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# BUFFALO LAW REVIEW

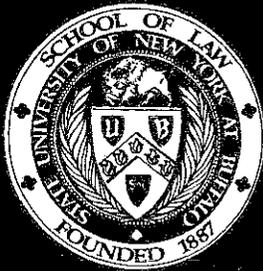
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LEARNED HAND: THE JURISPRUDENTIAL  
TRAJECTORY OF AN OLD PROGRESSIVE

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## BOOK REVIEW

### Learned Hand: The Jurisprudential Trajectory of an Old Progressive

EDWARD A. PURCELL, JR.†

For more than half a century Learned Hand sat on the federal bench, and he is still widely considered the greatest American judge never to sit on the United States Supreme Court.<sup>1</sup> For two decades Gerald Gunther, a distinguished authority on constitutional law, has labored faithfully on his biography. Such an exceptional combination of author and subject promises a weighty and stimulating result, and *Learned Hand: The Man and the Judge*<sup>2</sup> amply fulfills the expectation. It is massive in scope, elegant in style, insightful in analysis, and sensitive in characterization.

Gunther examines the noteworthy events that marked Hand's public career and explores the fears, beliefs, aspirations, and insecurities that shaped his private reality. Extensive and astonishingly rich sources underwrite the inner exploration, and Gunther carefully seasons his reading of the historical materials with his own first-hand knowledge of his subject, gleaned from his service as Hand's law clerk in 1953-54 and the years of friendship that followed.<sup>3</sup> The resulting biography reveals a largely unknown inner person while casting new light on a well-known outer one.

The very strengths that help make the book so successful, however, carry some limitations. As the wealth of personal material deepens and enriches the book, it also narrows it. Beyond sketching broad historical periods, the book tends to assume social, political, and intellectual change as a distant backdrop for Hand's personal journey. Similarly, the volumes of opinions that Hand wrote during his tenure of more than half a century on the bench receive

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† Professor of Law, New York Law School. I wish to thank William P. LaPiana, Rachel Vorspan, and Harry H. Wellington for their comments on an earlier draft.

1. See, e.g., GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* ix-x (1994).

2. *Id.*

3. Gunther appears directly in the book only once, when he recounts Hand's work on an important Cold War case in 1954. See *id.* at 620-21.

highly selective and surprisingly truncated consideration. Such limitations, however, detract little from the book's contributions. Gunther decided to mine his richest sources and exhaust the purest veins, keeping his focus on the true subject he chose—Learned Hand, the complex and intriguing human being.

The panorama of issues the book presents compels selectivity. This review, consequently, focuses on one major theme that Gunther explores—the evolution of Hand's politics and his ideas about judicial review. Two reasons support this focus. First, although Hand was not primarily, or even significantly, a constitutional judge, he is closely associated with a major tradition in American constitutional law and ultimately authored its most extreme and well-known statement.<sup>4</sup> As a figure in American constitutional and intellectual history, his position on judicial self-restraint constitutes his primary claim to our attention. Second, most previous accounts of Hand's constitutional philosophy have concentrated on his debt to his teacher, James Bradley Thayer, and his resulting life-long commitment to judicial restraint. They have consequently downplayed or ignored the extent to which his ideas changed over time. To some extent Gunther's book continues that tradition. Although it provides a mass of revealing information and a wealth of perceptive insights, it does not focus as sharply as it might on the historian's basic questions: When, why, and how did Hand change?

Accordingly, after discussing Gunther's overall treatment of Hand in Part I, this review examines in detail three major phases in Hand's political and intellectual development. It seeks to identify the areas where Gunther illuminates that evolution as well as the areas where his account seems incomplete. Part II considers the ways in which Hand adapted Thayer's ideas in developing his own version of progressive jurisprudence. Part III examines the evolution of Hand's First Amendment jurisprudence and explores the path that led him from his libertarian opinion in *Masses Publishing Co. v. Patten*<sup>5</sup> to his later conclusion that courts should defer to legislative judgments even when First Amendment claims were at stake. Part IV considers Hand's most elaborate and famous statement about the scope of judicial review, his three lectures published in 1958 as *The Bill of Rights*.<sup>6</sup>

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4. LEARNED HAND, *THE BILL OF RIGHTS* (Atheneum 1964)(1958).

5. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

6. HAND, *supra* note 4.

## I. GUNTHER'S LIFE OF LEARNED HAND

The nutshell biography, of course, is familiar. Born in 1872, Learned Hand grew up in Albany, New York, the offspring of locally prominent families and a long line of lawyers and judges. Graduating from Harvard College in 1893, he studied at Harvard Law School and then returned to Albany where he practiced for several years. In 1902 he married and moved to New York City. Building a modestly successful law practice, he developed a wide range of friends and acquaintances, became increasingly active in progressive politics, and in 1909 was appointed United States District Judge for the Southern District of New York. Although he remained politically active for another decade, Hand gradually withdrew from politics shortly after World War I. His reputation as a judge began to grow, and in 1924 he was promoted to the United States Court of Appeals for the Second Circuit. There, during the next thirty-seven years, he reigned as the most widely respected judge in the lower federal courts and, in some people's minds, in the entire federal judiciary. Twice he was almost appointed to the Supreme Court, but both times the nomination escaped him. Surprisingly for a lower court judge, he developed a national reputation, the result of his exceptional judicial stature and the powerful resonance of his public speeches and writings. A passionate advocate of "judicial restraint," a firm believer in democratic government, and an intellectual skeptic with a fervent commitment to freedom of speech and thought, the elderly judge ended his long and illustrious career widely known, admired, and respected.<sup>7</sup>

Gunther is fascinated by Hand's personality, particularly by what he sees as his sense of being a social outsider and his "extraordinary self-doubts and anxieties."<sup>8</sup> Hand, he tells us, had an "almost masochistic penchant for self-doubt and self-criticism."<sup>9</sup> Gunther sensitively traces this quality to the demanding traditions and expectations of his family, his position as "the precious male" surrounded and "spoiled" by the family's several women, and a religious upbringing that "transmuted" the fear of God and Hell into "an anxious sense of duty."<sup>10</sup> Most significantly, he also traces it to his father's local prominence and then sudden death when Learned was only fourteen and to "the image of paternal perfection" that

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7. GUNTHER, *supra* note 1, at 639-52.

8. *Id.* at 4. For his general sense of being an "outsider," see, e.g., *id.* at 4-13, 26-31, 152, 154.

9. *Id.* at 513.

10. *Id.* at 11, 17.

his "hovering, sometimes smothering" mother persistently "drilled" into the young boy.<sup>11</sup> For most of his life, Gunther explains, Hand was "blinded by his deeply ingrained family perception of [his father] as an intellectual giant of unmatched talents."<sup>12</sup>

Even more sensitive is Gunther's treatment of Hand's somewhat unusual marriage. Inexperienced in matters of the heart, Learned had been utterly taken with Frances Fincke, a young Bryn Mawr graduate. He courted her assiduously and after they married proved entirely devoted to her. For her part, Frances had maintained a particularly close friendship with her college roommate and then, after marriage, developed an unusually close relationship with Louis Dow, a male college professor who lived near the Hand's summer home in New Hampshire. Frequently, Frances was away from Learned and with Dow in New Hampshire, especially after 1913 when Dow's wife was committed to an institution. On several occasions, she even accompanied Dow to Europe while Learned remained at home. Although Gunther finds no evidence that Frances and Dow "ever had a physical affair," he concludes that she failed regularly and for long periods of time to give Learned the affection, attention, and companionship that he so deeply and obviously craved.<sup>13</sup> Hand finally confronted her shortly after the war, but to no avail. She continued her long absences in New Hampshire and remained in Dow's company regularly, while Learned "accepted her decision and acquiesced in her desires."<sup>14</sup>

Gunther discusses the marriage at length, both because he had available an extraordinary documentary record and because it was clearly of great importance to his subject. A review, especially one focused on Hand's politics and his ideas about judicial review, might delicately ignore the subject. Unfortunately, however, one rather too obvious question jumps to the fore. Is it possible that the psychological makeup that would help explain his willingness to defer to his wife's deeply hurtful behavior would also help explain his extreme version of judicial self-restraint? One hardly need strain, after all, to note a parallel between his personal and judicial self-abnegation— between his willingness to accept both the extreme marital independence of his wife and the extreme constitutional independence of other governmental branches.<sup>15</sup>

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11. *Id.* at 6, 10.

12. *Id.* at 9.

13. *Id.* at 187.

14. *Id.*

15. Gunther suggests, though he does not methodically explore, the likelihood that Hand's judicial self-restraint was rooted in emotional and psychological sources. *Cf.* Carl

While Gunther stays away from such speculations, perhaps wisely, he does suggest another facet of Hand's personal life that surely did influence his career and politics. Whatever his psychological anxieties and early professional struggles, Hand was amazingly fortunate in the ethnic, social, and economic position he occupied. He worried about his career at the bar, but he had friends and relatives with extensive professional contacts who helped him along. He worried about being a social outsider, but he managed to become friends with a wide range of prominent people. By 1898, for example, when he was only twenty-six, he "had gotten to know [Theodore Roosevelt] somewhat."<sup>16</sup> He worried about money, but his family provided him with moderate inheritances, and his connections brought him jobs where he earned a more than respectable living. By 1906, after only four years in New York City, he was able to pay almost \$30,000 for a Manhattan brownstone and another \$20,000 for a summer home.<sup>17</sup> He worried about being a failure as a practicing attorney and wished at the age of only thirty-five to become a federal judge, and his friends secured the position for him within a mere two years.<sup>18</sup> While Gunther records these various episodes,<sup>19</sup> he may underestimate the insight they offer into Hand's personality. Beyond his personal anxieties and insecurities, it would seem, Hand was also comforted quite luxuriously by the experience of profound support and lived security. In many ways his life led him to share in the complacency of an upper middle-class social and economic elite.<sup>20</sup>

As much as his social position provided opportunities, however, it was Hand's impressive personal qualities that repeatedly

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Landauer, *Scholar, Craftsman, and Priest: Learned Hand's Self-Imagining*, 3 YALE J.L. & HUMAN. 231 (1991).

16. GUNTHER, *supra* note 1, at 64.

17. *Id.* at 99, 139. "Among young professionals in the Hands' circle, a summer place was the norm." *Id.* at 99.

18. *Id.* at 123-33. It should be noted, as Gunther points out, that the position of federal district judge lacked much of the prestige that the position now commands. *E.g., id.* at 139.

19. *E.g., id.* at 230, 418, 438.

20. Hand was intimately involved in the social life of New York City's eminent, well-to-do, and overwhelmingly Anglo-Saxon Protestant elite. *Id.* at 408-09, 455. He led a distinctly upper-middle class life and travelled abroad frequently in the summer, *id.* at 369-73, and he was essentially insulated from the depression. In 1930, for example, Hand decided that he should provide for his three daughters by leaving each of them a minimum of \$100,000. *Id.* at 430. Although he showed an early and "energetic hostility to the prevailing anti-semitism of his class," *id.* at 115, he could show the marks of that class. *See id.* at 409 (Hand makes an "unusual" anti-semitic "slur"). His wife also manifested anti-semitic attitudes. *Id.* at 285-86, 409. Class attitudes seemed to underwrite Hand's ambivalent feelings about Franklin Roosevelt, *id.* at 455-56, as they did his view, expressed in the 1920s, that "the ghost of the innocent man convicted" was nothing more than "an unreal dream." *Id.* at 391.

attracted friends and inspired them to assist him. As Gunther phrases it, they "recognized his acuity and breadth and admired the independence of his mind."<sup>21</sup> In fact, the cumulating details of this intimate biography gradually convince the reader of one basic, if somewhat elusive, conclusion. Hand was, indeed, an individual of exceptional intelligence, extraordinary analytical powers, and an unusually free and self-reliant judgment. Those qualities, combined with his basic decency, his capacity for kindness, and his keen love of wit, make it readily understandable why so many people wished to see him advance.

Gunther draws on these personal and social considerations when he details the slow accretion of factors that led Hand, in the years after 1900, to "a passionate commitment" to reform.<sup>22</sup> Many of the compelling forces, of course, were characteristic of the period. The Spanish-American War stirred his interest in politics, and a sharpening awareness of the social hardships of industrialism began to distress him.<sup>23</sup> Professional experience, too, played a role as Hand's practice led him to public hearings, a local labor strike, and an investigation of a state mental hospital.<sup>24</sup> But, as Gunther nicely shows, more personal factors also moved Hand toward progressivism. His life-long unease about being a "social outsider" gave him a special sensitivity to the disadvantaged,<sup>25</sup> and his probing intellect, philosophical bent, and pervasive skepticism led him to doubt prevailing social and economic verities. His law school training accentuated his belief in the breadth and flexibility of legislative power,<sup>26</sup> while a deep commitment to reasoned action fired his enthusiasm for the possibilities of intelligent social reform.<sup>27</sup>

Perhaps of greatest importance for Hand's political growth was the network of friends he established after his move to New York City. During the next dozen years Hand developed close relationships with many prominent reformers, including C.C. Burlingham, George Rublee, Felix Frankfurter, Norman Hapgood, Walter Lippmann, and Herbert Croly. "Hand's interest in American politics," Gunther believes, "was closely related to his friendships."<sup>28</sup> Hand met Croly, for example, in 1908 when the two were summer

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21. *Id.* at 107.

22. *Id.* at 190.

23. *Id.* at 61-64, 67, 113.

24. *Id.* at 65-67.

25. *Id.* at 115; *see id.* at 362, 367, 431.

26. *Id.* at 373-74.

27. *See, e.g., id.* at 33-36, 40-43, 231, 240, 581-82.

28. *Id.* at 190.

neighbors. They "established an immediate and warm rapport,"<sup>29</sup> and Croly's political thinking "struck an especially responsive chord in Hand."<sup>30</sup> When Croly published *The Promise of American Life* the following year, Hand's enthusiasm was so great that he sent a copy to Theodore Roosevelt who subsequently hailed it as a major influence on his own "New Nationalism."<sup>31</sup> Hand was drawn into progressive politics and soon began working with Roosevelt closely on political issues involving the judiciary, especially the question of the recall of judges and decisions. In 1913 he helped Croly found *The New Republic* as the intellectual organ of national progressivism, and the next year he stood as the Progressive Party candidate for chief judge of the New York Court of Appeals. Although he lost the election, he continued to advise the Progressive Party and contribute short pieces to *The New Republic*. "For once in his life," Gunther writes of Hand's pre-war progressivism, "he was a true believer."<sup>32</sup>

After the war, Hand gradually withdrew from politics, and his progressivism began to atrophy. In part, he was responding to a growing sense that political activism was inappropriate for a federal judge. Gunther believes that the "central truth was that an older, wiser, and more reflective Learned Hand had decided that" judicial separation from politics "was essential to the fairness of courts."<sup>33</sup> Whatever the nature of Hand's altered views about political activism on the bench, it seems likely — contrary to Gunther's conclusion—that more significant factors also conspired to draw him away from progressivism. Not only did the political mood of the country change drastically in the twenties, dampening reform ardor and turning attention elsewhere, but Hand also found himself increasingly in disagreement with the substance of post-war progressivism. He split bitterly with Croly and the editors of *The New Republic* over their decision to oppose the Treaty of Versailles,<sup>34</sup> and then during the twenties he found himself unsympathetic with several progressive causes and sometimes at odds with such old colleagues as Lippmann and Frankfurter.<sup>35</sup> Here, in fact, Gunther renders one of his harshest judgments. Confronted during the 1920s by several important issues implicating free speech, Hand "vacillated," Gunther concludes, and "showed the uncer-

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29. *Id.*

30. *Id.* at 193.

31. *Id.* at 192-93.

32. *Id.* at 190.

33. *Id.* at 345. For Hand's earlier view of the propriety of his activism see *id.* at 237-39.

34. *Id.* at 264-66.

35. *Id.* at 382-98.

tainty, even fearfulness, that had been part of his makeup ever since childhood."<sup>36</sup> In particular, Gunther faults him for failing to join Frankfurter in protesting the Sacco and Vanzetti case, and here he suggests that Hand's contemporaneous comments urging judicial self-restraint had important psychological roots. At least "some of his greater caution," Gunther charges flatly, "was less the product of self-disciplined 'forbearance' than of what he himself sometimes called a lack of courage."<sup>37</sup>

Gunther also suggests, without exploring the idea sufficiently, that the growing recognition Hand received for his work as a judge accelerated his declining interest in both active politics and progressive causes. In 1922 Hand was one of only a few federal judges invited to join the elite of the American bar in founding the prestigious American Law Institute. Even more impressive, he was one of only twenty-one individuals asked to serve on the Institute's governing council. His emergence among the bar's *creme de la creme* both confirmed and enhanced his growing professional renown,<sup>38</sup> and two years later he at last received his promotion to the Second Circuit. At the same time, his reputation began to spread beyond the profession, and the non-partisan speeches and essays he prepared on law and culture began attracting favorable notice in the general press.<sup>39</sup> Hand must have realized that the "most important ingredient of [his] mounting renown was clearly his work on the bench."<sup>40</sup> If so, Gunther's suggestion seems to run, Hand came to realize that his judicial career held the promise of unusual success and that the achievement of such success depended fundamentally on his work and persona as a judge. "If it be selfishness to work on the job one likes, because one likes it and for no other end," Hand declared in 1927, "let us accept the odium."<sup>41</sup> That recognition counselled withdrawal from politics, great care in judicial craftsmanship, and a far more austere public image.<sup>42</sup>

In spite of his withdrawal from politics, Hand remained keenly

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36. *Id.* at 388.

37. *Id.* at 388.

38. *Id.* at 411-12.

39. *Id.* at 347.

40. *Id.* at 345.

41. Learned Hand, *The Preservation of Personality*, BRYN MAWR ALUMNAE BULL., Oct. 1927, at 7-14 [hereinafter *Preservation of Personality*], reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 23, 34 (Irving Dilliard ed., Vintage Books 1959) (1952) [hereinafter *SPIRIT OF LIBERTY*]. This hypothesis would be consistent with Hand's unusual emphasis on "jobbism." See *id.*; GUNTHER, *supra* note 1, at 401-05.

42. See OTIS L. GRAHAM, JR., AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL 151 (1967) (describing the withdrawal of most progressives from events "outside a narrowly personal orbit"). See generally Landauer, *supra* note 15.

interested in both domestic and foreign affairs. His views remained vaguely progressive, but they also became increasingly ambivalent and constrained as he grew more skeptical about the capacities of experts, governments, and the people. He continued to accept the need for government economic regulation, but his public concerns began to shift from issues of social and economic inequality to more personal problems of maintaining individual liberty in the context of an expanding and oppressive mass consumer culture.<sup>43</sup> His attitude toward the New Deal was mixed. He recognized the need for forceful government action and approved or at least sympathized with many New Deal efforts, but he also disliked the massive spending, swelling bureaucracies, and expansion of executive powers they brought in their wake.<sup>44</sup>

Gunther tracks Hand's later years with equal care, and the results provide a rich personal view of many of the major political and legal issues that marked the 1940s and 1950s. A dedicated internationalist, Hand was caught up in the foreign crises of the 1930s and then the World War and Cold War that followed. He was deeply distressed over the rise of McCarthyism, and in private he criticized the Republican party for behaving "with indecency" in its attacks on the Truman administration and its Secretary of State, Dean Acheson.<sup>45</sup>

In discussing McCarthyism Gunther offers one of his relatively few harsh judgments on Hand's behavior. Noting that "Hand, like most Americans, still failed to speak out publicly against McCarthyism,"<sup>46</sup> he suggests that the "principal factor involved here was, surely, Hand's own fearful nature."<sup>47</sup> The judgment seems unnecessary and unfair. First, as Gunther notes, few people were willing to speak out against McCarthy in the early 1950s. If Hand was at fault, his failing hardly evidenced any unusual fearfulness. Second, as an active federal judge, he had a special reason to maintain public silence. Sitting on the Second Circuit, he was in the middle of several significant communist-related prosecutions that counselled special prudence.<sup>48</sup> Third, and most importantly, Hand did in fact speak out. He did so in a highly visible forum—the annual dinner of the American Law Institute—and at a relatively early

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43. *Preservation of Personality*, *supra* note 41, at 23-35.

44. GUNTHER, *supra* note 1, at 440-42, 444-45, 453-57.

45. *Id.* at 577-86.

46. *Id.* at 585.

47. *Id.* at 586.

48. Gunther discounts this justification for Hand's silence by pointing to three other relatively contemporaneous instances in which he spoke out. *Id.* at 585-86. None of the three seems truly comparable.

date, May, 1951.<sup>49</sup> If Hand were culpable on this particular score, his failing seems minimal.

Beyond exploring Hand's life and politics, of course, Gunther examines his extraordinarily long and illustrious judicial career, especially his period of greatest fame from the mid 1920s through the 1950s. Gunther tells us that Hand quickly established himself as the Second Circuit's intellectual leader, a position he held long before he became the circuit's Chief Judge in 1939.<sup>50</sup> He shows how Hand sought consistently to uphold legislative enactments and to effectuate their purposes, and he identifies several areas in which he showed a deep sympathy for the poor and unfortunate who faced government prosecutions.<sup>51</sup> Moreover, Gunther shows that Hand retained throughout his career a fervent belief in the values of free speech and free thought. His unquestioned leadership and growing national stature, together with the exceptionally high calibre of the entire bench, brought the Second Circuit's reputation to its professional zenith. For a quarter of a century, Gunther declares, it "symbolized the highest judicial quality for the nation."<sup>52</sup>

Addressing Hand's career on the Second Circuit, Gunther confronts an unavoidable question. Was Hand truly a "great" judge and, if so, why? Gunther's answer to the first question is resoundingly affirmative, but his answer to the second is more diffuse and less convincing. Although he discusses Hand's judicial work in numerous sections, he evaluates it most systematically in one long chapter focusing on the 1920s and 1930s.<sup>53</sup> Here, Gunther describes Hand's working habits, his tactful and congenial relations with his colleagues, his joyfulness in dealing with legal issues, his assiduous efforts to master factual details, his determination to probe the legal sources for their wisest and truest teaching, and his deep personal commitment to fairness and honesty in reaching the proper disposition. Seeking to demonstrate the depth and care of his analyses, Gunther focuses in particular on Hand's opinions in the areas of admiralty, copyright, patents, and obscenity. Although he frequently tells his readers that Hand was great, he does not consistently succeed in showing him so. Some of Gunther's discussions are

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49. *Id.* at 587-88; see Learned Hand, *Telling the Bar*, WASH. POST, May 27, 1951, at A11, reprinted in *SPIRIT OF LIBERTY*, *supra* note 41, at 169. Hand issued an even stronger attack on McCarthyism the next year. See Learned Hand, *The Future of Wisdom in America*, SATURDAY REV., Nov. 22, 1952, at 9, reprinted in *SPIRIT OF LIBERTY*, *supra* note 41, at 208; GUNTHER, *supra* note 1, at 588-89.

50. GUNTHER, *supra* note 1, at 297.

51. Hand, for example, showed special solicitude for aliens, *id.* at 303-04, 629-38, and for those deprived of the protections of the Fourth Amendment. *Id.* at 305, 596-98.

52. *Id.* at 284.

53. *Id.* at 278-343.

illuminating and persuasive,<sup>54</sup> but others seem insufficiently developed either to allow readers to recognize whatever unusual qualities Hand exhibited or to persuade them that his conclusions were necessarily so impressive. Surprisingly, too, several of Hand's most famous and presumably most important decisions are simply missing.<sup>55</sup>

In fairness, the task of showing why Hand was a "great" judge constitutes a daunting challenge, especially in a biography so rich in other interests and so clearly designed for a general audience. Hand was a judge in a lower federal court, and his efforts were most commonly directed toward relatively narrow and technical problems in federal specialties and statutory construction. With few exceptions, his institutional position prevented him from serving as either an architect of the Constitution or a shaper of basic common law principles. Thus, Gunther's opportunities were severely restricted in those areas where judicial biographies usually focus and where the "major" contributions of American judges appear most obvious and easily explainable.

If Gunther enjoys only limited success in showing Hand's judicial greatness through an examination of his opinions, however, he succeeds on a different and perhaps ultimately more meaningful level, at least for his general readers. He makes it easy to believe that Hand must have been a great judge. Illustrating repeatedly and in a variety of circumstances Hand's honesty, integrity, perspicacity, and intelligence, Gunther shows that he possessed to an extraordinary degree that single most essential of qualities, the quality of good judgment.<sup>56</sup>

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54. For example, Gunther shows Hand's exacting attention to detail in a series of admiralty suits and his intellectual rigor in dealing with patent and copyright law. *Id.* at 308-28. Similarly, in a later chapter he nicely illustrates, in contrast to Frankfurter's approach, Hand's crisp and focused treatment of an issue arising under the Fair Labor Standards Act of 1938. *Id.* at 467-71.

55. See Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L.J.* 511 *passim* (1994); John F. Wirenius, *Helping Hand: The Life and the Legacy of Learned Hand*, 25 *SETON HALL L. REV.* 505, 515-25 (1994). For discussions of Hand's work as a judge see MARVIN SCHICK, *LEARNED HAND'S COURT* 154-91 (1970); see also Symposium, *Judge Learned Hand*, 60 *HARV. L. REV.* 325 (1947).

56. This conclusion, unfortunately, comes only from considering the bulk of Gunther's book. However, at least one example seems appropriate: immediately after being passed over for the Supreme Court, a crushing disappointment, Hand was nevertheless able to analyze his situation, and Frankfurter's role in it, with fairness and acuity. GUNTHER, *supra* note 1, at 567-68.

## II. HAND, THAYER, AND LEGAL PROGRESSIVISM

James Bradley Thayer, Gunther tells us, was "the one teacher Hand admired in every respect."<sup>57</sup> Thayer taught Hand evidence during his second year at Harvard Law School, and his "tentative and moderate" approach "was the un-Langdellian one of eschewing the search for orderly systems and emphasizing instead the historical and human dimensions too often ignored by his colleagues."<sup>58</sup> Hand recalled Thayer's courses as "the fitting crown of the whole three years" in law school.<sup>59</sup>

Thayer was best known, of course, for his views about judicial review. His "greatest impact on Learned," Gunther continues, "came in a third-year course in constitutional law."<sup>60</sup> Thayer taught his students a deep suspicion of judges who allowed their own "predetermined attitudes" to override the actions of the legislative and executive branches.<sup>61</sup> He was "the prophet of a new approach" to the Constitution,<sup>62</sup> Hand declared, and his impact "was to imbue us with a scepticism about the wisdom of setting up courts as the final arbiters of social conflicts."<sup>63</sup>

Notwithstanding Thayer's influence, however, Hand did not simply adopt Thayer's ideas *in toto* nor adhere to them without modification. Gunther's emphasis on Hand's life-long allegiance to Thayer leads him to overlook the ways in which Hand, as a pre-war progressive, modified his teacher's ideas and used them for his own political purposes.

### A. Thayer's "American Doctrine"

While Thayer influenced countless students through his course and through his massive casebook on constitutional law,<sup>64</sup> his widest and most enduring influence came from an essay he published in 1893, the year Hand entered law school. "The Origin and Scope

57. *Id.* at 50.

58. *Id.* at 51. His comments on Thayer remind us that there were, after all, relatively few stereotypical "conceptualists" around in the late nineteenth century, even in the law schools. See generally WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN AMERICAN LEGAL EDUCATION (1994).

59. GUNTHER, *supra* note 1, at 50; see also *id.* at 52.

60. *Id.* at 51.

61. *Id.*

62. Learned Hand, *Chief Justice Stone's Concept of the Judicial Function*, 57 COLUM. L. REV. 696 (1946) [hereinafter *Chief Justice Stone*], reprinted in SPIRIT OF LIBERTY, *supra* note 41, at 152, 154.

63. GUNTHER, *supra* note 1, at 51.

64. See generally JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW (Cambridge, Mass., University Press 1895).

of the American Doctrine of Constitutional Law"<sup>65</sup> contains an account of the development of judicial review in the United States and a careful prescription for its proper scope. The essay's principal argument is that the role of the courts should be sharply limited and that judicial invalidation of an executive or legislative act is allowable only when its unconstitutionality is "so clear that it is not open to rational question."<sup>66</sup> This so-called "rule of the clear mistake" meant, according to Thayer, that legislative and executive acts should be sustained if they could be justified under any "rational" interpretation of the Constitution, no matter how fiercely such interpretation might be disputed. "[W]hatever choice is rational is constitutional."<sup>67</sup> The capacious phrases of the Constitution, Thayer stressed, necessarily allowed a wide range of "rational" interpretations.<sup>68</sup>

Much evidence testifies to the influence of Thayer's "American Doctrine." As Gunther notes, Hand frequently expressed his indebtedness and considered his own views on judicial review the direct result of Thayer's teachings.<sup>69</sup> Oliver Wendell Holmes, Jr., Theodore Roosevelt, Louis D. Brandeis, and Felix Frankfurter were among the many national figures who also claimed allegiance to his views.<sup>70</sup> Nearing the end of his own long career on the Supreme Court, Frankfurter proclaimed Thayer's "American Doctrine" the "most important single essay" ever written on American constitutional law and termed it "the great guide for judges."<sup>71</sup>

Thayer's essay resonated with particular force, of course, because it appeared near the dawn of a newly activist and "conservative" federal judiciary and only a few years prior to the emergence of political progressivism.<sup>72</sup> Hand, Brandeis, Roosevelt, and Frankfurter all sprang to the support of the new reform movement, and they frequently criticized the Supreme Court for its decisions invalidating governmental efforts to regulate the economy and pro-

65. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) [hereinafter *American Doctrine*].

66. *Id.* at 144.

67. *Id.*

68. *Id.*

69. GUNTHER, *supra* note 1, at 51-52, 373.

70. Wallace Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978); Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 8 (1993).

71. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 300-01 (1960) (recorded in talks with Dr. Harlan B. Phillips).

72. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 237-53 (1992); EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 282-91 (1992); ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, at 221-37 (1960).

tect industrial workers. All, for example, fiercely attacked *Lochner v. New York*,<sup>73</sup> the case that subsequently, if somewhat misleadingly, gave its name to a half century of constitutional law. There, the Court struck down a state statute limiting the work hours of bakers on the ground that it violated the due process rights of both employers and employees to freedom of contract. Hand responded with a scathing piece in the *Harvard Law Review* that declared the Court's doctrine a "usurpation" and echoed Thayer's argument that courts could invalidate a statute only when its unconstitutionality was "obvious beyond peradventure."<sup>74</sup>

Like most of those who have written about Thayer's influence, Gunther does not discuss the extent to which the legal progressives modified their mentor's ideas. The "American Doctrine" essay does not quite make the argument they attributed to it. True, it does argue that judicial review has a narrow scope and that courts can invalidate governmental actions only when they constituted "clear mistakes." True, also, the essay emphasizes the broad constitutional role of Congress, stresses the weakness of courts as bulwarks of free government, and concludes with a plea for Americans to look to themselves and their democratic institutions for their "chief protection."<sup>75</sup> The essay, however, also advances two other propositions that give it a somewhat different slant than many of its progressive acolytes acknowledged.

First, Thayer explained that the rule of the clear mistake applies only when the courts are "revising the work of a co-ordinate department."<sup>76</sup> When "the national judiciary"<sup>77</sup> reviews actions taken by the states, however, they "have a different matter in hand."<sup>78</sup> State actions, unlike federal actions, present potential challenges "to the paramount constitution, the supreme law of the land."<sup>79</sup> The federal courts, Thayer insisted, had a "duty in all questions involving the powers of the general government to maintain that power as against the States in its fulness."<sup>80</sup>

Second, in order to check the states tightly, Thayer prescribed

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73. 198 U.S. 45 (1905).

74. Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 496, 500 (1908) [hereinafter *Eight-Hour Day*]. Thayer, for example, maintained that the court's role in reviewing legislation was analogous to its role in reviewing jury verdicts on their facts. *American Doctrine*, *supra* note 38, at 147-48. Hand used the same analogy. *Eight-Hour Day*, *supra*, at 500; see also GUNTHER, *supra* note 1, at 118-23.

75. *American Doctrine*, *supra* note 65, at 156; see also *id.* at 136 n.1.

76. *Id.* at 150.

77. *Id.* at 155.

78. *Id.* at 154.

79. *Id.*

80. *Id.*

a more rigorous standard for federal review of their actions.<sup>81</sup> The national courts had the "duty" of maintaining the nation's "paramount authority in its *true and just proportions*."<sup>82</sup> That "narrow" and "literal" standard—the "true and just" interpretation of the Constitution—was radically different from the standard applicable under the rule of the clear mistake. Under the latter standard, a court could not invalidate the act of a coordinate branch "merely because it is concluded that upon a *just and true construction* the law is unconstitutional."<sup>83</sup> To provide greater flexibility for national actions by negating appeals to the "true and just" construction of the Constitution, Thayer explained, "*is precisely the significance of the rule* [of the clear mistake]."<sup>84</sup> Unlike the "clear mistake" standard, the "true and just" standard conferred—and on Thayer's account encouraged—a broad judicial review that promised to restrict state actions significantly. The "true and just" standard "easily results in the wrong kind of disregard of legislative considerations" and "really operates to extend the judicial function beyond its just bounds."<sup>85</sup> While Thayer rejected that "narrow" approach when the national courts reviewed federal actions, the "true and just" standard was precisely the approach he sanctioned when they reviewed state actions.<sup>86</sup>

Both the structure of Thayer's "American Doctrine" essay and the context within which he wrote, establish that his paramount concern was to restrict judicial review of congressional legislation, and that he viewed a more rigorous federal scrutiny of state ac-

81. *Id.*

82. *Id.* (emphasis added); see also *id.* at 155.

83. *Id.* at 144 (emphasis added).

84. *Id.* The proper doctrine of judicial review, Thayer explained, is sometimes "perverted" by "a pedantic and academic treatment of the texts of the constitution and laws." *Id.* at 138. Commentators who adopted this "literal" approach assumed that judicial review was the same as "ordinary" legal work, "the mere and simple office of construing two writings and comparing one with another." *Id.* This "simple" and "narrow" approach "went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations." *Id.* at 139. Thayer rejected that "literal" approach with scorn. It was "petty" and "narrow," and it lacked "that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions of constitutional law." *Id.* at 138. The rule of the clear mistake "corrected" the practice of judicial review by bringing "into play large considerations not adverted to" in the "pedantic and academic" approach. *Id.* at 140.

85. *Id.* at 138.

86. Compare *id.* at 144 (federal court review of federal actions) with *id.* at 154-55 (federal court review of state actions).

Suggesting the importance he attributed to this more demanding standard of review, Thayer applied it again when he addressed an analogous issue involving the relationship between federal judicial power and state law. James Bradley Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891).

tions as both necessary and desirable.<sup>87</sup> First, his essay focused almost exclusively on the former. Second, his avoidance of the latter issue is highly suggestive since it was the most politically controversial constitutional issue of the entire last quarter of the nineteenth century. Had Thayer believed in the need for special federal judicial deference to state actions, he would surely have addressed that issue specifically or expanded the rule of the clear mistake to reach federal review of state actions. Third, Thayer had concrete reasons to worry about the judicial review of federal actions because Congress was beginning to expand its regulatory efforts. Shortly before he wrote, Congress had passed the Interstate Commerce Act (1887) and the Sherman Antitrust Act (1890), and it was considering a highly controversial new federal income tax law. All were critical innovations that would have to pass constitutional scrutiny. Finally, Thayer's argument for a double standard of review had particular salience because many judges and commentators believed that the same single standard applied to both federal and state actions. Proclaiming the Court's duty to review the actions of federal and state governments with equal strictness, such writers—Justice Steven J. Field and Judge John F. Dillon, for example—could not have failed to attract Thayer's attention.<sup>88</sup>

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87. Thayer urged a more rigorous standard of judicial review to protect federal power, not to enforce individual rights against the states. His more rigorous standard for review of state actions, however, made his doctrine more pliable than many of his progressive followers would allow and gave it the potential for justifying a broader kind of federal judicial intervention against state actions. This, of course, is not meant to suggest that Thayer necessarily approved as strict a standard of review over state actions as the Court seemed to be developing in the nineties.

A passage from Thayer's book on Marshall, where he seems to cite cases involving federal review of state and of federal actions as parallel, might be thought to cast doubt on the statement in the text. JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (Da Capo Press 1974) (1901) [hereinafter MARSHALL]. The relevance of the passage, however, seems unclear. While Thayer states that judicial invalidation of legislation is "now lamentably too common," *id.* at 107, he also declares that "the advantages in a popular government of this conservative influence" of judicial review are "[g]reat and, indeed, inestimable." *Id.* at 106. Perhaps of greatest significance, he neither criticizes any of the Supreme Court's pivotal decisions from the 1890s that established a more restrictive approach to the review of state actions nor abandons his familiar insistence that the rule of the clear mistake applies only to the review of actions of coordinate branches. See generally *id.* at 102-09 (discussing the position of the judiciary in the system of constitutional law).

88. See, e.g., Stephen J. Field, The Centenary of the Supreme Court of the United States, Address at the Centennial Celebration of the Organization of the Federal Judiciary (Feb. 4, 1890), in 24 AM. L. REV. 351, 360-63 (1890) [hereinafter Field Address]; John F. Dillon, Law and Legislation, Conclusion of Address at Saratoga, N.Y. (Aug. 24, 1892) reprinted in 26 AM. L. REV. 658, 665, 669-70, 674 (1892) [hereinafter Dillon Address].

### B. *Creating Thayerian Progressivism*

When Hand and other legal progressives drew on Thayer's "American Doctrine" essay, they generally ignored both its distinction between the two standards of review and the stricter standard it proposed for examining state actions. Further, they trained later generations to see Thayer as the inspired voice of a generalized philosophy of judicial restraint.<sup>89</sup> Such a picture is, of course, rooted in a great deal of truth,<sup>90</sup> but it is also misleading.<sup>91</sup>

The legal progressives drew a broader and somewhat different lesson than Thayer had offered because their politics were profoundly different from his. Thayer was a nineteenth-century Yankee who imbibed the "Brahmin" culture of Boston and Harvard and who served through the Civil War distributing news and propaganda on behalf of the Loyal Publication Society.<sup>92</sup> His orientation was national, and his deepest political and emotional commitments were to the preservation of the Union.<sup>93</sup> Whatever disputes

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89. General references to Thayer's theory of judicial review emphasize his advocacy of "judicial restraint" and almost invariably ignore the difference between federal review of federal actions and federal review of state actions. *See, e.g.*, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 366 (Max Freedman ed., 1967).

A superb symposium on Thayer provides a more complex and sophisticated view of Thayer and his thinking. *See generally* Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. Rev. 1 (1993). Although many of the articles point to the fact that Thayer did distinguish between federal review of federal and state actions, they still tend to consider Thayer primarily as a spokesman for a generalized position of judicial restraint. Several of the contributors, however, develop positions that seem consistent with at least much of the argument in the text. *See, e.g.*, Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 Nw. U. L. Rev. 9 (1993); G. Edward White, *Revisiting James Bradley Thayer*, 88 Nw. U. L. Rev. 48 (1993); Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origins, Scope, and Present Implications*, 88 Nw. U. L. Rev. 28 (1993).

90. *See, e.g.*, *American Doctrine*, *supra* note 65, at 156; MARSHALL, *supra* note 87, at 102-07.

91. Thayer's other writings establish that his basic position on judicial review scarcely changed from the mid-eighties to his death in 1902. Nine years before he wrote his "American Doctrine" essay he outlined the same basic views in *The Nation* and eight years after the essay he reiterated those same views in a book on John Marshall. *See* James Bradley Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884 at 314; MARSHALL, *supra* note 87; Jay Hook, *A Brief Life of James Bradley Thayer*, 88 Nw. U. L. Rev. 1, 5-6 (1993).

92. White, *supra* note 89, at 48; Hook, *supra* note 91, at 1, 3.

93. *See* James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899) (revealing Thayer's devoted nationalism). Although he thought the nation's role in the Spanish-American War "discreditable," *id.* at 465, he nevertheless defended the power of the national government to acquire and govern the nation's new Pacific territories. *Id.* at 467-73. Successive and expanding uses of national power had been necessary to the nation's growth, he maintained, and the Constitution had consistently found those uses warranted. The Constitution was "astonishingly well adapted for the purposes of a great, developing nation"

hung in the balance between courts and legislatures, Thayer's primary concern was that the national government remain supreme. That central conviction, for example, informed his book on John Marshall. Thayer praised the Chief Justice unstintingly as the shaper of the "National Constitution," a contribution where Marshall "was preëminent—first, with no one second."<sup>94</sup> Although he wrote in 1901 at the age of seventy, memories of the Civil War still suffused his thinking. "It was Marshall's strong constitutional doctrine," he declared fervently, "that saved the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces."<sup>95</sup>

If Thayer was a Yankee Unionist forged in the heat of the Civil War, Hand and his fellow legal progressives were middle-class professionals galvanized emotionally by the social turmoil of the late nineteenth century, inspired intellectually by the ideal of science as an instrument of social progress, and shaped legally by a distinctive set of political conflicts that consistently pitted courts against legislatures.<sup>96</sup> Much of the characteristic tone of legal progressivism, in fact, stemmed from the way it fused an intellectual commitment to scientism and reform with a politicized view of the institutional tensions between courts and legislatures. Legal progressives tended to see a close and beneficent connection between science, democracy, social progress, widespread economic welfare, and the innovative power of the legislature. Concurrently, they tended to see a parallel, and maleficent, connection between obscurantism, oppression, social disruption, the rights of property, and the common law of the courts.<sup>97</sup> Brandeis, for example, identi-

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and for "the purposes of a great people." *Id.* at 468. The lesson was that Americans needed to "appreciate the large scope of this great charter of our national life." *Id.* at 469.

Grey further illustrates Thayer's nationalism in discussing the latter's position on the power of the federal government to issue paper money. Grey, *supra* note 89, at 32-36.

94. MARSHALL, *supra* note 87, at 58-59.

95. *Id.* at 58-59. Thayer shared many of the views of his friend, colleague, and fellow Yankee, Oliver Wendell Holmes, Jr. *E.g.*, Grey, *supra* note 89, at 36-40. Holmes, who of course also remembered the Civil War vividly, shared Thayer's view about the role of judicial review: "restraint" was important but national supremacy was essential. In 1913, while on the Supreme Court, Holmes expressed the essence of the view that united him with Thayer and the "American Doctrine" essay: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." OLIVER WENDELL HOLMES, JR., *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

96. See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1875-1895* (1960) (focusing on legal profession's responses to the labor and social unrest of the late nineteenth century).

97. The conflict between courts and legislatures is, of course, a perennial. The period

fied legislatures with the scientific method of investigation and experimentation, and he charged that "the unwritten or judge-made laws as distinguished from legislation" were "largely deaf and blind."<sup>98</sup> Roscoe Pound imagined his sociological jurisprudence on the same dichotomy. "[T]here is coming to be a science of modern legislation," he proclaimed.<sup>99</sup> As a result, "modern" statutes "represent long and patient study by experts," elaborate public discussions, "and hearings before legislative committees."<sup>100</sup> In contrast, the courts were "less and less competent to formulate rules for new relations which required regulation."<sup>101</sup> Indeed, Pound declared, the courts had become major obstacles to rational law making. "Judicial law-making for sheer lack of means to get at the real situation, operates unjustly and inequitably in a complex social organization."<sup>102</sup> In 1912, Frankfurter packed those typical progressive beliefs together tightly. "Growing democratic sympathies, justified by the social message of modern scientists," he declared sweepingly, "demand to be translated into legislation for economic betterment."<sup>103</sup>

Hand shared those animating convictions. He was, Gunther tells us, one of those "for whom true progressivism required national policy-making based on expertise."<sup>104</sup> In one of his earliest essays, published in 1901, he criticized the partisan use of expert testimony at trial and emphasized the inability of juries to understand complex scientific issues.<sup>105</sup> "Knowledge of such general laws can be acquired only from a specialized experience such as the or-

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from approximately 1890 to 1937, however, is distinctive. The conflict ran relatively consistently through the whole period. It shaped the period's dominant politics and constitutional disputes, and it was closely tied to a historically specific set of social and economic disputes. In addition, the period's rhetoric and self-understanding was linked to fundamental intellectual assumptions about the nature of both human knowledge and social behavior.

98. LOUIS D. BRANDEIS, *The Curse of Bigness*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 316, 318-19 (Osmond K. Fraenkel ed., Kinnikat Press 1965) (1934).

99. Roscoe Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 384 (1908).

100. *Id.*

101. *Id.* at 403.

102. *Id.* at 404; see also Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 469-70 (1909).

103. FELIX FRANKFURTER, *The Zeitgeist and the Judiciary*, *Address at the Twenty-Fifth Anniversary Dinner of the Harvard Law Review (1912)*, in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938*, at 3, 4 (Archibald MacLeish & E.F. Pritchard eds., 2d ed. 1962) (1939).

104. GUNTHER, *supra* note 1, at 213; cf. *id.* at 312 (discussing Hand's support for the use of court-appointed experts rather than partisan experts in complex technical cases).

105. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 *HARV. L. REV.* 40 (1901).

dinary man does not possess,"<sup>106</sup> he explained. When such matters were at issue, "the jury is not a competent tribunal."<sup>107</sup> His solution was the scientific expert. "It is obvious that my path has led to a board of experts or a single expert, not called by either side, who shall advise the jury."<sup>108</sup> If jurors refused to follow the expert's advice, Hand continued, the court could easily rule that "their verdict is 'against the evidence' and cannot stand."<sup>109</sup>

Like Pound, Brandeis, and Frankfurter, Hand adopted the standard progressive dichotomy between courts and legislatures, linking the former to class prejudice and the latter to scientific reform. Progressivism, he declared, "reflects a suspicion of courts."<sup>110</sup> Social problems required an "experimental" approach that could act on adequate factual grounds. The courts, however, relied only on "the yardstick of abstract economic theory" and on the "inevitable bias" that suffused the judges' "individual opinions upon political or economic questions."<sup>111</sup>

The only way in which the right, or the wrong, of the matter may be shown, is by experiment; and the legislature, with its paraphernalia of committee and commission, is the only public representative really fitted to experiment.<sup>112</sup>

That compelling ground for restricting the scope of judicial review, a quintessential element of early twentieth-century progressivism,<sup>113</sup> was not the view of James Bradley Thayer.

There were, in fact, at least three significant differences that separated Thayer from his later progressive apostles. First, when Thayer wrote his "American Doctrine" essay, he still assumed that

106. *Id.* at 55.

107. *Id.*

108. *Id.* at 56.

109. *Id.* at 57.

110. Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916) [hereinafter *Speech of Justice*], reprinted in SPIRIT OF LIBERTY, *supra* note 41, at 10, 15. Hand was initially enthusiastic about the possibilities of economic regulation through the Federal Trade Commission. Agency action, as opposed to judicial enforcement, struck him as "clear recognition" of "the proper mental attitude toward the trust question." GUNTHER, *supra* note 1, at 246.

111. *Id.* at 507, 501, 508. A few years later, at the request of George Rublee, Hand examined the Supreme Court's opinions under the Sherman Act. The results, he wrote, were "haphazard and unscientific." GUNTHER, *supra* note 1, at 247. The study "confirmed his view that courts were incompetent to develop coherent antitrust policies." *Id.*

112. *Eight-Hour Day*, *supra* note 74, at 495, 508.

113. Croly said essentially the same thing, for example, in the book that Hand admired so much. GUNTHER, *supra* note 1, at 195-96; HERBERT DAVID CROLY, *THE PROMISE OF AMERICAN LIFE* 394-95 (Northwestern University Press 1989) (1909). Indeed, Gunther tells us, it was Hand who helped shape Croly's views about the courts. GUNTHER, *supra* note 1, at 194.

the fundamental issue in American constitutional law was the relationship between states and the nation. Hand and the legal progressives, however, located that defining issue elsewhere, in the patterned political tensions between courts and legislatures. While Gunther attributes Hand's inspiration in attacking *Lochner v. New York*<sup>114</sup> to Thayer,<sup>115</sup> his essay in fact articulates an altered and distinctively "progressive" Thayerism. It argues for the applicability of the classic Thayerian "rationality" test<sup>116</sup> when that standard—at least as stated in the "American Doctrine" essay—did not apply. *Lochner*, after all, challenged the constitutionality of a state law. Hand's progressive concerns, however, led him to smother the distinction between the review of state and federal actions and to apply Thayer's highly deferential rationality standard to the former as well as the latter. Adapting Thayer to their purposes, Hand and the progressives unceremoniously elided their mentor's qualification to the rule of the clear mistake. They generalized the qualification sweepingly as part of their effort to reform society by harnessing the "deaf and blind" courts and by liberating the "experimental" legislatures—those of the states every bit as much as those of the nation.<sup>117</sup>

Second, by stressing the politico-intellectual dichotomy between courts and legislatures, progressives constructed their own special justification for Thayer's rationality standard. In their minds, the rule of the clear mistake applied for reasons beyond the fact that the Constitution gave Congress broad powers and broader discretion. It also applied because the courts did not have the scientific capacity to deal intelligently with social problems. Hand's attack on *Lochner*, for example, made it clear that the "experimental" nature of the question required a scientific approach that was possible only through legislative inquiry and action.<sup>118</sup> The courts

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114. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

115. GUNTHER, *supra* note 1, at 118-19.

116. See *Eight-Hour Day*, *supra* note 74, at 502; see also *id.* at 499-503, 507-08.

117. Again, it is critical to note that Thayer's stricter standard of review was intended, at least primarily, to protect federal power against state interference, not to protect individual rights from state regulation. The essay's double standard and stricter test for state actions could, however, have supported the more rigorous type of judicial review that progressives opposed so strenuously.

118. Hand's use of the progressive "court/legislature" dichotomy marks a rich juncture in the history of American legal thought. His essay linked Thayer's approach to the problem of judicial review with the progressives' belief in a political and intellectual dichotomy between courts and legislatures. In doing so, it helped clear a path that would eventually lead from Thayer to Henry Hart, the path from the origins of "judicial restraint" in the late nineteenth century to the development of process jurisprudence in the mid-twentieth. For a revealing look at some of the differences between the political and legal views of Thayer and the Progressives, compare *Eight-Hour Day*, *supra* note 74, with James Bradley Thayer,

could contribute little or nothing to the resolution of the question. As Gunther puts it, Hand's analysis meant that "the very attempt to evaluate the wisdom of protective laws was simply beyond the competence of the judges."<sup>119</sup>

Third, Thayer believed that the scope of judicial review should be narrow because the people should govern themselves through their elected representatives and because courts could not safeguard a free society.<sup>120</sup> Hand and his fellow legal progressives sympathized with those beliefs, but they also transformed them. While they believed in popular government, they also believed that the people needed the assistance of experts in order to succeed. Only specialized agencies armed with scientific expertise could cope with the complex and dynamic problems of the modern world, and those agencies required flexibility if they were to carry out their difficult assignments.<sup>121</sup> Progressive legal thinkers, then, favored a strictly limited judicial review for a second reason that was foreign to Thayer: not to enable "the people" to participate in governing themselves and thereby to grow personally in "moral responsibility,"<sup>122</sup> but rather to enable professional experts to utilize science on the people's behalf in order to make the machinery of government more efficient. Those experts, unlike the courts, *could* safeguard a free society.

Before the war, then, Hand both modified Thayer and expanded his doctrine in the service of his ardent and deeply felt reform politics. While he drew on his mentor's teachings, he did not reject "liberty of contract" merely because it violated the

*American Judges and the Interests of Labor*, 5 Q.J. ECON. 503 (1891).

119. GUNTHER, *supra* note 1, at 121.

120. When Thayer referred to "the people," he meant actual citizens who ought, in a democracy, to benefit personally from "the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience" that came from active participation in popular government. MARSHALL, *supra* note 87, at 106-07.

In contrast, Progressives spoke constantly of "the people," but a significant segment of the movement's intellectual wing were highly skeptical of the untutored wisdom of "the people." When Hand developed his highly restrictive interpretation of the First Amendment in 1917, for example, he referred in distinctly unflattering terms to "the people" when he explained privately that his goal was "to withhold the torrents of passion to which I suspect democracies will be found more subject than for example the whig autocracy of the 18th century." GUNTHER, *supra* note 1, at 159. Hand did not think that juries could or would protect the speech rights of minorities and dissidents. *Id.* at 157.

121. Gunther tells us relatively little about Hand's views of social "experts," but he does make clear that, by the time of the New Deal, Hand "doubted the political neutrality and genuine expertise of the administrative agencies." *Id.* at 473. Gunther notes, however, that "in his official capacity, he deferred generously." *Id.*

122. MARSHALL, *supra* note 87, at 107. In this regard, Brandeis remained closer to Thayer than did the others.

proper canons of constitutional construction. He indicted it on far broader and more substantive grounds. The ostensible protection of "liberty of contract," he maintained, was the result of duplicitous and unprincipled class bias. On its merits it was an outrageous social and economic wrong.<sup>123</sup> Confronting the ultimate issue of social and economic inequality, Hand declared that:

for the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force.<sup>124</sup>

In a series of largely unsigned editorials for *The New Republic*, he stated his views even more bluntly, accusing the courts of serving the prejudices of their "economic class" and committing themselves to the preservation of "inequalities of economic power."<sup>125</sup>

Indeed, by 1916 Hand was even prepared to issue a plea for his own brand of progressive judicial activism, apparently limited, to be sure, to non-constitutional issues. In an article entitled "The Speech of Justice," to which Gunther pays insufficient attention, Hand rejected the idea that the judge was a mere "passive interpreter" of the law.<sup>126</sup> "Conservative political opinion," he announced, "cleaves" to the belief that the judge's "absolute loyalty to authoritative law is the price of his immunity from political pressure and of the security of his tenure."<sup>127</sup> But that "conservative opinion" was a partisan screen. "In its passionate adherence to this tradition such opinion is not disinterested," he charged; "it would as eagerly encourage judicial initiative, if the laws were framed by labor unions."<sup>128</sup> Although conservatives were right in saying that the judge stood "low" in the "hierarchy of power," they were wrong in denying that "the judge has, by custom, his own proper representative character as a complementary organ of the social will."<sup>129</sup> In fact, Hand maintained, judges must inevitably choose: "interpretation is a mode of the will and understanding is a choice."<sup>130</sup> They had to grapple with "the contests of their time," he insisted, and "ritualistic piety" could give them no refuge.<sup>131</sup>

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123. *Eight-Hour Day*, *supra* note 65, at 497-501, 508.

124. *Id.* at 506.

125. GUNTHER, *supra* note 1, at 249; *see id.* at 248-51.

126. *Speech of Justice*, *supra* note 110, at 10.

127. *Id.* at 10-11.

128. *Id.*

129. *Id.* at 11.

130. *Id.* at 14.

131. *Id.* at 15.

"Like every public functionary, in the end they are charged with the responsibility of choosing but of choosing well."<sup>132</sup> The true and "final test" of their judicial work was their service to "a genuine social ideal which shall be free from class prejudice." That test, Hand believed, they could not avoid.<sup>133</sup>

Thus, Hand did not simply adopt Thayer's "American Doctrine," nor did he find it congenial wholly for reasons of constitutional logic. Rather, he expanded Thayer's ideas into a broader and more serviceable political tool, and he used that tool vigorously to advance the substantive political values that he cared about deeply. In the years before World War I, "Thayerian" was for him the adjective, not the noun.

### III. THE EVOLUTION OF HAND'S FIRST

#### AMENDMENT JURISPRUDENCE

The defining twentieth-century constitutional dilemma for progressives and their liberal successors has been the problem of reconciling a commitment to certain special individual rights, most notably those enshrined in the First Amendment, with a rejection of the old economic "substantive" due process. Hand's historical reputation rests largely on the uncompromising position he staked out in the years after World War I. Judges, he came to insist, should not interfere with legislative or executive actions that restricted so-called personal rights, including those protected by the First Amendment, any more than they should intervene to protect "economic" rights.

#### A. *Overview: From Masses to Dennis*

Hand was an extreme case in confronting the progressive dilemma. Not only had he vigorously attacked "liberty of contract" before he went on the bench, but after he became a judge he pronounced as law a powerful and innovative interpretation of the First Amendment that raised the right of free speech to a fundamental principle of American government. His 1917 opinion in *Masses Publishing Co. v. Patten*,<sup>134</sup> Gunther declares, "was an

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132. *Id.*

133. One of the major gaps in Gunther's biography is its lack of any substantial discussion of Hand's work on the district court bench. The book does not touch on the question of the extent, if any, to which his pre-war progressivism affected his early judicial work. Gunther does discuss one pre-war obscenity case where Hand exhibited his sympathy for free speech. GUNTHER, *supra* note 1, at 148-51.

134. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

original, penetrating analysis, an expression of an outsider's deepest belief about the importance of dissent in a democratic society."<sup>135</sup> Indirectly, but ultimately, it helped to inspire a substantial expansion of constitutional civil liberties in the twentieth century.<sup>136</sup>

In the short run, however, the opinion was a failure. Dubious if not obviously wrong under prevailing legal standards, it was widely criticized by the bar and quickly reversed by the Second Circuit.<sup>137</sup> Moreover, as Hand had feared, a few months later it apparently cost him promotion to the appellate court.<sup>138</sup>

In *Masses*, Hand construed a federal wartime measure, the Espionage Act of 1917, to deny the postmaster of New York City the power to ban a radical magazine from the United States mail.<sup>139</sup> In terms of Hand's Thayerian and First Amendment values, his effort was a *tour de force* of creative synthesis, the audaciously willful restraint of a constitutional wolf in statutory clothing. Throughout the opinion he insisted that he was not questioning the power of Congress, that he was straining to be faithful to its statutory language, and that he was striving solely to effectuate its legislative purpose.<sup>140</sup> At the same time, he construed the statute in an exceptionally restrictive manner and negated what would appear to have been its rather clear meaning and purpose. He did so by invoking what he termed "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."<sup>141</sup> He did it, in other words, by creating an exceptionally demanding legal test for proscribable speech—compelled apparently by the First Amendment—and then adamantly maintaining that "Congress had no such revolutionary purpose in view" as to violate that fundamental standard.<sup>142</sup> Consequently, he ruled, since it was respectfully drawn, the statute did not authorize the postmaster to ban the magazine.

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135. GUNTHER, *supra* note 1, at 152.

136. As Gunther established twenty years ago, Hand's opinion contributed to the development of a vibrant First Amendment law in the years after World War I. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) [hereinafter *Fragments of History*].

137. *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir. 1917). Hand's opinion came down in late July and was overturned in November.

138. GUNTHER, *supra* note 1, at 152, 155, 160-61.

139. Act of June 15, 1917, ch. 30, 40 Stat. 217, *repealed by* Act of June 25, 1948, ch. 645, 62 Stat. 683. GUNTHER, *supra*, note 1, at 151-70.

140. *Masses*, 244 F. at 538-40.

141. *Id.* at 538, 539.

142. *Id.* at 540.

Hand's willingness to infuse his own values into the *Masses* opinion raises a number of questions, and Gunther is primarily interested in those that explore the relationship between *Masses* and Hand's later career. How and why did someone with such a fervent commitment to the values of free speech come subsequently to deny the judiciary any special or significant role in enforcing the First Amendment? Did its author's views about judicial review or the First Amendment change over the course of the next four decades? Most particularly, how and why did the libertarian author of *Masses* wind up four decades later writing an opinion in *United States v. Dennis*<sup>143</sup> that substantially minimized First Amendment values?

*Dennis*, of course, was a case from another era, the Cold War. It involved an appeal of the convictions of eleven leaders of the Communist Party of the United States under the Smith Act, a 1940 statute that made it unlawful to teach or advocate the overthrow of the government of the United States by force and violence.<sup>144</sup> Writing for the Second Circuit, Hand "restated and diluted the most speech-protective interpretations of Holmes's 'clear and present danger' test" and upheld the convictions.<sup>145</sup> The Supreme Court affirmed, and its plurality opinion expressly adopted Hand's limp formulation of the appropriate constitutional test.<sup>146</sup> *Dennis*, Gunther writes, "has been viewed by many as a debacle for the First Amendment, and critics have attributed a share of the blame to Hand's opinion."<sup>147</sup>

For Gunther, Hand bears little if any blame. He quickly dismisses the possibility that Hand's opinion was due to any change in his views about the importance of First Amendment values. Hand was "a lifelong believer in the First Amendment,"<sup>148</sup> Gunther maintains, and his beliefs remained as strong in the 1950s as they had been during World War I. Similarly, Gunther dismisses the possibility that the intensities of Cold War anticommunism intimidated the judge. "Hand's performance in *Dennis* was neither a sudden surrender to McCarthyism nor an act of cowardice."<sup>149</sup> In-

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143. 183 F.2d 201 (2d Cir. 1950), *aff'd.*, 341 U.S. 495 (1951).

144. GUNTHER, *supra*, note 1 at 598-99 (summarizing Hand's opinion, 183 F.2d at 201).

145. GUNTHER, *supra* note 1, at 599.

146. *Id.* at 599. Hand's formulation was that the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 600.

147. *Id.* at 599. Gunther previously called *Dennis* "the nadir of modern civil liberties protection." *Fragments of History*, *supra* note 136, at 752-53.

148. GUNTHER, *supra* note 1, at 565; *see id.* at 281 (substantiating Hand's commitment to First Amendment ideals).

149. *Id.* at 603.

stead, he concludes, the explanation for Hand's *Dennis* opinion is both simple and direct. "The central answer to the puzzle of how Hand could write so speech-restrictive an opinion as *Dennis* lies in the fact that as a lower court judge, he was bound by and faithful to Supreme Court precedents."<sup>150</sup>

The answer is not entirely convincing. First, Hand saw the relevant precedents as ambiguous and unhelpful, and Gunther himself declares that the judge "found no clear guidance" in them.<sup>151</sup> Second, because the precedents were ambiguous, they were capable of supporting a more rigorous and protective standard than Hand shaped from them. Gunther acknowledges, in fact, that Hand not only failed to articulate a demanding test but actually "diluted the most speech-protective interpretations" the precedents offered.<sup>152</sup> Third, Gunther notes that Hand also ignored grave weaknesses in the record and "relied heavily on the world situation during the Cold War."<sup>153</sup> The precedents required neither of those moves. Finally, as his technique in *Masses* showed, Hand knew full well how to avoid legal rules, craft purposeful presumptions, manipulate standards of proof, and exploit weak records. Those techniques were equally available to him in *Dennis*. Indeed, as Gunther also points out, Justice John Marshall Harlan used some of those very same tools when he helped design from the same precedents the Court's move toward a more speech-protective approach later in the decade.<sup>154</sup>

More problematic than Gunther's unconvincing answer, however, is his limited consideration of what seems, at least in a historical inquiry, a different and more interesting question. Focusing on Hand's commitment to free speech and attempting to show his consistency during the decades after *Masses*, Gunther does not puzzle over the reasons why Hand in *Masses* dared write his First

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150. *Id.* at 603-04. "Hand thought his court really had no choice but to reject the defendant's challenges in *Dennis*." *Id.* at 605. Gunther's explanation for Hand's *Dennis* opinion may help explain why he stresses the fact that Hand was "writing on a blank slate" in *Masses*. *Id.* at 152.

151. *Id.* at 600. Gunther notes Hand's willingness in an earlier case to follow a First Amendment precedent he did not like. *Id.* at 300. However, discussing another area he also notes that "Hand would distinguish an unappealing precedent whenever possible." *Id.* at 299.

152. *Id.* at 599; see Wirenius, *supra* note 55, at 516-20; Posner, *supra* note 55, at 516-18.

153. GUNTHER, *supra* note 1, at 601. See *Dennis*, 183 F.2d at 213.

154. GUNTHER, *supra* note 1, at 603. Other evidence that Gunther cites to support his defense of Hand seems of little help. Neither the fact that Hand believed that the prosecutions should not have been brought nor the fact that he continued in private to advocate the more restrictive test he had developed in *Masses* provide significant support for the proposition that he felt compelled by the legal precedents to decide as he did. *Id.* at 603-04.

Amendment values into law in the first place. Surely, the fact that he was acting on a "clean slate" cannot explain his heavy reliance on the "normal assumption of democratic government," nor can it justify the extent to which he restricted the statute and ignored relevant case law. Although Hand may well have valued free speech consistently over the years, in giving judicial protection to that value it was his behavior in *Masses*, not in *Dennis*, that seems in retrospect aberrational.

Indeed, Hand's private reflections at the time he wrote *Masses* show an acute awareness that his opinion embodied an extraordinary enterprise. Knowing it would be unpopular and fearing it would cost him professionally, he wrote to his wife:

I must do the right as I see it and the thing I am most anxious about is that I shall succeed in giving a decision absolutely devoid of any such considerations [as the prospect of promotion]. There are times when the old bunk about an independent and fearless judiciary means a good deal. This is one of them; and if I have limitations of judgment, I may have to suffer for it, but I want to be sure that these are the only limitations and that I have none of character.<sup>155</sup>

The key fact in construing this passage is that the relevant judicial precedents and statutory language pointed quite readily to an easy, popular, and uncontroversial result.<sup>156</sup> A reasonable construction of the statute and a faithful application of established precedents required nothing unusual in the way of either courage or integrity, and they surely gave no cause for Hand's sense of personal crisis. His remarks, in other words, make sense only on the assumption that he understood full well that he was doing something far different than merely announcing the command of established law. He was, instead, as he knew, and as Gunther rightly emphasizes, attempting a stunning and radical break with established law.

Hand's reasons for writing his *Masses* opinion are undoubtedly complex, and Gunther's explanation—the "outsider's deepest belief" about the importance of dissent—undoubtedly contains an important element of truth. It seems likely, however, that there were additional and more specifically historical reasons for Hand's aberrational decision. One was probably his keen intellectual sympathy for the magazine itself. Hand was no radical, and he did not agree with the magazine's politics; but his philosophical bent and skeptical attitude made him appreciate the magazine's stimulating

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155. *Id.* at 155.

156. *Id.* at 156-57. See David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 *YALE L.J.* 514 (1980); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 *U. CHI. L. REV.* 1205, 1217-27 (1983).

freshness. Indeed, he not only read it occasionally and knew its editor personally (though not well), but only the previous year, at the editor's request, he had written a letter that specifically defended the magazine and its right to publish unpopular opinions.<sup>157</sup> A second and related reason for his decision was the fact that his intellectual enthusiasm for reform was at its peak. He was intensely involved with *The New Republic* and excited by the possibilities it promised for a new kind of philosophical political debate.<sup>158</sup> Indeed, only the year before *Masses*, in his article "The Speech of Justice," Hand had undertaken the task of articulating a new kind of progressive judicial activism on behalf of a true "social ideal."<sup>159</sup>

This combination of political enthusiasm, the inspiration of a community of intellectual activists, and an exhilarating flirtation with the idea of developing a new and activist progressive jurisprudence may well have been primary determinants behind Hand's behavior in *Masses*. In his 1916 article "The Speech of Justice" he rejected the idea of a passive judiciary and urged judges "to show a more enlightened sympathy with the deeper aspirations of the time."<sup>160</sup> There was a "genuine social ideal" that should be the true test of their work. "Life overflows its moulds and the will outstrips its own universals," he wrote in the ringing tones of pre-war progressive exuberance.<sup>161</sup> "Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts."<sup>162</sup> In retrospect, the essay reads like Hand's brief in support of his opinion in *Masses*. The two were written only a year apart, and in addressing the Espionage Act in *Masses* Hand surely tried "to show a more enlightened sympathy" and accepted, as well, the responsibility "of choosing well." Read together, as the essay and the opinion should be, the gulf between *Masses* and *Dennis* widens, and the former, not the latter, emerges as the special case.

Gunther's inattention to the aberrational aspect of *Masses* suggests not only his determination to show that his subject was a

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157. GUNTHER, *supra* note 1, at 153-55. This, of course, raises a rather obvious ethical problem—at least under current standards—in Hand's decision to hear the magazine's suit. Gunther passes over the issue.

158. *Id.* at 241-51.

159. *Speech of Justice*, *supra* note 110, at 10-15. In the decade before the war libertarian ideas were in circulation among a number of important law writers, though they had little impact on the courts. See David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 *YALE L.J.* 514, 559-79 (1980-81).

160. *Speech of Justice*, *supra* note 110, at 14.

161. *Id.*

162. *Id.*

consistent supporter of free speech but also his own occasional lack of interest in the fact and process of historical change.<sup>163</sup> Only admiration for Hand and the First Amendment and an excessive concentration on showing consistency over time can explain the extent to which he accepts *Masses* as the product of an essentially unchanging personal philosophy and psychology. The opinion was at least equally the product of a specific and compelling historical context. To the extent that those other historically contingent factors did help induce Hand to act, the path from *Masses* to *Dennis* becomes more complicated than Gunther estimates.

Even considering the question that primarily interests Gunther—how did Hand move from *Masses* to *Dennis* when his commitment to free speech remained unchanged?—a sharper historical answer is possible. Two factors, one narrow and specific and the other quite broad and complex, seem to explain the path Hand took. The first factor was simply Hand's lack of sympathy for the defendants in *Dennis*. He did not see them as the kind of weak or unfairly ensnared individuals with whom he could identify.<sup>164</sup> Rather, they constituted a group, and they were parts of a larger group with powerful international resources. Quite simply, it seems, in the context of the early Cold War, Hand regarded the defendants as sufficiently dangerous to warrant the government in stopping their activities.<sup>165</sup> The second, and more complex, factor was that by the 1940s Hand's views about politics, judicial review, and the social role of the courts had changed substantially from what they had been before World War I.

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163. Gunther's inattention to history raises unnecessary questions about his case for Hand's consistency. Discussing his attitude toward a case in 1913, for example, Gunther relies on a statement Hand made in 1943. GUNTHER, *supra* note 1, at 149.

164. This is not to suggest that, because the precedents do not fully explain *Dennis*, it was therefore the result of "cowardice" or a "surrender to McCarthyism." *Id.* The point is, rather, that Hand himself saw no reason to strain for these particular defendants. Although he remained committed to the values of free speech, he "never doubted the need for American firmness in the face of Stalinist foreign policy." *Id.* at 578. As early as 1920 he had called Bolshevik rule a "militant oligarchy" and "an intolerable government." *Id.* at 356, 357. Hand's views about the political significance of revolutionary advocacy had changed since *Masses*. Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*: *Masses Publishing Co. v. Patton*, 61 U. COLO. L. REV. 1, 37 n.149 (1990). In contrast, he did exhibit considerable sympathy for other, more sympathetic victims of the McCarthy period, even those implicated in espionage. He found ways to lend them judicial assistance, even when the law did not seem to favor them. GUNTHER, *supra* note 1, at 592-98, 612-25.

165. Hand not only relied on material outside of the record, but at crucial points he identified the court with the government (using "we" and "our" repeatedly), stressed that the Communist leaders habitually "masked" their true intentions, and described their views in the language of religious absolutism, a sure sign of his antipathy. *Dennis*, 183 F.2d at 211-13.

B. *Processes of Change: 1917-1942*

Tracing changes in Hand's thought is a complex challenge. Many of his basic attitudes seem to have been present from his college and law school years. Early on, for example, he showed himself a philosophical skeptic and value relativist who believed in the virtues of cultural tolerance, intellectual honesty, democratic freedom, and the spiritual—as opposed to the strictly economic—liberty of the individual. Moreover, he was a highly sophisticated thinker who fully recognized the complex nature of law and the judicial process. Consequently, when he addressed those subjects, his comments were almost invariably qualified and modulated. Similarly, his formal constitutional orientation changed relatively little. At the beginning of his legal career he learned the doctrine of judicial deference,<sup>166</sup> and progressivism seared into his mind the dangers and duplicities of an activist judiciary. And yet, change he did. As his outlook and ideas subtly shifted in nuance and tendency, his jurisprudence evolved and hardened.

1. *Personal and Professional Transformation: World War I and its Immediate Aftermath.* For Hand, the decade after World War I seems to have been a time when his personal, political, and professional self-identity was reshaped and then solidified. He had lost faith in Roosevelt and the Progressive Party by 1916,<sup>167</sup> and then during and immediately after the war he split with Croly and his friends at *The New Republic*.<sup>168</sup> His hopes for a new kind of intellectualized politics crumbled, and Hand was left without foundation for any significant reform position. During the same years the tensions in his marriage reached their peak of intensity, and he

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166. A psychohistorian might speculate that Thayer was, after all, Hand's "father in the law."

167. GUNTHER, *supra* note 1, at 239-41.

168. *Id.* ("What began in 1916 as a disagreement about the presidential candidates would culminate three years later in sharply conflicting positions on the acceptability of the Treaty of Versailles."). Curiously, Gunther tells us almost nothing about Hand's attitude toward the war itself. One might speculate that, like so many of his contemporaries, he was repulsed by its stupidity and butchery. If so, that might help explain the increasingly pessimistic turn that Hand's thinking took in the twenties. Unfortunately, however, Gunther provides no evidence suggesting that this happened. Indeed, the war's main impact seems to have been to stir Hand's patriotism and his desire to somehow participate. He received permission from his senior judge to take a leave of absence and promptly told the State Department that he "would be glad to undertake that work if the Department thinks fit." *Id.* at 256. He tried to secure a position with the administration during the war and to obtain an appointment on the American delegation to the Paris Peace Conference afterwards, but both efforts failed. "Hand's hopes," Gunther writes, "were crushed." *Id.*; see *id.* at 252-57.

confronted his wife directly about her distinct and separate life style. He pressed her to spend more time with him, but she refused and Hand finally acquiesced.<sup>169</sup> In the single matter that was apparently most central to his personal life, he was forced into a profoundly deferential posture. At the same time, he began his ascent into the professional elite, developing new interests, friendships, and working relationships. The prestigious, technical, and staid American Law Institute began to occupy a significant place in his life and work.<sup>170</sup> If Gunther is correct in believing that Hand's friendships were critical in shaping his political views,<sup>171</sup> as he appears to be, it seems likely that this social, personal, and professional reorientation helped Hand shed the ideals and concerns that had marked his pre-war progressivism.

As early as 1921, in fact, Hand was looking back on his progressivism with nostalgia. Although he still believed that "a good test" of "the people" was "their courage in protecting the weak and controlling the rapacious," his tone was wistful and his mood resigned.<sup>172</sup>

And still at times I can have the hope that in America time may at length mitigate our fierce individualism, may teach us the knowledge we so sorely lack 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.<sup>173</sup>

He hoped, but no longer with any noticeable expectation of fulfillment. It was unlikely that any "conversion" could "abate the intensity of our own wills," he admitted, adding ominously that "the cloven hoof will show however well the bestial heart be covered."<sup>174</sup>

2. *Constitutional Turning Points, 1917-1925.* Gunther is particularly illuminating in identifying two major constitutional developments that accelerated the process of change. One was the fate of Hand's *Masses* test. The other was the emergence of a new kind of liberal judicial activism.

Gunther stresses Hand's conviction that the "incitement" test

169. *Id.* at 183-89.

170. *Id.* at 408-15.

171. *Id.* at 190.

172. Learned Hand, Address of Learned Hand, in 3 LECTURES ON LEGAL TOPICS 1921-1922, at 105 (MacMillan 1926).

173. *Id.* at 106.

174. *Id.* Although Hand remained in contact with *The New Republic* into the early 1920s, he had essentially stopped writing for it by the end of the war. His last unsigned editorial appeared in 1923, and it was characteristically an attack on one of the Court's most extreme "liberty of contract" decisions, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). GUNTHER, *supra* note 1, at 251.

he set forth in *Masses* was both drastically different from Holmes's "clear and present danger" test and far superior to it as a method of protecting free speech. Essentially, Hand argued in *Masses*—and thereafter in private—that the First Amendment should protect a speaker unless the actual words she used, fairly considered, constituted a direct "incitement" to commit a crime. The test was not only highly restrictive, but it also made the question a matter of law for the court. Hand understood the "clear and present danger" test, in contrast, to require a judgment of future probabilities and facts. Such a test, he believed, was ambiguous and speculative, and it placed the decision in the hands of a jury. On both counts it would likely prove much less protective than would a judge applying his "incitement" test.<sup>175</sup>

Pivotal to the development of Hand's thinking, Gunther perceptively suggests, was the decisive difference he saw between the two tests: not the degree of protection they promised, but the scope of judicial authority they defined. "Once you admit that the matter is one of degree," as Holmes's test did, Hand reasoned, determination of First Amendment questions became "a matter of administration," that is, a question to be decided by a practical estimate of probabilities.<sup>176</sup> In Hand's mind, such a judgment was "legislative" and "executive," but not judicial. If such was the test, he believed, then the courts exercised only a narrow authority in applying it and had little choice but to defer. In contrast, he believed that his "absolute and objective test," focusing on the specific language the speaker had used, created a question of law. Such a question did not require judicial deference. Thus, in his mind, the rejection of his "incitement" test and acceptance of Holmes's "clear and present danger" test had a broad and special import. It meant that First Amendment issues were properly determined under an essentially deferential standard.<sup>177</sup>

Although the Second Circuit rejected his *Masses* opinion, Hand continued to urge the "incitement" test on Holmes and others during the years immediately after the war. He seemed to have no success. By 1921 he feared his *Masses* test had proven a

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175. GUNTHER, *supra* note 1, at 157-70. See *Fragments of History*, *supra* note 136, at 721. For Hand's articulation in *Masses* see 244 F. 535, 540-42 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

176. GUNTHER, *supra* note 1, at 169.

177. In *Dennis*, Hand affirmed the decision of the trial judge to withdraw from the jury "all questions regarding the constitutionality of the Act." 183 F.2d at 215-16. Although the critical question under the "clear and present danger" test was "not a question of fact at all," he wrote, it was nevertheless "[o]rdinarily" one "for a legislature." *Id.* at 215. Under the Act, he wrote, Congress delegated the power to make ultimately legislative judgments in this area to the courts. *Id.*

"false coin," and two years later he claimed to be resigned to its demise. "I have not much hope," he wrote, "that my own views as stated in the *Masses* case would ever be recognized as law."<sup>178</sup>

By the mid-twenties, then, Hand knew his "incitement" test had been rejected, and he believed it was buried. His faith in the test and his conviction that it was necessary to protect free speech combined to make the rival "clear and present danger" test seem to him particularly weak, uncertain, and manipulable. Those views also made him feel acutely the lack of "judicial" authority to override legislative and executive judgments in First Amendment cases. Thus, some thirty years later in *Dennis*, even though the precedents might have been confused and unhelpful, Hand was nevertheless constrained by his conviction that—whatever else they might mean—they did impose a deferential standard and limit the court severely.<sup>179</sup>

In addition to the import of Hand's failed "incitement" test, a second legal development contributed to hardening his ideas about judicial review. Gunther pinpoints the Supreme Court's 1923 decision in *Meyer v. Nebraska*<sup>180</sup> as a "watershed" event in the process.<sup>181</sup> The question in *Meyer* and a companion case was the constitutionality of several state statutes that prohibited the teaching of certain languages, principally German, in primary schools. Clearly, the statutes intruded into education, discriminated against certain groups, and limited free speech and thought. Just as clearly, they were popular responses to significant public concerns and sought to achieve such "rational" goals as making "English" a widely understood language in the states and fostering the teaching of "American ideals" to immigrants.<sup>182</sup> In *Meyer* the Court declared that the term "liberty" in the Fourteenth Amendment included not just the right to make contracts but also a series of rights "essential to the orderly pursuit of happiness by free men."<sup>183</sup> On the ground that the statutes violated those rights, the Court held them unconstitutional.

For more than a quarter of a century progressives and their

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178. GUNTHER, *supra* note 1, at 170 (citing letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921)).

179. Hand was still acutely conscious of his *Masses* test and, consequently, of the weakness of the "clear and present danger" test. "Hand's contemporaneous correspondence [during *Dennis*] makes it clear that he continued to adhere to the essence of his *Masses* test of 1917." *Id.* at 604.

180. 262 U.S. 390 (1923). There was also a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923).

181. GUNTHER, *supra* note 1, at 376-77.

182. *Meyer*, 262 U.S. at 401.

183. *Id.* at 399.

liberal successors had attacked substantive due process. *Meyer*, however, gave them pause. "For the first time," Gunther explains, "substantive due process had been used to reach a result liberals could cheer."<sup>184</sup> As a result, the case "divided liberals, on the Court and off, in a way that has still never been healed."<sup>185</sup> Indeed, Holmes and Brandeis split, the former dissenting and the latter joining the majority. Soon their split "echoed throughout the civil liberties community."<sup>186</sup> As new issues arose, "the *Meyer* precedent prompted liberals to look to the courts for the protection of those personal rights they cherished."<sup>187</sup> Some, however, refused, and both Hand and Frankfurter sided with Holmes. They "had battled too long against quasi-political due-process rulings," Gunther writes, "to turn now to an opportunistic embracing of what they considered to be an illegitimate constitutional tool."<sup>188</sup>

As liberals debated the issue, the temptation of judicial activism grew. Only two years after *Meyer*, in *Pierce v. Society of Sisters*,<sup>189</sup> the Court again applied substantive due process to defeat "the rabid Americanization movement" and to protect the rights of parents to control the upbringing of their children.<sup>190</sup> This time, too, the decision was unanimous. Holmes as well as Brandeis joined the majority.

Gunther argues that Hand, in an exchange of letters with Lippmann, made a fundamental decision in the mid-twenties to reject such liberal judicial activism. As *Pierce* came down, the stage was being set for the famous Tennessee "monkey trial," where the American Civil Liberties Union was challenging a state statute that prohibited public school employees from teaching Darwinism in their classes. Lippmann supported the A.C.L.U. effort and denied that "[s]uch foolishness should be within the province of the legislature."<sup>191</sup> He acknowledged what he was rejecting. "Now I know this is progressive dogma as we all accepted it in the days when the courts were knocking out the laws we wanted."<sup>192</sup> But the context of American politics had changed. "I wonder whether we don't have to develop some new doctrine to protect education from majorities." In fact, Lippmann concluded, "the fierce ignorance of

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184. GUNTHER, *supra* note 1, at 377.

185. *Id.* at 376.

186. *Id.* at 377.

187. *Id.*

188. *Id.*

189. 268 U.S. 510 (1925).

190. GUNTHER, *supra* note 1, at 378-79.

191. *Id.* at 382 (citing letter from Walter Lippmann to Learned Hand (June 8 or 9, 1925)).

192. *Id.*

these millions of semiliterate priestridden and parsonridden people," made it necessary to find ways to "confine the actions of majorities."<sup>193</sup> Hand disagreed. "I think you are wrong," he bluntly told Lippmann. "Ignorance may yet overwhelm us but I am laying my odds against it." The lure of "liberal" substantive due process, Gunther concludes, "was ultimately negated by his belief in the democratic process."<sup>194</sup>

Hand's faith in democracy was especially salient in reaffirming his commitment to the old "progressive dogma" because Lippmann openly acknowledged that his move toward substantive due process was rooted in his rapidly escalating doubts about the basic viability of democratic government. "My own mind," he told Hand privately, "has been getting steadily antidemocratic."<sup>195</sup> Indeed, in two contemporaneous and influential books, Lippmann severely questioned and then rejected the "false ideal" of popular government.<sup>196</sup> When Lippmann personified the clear connection between the lure of liberal substantive due process and acceptance of overtly antidemocratic values, he confirmed for Hand the democratic authenticity of the old "progressive dogma." Lippmann's example steeled his growing determination to reject liberal substantive due process by confirming for him its express antidemocratic premises and implications.<sup>197</sup>

3. *Wavering: 1925-1926.* The events of the early and mid-twenties—the withering of progressivism, ascension into the professional elite, the fate of his "incitement" test, and his reaction against Lippmann and Meyer—began to rigidify Hand's ideas about judicial review. Although Gunther does not note their significance, he discusses two episodes that reveal that Hand's ideas in the mid-1920s were still not irrevocably fixed.

One was his reaction to *Gitlow v. New York*.<sup>198</sup> There, the Supreme Court for the first time accepted the idea that the concept of "liberty" in the Fourteenth Amendment "incorporated" the

193. *Id.*

194. *Id.* at 383 (citing letter from Learned Hand to Walter Lippmann (June 10, 1925) (from Lippmann Papers, Yale University L-23 (photocopy in Hand Papers))).

195. *Id.* at 382 (citing letter from Walter Lippmann to Learned Hand (June 8 or 9, 1925)).

196. *Id.* at 383-86. The books were WALTER J. LIPPMANN, PUBLIC OPINION (Harcourt & Brace 1922) and WALTER J. LIPPMANN, THE PHANTOM PUBLIC (Harcourt & Brace 1925).

197. Hand's commitment to his idea of democracy and his rejection of Lippmann's contrary views persisted into the fifties. See RONALD STEEL, WALTER LIPPMANN AND THE AMERICAN CENTURY 493-96 (1st ed. 1980).

198. 268 U.S. 652 (1925).

rights protected by the First Amendment.<sup>199</sup> While the majority applied a weak version of the “clear and present danger” test to uphold a conviction under a state criminal syndicalism statute, Holmes and Brandeis dissented. They accepted incorporation of the First Amendment into the Fourteenth, advocated a far more speech-protective version of the “clear and present danger” test, found the words at issue insufficient to sustain the conviction, and proposed a radically expanded concept of the constitutional scope of free speech.<sup>200</sup> Hand responded to their dissent with enthusiasm. Had he been on the Court, he told a colleague, “I should join in [Holmes’s] dissent.” Indeed, he declared, without some such approach as the dissent set forth “the whole doctrine of free speech goes by the board.”<sup>201</sup> Thus, in the same year that he told Lippmann he was “wrong” about substantive due process, Hand still entertained some commitment to special judicial protection for free speech.

The second indication of flexibility came the following year in a tribute Hand wrote for Holmes. There were, he explained, “two schools” of thought on the scope of judicial review.<sup>202</sup> One was prepared “to impose upon the Constitution the fundamental political assumptions which for the time being are dominant.”<sup>203</sup> The other—the Holmesian—believed in contrast that “almost any experiment is in the end less dangerous than its suppression.”<sup>204</sup> Hand’s formulation revealed his residual ambivalence. By declaring that the Holmesian school “does not depart from the first [school] in theory but in application is more cautious,”<sup>205</sup> he left room for some specialized but still significant element of judicial activism. Further, by defining the Holmesian school as opposed to “suppression” and committed to the relative desirability of “almost any experiment,”<sup>206</sup> he seemed to justify its position on a the-

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199. *Id.* at 666; see, e.g., HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES*, 52-53 (6th ed. 1994).

200. *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting).

201. GUNTHER, *supra* note 1, at 281 (citing letter from Learned Hand to Charles Merrill Hough (July 9, 1926)); see also William P. LaPiana, *Thoughts and Lives*, 39 N.Y.L. SCH. L. REV. 607 (1994) (dissecting the evolution of Holmes’s thinking). Compare GUNTHER, *supra* note 1, at 281 with G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 438-45 (Oxford Univ. Press 1993) (discussing the evolution of Holmes’s thinking). Apparently, Hand did not leave a record as to his views on the other critical early cases that incorporated the First Amendment into the Fourteenth.

202. Learned Hand, *Mr. Justice Holmes at Eighty-Five*, N.Y. WORLD, Mar. 8, 1926, at A6, reprinted in SPIRIT OF LIBERTY, *supra* note 41, at 18, 21.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

ory that could offer special protections for speech. Both of those implications were consistent with his statement the previous year that he would have joined Holmes's dissent in *Gitlow*.

4. *Rigidification: The Cumulating Burdens of History, 1927-1942.* If Hand retained some residual commitment to the judicial protection of First Amendment rights in the mid-1920s, his enthusiasm shrivelled during the next fifteen years to little more than a faint personal preference. Between approximately 1927 and 1942, a series of developments set his hardening views in stone. Five seem of primary importance.

First, the 1920s and 1930s witnessed a powerful intellectual assault on democratic ideas,<sup>207</sup> and Hand's faith in popular government shrank in response. Though his belief in democracy helped fire his disagreement with Lippmann's express challenge, Hand surrendered a good deal to his old friend. As did many intellectuals in the 1920s, he abandoned optimistic ideals of popular government and accepted a harsher and more "realistic" version. In 1929 he announced his fundamental break from his earlier progressivism in a speech he gave to the American Law Institute. There, he specifically rejected the premise of his 1916 plea for a progressive jurisprudence and denied both the legitimacy and existence of any "social will" that could serve as a non-positivistic moral norm. The very idea of such a "common will" was "a fiction," he announced.<sup>208</sup> "The truth appears to be that what we mean by a common will is no more than that there shall be an available peaceful means by which law may be changed when it becomes irksome to enough powerful people who can make their will effective."<sup>209</sup> The next year he stated a hard corollary. "Liberty is so much latitude as the powerful choose to accord the weak."<sup>210</sup> By 1932 he was echoing the thesis Lippmann himself had advanced in his books attacking democracy. "[M]en often answer for reasons quite alien to the issue," he declared; "they seldom have anything that can truly be called an opinion."<sup>211</sup>

Hand's narrowed and "realistic" view of democracy helped al-

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207. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 15-114 (Univ. of Ky. Press 1973).

208. Learned Hand, *Is There a Common Will?*, 28 MICH. L. REV. 46 (1929) [hereinafter *Common Will*], reprinted in *SPIRIT OF LIBERTY*, supra note 41, at 36, 40.

209. *Id.* at 41.

210. Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1 (1930) [hereinafter *Sources of Tolerance*], reprinted in *SPIRIT OF LIBERTY*, supra note 41, at 51, 55.

211. Learned Hand, *Democracy: Its Presumptions and Realities*, FED. B. ASS'N J., Mar. 1932, at 40 [hereinafter *Democracy*], reprinted in *SPIRIT OF LIBERTY*, supra note 41, at 70, 74.

ter his jurisprudence in three ways. First, the "realistic" view led him to reject the idea of a "common will" existing independent of positive law and hence left him with no basis on which to claim that a judge could legitimately seek to enforce some higher "social ideal." Second, since law was nothing but the result of shifting balances among powerful individuals and groups, there was no way a judge could improve on the practical compromises that democratic politics reached. Accordingly, he concluded, "the path of temperance and of wisdom is to leave the solution to the other organs of government where the opposing interests may more adequately count in their mutual impact."<sup>212</sup> Third, as he abandoned his optimistic ideas of democracy, he apparently lost his faith in the vibrant democratic justification for judicial review that he had infused into *Masses*. As long as he conceived of the First Amendment as a structural necessity for democratic government, he had a justification for providing special judicial protection to speech that transcended the individual's "liberty" interest and that was constitutionally distinguishable from a mere "liberal" substantive due process.<sup>213</sup> When he lost faith in the practicability of truly popular government, he also seemed to lose faith in his structural justification for free speech as well. Those new assumptions counselled judicial passivity, and by the end of the 1920s Hand began preaching not reform but rather "a duty to preserve."<sup>214</sup>

Second, the rise of fascism in his beloved Italy during the 1920s began to disturb Hand deeply.<sup>215</sup> As early as 1927 he lumped Mussolini with Stalin as a threat to human freedom,<sup>216</sup> and the following year he charged that their commitment to "far-reaching programs" of social reconstruction made the two dictators unalterable enemies of human freedom. By 1932 he was defending American democracy "with all its defects" because, at a minimum, "it gives a bloodless measure of social forces."<sup>217</sup> Referring to his vacations in Italy, he confessed that "I have been where this was not

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212. Learned Hand, To Yale Law Graduates, Address at the Yale Law School Graduation (June 17, 1931) [hereinafter Yale Address], in *SPIRIT OF LIBERTY*, *supra* note 41, at 65, 68.

213. See Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1 (1990); Robert M. Cover, *The Left, the Right, and the First Amendment*, 40 MD. L. REV. 349 (1981).

214. *Common Will*, *supra* note 208, at 43.

215. Italy was Hand's favorite country, and he spent much time there in the 1920s and 1930s. GUNTHER, *supra* note 1, at 371-72. For his general views about totalitarianism, see *id.* at 442-44.

216. *Preservation of Personality*, *supra* note 41, at 28.

217. *Democracy*, *supra* note 211, at 76.

true; in lands where one felt the pervasive foreboding of violence, of armed suppression."<sup>218</sup> The emergence of Nazism in the 1930s only strengthened his belief that "totalitarianism" presented a potentially fatal challenge. He urged American efforts to counter German expansionism, agonized over the foreign policy crises of the late thirties, and after 1939 strongly endorsed military action against Hitler.<sup>219</sup> The "totalitarians," he announced in early 1941, "in the end will fail."<sup>220</sup>

The rise of totalitarianism was significant for Hand's views about judicial review. The political and intellectual challenges it raised moved him to embrace whole-heartedly a theory of democratic government that was founded philosophically on an extreme intellectual skepticism about human values and politically on an unwavering faith in the ultimate virtue of expedient compromise and social stability. Justice, he explained, meant nothing but a "tolerable compromise," the only alternative to "the rule of the tooth and claw."<sup>221</sup> Hand had long been both a skeptic and a pragmatist, but the political and intellectual crisis of the thirties transformed those characteristics into a compelling politico-moral ideology. On the side of evil, it identified totalitarian repression with absolutistic, non-empirical, and non-majoritarian values; and, on the side of good, it identified individual freedom and democratic government with the kind of tentative, tolerant, relativistic, and experimental attitudes that Hand had long found congenial.<sup>222</sup> Totalitarianism and a relativist theory of democracy led Hand to categorize judicial review not merely as anti-majoritarian or dangerous but, more decisively, as incompatible with the fundamental prerequisite of democratic government, acceptance of the "tolerable compromise" that held off "the rule of the tooth and claw."

Third, as Hand was increasingly drawn into and absorbed by the problem of statutory construction, his view of the appropriate judicial role seemed to change. Although Gunther would apparently disagree with that claim, he does note that Hand's judicial work came increasingly to deal with problems of statutory construction.<sup>223</sup> Over the years, Hand developed a special interest in

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218. *Id.* at 76; *see id.* at 73.

219. GUNTHER, *supra* note 1, at 479-93.

220. Learned Hand, *Liberty*, YALE ALUMNI MAG., June 6, 1941, at 10 [hereinafter *Liberty*], reprinted in *SPIRIT OF LIBERTY*, *supra* note 41, at 109, 117.

221. Yale Address, *supra* note 212, at 68. The "tooth and claw" image was a favorite of Hand's. *See, e.g., Chief Justice Stone*, *supra* note 62, at 157.

222. *See, e.g., Sources of Tolerance*, *supra* note 210, at 51-64; *Democracy*, *supra* note 211, at 70-79. Hand's response was typical of many American intellectuals. PURCELL, *supra* note 207, at 117-38, 197-217.

223. GUNTHER, *supra* note 1, at 466.

statutory construction and gradually earned a reputation as a master of the craft. His constant grappling with the problem seems to have led him to a greater respect for the complexities involved and to embrace more firmly an ideal of strict fidelity to statutory purposes. "But the judge must always remember," he wrote in 1933

that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.<sup>224</sup>

The change in Hand's views about statutory construction helps, in particular, to explain much of the difference between his opinions in *Masses* and *Dennis*. *Masses* was not, after all, simply creative and activist. It was also Thayerian; that is, it was *in form* highly deferential to the legislature.<sup>225</sup> Throughout, Hand carefully preserved the image of nearly absolute congressional authority and avoided any hint of a conflict between the statute and the Constitution. In substance, however, he simply poured his own values directly into the statute and identified his conclusions with the intent of the legislature. His first major attempt to resolve the dilemma of progressive judicial review relied on a jurisprudential oxymoron, designing deference. The contrast between *Masses* and *Dennis* does not reside primarily in any change in Hand's formal theory of judicial review or the First Amendment but in his unwillingness to rest again on a purposeful fiction. That change, in turn, seems in part the result of his altered view of the nature of judicial fidelity in the task of statutory construction.

Fourth, while the Supreme Court's conservative activism had

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224. Learned Hand, *How Far is a Judge Free in Rendering a Decision?* (CBS radio broadcast, May 14, 1933), in NATIONAL ADVISORY COUNCIL ON RADIO IN EDUC., LAW SERIES I, at 1 (1935), reprinted in SPIRIT OF LIBERTY, *supra* note 41, at 79, 84. Even in his first years as a judge, Hand recognized "that his first duty is honestly to try to get at the legislative meaning when it is written." GUNTHER, *supra* note 1, at 237 (quoting a letter written by Hand to civil liberties lawyer Gilbert E. Roe). What changed over the years was the personal intensity with which Hand felt this "duty." See generally Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947).

225. Hand even included a covert bow to Thayer by citing the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), as support for the existence of broad congressional powers in time of war. *Masses Publishing Co. v. Patten*, 244 F. 535, 538 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). Compare James Bradley Thayer, *Legal Tender*, 1 HARV. L. REV. 73, reprinted in LEGAL ESSAYS at 60 (Ezra Ripley Thayer ed., 1908); Grey, *supra* note 89, at 32-36.

long distressed Hand, his concerns about the role and vulnerability of the judiciary escalated sharply in the 1930s. The frequency with which the Court invalidated New Deal legislation struck him as both unwarranted and foolish, and he began to refer derisively to the four stalwartly "conservative" Justices as the "Battalion of Death."<sup>226</sup> When Roosevelt announced his "Court-packing" proposal in January of 1937, it strengthened Hand's persistent fear that activist judicial review would ultimately destroy the independence of the judiciary. He opposed Roosevelt's proposal, but he believed that the conservative Justices had fairly called the wrath of the administration and people down on themselves.

When the Court seemed to reverse itself only months after Roosevelt presented his proposal, Hand was pleased with the result but disturbed by what it revealed about the dangers of judicial review. He "viewed the Court's change of course—welcome as it was as a matter of constitutional doctrine," Gunther explains, "as a confirmation of his deepest misgivings about the increasingly politicized nature of judicial review."<sup>227</sup> The entire episode confirmed his belief that the only proper way to preserve an independent judiciary was to prevent the courts from intruding themselves into matters that were debatable, political, and properly legislative.<sup>228</sup>

Fifth, and by far the most intimate, was Hand's failure to achieve the ultimate prize, appointment to the Supreme Court. He had come close and missed once before, but in 1942 he seemed to be the leading contender. At sixty-nine, his age was a major strike against him, and it meant that this chance would be his last. Frankfurter, his long-time friend and one of the President's closest advisors, was orchestrating an all-out campaign on his behalf. Roosevelt, however, passed over him, and Hand was crushed. Eight years later he was able to confess the agonizing truth to Frankfurter: "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 [the Court]. Don't, for God's sake, say I have done as well."<sup>229</sup>

Gunther's discussion of Hand's failure is astute and, though unavoidably speculative, probably correct.<sup>230</sup> Hand did not fail, as

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226. Edward A. Purcell, Jr., *Alexander Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 523 (1976) (quoting letter from Felix Frankfurter to Alexander M. Bickel, Feb. 13, 1958, FRANKFURTER PAPERS, Library of Congress, box 65, folder 1265).

227. GUNTHER, *supra* note 1, at 462.

228. *Id.* at 457-60.

229. *Quoted in id.* at 569.

230. *Id.* at 553-72.

many thought, primarily because of his advanced age, but for more complex reasons. Essentially, Gunther suggests that Roosevelt doubted Hand was the kind of liberal he wanted on the Court and that Frankfurter's campaign reinforced the President's doubts and contributed to Hand's failure. The central dynamic, Gunther believes, revolved around the controversial "flag-salute" case handed down in 1940,<sup>231</sup> Frankfurter's declining influence on the Court, and the emergence of a liberal activist bloc led by Chief Justice Harlan F. Stone and the Court's outspoken New Dealers, Justices Hugo L. Black, William O. Douglas, and Frank Murphy. Gunther speculates that Frankfurter campaigned so relentlessly for Hand in part because he needed Hand's support to maintain his disintegrating position on the Court and on the constitutionality of the flag salute. And Hand, he notes, "would probably have sided with Frankfurter on the civil liberties issues dividing the New Deal Court."<sup>232</sup> When Roosevelt picked Wiley Rutledge, a liberal activist, instead of Hand, he set up Frankfurter's most humiliating defeat and helped to launch the Court on a more activist course. Within months of Rutledge's appointment the Court endorsed Stone's "preferred freedoms" approach and repudiated Frankfurter's three-year old flag-salute opinion.<sup>233</sup> Eight Justices formed the majority, while Frankfurter dissented passionately and alone.

Although Gunther does not draw the inference, it seems likely that Hand's failure to get on the Court in 1942 contributed to the hardening of his attitude toward judicial review, not because it caused resentment, but because it compelled recommitment. As Gunther does show, Hand sensed that the root cause of his failure was Roosevelt's recognition that Hand's values and attitudes were not what the President wanted on the Court.<sup>234</sup> If those deeply-felt views about politics and the judicial process had kept him off the Court, and if his opportunity for the ultimate prize had passed forever, what then remained for him but to prove himself scrupulously true to those controversial views that had cost him so dearly?

In retrospect, Hand may have sealed his fate with a speech he gave in late 1942, while he was apparently still under consideration

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231. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

232. GUNTHER, *supra* note 1, at 565.

233. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). For a superb analysis of Frankfurter's decisions in the "flag-salute" cases, see Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257; Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675 (1984).

234. GUNTHER, *supra* note 1, at 568.

for the Court. In "The Contribution of an Independent Judiciary to Civilization" he seemed to go out of his way to address the question of judicial activism and to set himself uncompromisingly against it.<sup>235</sup> In a striking passage, ambiguous in its references but explosive in its implications, he declared:

To interject into the process [of construing statutes] the fear of displeasure or the hope of favor of those who can make their will felt, is inevitably to corrupt the event, and could never be proposed by anyone who really comprehended the issue. This was long held a truism, but it must be owned that the edge of our displeasure at its denial has of late been somewhat turned. In the name of a more loyal fealty to the popular will, we are asked to defeat the only means by which that will can become articulate and be made effective. To this, the first aspect of our question, I submit that there is but one answer: an unflinching resistance.<sup>236</sup>

If Hand failed to reach the Court because of his views, he would proclaim them only more fervently.

Hand's 1942 speech seemed, in fact, to mark the completion of the rigidification that overtook his thinking about judicial review. Here, he set out all the essentials of his later judicial philosophy, placed squarely in the compelling framework of an intensely-felt relativist theory of democracy. He declared that "values are incommensurable."<sup>237</sup> He praised "compromise" as the basis for resolving all conflicts and hailed strict judicial fidelity to those compromises as the only enduring basis for peace and justice. When courts twisted and stretched the language of positive laws, as he himself had done in *Masses*, they were engaging in "surreptitious, irresponsible and anonymous intervention" that "upsets the whole system."<sup>238</sup> Further, he sharply distinguished constitutional provisions that distributed political power from those designed "to insure the just exercise" of that power. The latter provisions "are not law at all," he declared; "they are cautionary warnings."<sup>239</sup> Finally, he expressed his belief that an independent judiciary could only be

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235. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, Address at the 250th Anniversary of the Supreme Judicial Court of Massachusetts (Nov. 21, 1942) [hereinafter *Independent Judiciary Address*], in MASSACHUSETTS B. ASS'N, *THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692-1942*, at 59-67 (1942), reprinted in *SPIRIT OF LIBERTY*, *supra* note 41, at 118.

236. *Id.* Five years after the Court had interred "liberty of contract," and when the Court seemed to be moving toward a new liberal activism Hand threw in an offhand reference to a "judge who will hector the bar and browbeat the witnesses and who can find a warrant in the Fourteenth Amendment for stifling a patently reasonable legislative experiment." *Id.* at 121.

237. *Id.* at 123.

238. *Id.* at 120.

239. *Id.* at 123.

secured at the cost of its power to annul legislation. The "price of this [judicial] immunity, I insist," he proclaimed, "is that [the judges] should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides'."<sup>240</sup> Without judicial review, he acknowledged, he did not know what would happen to "the fundamental principles of equity and fair play which our constitutions enshrine."<sup>241</sup> He then offered his ultimate wisdom, "but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes no court *need* save."<sup>242</sup> It was an overblown, inappropriate, and essentially irrelevant paraphrase of Thayer, a rhetorical flourish that masked analytical failure. It indicated the extent to which his views had ossified and reached a dead-end.<sup>243</sup>

The rigidification of Hand's views in the late thirties and forties is suggested poignantly in the shifting tone and content of the appreciations he wrote upon the deaths of three of the greatest judicial heroes of legal progressivism, each of whom had contributed in one way or another to the development of judicial protection for "fundamental" non-economic rights. In 1939 he praised Justice Benjamin N. Cardozo, but only for the "purity" of his motives.<sup>244</sup> Cardozo was a great judge because he had become "the detached man" by negating his own personal interests and aspirations. In 1942 he spoke of Justice Louis D. Brandeis, but he could scarcely bring himself even to comment on Brandeis's work as a judge.<sup>245</sup> He spoke primarily of other matters, referring to Brandeis's judicial career only briefly and with distinct undertones of disapproval.<sup>246</sup> In 1946 he spoke of Chief Justice Harlan F. Stone, and now neither vagueness nor disapproval was sufficient.<sup>247</sup> Unable even to acknowledge the true nature of Stone's judicial views, Hand distorted them shockingly and tried to claim the Chief Jus-

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240. *Id.* at 125. This seemed a direct repudiation of his statement in "The Speech of Justice." Cf. *Speech of Justice*, *supra* note 110, at 10-11.

241. Independent Judiciary Address, *supra* note 235, at 125.

242. *Id.* at 125.

243. Compare *id.* with *American Doctrine*, *supra* note 65, at 156.

244. Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361 (1939), reprinted in *SPIRIT OF LIBERTY*, *supra* note 41, at 98, 98-101.

245. Learned Hand, *Mr. Justice Brandeis*, Address at Supreme Court Memorial Service (Dec. 21, 1942), in *SPIRIT OF LIBERTY*, *supra* note 41, at 127, 127-33.

246. *Id.* "Allied with [his opposition to large size] was his attitude towards concentration of political power which appeared so often in what he said from the bench. Indeed, his determination to preserve the autonomy of the states . . . amounted almost to an obsession." *Id.* at 130 (emphasis added).

247. *Chief Justice Stone*, *supra* note 62, at 152-57.

tice for his own brand of extreme judicial deference.<sup>248</sup>

However complex Hand's thought, however open-minded and skeptical, the issue of judicial review now seemed to him one of black and white. "And make no mistake," he declared in his twisted tribute to Stone, the "tradition of detachment and aloofness without which, I am persuaded, courts and judges will fail" was "under attack."<sup>249</sup> Committed to decisive new battle lines, he armed himself—ironically—with absolute conviction in order to battle the most frightening enemy, the forces of good suddenly turned evil.<sup>250</sup>

#### IV. VALEDICTORY

In 1951 Hand agreed to deliver the Oliver Wendell Holmes, Jr. Lectures at Harvard Law School, the most prestigious lecture forum in American legal education. For years thereafter, he worried about the heavily hanging obligation, writing and rewriting his drafts. He recognized, Gunther explains, "that [the lectures] would be his farewell statements, and he dreaded the overwhelming responsibility they represented."<sup>251</sup>

At long last, on three successive nights in February, 1958 he delivered the lectures. Each evening a full audience packed the hall, and an overflow spilled into two large classrooms where loudspeakers carried his voice. The scene, declared one witness, was like "the entrance to a big theatre where a hit was playing."<sup>252</sup> Though Hand had requested a special chair for his bad back, he delivered his lectures standing. "His eyes, often melancholy and moody in repose," Gunther writes, "gazed piercingly at the audience, and they glistened with emotion—partly from sentiment, partly from the intensity of his urge to convey a deeply felt message."<sup>253</sup> Within months, Harvard University Press published the lectures under the somewhat inflated title *The Bill of Rights*.<sup>254</sup>

Distilling his deepest concerns and reflections, Hand offered the legal world his conclusions, polished with elegance and honed to an edge. Judicial review, he declared, was socially dangerous, legally unprincipled, and constitutionally illegitimate. Rejecting the validity of a "double standard" that would justify greater pro-

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248. *Id.* at 155-56; see also GUNTHER *supra* note 1, at 565 n.\* (commenting on Hand's remarks about Justice Stone).

249. Chief Justice Stone, *supra* note 62, at 157.

250. *Id.* at 155-56.

251. GUNTHER, *supra* note 1, at 671.

252. *Id.* at 653.

253. *Id.*

254. HAND, *supra* note 4.

tection for "personal" as opposed to "property" rights, Hand sharply criticized the Warren Court and, in particular, questioned the constitutional legitimacy of *Brown v. Board of Education*,<sup>255</sup> then but four years old and the target of intensive political opposition.

*The Bill of Rights* was not significant for its originality or brilliance. It was classic Hand and contained little that he had not been saying for at least fifteen years. Its importance, instead, arose from its context. First, the occasion made it loom important. It was the valedictory of a judicial legend delivered as the Holmes Lectures at the Harvard Law School. Second, its critique of the Warren Court gave it immediate salience, and its challenge to *Brown's* legitimacy conferred special gravity that went well beyond the depth of its brief comments on the case. Finally, a massive change in the attitudes of the American left guaranteed the book the status of constitutional *bete noire*. The old "progressive dogma" had largely disappeared, and in its place reigned ideas of incorporation, preferred freedoms, and the virtues of a new liberal judicial activism.

Gunther approaches *The Bill of Rights* gingerly, distancing himself from its more extreme claims while insisting that Hand's position not be oversimplified. Summarizing each lecture succinctly, he identifies its major contentions and notes the qualifications the judge placed on them.<sup>256</sup> In discussing the first lecture, for example, where Hand maintained that judicial review was not authorized by the Constitution, Gunther notes that the judge also argued that the practice was "not lawless" and that, as a practical matter, it was essential to the union.<sup>257</sup> Similarly, in summarizing the third lecture, where Hand maintained that as a matter of "constitutional interpretation" the First Amendment was not entitled to any "measure of protection different from other interests,"<sup>258</sup> Gunther calls attention to Hand's acceptance, again as a practical matter, of the need for some judicial protection of First Amendment values.<sup>259</sup>

Gunther's discussion of the first and third lectures suggests the extent to which Hand was determined to present an uncompromising position. He treated "constitutional interpretation" almost arbitrarily as a narrow matter of language analysis, and he surely inflated the weight of the separation of powers argument against

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255. 347 U.S. 483 (1954).

256. GUNTHER, *supra* note 1, at 655-59.

257. *Id.* at 655; *cf.* HAND, *supra* note 4, at 10-11, 14-15.

258. HAND, *supra* note 4, at 56.

259. GUNTHER, *supra* note 1, at 658; HAND, *supra* note 4, at 69.

judicial review.<sup>260</sup> Moreover, Hand himself offered not only practical reasons, but legal reasons as well, for a limited type of judicial review.<sup>261</sup> Without altering the substance of his remarks, he could have presented a more modulated set of lectures than he did. His flinty tone and extreme assertions were purposely chosen, not the inevitable result of an unflinching logical analysis. Presumably crafted to manifest the presence of a pure judicial soul, the lectures overshot the mark and were far less persuasive than they might have been.<sup>262</sup>

It was the second lecture, however, that contained the "most provocative aspect of Hand's message."<sup>263</sup> First, he declared that the Due Process Clause and other similar constitutional phrases were too vague to be enforceable by the courts. Attempts to give them practical meaning led only to judicial subjectivity and the transformation of the judiciary into "a third legislative chamber."<sup>264</sup> Then, he launched into a sharp critique of the Warren Court, charging that it was reviving a discredited substantive due process and falling into an erratic subjectivism.<sup>265</sup> Finally, he concluded by challenging *Brown's* constitutional validity. The decision did not invalidate segregation in public schools on the basis of a race-neutral constitutional principle, he explained, but rather it voided "the 'legislative judgment' of states by its own reappraisal of the relative values at stake."<sup>266</sup>

Social conservatives and southern segregationists praised Hand's message, and Gunther notes their efforts to exploit it.<sup>267</sup> At the very time Hand was delivering his lectures, in fact, conservative Republicans and southern Democrats were pushing a retaliatory bill in Congress that would have eliminated the Supreme Court's appellate jurisdiction over several classes of cases involving anti-subversion issues. Although the bill did not deal with school desegregation, it was animated by a deep hostility to the Warren Court that was driven by hatred of *Brown*. Quickly, the bill's supporters seized on Hand's lectures to support their charge that the Court was legislating. Gunther describes Hand's effort to distinguish his views from those of the Court's congressional foes and to make clear his substantive opposition to their bill. Recalling his

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260. HAND, *supra* note 4, at 10-11.

261. *Id.* at 11, 15, 29-30, 31-33.

262. GUNTHER, *supra* note 1, at 662-64. Gunther describes the academic response to Hand's lectures as "almost universally negative." *Id.* at 662.

263. *Id.* at 655.

264. HAND, *supra* note 4, at 42.

265. *See id.* at 45-46, 50-55.

266. *Id.* at 54.

267. GUNTHER, *supra* note 1, at 659-62.

rejection of Theodore Roosevelt's plan for the "recall" of judicial decisions and Franklin Roosevelt's "Court packing" proposal, Gunther concludes that Hand's response to the anti-Court bill was based on long-standing and principled views. He always "drew the line at tampering with the Court's powers."<sup>268</sup>

Gunther's explanation for Hand's attack on *Brown* is enlightening and important. It contains four factors of noticeably different weight. First, of course, was Hand's long-standing view of the political dangers of the Due Process Clause.<sup>269</sup> Second was the fact that Hand was almost awed by the nature of his platform and the extravagant expectations that his audience held. He was, Gunther declares, "obsessed by his drive to produce logically airtight arguments."<sup>270</sup> Next was the fact that Hand no longer "read most Supreme Court decisions with care." He was largely out-of-touch with the Court's opinions, its docket, and its inner workings.<sup>271</sup> Finally, there was Frankfurter. Hand's "doubts about judicial activism had increased during his last years,"<sup>272</sup> Gunther declares, and his views in *The Bill of Rights* were "more extreme" than those he had expressed earlier.<sup>273</sup> "The best explanation of Hand's extreme, stark position," he continues, "can be found in his private correspondence" with Frankfurter "where the Warren Court's performance evoked comments as bitter and sarcastic as those he had directed at the product of the Nine Old Men in the 1930s."<sup>274</sup> Frankfurter was Hand's "only direct pipeline to the Court and his most important source of information about Court decisions."<sup>275</sup> For his part, Frankfurter "had grown increasingly bitter about most of his colleagues" and consistently "poured out scathing denunciations in letter after letter."<sup>276</sup> Highlighting both Frankfurter's "personal pique" and his habit of implying that his colleagues were operating from base motives, Gunther concludes that "Hand accepted Frankfurter's often excessive invective uncritically."<sup>277</sup>

Most pointedly, Gunther argues that Hand's interpretation of

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268. *Id.* at 661. See also HAND, *supra* note 4, at 226-27, for Hand's formal response to a Senate inquiry.

269. GUNTHER, *supra* note 1, at 664 (arguing that Hand's views represented "no sudden emergence of conservatism").

270. *Id.* at 671.

271. See *id.* at 665, 667 n.\*.

272. *Id.* at 664.

273. *Id.* at 665.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

*Brown* "came directly from Felix Frankfurter."<sup>278</sup> In the key passage in *The Bill of Rights*, Hand considered two possible interpretations of *Brown*. "[D]id the Court mean to 'overrule' the 'legislative judgment' of states by its own reappraisal of the relative values at stake?"<sup>279</sup> Hand asked. "Or did it hold that it was alone enough to invalidate the statutes that they had denied racial equality because the [Fourteenth] [A]mendment inexorably exempts that interest from legislative appraisal."<sup>280</sup> Stressing the fact that *Brown* did not overrule *Plessy v. Ferguson*<sup>281</sup> but rather "distinguished [it] because of the increased importance of education," Hand decided that *Brown* could not be reconciled with the principle that the Constitution prohibits racial classifications.<sup>282</sup> He concluded, therefore, that *Brown* represented the old judicial policy making, not the triumph of a race-neutral constitutional principle. Gunther's important contribution is to show that Hand had initially considered *Brown* as standing for a constitutional principle of race neutrality and that he had continued to hold that view for several years until shortly before he delivered his lectures. Frankfurter, however, "repeatedly told Hand between 1956 and 1958, in letter after letter, what meaning the Supreme Court intended to convey in *Brown*."<sup>283</sup> That meaning, the Justice insisted, was not to bar all uses of racial classification, but rather to exclude them only in the area of public education. That was the pivotal interpretation that Hand finally adopted. It was, Gunther writes, "Hand's delayed surrender to Frankfurter's self-serving interpretation of *Brown*."<sup>284</sup>

Frankfurter's purpose in conducting his dogged campaign to change Hand's view, Gunther explains, was to prevent the latter's long-anticipated lectures from interfering with his own campaign to prevent the Court from considering and invalidating southern miscegenation laws.<sup>285</sup> Such a ruling, Frankfurter feared, would fire southern hostility to the Court and further jeopardize efforts to desegregate the public schools. Hand, however, believed that *Brown* required invalidation of miscegenation laws. "There was no legitimate escape from ruling on miscegenation, he bluntly told Frank-

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278. *Id.* at 666; *id.* at 665-72.

279. HAND, *supra* note 4, at 54.

280. *Id.*

281. 163 U.S. 537 (1896).

282. HAND, *supra* note 4, at 54; *id.* at 54-55.

283. GUNTHER, *supra* note 1, at 666.

284. *Id.* at 671.

285. *Id.* at 666-67. Gunther points out that twice, in 1955 and 1956, Frankfurter had persuaded the Court to dismiss cases that presented the constitutionality of miscegenation laws. *Id.* at 667.

furter," Gunther reports, "and no possible constitutional distinction between that issue and school segregation."<sup>286</sup> Although Frankfurter persisted, "as late as September 1957, Hand refused to go along" with his interpretation.<sup>287</sup> Increasingly desperate, Frankfurter "bombarded" Hand with theories for distinguishing miscegenation from school desegregation, and then in the fall of 1957 he hit upon the "decisive response." Frankfurter "asserted . . . inside knowledge of the Court's deliberations on *Brown* to persuade Hand that the Court had *not* intended an across-the-board rule barring discriminatory racial factors in state laws."<sup>288</sup> It was this claim of "inside knowledge," Gunther argues, together with the fact that Hand "was suffering from fatigue about the lectures" that led him at the last minute to "reluctantly accept[ ] Frankfurter's gloss" on *Brown*.<sup>289</sup>

Gunther's argument raises an obvious question: How could Hand have ignored the series of *per curiam* decisions that the Court handed down between 1954 and 1957 extending *Brown* to public parks, beaches, buses, airports, and golf courses?<sup>290</sup> Acknowledging their obvious significance, Gunther explains that by the mid-fifties, "Hand was not a sufficiently careful follower of Supreme Court rulings to know" about the decisions.<sup>291</sup> "Frankfurter never told Hand" about them,<sup>292</sup> and, more surprising, neither did any of those who offered Hand advice about his lectures and told him "that he had to discuss *Brown*."<sup>293</sup> If Gunther is correct about the path Hand took in reaching his conclusion about *Brown*, it suggests not only that Hand had indeed become "fatigued" with his lectures but also that he was surely no longer functioning at his best.

While Gunther's argument about Frankfurter's influence is persuasive, his claim that Hand was unaware of the *per curiam* decisions extending *Brown* seems dubious. Even assuming that Frankfurter never told Hand about them, and even assuming that Hand no longer read the *U.S. Reports*, is it possible that he had not read about the decisions in the newspapers or heard them discussed by friends and acquaintances? The decisions were a topic of intense public and professional debate at the time. Indeed, is it

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286. *Id.*

287. *Id.* at 669.

288. *Id.*

289. *Id.* at 669, 671.

290. *Id.* at 670.

291. *Id.*

292. *Id.*

293. *See id.*

possible that Hand's various law clerks who worked with him on the lectures would not have felt impelled by duty to call the cases to the judge's attention? Rather than ignorance causing an oversight, it seems more likely that Hand knew of the cases and simply chose to ignore them, perhaps because they were *per curiam* opinions and did not articulate any constitutional principle.

Gunther's discussion also raises a broader and more perplexing question: How and why did such a judge and philosopher—seasoned, skeptical, and sophisticated—decide that the overriding goal of his valedictory should be “to produce logically airtight arguments?”<sup>294</sup> That was, after all, as Gunther rightly judges, the fatal flaw in *The Bill of Rights*.<sup>295</sup> Sixty years earlier, as a young man writing his first law review article, Hand had recognized that any legal rule was ultimately based on “a reason of policy, not of logic.”<sup>296</sup> His first wisdom—indeed, quite ironically, Thayer's ultimate constitutional wisdom—was the recognition that in understanding the scope of judicial review “logically airtight arguments” were, ultimately, either irrelevant or arbitrary. Hand's quest for such arguments, however, revealed the ossification of his thought.<sup>297</sup> Gunther's conclusion is on the mark. “Ultimately, the bleakness, pessimism, and extremism of Hand's final major statement,” he explains, “did not do full justice to the richness, subtlety, and complexity of his lifelong search for a delicate balance” in dealing with judicial review.<sup>298</sup>

#### CONCLUSION

Gunther has written a monumental biography that allows us for the first time to begin to understand Learned Hand and to place him accurately in his historical context. It is a superb accomplishment.

Considering the book as a whole, and Hand's place in twentieth-century American legal and intellectual history, several tentative conclusions seem warranted. First, Hand's life suggests that a commitment to judicial restraint, like a commitment to any other

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294. *Id.* at 671.

295. *See id.* at 672.

296. Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 249-50 (1897).

297. This hypothesis may explain some of Hand's overblown and even purposely obtuse statements. *See, e.g.,* HAND, *supra* note 4, at 39, 55, 73-74. It is worth noting, too, that at the time Hand was writing his lectures, he was still expressing privately his profound doubts as to whether “the LAW, as I used to think of it, has any genuine ‘principles.’” GUNTHER, *supra* note 1, at 677.

298. GUNTHER, *supra* note 1, at 672.

judicial posture, may be the product of the individual's deepest emotional and psychological drives. In deciding to stay his or her hand, in other words, the restrained judge may be serving personal needs as much as the activist judge who "imposes" his or her own values on others. Hand's life, indeed, suggests that judicial restraint no more proves the absence of driving personal motivations than judicial activism proves their presence.

Second, the label "Thayerian" does not do justice to Hand's thinking or to its evolution. Although he was deeply influenced by Thayer, he nevertheless adapted his teacher's ideas to his own purposes. Before World War I he ignored the significance of Thayer's alternative standard of review for state actions, infused progressive ideals into the argument for judicial restraint, and then in *Masses* found a way to elude the substance of Thayer's injunction by magnifying his loyalty to its form. After his transformation during the 1920s and 1930s, he moved in a different direction, basing Thayer's doctrine on a more narrow and pessimistic view of democracy, separating it wholly from the substantive social values it served, and turning it into a more rigid rule than his teacher had proposed or thought desirable.

Third, Hand's continued deference to democratic decision-making is something less than it initially appears. True, he held firm to his idea of democratic practice and insisted that it demanded judicial restraint. But his post-World War I idea of democracy marked a break with his earlier views and was in significant part the product of the anti-democratic vogue of the 1920s and early 1930s. For Hand democracy became a poor and minimalist political norm, based on a passive acceptance of the "bloodless" rule of the more powerful and largely devoid of significant communal ideals and moral aspirations.<sup>299</sup> His inability to see any galvanizing connection between democracy as a social and moral ideal and the Court's decision in *Brown v. Board of Education* must render his fidelity to the idea of democracy a dubious virtue.

Finally, Gunther's biography suggests that Hand's valedictory represented neither the ultimate wisdom of a great judge nor a

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299. During World War II Hand occasionally spoke in more elevated terms. See, e.g., Learned Hand, Address at the Fiftieth Anniversary Commencement Reunion and Ceremony (May 26, 1943), in *SPIRIT OF LIBERTY*, *supra* note 41, at 133, 133-36; Learned Hand, *Philhellene* Editorial, in *SPIRIT OF LIBERTY*, *supra* note 41, at 139, 139-41; Learned Hand, The Spirit of Liberty, Address at "I Am an American Day" Ceremony in Central Park, New York (May 21, 1944), in *SPIRIT OF LIBERTY*, *supra* note 41, at 143, 143-45. For the most part, however, his social hopes and aspirations remained minimal. See, e.g., HAND, *supra* note 4, at 73-74. Hand's deepest commitments were to individual freedom, especially intellectual freedom, not to broad social or democratic goals. See, e.g., *Liberty*, *supra* note 220, at 109-18. *Contra* Ronald Dworkin, *Mr. Liberty*, 41 N.Y. REV. BOOKS 17, 21-22 (1994).

timeless articulation of essential truths about judicial review. Rather, it was a marker at one point in Hand's evolution, the product of complex personal and historical forces that reveal the contingent nature of its formulation. It was the product of a great judge at far less than his best, and it was also the product of inadequate research, misleading information, and a misguided quest for "logically airtight arguments" in a field where wisdom and justice lay elsewhere.