

speech where . . . there is nothing to indicate that the advocacy would be immediately acted on.'" STONE, *supra* note 25, at 237–38.

133. "I do not altogether like the way Justice Holmes put the ["clear and present danger"] limitation." Gunther, *supra* note 33, at 763 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Dec. 3, 1919)). Hand "had frequently expressed his criticisms of Holmes's 'clear and present danger' formula." GUNTHER, *supra* note 2, at 281; *see id.* at 167; Gunther, *supra* note 33, at 732–41; *id.* at 770 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 2, 1921)). In developing the "clear and present danger" test, Hand wrote, "I cannot help thinking that for once Homer nodded." HAND, THE BILL OF RIGHTS, *supra* note 11, at 59. Holmes "for once slipped his trolley on 'clear and present [danger].'" Letter from Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit, to Felix Frankfurter, Assoc. Justice of the U.S. Supreme Court (June 8, 1951), *in* REASON AND IMAGINATION, *supra* note 3, at 306.

134. Letter from Learned Hand to Charles Merrill Hough, *supra* note 125, at 141; *see* GUNTHER, *supra* note 2, at 280–81.

135. Letter from Learned Hand to Charles Merrill Hough, *supra* note 125, at 141; *see* GUNTHER, *supra* note 2, at 280–81.

136. Hand's refusal to embrace Brandeis's reasoning was apparently rooted in his changed thinking about the nature of both democracy and the role of courts, *see supra* note 72, and confirmed by his likely identification of Brandeis with both the Progressive judicial "activism" he was rejecting and the judicial subjectivism he condemned in the pre-New Deal Court. "Brandeis's [judicial] outlook," Hand believed, was influenced by his views on "general social and political matters." Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S. (Jan. 8, 1937), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frames 793–95 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library). Finally, Hand revered Holmes as his "unblemished idol on the bench," GUNTHER, *supra* note 2, at 345, and regarded Brandeis as a

Thus, given both his profound commitment to free speech and his pre-war flexibility in interpreting Thayer for Progressive purposes,[137] Hand's unwillingness to accept Brandeis's free speech reasoning marked a point of stasis in his jurisprudential thinking. It suggested a new bar of unyielding resistance in his psychological make-up, a profound change in his ideas about both democracy and the courts,[138] and a new and narrowing rigidity in his constitutional thinking. Both would ultimately underwrite his later efforts in both *Dennis* and *The Bill of Rights*.[139]

If Hand's thinking about judicial protection of speech rights seemed increasingly rigid by the late 1920s, it ossified over the following two decades. The process appeared nearly complete when he gave two speeches a month apart in late 1942—the year of his final failure to gain a seat on the Supreme Court. In the first, at a celebration of the 250th anniversary of the founding of the Supreme Judicial Court of Massachusetts, Hand sounded an alarm against unidentified but ominous threats to the independence of the judiciary that he saw in demands for "a more loyal fealty to the popular will."[140] He scorned the "dumb energy" generated by "vague stirrings of mass feeling which many who pride themselves upon their democracy mistake for the popular will."[141] Although he left the exact source of the threats

---

distinctly lesser figure. While he might have continued to follow Holmes on the First Amendment, he was less likely to do so with Brandeis. The fact that Hand regarded the two Justices quite differently seemed apparent, for example, in his contradictory reactions to the decade's two expansive new due process cases that divided Progressives, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). In the former, Brandeis joined the majority while Holmes dissented, and Hand rejected the Court's decision. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Felix Frankfurter, Professor, Harvard Law Sch. (June 6, 1923), *in* REASON AND IMAGINATION, *supra* note 3, at 121; GUNTHER, *supra* note 2, at 377–78. In the latter, Holmes joined the Court's opinion along with Brandeis, and Hand announced, albeit with qualms, that he agreed with the decision. Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Walter Lippmann (June 7, 1925), *in* REASON AND IMAGINATION, *supra* note 3, at 134; GUNTHER, *supra* note 2, at 378–80. Holmes noted his dissent in *Meyer*, 262 U.S. at 403, but published his opinion on the issue in a companion case, *Bartels v. Iowa*, 262 U.S. 404, 412 (1923).

137. *See supra* notes 81–95 and accompanying text.

138. By the end of the 1920s Hand's thinking about democracy had diverged sharply from Thayer's. *See, e.g.*, HAND, *Democracy: Its Presumptions and Realities*, *supra* note 72, at 73–76; HAND, *Is There a Common Will?*, *supra* note 72, at 38–39; HAND, *Sources of Tolerance*, *supra* note 72 at 55–56.

139. As early as 1930 Hand expressed his seeming resignation about the inability of the courts to protect dissenters. HAND, *Sources of Tolerance*, *supra* note 72, at 55–56. "If a community decides that some conduct is prejudicial to itself, and so decides by numbers sufficient to impose its will upon dissenters, I know of no principle which can stay its hand." *Id.*

140. HAND, *Contribution of an Independent Judiciary*, *supra* note 76, at 120.

141. *Id.* at 119. Such efforts, he continued, come from "dumb energy." *Id.*

unspecified, his warnings surely evoked memories of New Deal attacks on the judiciary and especially Franklin Roosevelt's "Court packing" plan, barely five years in the past.[142] Indeed, Hand made it clear that political power lurked menacingly behind the threats. "To interject into the [judicial] process the fear of displeasure or the hope of favor of those who can make their will felt," he warned, "is inevitably to corrupt the event."[143] To that potentially lethal danger he announced that there was "but one answer: an unflinching resistance."[144] That resistance, he then insisted, must take the form of judicial adherence to one paramount principle: courts "should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides.'"[145] Against possibly fatal perils facing the courts, Hand announced his implacable opposition and identified extreme judicial restraint as the only effective defense possible. He seemed a man under siege.

A month later, on December 21, the second speech confirmed the unyielding nature of Hand's now rigid constitutional thinking. Addressing a Supreme Court memorial service for the recently deceased Brandeis, Hand could not bring himself to comment on Brandeis's constitutional jurisprudence or even mention his inspiring contributions to First Amendment law.[146] Rather, at a memorial ceremony held at the Supreme Court and convened to pay homage to one of the Court's truly great Justices, Hand passed over the honoree's many landmark judicial contributions with the announcement—seemingly inexplicable on any ground other than Hand's adamant unwillingness to offer words of praise—that "this is no occasion to appraise the life and work of the man whose memory we have met to honor."[147] Instead, he spoke generally about Brandeis's views on broad

142. Hand had deeply mixed feelings about Roosevelt's "Court-packing" plan. He rejected it as exceptionally dangerous but nonetheless saw it was wholly understandable in light of what he regarded as the "political" decision-making of the "old" Court. GUNTHER, *supra* note 2, at 453–60. His fears were likely stoked further by the rise of totalitarianism, the pressures World War II imposed on the courts, and the continuing doctrinal turmoil that accompanied the New Deal's "constitutional revolution."

143. HAND, *Contribution of an Independent Judiciary*, *supra* note 76, at 120.

144. *Id.*

145. *Id.* at 125. Hand quoted from a speech by Ulysses in WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA, act 1, sc. 3.

146. When Hand gave a radio address in 1938 honoring Brandeis on the Justice's eighty-second birthday, he mentioned Brandeis's legal contributions only briefly and refused to commend or even nod to his First Amendment jurisprudence. Learned Hand, *Justice Louis D. Brandeis and the Good Life*, 4 J. SOC. PHIL. 144, 144 (1938). He offered only the barest non-committal comment that Brandeis had "his own technique" in dealing with the Fourteenth Amendment. *Id.* at 145.

147. LEARNED HAND, *Mr. Justice Brandeis*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 127, 128. Hand seemed to have distinctively mixed feelings about Brandeis. On the positive side, he

philosophical and cultural matters while alluding to his work on the Court only obliquely and with undertones of disapproval.[148]

---

admired Brandeis in some ways, including parts of his jurisprudence and especially his moral "vision" of a society of small units and independent individuals. Hand, *supra* note 146, at 146. Even when Hand spoke well of Brandeis, however, his comments sometimes seemed less than whole-hearted. Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S. (Jan. 21, 1942), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frames 872–74 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library). On the negative side, Hand seemed to harbor real reservations about Brandeis as a judge. He bemoaned "Brandeis with his pretense of being encyclopedic" in his opinions, Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S. (Dec. 11, 1939), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frames 833–35 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library), for example, and apparently disdained Brandeis's opinion in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). Hand had been on the panel below that *Erie* reversed, *Tompkins v. Erie Railroad Co.*, 90 F.2d 603 (1937), and the following year—though not mentioning *Erie*—he expressed concern about Court decisions "to upset old precedents" and then declared that "the whole diversity jurisdiction is an utter mess." Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S. (Nov. 27, 1939), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frames 837–38 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library). It seems likely that Hand shared the view of his cousin and Second Circuit colleague, Judge Augustus N. Hand, who told Frankfurter that "I really do not like the way [*Erie*] was handled by L.D.B." Letter from Augustus Noble Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S. (May 10, 1938), *microformed on* Felix Frankfurter Papers, Part 3, Reel 3, Frames 912–13 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library); *see supra* notes 115, 136.

148. HAND, *supra* note 147, at 128–33. Hand was aware that some thought his comments inappropriate if not hostile. Remarking on his "Brandeis speech," he told Frankfurter that he had suspected that Brandeis's "idolators might be displeased at having him said to be outside the main current of his time." Letter from Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit, to Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S. (Mar. 8, 1943), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frames 903–09 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library). Hand dismissed their negative reaction as the response of "gross creatures" and explained that his goal was merely to provide "an understanding of the deeper nature of the man." *Id.* Although Frankfurter praised the speech effusively—Hand thought his words "extravagant," *id.*—his long-delayed response to it suggested that he, too, had serious concerns about it. Frankfurter pondered the speech for more than two months before he finally wrote Hand about it, and then he confessed that he had been forced to think long and hard before coming to his favorable conclusion. "Now that I have read and reread and twice read aloud what you said at the Brandeis meeting here," Frankfurter began cautiously, "it is about time that I said a word to you." Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit (Mar. 4, 1943), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frame 901 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library). He then told Hand that he had concluded that the speech "truly conveyed the man" because it "conveyed that which went to the heart of his greatest concern and his deepest reflection." *Id.* Accordingly, he wrote, the speech filled him "with pride and joy." *Id.* Thus, it seems likely that Frankfurter had also been disturbed by the speech and that he needed more than two months before he could work out a

Four years later the result of Hand's jurisprudential ossification was fully manifest. Addressing another memorial service at the Supreme Court, this time for Harlan F. Stone, Hand praised the recently deceased Chief Justice as a faithful follower of Thayer and a stalwart proponent of Thayer's principles of judicial restraint. Whether "as teacher or as judge," Hand asserted, Stone "believed with deep conviction" in Thayer's position and had followed its prescriptions "with undeviating loyalty."[149] Even when New Dealers came to dominate the Court and began favoring "personal rights" over "property" rights,[150] Hand continued, Stone's "robust and loyal character" meant that he would not join "an opportunistic reversion at the expense of his conviction as to the powers of a court."[151] In point of fact, Hand's claims about Stone were shockingly inaccurate, denying Stone's paramount achievements in leading the Court toward providing greater judicial protections for individual rights.[152] As Hand well knew, Stone had written the Court's path-breaking opinion in *Carolene Products*[153] and had inspired the Justices in the *Flag Salute* cases, foundation stones for the Court's growing activism on behalf of non-economic individual rights.[154]

Thus, by 1946 Hand's now iron-bound commitment to judicial minimalism barred him from acknowledging the major achievements of both

---

serviceable interpretation. *See id.* His goal in writing Hand was apparently to use his flattering technique to soften Hand, give the speech a positive spin, and counter the idea that there was a significant split between Hand and Brandeis. Frankfurter had previously sought to maintain cordial and sympathetic relations between the two. Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Court of Appeals for the Second Circuit (Feb. 16, 1939), *microformed on* Felix Frankfurter Papers, at Part 3, Reel 26, Frame 832 (Univ. Publ'ns of Am., Inc.) (on file with the Harvard Law School Library).

149. LEARNED HAND, *Chief Justice Stone's Concept of the Judicial Function*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 152, 154. Thayer has "become the prophet of a new approach," Hand declared, and Stone "made no secret" of his allegiance to it. *Id.* Stone, Hand announced quite inaccurately, "was throughout true to this view." *Id.* at 156.

150. *Id.* at 155–56.

151. *Id.* at 156.

152. John Frank concluded that Hand's arguments in *The Bill of Rights* "amount to a systematic attack on the views of the late Chief Justice Stone." John P. Frank, Book Review, 32 TUL. L. REV. 790, 793 (1958).

153. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). On the far-reaching significance of *Carolene Products*, see, for example, WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 116–42 (2006), and on Stone's role in the case, see *id.* at 119–24.

154. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Stone, J., joining majority reversing *Gobitis*); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, J., dissenting). On the *Flag Salute Cases* and Stone's role in them, see WIECEK, *supra* note 153, at 128–37. "Stone's *Gobitis* dissent has established itself in the canon of libertarian thought on religious liberty." *Id.* at 225.

Brandeis and Stone and, further, from recognizing the extent to which Stone had seemingly accepted Brandeis's implicit reinterpretation of Thayer's principles.[155] The year after Hand's speech, resorting to exceptionally discrete and understated language, Judge Wyzanski—one of Hand's ex-law clerks and one of his great judicial admirers—acknowledged the salient truth. In his remarks, Wyzanski noted, "Judge Hand revealed his own attitude perhaps better than that of the Chief Justice."[156]

The change in Hand's thinking between the Progressive Era and World War II was dramatic. Early in his career Hand had been willing to interpret Thayer's "rule of the clear mistake" to support Progressive political goals. In the middle of his career he was unwilling to interpret the rule to serve his own—and Thayer's—honored goal of protecting the operations of free, open, and informed democratic government. Late in his career he was unable even to admit what Brandeis and Stone had done by interpreting Thayer's rule to help justify and establish greater judicial protection for those rights. Assuming that Hand valued free speech as highly as he continually proclaimed,[157] those episodes charted an intellectual ossification that began in the 1920s, reached its completion in the 1940s, and led to both his restrictive First Amendment opinion in *Dennis* and his misconceived constitutional vision in *The Bill of Rights*.[158]

---

155. Jerome Frank argued that Stone's opinion in *Carolene Products* represented an "explicit restatement of Thayer" based on Thayer's stress on the need to protect "the public discussion of policies" and ensure that "the people" maintained "that political maturity which democracy required." Frank, *supra* note 106, at 691–92. In Stone's famous footnote four in *Carolene Products*, he cited Brandeis's separate concurrence in *Whitney v. California*, 274 U.S. 357, 372–78 (1927) (Brandeis, J., concurring), where Brandeis argued that free speech was "essential to effective democracy," *id.* at 377.

156. Wyzanski, *supra* note 10, at 356.

157. In 1943, in a federal antitrust prosecution against the Associated Press, Hand declared that the publishing industry

> serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

158. The rigidity was apparent, for example, in his discussion of the First Amendment in *The Bill of Rights*. He acknowledged that advocates of special judicial protection "have the better argument so far as concerns Free Speech," HAND, BILL OF RIGHTS, *supra* note 11, at 69, but nonetheless held to his sweeping position negating the constitutional validity of such special judicial protection. "I do not think that the interests mentioned in the First Amendment are entitled

III. RECONSIDERING *MASSES* AND *DENNIS*

United States v. Dennis, Hand's widely publicized First Amendment decision in 1950, upheld the prosecution of eleven leaders of the Communist Party of the United States (CPUSA) under the Smith Act on the ground that they conspired to advocate the use of force and violence to overthrow the government.[159] In doing so, he applied an even weaker version of the Court's already weak "clear and present danger" test.[160] Affirming defendants' convictions, he declared that the proper test under the First Amendment was "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[161] That was a far cry from the Holmes-Brandeis version of "clear and present danger" and from his own "incitement" test as well.[162]

The next year Chief Justice Fred M. Vinson announced the Supreme Court's judgment affirming Hand's decision and defendants' conviction.[163] His plurality opinion quoted Hand's weak formulation of the "clear and present danger" test and expressly adopted it as the correct statement of the law.[164] "As articulated by Chief Judge Hand, it is as succinct and inclusive as

---

in point of constitutional interpretation to a measure of protection different from other interests . . . ." *Id.* at 56.

159. 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). For the general political and legal background of the case, see William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375.

160. From the late 1920s to the mid-1940s the Court shifted toward a more protective view of speech rights, but in the late 1940s it began to move back to a narrower and more repressive approach. WIECEK, *supra* note 153, at 145–46; *see also id.* at 116–42. "[A] literal application of the words 'clear and present danger' could easily support a decision that the advocacy of the Communist Party leaders was protected speech." SCHICK, *supra* note 8, at 180.

161. *Dennis*, 183 F.2d at 212. He later repeated the formula. *Id.* at 215. Hand wrote for himself and Judge Thomas Swan. *Id.* at 205. Judge Harrie B. Chase concurred. *Id.* at 234.

162. Hand

> explicitly stated that he was substituting his 'improbability' test for the 'remoteness' component of *present* danger, but the real impact of his new formula came in the 'gravity' part of the equation. For under the Hand reading, if a judge found an evil sufficiently menacing, its remoteness, improbability, or likelihood could be severely reduced.

OWEN M. FISS & WILLIAM M. WIECEK, THE HISTORY OF THE SUPREME COURT 559 (2006). The "balancing" test in *Dennis* was "hardly what Holmes and Brandeis had in mind." STONE, *supra* note 25, at 404. Hand's formulation "excised the main features of the original [clear and present danger] test by eliminating or minimizing the requirement that the danger be immediate and clear." Emerson, *supra* note 121, at 912.

163. Dennis v. United States, 341 U.S. 494, 494 (1951).

164. *Id.* at 510. In a 6–2 decision, Vinson wrote for Justices Stanley Reed, Harold Burton, and Sherman Minton, *id.* at 495, while Justices Felix Frankfurter, *id.* at 517, and Robert Jackson,

any other we might devise at this time," Vinson wrote. "It takes into consideration those factors which we deem relevant, and relates their significances [*sic*]."[165]

While the differences in both reasoning and results between Hand's opinions in *Masses* and *Dennis* were obvious, prominent scholars have argued that those differences did not mean that Hand had changed his personal views about free speech. First, they cite evidence from his letters showing that he continued in private to defend his *Masses* "incitement" test, that he disagreed with the government's prosecution in *Dennis*, and that he had nothing but scorn for the extreme anticommunist fervor of the day.[166] Second, they maintain that Hand wrote his restrictive opinion in *Dennis* because, "as a lower court judge," in Gunther's words, "he was bound by and faithful to Supreme Court precedents."[167] Charles Alan Wright agreed, adding that *Masses* and *Dennis* both reflected Hand's principled deference to Congress. In *Masses* Hand was free to base his decision on a congressional statute and thereby defer to congressional intent, whereas in *Dennis* he was asked to void a congressional statute, an act that his deferential approach would not allow.[168]

Geoffrey Stone reached similar conclusions[169] and, moreover, strengthened the case for Hand's consistency. He argued that Hand's interpretation of congressional intent in *Masses* was not strained but correct and, consequently, that in both cases Hand had simply construed the applicable statute properly.[170] Further, he pointed out that "in *Dennis*, Hand

---

id. at 561, concurred separately. Justices Hugo Black, *id.* at 579, and William O. Douglas, *id.* at 581, dissented.

165. *Id.* at 510 (majority opinion). "More we cannot expect from words," Vinson continued. *Id.*

166. *See* GUNTHER, *supra* note 2, at 578–92, 603–05; Letter from Learned Hand to Felix Frankfurter, *supra* note 133, at 306–07; STONE, *supra* note 25, at 401.

167. GUNTHER, *supra* note 2, at 603–04. Schick argued similarly that Hand was relatively free in *Masses* to shape the law but that in *Dennis* he was constrained by intervening Supreme Court precedents. SCHICK, *supra* note 8, at 179.

168. *Accord* SCHICK, *supra* note 8, at 179; *see* Wright, *supra* note 8, at 1850. The point arguably receives support from a passage in *The Bill of Rights. See* HAND, THE BILL OF RIGHTS, *supra* note 11, at 9–10. During his more than fifty years on the bench Hand voted to strike down parts of only three statutes, two federal and one state. *See* GUNTHER, *supra* note 2, at 451–53. Of the two federal laws, one was *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir. 1935), which involved a statute that the Supreme Court subsequently struck down on broader grounds than the Second Circuit had invoked. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

169. *See* STONE, *supra* note 25, at 398–402.

170. *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 335 (2003). *Contra* RABBAN, *supra* note 25, at 249–55. The

makes clear that, in his view, *Masses* required affirmance of the convictions."[171] Hand found that the *Dennis* defendants had expressly advocated unlawful conduct, and consequently his "incitement" test—even had it been the law—would not have protected them.[172]

Those arguments make a plausible case for Hand's consistency, and yet they seem unduly formal and critically incomplete. Largely abstract and legalistic in nature, they elide the underlying realities of time, context, human motivation, and Hand's own words.[173] That lack simplifies our understanding of Hand's behavior and, more important, risks obscuring our understanding of American constitutionalism.

"legislative history of the Espionage Act, which Hand never cited in his opinion, demonstrates the congressional intent to publish the very kind of antiwar material that prompted the postmaster to declare *The Masses* 'nonmailable.'" *Id.* at 265. The passage of the Sedition Act the next year suggests that Rabban may have the better of the argument. It shows that, whatever Congress intended in June of 1917, by May of 1918 it clearly intended to use the mail to punish the "disloyal." The later act strengthened the earlier measure's mail provisions by authorizing the Postmaster General to deny mail deliveries to those who violated the act. RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 34 (1987). In an earlier piece, I argued that Hand narrowed the reach of the Espionage Act by infusing his own values into its construction. Purcell, *supra* note 70, at 897–98, 913. Weinstein notes more cautiously that "Hand's decision to rest his decision on statutory interpretation rather than the First Amendment might have been strategically motivated by the outcome he wanted to reach." Weinstein, *supra* note 19, at 70 n.40.

171. STONE, *supra* note 25, at 401.

172. *Id.* at 401–02. Justice Robert Jackson seemed to agree, concurring in *Dennis* and quoting the *Masses* incitement test to reject defendants' First Amendment claim. Dennis v. United States, 341 U.S. 495, 571 (1951) (Jackson, J., concurring).

> As aptly stated by Judge Learned Hand in Masses Publishing Co. v. Patten: 'One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.'

Id. (citation omitted). To the extent that Stone and Jackson were right, Hand's application of his "incitement" test in *Dennis* severely shrinks its doctrinal importance and protective reach, leaving considerable room for government suppression. Not everyone agrees, however, that Hand properly applied the *Masses* test in *Dennis. See, e.g.*, FELDMAN, *supra* note 29, at 442.

173. Legal commentators gave little attention to the possibility that Hand himself had changed, and they seemed to minimize the influence of contemporary political and cultural pressures on him. Stone noted the influence of those pressures on the Supreme Court in *Dennis*, STONE, *supra* note 25, at 410–11, but he seemed to pass over their possible influence on Hand. *Id.* at 398–402. Gunther also seemed to suggest that they had little influence on Hand. *See* GUNTHER, *supra* note 2, at 598–612. Schick similarly discounted those factors and stressed the consistency of Hand's decision in *Dennis* with his deferential judicial philosophy. *See* SCHICK, *supra* note 8, at 176–87.

The Hand of 1917 was not the Hand of 1950, as Part II argued,[174] and the United States in the later year was hardly the United States in the earlier one. In 1917, when Hand wrote *Masses*, Progressives remained optimistic and enthusiastic about expanded possibilities for reform, and many welcomed the war as an exciting opportunity to remake both American society and potentially the world.[175] By 1950 Americans had witnessed the collapse of the old Progressive movement, the destructive impact of what they called "The Great War," a post-war depression and Red Scare, a decade-long and even more devastating "Great Depression," a Second World War that proved far more costly and destructive than the First, the stunning development of nuclear weapons and their acquisition by the Soviet Union, the rapid spread of an anti-Communist fervor accompanied by public and private efforts at domestic repression, an accelerating Cold War with the Soviet Union that threatened a nuclear conflict far more terrifying than anything Americans had previously thought possible, and finally a new and bitterly controversial war in far-away Korea that brought the looming possibility of a broader and potentially disastrous war with China. Those overwhelming developments profoundly changed American attitudes, understandings, perceptions, and fears.[176]

In the context of those sweeping developments, Hand's ideas had changed not only in the ways already noted but also in a more specific way. After World War II he became a committed and fearful Cold Warrior. Although he disdained extreme anti-Communism,[177] he had nothing but contempt for Communism itself. It was an irrational "living faith" that was "Saturnine and

---

174. *See supra* Part II.

175. Hand wrote his opinion three months after the United States declared war on Germany. "Instead of interruption, World War I brought the extraordinary culmination of the progressive movement. U.S. participation in the Great War gave progressives their 'heart's desire'—the best opportunity they ever had to remake the nation along progressive lines." MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, at 280–81 (2003); *accord* ALAN DAWLEY, CHANGING THE WORLD: AMERICAN PROGRESSIVES IN WAR AND REVOLUTION 147–50 (2003); ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE 214–15 (1991); Allen F. Davis, *Welfare, Reform and World War I*, 19 AM. Q. 516, 517–19 (1967).

176. *See generally* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 (1999); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 (1996). On anti-Communism in America after World War II, see, for example, DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE (1970); MICHAEL PAUL ROGIN, THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER (1967).

177. Hand detested the era's anti-Communist "witch hunts" and in 1952 publicly denounced Senator Joseph McCarthy and his tactics. GUNTHER, *supra* note 2, at 588–89.

false," he declared, and it led people to "the hairy embraces of that strangest of all strange deities, the enraged egoist, Karl Marx."[178] More immediately compelling, Hand feared the Soviet Union. As early as 1946 he confessed that he was "full of trepidation" about the threat it posed to America and the world, and a year later he explained that he was "gloomier than ever about Soviet intransigence."[179] It "will only take three or four months of Russian occupation of Europe," he wrote privately in July 1950, "to extinguish all that we draw on for our spiritual sustenance."[180]

Hand's *Dennis* opinion made clear that he not only recognized the Soviet Union as a powerful and dangerous international adversary but also saw the CPUSA as a dire and immediate threat to the United States. The party's conspiracy, he wrote, "creates a danger of the utmost gravity."[181] Moreover, the potentially lethal threat it posed was sufficiently imminent to justify government efforts to suppress it. "We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities."[182] Keenly and anxiously, Hand felt an overweening danger, and he steeled himself to confront it. Eight years earlier the "dumb energy" driving "the popular will" had convinced him of the need for "unflinching resistance," and now the CPUSA did the same.[183] Americans, he declared in *Dennis*, "must not flinch at the challenge."[184] He feared not just the Soviet

178. Letter from Learned Hand, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Bernard Berenson (Jan. 8, 1950), *in* REASON AND IMAGINATION, *supra* note 3, at 286–87.

179. GUNTHER, *supra* note 2, at 577, 578. For Hand's attitudes toward the early Cold War and McCarthyism, see *id.* at 577–92, and for his related judicial work, see *id.* at 592–629.

180. Letter from Learned Hand, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Walter Lippmann (July 18, 1950), *in* REASON AND IMAGINATION, *supra* note 3, at 291.

181. United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950). "Our democracy, like any other, must meet that [Communist] faith and that creed on the merits, or it will perish." *Id.* at 212.

182. *Id.* at 213.

183. HAND, *Contribution of an Independent Judiciary*, *supra* note 76, at 119, 120. *See supra* note 59.

184. *Dennis*, 183 F.2d at 212.

> The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy.

Id.

Union and world Communism but, like most Americans, the small and generally despised CPUSA as well.[185]

Equally significant, Hand was not actually "bound" in *Dennis* by controlling Supreme Court precedents. The Court's various First Amendment opinions were neither sufficiently clear nor sufficiently consistent to require him to interpret the "clear and present danger" doctrine as he did.[186] Geoffrey Stone, for example, has maintained that "in the thirty years since World War I, the Court had moved decidedly toward the Holmes-Brandeis approach, under which the convictions in *Dennis* would clearly have to be reversed."[187]

In his *Dennis* opinion Hand acknowledged the law's shift toward a more welcoming view of free speech, noting that the "Supreme Court has certainly evinced a tenderness towards political utterances since the First World War."[188] Then he worked his way through an extended and "wearisome analysis"[189] of the Court's precedents and, as Gunther noted, "found no clear guidance there."[190] Repeatedly, his opinion explained that the available precedents had little or no relevance to the issue he faced.[191] Thus, he had

---

185. Hand "emerged as deeply biased in favor of the prevailing political assumptions of the day." CAUTE, *supra* note 176, at 193. His language "boded ill for judicial impartiality; in Hand's Cold-War diatribe the judiciary merely fused its values and its criteria of judgment with those of the President and Congress, of the aggravated *patria*." *Id.* at 194. The CPUSA was under widespread and fierce attack in the late 1940s and 1950s. *See, e.g.*, THEODORE DRAPER, AMERICAN COMMUNISM AND SOVIET RUSSIA: THE FORMATIVE PERIOD 430 (1960); MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945–1954, at 315–16 (1998); LISLE A. ROSE, THE COLD WAR COMES TO MAIN STREET: AMERICA IN 1950, at 217–21 (1999); DAVID A. SHANNON, THE DECLINE OF AMERICAN COMMUNISM: A HISTORY OF THE COMMUNIST PARTY OF THE UNITED STATES SINCE 1945, at 317–19 (1959). Further, the party was struggling under internal divisions. *See* JOSEPH R. STAROBIN, AMERICAN COMMUNISM IN CRISIS, 1943–1957, at 197–205 (1972).

186. "While it is true that the Court did not fully explain the relationship of 'gravity' to the other elements of the test, it never suggested that the gravity of the evil was to be weighed against the imminence of the danger." KALVEN, *supra* note 110, at 198.

187. STONE, *supra* note 25, at 402; *accord id.* at 236–38, 396.

188. *Dennis*, 183 F.2d at 207. On appeal, Chief Justice Vinson's plurality opinion announcing the Court's judgment acknowledged the same point: "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale." Dennis v. United States, 341 U.S. 494, 507 (1951).

189. *Dennis*, 183 F.2d at 212.

190. GUNTHER, *supra* note 2, at 600. As Stone put it, "the Court's precedents in this area were hardly crystalline." STONE, *supra* note 25, at 402.

191. Hand canvassed almost every possibly relevant precedent and found none clearly applicable or particularly helpful. *See Dennis*, 183 F.2d at 207–12. "It does not seem to us therefore that these decisions help towards a solution here," he wrote about one group of cases. *Id.* at 209. Several other precedents "throw no light" on the issue, *id.*, while other "cases are not helpful here." *Id.* at 210. Of the last case he considered, the Supreme Court's most recent free

sufficient leeway to construe the Court's precedents to establish a more demanding First Amendment standard.[192] He could, for example, have given far more "weight" to the importance of "free speech" itself,[193] required that a danger be "imminent" rather than merely "probable," and treated the "gravity" of a danger and its "imminence" as independent variables to be considered separately rather than as dependent variables to be balanced against one another.[194]

---

speech case, *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382 (1950), he wrote that "[w]e do not pretend" that it "is authoritative here." *Dennis*, 183 F.2d at 211. "What we do say is that no longer can there be any doubt, if indeed there was before, that the phrase, 'clear and present danger,' is not a slogan or shibboleth to be applied as though it carried its own meaning." *Id.* at 212.

192. Although by the time he wrote *Dennis* there were many Court precedents on First Amendment speech issues, they did not necessarily constrain Hand beyond establishing that the label of the proper constitutional test was "clear and present danger," not "incitement." As Hand argued in *Dennis*, however, those precedents did not make the meaning of "clear and present danger" apparent, nor did they determine how it should be applied to the defendants. The phrase, he wrote immediately before his formulation of its meaning, "is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can." *Dennis*, 183 F.2d at 212.

193. Even assuming that the legal test was one of "balancing," that did not determine what elements were to be "balanced," the "weight" each was to be given, or the relation among them. Hand's failure to place the values of free speech more heavily into the scales was puzzling given both his repeated statements about its importance and his personal view that the prosecution and conviction of defendants was unwise and even potentially harmful. "Personally I should never have prosecuted those birds: 'the blood of martyrs is the seed of the church.' So far as all this will do anything, it will encourage the faithful and maybe help the Committee on Propaganda." Letter from Learned Hand to Felix Frankfurter, *supra* note 133, at 306; *accord* Letter from Learned Hand, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Augustus Noble Hand, Judge, U.S. Court of Appeals for the Second Circuit (Aug. 8, 1950), *in* REASON AND IMAGINATION, *supra* note 3, at 294. Those considerations suggested additional reasons why Hand should have given greater weight to the importance of protecting free speech.

194. In the most recent Court precedent, *Douds*, 339 U.S. at 411, the Court spoke of "balancing," and from that Hand inferred that the proper "clear and present danger" test "involves in every case a comparison between interests which are to be appraised qualitatively." *Dennis*, 183 F.2d at 212. That conclusion ("interests" to be "appraised qualitatively") highlighted the subjective nature of the test that was ostensibly required, and it hardly mandated the test as Hand stated and applied it. *Douds* did not require him to minimize the evil of an "invasion of free speech," *id.*, nor did it require his findings regarding either the "gravity" or the "probability" of the danger at issue. Further, it did not require him to substitute "probability" for "imminence." Finally, *Douds* specified neither all of the "interests" to be included in the analysis nor the "weight" each interest was to have. "Unlike Brandeis in *Whitney*, who maintained that the gravity of the evil should be considered only after its imminence had been demonstrated, Hand 'purposely substituted 'improbability' for 'remoteness' and used gravity as a 'mutually interdependent' factor to be balanced against improbability, not as an independent test." RABBAN, *supra* note 25, at 377.

Hand, moreover, knew how to shape precedents and doctrines to accord more closely with his own views of wisdom, efficacy, and propriety. Even if he had not infused his own value judgments into his *Masses* opinion,[195] on both the district and circuit courts he had interpreted unsettled law, unclear rules, and unhelpful precedents in ways that brought new direction and substance to many areas of the law.[196] Indeed, those achievements were precisely why so many commentators called him a "great" judge and repeatedly hailed him for shaping the law wisely and well.

Thus, in *Dennis* Hand had the opportunity to strengthen or weaken First Amendment law.[197] As he had repeatedly declared, judges had to make choices, and they often had considerable discretion in doing so.[198] A judge,

---

195. *See* GUNTHER, *supra* note 2, at 158.

196. Hand

> had a high respect for precedent, but was unwilling that courts—or at least courts of last resort—should move only within the stated limits of precedent. His tributes to tradition were coupled, as often as not, with encouragement of experiment and change. His was the middle way. In his intellectual humility, he knew that his solution was not necessarily superior to the wisdom of the past, and yet he knew that if we are to progress, we must move by what light we have.

THE ART AND CRAFT OF JUDGING, *supra* note 8, at 17. For discussions of ways in which Hand's ideas helped alter or shape the law in other areas, see, for example, GUNTHER, *supra* note 2, at 138 (patents); *id.* at 148–51 (obscenity); *id.* at 612–25 (criminal conviction); *id.* at 629–38 (naturalization); Marvin A. Chirelstein, *Learned Hand's Contribution to the Law of Tax Avoidance*, 77 YALE L.J. 440, 473–74 (1968) (Hand "was a system-builder, whatever he may have declared to the contrary," and he made a "persistent effort to rationalize the administrative process"); Cox, *supra* note 67, at 370 (Hand changes established approaches to statutory interpretation); Orrin G. Judd, *Judge Learned Hand and the Criminal Law*, 60 HARV. L. REV. 405, 407 (1947) (noting Hand makes decisions though "recognizing that there was authority to the contrary"). For a somewhat different argument that Hand was a particularly "obedient" judge, see SCHICK, *supra* note 8, at 154–91, and, for the same point, Wyzanski, *supra* note 10, at 352–54.

197. Hand was sufficiently adroit to even have found a way to state a more protective test while, at the same time, upholding defendants' convictions. His adoption of a test balancing "gravity" and "probability," however, made such a result much more difficult, and the fact that he framed such a balancing test suggests that he was determined to uphold the convictions because of his intense fear of the Communist danger. Seven years later Justice John Marshall Harlan demonstrated how Hand could have gone even farther and reversed defendants' convictions on the basis of arguably established rules and precedents, including a narrowed concept of "incitement." *See* Yates v. United States, 354 U.S. 298, 312–27 (1957); *see also* STONE, *supra* note 25, at 413–15 (suggesting a parallel between Harlan's approach and Hand's in *Masses*, at 414). In *Yates*, the Court did not decide on the basis of the "clear and present danger" test. 354 U.S. at 303 n.2.

198. From his early years on the bench Hand understood that judges were often required to choose between plausible alternatives. They are, he wrote in 1916, "charged with the

he explained several years after *Dennis*, must strive for "complete personal detachment" but must also "have as much imagination as is possible."[199] Like the poet and sculptor, the judge "has some vague purposes and he has an indefinite number of what you might call frames of preference among which he must choose; for choose he has to, and he does."[200] Indeed, in *Dennis* he reiterated his claim that "choose we must."[201] Then, he chose to weaken First Amendment law, not strengthen it.[202]

In neither *Masses* nor *Dennis* did Hand's choice flow simply from an eternal and unchanging jurisprudence, whether one committed to free speech or judicial deference. Rather, both were products of a judge at two quite different times in his life, of two quite different historical contexts, and of a decision made many years earlier to reject Brandeis's democracy-based free speech jurisprudence. Hand's *Masses* opinion in 1917 was a product of the open-ended pragmatism he learned from William James, an enthusiastic embrace of a buoyant Progressive spirit, an instinctive appreciation of the intellectually exciting nature of *The Masses*, and a heady flirtation with a new jurisprudential ideal that was activist, forward looking, justice oriented, and in accord with what he believed was a new and "genuine social ideal."[203]

---

responsibility of choosing but of choosing well." HAND, *The Speech of Justice*, *supra* note 59, at 15; *see* HAND, *Mr. Justice Holmes*, *supra* note 74, at 21 ("In the end, and quite fairly, a judge will be estimated in terms of his outlook and his nature. He cannot evade responsibility for his beliefs, because there are at bottom the creatures of his choice").

199. PROCEEDINGS OF A SPECIAL SESSION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO COMMEMORATE FIFTY YEARS OF FEDERAL JUDICIAL SERVICE BY THE HONORABLE LEARNED HAND, *reprinted in* 264 F.2d 1, 28 (2d Cir. 1959) (separate pagination from the cases reported in the volume).

200. *Id.* at 29.

201. United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

202. Hand's opinion "provided a speech-repressive precedent that undercut the libertarian potential of clear-and-present-danger and set back the First Amendment momentum by twenty years." WIECEK, *supra* note 153, at 558. "The First Amendment simply cannot stand on the shifting foundation of ad hoc evaluations of specific threat[s]." ELY, *supra* note 42, at 109. The "'balancing' test has tended to reduce the first amendment [*sic*], especially when a legislative judgment is weighed in the balance, to a limp and lifeless formality." Emerson, *supra* note 121, at 877. "Such an unstructured inquiry invariably lends itself to ideological manipulation," and the "very ambiguity of the standard creates an intolerable uncertainty of application and a potent chilling effect on free expression." STONE, *supra* note 25, at 409; *accord* RABBAN, *supra* note 25, at 376–78. Anthony Lewis sought to exonerate Hand while at the same time acknowledging that he weakened First Amendment law. "Hand felt obliged to follow the Holmes approach, though his version of it was much weaker than what was intended by Holmes . . . ." ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 122 (2007).

203. HAND, *The Speech of Justice*, *supra* note 59, at 15; *see* Purcell, *supra* note 70, at 900–01.

More than thirty years later his opinion in *Dennis* was a product of profound personal and contextual changes. His pragmatism had grown brittle and timid, and the other factors that had inspired him in *Masses* had long disappeared from his life. In their place were constraining personal experiences and a more threatening world that together had combined to chasten his optimism, deepen his skepticism, narrow his faith in the possibilities of democratic government, and strengthen his convictions about the primacy of social stability and the necessity of political acquiescence. Those changes channeled his thinking in *Dennis*, and as a result he chose to put a relatively restrictive interpretation on the law, an interpretation that would not only uphold the conviction of the Communist defendants but also limit more generally the scope the law would allow to political dissenters.

In 1950, Hand was not free as a matter of law to apply his *Masses* "incitement" test as such, but he was free to make the "clear and present danger" test far more protective than he did. He chose to do the opposite. Regardless of whether he continued to believe in the superiority of his "incitement" test as a personal matter, his views and values—and his performance as a judge—had changed. Those changes altered his perceptions of both free speech and the world, and together they reshaped the way he would explore, state, and apply the law.[204]

Masses and *Dennis* together have their most enduring historical significance, then, because they exemplify the unavoidable press of personal viewpoints and historical contexts and because they illustrate the unavoidable processes of constitutional change. They spotlight the fact that principles neither articulate nor define themselves and that their shaping, selection, interpretation, and application always take place "in history" and through the medium of individual minds.[205] They demonstrate that understanding American constitutionalism and its laws requires constant attention to those factors which are too often ignored or minimized in the quest for clear,

---

204. In the actual circumstances of 1950, it seemed highly unlikely that the American Communist Party could threaten in any serious way to overthrow the United States government or to do so in the foreseeable future. Further, in spite of the party's teaching about the inevitability of a proletarian revolution, it did not advocate any unlawful actions at the time or in the near future. *See, e.g.*, Posner, *supra* note 5, at 517–18.

205. Posner's comment on Hand's *Dennis* opinion was harsh but accurate. The opinion was "a period piece," Posner wrote, and "we might expect of a judge of Hand's ability something more than the conventional wisdom of his time and place." Posner, *supra* note 5, at 517–18. Ironically, after World War I, referring to the work of "their Ineffabilities, the Nine Elder Statesmen," Hand declared that the Justices had "not shown themselves wholly immune from the 'herd instinct'" and noted that "what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged." Gunther, *supra* note 33, at 770.

controlling, authoritative, and unchanging constitutional theories and doctrines. The tensions between "law" and "history" and between legal reasoning and social realities raise serious and unavoidable normative questions,[206] and understanding those tensions and grappling intelligently with those questions is essential to ensuring the vitality, integrity and efficacy of American constitutionalism.[207]

Understood in historical context, then, *Masses* and *Dennis*—and *Brandenberg* as well—sound a grave warning. Changing times and contexts always generate new pressures, and those pressures may create new and sometimes particularly dangerous threats to individual rights, democratic government, and the rule not just "of law" but "of fair and decent law.[208] In his book *Perilous Times* Geoffrey Stone identified that lesson for First Amendment law,[209] but the lesson applies equally to American constitutionalism in general. There can be no end to the story of either free speech or open democratic government, for changing times and contexts will always bring ominous new challenges to both, challenges that mere words—however noble, comforting, or unchanging—cannot by themselves meet and successfully overcome.

IV. RECONSIDERING *THE BILL OF RIGHTS*

Masses and *Dennis* marked changes in Hand's constitutional thinking, as did *The Bill of Rights* which was far more rigid and extreme that Hand's view of the judiciary in the years before World War I. Beyond representing change, however, *The Bill of Rights* illustrated quite sharply both the rigidification of his thinking and the shaping power of historical context and personal values. The book is particularly revealing in the latter regard, moreover, because Hand purposely strove to present his views as the pure and spare product of the most rigorous constitutional logic. It was a work ostensibly based on

206. *See, e.g.*, Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 299 (1990); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731–32 (1987).

207. The evolution of First Amendment law from the New Deal to the present illustrates many of the tensions between "law" and "history" and some of the ways the latter continually remolds the former, bringing complicated, unanticipated, and sometimes deeply controversial results. *See, e.g.*, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 2002–04 (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1456–58 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135–38 (2016).

208. For an analysis of the impact of historical context and change on ideas about free speech, see, for example, GRABER, *supra* note 23, at 3–15.

209. STONE, *supra* note 25, at 523–25.

"unanswerable" propositions that led to timelessly correct conclusions.[210] That facade of Olympian truth, however, could not conceal the extent to which the book was a deeply personal effort rooted in its author's specific time, context, and individual beliefs. An examination of *The Bill of Rights*, then, suggests that normative constitutional theories—however abstract, "logical," and ostensibly "timeless" in form—cannot escape the cabining limitations of history.

A. Time and Context in The Bill of Rights

Most apparent, several immediate historical factors shaped *The Bill of Rights*. Perhaps most fundamental was Hand's acute awareness of the professional expectations he had aroused by agreeing to give the prestigious Holmes Lectures and his consequent decision to present the lectures as a grand jurisprudential valedictory. That, in turn, led to two other equally fateful decisions. One was his decision to focus on constitutional theory rather than on any of the other subjects he had written about over the decades and could have likely addressed with greater subtlety and nuance; the other was his determination to lay out a general constitutional theory and support it with "logically airtight arguments," a goal wholly inappropriate to the subject he chose.[211] A more specific factor was Felix Frankfurter's desperate—and ultimately successful—effort to convince him that *Brown v. Board of Education*[212] was not based on the general principle that race-based laws violated the Equal Protection Clause.[213] Frankfurter's misleading reports

---

210. HAND, THE BILL OF RIGHTS, *supra* note 11, at 10, 51. Hand's legal philosophy "was timely when he preached it and yet was imbued with a sure timelessness, transcending in importance even his most significant decisions." SCHICK, *supra* note 8, at 156.

211. Hand was "obsessed by his drive to produce logically airtight arguments" and that drive led him to articulate "a more rigid, more negative view of judicial power than any he had ever voiced before." GUNTHER, *supra* note 2, at 671. Interestingly, Hand's goal was identical to the approach he took in *Masses*. In both he sought to articulate a test that would be, as he said of his earlier opinion, "hard, conventional, difficult to evade." Gunther, *supra* note 33, at 770. If that approach was fruitful for his earlier purpose, it proved stultifying for his later one.

212. 347 U.S. 483, 495 (1954) (holding racial segregation in public schools unconstitutional). For Hand's assessment, see HAND, THE BILL OF RIGHTS, *supra* note 11, at 54–55.

213. Fearful of Southern anger, intransigence, and violence, Frankfurter was determined to stop the Court from hearing challenges to anti-miscegenation laws. If *Brown* were recognized as establishing the general principle that racial categories were constitutionally prohibited, he believed, it would force the Court to invalidate such laws. That, in turn, would infuriate the South and cause untold damage to the Court and the country. GUNTHER, *supra* note 2, at 665–72; BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 158–62 (1983); *see, e.g.*, Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit

and repeated exhortations were largely responsible for Hand's unfortunate and negative treatment of *Brown*.[214] Another related factor was Hand's confused understanding, or perhaps even inexplicable ignorance, of the Court's *per curiam* desegregation decisions that followed *Brown*, a factor that made him acutely vulnerable to Frankfurter's urging.[215] Finally, one last factor cannot be disregarded. Lurking in the back of Hand's mind may have been concerns about his still recent and increasingly criticized opinion in *Dennis*, an opinion that he felt conflicting needs to defend, clarify, and to some extent disclaim.[216]

(Sept. 8, 1957), *in* REASON AND IMAGINATION, *supra* note 3, at 374–75; Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit (Sept. 17, 1957), *in* REASON AND IMAGINATION, *supra* note 3, at 376–77; Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit (Sept. 27, 1957), *in* REASON AND IMAGINATION, *supra* note 3, at 379–80; Letter from Felix Frankfurter, Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit (Oct. 12, 1957), *in* REASON AND IMAGINATION, *supra* note 3, at 381–82.

214. HAND, THE BILL OF RIGHTS, *supra* note 11, at 54–55. The arid rigidity of Hand's thinking was apparent in his refusal to consider or even mention two overshadowing facts about *Brown*. One was that the Court had almost surely exercised a practical prudence in distinguishing *Plessy v. Ferguson* rather than overruling it. Brown v. Bd. of Educ., 347 U.S. 483, 491–92, 494–95 (1954). The other was that, even assuming that *Brown*'s holding was limited, it had nonetheless ignited race-based tumult that had been dominating the national headlines. In addition to vigorous and sometimes violent resistance throughout the South, at the very time Hand was preparing and delivering his lectures two race-based crises were reaching their peak. In Congress, Southern representatives were pushing legislation to retaliate against the Court for its decision in *Brown*, and in Little Rock, Arkansas, a riotous school desegregation battle had forced a reluctant president to send in the 101st Airborne Division to ensure order. For Hand, those considerations were apparently irrelevant. *See* GUNTHER, *supra* note 2, at 660–62; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 326–28, 398–400 (2004); WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 79–80, 91–95 (1962). *See generally* J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971).

215. GUNTHER, *supra* note 2, at 670.

216. *The Bill of Rights* justifies Hand's deferential behavior in *Dennis*, HAND, THE BILL OF RIGHTS, *supra* note 11, at 9–11, 56, while at the same time both suggesting doubts about the law he stated there, *id.* at 58–60, and acknowledging the practical value of judicial review in protecting free speech rights, *id.* at 69. Hand's private letters show that he continued to believe that his *Masses* opinion offered a sounder test for First Amendment issues and that he was uneasy with his *Dennis* test. *See* Letter from Learned Hand to Felix Frankfurter, *supra* note 133, at 306; Letter from Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit, to Elliot Richardson (Feb. 29, 1952), *in* REASON AND IMAGINATION, *supra* note 3, at 311–12; and Letter from Learned Hand, Senior Judge, U.S. Court of Appeals for the Second Circuit, to Charles Wyzanski, Judge, U.S. Dist. Court for Dist. of Mass. (Apr. 13, 1952), *in* REASON AND IMAGINATION, *supra* note 3, at 314–16.

Time and context also marked many of the book's basic assumptions. Hand's concepts of federalism and separation of powers, for example, appeared rigid and formalistic, and they lacked insight into the complexities that more recent scholarship has illuminated. On federalism, Hand blinked the fact that federal judicial enforcement of the Bill of Rights represented not just a "judicial" power but also a "national" power.[217] That power functioned not only as a limit on governmental power, as Hand recognized,[218] but also as an instrument capable of magnifying national powers over the states—legislative and executive as well as judicial.[219] Thus, Hand missed what later scholarship recognized as a central dynamic of federal judicial review.[220] On separation of powers, his position seemed equally outmoded. Judicial review "invaded" the separation of powers, he declared, terming that assertion "to

---

217. "I am not concerned with those decisions that have marked the division between the powers of the nation and of the states, for the 'Bill of Rights' is concerned only with the protection of the individual against the impact of federal or state law." HAND, THE BILL OF RIGHTS, *supra* note 11, at 31; *see also id.* at 1 (seeming to treat judicial review of "statutes of Congress, or of the States, or acts of the President" as involving equal issues subject to the same standards); *id.* at 13–15 (discussing judicial review of federal "Departments" and including "the states"); *id.* at 31 (equating question of judicial review of state and federal actions).

218. *Id.* at 31, 33.

219. Obvious examples coming in the decade after Hand wrote include *Katzenbach v. McClung*, 379 U.S. 294, 303–05 (1964) (upholding power of Congress under the Commerce Clause to prohibit racial discrimination in interstate commerce); *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966) (upholding power of Congress under Section 2 of the Fifteenth Amendment to impose restrictions on state power to control voting rights); and *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (upholding power of Congress under Section 5 of the Fourteenth Amendment to enact laws protecting minority voting rights). *See, e.g.*, LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 487–88 (2000) (describing how the Warren Court enforcement of the Bill of Rights and the Fourteenth Amendment sought to make racial policies of Southern states conform to new national standards and values); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000) (describing early cases enforcing Bill of Rights and Fourteenth Amendment in criminal cases linked closely to reaction against racial injustice in South).

220. Contemporary scholarship has made it clear that modern "federalism" is an exceptionally complex system involving intertwined relations between the ostensibly "separate" levels and branches of government. *See, e.g.*, EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 7 (2007) ("The idea of American federalism as a simple binary division between 'the nation' and 'the states,' then, is an artificial abstraction unrelated to the actual history and operations of the nation's constitutional system."); ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 350 (2011) ("Indeed, the important interpretative roles by political actors in vertical federalism bargaining are enhanced by the horizontal check of judicial review."); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1957 (2014) ("Taking administration and politics seriously ultimately points not to preservation of traditional conceptions of federalism, but instead to a new anti-essentialist view of states and their role in our compound republic.").

my mind an unanswerable" proposition.[221] That proposition, however, was easily answerable, and historical studies have convincingly done so. They have demonstrated that at the founding the doctrine of separation of powers was so vague, unsettled, and contested that it could not have supported any conclusive argument, let alone one that was "unanswerable."[222] Further, the only proposition about the doctrine that was truly "unanswerable" contradicted Hand's assertion. It was apparent, after all, that the Constitution adopted separation of powers in a specially modified form that partially blended the diverse and "separated" powers of the federal branches in order to create a complex new system of checks and balances.[223] Thus, "invasions" of the separated powers of the three branches were literally built into the Constitution's structure.

Similarly, time and context marked Hand's declaration that the power of judicial review "is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation."[224] True, judicial review was not a *necessary* "logical deduction," but it was manifestly one that was eminently "logical."[225] Herbert Wechsler demonstrated that point a year after Hand wrote,[226] and a decade later Charles Black showed at great length that "the method of inference from the

---

221. HAND, THE BILL OF RIGHTS, *supra* note 11, at 10–11.

222. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 261 (1989); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755 (1996); Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269, 270–71 (1989).

223. Madison repeatedly made the point that the Constitution's structural "inventions of prudence" created multiple institutions with partially overlapping powers that would enable them to check and balance one another. THE FEDERALIST NO. 51, at 337 (James Madison) (Edward Mead Earle ed., 1937); *see* THE FEDERALIST NO. 47, at 314–15 (James Madison) (Edward Mead Earle ed., 1937); THE FEDERALIST NO. 48, at 321 (James Madison) (Edward Mead Earle ed., 1937).

224. HAND, THE BILL OF RIGHTS, *supra* note 11, at 15. "The arguments deducing the court's authority [of judicial review] from the structure of the new government, or from the implications of any government, were not valid, in spite of the deservedly revered names of their authors." *Id.* at 28.

225. The *Federalist Papers*, for example, suggested the importance of such "structural" reasoning. *See, e.g.*, THE FEDERALIST NOS. 9, 22, 78 (Alexander Hamilton), NOS. 39, 48 (James Madison). Hand was, of course, well aware of *The Federalist*, and in *The Bill of Rights* he discounted Hamilton's argument in Number 78 by distinguishing constitutional judicial review from the inference Hamilton drew based on "the ordinary function of courts to construe statutes." HAND, THE BILL OF RIGHTS, *supra* note 11, at 7–11. Hand did not address the broader structural arguments that both Hamilton and Madison advanced in their various essays.

226. Wechsler, *supra* note 42, 3–5.

structures and relationships created by the constitution [*sic*]"[227] can logically support the practice of judicial review while helpfully illuminating the substantive interests and values at issue in its exercise.[228] The Court itself, moreover, has frequently advanced arguments based on constitutional structure. "Because there is no constitutional text speaking to this precise question," Justice Antonin Scalia wrote, resolution "must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[229] One can contest the merits of any particular structural argument,[230] but Hand's flat assertion that structural arguments did not allow any "logical deduction" supporting judicial review was simply unfounded and has, by and large, long been abandoned.[231]

Again, time and context dated Hand's assumption that judicial review was an anti-majoritarian practice.[232] While the "counter-majoritarian difficulty" in constitutional theory remains a subject of debate,[233] there is virtually no basis

---

227. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969). "On the whole, there is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality." *Id.* at 74.

228. For example, the "textual method, in some cases, forces us to blur the focus and talk evasively, while the structural method frees us to talk sense." *Id.* at 13. "I am inclined to think well of the method of reasoning from structure and relation . . . because to succeed it has to make sense—current, practical sense. The textual-explication method . . . contains within itself no guarantee that it will make sense." *Id.* at 22.

229. Printz v. United States, 521 U.S. 898, 905 (1997). For further references to the majority's structural argument in *Printz*, see *id.* at 918, 921, 932. Similarly, in *Alden v. Maine* the Court relied for its decision on "history, precedent, and the structure of the Constitution." 527 U.S. 706, 760 (1999). For other examples of the judicial acceptance of structural arguments, see *Miller v. French*, 530 U.S. 327, 349–50 (2000); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 217–18 (1995); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859–60 (1986) (Brennan, J., dissenting).

230. In *Printz*, 521 U.S. at 955, 961, for example, Justice Stevens dissented from the majority's structural reasoning. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 737, 743, 785, 797 (2008) (majority invoking structural argument) and *id.* at 826, 833 (Scalia, J., dissenting (rejecting structural argument).

231. *See, e.g.*, BLACK, *supra* note 227, at 72–75; *accord* ELY, *supra* note 42, at 12 ("[T]he theory one employs to supply that [specific] content should be derived from the general themes of the entire constitutional document and not from some source entirely beyond its four corners."). "Respecting the general technique of bringing the document's broader themes to bear on the resolution of specific questions," Ely wrote, "I have been importantly influenced by C. Black, *Structure and Relationship in Constitutional Law* (1969)." *Id.* at 225 n.48.

232. Judicial review contradicted "the presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve." HAND, BILL OF RIGHTS, *supra* note 11, at 73.

233. The term was discussed and popularized in BICKEL, *supra* note 36, at 16. The idea has a long history. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The*

today for rejecting judicial review on the ground that it is simply "anti-majoritarian."[234] Overwhelming evidence has demonstrated that judicial review for the most part has not functioned as an anti-majoritarian practice.[235] Indeed, when courts exercise their power of judicial review they are most frequently reviewing not acts of "majoritarian" legislatures but of relatively low-level executive and administrative officials exercising discretion.[236] Equally to the point, other research has shown Hand's "majoritarian" view of

---

History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession*, 112 YALE L.J. 153 (2002). For an interpretation placing the post-New Deal debate in a broad intellectual context, see FELDMAN, *supra* note 29, at 349–50.

234. For a review of much of the literature on the extent to which the Court is "majoritarian," see Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 103. For a sampling of the literature showing the Court's responsiveness to the other branches of government, see, for example, GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 252–53 (2003) (describing judicial lawmaking as frequently the result of congressional delegations of power); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 288–92 (2007) (noting the Court follows presidential wing of dominant political party); Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a* Strategic *National Policymaker*, 50 EMORY L.J. 583, 585 (2001) (noting that the Court adjusts decisions in anticipation of responses of other branches); Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) (showing the Court more likely to overturn a congressional statute when it was passed by earlier Congress and current Congress is ideologically sympathetic with overruling); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (noting the Court makes policy when legislature is stalemated or invites action); *see also* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 3–4 (2011); Neal Devins, *Is Judicial Policymaking Countermajoritarian?*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE (Mark C. Miller & Jeb Barnes eds.) 189–201 (2004); Lee Epstein, Jack Knight & Andrew D. Martin, *Constitutional Interpretation from a Strategic Perspective*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE (Mark C. Miller & Jeb Barnes eds.)170–88; Jeffrey A. Segal, Chad Westerland & Stephanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 90 (2011); Alicia Uribe, James F. Spriggs II & Thomas G. Hansford, *The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions*, 48 L. & SOC'Y REV. 921, 922–25 (2014).

235. In addition to the sources cited in note 234, *supra*, see, for example, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 367–71 (2009) (noting the Court commonly follows public opinion); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004). For a general review of the literature, see Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1611 (2017).

236. BLACK, *supra* note 227, at 78, 89–90.

legislatures is highly flawed because state and federal legislatures quite commonly represent narrow special interests—or the careerist interests of their members—rather than "majoritarian" views.[237] In many cases, then, even judicial review of legislative acts is not, in reality, an anti-majoritarian process. Indeed, when the Court invalidates legislative acts, its decisions are often the result of a new political majority taking over the federal branches and enforcing their new ostensibly majoritarian views on the nation and states.[238] Thus, today it is well established that judicial review is far more subtle, varied, complex—and often even "majoritarian"—than *The Bill of Rights* recognized.[239] More than half a century of scholarship has superseded Hand's simplistic treatment of the issue.

B. Personal and Subjective Values in The Bill of Rights

While time and context marked *The Bill of Rights*, many of its arguments also revealed its deeply personal, subjective, and even idiosyncratic nature. Hand went out of his way, for example, to discuss the dormant Commerce Clause although he acknowledged that it was "not relevant to my subject."[240] The Court's embrace of the doctrine was "an extreme construction of the

---

237. *See, e.g.*, DAVID S. SCHOENBROD, D.C. CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON 18–19 (2017). The federal structure, the practice of gerrymandering, and the lobbying power of organized interest groups often prevent federal and state legislatures from following "majoritarian" wishes. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 23 (1980) ("[B]y transmitting pertinent information to key lawmakers, by skillfully and selectively applying pressure at critical points in the system, and by expanding massive sums of money—not infrequently in an abusive, and occasionally criminal, manner—[interest groups] are able to exercise power well beyond the force of the numbers of people they represent."); LOVELL, *supra* note 234, at 22 ("[T]hat legislative outcomes should serve as a paragon of democracy or a proxy for the will of 'majorities' seems almost bizarre."); Paul A. Diller, *Reorienting Home Rule: Part I—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 290–91 (2016) (institutional and geographic factors often block majority rule); Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345, 368 (2002) ("The results in this paper support the hypothesis that interest groups 'buy' legislators' votes with PAC contributions."). For a qualification of the argument about the anti-majoritarian nature of many legislatures, see ELY, *supra* note 42, at 181–83.

238. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529 (2013) (invalidating section of Voting Rights Act of 1965); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (invalidating state "poll tax" law). *See generally* FRIEDMAN, *supra* note 235.

239. Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 889–92 (2001).

240. HAND, THE BILL OF RIGHTS, *supra* note 11, at 33; *see also id.* at 31–32 (The issue of the dormant Commerce Clause "is irrelevant to the 'Bill of Rights,'" but it "so well discloses the kind of *media concludendi* used in constitutional cases that it justifies a short digression.").

clause,"[241] he explained, yet it was defensible on the ground that it was "not altogether irrational."[242]

Two points were apparent. One was that his judgment on the dormant Commerce Clause reflected his own personal views, derived from his Progressive association with both Theodore Roosevelt and Herbert Croly, "that a nationally integrated market was the constitutional ideal."[243] The other was that he refused to judge *Brown* and its interpretation of the Fourteenth Amendment by the same test.[244] Hand based his justification of the dormant Commerce Clause on practical considerations. It was necessary to overcome state "rivalries" that could otherwise "strain the whole national fabric" and impede the power of Congress to assert national authority.[245] Given the context of American race relations in 1958, he could have defended the Court's efforts against racial segregation on those identical practical grounds, and those grounds would surely have been constitutionally sufficient had he judged them by the "not altogether irrational" test that he used to justify the dormant Commerce Clause.

Hand's failure to apply the same test to both the dormant Commerce Clause and the Fourteenth Amendment was particularly noticeable because he repeatedly insisted that there was no constitutional justification for treating "personal" rights differently from "economic" rights.[246] That proposition, he asserted, also seemed "unanswerable."[247] Yet he sanctioned stricter judicial supervision over "economic" issues under the dormant Commerce Clause than he allowed for "personal" and "economic" rights under the Fourteenth Amendment. Although he did not adequately explain his grounds for making that distinction, his reasoning suggested two possible arguments in support, neither of which was persuasive.

One possible ground for the distinction was that the dormant Commerce Clause, unlike the Fourteenth Amendment, was a structural doctrine designed to keep the levels and branches of government "within their prescribed powers."[248] That ground was unconvincing, however, for two distinct reasons. First, the dormant Commerce Clause was not a textually

---

241. *Id.* at 32.

242. *Id.* at 33. On the dormant Commerce Clause, Hand's Progressive view parted from Thayer's position. *See* Gabin, *supra* note 85, at 980–83.

243. GUNTHER, *supra* note 2, at 448.

244. For Hand's disagreement with *Brown*, see HAND, THE BILL OF RIGHTS, *supra* note 11, at 54–55.

245. *Id.* at 33.

246. There was no constitutional basis "for asserting a larger measure of judicial supervision over the first than over the second." *Id.* at 51.

247. *Id.*

248. *Id.* at 15.

"prescribed" power; and, insofar as the clause itself conferred a prescribed power, it was a power of Congress, not of the courts. The dormant commerce power, moreover, required extended practical reasoning to support its legitimacy, and that kind of reasoning could have equally supported stricter judicial supervision under the Fourteenth Amendment over at least some issues—racial segregation and disenfranchisement, for example—that involved both "personal" and "economic" rights. Second, the Fourteenth Amendment imposed substantial restraints on the states, and hence it was on its face a structural component designed to limit "their prescribed powers." In that sense the dormant commerce power and the Fourteenth Amendment were identical.

A second possible ground for his distinction was that the dormant Commerce Clause met his test for allowable judicial review because it was necessary to prevent the failure of the whole constitutional enterprise.[249] Yet that ground was equally unconvincing. First of all, in 1958 it was "not altogether irrational" to think that racial strife and turmoil could also threaten the whole constitutional enterprise. It had surely done so several times before, once spectacularly and tragically. Second, and doctrinally more obvious, the dormant Commerce Clause was not necessary to prevent such a possible failure. Had state economic rivalries created problems threatening the constitutional enterprise, Congress had ample power under the Commerce Clause to intervene and end the threat by enacting any measure necessary to accomplish its purpose. Indeed, such congressional action would have been the kind of remedy that Hand—committed to "judicial restraint" and deference to the legislature—should have hailed and readily limited himself to defending. More pointedly, he should certainly have endorsed such congressional action as far more appropriate than judicial intervention based on the strained interpretation of a power granted only to another branch of government.[250]

---

249. *Compare id.* at 14–15, 29 (describing the failure of enterprise standard), *with id.* at 32–33 (offering reasons supporting dormant Commerce Clause).

250. On this point, Hand seemed to abandon principles that he as well as Thayer had often pronounced. Thayer had emphasized that one of the evils of judicial review was that it discouraged legislatures and the people from taking responsibility for their own government. Thayer, *supra* note 81, at 155–56.

> If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.

Id. at 156.

Whatever Hand's exact thinking on the point, his theoretical grounds for distinguishing between judicial activism under the dormant Commerce Clause and judicial activism under the Fourteenth Amendment were anything but "unanswerable." Those grounds were personal, subjective, and inconsistent with other elements of his own theory.

Equally significant, Hand's negative judgment on *Brown* was unjustified and subjective given the constitutional standards he urged at various points in his book. In a particularly striking comment, for example, he declared that the provisions of the Bill of Rights were too vague to be enforced[251] and that they required "no more than that temper of detachment, impartiality, and an absence of self-directed bias that is the whole content of justice."[252] As was undeniable in 1958, nothing in American life was infused with a more intense and obvious "self-directed bias" than the Jim Crow laws and practices that white governments imposed on blacks. Moreover, even if Hand intended to refer only to "self-directed bias" on the part of judiciary, his argument was still unjustified. The Justices who decided *Plessy v. Ferguson*, to which Hand specifically referred,[253] as well as the judges—including Justices on the Supreme Court—who had repeatedly upheld abusive racist laws and actions were all white men, many if not most of whom shared racist attitudes and values.[254] Their decisions were surely the products of "self-directed bias."

Similarly, Hand declared that he could see no reason "why courts should intervene" under the Due Process Clause "unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised."[255] In the context of his dismissal of *Brown* and its foundation in the Equal Protection Clause, the standards he prescribed for due process were meaningless and, in context and effect, racially biased.[256] If Southern segregation laws constituted "honest choices between values," the "honesty" standard he offered could impose no meaningful limit on any kind of abusive lawmaking. If such laws were constitutional, the requirement of "sacrifices honestly appraised" could have no determinate and substantive meaning. Ironically, Hand had seemed to glimpse that fact sixteen years earlier. Then, considering whether courts "might properly intervene" to check legislative

---

251. The Bill of Rights should be construed "as admonitory or hortatory" and "not definite enough to be guides on concrete occasions." HAND, THE BILL OF RIGHTS, *supra* note 11, at 34.

252. *Id.*

253. *Id.* at 54.

254. Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 2010–28 (2003).

255. HAND, THE BILL OF RIGHTS, *supra* note 11, at 66.

256. He repeatedly invoked as standards "honest effort," and "impartial effort." *Id.* at 62, 67; *see also id.* at 61, 66.

judgments, he had added a specific qualification. While such intervention should not be allowed if the legislature "has honestly tried to appraise" the conflicting values at stake, he explained, a legislature would have "failed" that "honesty" test if its action was "nothing but the patent exploitation of one group whose interests it has altogether disregarded."[257]

Another standard Hand proposed was normatively incoherent. The judiciary should refuse to void a statute, he announced, "unless the court is satisfied that it was not the product of an effort impartially to balance the conflicting values."[258] Yet, at the same time—and throughout his life—Hand also insisted that "[v]alues and sacrifices are incommensurables."[259] By definition, it is impossible to "balance" values that are "incommensurable." Indeed, Hand himself admitted as much only a few years earlier when he acknowledged that "I do not know how to weigh values against each other."[260]

Yet another standard Hand proposed—the "underlying presuppositions of popular government"[261]—was inconsistent with his own theory. At the beginning of his first lecture he announced that he based his reasoning about the legitimacy of judicial review on the text of the Constitution and principles of positivism.[262] The text of the Constitution, however, did not identify any "underlying presuppositions of popular government" as such, nor did its many relevant provisions adequately specify the content of such "presuppositions."[263] Indeed, the constitutional provisions that did provide

257. HAND, *Contribution of an Independent Judiciary*, *supra* note 76, at 123. Similarly, Southern racial laws would seem a clear exception to Hand's conviction that "it is very seldom possible to say that a legislature has abdicated by surrendering to one faction; the relevant factors are too many and too incomparable." *Id.* at 124.

258. HAND, THE BILL OF RIGHTS, *supra* note 11, at 61.

259. *Id.* at 38. Hand maintained that proposition repeatedly over the years. *See, e.g.*, HAND, *Contribution of an Independent Judiciary*, *supra* note 76, at 123; LEARNED HAND, *To the Harvard Alumni Association*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 85, 87; HAND, *Sources of Tolerance*, *supra* note 72, at 55. In spite of his view that values were incommensurable, Hand cherished his own deeply held values. *See, e.g.*, LEARNED HAND, *A Plea for the Open Mind and Free Discussion*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 208, 214–15; HAND, *At Fourscore*, *supra* note 11, at 196–97; LEARNED HAND, *At the Fiftieth Anniversary Commencement*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 133, 135; HAND, *Democracy: Its Presumptions and Realities*, *supra* note 72, at 76–77.

260. LEARNED HAND, *Morals in Public Life*, *in* THE SPIRIT OF LIBERTY, *supra* note 11, at 170, 173. Further, his claim that values are "incommensurables" undermined his assertion about the nature of "the whole content of justice." *Compare id.*, *with* HAND, THE BILL OF RIGHTS, *supra* note 11, at 34, 38.

261. HAND, THE BILL OF RIGHTS, *supra* note 11, at 73.

262. *Id.* at 2–3; *see also id.* at 27–29.

263. The Bill of Rights should be construed "as admonitory or hortatory" and "not definite enough to be guides on concrete occasions." *Id.* at 34. Hand saw history as providing little or no guidance. It "would be fatuous to attempt imaginatively to concoct how the Founding Fathers

some relatively specific content to those "presuppositions"—those in Bill of Rights and the Fourteenth Amendment—were precisely the provisions that Hand claimed were too vague for judicial enforcement.[264] On his own textualist and positivist assumptions, then, his "underlying presuppositions of popular government" lacked clear meaning and, more to the point, could have no claim in theory to constitutionally authoritative status.

Indeed, the same may be said equally of his own theory of judicial review. "I have been only trying to say," he explained, "what is the measure of judicial intervention that can be thought to be implicit, though unexpressed, in the Constitution."[265] On those same textualist and positivist grounds, Hand's prescriptions for judicial review also lacked any claim to authoritative status.

Even more striking was the contradiction in his self-proclaimed effort to discover what was "implicit, though unexpressed, in the Constitution." Such an effort was, after all, nothing but an attempt to develop the kind of "structural" theory of judicial review that he had previously discarded as without a "logical" foundation.[266]

Finally, the majoritarianism that Hand assumed as fundamental to his "underlying presuppositions of popular government" was not the comprehensive principle he tried to make it.[267] Rather, for American constitutional government, majoritarianism is but a partial and limited principle. On its face the Constitution created a carefully structured and highly restricted form of "popular government," mandating a range of intervening institutions whose very purpose was to bar "the people" from directly controlling their government.[268] Thus, Hand's majoritarian "presuppositions" could not support the sweeping implications he drew from them, for majoritarianism was but one part of a complex structure of law and government that filtered majority preferences through multiple mediating institutions. His principle of majoritarianism was not adequate to resolve any specific issue about the proper scope of judicial review.

---

would have applied [the provisions of the Bill of Rights] to the regulation of a modern society." *Id.*

264. *Id.* at 33–42.

265. *Id.* at 67.

266. *Id.* at 15.

267. *Id.* at 73. The "ever present problem in all popular government," Hand wrote, was "how far the will of immediate majorities should prevail." *Id.* at 69–70.

268. ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 10–12 (2014). In addition to the principle of representation, the federal structure, the Senate, and the Electoral College all demonstrate the limited nature of American "popular government." The Article III federal judiciary and its power of judicial review arguably constitute merely another example of the Constitution's limitations on "popular government."

In sum, then, *The Bill of Rights* was embedded in a particular time, context, and individual mind, and it was profoundly personal, subjective, and in places self-contradictory. Its pose of "timelessness" was a facade, and the "unanswerable" propositions it proclaimed were little more than dubious opinions expressed at a particular time and in a particular context by a single distinctive individual. Hand's goal of producing "logically airtight arguments" did not mask the fact that his reasoning and judgments flowed from his own personal views, not from the text of the Constitution, authoritative "presuppositions of popular government," or some pure and eternal commitment to extreme judicial deference.

Ironically, Hand acknowledged as much in his oft-quoted conclusion. "Each one of us," he declared, "must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies."[269] Then, he offered a personal confession. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[270]

The ultimate constitutional choice Hand identified between "wayward" legislatures and "Platonic Guardians" illustrated with striking clarity how his thinking had ossified. In his valedictory's summation, he could discern only one binary choice between almost cartoon-like extremes. It was a sterile vision that missed entirely the elastic, dynamic, malleable, counterbalancing, and culturally embedded nature of American constitutionalism.[271] The choice the Constitution presents is not stark; it is not unchanging; and it is not an "either/or" matter. Such a false and arbitrary choice is simply irrelevant to American constitutionalism whose essential challenge is to continually find effective and popularly acceptable ways to balance the inherent tensions the Constitution establishes in both the checking structures it creates and the conflicting values it enshrines.[272] That is precisely the ultimate constitutional challenge, and *The Bill of Rights* failed even to recognize its nature.[273]

---

269. HAND, THE BILL OF RIGHTS, *supra* note 11, at 73.

270. *Id.*

271. *See, e.g.*, PURCELL, *supra* note 220, at 189–206; Robert C. Post, *Foreward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 82 (2003).

272. As Alexander Bickel wisely noted, American constitutional government is "a working system, and stable, but in tension. It is the tension that interests me." ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT, at x (1965).

273. Gunther combined a fair point with an overly sympathetic whitewash when he concluded his treatment of *The Bill of Rights*. GUNTHER, *supra* note 2, at 671–72.

> Ultimately, the bleakness, pessimism, and extremism of Hand's final major statement did not do full justice to the richness, subtlety, and complexity of his lifelong search for a delicate balance between the competing pressures of

CONCLUSION

Although there are many reasons why Hand's constitutional jurisprudence has been important, its strongest claim to enduring significance rests on the ways it helps illuminate the fundamental characteristics and challenges of American constitutional government. In spite of Hand's purported consistency over the years and the ostensibly "timeless" nature of his constitutional claims, an examination of his thinking reveals the pervasive, if often subtle and uncertain, shaping power of historical context, social change, and personal values.

Recognition of that fact, in turn, suggests that every constitutional theory—however logical and ostensibly timeless it may appear—is also the product of both specific historical conditions and the individual views, values, and goals of its proponent. That recognition suggests that no constitutional theory has a claim to "timeless" correctness and that none can be fully and properly evaluated without placing it firmly in its time and place.[274] The Hand of *The Bill of Rights* has no more claim to "timeless" correctness than does the Hand of *The Speech of Justice*.

In American constitutionalism judgment is all, and exacting historical analysis is essential to understand the former and cultivate the latter.[275]

> passionate devotion to free speech in an open society on the one side and sensitivity to the legitimate restraints on courts in a democracy on the other.

Id. at 672. Hand's book certainly did not "do full justice" to the overall quality of his "lifelong search" for an understanding of the judicial process, but it did far worse than merely fail to "do full justice" to his thinking about the importance of free speech in a democracy.

274. "A theory framed with one generation's problems in mind can have continuing vitality for another's." Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 696 (2004). That statement is surely both true and important, and this essay does not minimize the value of the insights and arguments that innumerable constitutional theorists and commentators have developed over the centuries. It merely stresses the equal importance of understanding those insights and arguments in their specific historical contexts and the value of such understanding in the disciplined effort to apply the Constitution to the ever-new challenges that the nation confronts.

275. *See, e.g.*, Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987) ("[H]ow we are able to constitute ourselves [through our constitutional system and its practice] is profoundly tied to how we are already constituted by our own distinctive history.").