

THE SUPREME COURT 1960 TERM

FOREWORD: THE PASSIVE VIRTUES

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The volume of the Supreme Court's business is steadily on the rise. It seems to be, quite simply, a direct function of the birth rate. But the number of important and far-reaching issues offered up for decision in any single Term is, in some part at least, a matter of the accidents of litigation. Accident, so far as we can tell, contrived to make the October Term, 1960, one of the most remarkable of record. There was no single litigation quite so spectacular as the *Steel Seizure Case*¹ of 1952, or the *Segregation Cases*² of 1954 and 1955. But the Court was presented with an arresting variety of constitutional questions, truly to be described, in the phrase Marshall used in *Marbury v. Madison*, as "deeply interesting to the United States . . ." And in contrast to what Marshall would have had us believe of the issue in *Marbury*, these questions were also "of an intricacy proportioned to [their] interest."³

One is tempted to deal with the resultant prodigious output by passing a Solomonic judgment on it, something like Dean Griswold's on the subject of Professor Hart's *Foreword* of two years ago. Mr. Hart, Dean Griswold observed, should have cut what he had written in two, and printed the latter half at another time and perhaps in another place.⁴ The next best way out from under may be to talk not about what the Court did, but about whether it needed to do it; not so much, that is, about the Bill of Rights and the fourteenth amendment as about the Court's place in the scheme of American government. It happens that a number of this Term's most celebrated cases were as significant for having brought into focus the uses and nonuses of techniques of withholding ultimate constitutional adjudication, as for having wrought changes in substantive law. It may also be that questions of when, whether, and how much to adjudicate come as near as anything else to explaining the frequent divisions within the Court.

Writing in 1949, Professor Freund noted "a remarkable core of agreement on the Court" with respect to human rights and the rights of

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¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

² *Brown v. Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

³ 5 U.S. (1 Cranch) 137, 176 (1803). But see Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

⁴ Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 83 (1960); see Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959).

property. He found that "the degree of concord in this area is much more important than the degree of discord . . ."⁵ Despite unmuffled sounds of dispute, the area of concord has in some significant respects enlarged. One need only mention the *Segregation Cases*, *Cooper v. Aaron*,⁶ and a whole pride of summary dispositions⁷ as bespeaking the Court's unity in disposing of what is surely the single most important issue to come before it, at least in this century. More may be ventured. The conceptual distance between Mr. Justice Black's absolutist positions, on the first amendment, for example, and the majority's generally more "balanced" results — to use the word the Justice particularly despises — may not be the true measure of the area of discord between them. The extremity of Justice Black's absolutist professions is a dissenting position. It is an opposition program. As Professor Charles L. Black, Jr., recently undertook to explain, there may be a great deal about it that is merely tactical; Justice Black knows as well as anyone else that free speech cannot be an absolute — pure, unconditional, never to be restricted — and that the first amendment does not literally say any such certain thing.⁸ The gap is perhaps not as wide as has seemed. It exists and it is not to be minimized. The Justices do not all assess the values of speech and association alike. "There is something voluptuous in meaning well" — so Henry Adams reports a not altogether ill-meant remark by the French Minister about President Jefferson.⁹ The Justices are not all equally first amendment voluptuaries. Moreover, the absolutist-literalist position raises a grave question of process; a question, some might say, of candor. For in propagating his absolutes, Justice Black chooses to obscure the actual process of decision. Yet on the immediate merits, more discord may strike the ear than is necessarily involved.

But to say that the Justices may be nearer than is apparent to certain common value judgments concerning civil rights and liberties¹⁰ is not to ameliorate the plainly observable differences in the results they often reach. It is to say that there would be fewer occasions for such differences if certain techniques of the mediating middle way were more imaginatively utilized. The Court, as Mr. Hart has written, "is predestined in the long run . . . to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles . . ."¹¹ The question is not only which principles and how, but also, when and in what circumstances.

⁵ FREUND, ON UNDERSTANDING THE SUPREME COURT II, 9 (1949).

⁶ 358 U.S. 1 (1958).

⁷ E.g., *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (athletic contests); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (public parks); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf course).

⁸ See *Mr. Justice Black, the Supreme Court and the Bill of Rights*, Harper's, Feb. 1961, p. 63.

⁹ Quoted in LEVENSON, THE MIND AND ART OF HENRY ADAMS 129 (1957).

¹⁰ See also, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 261-67 (1957) (Frankfurter, J. concurring); *FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT* 76 (1961).

¹¹ Hart, *supra* note 4, at 99.

The jurisprudence of the Court has developed certain doctrines whose chief content is a generalization on the timing and limits of the judicial function. They are loosely referred to as jurisdictional. A good number of them came home to roost at the last Term, as did also some cognate devices, whose similar import is not often remarked. These doctrines and devices are heavily encrusted with what Felix S. Cohen called "the vivid fictions and metaphors of traditional jurisprudence."¹² They are in disrepair and consequently in not a little disrepute. I should like to draw attention to the need for scraping them off and refurbishing them, to the end that they may stand revealed in their full utility. It will be well to start somewhat anew, and from the beginning.

I. "STANDING," "CASE AND CONTROVERSY," "RIPENESS," "POLITICAL QUESTION," AND THE RATIONALE OF *MARBURY V. MADISON*

In the beginning was the reasoning of *Marbury v. Madison*, against the background of *The Correspondence of the Justices*¹³ and *Hayburn's Case*.¹⁴ The background was faint, but it assumed sharper outline once *Marbury v. Madison* had been decided. If, as Marshall argued, the judiciary's power to construe and enforce the Constitution against the other departments is to be deduced from the obligation of the courts to decide cases conformably to law, which may sometimes be the Constitution, then it must follow that the power may be exercised only in a case. Marshall offered no other coherent justification for lodging it in the courts, and the text of the Constitution, whatever other supports it may or may not offer for Marshall's argument, extends the judicial power only "to all Cases" and "to Controversies." It follows that courts may make no pronouncements in the large and in the abstract, by way of opinions advising the other departments upon request; that they may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere; and that they may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results. These are ideas at the heart of the reasoning in *Marbury v. Madison*. They constitute not so much limitations of the power of judicial review as necessary supports for the argument which established it. The words of art that are shorthand for these ideas are "case and controversy" and "standing."

It would seem also to follow from *Marbury v. Madison* that, except as stated, "all Cases" are justiciable and must be heard. Indeed Marshall, assuming the tone of absolute assertion that he deemed suitable when the Court's basic powers were in issue, said in *Cohens v. Virginia*:

It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should.

¹² THE LEGAL CONSCIENCE—SELECTED PAPERS OF FELIX S. COHEN 37 (L. K. Cohen ed. 1960).

¹³ (With Secretary of State Jefferson and President Washington in 1793); see HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 75-77 (1953).

¹⁴ 2 U.S. (2 Dall.) 409 (1792).

The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.¹⁵

But the doctrines of standing and case and controversy have in time come to mean also something entirely unrelated to the reasoning of *Marbury v. Madison*. They have encompassed numerous instances in which the Court did nothing else but to “decline the exercise of jurisdiction which is given” And to this end they have been abetted by, or used interchangeably (and rather unanalytically) with, other doctrines, such as “ripeness” and “political question.” This has caused great difficulties for those who would rest the institution of judicial review on the foundation of the opinion in *Marbury v. Madison*, or even on an independent, more scrupulous but quite similar process of deduction from the constitutional text.

Professor Wechsler, who is in this respect a strict constructionist, believes that “the power of the courts [to exercise judicial review] is grounded in the language of the Constitution”¹⁶ He is, of course, quite aware of the consequences for the legitimacy of any discretionary option to withhold the exercise of jurisdiction. “For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.”¹⁷ Mr. Wechsler, indeed, goes on to quote with approval the passage from *Cohens v. Virginia* given above. But he makes some room for what the courts have done in fact by arguing that the “judicial Power” extends to “all Cases arising under the Constitution” only when a remedy is made available by the general law of remedies, statutory or decisional.¹⁸ Some cases answer to this formulation. The general law may show that the plaintiff had no existing rights in the premises that a statute claimed to be unconstitutional could have infringed. Therefore the statute, even if in fact unconstitutional, could not have injured him. Therefore, in the pure sense, he has no standing, there is no case. This is what Brandeis showed in *Ashwander v. TVA*.¹⁹ But in most instances the formulation will not avail.

To begin with, it leaves out of account rights that the Constitution itself may be held to have created. Brandeis could well assume that

¹⁵ 19 U.S. (6 Wheat.) 264, 404 (1821).

¹⁶ See WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 5 (1961) [hereinafter cited as WECHSLER]. Professor Wechsler's paper, which is his 1959 Holmes Lecture, is also printed in 73 HARV. L. REV. 1 (1959).

¹⁷ WECHSLER 9; having quoted Judge Learned Hand, see HAND, THE BILL OF RIGHTS, *passim* and at 15 (1958), whose escape hatch is larger than the compartment from which it offers egress.

¹⁸ See WECHSLER 10; see also Wechsler, *Comment*, in GOVERNMENT UNDER LAW 134, 138 (Sutherland ed. 1956).

¹⁹ 297 U.S. 288, 341 (1936) (concurring opinion).

there is and should be no constitutional principle protecting the right of a preferred shareholder to have his say in the management of a corporation. Since the general law was also negative on the subject, the suit of such a shareholder to enjoin the corporation from carrying out a contract with the allegedly unconstitutional Tennessee Valley Authority gave rise to no "case." As there was no showing of financial loss, the shareholder stood neither to lose nor to gain from the suit. Although he may have had an abstract interest in being advised as to the law, such an interest will not make a case under *Marbury v. Madison*. But it was quite a different matter to hold that the companies in *Tennessee Elec. Power Co. v. TVA*²⁰ had no standing to test the constitutionality of the TVA act because their only claim was that the TVA injured them by competing with them and there is no right to prevent competition "otherwise lawful." The companies were subject to material injury. And the question whether the Constitution protects against some forms of competition cannot be assumed away; it protected a parochial school against a certain kind of public-school competition in *Pierce v. Society of Sisters*.²¹ So when the companies were held to have no standing, the Court was either deciding, on the merits but without opinion, that the Constitution does not protect against competition by such a governmental unit as the TVA,²² or that the case was for some discretionary reason an unsuitable one in which to pass on the constitutionality of the Tennessee Valley Authority. The general law of remedies obviously could not affect the former holding as such, for it could not create a constitutional right. The general law, state or federal, statutory or common, could however create a remedy against competition by instrumentalities of the federal government that are unconstitutional for independent reasons. Would that render adjudication mandatory in a case that the Court had otherwise deemed unsuitable? Perhaps not, if the remedy is the creature of state law, since special problems are thus raised.²³ But at least if federal law creates the remedy, an affirmative answer follows from Mr. Wechsler's position.

We have in view cases such as *Tennessee Elec. Power Co. v. TVA*, "cases" in the *Marbury v. Madison* sense because, as a matter of fact, a palpable injury is present. If in fact there is no injury, either material or to a right independently created by law, and if the Constitution itself does not create the right, as it was held to do in *Pierce* and in *Joint Anti-Fascist Refugee Comm. v. McGrath*,²⁴ no one contends that the law of remedies can, by allowing a suit to test constitutionality, make a "case." But if a "case" exists, is the question whether the Court must hear it answered by the federal law of remedies, that is, by jurisdictional statutes plus standard rules of equity, themselves subject to statutory

²⁰ 306 U.S. 118 (1939).

²¹ 268 U.S. 510 (1925).

²² *Cf. Atlantic Freight Lines, Inc. v. Summerfield*, 204 F.2d 64 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 828 (1953).

²³ *Cf. Doremus v. Board of Educ.*, 342 U.S. 429 (1952); SUPREME COURT AND SUPREME LAW 34-36 (Cahn ed. 1954).

²⁴ 341 U.S. 123 (1951).

change? Mr. Wechsler must say yes, but many judges have thought and acted otherwise, and many cases are to the contrary, including the oft-cited *Muskrat v. United States*,²⁵ which was a thoroughly concrete and adversary "case." If the decisions are explained as exercises of equity discretion, the argument is at a standstill; Marshall's remarks in *Cohens v. Virginia* are meaningless, and Mr. Wechsler might as well agree with Judge Hand.²⁶ But if the strict constructionist, *Marbury v. Madison* position is to be maintained it is impossible to allow anything like the escape from the duty to adjudicate of which the Court has continually, if erratically, availed itself. Moreover, the notion that the Court cannot decline to adjudicate any real "case" of which the law gives it jurisdiction pursuant to the constitutional enumeration may serve the purpose of avoiding an old theoretical difficulty for the strict-constructionist position; but the unseverable converse — that the Court may not hear constitutional claims made in real "cases" of which Congress has deprived it of jurisdiction — creates a serious new one. Indeed, in a phrase of Judge Hand's that Mr. Wechsler quotes, it should be an intolerable "stench in the nostrils of strict constructionists."²⁷ How is it to be squared with Marshall's syllogism? How can there be a duty to decide "all Cases" conformably to the Constitution, acts of Congress to the contrary notwithstanding, if Congress can defeat this duty by a jurisdictional act? Would not this be "to overthrow in fact what was established in theory"? Would it not seem "an absurdity too gross to be insisted on"?²⁸ Congress, to be sure, is authorized to regulate the Court's appellate jurisdiction and to make exceptions in it,²⁹ but that cannot be the whole answer.³⁰

Mr. Wechsler's explanation of the political-question doctrine, potentially the widest and most radical avenue of escape from adjudication, runs along different lines. The explanation is that when the Court declines jurisdiction of a case as "political," or when, having taken the case, it declines to adjudicate the merits of a particular issue on the same ground, what it does, in conformity with *Marbury v. Madison*, is to render a constitutional adjudication that the matter in question is confided to the uncontrolled discretion of another department. This is sometimes an adequate statement of the result. It also represents, however, for Mr. Wechsler, "all the doctrine can defensibly imply." He puts it quite plainly that

the only proper judgment that may lead to an abstention from decision is

²⁵ 219 U.S. 346 (1911); see, e.g., *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); cf. *Gritts v. Fisher*, 224 U.S. 640 (1912); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). *But cf.* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (nonconstitutional issue).

²⁶ See note 17 *supra*.

²⁷ HAND, *op. cit. supra* note 17, at 15; quoted in WECHSLER II.

²⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁹ *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

³⁰ See, e.g., *Harmon v. Brucker*, 355 U.S. 579 (1958); Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). *But see* *Schilling v. Rogers*, 363 U.S. 666 (1960).

that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.³¹

It is different, just so; but only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation. The political-question doctrine simply resists being domesticated in this fashion.³² There is something different about it, in kind, not in degree, from the general "interpretive process"; something greatly more flexible, something of prudence, not construction and not principle. And it is something that cannot exist within the four corners of *Marbury v. Madison*.

The strict-constructionist position also has difficulty reconciling itself to the Court's two commonest devices of declining "the exercise of jurisdiction which is given": denials of certiorari and dismissals of appeals "for the want of a substantial federal question."³³ Chief Justice Warren, speaking generally, has allowed that it "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari."³⁴ It can be said, and indeed it is commonly assumed, that dismissals for the want of a substantial federal question are decisions on the merits, albeit without opinion. But what of the alternative of summary reversal or affirmance? There is, and has been for many years, a great deal that is fiction in this explanation. Many are the dismissals for the want of a convenient, or timely, or suitably presented question.³⁵ The certiorari jurisdiction is of course professedly discretionary and based on few articulated standards. It may be said of it that it does not deny judicial review, but rather denies it in a particular court only. But constitutional adjudication in the lower courts is not the equivalent of what can be had in the Supreme Court. It lacks the general authoritativeness. And judgment, even as it affects the immediate litigant, is constrained.³⁶ Moreover, what of cases coming up through the state courts, in which no access could have been had, or can any longer be had, to the lower federal courts? Here, surely,

³¹ WECHSLER 11, 13-14.

³² For a full-scale, enlightened attempt, see Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925). It cannot be deemed successful. It ends bravely, yet comes close to admitting the failure. See Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1302-07 (1961).

³³ See WECHSLER 14-15; Hart, *supra* note 4, at 89 n.13 (1959).

³⁴ Address of Chief Justice Warren, ALI Meeting, May 19, 1954, quoted in Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954); see *Naim v. Naim*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956); Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CALIF. L. REV. 15, 45 n.79 (1961).

³⁵ See Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 492-93 (1949).

³⁶ Compare *Latva v. Nicolls*, 106 F. Supp. 658 (D. Mass. 1952), with *Rowoldt v. Peretto*, 355 U.S. 115 (1957).

we have outright denial of adjudication by an article III court.³⁷ The system, says Mr. Wechsler, “rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court’s appellate jurisdiction”³⁸ But it is the Supreme Court that makes the exceptions, and it does so by the case, not by the category; that is what happens even though the exceptions are the cases that are heard rather than those that are dismissed.

II. THE POWER TO DECLINE THE EXERCISE OF JURISDICTION WHICH IS GIVEN

I have tried to show that the Supreme Court’s well-established if imperfectly understood practice of declining on occasion to exercise the power of judicial review is difficult to reconcile with the strict-constructionist conception of the foundation of that power. If this were all what is called merely academic, it would be none the worse for it. Actually, however, important consequences are in play. Of course, no concept, strict-, loose-, or medium-constructionist, can get around the sheer necessity of limiting each year’s business to what nine men can fruitfully deal with. But strict-constructionist compunctions cause the techniques for meeting this necessity to be viewed with misgiving and to be encumbered with fictive explanations. So are other techniques of avoiding adjudication, and I would suggest that herein lies at least part of the reason for the confusion and lack of direction that has characterized their development.³⁹ Some of the confusion may be in the eye of the beholder, but not all. Beyond this, and more fundamentally, the consequences of the strict-constructionist position are in the alternative. Either literal reliance on *Marbury v. Madison* leads to a rampant activism that takes pride in not “ducking” anything and takes comfort, and as Mr. Wechsler says, finds “protection,”⁴⁰ in the dictum of *Cohens v. Virginia*. Or, for those like Mr. Wechsler who are not unaware that judicial review is at least potentially a deviant institution in a democratic society, the consequence is an effort to limit the power of review and render it tolerable through a radical restriction on the category of substantive principles that the Court is allowed to evolve and declare; the consequence is, indeed, a radical constriction of the quality of the Court’s function.

The volume of responsible criticism that Mr. Wechsler’s paper on “Neutral Principles” has produced is nothing short of the most genuine

³⁷ See, e.g., *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958); *Rice v. Sioux City Memorial Park*, 245 Iowa 147, 60 N.W.2d 110 (1953), *aff’d by equally divided Court*, 348 U.S. 880 (1954), *on rehearing, cert. dismissed*, 349 U.S. 70 (1955); *Baltimore Radio Show, Inc. v. State*, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). See also Jaffe, *Foreword, The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 108-10 (1951); Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

³⁸ WECHSLER 14.

³⁹ See 1 DAVIS, ADMINISTRATIVE LAW TREATISE ix (1958); 3 *id.* §§ 21.01-22.10; Jaffe, *supra* note 32, at 1293-94, 1307-14.

⁴⁰ See WECHSLER 15.

kind of tribute to him. But it has not been sufficiently noticed how inextricably Mr. Wechsler's thesis is tied to the conviction — never lacking in comfort, yet fraught with risk — that there is no escape from the exercise of jurisdiction which is given. I take it that a neutral principle, whatever its other, less controversial but by no means unimportant aspects, is one that the Court must be prepared to apply across the board, without compromise. A neutral principle — of which, given the nature of a free society and the consensual basis of all its effective law, there can be but very few — is a rule of action that will be authoritatively enforced under present circumstances and in the foreseeable future, without adjustment or concession. If it sometimes hurts, nothing is better proof of its validity. If it must sometimes fail of application, it won't do. Thus the principle of the *Segregation Cases* is dubious for Mr. Wechsler. And the essential reason, if I am not mistaken, is that the principle must be tested not alone by its effect "on state-required segregation but also by its impact upon measures that take race into account to equalize job opportunity or to reduce *de facto* segregation, as in New York City's schools."⁴¹ When such cases come up, the Court is duty bound to decide them, and if it cannot apply evenhandedly the principle of the *Segregation Cases*, then that principle was not a proper one for the Court to enunciate. Hence the legislative choice represented by segregation statutes should have been declared valid. No other course was open to the Court.

The first thing to be remarked of the principle of the neutral principles is that it grievously mistakes the effect of decisions allowing a legislative policy to stand. It is true enough that the Court does not approve or otherwise anoint a legislative policy when it finds it not unconstitutional. No doubt, in one of the late Charles P. Curtis' phrases, "to call a statute constitutional is no more of a compliment than it is to say that it is not intolerable."⁴² But, though not a compliment, it is a not inconsequential appreciation. To declare that a statute is not intolerable because it is not inconsistent with principle amounts to a significant intervention in the political process, different in degree only from a declaration of unconstitutionality. It is no small matter, as Professor Black has argued, to "legitimate" a legislative measure.⁴³ The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution. The Court, regardless of what it intends, can generate consent and may impart permanence. This is an ineradicable fact of life, and has been at least since *McCulloch v. Maryland*,⁴⁴ which caused President Jackson to have to contend with the constitutionality as well as the expediency of a Bank of the United States. And how could it be otherwise? It is a necessary concomitant of a process of principled decision. The point has never

⁴¹ WECHSLER xiv.

⁴² Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427, 433 (1951).

⁴³ BLACK, *THE PEOPLE AND THE COURT* 56-86 (1960).

⁴⁴ 17 U.S. (4 Wheat.) 316 (1819).

been more tellingly put than in the dissent of Mr. Justice Jackson in *Korematsu v. United States*:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.⁴⁵

Would a holding that segregation is constitutional have left the situation unaffected — not merely in Mississippi and South Carolina, but in Kansas and in St. Louis and in Baltimore and in Louisville and in the District of Columbia?

Thus the rule of the neutral principles does not remove the Court from the arena; rather it works an uncertain and uncontrolled change in the degree of the Court's intervention, and it shifts the direction. In the course of achieving this result, it excises a great deal of what the institution is capable of doing without undue offense to democratic theory and practice, and without danger to itself. At the root is a question — in the large — of the role of principle in democratic government.

Quite obviously, no society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways to muddle through. No good society can be unprincipled; and no viable society can be principle-ridden. But it is not true in our society that we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line. There are exceptions, some of which are delineated by the political-question doctrine. Most often, however, and as often as not in matters of the widest and deepest concern such as the racial problem, both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the inflexible governing rule, is to affect the tendency of policies of expediency. And it is a potent role.

This idea was central to the political philosophy of Lincoln. As Professor Harry V. Jaffa is able to show in a highly original analysis of

⁴⁵ 323 U.S. 214, 245-46 (1944); cf. Rostow, *The Japanese American Cases — A Disaster*, 54 *YALE L.J.* 489, 510-12 (1945).

Lincoln's thought,⁴⁶ "government of, by and for the people," was for Lincoln required also to be principled government, with the counter-majoritarian restraints that this implies. And so Douglas' program of popular sovereignty, freeing the people to vote slavery up or down without reference to principle, was inadmissible, indeed revolting. But principled government by the consent of the governed often meant the definition of principled goals and the practice of the art of the possible in striving to attain them. It is the Court's function of declaring principled goals that the rule of the neutral principles would excise. More, it would require the Court to validate with overtones of principle most of what the political institutions do merely on grounds of expediency. Like Judge Hand, Mr. Wechsler appears to depreciate the function of the judges as "teachers to the citizenry."⁴⁷

The Court exists in the Lincolnian tension between principle and expediency. Mr. Wechsler would lift it out, but he cannot. He only distorts the tension, by placing the weight of the Court most often on the side of expediency. The Court is able to play its full role, as it did in the *Segregation Cases*, maintaining itself in the tension on which our society thrives, because at least in modern times it nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither. When it does neither, it need not forsake its educational function, nor abandon principle. Indeed, very often it engages in a Socratic dialogue with the other institutions and with society as a whole concerning the necessity for this or that measure, for this or that compromise. Is not this the meaning of the deliberate-speed formula itself, which resembles poetry and resembles equity techniques of discretionary accommodation between principle and expediency, but which fits precisely one thing only, namely the unique function of constitutional adjudication in the American system?⁴⁸ Did not the Court, having announced its principle, resume its accustomed posture of passive receptiveness to the complaints of litigants; some of which may be heard, but some of which may not, because they attack compromises whose present necessity and whose consistency or inconsistency with the ultimate goal must await the proof of further experience? It is not for the Court to work out or even to approve such compromises. That would be incompatible with the function of principled judgment. Nor is it automatically true, however, that such compromises nullify the validity or the effectiveness of principle. In its day, when the education of Negro children was just beginning, segregation by law in the public schools may have been a necessary compromise, and the Court's grave error lay not in failing to strike it down in the nineteenth century, but in legitimating it on principle. The Court's proper role is more truly exemplified by the recent affirmance in the *Shuttles-*

⁴⁶ JAFFA, *CRISIS OF THE HOUSE DIVIDED* (1959).

⁴⁷ Wyzanski, *Constitutionalism: Limitation and Affirmation*, in *GOVERNMENT UNDER LAW* 473, 485-86 (Sutherland ed. 1956).

⁴⁸ See Thaler, "*With All Deliberate Speed*," 27 *TENN. L. REV.* 510 (1960).

worth case⁴⁹ of a refusal—a discretionary refusal, not based on lack of standing in the pure sense—to adjudicate the constitutionality of pupil-placement statutes on their face.

It follows that the techniques and allied devices for staying the Court's hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled. They mark the point at which the Court gives the electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here the Court is most a political animal. But this is not to concede unchanneled, undirected, unchartered discretion. It is not to concede judgment proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned. The antithesis of principle in an institution that represents decency and reason is not whim, nor even expediency, but prudence. And so all the significant questions are still before us. We have touched so far only on the sort of generalization that cannot resolve a single concrete case, but without the aid of which no case can be sensibly decided. What then are the decisive considerations in various categories of cases? Toward this inquiry, which needless to say I mean merely to commence, a number of this Term's cases point a way.

III. RESTRAINT: PRIOR AND JUDICIAL

A purposive administration of the certiorari jurisdiction would have found no room for *Times Film Corp. v. City of Chicago*.⁵⁰ Certiorari was granted, and the Court divided five to four on the merits.⁵¹ The case was this. Chicago has an ordinance requiring all motion pictures to be submitted "for examination or censorship" prior to being licensed for exhibition. An administrative appeal lies to the Mayor, and exhibition of a picture without the required license is subject to a fine of not less than fifty dollars nor more than a hundred for each day the picture is thus exhibited.⁵² Times Film applied for a license but, when requested to present the motion picture in question, "Don Juan," for inspection, flatly refused to do so. For this reason the license was denied, and the Mayor affirmed. Times Film thereupon filed suit in federal district court for an injunction requiring issuance of a license and restraining the city from interfering with exhibition of the picture "Don Juan." No allegation was made describing the picture. The district judge held that there was no justiciable controversy, no substantial federal question, and no direct or threatened injury to plaintiff, and dismissed.⁵³ On appeal, the dismissal was affirmed. The film not being part of the record, the court said, no one had any idea what kind of a picture "Don Juan" was. Thus

⁴⁹ *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd*, 358 U.S. 101 (1958).

⁵⁰ 365 U.S. 43 (1961).

⁵¹ The Chief Justice dissented in an opinion joined by Justices Black, Douglas, and Brennan, 365 U.S. at 50; Mr. Justice Douglas also dissented separately, and was joined by the Chief Justice and Mr. Justice Black, 365 U.S. at 78.

⁵² CHICAGO, ILL., MUNICIPAL CODE ch. 155, §§ 1-7 (1939).

⁵³ *Times Film Corp. v. City of Chicago*, 180 F. Supp. 843 (N.D. Ill. 1959).

the case was reduced "to an abstract question of law." There was no telling what kind of exhibition the court would be sanctioning if it granted the relief prayed for. "It might be a portrayal of a school of crime, which, for instance, teaches the steps to be taken in successfully carrying out an assassination of a president of the United States as he leaves the White House; or shows how to arrange an uprising of subversive groups in one of our cities."⁵⁴

"The precise question at issue here [the constitutionality of prior restraints on the showing of motion pictures] never having been specifically decided by this Court, we granted certiorari."⁵⁵ So runs the ritual recital of the grant in the opinion of the Court by Mr. Justice Clark. It hardly needs counterrecital to establish that the Court does not grant certiorari to decide all questions that have not previously been "specifically decided by this Court." Grants and denials turn rather, in addition to other factors, on the importance of the issue and the suitability of the case. The problem of movie censorship in general happens to have a rather full recent history in the Supreme Court. For nearly a decade, starting with *Joseph Burstyn, Inc. v. Wilson*,⁵⁶ everything that came up was struck down.⁵⁷ The guiding consistency of this course of adjudication is marred, however, by the fact that only two opinions of the Court were written, the rest being summary dispositions, and that no single readily applicable principle was evolved. There can be no doubt that lower courts as well as local administrators and legislators have had great difficulty making head or tail of the so-called law that the Court provided them with. And so, everything else being equal, the issue that the *Times Film* case offered for adjudication was important. Certiorari should have been denied, however, for overriding reasons of unsuitability for adjudication. These do not concern "standing" or "case and controversy" in the pure sense. They do necessarily involve the merits.

The question of constitutional standing is scarcely debatable. *Times Film* was in danger of being fined for exhibiting "Don Juan," which is quite an immediate prospect of palpable injury. The company could have avoided the prospect, to be sure, by submitting the film for licensing. But that was precisely the requirement of law that it deemed unconstitutional. To hold that the requirement is unburdensome, or in other words, that there is no right to be protected against censorship, is simply to decide the merits.⁵⁸ There is and there ought to be no rule of constitutional standing that, in order to construct a justiciable "case," a plaintiff must submit to the very burden whose validity he wishes to attack. It is necessary to comply with the other conditions of a licensing process before one can object to denial of a license on this or that ground,

⁵⁴ *Times Film Corp. v. City of Chicago*, 272 F.2d 90, 91, 92 (7th Cir. 1959).

⁵⁵ 365 U.S. at 44-45.

⁵⁶ 343 U.S. 495 (1952).

⁵⁷ *Gelling v. Texas*, 343 U.S. 960 (1952); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954); *Holmby Prods. Inc. v. Vaughn*, 350 U.S. 870 (1955); *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684 (1959).

⁵⁸ *Cf. Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939).

because there is no injury before the denial. But no like necessity arises before one can object to licensing altogether, for then the very requirement constitutes the injury alleged to be illegal.⁵⁹

Was *Times Film*, as the court of appeals thought, an "abstract" case? This was not a question of constitutional justiciability, and the answer must depend on at least an initial judgment of the merits. If a judge holds the conviction that there ought to be no governmental power whatever, no matter what the means used, to forbid the showing of any movie whatever to anyone, no matter how obscene or gruesomely offensive or incendiary it may be; or if he takes the view that a prior restraint is unconstitutional per se under any circumstances, then *Times Film* was as concrete a case as the next. For a judge who so much as entertains the faintest doubt about the absoluteness of such absolutes, no case could be less suitable, for no case could have truncated the issue more or narrowed the line of vision more severely. Absolutes to the side, what after all is the issue of prior restraints?

There was a time when the issue was quite straightforward, because the difference between a prior restraint on speech and regulations by way of subsequent punishments was plain.⁶⁰ A prior restraint was censorship by the Crown or under the authority of Parliament. It represented, therefore, control by irresponsible or oligarchic officials. Subsequent prosecution was subject to the safeguard — by the eighteenth century, the reasonably well-developed safeguard — of trial by jury.⁶¹ Lord Mansfield wrote in 1754 that a conviction then obtained was the first from a London jury in twenty-seven years.⁶² In the colonies the difference was even starker. Prior restraint meant control by officers responsive to officials in England. Subsequent punishment meant trial before local juries. The problem was to protect a majority and to foster an infant democratic process. Prior restraints were a certain means of strangling it. Jury trials came near to placing total control in the hands of the very majority whose freedom was in question. This straightforward difference lay behind the abhorrence of prior restraints, expressed by Blackstone, which was so strong in the English tradition and which most of the colonists certainly shared.⁶³ The problem today is quite different. It is the protection of minorities against a majority in a mature democracy, a majority whose attitudes will be reflected by the executive as well as by the jury system. In a representative democracy, neither officials — especially appointive ones — nor juries should be allowed too wide a discretion to make policy in these matters. The legislature, as the most broadly-based deliberative institution, may, as we shall see, have to be held fairly strictly to its own responsibility.

⁵⁹ *Staub v. City of Baxley*, 355 U.S. 313 (1958), heavily relied on by the plaintiff, establishes this much, though it is distinguishable in respect of other, discretionary considerations applicable to *Times Film*, because it was a criminal prosecution, and because it had a much more fully developed factual situation.

⁶⁰ See generally SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776* (1952); LEVY, *LEGACY OF SUPPRESSION* (1960).

⁶¹ See Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

⁶² See SIEBERT, *op. cit. supra* note 60, at 383.

⁶³ See Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295, 304 (1958).

But this is a consideration that applies about equally to prior restraints and to a system of subsequent prosecution. If there remain significant general differences between the two, they must be other ones.

One difference is in the timing and posture of litigation, the difference between requiring the exhibitor to apply for a license and then perhaps to sue, and inviting him to act at his peril and wait for the censor to sue him. In either event, the ultimate decision will be by judges on review. In neither event can litigation be avoided. But a criminal prosecution is not so easily stated as a license is denied. One may well wonder why there should not be demanded of the censor a showing, or at least an allegation of reason to believe, that a film which must be submitted for examination might fall within a forbidden category. The state cannot ordinarily arrest an individual, or search his papers or effects, without first making out probable cause that he has committed an illegal act, and it ought to have no greater power over the product of an individual's mind, which a motion picture may sometimes turn out to be. It is strange and unaccustomed that the exhibitor of a motion picture should have the burden of coming forward with evidence of "innocence," while the censor need prove nothing at this stage. But this is not an argument that could lead to wholesale prohibition of prior restraints. The most crucial present-day difference between prior restraints and subsequent punishment concerns what happens to the film while litigation takes its course. If it were necessarily true that a film may be exhibited — at the defendant's risk, to be sure — throughout the period of criminal litigation and appellate judgment,⁶⁴ while it may not be exhibited during the period of civil litigation following denial of a license, then the difference would indeed be major. But this is far from a necessary consequence. The solution is to hold that showing the film without a license is not a punishable offense if the exhibitor wins the ultimate litigation.⁶⁵

The brief for the defendant in *Times Film* spent no more than a page dealing with justiciability. Its discussion of the merits ends with what is surely one of the most touching, upturned-face pleas ever made to any authoritative oracle, let alone the Supreme Court:

What, then, is the answer? It is for this Court to lead the way, for it is with this Court that the ultimate responsibility rests. The Court must adhere to a middle-of-the-road policy — a road that is flanked by two precipices. The one drops off to moral debasement, the other to witch-hunting, thought-strangulation, puritan regimentation. Neither course is for America. This Court must take the helm and lead us — both sides to this controversy — down the middle path where motion pictures will be subject to only such prior restraint as may be necessary to prohibit the obscene, the immoral and those motion pictures which tend to produce a breach of the peace and riots.⁶⁶

⁶⁴ But see *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

⁶⁵ See Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 538-39 (1951).

⁶⁶ Brief for Respondents, No. 34, at 12, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

The case is hardly imaginable in which the materials for such a judgment could be scantier. The only thing to be said in favor of its suitability for adjudication is that portions of the Chicago ordinance have been construed, in another case but fairly recently, by the Illinois Supreme Court.⁶⁷ For the rest, and despite descriptive testimony in the record,⁶⁸ no case could throw less light than did *Times Film* on the actual workings of the licensing operation in Chicago. In no case could there be less opportunity to consider in detail and concretely the ramifications of prior restraints, or to assess ways of removing their most objectionable features. Had it been alleged that the showing of "Don Juan" could not be forbidden under any of the provisions of the ordinance, construed so as otherwise to save their constitutionality, the City might have demurred, and the question of probable cause would thus have been brought into focus. Another of the crucial aspects of the issue of prior restraint would have been raised if the film had been exhibited for one day without a license, so that a criminal prosecution might result; which, at the maximum cost of \$100, is not a prohibitive thing to ask of defendants able to bear the overall expense of litigation. And, of course, going beyond the question of the differences between prior restraints and subsequent punishment, there was no way to evaluate the validity under the first amendment of any regulation, by whatever means, as applied to this film, for the Court was not allowed to know anything about it.

Thus the short of it is — to borrow a figure of Mr. Freund's — that the real issues must be dealt with at retail, whereas the parties here offered one issue at wholesale. This, as I have said, represents an initial estimate of the merits; namely, that the Court should not impose an absolute prohibition outlawing all prior restraints across the board. But we know that five judges were prepared to hold something quite different, though far from inconsistent — namely, that in some circumstances, however to be restricted and narrowed, prior restraints are constitutional. What can there be to object to in such a holding? All that was decided was the issue exactly as tendered. The majority dealt — the Chief Justice's dissenting alarms notwithstanding⁶⁹ — with motion pictures only, for motion pictures are different, or may be thought to be, even from television, in impact and most signally in the numbers and nature and situation of any single audience; movies, like the theater, address themselves to groups of people in public places, not to the individual in the home. Although they are not unprotected by the constitutional guarantees of free speech, movies are neither books nor newspapers nor even television, and Justice Clark's statement on behalf of the majority that he was speaking of motion pictures only may be fully credited. As it concerns the movies, the majority's holding was merely that there is no absolute right to exhibit all films without prior submission to censorship — all films, perchance including one which contains "the

⁶⁷ American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954).

⁶⁸ See 365 U.S. at 68 n.8 (Warren, C.J., dissenting).

⁶⁹ 365 U.S. at 50, 75-77.

basest type of pornography, or incitement to riot, or forceful overthrow of orderly government"⁷⁰

That is not very far-reaching doctrine. But there can be little doubt that the decision — especially since it was rendered in an unconcerned opinion, which treated the power to censor as if it hardly differed from a municipality's street-maintenance functions — will have radiating consequences, and that these will be to encourage Comstockian tendencies. The Court's previous adjudications, confusing as they were, at the very least rendered censorship much more difficult and much more uncertain of ultimate effectiveness. Some state courts and some communities even misinterpreted the Court's decisions — and perhaps they eagerly seized the occasion to do so — as invalidating all motion picture censorship. Certainly it can be said that the Court had been having, and might expect to continue to have, a dampening effect on censorship.⁷¹ *Times Film* bids fair to inaugurate an opposite trend. Is this a consideration not properly addressed to the Court? It is unreal to think that by putting such matters out of view the Court keeps itself out of politics. It merely abandons control of the direction in which, inevitably, its decisions on the merits do influence public opinion and the political institutions; it merely abandons control, this is to say, of its educational function, which it can so often exercise without approaching any sort of conflict with the theory or practice of democratic government.

An absolute prohibition on prior restraints is not, as I have maintained, a proper principle for the Court to impose. It is neither a proper neutral principle, in Mr. Wechsler's sense, nor a proper principled goal, because it does not proceed from moral or other considerations sufficiently clear-cut to override countervailing ones. If it were an adequately principled goal, the Court might have announced and enforced it in this case, expecting to allow room for accommodation and compromises, if any, that might prove necessary in practice by means of one or another of the devices for withholding future judgments on the merits. It is decidedly the Court's function to proclaim principled goals, including some that it foresees may be incapable of immediate, full attainment. In no way does it demean the process of reason or the durability of principle for the Court to undertake in this fashion to move public action toward an end of whose validity it has no present doubt. It would be quite a different matter, however, for the Court to proclaim an absolute which is not merely unattainable in practice, but untenable as such on principle. Herein appears to lie one of the differences between Justice Black's absolutist position and the so-called balancing approach.⁷²

⁷⁰ 365 U.S. at 47.

⁷¹ See *Brattle Films, Inc. v. Commissioner of Pub. Safety*, 333 Mass. 58, 127 N.E.2d 891 (1955); *RKO Radio Pictures v. Department of Educ.*, 162 Ohio St. 263, 122 N.E.2d 769 (1954). Springfield, Missouri, Palo Alto, California and Pine Bluff, Arkansas all repealed censorship ordinances in 1954. See Brief of Motion Picture Ass'n of America, Inc. as Amicus Curiae, No. 34, at 3-4; and see Brief for the Petitioner, No. 34, at 15, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

⁷² See C. L. Black, Jr., *Mr. Justice Black, the Supreme Court and the Bill of Rights*, Harper's, Feb. 1961, p. 63.

But to have said this is not remotely to suggest that good reasons are lacking for an attitude of extreme hostility to prior restraints. The differences between prior restraints and other regulations of speech are relatively slight and capable of being minimized even further or eliminated altogether. Yet certain imponderables come into play,⁷³ not least of all the attitude of mind that seems always to be engendered in professional censors (or that propels people into that profession), and that results in excesses and stupidities such as are impressively recited in the Chief Justice's dissent.⁷⁴ There is not enough in this to form the basis of an absolute principle outlawing censorship, but there is enough for a prudential judgment that censorship should not be lightly encouraged; enough, therefore, to have caused the Court to withhold the sanction of constitutionality by the inoffensive expedient of denying certiorari.

There would have been offense, to be sure — continued uncertainty and confusion — to the front-line officials, as Mr. Hart calls them. But certainty, like stability, is not always the highest value served by law. Moreover, the issue being what it is, and the materials of judgment having been truncated as they were, the likely adjudication on the merits was the one actually handed down, and it is scarcely the ultimate in shafts of light. There would also have been offense to the party moving for relief, whose situation ought generally to be one of the decisive considerations. But Times Film elected — presumably by way of a gamble — to frame this sort of a case. Had the case been fleshed out more, Times Film would have run the risk of an adjudication on the merits that avoided the broad issue tendered; that is, the risk of a disposition similar in one fashion or another to those of the previous seven cases. But this is to say that Times Film would have run the risk of winning its case.⁷⁵ It guarded itself effectively. Most law suits if allowed to develop naturally will afford the Court a choice of more than one ground on which to rest adjudication. The considerations that enter into the choice are of the sort discussed above. There was room for choice, as is well known, in *Marbury v. Madison*; the Judiciary Act could have been construed so as to avoid the issue of constitutionality. And there was room for choice in the *Segregation Cases*, as there had been in their predecessors.⁷⁶ The Court might have reached the same or a slightly different result on the merits with respect to the parties before it, without undertaking expressly either to overrule or reassert the separate-but-equal doctrine. Findings of present or prospective equality could have been treated as less adequate or less conclusive than they were actually made to appear. The Court did not do so, because in the fullness of prior cases and of that litigation, it had matured the principle that was in fact announced. This is a judgment for the Court to make, not for the parties to a litigation. As Professor Pollak has well said: "Judicial authority to select the most apt of several possible avenues of decision

⁷³ See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 658-60 (1955).

⁷⁴ 365 U.S. at 69-72.

⁷⁵ Cf. *Peters v. Hobby*, 349 U.S. 331 (1955).

⁷⁶ For example, *Sweatt v. Painter*, 339 U.S. 629 (1950).

is a sensitive and a powerful weapon. Utilized with sophistication, it complements the Supreme Court's broad discretion as to which cases the Court will entertain, and in what sequence."⁷⁷ Cases framed as *Times Film* was framed should not be heard because they are attempts to deprive the Court of a freedom of choice which it must reserve to itself.

To the extent that the decisive considerations at the certiorari stage have been accurately isolated here, the Court's practice whereby four votes are sufficient for a grant is brought into doubt. Of course, nothing has been said to shake the assumption that denial of certiorari is not an adjudication of the issues tendered; a denial is an avoidance of adjudication of the merits. But it is clear also that there are times when avoidance should rest on merits of its own, and it is not clear why a majority of the Court should lack the power to make this judgment.⁷⁸ While the rule of four is in effect, however, it would seem to dictate that once certiorari had been granted in *Times Film* the action could not be reversed. The argument revealed nothing new about the case in respect of the relevant considerations, and a single case is involved, not a category.⁷⁹ And so the appropriate disposition called for after argument was a jurisdictional dismissal for lack of ripeness.

IV. RIPENESS: BIRTH CONTROL

Connecticut has a statute which forbids the use by any person of "any drug, medicinal article or instrument for the purpose of preventing conception." Violations are punished by fines of not less than fifty dollars or imprisonment of not less than sixty days nor more than one year, or both.⁸⁰ No Connecticut statute specifically forbids the sale or distribution of these devices, but the state is able to punish, as if they were the principal offenders, accessories who assist or counsel others to commit any offense.⁸¹ In *Tileston v. Ullman*, decided in 1943,⁸² the Court was asked to pass on the constitutionality of the Connecticut statute; but this attempt to obtain a decision failed for an elementary reason. Dr. Tileston alleged that he was prevented from giving professional birth-control advice to three patients whose lives would be endangered by childbearing, but he did not allege any infringement of his own rights, nor even any inconvenience to himself. Consequently he was held to lack standing, in the pure *Marbury v. Madison* sense.⁸³

⁷⁷ See Pollak, *supra* note 34, at 17. Compare *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956), *with id.*, 367 U.S. 1 (1961), and especially, 367 U.S. at 115 (Warren, C.J., dissenting). Compare *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961), *with Elkins v. United States*, 364 U.S. 206 (1960).

⁷⁸ See Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

⁷⁹ See *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 527, 529, 559 (1957) (dissenting opinion of Frankfurter, J.).

⁸⁰ CONN. GEN. STAT. REV. § 53-32 (1958).

⁸¹ CONN. GEN. STAT. REV. § 54-196 (1958).

⁸² 318 U.S. 44.

⁸³ *Cf. Barrows v. Jackson*, 346 U.S. 249 (1953); Jaffe, *supra* note 32, at 1300-02. In my judgment, however, Mr. Jaffe mistakes the significance of the *Tileston* case. See *id.* at 1301 n.109. In *Barrows v. Jackson*, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and in similar cases that Mr. Jaffe adduces, the moving party was in fact injured, and I quite agree that as a constitutional matter there is then

In *Poe v. Ullman*,⁸⁴ decided this Term, the pleading omission of *Tileston v. Ullman* was well and truly supplied. Dr. Buxton, one of the parties, sued in his own right, alleging that the Connecticut law prevented the full, conscientious exercise of his profession, and thus injured him in violation of the fourteenth amendment. Two other plaintiffs, suing under fictitious names, were patients of Dr. Buxton's who alleged that their health would be endangered unless contraception could be prescribed for them. Excruciatingly enough, these attempts to obtain adjudication also failed, though in very different fashion, and for a more intricate and interesting reason.

Like *Tileston*, these were suits under the Connecticut Declaratory Judgment Act,⁸⁵ alleging that the defendant state's attorney "intends to prosecute any offense" against the Connecticut birth-control statute. The state's attorney demurred, and the Connecticut supreme court held the statutes applicable and valid. The subsequent appeal to the Supreme Court was dismissed. The considerations on which dismissal was based became apparent only upon the oral argument. Professor Fowler V. Harper, counsel for plaintiffs, stated in answer to questions from the Bench that there has never been any enforcement of the Connecticut law against persons who use contraceptives.⁸⁶ In the opinion of Assistant Attorney General Raymond J. Cannon, of Connecticut, arguing for defendant, a sale of contraceptives, even if the use intended was merely to prevent disease, would violate the statutes,⁸⁷ despite a letter dated September 15, 1954, quoted in the plaintiffs' brief, from the State Commissioner of Food and Drugs to the Secretary of the Bridgeport Pharmaceutical Association stating that since diaphragms have therapeutic and other uses, there is no reason why drug stores may not fill a physician's prescription for them.⁸⁸ In any event, both Mr. Cannon and Mr. Harper stated to the Court that contraceptives are notoriously sold in drug stores, and that there has never been a prosecution for such sales.⁸⁹ There have been, Mr. Cannon told the Court, two police-court prosecutions for vending-machine sales, which were successful and were not appealed.⁹⁰ And in 1940, two doctors and a nurse were successfully prosecuted for aiding and abetting violation of the statute in the operation of a birth-control clinic, which was closed, with the result that no further such clinics have been operated in Connecticut.⁹¹ This states the entire history of the enforcement of the statute.

standing to litigate any infirmity in the statute that inflicted the injury. But Dr. Tileston failed to allege that he was injured or threatened with injury. On the allegations he saw fit to make, he was in the position of a public-spirited bystander. There can be no standing in such circumstances. The majority opinion in *Ashwander* may be *contra*, but Brandeis was, after all, right.

⁸⁴ 367 U.S. 497 (1961).

⁸⁵ CONN. GEN. STAT. REV. § 52-29 (1958).

⁸⁶ 29 U.S.L. WEEK 3258 (1961).

⁸⁷ *Id.* at 3259.

⁸⁸ Brief for Appellants, Nos. 60, 61, at 17, *Poe v. Ullman*, 367 U.S. 497 (1961). See also ST. JOHN-STEVAS, BIRTH CONTROL AND PUBLIC POLICY 25 (1960).

⁸⁹ 29 U.S.L. WEEK 3260 (1961).

⁹⁰ *Id.* at 3259.

⁹¹ See 367 U.S. at 501-02; ST. JOHN-STEVAS, *op. cit. supra* note 88, at 25.

"So the matter is entirely academic," Mr. Justice Frankfurter said to counsel for the defendant on the argument. "I suppose so," replied Mr. Cannon.⁹² But it hardly was. The highest court of the state, in the *Tileston* case, as well as in this case, had construed the statute to forbid and make punishable dissemination of birth-control information privately, by a doctor to his patients. Dr. Buxton alleged that he is a law-abiding as well as a prudent citizen and that the statute deterred him from prescribing contraceptives. This is something only Dr. Buxton can know. Whether prosecution is very likely, likely, possible, or even improbable, the incidence of some deterrent effect cannot be gainsaid. The matter was not academic at the time of the argument; it became so by decision of the Supreme Court.

The point of Mr. Justice Frankfurter's opinion announcing the judgment of the Court,⁹³ as Justice Harlan was able to show, is not that the plaintiffs had no standing, not that the controversy was feigned or unreal, and not, as in *Times Film*, that it was "so artificially truncated as to make the cases not susceptible to intelligent decision."⁹⁴ The point is that the job of the Court, even in a perfectly real, concrete, and fully developed controversy, is not to resolve issues on which the political processes are in deadlock, but to do what it can to break that deadlock, so that the political institutions may make their decision before the Court is required to pass judgment on its validity. If the Court was not "to close our eyes to reality,"⁹⁵ it had to find that the situation in Connecticut in respect of the use of contraceptive devices by a doctor's prescription is most curious. The influences that favor the objective of the statute cannot summon sufficient political strength — or perhaps they have not the desire⁹⁶ — to cause it to be enforced; assuming that the consistent enforcement of a law is as much a function of the political process as is enactment of it. The influences which oppose the law cannot summon sufficient political strength to cause it to be repealed; attempts have been made from 1923 onward, and they have failed. All this is not known to be the fact with regard to sales from vending machines or the establishment of birth-control clinics. But the cases before the Court concerned neither vending machines nor clinics. Had the attempt been to obtain a decision on the statute as applied to vending machines or to clinics, these cases should have been dismissed for lack

⁹² 29 U.S.L. WEEK 3260 (1961).

⁹³ In this opinion, the Chief Justice and Justices Clark and Whittaker joined. Mr. Justice Brennan concurred specially in the judgment of dismissal, writing a brief opinion. Mr. Justice Black, believing "that the constitutional questions should be reached and decided," dissented without opinion. This was also the view of Mr. Justice Douglas and Mr. Justice Harlan, each of whom wrote an opinion reaching the question and holding the statute unconstitutional as applied. Mr. Justice Stewart joined the opinions of Justices Douglas and Harlan insofar as they dissented from the dismissal of the appeals. He refrained, however, from discussion or decision of the issue on the merits, and took care to refrain as well from implying that his ultimate conclusions would differ from those of Justices Douglas and Harlan.

⁹⁴ 367 U.S. at 528. Compare *United States v. Fruehauf*, 365 U.S. 146 (1961).

⁹⁵ 367 U.S. at 508.

⁹⁶ See *St. JOHN-STEVAS*, *op. cit. supra* note 88, at 53-57.

of ripeness and concreteness.⁹⁷ When enacted in 1879, as part of a wholesale attack on what was then deemed obscene, under the title "An Act to Amend an Act Concerning Offenses against Decency, Morality and Humanity,"⁹⁸ the statute was the product of very different political forces and a very different climate of opinion. There is nothing too uncommon about its survival under other patronage and to other ends today. But having regard to the total lack of enforcement in circumstances such as those of the cases before the Court, it is evident that, as so applied, the statute does not speak the present will of dominant forces in the state. It represents at present a deadlock of wills, from which the Court was asked to extricate the state. This may be the reality more often than we know or care to acknowledge. But this time it was demonstrable. Such a deadlock, in such circumstances, nevertheless constitutes a species of effective law, in the degree complained of by Dr. Buxton and his patients. But it is law by default. And it does not follow — except from the dictum in *Cohens v. Virginia* — that the Court owed an adjudication to Dr. Buxton and his patients.

For anyone prepared not to heed Thayer's admonition that the "tendency of a common and easy resort to this great function [of judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility,"⁹⁹ the Court's judgment in *Poe v. Ullman* is nonsense. But if the case is regarded as having presented the Court with a choice between, on the one hand, a constitutional adjudication that would cooperate with the state's political institutions in their efforts to evade their own responsibility for decision, and on the other, an opportunity to set in motion forces that could conduce to a political decision, then the result appears in a very different light. The truth is that neither the Connecticut legislature nor the prosecuting authorities have ever faced the issue in its present significance and in the context of the present political configuration. The legislature has voted against repeal. But that is not the same as voting to enact a statute,¹⁰⁰ and the difference is peculiarly crucial, as I shall argue further, in circumstances of non-enforcement. Prosecutors have dealt only with a clinic and two vending machines. For the rest, all they have ever done has been, literally, to demur as occasion offered. A device to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system, was available to the Court, and it is implicit in the prevailing opinion. It is the concept of *désuetude*.

This, it must be said, is not an everyday, familiar doctrine of Anglo-American law.¹⁰¹ The question which the doctrine seeks to answer is

⁹⁷ Cf. *United States v. Raines*, 362 U.S. 17 (1960); note 106, *infra*.

⁹⁸ Conn. Pub. Acts ch. 78 (1879); see *Tileston v. Ullman*, 129 Conn. 84, 98, 26 A.2d 582, 589 (1942) (dissenting opinion).

⁹⁹ THAYER, JOHN MARSHALL 106-07 (1901).

¹⁰⁰ Cf. *Girouard v. United States*, 328 U.S. 61 (1946).

¹⁰¹ Nor is *désuetude*, however, as Mr. Justice Douglas remarked, "contrary to every principle of American or English common law . . ." 367 U.S. at 511. It is squarely inconsistent with Mr. Justice Douglas' opinion for the Court in *District of*

not — as it was with bootlegging — whether “because a certain number of people do not like an Act and because a good many people disobey it, the Act is therefore ‘obsolescent’ and no one need pay any attention to it”¹⁰² It is whether a statute that has never been enforced and that has not been obeyed for three-quarters of a century may suddenly be resurrected and applied. The civilians, though more bound to codes than we are, recognize the doctrine. “Wherefore very rightly this also is held,” John Chipman Gray quotes from the early writer, Julianus, “that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.”¹⁰³ And Gray points out, with his usual freshness, that formal rejection of the doctrine by our courts does not necessarily mean failure to apply its substance. “It is not as speedy or as simple a process to interpret a statute out of existence as to repeal it, but with time and patient skill it can often be done.”¹⁰⁴

The strongest claim that desuetude has to naturalization in American law is consanguinity with the well-established doctrine that statutes may be declared void for vagueness. As Mr. Anthony G. Amsterdam’s brilliant recent analysis¹⁰⁵ has shown, vagueness is vague; the doctrine has several meanings and serves more than one end. There are times when it imports a substantive adjudication, as when a statute is so worded that it is likely to deter more than it actually forbids, and this unearned increment of deterrence, so to speak, causes it to intrude into an area that it may not constitutionally regulate.¹⁰⁶ But there are other instances when a finding of vagueness, far from signifying substantive adjudication, is a device for avoiding it.¹⁰⁷ In such cases, courts often talk a great deal about fair notice.¹⁰⁸ But this factor can hardly be

Columbia v. John R. Thompson Co., 346 U.S. 100, 113-18 (1953), although the Justice fails to cite it. But, happy as it was in the result, that was an exceedingly hard case, which may perhaps be excused for the kind of law it made. The Court did not there consider, and it has not elsewhere canvassed, the reason of the thing.¹⁰² Scrutton, L.J., in Rex v. London County Council, [1931] 2 K.B. 215, 226, quoted in ALLEN, LAW IN THE MAKING 463 (6th ed. 1958).

¹⁰³ GRAY, THE NATURE AND SOURCES OF THE LAW 190 (2d ed. 1921). See also KELSEN, GENERAL THEORY OF LAW AND STATE 119 (1945).

¹⁰⁴ GRAY, *op. cit.* *supra* note 103, at 192.

¹⁰⁵ Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

¹⁰⁶ See *id.* at 75-76, 80. Such cases do not cause standing difficulties. See note 83 *supra*. There will be a problem of ripeness, sometimes also covered with the “standing” label, if defendant’s behavior, to which the statute was applied, falls within the area that may be constitutionally regulated. Such a defendant has standing because he is obviously subject to an injury from which he would be saved if the statute were held void. But just as obviously, his is not the most suitable case for adjudication of the issue tendered. Yet it may be true — as it was not in *Times Film* — that by hypothesis no more suitable case can ever be constructed, because those who are unjustifiably deterred will never be prosecuted, and what deters them is precisely the prospect of litigation. Whether they should be protected against it is the issue on the merits, and if the answer is at least initially yes, then no more concrete case raising the issue can be expected. See Amsterdam, *supra* note 105, at 96-109.

¹⁰⁷ *E.g.*, United States v. Cardiff, 344 U.S. 174 (1952).

¹⁰⁸ *Cf.* McBoyle v. United States, 283 U.S. 25, 27 (1931); Amsterdam, *supra* note 105, at 82-83 n.79. J. Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69

decisive or even significant where enforcement is initially administrative rather than criminal, because no duty arises before the administrator acts and his action is ample notice. The decisive consideration is, rather, that a broadly worded statute necessarily delegates the power of *ad hoc* decision to officials. And so the official's action cannot be said to derive from a prior legislative decision; it does not represent the will of the state expressed through the political process. When the court declares the statute void for vagueness, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision. It does not hold that the legislature may not *do* whatever it is that is complained of, but rather asks that the *legislature* do it, if it is to be done at all. Herein, chiefly, lies the kinship with the idea of desuetude.

It would be foolish, of course, and it would ensure paralysis, to expect continual expression of the legislative will through continual reconsideration of the statutebook. But normal law enforcement indicates the continuity of will, because it conduces to legislative reconsideration when the dominant opinion turns — although greater strength must be mobilized to repeal a statute than to resist its enactment. When the law is consistently not enforced, the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point.¹⁰⁹ For consistent failure to enforce is itself a political concession to the opposition, and will satisfy at least some portions of it. Consequently that “ease of obtaining new legislation,” of which Gray speaks as leaving “little occasion to apply the doctrine of desuetude,”¹¹⁰ is nullified. The unenforced statute is not, in the normal way, a continuing reflection of the balance of political pressures. When it is resurrected and enforced, it represents the *ad hoc* decision of the prosecutor, unrelated to anything that may realistically be taken as present legislative policy. To be sure, consistent future enforcement will restore the political situation to normal, and reopen the channels to legislative reconsideration.¹¹¹ But of such a consistent course there is no assurance after seventy-five years of nonenforcement, and for the individual the first prosecution has all the vices of an *ad hoc* official decision.

The absence of fair notice in obsolete statutes is not to be minimized, despite such deterrent effect as the statute may retain for the well-informed and ideally law-abiding and prudent citizen. Fair warning as a factor in a holding of desuetude would be much more soundly based on the realities of the common experience with the criminal law than it can possibly be in the usual vagueness case. The average non-reader of the statutebook knows of the law what he knows of ethics and custom, and for the rest, what he knows of prosecutions — hardly

YALE L.J. 543, 547-48 n.9 (1960). Compare the Court's sensitivity to the problem of notice in *Lambert v. California*, 355 U.S. 225 (1957), and in *James v. United States*, 366 U.S. 213 (1961), in which an apparent majority of the Court seemed to accept the practice of prospective overruling of precedents, so as to give fair notice of the law.

¹⁰⁹ See J. Goldstein, *supra* note 108, at 587 n.95.

¹¹⁰ See GRAY, *op. cit. supra* note 103, at 192-93.

¹¹¹ See J. Goldstein, *supra* note 108.

more. Regardless of two declaratory judgments in over seventy-five years, such as those in *Tileston* and in the present case, the total absence of prosecutions is surely the operative fact for the vast majority of people. It is bound to have greater significance than the imprecision of statutory language, which most people are unlikely to consult anyway, and which the courts will often hold to be the more precise and invulnerable, the more technical and incomprehensible it is to the layman. The books are full of dead-letter statutes.¹¹² They make good comic filler at the foot of newspaper columns. The books are full also of more sinister enactments, which are administratively used short of prosecutions, to blackmail and harass and cajole people. It is no coincidence that such statutes are not infrequently found void for vagueness when a prosecution brings them to light.¹¹³ If this is not foreign to Anglo-American practice,¹¹⁴ then in the appropriate case, when there is a history of consistent nonenforcement over a long period, neither is the idea of desuetude, which serves exactly the same end and which is conceptually cleaner — not being enmeshed in what Mr. Amsterdam calls the “infinitely parallel contrariety” of “mutually oblivious doctrines.”¹¹⁵

The prevailing opinion by Mr. Justice Frankfurter does not in so many words hold that the Connecticut birth-control statute has been nullified by desuetude in its application to the use of contraceptives by a doctor's prescription. But it does rest on this flat statement: “The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis.” And the prevailing opinion declines on this ground to reach what would otherwise be a ripe, justiciable issue. There might have been nothing amiss in language a shade more explicit. But the guarded expression is characteristic of our law in the initial stages of a doctrinal development. The consequence of the opinion, nevertheless, must be that a prosecution of persons situated as are Dr. Buxton and his patients would fail on the ground of desuetude. It has to be added, however, that Mr. Justice Brennan's brief concurrence, making a majority, amounts only to a discretionary vote against adjudication, for reasons that are none too scrutable.

V. POLITICAL RESPONSIBILITY AND CONGRESSIONAL INVESTIGATIONS

The Court in the *Birth Control Cases* engaged in a sort of colloquy with the political institutions, begun by way of questions and answers at the argument, stylized and brought to a Socratic conclusion in the prevailing opinion. The upshot was the framing of conditions to invite a responsible legislative decision. By contrast, in this Term's *Wilkin-*

¹¹² Cf. ALLEN, *op. cit. supra* note 102, at 463-66.

¹¹³ See, e.g., Amsterdam, *supra* note 105, at 91 n.120; Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 7 (1960); J. Goldstein, *supra* note 108, at 580-81.

¹¹⁴ But see note 101 *supra*.

¹¹⁵ Amsterdam, *supra* note 105, at 67.

*son*¹¹⁶ and *Braden*¹¹⁷ cases, the Court, as it had done in *Barenblatt v. United States*,¹¹⁸ refused to continue a colloquy upon which it had entered earlier. As in *Times Film*, and as unnecessarily as in *Times Film*, the Court reached the merits and legitimated government action which, to be sure, as I shall argue, it could not very well forbid, but which need not have been turned into "the doctrine of the Constitution," there to gain "a generative power of its own."¹¹⁹

The first of the congressional-investigation cases that the Court brought up for full consideration was *United States v. Rumely*,¹²⁰ decided in 1953. It was a well-selected case, and if one may say so, it stands as a textbook illustration of the Court's awareness and control of the implications and possibilities of its role in our scheme of government. Rumely had collided with a committee empowered by a special resolution of the House to investigate "all lobbying activities intended to influence, encourage, promote, or retard legislation."¹²¹ Rumely's organization sold far-right political tracts, and he declined to reveal to the committee the names of those who made bulk purchases. The Court gracefully conceded the indispensable and far-ranging nature of what Wilson called the "informing function of Congress."¹²² But it emphasized as well the obvious ways in which this function can impinge on what might be thought to be first amendment freedoms, and it construed the resolution as not authorizing the questions that were put to Rumely, despite considerable legislative history to the contrary, including, of course, the action of the House in citing Rumely for contempt. "So to interpret," said the Court, "is in the candid service of avoiding a serious constitutional doubt." "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."¹²³

The next important event was *Watkins v. United States*.¹²⁴ Watkins' inquisitor was the House un-American Activities Committee, whose charter authorizes it to investigate

(i) the extent, character, and objects of un-American propaganda activi-

¹¹⁶ *Wilkinson v. United States*, 365 U.S. 399 (1961). Mr. Justice Stewart delivered the opinion of the Court; Mr. Justice Black, joined by the Chief Justice and Justice Douglas, dissented, 365 U.S. at 415; Mr. Justice Douglas also wrote a dissenting opinion, in which the Chief Justice and Justice Black joined, 365 U.S. at 429; Mr. Justice Douglas also concurred in the dissenting opinion of Justice Brennan, 365 U.S. at 429.

¹¹⁷ *Braden v. United States*, 365 U.S. 431 (1961). Mr. Justice Stewart again spoke for the majority while Justice Black, joined again by the Chief Justice and Justice Douglas, again dissented, 365 U.S. at 438; Mr. Justice Douglas wrote a dissenting opinion, concurred in by Justices Brennan, Black, and Warren, 365 U.S. at 446.

¹¹⁸ 360 U.S. 109 (1959).

¹¹⁹ Jackson, J., dissenting in *Korematsu v. United States*, 323 U.S. 214, 246 (1944).

¹²⁰ 345 U.S. 41 (1953).

¹²¹ See 345 U.S. at 44.

¹²² WILSON, CONGRESSIONAL GOVERNMENT 303 (1901), quoted in 345 U.S. at 43.

¹²³ 345 U.S. at 47, 46.

¹²⁴ 354 U.S. 178 (1957).

ties in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.¹²⁵

Watkins, a labor union official, when asked whether he had been or was then a member of the Communist Party, answered no to both questions, though he allowed that he had "freely cooperated with the Communist Party" He was asked further whether certain named persons had to his knowledge been members of the Party, but declined to answer, asserting his belief that these questions were "outside the proper scope of your committee's activities." The chairman told Watkins that the Committee was authorized "to investigate subversion and subversive propaganda . . . for the purpose of remedial legislation." The questions, the chairman said, were pertinent to such an inquiry, and he directed Watkins to answer. But Watkins maintained his refusal, and the citation for contempt followed. Reversing a conviction, the Supreme Court ordered the indictment dismissed. The opinion of the Court made obeisance to "the informing function," and drew attention also to limitations on it which it might be necessary to impose under the Constitution. But it reached no such issues. "It would be difficult to imagine a less explicit authorizing resolution," the Court said, than the one under which this committee operates. "Who can define the meaning of 'un-American?'"¹²⁶ Given the nature of this charter, and the equally cloudy remarks of the chairman in directing Watkins to answer, and given the fact that under the contempt statute only failure to answer "pertinent" questions is punishable,¹²⁷ that statute suffered from the infirmity of vagueness as applied in this case. So stated — and a special concurrence by Mr. Justice Frankfurter took pains to state it just this narrowly¹²⁸ — vagueness here means very strictly lack of fair notice. But it is open to question how realistic an application of this element of the doctrine the case marks. The chairman's explication of the Committee's mission did nothing to dispel the vagueness of the authorizing resolution. He did, however, direct Watkins to answer. There was no lack of warning in the elemental sense, for example, of *Quinn v. United States*.¹²⁹ The chairman's direction to answer, following Watkins' protest, was fair notice that the question was pertinent in the Committee's view. If vagueness persisted it was not because Watkins remained without guidance as to the meaning of the word "pertinent," applied to his situation; it was rather because the notice should not in the Court's judgment be deemed authoritative; it was, in other words, because the Committee should not have this much discre-

¹²⁵ 60 Stat. 823, 828 (1946).

¹²⁶ 354 U.S. at 202; cf. *Kilbourn v. Thompson*, 103 U.S. 168, 195 (1881): "To inquire into the nature and history of the real-estate pool. How indefinite!"

¹²⁷ REV. STAT. § 102 (1875), as amended, 2 U.S.C. § 192 (1958).

¹²⁸ 354 U.S. at 216.

¹²⁹ 349 U.S. 155, 165 (1955); see *Bart v. United States*, 349 U.S. 219 (1955).

tion to decide what is "pertinent." That is an issue of vagueness, but not of fair notice. Two years later, in *Barenblatt v. United States*, the Court, dividing five to four, held the *Watkins* case to the narrow and none too tenable ground mentioned above, reached the constitutional merits, and placed the crown of principled legitimacy upon the modestly inclined head of the House un-American Activities Committee. *Wilkinson* and *Braden* now reaffirm *Barenblatt*.

But the majority opinion in the *Watkins* case was more broadly and soundly based than has thus been made to appear; it carried forward what might be called the process of avoidance and admonition begun in *Rumely*. The power to investigate, the Court said in *Watkins*, though exercised by committees, is the power of the Houses of Congress. The broader the authorizing resolution, the greater "the discretion of the investigators." Under this resolution, "the preliminary control of the committee exercised by the House of Representatives is slight or non-existent." For the Committee "is allowed, in essence, to define its own authority, to choose the direction and focus of its activity." Wide-ranging investigations may place in issue constitutional protection of individual rights, and thus call for a "critical judgment," which the Court is in a poor position to make because "the House of Representatives itself has never made it."¹³⁰ This, in the statement and in the application, is an element of the doctrine of vagueness that has more substance and is more frequently decisive than the fair-notice factor. In the realm of federal legislation other than the criminal code, it goes by the name of the doctrine of delegation. As such, it does not, unfortunately, have an illustrious past, which perhaps accounts in part for the rejection of *Watkins* in *Barenblatt* and in *Wilkinson* and *Braden*. But this is no reflection on its validity or utility. The Court has since early times paid lipservice to the doctrine in terms of the polarities of the separation of powers.¹³¹ For decades the Court would recite something to this effect but go on to decide the case regardless. Then came *Panama Refining Co. v. Ryan*,¹³² and *Schechter Poultry Corp. v. United States*,¹³³ in which the recitals were as of old, except that the Court did not go on to uphold what Congress had done. The ill repute of those cases has stuck to the doctrine, and not until *Watkins* was it ever made effective again, and not until *Watkins* was there ever a statement by the Court of its substance.

To say that the doctrine of delegation is concerned with the separation of powers is merely to invoke a symbol. To say that it is concerned with checks and balances is to speak of a side-effect it surely has. But it is not to get at the essence of its utility, for the important checks and counterchecks are built into the governmental scheme in more binding ways. To say that it facilitates control of official action by the courts is again to notice a byproduct, and it is to beg the question somewhat, by assuming that judicial control is necessary or desirable. The doctrine of delegation is concerned with the sources of policy, with the crucial

¹³⁰ 354 U.S. at 200-06.

¹³¹ See generally JAFFE & NATHANSON, ADMINISTRATIVE LAW 33-34 (2d ed. 1961).

¹³² 293 U.S. 388 (1935).

¹³³ 295 U.S. 495 (1935).

joinder between power and broadly based, democratic responsibility, bestowed and discharged after the fashion of representative government. It follows that the doctrine should be as applicable to the relationship between Congress and one of its committees as between Congress and the administrative. The members and staff of a congressional committee have of course no more of a national electoral mandate than does the Federal Communications Commission or a special assistant to the Third Assistant Postmaster General. The committee and its staff are a part of the bureaucracy, although the bureaucracy of Congress rather than the executive.

"Delegation of power to administration is," however, "the dynamo of the modern social service state."¹³⁴ When should the Court recall the legislature to its own policymaking function? Obviously, the answer must lie in the importance of the decision left to the administrator or other official. And this is a judgment that will naturally be affected by the proximity of the delegated area to a constitutional issue. The more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature. In the peculiar desuetude situation, when the legislature cannot be said to have made and sustained any decision at all, not even the decision to delegate, no additional criteria come into play. Where delegation properly speaking has occurred, however, as in the usual vague statute, the incidence of criminal sanctions is the first significant factor. But it is not alone decisive. A judicial judgment remains to be exercised concerning the importance of what has been relegated to official discretion. This is not a principled constitutional judgment, denying or affirming the power of government to do this or that. It precedes such a judgment and avoids it, and is in the nature of an estimate, and quite properly prudential in character. Its end is to pose a question, not to impose an answer. This is perhaps all the Court can ever do with respect to most congressional investigations — but one was entitled to expect that it would follow the *Rumely* case, which dealt with a one-shot investigation only, by doing no less.

Nothing can better exemplify the tension between expediency and principle in American government than the problem of congressional investigations. It is easily said that there are constitutional limits to the power to investigate — that is, limits grounded in principle and to be enforced by the Court. Congress, as was held in *Kilbourn v. Thompson*,¹³⁵ may not conduct an investigation unrelated to legislative purposes. It may not, as the Court said in *Barenblatt*, set itself up in place of the judiciary to adjudicate guilt. And the power to investigate, as the Court also affirmed in *Barenblatt*, is subject to "the relevant limitations of the Bill of Rights,"¹³⁶ including the first amendment, and including, one would suppose, what is perhaps most comprehensive,

¹³⁴ Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 592 (1947).

¹³⁵ 103 U.S. 168 (1881).

¹³⁶ 360 U.S. at 112.

“the right to be let alone.”¹³⁷ But there is only one limitation that has been imposed with effective continuity, and that is the privilege against self-incrimination.¹³⁸ The restriction to legislative matters may have meant something in 1881, though not in *Kilbourn v. Thompson* itself; it means almost nothing today, having regard to what are now the acknowledged concerns of Congress. Moreover, the informing function serves not only Congress but the public, for law with us is effective by consent, and Congress should have the power to generate consent by making known the facts that lead it to legislate. There are no doubt some barriers capable of principled formulation that might be imposed under the first and perhaps the fourth and fifth amendments.¹³⁹ But they cannot normally be the same ones as may be imposed upon the governmental power to regulate, for Congress must in all reason be allowed to investigate in order to learn enough to know that it should not legislate; anything else is “to require of senators that they shall be seers;”¹⁴⁰ or is an aspect of the illusion of immutable, self-applying absolutes enclosing an area of permissible governmental power like some international line drawn on a map. Fittingly enough, Mr. Justice Black’s dissent in *Wilkinson* contains one of the most striking expressions of the literalist-absolutist conception:

Our Constitution, in unequivocal terms, gives the right to each of us to say what we think without fear of the power of the Government. . . . Those principles are embodied for all who care to see in our Bill of Rights. They were put there for the specific purpose of preventing just the sort of governmental suppression of criticism that the majority upholds here. . . . For the principles of the First Amendment are stated in precise and mandatory terms. . . .¹⁴¹

But for those for whom the governing rules of our day were less firmly and less completely prepackaged 180 years ago, facts and conditions, yet to be uncovered when the power of investigation is put into question, are essential not only to the enactment of legislation but most often also to principled constitutional judgment by the Court. James M. Landis said it, concisely and definitively, a generation ago:

Relationships, and not their probabilities, determine the extent of Congressional power. Constitutionality depends upon such disclosures. Their presence, whether determinative of legislative or judicial power, cannot be relegated to guesswork. Neither Congress nor the Court can predicate, prior to the event, the result of investigation.¹⁴²

The sum of it is that the power to investigate operates of necessity under a suspension of many otherwise applicable rules. This includes

¹³⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

¹³⁸ See *Quinn v. United States*, 349 U.S. 155 (1955); *Emspak v. United States*, 349 U.S. 190 (1955). *But see* *Rogers v. United States*, 340 U.S. 367 (1951).

¹³⁹ See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

¹⁴⁰ See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 221 (1926).

¹⁴¹ 365 U.S. at 422.

¹⁴² Landis, *supra* note 140, at 217 (footnote omitted).

not only substantive principles but such procedural ones as the right to an impartial judge, to the showing of probable cause, to confrontation and cross-examination. And there seems to be no way to tailor a full suit of principled rules specially for congressional investigations, as has been or can pretty well be done with quasi-judicial agencies, grand juries, and courts-martial. An investigation which invades what would otherwise be protected privacy may be a self-serving frolic, or it may answer to an urgently felt need. Most often, this is the real dividing line between investigations that should be permitted and those that should not. But as the Court said in *Watkins*: "Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures."¹⁴³ The Court can see that it does.

One method of judicial control which has been urged was rejected in *Watkins* and again now in *Wilkinson* and *Braden*. It is that the Court judge of the motives of the Committee, and hold unconstitutional an investigation whose "dominant purpose" is not "to gather information in aid of law making or law evaluation but rather to harass . . . [the witness] and expose him for the sake of exposure."¹⁴⁴ To the extent that, in *Barenblatt*, *Wilkinson*, and *Braden*, this position was bottomed on a determination of purpose proceeding from an objective inquiry, it represents an untenably simplistic view of the "informing function."¹⁴⁵ For the rest, it suffers from the uncertainty, indeed the impossibility that has always bedeviled the search for the decisive motive behind the action of a group of men. Motives are nearly always mixed and nearly never professed. They are never both unmixed and authoritatively professed in behalf of all those responsible for the action. This need not paralyze the function of political judgment; one may be satisfied, as a matter of prudence, that the un-American Activities Committee customarily embarks on punitive expeditions which misuse its power. But, as the Court has had occasion to find out,¹⁴⁶ this is shifting ground; it is an *ad hoc* foundation on which to rest a judgment purporting to be principled.

It remains to note that there was present in *Barenblatt*, *Wilkinson*, and *Braden* the procedural point that these three defendants, unlike *Watkins*, did not exhaust administrative remedies by specifically raising to the committee chairman the question of pertinency. This is a distinction relevant only on the fair-notice view of *Watkins*. At any rate, the Court did not avail itself of it. And it remains to account for *Hannah v. Larche*.¹⁴⁷ By a statute as precise as could be wished, the Civil Rights Commission was empowered to investigate denials of voting rights. The Commission is not an accusatory body; it wields no criminal sanctions. But it does wield the great power of exposure. It operates, both by its

¹⁴³ 354 U.S. at 206.

¹⁴⁴ Brennan, J., dissenting in *Wilkinson v. United States*, 365 U.S. 399, 429; see *Barenblatt v. United States*, 360 U.S. 109, 166 (Brennan, J., dissenting).

¹⁴⁵ See p. 65 *supra*; Landis, *supra* note 140, especially at 212-21.

¹⁴⁶ Compare *Child Labor Tax Case*, 259 U.S. 20 (1922), with *Sonzinsky v. United States*, 300 U.S. 506 (1937), *United States v. Sanchez*, 340 U.S. 42 (1950), and *United States v. Kahriger*, 345 U.S. 22 (1953).

¹⁴⁷ 363 U.S. 420 (1960).

charter and by its own rules, under procedural safeguards that would do great honor to the average congressional, and perhaps even to the average administrative, investigation. For example, the Commission proceeded in *Hannah* with probable cause, made out in writing under oath. But its charter and rules do not provide for confrontation of witnesses with their accusers, nor for the right to cross-examine. There is thus in play a fixed and abidingly important principle of our society, to which this Commission, like other investigative bodies, constitutes an exception. To have held this sort of procedure impermissible on principle might have been gravely to cripple the informing function. But the alternative was not legitimation on principle. Nor did the delegation doctrine offer the sole alternative at this stage of the case. *Hannah v. Larche* was a suit to enjoin hearings that had not yet begun. An injunction had issued below. The Court should have quashed it and dismissed the suits as not ripe. Further proceedings would have made clearer just what the Commission was proposing to do, and just what the consequences were for the complaining witnesses. The Commission is bound by its enabling statute to hear in executive session evidence that tends to defame, degrade, or incriminate.¹⁴⁸ It might have done so here and thus cured all that could be complained of. Or everything might have ended in a plea of the fifth amendment. Enforcement of the Commission's subpoenas, in any event, requires action by a federal court.¹⁴⁹

VI. POLITICAL RESPONSIBILITY AND SECURITY DISMISSALS

Watkins, though now repudiated, does not stand alone in the books, even aside from *Rumely*. And among its companions, *Kent v. Dulles*,¹⁵⁰ a much more difficult case for the result reached, retains unimpaired authority and, one may hope, influence. In *Watkins*, immense discretion was delegated, which the Committee never narrowed in the administration. Subsequent actions of the House may for the sake of argument be deemed to have ratified what the Committee did in the past; prospectively, they can only be said to have continued the grant of the widest discretion. In *Kent v. Dulles*, the original grant of authority to deny passports was as broad. But discretion had been narrowed administratively to reasonably well-defined categories of cases, of which this was one. Normal methods of statutory construction would therefore lead one to conclude that a congressional ratification in 1952 amounted prospectively to an affirmation of administrative authority as limited to the categories of cases in which it had hitherto been exercised. It can thus be said that there was a legislative policy applicable in the circumstances of *Kent v. Dulles*. But as in *Rumely*, it was not wholly explicit. Were freedom to travel less jealously regarded, it might have sufficed. In "the candid service of avoiding a serious constitutional doubt,"¹⁵¹ it need not

¹⁴⁸ 71 Stat. 634 (1957), 42 U.S.C. § 1975a (1958).

¹⁴⁹ 71 Stat. 636 (1957), 42 U.S.C. § 1975d(g) (1958).

¹⁵⁰ 357 U.S. 116 (1958).

¹⁵¹ Frankfurter, J., in *United States v. Rumely*, 345 U.S. 41, 47 (1953).

have, and didn't. But this is a step beyond holding Congress to its responsibility for a policy decision which it has failed to make or to announce with sufficient particularity; this is remanding for a second look.¹⁵²

*Greene v. McElroy*¹⁵³ was *Watkins* all over again, only an even easier *Watkins*. Curiously enough, its authority has now been somewhat impaired, in this Term's *Cafeteria Workers v. McElroy*.¹⁵⁴ The issue in both cases was procedural, as in *Hannah v. Larche*, not substantive, as in *Kent v. Dulles*. In *Greene* the Government had caused a security clearance to be withdrawn from Greene, an executive officer of a defense contractor, who consequently lost his job. There was no quarrel over the question of ultimate power; it was just that the Government had acted on the basis of confidential information from witnesses whom it did not make available for confrontation and cross-examination. This procedure had not been specifically authorized either by Congress or the President. Citing *Watkins*, the Court held that official discretion could not be allowed to impose "substantial restraints on employment opportunities of numerous persons . . . in a manner which is in conflict with our long-accepted notions of fair procedures."¹⁵⁵

Rachel Brawner, in whose behalf the Cafeteria and Restaurant Workers Union sued, was a short-order cook employed by a private contractor who operated a cafeteria at the Naval Gun Factory in Washington, where classified weapons are developed. She needed, and had, clearance and a badge to come to work. One fine day both were withdrawn on the ground that she did not "meet the basic security requirements as regards entrance."¹⁵⁶ No charges were made known; no hearing was held. The admiral in command said it would serve "no useful purpose."¹⁵⁷ Affirming an *en banc* judgment of the court of appeals,¹⁵⁸ the Supreme Court, Mr. Justice Stewart writing, held that the admiral of the gun factory was authorized to dismiss short-order cooks in this fashion, and that it was all quite constitutional.¹⁵⁹

The admiral's authority was derived from Navy regulations approved by the President, which provide: "In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer . . ." ¹⁶⁰ The question was whether employees of contractors may be summarily deprived of their jobs "within a command." Wherein, so far as failure to address itself to this question is concerned, does the above prose differ from the regulation under which *Greene v. McElroy* was disposed of? It read: "Classi-

¹⁵² Cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

¹⁵³ 360 U.S. 474 (1959).

¹⁵⁴ 367 U.S. 886 (1961).

¹⁵⁵ 360 U.S. at 506-07.

¹⁵⁶ Transcript of Record, No. 97, at 32, *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

¹⁵⁷ 367 U.S. at 888.

¹⁵⁸ *Cafeteria Workers v. McElroy*, 284 F.2d 173 (D.C. Cir. 1960).

¹⁵⁹ Mr. Justice Brennan, joined by the Chief Justice and Black and Douglas, JJ., dissented, 367 U.S. at 899.

¹⁶⁰ Quoted in 367 U.S. at 892.

fied defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department”¹⁶¹ There is, said Mr. Justice Stewart, “the illuminating gloss of history.”¹⁶² It shows that the gun factory is government property, and that the Government may exclude anyone from it. But it shows nothing concerning procedures in security dismissals. The commanding officer’s power can hardly be absolute, as Justice Stewart said it was, though he seemed himself to doubt it at another point.¹⁶³ Assuredly the commanding officer of an aircraft carrier docked in New York harbor has absolute authority to order all visitors off at 5 p.m.; but may he order Jews off at 3, or may he order that anyone be put off by being dumped in the sea? Despite disclaimers, the Court’s opinion marks a regression to the question-begging “privilege v. right” reasoning of such inglorious episodes as *Knauff v. Shaughnessy*.¹⁶⁴

But let us assume that the “gloss of history” does illumine the commanding officer’s absolute authority. There was authority — that is, total discretion — in *Watkins* and *Greene*, and there was more detailed authority in *Kent v. Dulles*. Why, in contrast to those cases and to *Rumely*, was there this time no judicial performance “in the candid service of avoiding a serious constitutional doubt”? Plainly because the Court suffered no constitutional doubt. But why? It is not arguable that Mrs. Brawner was not injured. The Court maintained that she was not injured much; but that was not her view, as the only other job offered her by her employer, which she could not accept, was in an inconvenient out-of-town location.¹⁶⁵ The Court may for good reason decline adjudication of an issue, taking into consideration that the injury to the moving party is in the Court’s view *de minimis*. But it is surely startling to find a constitutional principle that the Government must grant hearings to private persons before inflicting palpable injury, except that it need not do so when the injury, though undoubted and bitterly complained of, seems slight. Such an estimate, prudently considered alongside other factors, may determine ripeness; it can scarcely form the content of an “impersonal and durable”¹⁶⁶ principle of the Constitution.

The decisive factor for the majority, it may be ventured, is to be found in the unsubstantiated and on this record unprovable statement that the reason advanced for Mrs. Brawner’s dismissal was “entirely rational,” supplemented at the end by the casual suggestion that perhaps the admiral “simply thought that Rachel Brawner was garrulous, or careless with her identification badge.”¹⁶⁷ Perhaps the gun factory, like

¹⁶¹ Exec. Order No. 10501, § 7(b), 18 Fed. Reg. 7049, 7053 (1953), quoted in 360 U.S. at 502.

¹⁶² 367 U.S. at 892.

¹⁶³ Compare 367 U.S. at 894 with 367 U.S. at 898.

¹⁶⁴ 338 U.S. 537 (1950).

¹⁶⁵ See 367 U.S. at 888; 284 F.2d at 176.

¹⁶⁶ Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 99 (1959).

¹⁶⁷ 367 U.S. at 894.

the west coast in 1942, is a place from which jittery commanders must be allowed to ship people out on hunch, and ask and be asked no questions.¹⁶⁸ One doubts it. But if this is necessary and expedient, no amount of ratiocination can divine the fact, and the Court cannot know and has not demonstrated it. The Court should have required a responsible policy decision to be made, as it did in *Greene*. Certainly it should not have sanctioned such procedures in this case, if ever.

Of course, there are in government, as in private employment, conditions which require that the superior have arbitrary power to be rid of his subordinate, because of the intimacy of their relationships, or in order to complement high political responsibility with commensurate authority. A hearing then would be nonsense, because it could come to nothing.¹⁶⁹ It can be asserted with calm confidence that the relationship between Admiral Tyree of the gun factory and Mrs. Brawner of the cafeteria was nothing of the sort. Despite Andrew Jackson and his spoils system, which really raised quite different issues,¹⁷⁰ hearings are now the norm, and for the most fundamental of reasons.¹⁷¹ Mrs. Brawner was the subject of an exception for which no principled justification has been put forward. It is not the function of the Court to construct such exceptions.

VII. THE POLITICAL QUESTION

Any progression of instances when the final, constitutional judgment of the Supreme Court has been or should be withheld culminates naturally in the nebulous neighborhood of the doctrine of political questions. In *Times Film* — as most often, but not always; not in the *Segregation Cases*, for example — the substantive issue would not answer to any absolute principle; something equally principled but more malleable was called for, which was well within the Court's competence to evolve, but not in the case before it. Insufficient materials were offered for one sort of judgment, and the alternative, though adequate, was unwise in its tendency. We enjoy in many respects more freedoms (which is to say, more convenient social disorderliness) than the rule of principle should, or the judges could, guarantee us. But where freedom makes special claims, though they fall short of principle, the judges have no duty officiously to encourage majoritarian forces of order, who will speak for themselves readily enough when they feel the need. In the *Birth Control Cases*, the substantive issue was again fit for judicial decision. Indeed, the cases presented relatively the easiest aspect of the issue. But there had, effectively, been no prior political decision. Hence the issue was not ripe — not merely in that case, but at all — because the Court should not sap the quality of the political process by exercising initial as opposed to reviewing judgment. The people of Connecticut might enjoy freedom from birth-control regulations without being guaranteed it by the judges,

¹⁶⁸ Cf. *Korematsu v. United States*, 323 U.S. 214 (1944). *But cf. Ex parte Endo*, 323 U.S. 283 (1944).

¹⁶⁹ See *Cafeteria Workers v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960).

¹⁷⁰ *But cf. id.* at 181-82.

¹⁷¹ See Gardner, *The Great Charter and the Case of Angilly v. United States*, 67 HARV. L. REV. 1 (1953).

and it is better that way, if possible. The last collection of cases, starting with *Rumely* and *Watkins*, turned ultimately on issues bringing into question the very capacity of judicial judgment. Here “the candid service of avoiding a serious constitutional doubt” needed to be performed for the added reason that decision should, perhaps, be avoided permanently.

In *Greene v. McElroy*, the Government had won below. The Court of Appeals for the District of Columbia Circuit affirmed a dismissal of the suit, the operative reason being that the case did not present a justiciable controversy — a controversy, “which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence.” The ultimate question was Greene’s fitness to be entrusted with state secrets, and “any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risk, appropriate only to the executive branch of the Government In a mature democracy, choices such as this must be made by the executive”¹⁷² Such is the basis of the political-question doctrine: the court’s sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won’t; finally and in sum (“in a mature democracy”), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.

The case does not exist, of course, in which the power of judicial review has been exercised and to which some such misgivings were not applicable in some degree. But the differences of degree can sometimes be satisfyingly conclusive. There are cases, such as *Luther v. Borden*,¹⁷³ of which no more need be said than what Mr. Maurice Finkelstein said of *Dred Scott v. Sandford*:¹⁷⁴ “A question which involved a Civil War can hardly be proper material for the wrangling of lawyers.”¹⁷⁵ Then there are questions that, as Professor Jaffe has written, “are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that the job is better done without rules” We may also believe, Mr. Jaffe adds, “that even though there are applicable rules, these rules should be only among the numerous relevant considerations.”¹⁷⁶ But this, as I shall argue, is a very different category of cases.

Civil wars to the side, it is quite plain that some questions are held to be political pursuant to a decision on principle that there ought to be discretion free of principled rules. The existence of such discretion may

¹⁷² *Greene v. McElroy*, 254 F.2d 944, 953-54 (D.C. Cir. 1958).

¹⁷³ 48 U.S. (7 How.) 1 (1849).

¹⁷⁴ 60 U.S. (19 How.) 393 (1856).

¹⁷⁵ Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 243 (1925).

¹⁷⁶ Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961).

be considered not generally, but with particular relation to the interest of a particular complainant, which it is held to override. The basis of the decision will be the same, only the result is put in terms of standing, and this is too bad, as it befuddles a concept that has a useful original significance.¹⁷⁷ Recognition of foreign governments and unilateral abrogation of treaties fall in this discretionary category.¹⁷⁸ So also, in effect at any rate, does the question whether and when Congress may permit the states to regulate interstate commerce; and so does the nature of the general welfare for whose promotion the federal government may tax and spend.¹⁷⁹ Uniform *geographic* restrictions on travel by American citizens would appear to present this kind of political question;¹⁸⁰ also which *nationalities* of aliens may be excluded or deported.¹⁸¹ But the italics are crucial. And with respect to the general welfare, travel, and alien matters, only the nature and coverage of the substantive regulation are deemed discretionary; procedural matters are not the same thing. Moreover, this political-question area is to be distinguished from such a power as that of Congress to regulate interstate commerce, which is plenary and almost without practical limit, but is yet not given up as wholly discretionary.¹⁸²

These are discretionary functions of the political institutions, which are unprincipled on principle, because we think "that the job is better done without rules," and there is no reason why their legitimacy as such should not be affirmed by the Court, as it sometimes has been. Such questions call for no avoidance; they call for principled adjudication. The same result would follow should a cabinet officer sue for back pay on the ground that the President had dismissed him arbitrarily, because of his race, and without a hearing. As the present consensus about the impeachment of President Johnson would indicate, it is not difficult to articulate the reasons why the President should have such arbitrary power. His whim should rule, because it is desirable to enlarge as broadly as possible his personal political responsibility, and this demands a special kind of loyalty and responsiveness in his immediate subordinates.¹⁸³ But it is not arguable on principle that the security of the nation will be best served if all employees of the Government and of its contractors can be dismissed on whim or hunch. Nobody con-

¹⁷⁷ See, e.g., *Atlantic Freight Lines, Inc. v. Summerfield*, 204 F.2d 64 (D.C. Cir. 1953); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Reed, J., Vinson, C.J., and Minton, J., dissenting); *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (*semble*); *Massachusetts v. Mellon*, 262 U.S. 447, 482-86 (1923) (*semble*); cf. *id.* at 486-89, where standing in the pure sense was in question.

¹⁷⁸ *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889).

¹⁷⁹ See *In re Rahrer*, 140 U.S. 545 (1891); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); cf. *Pennsylvania v. West Virginia*, 262 U.S. 553, 605 (1923) (Brandeis, J., dissenting); *McCarrroll v. Dixie Greyhound Lines*, 309 U.S. 176, 183 (1940) (Black, Frankfurter, and Douglas, JJ., dissenting); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 359-64 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925).

¹⁸⁰ See *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

¹⁸¹ See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁸² See *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁸³ See, e.g., NEUSTADT, *PRESIDENTIAL POWER* 34-35 (1960).

tends that, given a substantive standard which takes account of the Government's high interest, the adversary process of proof and refutation is not suited to achieving the soundest results here, as in the administration of criminal justice. Security officials contend only that it is often necessary to proceed otherwise, for reasons which the same necessity causes to remain largely obscure. To this unknowable necessity the courts may have to yield, because of misgivings such as those voiced by the lower court in *Greene*, but no principled judgment circumscribing a desirable area of discretionary power is possible.

At least it is true that the question just described, which is of the sort last mentioned by Mr. Jaffe, is different in that the decision whether it should be ruled by principle must be circumstantial and varying. Whether congressional investigations should inquire into matters generally held private, and whether they and other inquisitions should damage careers and reputations without benefit of adversary safeguards are similar questions. The answer cannot be — across the board — yes, we have no principles. It can only be, yes, in contravention of principle if necessary, in the same way in which, by disagreeable necessity, many Negro children do not yet attend integrated schools, though entitled to do so on principle; in the same way in which antimiscegenation statutes are yet allowed to exist; and in which the measures, mentioned by Mr. Wechsler, taking race into account to reduce *de facto* segregation, and benevolent racial housing quotas,¹⁸⁴ may be allowed their day. The judgment of necessity is prudential. The Court sometimes makes bold to undertake it for itself and to cause principle to prevail, usually when the subject matter is well within its experience, as in the administration of the criminal law, or when its own political sense (which can be treacherous) tells it that the necessity has abated, or when it can draw on some fairly stable body of knowledge to disprove the necessity. Otherwise the Court is capable only of a tentative estimate. But the resources of rhetoric and the techniques of avoidance enable the Court to exert immense influence. It can explain the principle that is in play and praise it; it can guard its integrity. The Court can require the countervailing necessity to be affirmed by a responsible political decision, squarely faced and made with awareness of the principle on which it impinges. The Court can even, possibly, as in *Kent v. Dulles*, require a second decision. Of course, vagueness and delegation and their extensions have an intellectual content that must be respected; hence they cannot always be availed of. But in any event, the role of the Court and its *raison d'être* are to evolve, to defend, and to protect principle. If ultimately a course of action that cannot be accommodated to principle is insisted upon by the political institutions, it is no part of the function of the Court to bless it, however double-negatively. Where the judicial process has been invoked defensively, dismissal of the suit is the solution, after other devices have been exhausted. In the congressional-investigation cases, where the criminal process is invoked, the solution, when all else fails, is to deny the process to Congress and require it to use its own, at the Bar of each

¹⁸⁴ See Note, *Benign Quotas: A Plan for Integrated Private Housing*, 70 YALE L.J. 126 (1960).

House.¹⁸⁵ There is nothing shocking about this. The defendant would, to be sure, lose the benefit of jury trial, but the jury's function at present is small; for example, it does not pass on authority of the committee or pertinency of the question.¹⁸⁶ The role that the Court should and can play would still be open to it on habeas corpus.

The most celebrated modern political-question case is, of course, *Colegrove v. Green*.¹⁸⁷ This Term, Mr. Justice Frankfurter, the author of that opinion, had occasion to emphasize the essential foundation of *Colegrove* in the course of delivering the Court's adjudication on the merits in *Gomillion v. Lightfoot*.¹⁸⁸ *Colegrove* does not rest on "a play upon words"¹⁸⁹ about the politics of the people, else *Smith v. Allwright*¹⁹⁰ and its progeny are unexplained, though there are differences in degree here which may have some influence. *Colegrove* is not a standing case, and it does not hold on principle that, like recognition of foreign governments, legislative apportionment must be unprincipled. Nor was the decisive factor the difficulty or uncertainty that might attend enforcement of a decree; it comes easily enough to mind that the foreseeable difficulty in the *Segregation Cases* was graver. The point of *Colegrove* is that even aside from such exceptions as are fixed by the constitutional scheme itself, the political institutions have consistently found it necessary to modify the principle of equality of representation, which is the goal established under the fifteenth and fourteenth amendments. It has been found necessary to represent not only people, but interests. The Court felt unable to deny this necessity, or — without probing motives — to construct a principle that might accommodate it. Nor did the Court see it as its function to bless purely expedient arrangements, or to abandon the principled goal of equality of representation, and the benefits that might be had from its influence as such. Perhaps in an extreme case the Court should see its way clear to make its own judgment of necessity, overriding the political one, and to apply the principle of equality.¹⁹¹ It will have a chance, in *Baker v. Carr*,¹⁹² a case argued this Term and set down for reargument at the next.

In the *Segregation Cases* necessity was set up to defend practices that were not merely deviations from an established principle, but were the fundamental negation of an emergent one, which the Court was to be

¹⁸⁵ See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); *Watkins v. United States*, 354 U.S. 178, 216 (1957) (Frankfurter, J., concurring).

¹⁸⁶ See *Braden v. United States*, 272 F.2d 653, 661 (5th Cir. 1959); Transcript of Record, No. 54, at 66, 69 (charge to the jury), *Braden v. United States*, 365 U.S. 431 (1961).

¹⁸⁷ 328 U.S. 549 (1946).

¹⁸⁸ 364 U.S. 339 (1960). The Court was unanimous in reaching the result. Mr. Justice Douglas, "while joining the opinion of the Court," adhered to his dissent in *Colegrove* and in *South v. Peters*, 339 U.S. 276 (1950). 364 U.S. at 348. Mr. Justice Whitaker concurred in the judgment, writing a brief opinion which placed the result strictly on the equal protection clause of the fourteenth amendment. 364 U.S. at 349.

¹⁸⁹ *Holmes, J.*, in *Nixon v. Herndon*, 273 U.S. 536, 540 (1927), quoted in *Gomillion v. Lightfoot*, 364 U.S. at 347.

¹⁹⁰ 321 U.S. 649 (1944).

¹⁹¹ See *Lewis, Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958).

¹⁹² 366 U.S. 907 (1961). The lower court opinion is reported at 179 F. Supp. 824 (M.D. Tenn. 1959).

prevented from proclaiming. Necessity was relied on to perpetuate an operating principle that was wrong, and to call in question the Court's function of defining the moral goals of government. To have yielded would not have been, as in *Colegrove*, a mere compromise or accommodation. No doubt, some discounting of the claimed necessity was implicit in the Court's decision, and this was done with an eye to the nation as a whole, not just a region. Once the principle was announced and activated as a governing goal, however, the Court placed itself in position, as in *Colegrove*, to yield to claims of necessity by allowing, though not legitimating, compromises; but not in *Cooper v. Aaron*, which was simply an attempt to relitigate the original determination. Thus *Colegrove* is not in conflict with the *Segregation Cases*, and it is thoroughly consistent with *Gomillion*. There, without entering into motives, but on an objective view of what had taken place, the conclusion, as the Court said, was

tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote. . . .

The Court went on:

Against this claim [of racial discrimination] the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve.¹⁹³

There was no necessity to estimate and perhaps yield to; nothing beyond an abstract invocation of the state's power to manage its political subdivisions. Of course it followed that equalitarian principles developed under both the fifteenth and fourteenth amendments prevailed.

I have emphasized the wide area of choice open to the Court in deciding whether, when, and how much to adjudicate. And I have discussed the order of considerations which, as I believe, should govern the choice. These are for the most part prudential in character, but they should not be predilectional, sentimental, or irrational. None of the devices for avoiding adjudication work any binding interference with the democratic process, though the Court's prestige and the quality of its principles, its reasoning and its rhetoric, may make it a persuasive influence. I would suggest that the great sin of the Vinson years, especially in the many alien cases, and perhaps not excluding *Dennis v. United States*,¹⁹⁴ was the failure of the Court to take imaginative advantage of the choices that were open.

Nor is the upshot a Court *fainéant*. There is, in the making of these choices, and in what remains, as Thayer said, "a great and stately jurisdiction."¹⁹⁵

¹⁹³ 364 U.S. at 341, 342.

¹⁹⁴ 341 U.S. 494 (1951).

¹⁹⁵ THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, in *LEGAL ESSAYS* 1, 32-33 (1908).