

## LEARNED HAND'S TWO CONCEPTS OF (JUDICIAL) LIBERTY

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### Abstract

*Amidst cries that judges have become too political (or for some, that they are not political enough), this Article examines the colorful and complicated views of Judge Learned Hand on the role of judges in American society. It explores four of Hand's public lectures and dinner speeches to see how he understood the complicated interaction between the common law, the common will, and the independence of the judiciary. Hand's view—that an independent judiciary is both a sign of a free society and a necessary part of a free society—is analyzed in the hopes that it will shed light on current debates about the role of the judge in America today and offer further insights into the beliefs and style of Judge Hand.*

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Few legal issues seem to capture public attention more than the role of the judiciary. Policy may be at the top of the agenda for a casual cocktail party or a sparring match on cable news, but the figures garbed in black robes loom close behind. Discussion of gun control turns into discussion about how judges should interpret the Second Amendment to the United States Constitution.<sup>1</sup> It rarely takes long for a discussion of gay marriage to move beyond issues of child rearing to a debate over whether gay marriage should be legalized through referendum or judicial action.<sup>2</sup> And the continuing debate over a woman's right to choose has become a proxy for a deeper question about which judicial

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1. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 275, 279-82 (2009); George F. Will, Op-Ed., *Privileges, Guns and the Court*, WASH. POST, Mar. 7, 2010, at A17.

2. See, e.g., Dahlia Lithwick, *Who You Calling Activist?* SLATE (May 15, 2008, 7:17 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2008/05/who\\_you\\_calling\\_activist.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2008/05/who_you_calling_activist.html).

appointees deserve preferment by the Senate.<sup>3</sup> Although the role of the judge is loosely defined in the Constitution, given the attention directed to the judiciary one might think the judiciary is defined in the first article of the Constitution, rather than the third.

In the classroom, a discussion of the role of judges and judicial review crosses disciplinary boundaries. In law schools, the question of judicial power is the stuff of constitutional law classes and advanced seminars on jurisprudence. The judiciary is ostensibly the “least dangerous” branch of the federal government,<sup>4</sup> although scholars have suggested that the Supreme Court is more akin to a lion in sheep’s clothing.<sup>5</sup> Merely asking the question of what a judge does brings forth a flurry of theories of constitutional interpretation.<sup>6</sup> For some political scientists, courts may have ascended to the top of the federal hierarchy, while for others they remain locked in conflict with the elected branches of government.<sup>7</sup>

That judges are controversial in a democratic society is not surprising. Law, after all, holds an uncomfortable position in a regime that is guided by a sense of popular will, whether reflected in a centuries-old Constitution or in more frequent acts of legislation. Law stands above politics as a slowly evolving force that, unlike a legislative statute or executive decree, is generally

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3. *Cf., e.g.*, Valerie Richardson, *Abortion Issue Looms Over High Court Fight*, WASH. TIMES (Apr. 22, 2010), <http://www.washingtontimes.com/news/2010/apr/22/abortion-looms-over-high-court-fight/?page=all>.

4. THE FEDERALIST NO. 78 (Alexander Hamilton).

5. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1-3 (1962) (acknowledging the counter-majoritarian difficulty posed by the judiciary); STEPHEN P. POWERS & STANLEY ROTHMAN, *THE LEAST DANGEROUS BRANCH? CONSEQUENCES OF JUDICIAL ACTIVISM* 1-11 (2002) (offering a quantitative study of the legacy of “judicial activism” in the fifty years since *Brown v. Board of Education*, 347 U.S. 483 (1954)).

6. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing that judicial review should reinforce popular self-government); RONALD DWORKIN, *LAW’S EMPIRE* (1986) (suggesting that judges are constrained to find a “right” answer in individual cases); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (presenting a textualist approach to constitutional interpretation); JACK BALKIN, *LIVING ORIGINALISM* (2011) (offering a theory of the relationship between judicial interpretation, constitutionalism, and the political forces that shape American society). Of course, the list of works that could be included in this footnote could make up an entire law review article. I recognize, then, that even inserting this footnote involves engaging in what one scholar refers to as the law scholar’s “mania for footnotes.” James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1268 (1998); see also Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 40 (1936) (referring to footnotes as the “Phi Beta Kappa keys of legal writing”); cf. Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 648 (1984) (explaining, primarily in the context of judicial opinions, that “[i]f footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane”).

7. Compare KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 4 (2007) (exploring “the process by which judicial supremacy has been constructed over the course of American history”), with STEPHEN M. ENGEL, *AMERICAN POLITICIANS CONFRONT THE COURTS: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER* 170 (2011) (exploring the concept of a “loyal opposition” in the evolving relationship between the elected branches and the federal judiciary).

not so prone to popular sentiment.<sup>8</sup> Law is written in a decidedly technical language and practiced through a series of procedures comprehensible only to its practitioners. Indeed, in his nineteenth century commentary on the American republic, Alexis de Tocqueville (by training a lawyer) noted that the “American man of law resembles in a way the priests of Egypt; like them, he is the lone interpreter of an occult science.”<sup>9</sup> Law is essential to the survival of the democracy, but it works by operating apart from democratic will. Given law’s place as both a third wheel and a vital force in the republic, it makes sense that American judges, who are both lawyers and, for many, the embodiment of the rule of law, are from time to time demonized as antidemocratic or heralded as the saviors of democracy.<sup>10</sup>

Among the heated policy debates of the day, the nature of judicial independence and judges’ accountability to the rest of the government are recurring concerns. During the last presidential election, talk of judicial activism assumed a new form, with one candidate suggesting concrete (and constitutionally questionable) ways to check judicial action.<sup>11</sup> The conversation can be so heated, particularly when seats open on the federal bench, that it may be hard at times to separate questions of politics from questions of law. If politics can dominate the conversation about the role of judges, what has happened to the very idea of judicial independence? Are judges, for all of their talk of independence, actually political actors—slightly apart from, but fundamentally part of a decidedly political government? What, if anything, does this tell us about the state of the republic?

This Article will not resolve the fundamental question of how constrained or free judges are. It takes no stance on constitutional interpretation or the outcome of confirmation hearings. It offers, instead, a bit of “local color” to the question of what role judges play in a democracy by looking to the popular

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8. This is not to say that courts never shift the law in response to popular movements. *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE, VOL. 1: FOUNDATIONS* 6-7 (1991); BRUCE ACKERMAN, *WE THE PEOPLE, VOL. 2: TRANSFORMATIONS* 3-6 (1998) (suggesting a relationship between popular movements and key moments of constitutional change).

9. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 255 (Harvey C. Mansfield & Delba Winthrop ed. & trans., 2000) (1835).

10. For example, in anticipation of and in response to the Supreme Court’s recent ruling regarding the 2010 healthcare reform law, both views received prominent attention in the media. *See, e.g.*, Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES BLOGS (OPINIONATOR) (June 28, 2012, 5:19 PM), <http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/>; Richard Hasen, *A Court of Radicals*, SLATE (Mar. 30, 2012, 4:36 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/supreme\\_court\\_and\\_obamacare\\_will\\_the\\_courts\\_conservatives\\_srike\\_down\\_the\\_affordable\\_care\\_act.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/supreme_court_and_obamacare_will_the_courts_conservatives_srike_down_the_affordable_care_act.html).

11. During his short-lived presidential campaign, former House Speaker Newt Gingrich suggested that Congress should be empowered to subpoena judges to explain controversial rulings. Should judges not willingly appear, he further suggested that the President should be empowered to send federal marshals to force judges to comply with these subpoenas. Amy Gardner, *As Gingrich Ramps Up Rhetoric on Judges, Some on Right Wince*, WASH. POST, Dec. 18, 2011, at A5; *see also* Curt Levy, Op-Ed., *Gingrich Vs. Judicial Activism*, WALL ST. J., Dec. 23, 2011, at A19 (arguing that Gingrich’s proposals, while problematic at points, may not be unconstitutional).

speeches and writings of a great judge. Over the course of more than five decades on the federal bench, Judge Billings Learned Hand issued scores of opinions on subjects ranging from intellectual property to antitrust to criminal law and civil procedure.<sup>12</sup> Hand maintains a reputation as a judge whose jurisprudence epitomizes restraint and “in which political or policy inclinations are supposedly kept out of judicial decision-making.”<sup>13</sup> Even during his life, he was viewed by members of the bench and bar as a first-rate judge. He was honored for his careful analysis as well as his ingenuity. Indeed, on the occasion of fifty years of service, first as a district judge and then as a circuit judge, Whitney North Seymour, a prominent New York attorney and then president-elect of the American Bar Association, offered the following tribute in the *New York Times*:

A deep concern for justice according to the rules is the thread that unites all his opinions. In criminal cases, he has avoided sentimentality over those who are convicted, but has insisted that they be fairly tried. Many principles which he helped develop early in his career have since become standard concepts in American jurisprudence. For example, Judge Hand's insistence on the principle that courts, in construing statutes, have a duty to seek, and then apply, the underlying purpose of the statute as well as its literal meaning is today universally accepted.

As a judge, he has been bold and imaginative; a genuine architect of the law. His opinions suggest a builder trying to fit each stone into its proper place but also concerned that the resulting edifice will not offend esthetic taste. He claims that the actual process of decision has always been hard for him. But his doubts are firmly resolved before he renders his opinion; there is nothing amateurish about his dressing and fitting of the stones.<sup>14</sup>

Such praise was not unique. Hand developed the reputation of being a judge's judge. Humble, erudite, and neither wholly conservative nor liberal, he remains the object of the sort of adoration that appears in Seymour's piece.<sup>15</sup> Indeed, the definitive biography of Hand, by Hand's former clerk Gerald

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12. Judge Hand's opinions remain staples in many basic law school courses. Among the most often studied are *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (establishing the “Hand” balancing test in negligence cases), *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (articulating a standard to differentiate idea from expression in a copyrighted work), *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) (suggesting a revision to obscenity laws in a case involving a novel), and *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (describing the circumstances under which a monopoly is guilty of monopolization under section 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890)).

13. Jack Van Doren, *Is Jurisprudence Politics by Other Means? The Case of Learned Hand*, 33 *NEW ENG. L. REV.* 1, 4 (1999).

14. Whitney North Seymour, *Tribute to the “Old Chief” of the Bench*, *N.Y. TIMES*, Apr. 5, 1959, at 17. As will be shown later, *see infra* notes 34-48 and accompanying text, Learned Hand's views on the importance of text were more complex than what Seymour presents here.

15. In 2011, the Second Circuit Judicial Council Committee on History, Commemorative Events and Civic Education inaugurated a regular lecture series honoring Learned Hand and his cousin and judicial colleague, Augustus Noble Hand. *See* Invitation, Inauguration of the Hands Lecture Series, Second Circuit Judicial Council Comm. on History, Commemorative Events and Civic Educ., available at <http://www.nynb.uscourts.gov/sites/default/files/News/InaugOfHands.pdf>.

Gunther, presented a jurist who was modest and careful, while at various points both self-assured and lacking in confidence.<sup>16</sup> As Judge Michael Boudin explained in his review of Gunther's biography, Hand left a legacy to the bench, the bar, and the general public. Although, Boudin explains:

Most people have no more interest in who was a great judge on the Second Circuit than in who was a great heart surgeon at the Massachusetts General Hospital[,] . . . [c]itizens want to believe that judges embody the cardinal judicial virtues of intelligence, knowledge, fairness, and balance. Now and then, a Holmes or a Hand becomes known to a wider public, and wins for the unelected judiciary a temporary reprieve from prevailing democratic suspicion.<sup>17</sup>

Hand's public reputation grew throughout his life. In 1952, a collection of Hand's essays and speeches were published to popular acclaim, selling tens of thousands of copies.<sup>18</sup> The speeches indicate a man of wit and erudition and show a frankness about the role of the judiciary less frequently demonstrated by members of the federal bench today. These works provide rare insight into the political views of a federal judge. Such rarity is not surprising. Judges have an obligation to maintain a distance from political commentary, lest such commentary lead to their recusal from any number of cases.<sup>19</sup> In addition, the most common form of judicial writing, the opinion, is a highly stylized form of expression. The most prominent raw materials for an opinion are earlier opinions. Through the careful use of quotations and commentary, judges construct arguments the way Matisse constructed his collages, with a series of paper cutouts—shaped and painted according to the artist's will.<sup>20</sup> And unlike a political theorist, who has great flexibility about what questions he treats in a given work, the judge is somewhat constrained by the demands of the case before him. There are, of course, exceptions to this view of the judiciary, but it is not the purpose of this Article to explore those exceptions in any detail.

By reputation and by practice, Hand was a constrained jurist.<sup>21</sup> Yet while

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16. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (2d ed. 2011). Gunther's biography, which is epic in sweep, sparked a series of thoughtful book reviews that explored the difficulty of writing judicial biography. Compare Richard Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L. J.* 511, 513 (1994) (questioning a lack of attention to the "day-to-day work" of Hand as a judge and his major private law cases in a book that attempted to place Hand in conversation with constitutional law rather than private law), with Michael Boudin, *The Master Craftsman*, 47 *STAN. L. REV.* 363, 363 (1995) (offering a far more flattering review of Gunther's biography).

17. Boudin, *supra* note 16, at 379.

18. *LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* (Irving Dilliard ed., 3d ed. 1960). Many of the pieces collected in this volume were originally published in periodical form, including law reviews. Nevertheless, for ease of citation, I cite to the 1960 edition of the Dilliard volume throughout this Article.

19. See 28 U.S.C. § 455 (2006) (describing circumstances in which a federal judge should seek disqualification from a case); see also *Code of Conduct for United States Judges*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (last visited June 26, 2013).

20. See Charles W. Millard, *The Matisse Cut-Outs*, *HUDSON REV.*, Summer 1978, at 321.

21. Charles Wyzanski, Jr. vividly honored Hand by writing:

As Spenser is the poet's poet, Learned Hand is the judge's judge. He is the master

he may not have used his opinions to offer political analysis, his public writings and speeches provide an engaging set of views on the value of an independent judiciary in a free society. Although Hand never forgot the need to maintain a critical distance from contemporary political debates as related to his cases, he was a highly effective speaker and writer when it came to defining his job. The question of what role a judge should play in democracy is a question that implicates issues of law and politics. Hand's particular take on the issue allowed him to reflect on what makes the decision of a judge legitimate. In so doing, he not merely reflected on the constraints placed upon a judge by American democracy, but asked important questions about the relationship between the common law, the common will of the American people, and the relationship between an independent judiciary and liberty. Judges, according to his argument, are torn between being servants of the common law and servants of a changing common will.<sup>22</sup> As he explores these dueling commitments, Hand suggests how independent judges fit into a society in which the prioritization of individual desires is all but impossible. Hand explains why the existence of an independent judiciary is both a necessary part of, and a sign of, a healthy liberal society.<sup>23</sup> While acknowledging the awkward relationship between law and politics, he offers a passionate defense of both the common law and its robed moderators.<sup>24</sup>

This Article takes as its sources a sample of Hand's speeches. It makes no grand claim to offer a full explication of Hand's beliefs, but is instead an exercise in resurrection. Hand's speeches are witty and erudite and deserve a second look—a second look that may help shed light on contemporary debates.<sup>25</sup> Given the limited extent to which judges speak publicly on such

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craftsman of our calling—a judge whose command of technique and beauty of expression are dedicated to harmonizing the claims of this “wistful, cloudy, errant You or I” and “that Great Beast, Leviathan.” His hold upon the bench and bar comes not from pre-eminent place in any official hierarchy; others have license to review even when they cannot surpass him. His remains a manifestation of the Athenian pattern of authority, the indirect leadership of individual men of insight and understanding. In an age that supposes power is the fruit of publicity, manipulation, and material grandeur, he has shown that one of the most durable influences may be an emanation from a life consecrated to membership in Holmes' “Society of Jobbists.”

Charles E. Wyzanski, Jr., *Judge Learned Hand's Contributions to Public Law*, 60 HARV. L. REV. 348, 348 (1947). Justice Benjamin Cardozo was more succinct when, asked which among his colleagues on the Supreme Court was the greatest living American judge, he answered, “The greatest living American jurist isn't on the Supreme Court.” John F. Hagemann, *The Judge's Judge*, 40 S.D. L. REV. 576, 576 (1995) (internal quotation marks omitted).

22. See LEARNED HAND, HOW FAR IS A JUDGE FREE IN RENDERING A DECISION? (1933), reprinted in THE SPIRIT OF LIBERTY, *supra* note 18, 103, 109 [hereinafter HAND, HOW FAR IS A JUDGE FREE?].

23. See LEARNED HAND, THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION (1942), reprinted in THE SPIRIT OF LIBERTY, *supra* note 18, at 155, 155.

24. See *id.* at 164-65.

25. Although Hand's political speeches may be largely straightforward, such cannot always be said for his opinions. In comparing Hand to Benjamin Cardozo, Judge Richard Posner noted, “Hand is the Henry James of judicial stylists.” RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION

matters, examining some of Hand's public writings on the question may elucidate new sides of the debate over the role of the judiciary. In addition, given the reputation of Hand, the opportunity to reflect upon his writings and speeches provides a certain joy in and of itself. Revisiting Judge Hand through his nonjudicial work product should be both timely and enjoyable.

By offering this reading of these pieces, I am not trying to argue that Hand offers a wholly thought-out political theory. Indeed, Hand himself was skeptical of attempts to generalize about a person's thoughts. He expressed his views on the matter frankly in a 1959 exchange with the Canadian literary critic Northrop Frye.<sup>26</sup> Frye, already a distinguished scholar of literature, was then serving as rapporteur of "the Basic Aims Committee . . . of the Atlantic Congress" on the occasion of the tenth anniversary of the founding of NATO.<sup>27</sup> Tasked with drafting a "statement of the fundamental conceptions and beliefs which animate the free world as represented by NATO, in the political, economic and cultural spheres as well as the military one,"<sup>28</sup> Frye wrote to Hand at the suggestion of the Canadian prime minister given that Hand was "one who has thought long and deeply on such subjects."<sup>29</sup> Frye asked the judge to help formulate a clear statement of principles for the West—a task that was difficult for any number of reasons.<sup>30</sup> For all of his humility and ostensible discomfort with the task before him, Hand accepted the challenge.<sup>31</sup>

Hand offered three-and-a-half pages of thoughtful comments on the nature of government in the West but noted that "the one thing to avoid is to adopt generalizations: i.e., 'Principles.'"<sup>32</sup> He explained:

I do not dispute that "Men of Principle" have extraordinary authority in any society, and it behooves governments to recognize it. They have that authority because we all more or less vaguely recognize our inability to appraise each others' values, so that when someone appears with an authoritative bearing and assures us that he can speak for all, we are apt gratefully to take him at his word. He becomes the mouthpiece, pro hac vice, of a "common consent."<sup>33</sup>

In the analysis that follows, Hand will not be presented as a figure who speaks on behalf of the judiciary as a whole. His are not principles that reflect the consent of the many, or even the judicial few. Nevertheless, Hand returned

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142 (1990). That is, "Hand's opinions are successful imitations of the judge's thinking process as he wrestles with a case. It twists and turns as the judge is pulled now hither, now yon, by the weight of opposing considerations as they present themselves to his mind." *Id.*

26. Letter from Learned Hand to Northrop Frye (May 28, 1959) (on file with the Harvard Law School Library).

27. Letter from Northrop Frye to Learned Hand (May 25, 1959) (on file with the Harvard Law School Library).

28. *Id.*

29. *Id.*

30. *Id.*

31. See Letter from Learned Hand to Northrop Frye 1 (May 28, 1959) (on file with the Harvard Law School Library).

32. *Id.* at 2.

33. *Id.*

to a limited set of issues repeatedly in his writing—the role of the judge, the nature of liberty in a democracy, and the relation between a common will and politics. The consistency with which he discussed these issues speaks to the fact that Hand thought seriously about them. In order to properly honor Judge Hand, this Article will not attempt to generalize from his thought or even assert complete intellectual consistency among his speeches. It will instead look to Hand as an example of a judge who thought deeply and publicly about his role in the hope that those thoughts may offer new insights into scholarly debates about a respected jurist and his profession.

#### I. THE WILL TO POWER

On May 14, 1933, Learned Hand delivered a lecture on the question *How Far is a Judge Free in Rendering a Decision?*<sup>34</sup> The lecture was broadcast through the nationwide radio network of the Columbia Broadcasting System.<sup>35</sup> In the speech, Hand lays out the basic conflict facing judges in America. At the beginning of the lecture, Hand presents a fundamental dichotomy that causes much “confusion” in the minds of many:

To some it seems that a judge ought to look to his conscience and follow its dictates; he ought not to be bound by what they call technical rules, having no relation to natural right and wrong. Others wish him to observe very strictly what they consider the law, reading it as though it were all to be found in written words, and never departing from the literal meaning. They demand this of him because they say, and rightly, that he ought not to usurp the power of government, and they believe that to exercise his own judgment as to the justice of the cause would be just such an usurpation.<sup>36</sup>

Hand’s dichotomy is a familiar one. On one side, the judge is a moral figure, addressing individual cases with an eye toward his sense of right and wrong—acting as the arbiter of a higher concept of law than what is found in a written statute or a precedent. On the other side, the judge is a textualist, looking only at the law that is found on the printed page.<sup>37</sup> In being a textualist, the judge resists the temptation to assume legislative responsibility and instead accepts the humbler task of merely serving as an interpreter, applying statutory law to individual cases.<sup>38</sup>

This second and restrained form of judging had long been a subject of interest for Hand in his writings. As a young lawyer, Hand wrote a short piece for the *Harvard Law Review* in which he explained that this vision of judge as “passive interpreter” was the “price of [the judge’s] immunity from political pressure and of the security of his tenure.”<sup>39</sup> Such a judge is a “faithful

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34. HAND, HOW FAR IS A JUDGE FREE?, *supra* note 22, at 103. The lecture was originally printed as *Lecture No. 14*, in NATIONAL ADVISORY COUNCIL ON RADIO IN EDUCATION, LAW SERIES I (1933).

35. HAND, HOW FAR IS A JUDGE FREE?, *supra* note 22, at 103.

36. *Id.*

37. *See id.*

38. *See id.*

39. LEARNED HAND, THE SPEECH OF JUSTICE (1916), *reprinted in* THE SPIRIT OF LIBERTY,



administrator” who suppresses any desire to discern the “uncertain and distracted yearnings of a suppositious public opinion.”<sup>40</sup> Instead, he accepts the written word as the fullest expression of the law.<sup>41</sup> In doing so, he provides a check on the popular will by not attempting to figure out the intent of legislators. The act of reading the words on the page provides an important safeguard to protect ordered liberty and the separation of powers.

The vision of law presented by Hand is deeply positivist. He states, in no uncertain terms, that law is not a higher force derived from God or reason. Instead, law is the “command of the government,” expressed in the form of “the conduct which the government, whether it is a king, or a popular assembly, will compel individuals to conform to, or to which it will at least provide forcible means to secure conformity.”<sup>42</sup> Law does not have moral weight according to this definition. It is a series of practices to which citizens must conform and that, under the Anglo-American common law tradition, are expressed in no small part through the work of judges. Accordingly, how these judges interpret the law determines how the law is applied and how the will of the government is enforced.

The language of the law, however, is vague and unscientific. Although one could imagine using a language as exact as scientific formulae or mathematical proofs,

that would be practically undesirable, because while the government’s commands are to be always obeyed, still they should include only what is generally accepted as just, or convenient, or usual, and should be stated in terms of common speech, so that they may be understood by those who must obey, and may not appear foreign to their notions of good or sensible conduct.<sup>43</sup>

The judge does not approach a given statute like a young student of Latin approaches a passage of Vergil, in a closed universe in which a dictionary provides all that one needs to consider when translating. Instead, the judge attempts to discern what the author of a given law would have thought about the specific case before him in order to make the law relevant to the general populace.<sup>44</sup> This is not, Hand suggests, the same as determining the “intent” of the lawmaker.<sup>45</sup> After all, the lawmaker has no idea what cases might arise in the future. “To apply [his words] literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary.”<sup>46</sup> If a judge were to do so, he would find himself making

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*supra* note 18, at 13, 13 [hereinafter HAND, SPEECH OF JUSTICE]. The article was originally published as Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916).

40. *Id.* at 13-14.

41. HAND, HOW FAR IS A JUDGE FREE?, *supra* note 22, at 106-07.

42. *Id.* at 104.

43. *Id.* at 105.

44. *See id.*

45. *Id.* at 106.

46. *Id.*

decisions that defied common sense. Hand offers the example of “a surgeon who ble[eds] a man in the street” even though a law exists that forbids the drawing of blood in the street.<sup>47</sup> Nobody, he suggests, would claim that the surgeon acted incorrectly in saving the man’s life, and the judge who would defy common sense in the name of the text in such a way “would not be long tolerated.”<sup>48</sup>

Yet even if a judge may need to use common sense, he cannot do so with abandon. Although the process of applying a text to a given situation requires the use of common sense (“and judges are by no means always men of common sense”<sup>49</sup>), this does not give judges carte blanche to act according to their conscience. No bright-line rule exists between interpreting according to common sense and according to the text. “When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right.”<sup>50</sup> Ultimately a judge finds himself in a terrible position; torn between failing at his job by focusing too much on the text, or usurping the legislative role, he must “beware . . . or he will usurp the office of government, even though in a small way he must do so in order to execute its real commands at all.”<sup>51</sup> He finds himself caught between the letter of the law and the spirit of the law.

What is a judge to do? In the American republic, the separation of powers is a fundamental principle. Nevertheless, according to Hand, America created a judiciary, which, by definition, finds itself constantly on the verge of violating that strict separation (or actually doing so).<sup>52</sup> The purpose of legislative assemblies is to “express the common will of the people who were to rule. Never mind what they thought that common will was . . . .”<sup>53</sup> Yet it is the judges who just as often need to discern and sometimes decide the common will present at the original ratification of a law and the common will held by those who will be ruled by the law. Judges are placed in the awkward position of attempting to speak for the common will in their work, even though that common will was never meant to be defined by one individual.<sup>54</sup> Using a favorite metaphor of his, Hand explains that the Founders “might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he would then have been ruler, like the Judges of Israel.”<sup>55</sup>

Judges are not America’s rulers, but they have the power to interpret the common will. And while certain “great judges do it better than the rest of us,”

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47. *Id.* at 107.

48. *Id.*

49. *Id.*

50. *Id.* at 108.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 108-09.

55. *Id.* at 109.

Hand says, it is a difficult task.<sup>56</sup> Hand's address is effectively a public plea for patience because "while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties . . . . Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand."<sup>57</sup> What the public is meant to understand is that any power arrogated by the judiciary is done reluctantly, and that such power is only arrogated in order to help the nation's law retain force. Independent judges are reluctant enforcers of the will of the people.

In short, the judge is in the awkward position of having to give people what they want (law), but also to give them what they do not want (laws that they might not want). In doing so, the judge needs to work with the text and beyond the text of a statute. In walking this fine line, he attempts to discern the common will of society. What is that common will, however? Is it actually something the judge can understand, much less apply? The question is vital for understanding how judges can survive the fickle whim of a democratic citizenry, keeping both the rule of law and the institution of the judiciary in tact. Hand tackled this question in a lecture before the American Law Institute on May 11, 1929, entitled *Is There a Common Will?*<sup>58</sup> The answer, Hand says, is maybe.

What a common will looks like, and how it should be measured, has been a perennial concern for political thinkers. Terms thrown about to define this complicated measurement of individual and societal preferences include "popular will,"<sup>59</sup> "general will,"<sup>60</sup> and, for Hand, "common will."<sup>61</sup> Beyond the semantic differences among these categories lie fundamental disagreements between political thinkers about what interests can and should be measured in politics.<sup>62</sup> The question leads with little effort into basic questions about individual rights, the relationship between those rights and political power, and the connection between the will of the many and the structure of the regime.<sup>63</sup>

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56. *Id.*

57. *Id.* at 110.

58. LEARNED HAND, *IS THERE A COMMON WILL?* (1929), reprinted in *THE SPIRIT OF LIBERTY*, *supra* note 18, at 47 [hereinafter HAND, COMMON WILL]. This speech was originally published as Learned Hand, *Is There a Common Will*, 28 MICH. L. REV. 46 (1929), and Learned Hand, *Is There a Common Will?*, 34 COM. L. J. 305 (1929).

59. See, e.g., Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 811 (1974) (discussing the role of an unelected judiciary in rejecting popular will by "denying policies formulated by . . . elected [officials]").

60. See, e.g., IAN SHAPIRO, *THE MORAL FOUNDATIONS OF POLITICS* 209 (2003) (discussing Rousseau's approach to general will as a guide to shape a political system).

61. See, e.g., HAND, *HOW FAR IS A JUDGE FREE?*, *supra* note 22, at 108 (discussing the claim that legislatures represent the common will).

62. See generally SHAPIRO, *supra* note 60 (comparing a number of competing political theories that address how interests should be measured).

63. The literature on the existence (or lack thereof) of a common will is massive, with the issue having been addressed by philosophers such as Aristotle, Locke, and Rousseau and social scientists such as Kenneth Arrow. Although I will not offer a full survey of their views here, a useful introduction to these issues can be found in SHAPIRO, *supra* note 60.

Hand does not agonize over the definition of the common will in his speech, aligning common will with a sort of popular sentiment about individual matters.<sup>64</sup> Such sentiment, although not rigorously defined, is powerful.

To explain his concept of a common will, Hand uses the example of a new police commissioner in New York who, upon receiving that high office was determined to show that he could effectively enforce the law.<sup>65</sup> This “gentleman of urbanity and elegant apparel” gathered all of the men of the New York “nether world” in whom the police had a genuine interest.<sup>66</sup> Painting a vivid scene for his audience, Hand explains that

[t]hese were gathered in large vans, following raids in those parts of the city which they were known to frequent, and they were taken through the streets, with every circumstance of publicity, to the magistrates, where, as there was generally no tenable charge against them, they were nearly all immediately released.<sup>67</sup>

This exercise in law enforcement-as-performance received the support of the media and may have even affected grand jury deliberations shortly thereafter when, in response to a judge advising the grand jury that “in the prosecution of crimes it was necessary to be circumscribed by the evidence,” the grand jury “said in substance that they thought the occasion was one when something more was necessary than barren adherence to legal form.”<sup>68</sup> Direct action, rather than legal process, became their motto.

It is not that people are utterly lawless. Men and women feel a deep connection to the law as they understand it. Yet abstract claims to due process have a hard time withstanding the force of human emotion. Even Judge Hand acknowledged that “although all my traditions oppose it, that after a particularly blood-thirsty murder or robbery in the streets of New York, something explodes within me which demands summary and bloody vengeance; that is no time for a nice legalism.”<sup>69</sup> And during the First World War and the Russian Revolution, as the nation sought to suppress dissent, one could see large swaths of the population dangerously assenting to this sort of raw emotion—raw emotion that Hand equates with a common will.<sup>70</sup>

It would be easy for Hand to argue that the common law stands as a safeguard against these moments of emotional excess. In fact, he makes no such claim. Common law does not serve as a check on the common will, nor does it reflect the common will.<sup>71</sup> One might hope that a common law, which “[w]e have been long accustomed to think of” as having approval “by the consent of the governed,” could serve to fix the system when the people choose passion

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64. HAND, COMMON WILL, *supra* note 58, at 51.

65. *Id.* at 47-48.

66. *Id.* at 47.

67. *Id.*

68. *Id.* at 48.

69. *Id.* at 49.

70. *See id.* at 49-50.

71. *See id.*

over process.<sup>72</sup> Instead, Hand asserts that to align the common law with a common will is folly. Law, he claims, is not “an expression of a common will which immanently pervades and broods over a society.”<sup>73</sup> The common law, in his view, was not originally made to express a common will, and accordingly, “no general recension has been accepted by any generation.”<sup>74</sup>

Common law survives, he claims, because mankind is rather conservative.<sup>75</sup> Although during key moments in history, such as the French Revolution, large scale political upheaval may take place, old institutions continue to survive, albeit in modified ways.<sup>76</sup> That something survives, though, does not evince assent by the people. People are generally too busy to concern themselves with the details of the law or political institutions, and so “[u]ntil something in the general frame of things is so irritating as to tease them into action, they go along with what is usual, not consciously accepting it, having no opinion and therefore no will about it.”<sup>77</sup> Into this world of seeming apathy, common law strikes a balance between custom and change.<sup>78</sup> It is, however, not an expression of the clear will or purpose of any generation. Instead:

The judges receive it and profess to treat it as authoritative, while they gently mould it the better to fit changed ideas. Indeed, the whole of it has been fabricated in this way like a coral reef, of the symmetry of whose eventual structure the artificers have no intimation as they labor. Sometimes for this reason we speak of the judges as representing a common will, and this was more nearly true before the advent of democracy, since they were of the class which alone had political power.<sup>79</sup>

That claim that the common law is a slow and steady force is a familiar one.<sup>80</sup> Judges both shape and are shaped by this organically developing structure.

At base, though, Hand is asking a more difficult question about where the common law originates and what grants it legitimacy. Does the common law grow out of a common will, or does the common will merely align itself with a preexisting common law? This seems to be a legal chicken-and-egg problem. At some point, when judges could adequately represent the will of the ruling class, the problem seemed easier.<sup>81</sup> After all, at such a moment, the decision of the judge clearly aligned with the will of the ruling class.<sup>82</sup> In a democracy, however, where the ruling class consists of many different social groups, all of

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72. *Id.* at 50.

73. *Id.* at 51.

74. *Id.*

75. *Id.* at 52.

76. *Id.* at 51-52.

77. *Id.* at 52.

78. *See id.*

79. *Id.* at 52-53.

80. *See, e.g.,* Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1463, 1478 (1990) (discussing the patient growth of the common law).

81. *See* HAND, COMMON WILL, *supra* note 58, at 52-53.

82. *See id.*

whom have different preferences, speaking of a unified will is not possible.<sup>83</sup> Given that the common law seems to survive more out of inertia than through assent, the success of the common law, if not based on a measurable will, seems to be a matter of mere happenstance.<sup>84</sup>

If the common will cannot be found in the common law, can it be found in legislation? Again, the answer seems to be no.<sup>85</sup> Legislation, which ostensibly carries the support of the majority, more often “represents the insistence of a compact and formidable minority” that is capable of gaining power.<sup>86</sup> Government is able to function on the basis of successive legislative victories because, as in the case of the common law, at most points in history people are willing to accept the victory of others.<sup>87</sup> “The truth,” Hand explains, “appears to be that what we mean by a common will is no more than that there shall be an available peaceful means by which law may be changed when it becomes irksome to enough powerful people who can make their will effective.”<sup>88</sup> A common will is merely a handy fiction for describing the fact that most are “too inert or too weak” to disagree.<sup>89</sup> The legitimacy of judges who rely on both the common law and a common will seems to be grounded in little more than passive reliance by the people.

Lest fans of the common law fear that the law has little strength because it is not supported by a common will, Hand offers some comfort. While a common will may offer a standard by which to judge the work of the common law, the absence of such will is somewhat liberating.<sup>90</sup> Although the common law does not rest on firm external foundations, it is able to support itself.<sup>91</sup> The common law does not require popular sanction to do what it does best—balance custom with adaptation. Such freedom would be lost if the common law responded to another force, be it the common will or popular violence.<sup>92</sup> In one of his more complicated constructions, Hand says that “there can be no intermediate hybrid which either creates or repeals law by recourse to a standard not fixed by some means itself the creation of law.”<sup>93</sup> What Hand

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83. *See id.* at 53.

84. *See id.* at 52-53. This is different, of course, than the traditional view of common law, adopted by figures such as Sir Edward Coke who explained that common law “embodies the wisdom of generations, as a result not of philosophical reflexion but of the accumulations and refinements of experience.” J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 35 (1987), cited in David Martin Jones, *Sir Edward Coke and the Interpretation of Lawful Allegiance in Seventeenth-Century England*, in *LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE* 86, 88 (Allen D. Boyer ed., 2004).

85. *See* HAND, *COMMON WILL*, *supra* note 58, at 53-54.

86. *Id.* at 53.

87. *See id.* at 53-54.

88. *Id.* at 53-54.

89. *Id.* at 54.

90. *See id.*

91. *See id.*

92. *See id.*

93. *Id.*

seems to mean here is that the common law has provided for the means of its own survival. Common law must be independent if it is to be law at all, and being independent it must be able to provide the means for its evolution and impact. It establishes a system of processes and customs, which, because they balance a popular desire for stability and occasional change, keeps the common law alive.<sup>94</sup>

At the end of his speech, Hand argues that the American Law Institute, as it works toward the clarity and promulgation of better laws, must “set [its] eyes to the future but . . . plant [its] feet upon the foundation of the common-law.”<sup>95</sup> Although the legitimacy of common law may not be strong, the common law has the means to defend and support itself and thus provides a basis for the work of the Institute.<sup>96</sup> As the Institute conducts its work, it should do so with an eye toward increasing justice, but without heeding cries for rapid change or revolution. Hand explains that he would never question the importance of rejecting tyranny, but he warns the free man who resists the law to “beware that in his rebellion he lay hold of some fundamental affirmation of his spirit” such that he becomes aware of how his pursuit of change may affect those around him.<sup>97</sup> He warns his audience to use its authority wisely lest the common law be subverted by being too responsive to the passions of the moment.<sup>98</sup> His plea is for an energetic defense of an evolving law, tempered by a deep sense of moderation. It reflects a faith in the existence of a common law, which can best be defined as a process of adaptation, rather than as a dogmatic set of legal truths.

It is unclear how the interpretive role of the judge relates to the independence of the common law. Hand rejects the vision of judge as dictionary, suggesting that the judge needs to interpret laws with an eye toward what will make sense in a given period.<sup>99</sup> At the same time, the judge needs to forswear concern for the popular will in order to support the common law. He believes in the importance of a common law that transcends popular will and in the existence of judges who defend that law by appealing to both the law as written and the law as people may imagine it should be.<sup>100</sup> The Learned Hand that appears in these speeches is both deeply idealistic and pragmatic, portraying a judge who seems to exhibit aspects of both independence and servitude.

How, though, can one use such authority wisely in a society filled with conflicting goods, and in which the common will seems to be little more than

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94. *See id.*

95. *Id.* at 56.

96. *See ALI Overview*, AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited June 26, 2013) (explaining the Institute’s role in “producing scholarly work to clarify, modernize, and otherwise improve the law”).

97. HAND, COMMON WILL, *supra* note 58, at 55.

98. *See id.* at 51-52.

99. *Id.* at 52 (explaining that “judges receive [the common law] and profess to treat it as authoritative, while they gently mould it the better to fit changed ideas”).

100. *See id.* at 49-52.

wild passion or the temporary whim of a legislative victory? Put in this position, the judge seems to be a servant with too many masters. He serves a common law whose persuasive power seems arbitrary, and a common will that is little more than passing fancy. With neither a concrete common law nor a concrete common will to build upon, how can he decide among various conflicting preferences found in a liberal society? Hand explains that “[l]ife in a great society, or for that matter in a small, is a web of tangled relations of all sorts, whose adjustment so that it may be enduring is an extraordinarily troublesome matter.”<sup>101</sup> Can any person, much less a judge, actually prioritize the conflicting wants of society if no common will exists? How can a judge actually do his job?

## II. BEING CHATTY WITH NEW HAVEN’S LITERATI

The preceding two speeches present judges who are torn between being robotic administrators and creative contributors to the common law, whose authority seems to rest neither wholly in the common law itself nor in allegiance to a common will. Indeed, the only common will Hand seems to acknowledge seems more akin to mob mentality, rather than to a rational, legitimizing standard.<sup>102</sup> Beyond the fact that this lack of standard makes the life of the judge more difficult, is the lack of an objective will a larger problem for society? One answer to this question appears in a colorful dinner talk delivered by Hand to the Elizabethan Club of Yale University in 1941.<sup>103</sup> The speech, simply titled *Liberty*, offered Hand the opportunity to reflect upon the freedom of individuals and the various forms of freedom available in a democratic society.<sup>104</sup> This understanding of liberty ultimately can help one understand his view of the judiciary and its place in a liberal society.

The Elizabethan Club (commonly known as “the Lizzie”) was founded thirty years earlier by Alexander Smith Cochran, a wealthy graduate of the Yale College Class of 1896.<sup>105</sup> Cochran, a Yonkers native who was heir to a major carpet fortune, was considered at one point to be the most eligible bachelor in the United States.<sup>106</sup> A yachtsman and collector, Cochran approached his college English professor William Lyon Phelps with the idea of founding a club in New Haven where students and faculty members could meet over tea on a daily basis to discuss ideas.<sup>107</sup> Cochran purchased and furnished a house in New

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101. *Id.* at 51.

102. *See id.* at 48-52.

103. LEARNED HAND, LIBERTY (1941), reprinted in THE SPIRIT OF LIBERTY, *supra* note 18, at 144 [hereinafter HAND, LIBERTY]. The speech was originally published as Learned Hand, *Liberty*, YALE ALUMNI MAG., June 6, 1941, at 10.

104. HAND, LIBERTY, *supra* note 103, at 144-46.

105. *See* Alan Bell, *Introduction* to STEPHEN PARKS, THE ELIZABETHAN CLUB OF YALE UNIVERSITY AND ITS LIBRARY 3-5 (1986) [hereinafter PARKS, CATALOGUE].

106. *Id.* at 3; Caroline McCullough, *Cochran’s Club: Exhibit Reveals Man Behind Literary Society*, YALE DAILY NEWS, Jan. 13, 2012, <http://yaledailynews.com/weekend/2012/01/13/cochrans-club-exhibit-reveals-man-behind-literary-society/>.

107. STEPHEN PARKS, THE ELIZABETHAN CLUB OF YALE UNIVERSITY, 1911-2011: A CENTENARY ALBUM 13-14, 133 (2011) [hereinafter PARKS, CENTENARY ALBUM]; PARKS, CATALOGUE, *supra* note 105, at 3-4.



Haven for the Club, and, to provide a centerpiece for this salon, donated Elizabethan manuscripts and books, including Shakespeare folios and quartos and first editions of Milton and Spenser.<sup>108</sup> These acquisitions were so significant that a November 1911 article in the London *Mail* noted that “[w]hile there are many Shakespeare collectors in the United States, [Cochran’s acquisitions] at once places Yale University on a level with, if not above, all other collections, public or private, in America.”<sup>109</sup> The Club opened in December 1911 and became a home for literary life on the Yale campus.<sup>110</sup>

In 1940, the Lizzie made the acquaintance of another college club, the Signet Society of Harvard University.<sup>111</sup> Founded in 1870 and housed in a charming house on Mount Auburn Street in Cambridge, the Signet served as a combination lunch club and literary society.<sup>112</sup> At its annual dinner in 1940, the Signet honored the Lizzie for its devotion to the arts.<sup>113</sup> The poet Stephen Vincent Benet, a Lizzie member, read some original work while Wilmarth Sheldon Lewis, the Lizzie president and a passionate collector of the works of Horace Walpole, offered remarks.<sup>114</sup> The following year, in reciprocity, the Elizabethans invited a group of Signets to join them for their thirtieth anniversary dinner in New Haven.<sup>115</sup> After what one Signet historian described as a “bruising battle” during an “inter-society duel on the croquet lawn scheduled for four-thirty,”<sup>116</sup> Elizabethans and the Signet representatives dined and were addressed by Learned Hand, a Signet alumnus.<sup>117</sup>

Hand admits at the beginning of the Elizabethan Club speech that to even attempt to define liberty is a dangerous task. The word, he explains, “is so charged with passion” that in approaching his subject he felt as though he were

108. *Id.* at 17.

109. *The Huth Sale, Shakespeare and Bacon*, THE MAIL (Nov. 20, 1911).

110. PARKS, CENTENARY ALBUM, *supra* note 107, at 17. For more detailed histories of the founding of the Elizabethan Club, see Alan Bell, *Introduction* to PARKS, CATALOGUE, *supra* note 105, at 3-37; PARKS, CENTENARY ALBUM, *supra* note 107, at 13-19.

111. Nathan C. Shiverick, *A Short History of the Signet Society*, in THE SIGNET: A CENTENNIAL CATALOGUE, 1870-1970, at 23-24 (1970), available at <http://www.signet.society.org/short-history-of-signet-1970/>.

112. *Id.* at 3-6.

113. *Id.* at 24.

114. *Id.* Lewis, who would strike up a personal friendship with Learned Hand, ultimately donated his collection to Yale, forming the basis of the Lewis-Walpole Library in Farmington, Connecticut. See WILMARTH SHELDON LEWIS, ONE MAN’S EDUCATION 357 (1967); see also *The Library and Its History*, THE LEWIS WALPOLE LIBRARY, [http://www.library.yale.edu/walpole/about/library\\_history.html](http://www.library.yale.edu/walpole/about/library_history.html) (last visited June 26, 2013) (discussing the history of the Lewis Walpole Library).

115. Shiverick, *supra* note 111, at 24.

116. *Id.* Shiverick notes that the Signet “archives are mute, unfortunately, as to who represented the Signet on the tournament ground and the outcome of that bruising battle.” *Id.* The historical record, however, indicates an Elizabethan Club victory on the croquet lawn. PARKS, CENTENARY ALBUM, *supra* note 107, at 48.

117. See THE SIGNET, THE THIRD CATALOGUE OF THE SIGNET 101 (1903), available at <http://archive.org/details/thirdcatalogues01socigoog>.

an explorer wading through “quicksand[.]”<sup>118</sup> Nevertheless, any individual in 1940 had an obligation to come to “at least a tentative conclusion with himself about it” given a world “so wretched and so riven, where men and women are suffering misery, mutilation, and death in the name of Liberty.”<sup>119</sup> Citing Abraham Lincoln, he notes that liberty acts as a god to whom both sides of a war can pray for solace and victory.<sup>120</sup> He thus approaches liberty gingerly, with the combination of caution and nerve that Oedipus used when approaching the Sphinx.<sup>121</sup>

The first vision of liberty Hand presents is one of negative liberty. Negative liberty would later famously be defined by Isaiah Berlin as “the area within which a man can act unobstructed by others.”<sup>122</sup> Continuing, Berlin explains that “if this area is contracted by other men beyond a certain minimum, [an individual] can be described as being coerced, or, it may be, enslaved.”<sup>123</sup> For Hand, negative liberty is a bit more concrete a concept, deeply tied to the standards of the society in which one lives: “Each has a vested right in his freedom grounded in the deepest of foundations, the current liturgies of the society to which he belongs.”<sup>124</sup> Citing the prominent anthropologist Lawrence Henderson, Hand explains that negative liberty may rest in the simple claim that people experience negative liberty when, as members of society, they engage in their “accustomed rituals.”<sup>125</sup> Under such a definition, any interference with one’s practices may be considered a denial of freedom—whether through interfering with the practices of a given society from the outside or denying “Colonel Lindbergh the privilege of assuring us of the speedy and certain collapse of Great Britain.”<sup>126</sup> This form of liberty, which is defined by the ability of individuals to act according to contemporary practice is relativistic, with there being “no objective standard except for blind partisans of the status quo whatever [that practice] may be.”<sup>127</sup>

Hand, however, tells his audience that he wishes to find such a rule, and he demonstrates that the move from complete relativism to an objective way to decide among whether some actions are better than others is difficult. In order to prove this, he offers a series of possible lives that can be considered fundamentally good. To start, he notes that certain basic needs must be considered objectively good—the rights to “eat, sleep, be clothed and

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118. HAND, LIBERTY, *supra* note 103, at 144.

119. *Id.* at 145.

120. *Id.* at 144.

121. *Id.* at 144-45.

122. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), *reprinted in* THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191, 194 (Henry Hardy & Roger Hausheer eds., 1997).

123. *Id.*

124. HAND, LIBERTY, *supra* note 103, at 145-46.

125. *Id.* at 145.

126. *Id.* One recent and vivid (albeit fictional) discussion of Charles Lindbergh’s affinity for Nazi Germany appeared in PHILIP ROTH, THE PLOT AGAINST AMERICA 6 (2004).

127. HAND, LIBERTY, *supra* note 103, at 146.

sheltered.”<sup>128</sup> Few, he assumes, would quarrel with those rights, but his audience, in the midst of enjoying fraternity and fine cuisine, would have no patience for a speech that merely asserted as good a Hobbesian state in which only the most basic needs of man are met.<sup>129</sup> (They would, it seems, deem such goods to be not good enough.) Others in his audience, however, may want to determine the good in a Kantian way—with reference to an act that could be accepted as moral, because of its universal applicability.<sup>130</sup> Hand dismisses the Kantian approach as hopelessly incomplete, not offering any substantive content for the good.<sup>131</sup> As neither mere necessity nor mere morality is enough to define the good, Hand thus seeks some standard that can define the good from on high.<sup>132</sup>

For that he turns to the *kallipolis* of Plato’s *Republic* and its proposed guardians who are capable of the “weighing of one good against another.”<sup>133</sup> Hand’s reference to Plato transforms him into an impishly Socratic figure. He narrates a not infrequent occurrence, in which a “cultivated snob” reflects upon the glories of fifth century Athens.<sup>134</sup> Inevitably, he explains, someone else in the room points out, earnestly and with cause, that the stylized vision of Athens as a glorious city covers up “a hideous nightmare; that these supposed specimens of ultimate human perfection were shameless exploiters of a far greater number of other men whose misery, when matched against their own splendors, makes Stygian blackness to the eyes of all just and humane persons.”<sup>135</sup> Playing the gadfly, Hand claims that in such a position he enjoys “siding with the snob,” and demanding that the interrupting “Thersites” explain himself.<sup>136</sup> While acknowledging that “exploitation of the weak” is an unadulterated evil, he asks his interlocutor to “put aside such concrete incidents disturbing to philosophic speculation and consider the issue abstractly.”<sup>137</sup> If, he wonders, it were possible to mathematically balance the good of the many with the good of the individual, what would the equation look like?<sup>138</sup> His interlocutor, “rightly [angered] at this offensively insincere humility” responds that injustice is never right, and Hand is left with the feeling that his companion had not “thoroughly illuminated all the dark places.”<sup>139</sup> Perhaps theory should

128. *Id.*

129. *Id.* See generally THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL* 81-87 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) (describing the “naturall [sic] condition of mankind”).

130. See HAND, *LIBERTY*, *supra* note 103, at 146. Kant introduces his categorical imperative in IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).

131. See HAND, *LIBERTY*, *supra* note 103, at 146.

132. See *id.* at 146-47.

133. *Id.* at 147.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 147-48.

138. See *id.*

139. *Id.* at 148.

triumph over reality—at least for the sake of argument.

Hand admits to frustration at the difficulty of answering the question. The inability to answer the question has the potential to lead to intellectual paralysis on one hand, as people become frustrated, or the domination by the one faction of a society that may provide an answer if it can claim the authority to do so.<sup>140</sup> More troubling (particularly given the war against fascist Germany), however, is Hand's suggestion that another answer to the question may involve subsuming the happiness of the individual within the happiness of the society as a whole.<sup>141</sup> In words that piercingly describe the political theory of totalitarianism, Hand explains that such a solution would

instill in all a faith that each achieves his personal and individual best by submerging himself in common aspirations, a common fate, a common self. There would be no denial of Liberty in that; nobody would feel himself under alien domination; each would realize himself in all, and all in each.<sup>142</sup>

The notion that liberty can only be found through connection to a higher sense of the good is the essence of what political theorists refer to as positive liberty. Positive liberty stems from the notion that liberty is impossible when merely defined as freedom from coercion.<sup>143</sup> It looks toward coercion as a means of giving people a purpose or sense of accomplishment in life.<sup>144</sup> In his explanation of positive freedom, Berlin explains that the adherent of positive freedom believes “it easy for me to conceive of myself as coercing others for their own sake, in their, not my, interest. I am then claiming that I know what they truly need better than they know it themselves.”<sup>145</sup>

It would be surprising for a federal judge of Hand's stature to so flippantly accept positive liberty, particularly during a war between democratic and fascist Europe. Perhaps even more shocking for his audience, he explains that the idea was not born among the Russians or Germans (or “their pathetic Italian imitator”).<sup>146</sup> Instead, models of positive liberty could be found in ancient Sparta and Rome, in eighth century Islam, sixteenth century Spain, and eighteenth century France.<sup>147</sup> “Man,” after all, “is a gregarious animal, extremely sensitive to authority; if it will only indoctrinate him thoroughly in his childhood and youth, he can be made to espouse any kind of orthodoxy—whether of belief or feeling.”<sup>148</sup> Even worse than the ease of achieving—and mankind's familiarity with this model of—social life, however, is the potential for success in this model of social organization. “Hitler,” Hand explains, “is

140. *Id.* at 149.

141. *See id.*

142. *Id.*

143. *See* BERLIN, *supra* note 122, at 202-03, 206.

144. *Id.* at 204 (“[Society] is then identified as being the ‘true’ self which, by imposing its collective, or ‘organic,’ single will upon its recalcitrant ‘members,’ achieves its own, and therefore their, ‘higher’ freedom.”).

145. *Id.*

146. *See* HAND, LIBERTY, *supra* note 103, at 149.

147. *Id.* at 149-50.

148. *Id.* at 150.

quite right in predicting the doom of democracies as he understands democracies . . . . A society in which each is willing to surrender only that for which he can see a personal equivalent, is not a society at all; it is a group already in [the] process of dissolution . . . .”<sup>149</sup> Hand’s message is bleak at best—the end result of a society dedicated to individualism (“be it ever so rugged”) is not “Utopia” but “Bedlam.”<sup>150</sup>

Lest the above shock admirers of Learned Hand, or lead them to question his patriotism or respect for democracy, at this point his tone shifts dramatically. While man can be trained to love orthodoxy, and while orthodoxy may even be necessary for “survival in a robber’s world,” Hand does not yearn for the day that “our communal self can become the chalice for a more exquisite liquor of civilization than the troubled world has yet seen.”<sup>151</sup> Instead, he believes that such a life would suppress an essential part of human nature. “[I]t is man’s inherent willfulness that I would preserve,” Hand explains, “and in which I wish to set the stronghold of that Liberty I prize; that stone which social reformers have always rejected I would make the head of the corner.”<sup>152</sup> Restlessness, and the inherent tensions that follow, is for Hand the essence of liberty, and that which totalitarian regimes by definition crush. That restlessness, which he suggests is common to our “simian cousins in captivity,” may be “trying” but teaches man the most basic of impulses—“to meddle and remember, and then to meddle and record.”<sup>153</sup> And from such meddling comes the greatest of human achievements:

battleships, aeroplanes, relativity, the proton, neutron, and electron, T.N.T.,  
poison gas, sulfathiazole, the Fifth Symphony, *The Iliad*, *The Divine Comedy*,

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149. *Id.*

150. *Id.* At this point in the speech, at least one member of the audience—not recognizing the speaker’s ironic tone—blanched at the fact that Hand was even invited to speak. Elliot Richardson, then a Harvard undergraduate who offered introductory remarks at the Elizabethan Club dinner on behalf of the Signet Society, recalls Hand as “a craggy-faced man, whose name I didn’t quite catch. He began his speech by making a few I thought rather heavy jokes, then pulled a sheaf of papers out of his pocket and began to read his speech page by page.” Geoffrey Kabaservice, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT* 59 (2004). During the initial section of Hand’s speech, in which the Judge explained the nature of positive liberty and the argument for totalitarianism, Richardson thought:

“My God, where the hell did we get this guy?” I tried to slink under the table, I was so embarrassed. But then, having erected this edifice, the speaker began to take the case for totalitarianism apart, and by the time he finished, he had totally demolished it. And in the course of his speech, he had become powerfully eloquent. That was the only after-dinner speech I ever heard where people stood and cheered and stamped at the conclusion, despite the fact that the speaker read from a script and, aside from his opening ad-lib remarks, made no attempt at humor.

*Id.* at 59-60. Richardson would go on to serve as a law clerk for Judge Hand and Justice Felix Frankfurter, and serve as Secretary of Health, Education and Welfare, Secretary of Defense, Attorney General, and Secretary of Commerce. Neil A. Lewis, *Elliot Richardson Dies at 79; Stood Up to Nixon and Resigned in “Saturday Night Massacre”*, N.Y. TIMES, Jan. 1., 2000, at B7.

151. HAND, LIBERTY, *supra* note 103, at 151.

152. *Id.* at 151-52.

153. *Id.* at 152.

*Hamlet, Faust, The Critique of Pure Reason, Das Kapital, The Constitution of the United States, The Congress of Industrial Organizations, Huey Long, and The New Deal.* All of these from just “monkeying around”!<sup>154</sup>

These achievements are not universally great, of course. They are a mix of noble innovations and tragic creations. Nevertheless, even though tragedy and violence may follow creativity, a society that denies man’s ability to meddle and dissent not only destroys liberty, but denies man access to “the password that has hitherto opened to us the gates of success as well.”<sup>155</sup>

By the end of his speech, Hand has failed, of course, to define any means of prioritizing the actions of various free individuals. Instead, he has asserted that the content of liberty itself rests upon the inability to achieve such prioritization. If liberty consists in the ability to be frenetic and dissenting, and to resist categorization and orthodoxy, then the stated purpose of his talk has been for naught. Yet Hand still does not view this robust individualism as completely anarchic. Indeed, “[w]e started to find some positive content for Liberty, and all we have discovered is that it does not follow because we are not conscious of [the] constraint that we are not constrained.”<sup>156</sup> What form does this constraint take, however? Although he does not define the constraint itself, he indicates that beneath that constraint lies “the faith that our collective fate in the end depends upon the irrepressible fertility of the individual, and the finality of what he chooses to call good.”<sup>157</sup> It seems that liberty, which left to its own devices is chaotic and competitive, is constrained only by faith that the long-term result of that sort of chaos is a fundamental good when such chaos is based in the will and creativity of the individual. The answer would not satisfy a philosopher, but Hand makes no pretense to offering a rigorous answer. The talk is a defense of individualism in its fullest form—motivated in no small part by the politics of the day—and written with the confidence of one who believes that even if you cannot define a hierarchy of goods, a system in which individualism is an inherent good is good itself.

### III. FREE SOCIETY FOR FREE JUDGES

Does the Elizabethan Club speech help resolve Hand’s concern about the role of judges? If anything, the 1941 speech showed the futility of attempting to establish a hierarchy of goods. Whether in citing Plato’s *kallipolis* or Hitler’s Germany, his point is that a search for a freedom based upon a unitary, positive good ultimately undermines liberty. Individualism, although possibly a source of chaos, is worthy of protection in a free society. Unfortunately, while this vision of a liberal society may be appealing, it does not seem to help us resolve the question of what standards judges can turn to in order to help legitimize the common law. The judge remains trapped in an awkward position, defending a common law that survives based upon the inertia of citizens and being expected

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154. *Id.* at 152-53.

155. *Id.* at 153.

156. *Id.* at 154.

157. *Id.*

to occasionally interpret law in accordance with the temporary whims of the people. Put in this situation, how are judges actually independent?

One final speech helps clarify the issue and suggests how the incomplete independence of judges may in fact be more complete than a first glance reveals. At a speech given in 1942 to honor the 250th anniversary of the Supreme Judicial Court of Massachusetts, Hand chose as his subject *The Contribution of an Independent Judiciary to Civilization*.<sup>158</sup> In the speech, Hand offers a deeper elaboration of the relationship between the common law and statutory law and a passionate defense of independence. In doing so, he helps clarify that the common law has a deeper legitimacy—which, when properly defended, helps ensure the survival of a society based upon negative liberty—and that a society that demands that its judges be anything less than independent is deeply flawed.

To begin, Hand distinguishes between what he calls the customary law and constitution from “enacted law.” Enacted law, he explains, is “any authoritative command of an organ of government purposely made responsive to the pressure of the interests affected.”<sup>159</sup> Such law is the result of a public deliberation process whereby many forces are able to influence the laws that are created.<sup>160</sup> Consider, for example, any act of legislation that grows out of a combination of deliberation, lobbying, and media attention. Tied to the moment in which it was promulgated, enacted law is “ordinarily a compromise of conflicts and its success depends upon how far mutual concessions result in an adjustment which brings in its train the most satisfaction and leaves the least acrimony.”<sup>161</sup> Enacted law is a vital part of democratic society that, because it is the result of actual political action, is prone to rapid change. An independent judiciary, Hand explains, exists to ensure that this compromise, although not permanent (for all enacted laws can be changed over time), is maintained.<sup>162</sup> It does this by “reconstruct[ing] the past solution imaginatively in its setting and project[ing] the purposes which inspired it upon the concrete occasions which arise for their decision.”<sup>163</sup> In short, the judge represents a conservative force in a changing society.

This imaginative reconstruction allows judges to determine the intent of the creators of the laws, not so much to apply the law to individual cases, but to ensure that the law is something more than the result of temporary whim.<sup>164</sup> Indeed, Hand explains that one could imagine a society that would not require an independent judiciary. In such a society, enacted law could be created and

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158. See LEARNED HAND, *THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION* (1942), reprinted in *THE SPIRIT OF LIBERTY*, *supra* note 18, at 155, 155. This speech originally appeared in MASSACHUSETTS BAR ASSOCIATION, *THE SUPREME JUDICIAL COURT OF MASSACHUSETTS: 1692-1942*, at 59 (1942).

159. *Id.*

160. *Id.* at 155-56.

161. *Id.* at 156.

162. See *id.* at 157.

163. *Id.* at 157.

164. See *id.*

changed by Gallup poll by measuring the popular will at any moment.<sup>165</sup> Civilization, however, has “an unflinching resistance” to this form of law.<sup>166</sup> Man enjoys and respects law when it is stable. Indeed, in explaining why customary law survives, he notes that “we accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action.”<sup>167</sup> Given mankind’s innate conservatism, judges have a role to play because people do not desire a society of rapidly changing laws.

Judges, however, are not the sort of unifying force that Hand decried in his Elizabethan Club speech. They are not mere reactionaries, nor are they prophets making declarations from above. In predemocratic society, judges were far more important and far more “hands on,” given that enacted law was not so readily made. Then, judges, as members of the governing class, may have easily held the respect of the larger polity by virtue of their station. By Hand’s time, however, laws were easily passed and the composition of the ruling class had expanded widely to include people of varying socio-economic and racial classes. As such, in order to justify and successfully complete their work, judges in a democracy must accept

a self-denying ordinance which forbids change in what has not already become unacceptable. To compose inconsistencies, to unravel confusions, to announce unrecognized implications, to make, in Holmes’ now hackneyed phrase, “interstitial” advances; these are the measure of what they may properly do, and there is not indeed much danger of their exceeding this limit; rather the contrary, for they are curiously timid about innovations.<sup>168</sup>

All of this, however, is complicated by American constitutions. The federal and state constitutions, as “instrument[s] to distribute political power,” require an independent tribunal to ensure that various political forces do not arrogate too much power for themselves.<sup>169</sup> Yet American constitutions go further than merely distributing power and establishing checks and balances. “[T]hey assume to lay down general principles to insure the just exercise of those powers,” and they do so in order to “answer future problems unimagined and unimaginable.”<sup>170</sup> Such principles are not, strictly speaking, law. They are, instead, “cautionary warnings against the intemperance of faction and the first approaches of despotism” and “[t]he answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh.”<sup>171</sup> Judges find themselves in the awkward position of making these appraisals, which more involve choosing among competing values than merely interpreting statutes. And judges, although ideally independent, are products of

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165. *See id.* at 156.

166. *See id.* at 157-58.

167. *Id.* at 157-58.

168. *Id.* at 158.

169. *Id.* at 159.

170. *Id.* at 160.

171. *Id.* at 160-61.



a particular professional class that shapes their values.<sup>172</sup> Their legitimacy comes less from the nature of the decisions they make when approaching such principles and more from the fact that society perceives them to be independent.<sup>173</sup>

It is in the application of these principles that judges reveal both the difficulty of their job, but also the connection between their work and the preservation of negative liberty in society. Constitutional principles begin as forces that transcend the factional decisions made in enacted law, but in the long-term such principles are interpreted in different ways by different factions.<sup>174</sup> In attempting to apply these principles to the law, the judge makes his most significant attempt at independence:

Thrown large upon the screen of the future as eternal verities, [constitutional principles] are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience. If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles.<sup>175</sup>

Of course, while judges need to deny the impulse to look to their hearts in interpreting constitutional principles, they also need to avoid giving into factional will.<sup>176</sup> If they fail to abstain from asserting particular constitutional principles, they will lose authority in society.<sup>177</sup> At the same time, “[a] society whose judges have taught it to expect complaisance will exact complaisance; and complaisance under the pretense of interpretation is rottenness.”<sup>178</sup>

The solution (which is more easily recommended than achieved) is for judges to refrain from making proclamations about constitutional values. Doing so involves imposing a hierarchy of goods upon society and putting at risk the legitimacy of the judiciary and its independence. An attempt to interfere with the jumble of goods that make up American society requires the judge to sacrifice his independence. Hand goes so far as to suggest that even values that seem uniquely appropriate for judicial commentary, such as “equity and fair play,” should be off-limits to judges. “You may ask,” Hand offers, “what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation.”<sup>179</sup> He admits to not knowing whether these values can survive without the intervention of courts, but frankly

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172. *Id.* at 162.

173. *See id.*

174. *See id.* at 162-64.

175. *Id.* at 163.

176. *See id.*

177. *See id.* at 163-64.

178. *Id.* at 163.

179. *Id.*

states that he is unsure whether a society that lacks the ability to preserve such values without the corrupt intervention of the judiciary is worth saving at all.<sup>180</sup> He knows that “a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.”<sup>181</sup>

For Hand, an independent judiciary does not exist merely to protect democracy. Its very survival and continued dedication to common law and the stability of enacted law is a sign that a free society exists in which multiple visions of the Good can survive. Judges may find themselves in a difficult position—one that little allows for peace with any faction. Yet, that the judiciary is torn between the common law and a shifting common will indicates that judges have neither usurped authority that is not theirs, nor has society demanded that its judiciary sacrifice independence such that a given faction may prosper. His is a defense of judicial moderation not based on idol worship of the common law or an overzealous desire to serve as an administrator. It is instead a moderation borne out of faith that in a society in which the prioritization of desires should be impossible, it is foolhardy to assume that any one part of the government should be able to attempt such prioritization in any systematic way. Judges are flawed men, serving in a flawed institution, and a society that wants to preserve its liberty needs to recognize the sanctity of its flawed servants.

Hand’s public speeches ultimately provide a humble attempt to explore these flaws, out of a respect for the system as a whole and the negative liberty it preserves. He offers a vision of judges who rely on the independence of their institution and on the importance of public perception of independence, so that they can do their job. His language is florid as he juggles metaphors and erudite references with remarkable ease. That his thoughts are not wholly systematic, however, may not merely be a matter of aesthetic taste or the result of addressing lavish dinner parties. Instead, it may reflect the fact that the role of the judge seems difficult to pin down, and the solution to the various conflicts that face judges are even more difficult to resolve. Hand’s attempt to offer a colorful, and sometimes chaotic, understanding of the role of the judge, however, is highly evocative. Although the act of opinion writing may require solid logic and careful reasoning, a description of an office whose burdens border on the irrational, in a free society driven by the conflicting whims of man, may be best described through the creative, passionate, and personal thoughts of a practicing judge.

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180. *See id.*

181. *Id.*