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The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter

Wallace Mendelson*

James Bradley Thayer was one of the major figures in American constitutional law if only because of his influence upon Holmes, Brandeis, and Frankfurter (to say nothing of Learned and Augustus Hand). Now almost forgotten, Thayer, along with Christopher Columbus Langdell, John Chipman Gray, and James Barr Ames, was one of the giants at the Harvard Law School during its "golden age" at the close of the nineteenth century.¹ His legal career began only after serious flirtation with divinity and the Greek and Latin classics.² That his interest in such matters was never suppressed entirely is evident in his *A Western Journey with Mr. Emerson* (1884).³ Yet Thayer was not a cloistered scholar. Graduated from Harvard Law School in 1856, he became a leading practitioner at the Boston bar before becoming Royall Professor of Law at Harvard in 1874, having previously turned down a Harvard professorship in English. His tongue and pen, moreover, were always ready to promote such "good causes" as tariff reform, better treatment of Indians, and reform in the granting of corporate charters.⁴ His great study, *A Preliminary Treatise on Evidence at the Common Law*, published in 1898, led in due course to Wigmore's masterpiece—Wigmore having been one of his students. Thayer also compiled the first casebook on American constitutional law, *Cases on Constitutional Law*, in 1895. Apart from his technical work, he is now known—by the few who remember—for his insistence upon judicial respect for the political branches of government. In his classic essay, "The Origin and Scope of the American Doctrine of Constitutional Law,"⁵ he in-

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1. See THE HARVARD LAW SCHOOL 1817-1917, at 30-33 (1917); Beale, *Langdell, Gray, Thayer and Ames—Their Contribution to the Study and Teaching of Law*, 8 N.Y.U. L.Q. REV. 385, 390 (1931); *James Bradley Thayer*, 15 HARV. L. REV. 599 (1902); *The Late James Bradley Thayer*, 36 AM. L. REV. 248 (1902).

2. See Hall, *James Bradley Thayer*, in 8 GREAT AMERICAN LAWYERS 345, 347, 350, 373-75 (W. Lewis ed. 1909).

3. The volume is the chronicle of Thayer's journey with the aged essayist Ralph Waldo Emerson, his wife's cousin.

4. See Hall, *supra* note 2, at 379.

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

sisted that judicial review is strictly judicial and thus quite different from the policy-making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of government. Full and free play must be permitted to "that wide margin of considerations which address themselves only to the practical judgment of a legislative body."⁶ Thus for Thayer, legislation could be held unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."⁷ Above all, Thayer believed, the Constitution, as Chief Justice Marshall had observed, is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of "great outlines" broadly drawn for an unknowable future.⁸ Often men of reason may differ about its meaning and application; in short, the written Constitution offers a wide range for legislative discretion and choice. The judicial veto, then, is to be exercised *only in cases that leave no room for reasonable doubt*.

This rule recognizes that, having regard to the great, complex everunfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.⁹

6. *Id.* at 135.

7. *Id.* at 144.

8. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 407 (1819).

9. Thayer, *supra* note 5, at 144. When such a "range of choice and judgment" is available to the legislature, the choice is, in Thayer's view, "a part of that mass of legislative functions which belong to it and not to the court." Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, 38 THE NATION 314, 314-15 (1884). Thayer did not extend the same deference to the exercise of state legislative power vis-à-vis congressional authority: [w]hen [in this context] the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments,—where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in *all* its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.

Thayer, *supra* note 5, at 154-55 (emphasis supplied). In Thayer's view, however, when Congress has exercised its power to regulate a particular aspect of interstate commerce and when the state also has exercised its regulatory power in the same area,

it would appear to be the office of the Federal legislature, and not of the Federal courts, to supervise and moderate the action of the local legislatures, where it touches these parts of commerce.

Thayer traced these views far back in American history, finding, for example, that as early as 1811 the chief justice of Pennsylvania had concluded:

For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.¹⁰

This view of the judicial function, of course, was the bedrock upon which Holmes, Brandeis, and Frankfurter built their judicial philosophies. Holmes had been Thayer's young friend and colleague on the Harvard faculty. Later, referring to Thayer's famous essay, Holmes wrote:

I agree with it heartily and it makes explicit the point of view from which implicitly I have approached the constitutional questions upon which I have differed from some of the other judges.¹¹

The young Brandeis had studied constitutional law under Thayer; thereafter they became close personal friends.¹² Much later Frankfurter referred to Thayer as "the great master of constitutional law" and in a lecture at the Harvard Law School observed that

[o]ne brought up in the traditions of James Bradley Thayer, echoes of whom were still resounding in this very building in my student days, is committed to Thayer's statesmanlike conception of the limits within which the Supreme Court should move, and I shall try to be loyal to his admonition.¹³

[I]f I were to name one piece of writing on American Constitutional Law . . . I would pick [Thayer's once famous essay] . . . [b]ecause . . . it's the

. . . [T]he question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a [national] legislative question, not a judicial one. For it involves a consideration of what, on practical grounds, is expedient, or possible, or desirable . . .

J. THAYER, *LEGAL ESSAYS* 36 n.1 (1927). When Congress has not exercised its power, the question whether the subject of the state regulation requires uniformity "is for Congress, and the State regulation 'must stand until Congress shall see fit to alter it,'" *Id.*; see Gabin, *Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test*, 3 *HASTINGS CONST. L.Q.* 961, 977-83 (1976).

10. Thayer, *supra* note 5, at 140. The case to which Thayer made reference is *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117 (Pa. 1811).

11. Quoted in Mark De Wolfe Howe, *Introduction*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, & FELIX FRANKFURTER ON JOHN MARSHALL, at xi (1967).

12. FELIX FRANKFURTER ON THE SUPREME COURT 252 (P. Kurland ed. 1970) [hereinafter cited as FRANKFURTER ON THE SUPREME COURT]; see Letter from Louis D. Brandeis to Alice Goldmark (Oct. 13, 1890), reprinted in 1 *LETTERS OF LOUIS D. BRANDEIS* 92-93 (M. Urofsky & D. Levy eds. 1971); Letter from James B. Thayer to Louis D. Brandeis (1878), reprinted in A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 43 (1946). When Thayer went abroad in 1882-1883, the young Brandeis assumed his former professor's course in evidence at Thayer's request.

13. FRANKFURTER ON THE SUPREME COURT, *supra* note 12, at 542.

great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions.¹⁴

To hold that Thayer's views were fundamental in the work of the three justices is not to suggest that they stopped where he stopped. Each of them indeed built upon his insights to develop what may be called the classic Harvard approach to constitutional adjudication. The Thayer touch is obvious in Holmes and Brandeis dissents in numerous substantive due process cases. In *Coppage v. Kansas*,¹⁵ for example, in which the Court invalidated a state statute prohibiting employers from requiring employees to agree not to become or remain members of labor unions, Holmes observed in dissent:

In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law. . . . Whether in the long run it is wise for the workmen to enact legislation of this sort is not my concern, but I am strongly of [the] opinion that there is nothing in the Constitution of the United States to prevent it. . . .¹⁶

Similar views appear in Holmes' dissent in *Adkins v. Children's Hospital*,¹⁷ in which the Court struck down a congressional minimum wage statute for women in the District of Columbia:

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot . . . deny that a reasonable man reasonably might have that belief. . . .

[Therefore,] I am of the opinion that the statute is valid. . . .¹⁸

Holmes' dissent from the Court's invalidation in *Bartels v. Iowa*¹⁹ of a state statute requiring the use of English as the medium of instruction in the public schools provides another example of Thayer's teaching:

I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.²⁰

In Brandeis' opinions Thayerism was generally fleshed out by extended "real life" analysis of the circumstances that had produced the challenged legislation, by the history of similar measures

14. H. PHILLIPS, FELIX FRANKFURTER REMINISCES 299-300 (1960).

15. 236 U.S. 1 (1915).

16. *Id.* at 26-27.

17. 261 U.S. 525, 567 (1923) (Holmes, J., dissenting).

18. *Id.* at 570-71.

19. 262 U.S. 404, 412 (1923) (Holmes, J., dissenting in part).

20. *Id.*

in other jurisdictions, and by resumé of relevant statistical and other studies—all this to establish the reasonableness of the legislation in question.²¹ Brandeis had perfected this innovating emphasis upon the “facts” in his highly successful Brandeis Brief in *Muller v. Oregon*.²² Prior thereto,

[s]ocial legislation was supported before the courts largely *in vacuo*—as an abstract dialectic between “liberty” and “police power,” unrelated to the world of trusts and unions, of large-scale industry and all its implications. In the [Brandeis approach] the facts of modern industry which provoke regulatory legislation were, for the first time, adequately marshalled before the Court. It marks an epoch²³

The Brandeis technique was more studied than Holmes’. Indeed Holmes reported to his friend Pollock that his colleague had chided him for indifference to extensive factual research:

Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don’t you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore—or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies.²⁴

In contrast to Brandeis’ massively researched opinions, Holmes’ efforts generally were expressed—as from Olympus—in a few epigrammatic sallies resting heavily upon Thayer and upon a deep-seated skepticism that led him to question even the foundations of his own most basic beliefs.

When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. . . .

. . . .
. . . . To have doubted one’s own first principles is the mark of a civilized man.²⁵

21. See, e.g., the Brandeis opinions in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924); and *Adams v. Tanner*, 244 U.S. 590, 597 (1917).

22. 208 U.S. 412 (1908).

23. FRANKFURTER ON THE SUPREME COURT, *supra* note 12, at 251-52.

24. Letter from Oliver W. Holmes to Frederick Pollock (May 26, 1919), reprinted in 2 HOLMES-POLLOCK LETTERS 13 (M. Howe ed. 1961).

25. Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 2-3 (1915).

I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. . . . I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view. If, as I have suggested elsewhere, the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*.²⁶

I see no meaning in the rights of man except what the crowd will fight for.²⁷

In sharp contrast, Brandeis was a hopeful progressive. Indeed he had been a major leader of the Progressive Movement.²⁸ His elaborate judicial opinions upholding regulations of business often must have been labors of love. Yet, he like Holmes was quite capable of vigorous judicial support for economic measures that he privately disliked. This is obvious, for example, in his dissent in *New State Ice Co. v. Liebmann*,²⁹ perhaps Brandeis' most brilliant statement of the principle of judicial restraint. There he makes quite clear his own distaste for the measure in question, a state statute prohibiting the manufacture, sale, or distribution of ice without a license:

The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable. The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens.³⁰

In such cases, then, Brandeis, the inspired Progressive, and Holmes, the thorough-going skeptic, found common ground in Thayer's mandate of hospitality for legislative experimentation. As Brandeis observed in various ways over and over again:

The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. . . . There must be power in the States and the Nation to remould, through experimentation, our economic practices and in-

26. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

27. Letter from Oliver W. Holmes to Harold J. Laski (July 28, 1916), reprinted in 1 HOLMES-LASKI LETTERS 8 (M. Howe ed. 1953).

28. See MASON, *supra* note 12, at 99-441.

29. 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

30. *Id.* at 309-10.

stitutions to meet changing social and economic needs. . . .

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.³¹

Holmes' response reveals a striking difference between the two jurists; it also suggests that although Holmes was a skeptic, he was not a cynic:

Generally speaking, I agree with you in liking to see social experiments tried but I do so without enthusiasm because I believe it is merely shifting the pressure and that so long as we have free propagation Malthus is right in his general view.³²

It is noteworthy that in Thayer's day no significant free speech or press litigation had reached the Supreme Court. Thus he had no empirical grounds for considering a judge's role in that context. Holmes and Brandeis did. Their tacit conclusion was that for purposes of the first amendment a lenient rational basis test was inadequate. Accordingly, they devised the stricter "clear and present danger" test for first amendment utterance cases,³³ an approach calculated to give legislatures less leeway than in other contexts. Speaking of Holmes, the then Professor Frankfurter provided for the first time an explicit rationale for this double standard:

The Justice deferred so abundantly to legislative judgment on economic policy because he was profoundly aware of the extent to which social arrangements are conditioned by time and circumstances, and of how fragile, in scientific proof, is the ultimate validity of a particular economic adjustment. He knew that there was no authoritative fund of social wisdom to be drawn upon for answers to the perplexities which vast new material resources had brought. And so he was hesitant to oppose his own opinion to the economic views of the legislature. But history had also taught him that, since social development is a process of trial and error, the fullest possible opportunity for the free play of the human mind was an indispensable prerequisite. Since the history of civilization is in considerable measure the displacement of error which once

31. *Id.* at 310-11.

32. Quoted in A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 221 (1957).

33. *Whitney v. California*, 274 U.S. 357 (1927); *Schenck v. United States*, 249 U.S. 47 (1919).

held sway as official truth by beliefs which in turn have yielded to other truths, the liberty of man to search for truth was of a different order than some economic dogma defined as a sacred right because the temporal nature of its origin had been forgotten. And without freedom of expression, liberty of thought is a mockery. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which only heroes hazard.

Naturally, therefore, Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements.³⁴

Another major supplement to Thayer's reasonable doubt principle was Brandeis' emphasis upon avoidance of unnecessary constitutional decisions by strict adherence to jurisdictional limitations such as those embodied in the standing, ripeness, mootness, and political question doctrines. This tactic, stressing what Bickel called the "passive virtues,"³⁵ found classic expression in Brandeis' concurring opinion in *Ashwander v. TVA*.³⁶ Concluding that the plaintiff in *Ashwander* had not sustained any past or potential injury and therefore had no standing, Brandeis reminded his colleagues that

The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. . . .

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.³⁷

He proceeded to "codify" at some length the rules in question. As Brandeis put it off the bench, "[t]he most important thing we do is not doing."³⁸ The thought, of course, was that the fewer social issues preempted by courts, the greater the latitude for legislative experimentation—for progress by a pragmatic system of trial and error. This plainly is an extension of Thayerism.

It was the fate of Holmes and Brandeis to sit with activist, conservative colleagues in an era of relatively progressive legislation. In this special setting, Thayer's principle of judicial restraint generally led to liberal results. Thus Holmes and Brandeis were praised (or criticized) for liberalism. The fact is that, whatever the tenor of his decisions, Holmes was an old-fashioned, aristocratic

34. F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 50-51 (1938).

35. See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962).

36. 297 U.S. 288, 341 (1936).

37. *Id.* at 345-46 (Brandeis, J., concurring).

38. BICKEL, *supra* note 35, at 17.

social Darwinian—although for him Darwinism was an explanation, not an excuse. Moreover, his deep-dyed skepticism put him far above mundane struggles and partisanship. All his life Holmes held to the survival of the competent:

I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence [nor] my disbelief that the Interstate Commerce Commission is a fit body to be entrusted with rate-making However I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criticism [criterion] except what the crowd wants. Personally I bet that the crowd if it knew more wouldn't want what it does—but that is immaterial.³⁹

The social reformers of today seem to me so far to forget that we no more can get something for nothing by legislation than we can by mechanics as to be satisfied if the bill to be paid for their improvements is not presented in a lump sum. Interstitial detriments that may far outweigh the benefit promised are not bothered about. Probably I am too skeptical as to our ability to do more than shift disagreeable burdens from the shoulders of the stronger to those of the weaker. . . . I believe that the wholesale social regeneration which so many now seem to expect . . . cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race.⁴⁰

Malthus pleased me immensely—and left me sad. A hundred years ago he busted fallacies that politicians and labor leaders still live on.⁴¹

Holmes' dear friends Brandeis and Frankfurter in private life were "social reformers" who supported the very "fallacies"—wage and hour laws, for example—that in Holmes' view Malthus had "busted."⁴² Professor Frankfurter had a hand in virtually every major liberal effort of the day. He was a founder of the American Civil Liberties Union and of the *New Republic*, a bible of liberalism in the 1920's and 1930's. He was counsel for the NAACP long before

39. Letter from Oliver W. Holmes to Frederick Pollock (Apr. 25, 1910), *reprinted in* 1 HOLMES-POLLOCK LETTERS, *supra* note 24, at 163.

40. Holmes, *supra* note 25, at 2-3. Holmes expanded upon this theme in his opinion for the Court in *Buck v. Bell*, 274 U.S. 200 (1927), in which the Court upheld a state statute providing for the sterilization of inmates afflicted with hereditary insanity or imbecility:

In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. . . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

Id. at 207.

41. Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1914), *reprinted in* 2 HOLMES-POLLOCK LETTERS, *supra* note 24, at 219.

42. See, e.g., F. FRANKFURTER, *The Eight-Hour Day*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1918, at 203 (A. MacLeish & E. Prichard eds. 1939); THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS (A. Lief ed. 1930).

that was fashionable and for the National Consumers' League as well. He fought the good fight for Tom Mooney,⁴³ for the Bisbee deportees,⁴⁴ for the victims of the Palmer Raids of 1920,⁴⁵ and for Sacco and Vanzetti⁴⁶ and played a (perhaps the) primary role in abolishing the labor injunction.⁴⁷ Frankfurter, of course, also was a major contributor to the New Deal.⁴⁸ Not only did he help found the *New Republic*, he wrote for it repeatedly until his appointment to the Supreme Court. One mentions this by way of emphasizing the off-the-bench liberalism of Frankfurter and the conservatism of Holmes. The latter, writing to Pollock, mentions the enchanting spring—"the air full of the smell of box and roses and . . . the yelling of birds," and then adds, "Really if a glance at the *New Republic* had not thrown the customary gloom over life it would seem fair once more."⁴⁹ Conversely, a brief passage in Frankfurter's highly eulogistic biography of Holmes reveals a sharp difference between the two on matters economic: Justice Holmes, Frankfurter wrote, "came dangerously close to believing in the simplicities of the wage-fund theory."⁵⁰

If one accepts and slightly amends Arthur Sutherland's definition of a liberal as the sort of person who enjoyed the *New Republic* in the 1920's and 1930's, obviously Frankfurter, unlike Holmes, was a thoroughgoing liberal in his personal life.⁵¹ His fate, however, was to sit on the Court with a number of liberal activists in an era when legislation was often quite illiberal. In that context the Thayer-Holmes-Brandeis principle of judicial restraint often led to less than liberal results. Accordingly, as a judge, Frankfurter was widely criticized—erroneously, of course—for conservatism, just as Holmes, operating in a different age and context, was widely praised—erroneously, of course—for liberalism. The point is that in their view—and in Brandeis' view—Thayer's conception of the relative roles of courts and legislatures was a principle for all seasons, not a tool to be used or ignored in the service of a judge's private

43. See L. BAKER, *FELIX FRANKFURTER* 68-73 (1969).

44. See *id.* at 66-68, 73.

45. See *id.* at 92-96.

46. See *id.* at 117-30.

47. See *id.* at 132-35.

48. See *id.* at 149, 153-79; PHILLIPS, *supra* note 14, at 235-50; ROOSEVELT AND FRANKFURTER: *THEIR CORRESPONDENCE 1928-1945*, at 93-442 (M. Freedman ed. 1968).

49. Letter from Oliver W. Holmes to Frederick Pollock (May 26, 1919), *reprinted in 2 HOLMES-POLLOCK LETTERS*, *supra* note 24, at 14.

50. FRANKFURTER, *supra* note 34, at 44. Frankfurter's comment is in reference to Holmes' opinion in *Plant v. Woods*, 176 Mass. 492 (1900).

51. A. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* 470 (1965).

preferences, which Holmes called his "Can't Helps." This was the great lesson that Frankfurter learned from Holmes.

We have already seen that Frankfurter had the highest regard for Thayer. He also was a close friend of both Holmes and Brandeis for many years, long before he went to the Supreme Court. His numerous laudatory essays on each of them indicate his discipleship.⁵² If respect for legislative experimentation as a tool for social progress characterized the work of Brandeis and skepticism the work of Holmes, dedication to democracy was the major theme of Frankfurter's jurisprudence. Perhaps only an immigrant, only one who had lived his first years under an emperor, could have been so dedicated to government by the people and to the diffusion of power. His judicial and other writings are filled with allusions to judicial review as a "limitation on popular government" and thus an "undemocratic aspect" of our system. He recognized, however, that "[o]ur right to pass on the validity of legislation is now too much part of our constitutional system to be brought into question."⁵³ Yet because this right is "inherently oligarchic" and practically uncontrollable and because it prevents "the full play of the democratic process,"⁵⁴ it is "vital that [this] power of the non-democratic organ of our Government be exercised with rigorous self-restraint."⁵⁵ For Frankfurter, the abuses of the "nine old men" were not ancient history. Nor could he pretend that activism on the left was any less "oligarchic" or any less an impediment to popular government than activism on the right. Accordingly, with Holmes and Brandeis he was deeply indebted to Thayer's rule of reasonable doubt—as is obvious, for example, in his *cri de coeur* in *West Virginia State Board of Education v. Barnette*,⁵⁶ the so-called second *Flag Salute Case*. There Frankfurter pointed out in dissent that on five previous occasions the Court had found no constitutional infirmity in a mandatory flag salute and that every one of the thirteen justices involved—including such heroic figures as Stone, Brandeis, Cardozo, Black, and Douglas—had so voted on one or more occasions. Indeed, of the forty-five votes cast in those five cases, forty-four had found the challenged measure to be within the ambit of

52. Several of Frankfurter's essays on Holmes and Brandeis are collected in FRANKFURTER ON THE SUPREME COURT, *supra* note 12.

53. *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 556-57 (1949) (Frankfurter, J., concurring).

54. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 650 (1943) (Frankfurter, J., dissenting).

55. 335 U.S. at 555 (Frankfurter, J., concurring).

56. 319 U.S. at 646 (Frankfurter, J., dissenting).

democratic self-government. In view of this history, Frankfurter thought it clear that legislators could not be deemed unreasonable in enacting what thirteen justices had found to be within a state's constitutional authority.

Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

. . . . I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State⁵⁷

This obviously is pure Thayerism. On the same occasion, Frankfurter again expressed—as in his eulogy to Holmes quoted above—his dedication to the special Holmes-Brandeis concern for free speech and press:

All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.⁵⁸

57. *Id.* at 661-62, 666-67.

58. *Id.* at 664. Frankfurter later observed again that such freedoms "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Here, too, Frankfurter objected to what he deemed his colleagues' doctrinaire, perverting use of the Holmes-Brandeis clear and present danger test.

If in *Dennis v. United States*, 341 U.S. 494 (1951), Mr. Justice Frankfurter was not very respectful of the discourse there in issue, surely the reason was that Dennis and his companions had spoken in secret and underground, *i.e.* conspiratorially. Their views had not been offered for what Holmes and Brandeis called "public discussion" as part of the "free trade in ideas" in the "competition of the market" where the public is offered exposure to conflicting views so that it can choose intelligently among them. *Ahrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Recall Milton's famous line in *Areopagitica*: "[W]ho ever knew truth put to the worse, in a free and open encounter?" J. MILTON, *Areopagitica*, in 2 THE PROSE WORKS OF JOHN MILTON 96 (J. St. John ed. 1900) (emphasis supplied). Mill's *On Liberty* rests on what he called "the morality of public discussion." J. MILL, *ON LIBERTY* 99 (1887). Jefferson put it briefly: truth is "the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition [*e.g.*, secrecy] disarmed of her natural weapons, *free argument and debate* . . ." 2 THE PAPERS OF THOMAS JEFFERSON 546 (J. Boyd ed. 1950) (emphasis supplied). Benjamin Franklin has it thus: "[W]hen Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick . . ." B. FRANKLIN, *An Apology for Printers* (1731), in 1 THE PAPERS OF BENJAMIN FRANKLIN 194-95 (L. Labaree ed. 1959). In Chafee's view, "the fundamental policy of the First Amendment [is] the *open discussion* of public affairs." Z. CHAFEE, *FREEDOM OF SPEECH* 30 (1920) (emphasis supplied). As Meiklejohn put it:

What, then, does the First Amendment forbid? Here again the town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of public policy. . . . *The voters, therefore, must be made as wise as*

So, too, Frankfurter might well have gone even further than Brandeis in strict adherence to jurisdictional limitations, the "passive virtues," as devices for avoiding unnecessary constitutional decisions.⁵⁹ Indeed Frankfurter, as professor of federal jurisdiction at Harvard, may have led Brandeis to this ploy initially. In any event, Brandeis no doubt discussed such matters with his professorial friend and former associate in litigation, who was then the nation's leading academic specialist in the problems of federal court jurisdiction.

Finally, just as Holmes and Brandeis added something to Thayerism, so did Frankfurter in the *McNabb-Mallory* doctrine,⁶⁰ which permits the Court to avoid constitutional judgment by turning decisions upon its supervisory control over the lower federal courts. Such decisions, because they do not rest upon the Constitution, are subject to congressional control. They thus escape the anti-democratic element that Frankfurter found in constitutional review. Free of this element, the Justice had no difficulty in reaching a highly liberal and thus personally gratifying result in *McNabb* and in *Mallory*. Finally, in his opinion for the Court in *Railroad Commission v. Pullman Co.*,⁶¹ Frankfurter launched the modern history of judicially developed federal district court abstention in cases in which state law may be dispositive⁶²—another device for avoiding unnecessary constitutional adjudication.

If Holmes' methodological forte was skepticism (and the sprightly epigram) and if Brandeis specialized in mining the facts, Frankfurter's specialty was precedent. What these three approaches have in common is plain: each provides a considerable barrier against subjectivity in the judicial process. To that end, in crucial

possible. . . . And this, in turn, requires that . . . all facts and interests relevant to the problem shall be fully and fairly presented to the meeting.

. . . .
 . . . [The fifth amendment's] limited guarantee of the freedom . . . to speak is radically different in intent from the unlimited guarantee of the freedom of public discussion, which is given by the First Amendment.

A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24-25, 39 (1948) (emphasis supplied). Thus all of these great founts of our free-speech ideal seem to have anticipated Mr. Justice Frankfurter's stand in *Dennis*; namely, that freedom of speech means open, public discussion, not underground activity designed to achieve its goals by circumventing, rather than winning, community consent.

59. For pertinent examples, see the long line of his opinions from *Coleman v. Miller*, 307 U.S. 433 (1939), through *Baker v. Carr*, 369 U.S. 186 (1962).

60. See *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

61. 312 U.S. 496 (1941).

62. See C. WRIGHT, *FEDERAL COURTS* 170 (1963).

case after case Frankfurter's opinions carefully analyze *all* relevant decisions in search of what Holmes called an "external standard" for judgment. The scholarly effort that went into Frankfurter's opinions, for example, in *Harris v. United States*,⁶³ *Wolfe v. Colorado*,⁶⁴ *Culombe v. Connecticut*,⁶⁵ and the *Steel Seizure Case*⁶⁶ is astounding. Such painstaking toil, like that of Brandeis,⁶⁷ is the unspoken answer to a freewheeling justice who not long ago insisted that the Court is "vastly underworked."⁶⁸ How easy the job of activist judges—new or old—who do not find, but only make, the law! No great effort, intelligence, or integrity is required to read one's merely personal preferences into the Constitution; a great deal is required to keep them out. The point is not that anyone does this perfectly, but rather that some try and indeed, as in all phases of life, some are far more capable of objectivity and detachment than others. As Judge Hand observed,

[W]e know that men do differ widely in this capacity [for detachment]; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered. We may deny—and, if we are competent observers, we will deny—that no one can be aware of the danger [of his bias] and in large measure provide against it.⁶⁹

For sixty years, from 1902 until 1962, at least one and for a time two of the "Harvard judges" were on the Supreme Court. In all those years their influence was far out of proportion to their numbers. With the coming of the hysterical 1960's—about the time of Frankfurter's retirement—almost all that they had stood for vanished. Perhaps not quite all, for no activist, modern or vintage, has ever admitted in public that he is an activist. Quite to the contrary, no matter how great the judicial leap, its authors always insist that it derives from some constitutionally appropriate (if previously invisible) source and that it really is not an innovation anyway.⁷⁰ Is

63. 331 U.S. 145 (1947).

64. 338 U.S. 25 (1949).

65. 367 U.S. 568 (1961).

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

67. Brandeis' draft opinions "went through dozens, sometimes scores, of revisions." P. FREUND, *ON LAW AND JUSTICE* 127 (1968).

68. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 178 (1972) (Douglas, J., dissenting).

69. L. HAND, *THE SPIRIT OF LIBERTY* 218 (1960).

70. For example, the majority opinion in *Miranda v. Arizona*, 384 U.S. 436, 442 (1966), proclaims, "We start . . . with the premise that our holding is not an innovation in our jurisprudence . . ." See also Israel, *Gideon v. Wainwright: The 'Art' of Overruling*, 1963 SUP. CT. REV. 211.

Need one say that in the Thayer view great policy leaps are for legislative bodies, not for courts, and that a flexible, living Constitution is one that makes reasonable accommodations to changing social needs *as perceived and enacted by legislatures*?

this not lip service to the Thayer tradition?

Since Frankfurter's retirement in 1962, courts have pushed beyond desegregation to integration via busing; they have undertaken to desegregate even private schools, to reapportion legislatures, to regulate private employment practices, to supervise municipal land-use planning, to provide a detailed abortion code, to oversee and redirect any number of welfare programs, to supervise police investigations, to outlaw capital punishment, in effect, and then to reinstate it with limitations, to direct credit policies of banks and credit card companies, to supervise the supervision of children in their schools, to monitor environmental quality, and even to manage prison and mental institutions.⁷¹ Surely all of this (and more) constitutes a radical transformation of the role of judges in American life. Surely, too, judicial pretension no longer can be justified on the ground that it is only a negative, a veto, power.

If, then, the Thayer tradition of judicial modesty is outmoded—if judicial aggression is to be the rule in policy matters, as in the 1930's—some basic issues remain. First, how legitimate is government by judges? Is anything to be beyond the reach of their authority? Will anything be left for ultimate resolution by the democratic processes—for what Thayer called “that wide margin of considerations which address themselves only to the practical judgment of a legislative body”⁷² representing (as courts do not) a wide range of mundane needs and aspirations? The legislative process, after all, is a major ingredient of freedom under government.

Legislation is a process slow and cumbersome. It turns out a product—laws—that rarely are liked by everybody, and frequently little liked by anybody. . . . [W]hen seen from the shining cliffs of perfection the legislative process of compromise appears shoddy indeed. But when seen from some concentration camp of the only alternative way of life, the compromises of legislation appear but another name for what we call civilization and even revere as Christian forbearance.⁷³

Let philosophy fret about ideal justice. Politics is our substitute for civil war in a constant struggle between different conceptions of good and bad. It is far too wise to gamble for Utopia or nothing—to be fooled by its own romantic verbiage. Above all, it knows that none of the numerous clashing social forces is apt to be completely without both vice and virtue. By give and take, the legislative process seeks not final truth, but an acceptable balance of community interests. In this view the harmonizing and educational function of

71. I am indebted here to Chayes, *The New Judiciary*, 28 HARV. L. SCH. BULL. 23 (1976).

72. Thayer, *supra* note 5, at 135.

73. T. SMITH, *THE LEGISLATIVE WAY OF LIFE* 91-92 (1940).

the process itself counts for more than any of its legislative products. To intrude upon its pragmatic adjustments by judicial fiat is to frustrate our chief instrument of social peace and political stability.

Second, if the Supreme Court is to be the ultimate policy-making body—without political accountability—how is it to avoid the corrupting effects of raw power? Can the Court avoid the self-inflicted wounds that have marked other episodes of judicial imperialism?⁷⁴ Can the Court indeed satisfy the expectations it has already aroused?

A third cluster of questions involves the competence of the Supreme Court as a legislative body. Can any nine men master the complexities of every phase of American life which, as the post-1961 cases suggest, is now the Court's province? Are any nine men wise enough and good enough to wield such power over the lives of millions? Are courts institutionally equipped for such burdens?⁷⁵ Unlike legislatures, they are not representative bodies reflecting a wide range of social interests. Lacking a professional staff of trained investigators, they must rely for data almost exclusively upon the partisan advocates who appear before them. Inadequate or misleading information invites unsound decisions.⁷⁶ If courts are to rely upon social science data as facts, they must recognize that such data are often tentative at best, subject to varying interpretations, and questionable on methodological grounds. Moreover, since social science findings and conclusions are likely to change with continuing research, they may require a system of ongoing policy reviews as new or better data become available.⁷⁷ Is the judiciary capable of performing this function of continuing supervision and adjustment traditionally provided by the legislative and administrative processes?⁷⁸

Finally, what kind of citizens will such a system of judicial activism produce—a system that trains us to look not to ourselves

74. Consider, for example, the gross abuse of judicial power in the era of rampant economic activism that culminated in the Court-packing crisis of 1937. See R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 136-79 (1960). For other examples of judicially self-inflicted wounds, see L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 129-31, 279-81 (1976); F. GRAHAM, *THE SELF-INFLICTED WOUND* (1970); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 171-254 (1977); C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50 (1928).

75. See Johnson, *The Constitution and the Federal District Judge*, 54 *TEX. L. REV.* 903, 905 (1976).

76. See HOROWITZ, *supra* note 74, at 274-84.

77. Glazer, *Toward an Imperial Judiciary*, in *THE AMERICAN COMMONWEALTH* 104, 116-17 (N. Glazer & I. Kristol eds. 1976).

78. See HOROWITZ, *supra* note 74, at 264-66.

for the solution of our problems, but to the most elite among elites: nine lawyers governing our lives without political or judicial accountability? Surely this is neither democracy nor the rule of law. Such are the problems addressed by and—at least in the minds of jurists like Holmes, Brandeis, and Frankfurter—resolved by Thayer's doctrine of judicial restraint.

