just over eight hundred pages, a prodigious undertaking in any event.

The book's primary market will undoubtedly be among practicing lawyers, and its effectiveness can really only be tested by practitioner use of the book. If the success of the Illinois volume is any indication, the federal version is likely to meet a warm reception. Nevertheless, the prudent prospective purchaser might be well advised to await publication of a second edition, which would incorporate the new FRE as enacted by Congress. Based upon the history of the Illinois volume, a second edition might be expected within the next year. But, for the attorney who is not bothered by the necessity to use the promised pocket part supplementation, the amount of investment required for this volume seems well worth the potential reward.

RICHARD W. STERLING*

JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY. By Kathryn Griffith.[1] University of Oklahoma Press, 1973. Pp. xi, 251. $8.95.

Kathryn Griffith has written a book devoted primarily to the political philosophy of Learned Hand, with particular focus on his view of the role of the federal judiciary in our tripartite and federal system of government. As Ms. Griffith states: "[Judge Hand's] breadth of interest makes his work of special relevance to students of political theory and philosophy, as well as of law,"[2] and her book should have some appeal to persons in any of those classifications. Nevertheless, Ms. Griffith's classification of the "special relevance" of Judge Hand's work and the consequent separation of students of the law from students of political theory and philosophy points out a major weakness of the book. Ms.

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2. K. GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 15 (1973) [hereinafter cited as GRIFFITH]. This book was a recent monthly selection of the Lawyers Literary Guild Book Club, offered with L. HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND. (3d ed. I. Dillard 1974) [hereinafter cited as THE SPIRIT OF LIBERTY].

Griffith, who is not an attorney,[3] does not integrate these three classifications, but rather approaches her work from a political scientist's perspective. While showing great attention to the writings of other political scientists, she gives minimal attention to legal scholars other than Judge Hand or those specifically addressing themselves to Judge Hand. Learned Hand certainly does ask "what are undeniably the right and the difficult questions,"[4] but a number of other legal scholars have asked the same questions in regard to the role of our judiciary. Her lack of attention to legal scholarship leaves the lawyer with a sense of incompleteness.

Still, "Learned Hand does not belong to the lawyers alone,"[5] and his philosophy should be discussed and widely circulated, whatever the emphasis. Ms. Griffith's book appropriately reminds us that our own views on judicial review, on judicial restraint versus judicial activism, if they are to be valid, must be based on more than simply a determination whether the legislature or the judiciary is currently the better reflector of our own politics. Times have changed and will keep changing, as have the philosophical leanings of our legislatures and courts. A philosophy supporting judicial activism or judicial restraint which is based on no more than whose ox is being gored at the moment will ultimately be inconsistent and will come back to haunt its exponent. Rather we must base our position on a more general theory concerning the role of each component in our tripartite, federal system of government.[6]

Ms. Griffith's book discusses the proper role of our federal courts. This discussion is important because of the depth of, and respect given, the views of Learned Hand on the subject. The dispute is a very basic one which benefits from a current perspective, a perspective which reminds us that the dispute is much more than academic and that it lives on beyond *Marbury v. Madison*.[7] Ms. Griffith, however, seemingly is content to collect and restate; thus she adds little that is new to the debate. This makes her work of primary value as a refresher for those

3. Ms. Griffith has a Ph.D. in political science. *See* note 1 *supra*.

4. Wyzanski, *Introduction* to L. HAND, THE BILL OF RIGHTS at xiii (1972).

5. Dilliard, *Introduction* to THE SPIRIT OF LIBERTY, at vi.

6. *See* GRIFFITH 232-33. Hand will "be remembered and honored for restructuring the dialogue about restraint and activism in judicial review so that both must be defended on the basis of the fundamental assumptions about the American Democratic System." *Id.* at 232.

7. 5 U.S. (1 Cranch) 137 (1803).

who have studied Hand and the questions he raises and an initiation for those who have not.

McGeorge Bundy, in his review of Learned Hand's only book, *The Bill of Rights*, states: "Time after time Judge Hand clears up in a page matters which are understood at ten times their length in other writings."[8] Ms. Griffith's book seems to be one of those "other writings." Her style is wordy and repetitious. Although her book serves the laudable purpose of disseminating Learned Hand's views and thereby contributes to the important debate over the courts' proper role in our system of government, if her point is not understood the first time she makes it, I doubt it will be understood the second, third, or fourth.

I.

Learned Hand seems fondly remembered and intellectually respected by even his severest critics. Judge Jerome Frank called him "our wisest judge."[9] The press referred to him as the "Tenth Justice" of the Supreme Court.[10] He has the distinction of being the lower court judge most often "cited by name in opinions of the Supreme Court of the United States [and] in academic publications."[11] And yet there is no "biography" of Learned Hand.[12] To date his life has been relegated to introductions,[13] short summaries in early chapters,[14] and law review and magazine articles.[15]

Though Ms. Griffith's book is certainly not meant to be a biography, she does devote her first chapter to a sketchy anecdotal presentation of Hand's life. Judge Hand's life with his wife and three daughters is noted only to conclude that he had an "obvious affection"[16] for them all and that he

8. Bundy, Book Review, 67 YALE L.J. 944, 948 (1958).

9. J. FRANK, COURTS ON TRIAL, at v (1949).

10. Wyzanski, *supra* note 4, at v.

11. *Id.* At least this was true as of 1963 when Judge Wyzanski wrote his introduction.

12. Professor Gerald Gunther, currently at work on a biography of Judge Hand, is in the process of filling this void. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 719 & n.1 (1975).

13. *E.g.*, THE SPIRIT OF LIBERTY; H. SHANKS, THE ART AND CRAFT OF JUDGING (1968).

14. *E.g.*, GRIFFITH; M. SCHICK, LEARNED HAND'S COURT (1970).

15. *See* GRIFFITH 356-63 (bibliography).

16. *Id.* at 6.

> possessed the ability to relax and enjoy the simplest pleasures of family life. To his children and then his grandchildren he told stores [*sic*] of Br'er Rabbit while he went hippity-hopping across the room and regaled them with tales about an imaginary character named Marge, who was well intentioned but was constantly in trouble with the law. Another favorite was his pantomime of the Crooked Mouth Family in which he took the part of each trying to blow out a candle. At the end he would wet his fingers and snuff out the flame. When he played cowboys and Indians with his grandchildren, he used a wastebasket for a headdress and, according to his son-in-law, was not one but a whole tribe of Indians cavorting around the house. As part of the annual Christmas celebration he always sang songs from Gilbert and Sullivan.[17]

He is described as a man who was a fine storyteller and a gifted mimic.

> Once, after delighting Justice Oliver Wendell Holmes with ribald sea chanteys, he said that he hoped that Holmes had not taken him for a "mere vaudevillian." . . . When in a puckish mood, he delighted his audiences with stories delivered in Irish, Yiddish, and Italian accents. His impersonation of William Jennings Bryan addressing a political meeting in Jersey City was a favorite of Justice Felix Frankfurter.[18]

These anecdotes seem to be the kind of stories told on a close personal friend, the kind that have an added meaning for the storyteller. That added meaning is conveyed to the listener, if at all, by the storyteller's obvious close feelings of affection and respect for the object of the story. That feeling of warmth towards the subject Learned Hand is missing here, however, as Ms. Griffith merely relates seriatim these second-hand anecdotes, giving one the impression that Hand was an intellectual giant professionally and a buffoon at home.

Ms. Griffith has attempted to capture the personal life of the man with a few selected examples of his actions, but we are not given enough examples to build an image of the man. Instead we are left with too many factual questions to which no answer is attempted and which would seem better unasked than left unanswered. Ms. Griffith tells us that as a youth, Learned Hand "chose to forego the certainties of divine absolutes." She then states that "[d]uring the last years of his life he and Mrs. Hand read the Gospels aloud, though he remained troubled by the miracles reported in them."[19] Can this possibly sum

17. *Id.* at 7.
18. *Id.* at 7-8.
19. *Id.* at 8.

up his religious doubts in later life? It is this kind of tidbit that needs fuller explanation and that leaves nagging doubts in the reader's mind.

In her Preface, the author states that "an understanding of the relationship between [Hand's] philosophical assumptions and his practice in political life may illuminate some problems of contemporary American life."[20] In light of this statement of intention, as well as the book's obvious relevance to the proper conduct of our political leaders, certain biographical facts directly affecting Judge Hand's political life would seem to demand some sort of resolution. For example, President Taft appointed Learned Hand to the federal district court in 1909. In the presidential election of 1912, however, Judge Hand supported Teddy Roosevelt against the incumbent, President Taft. Then, in 1913, while still a federal judge, Hand stood for election to the post of Chief Judge of the New York Court of Appeals. Ms. Griffith states that Judge Hand later "explained his action by saying that he 'knew that we had to break away from the Hanna thing—the control of the nation by big business.' "[21] Without discussing how Judge Hand viewed these actions, at the time, or in retrospect, Ms. Griffith simply concludes that he "must have regretted his action in light of his subsequent position regarding the necessity of judges to remain uncommitted in political matters."[22] But did Judge Hand in fact later regret his political activity? Does his explanation about "the Hanna thing" suggest that the end justified the means? Can we explain his actions simply by attributing them to the shortsightedness of youth?[23] Did Hand ever offer any more complete explanation? In any event—and I am unaware that this particular point has been given more complete attention anywhere else—I would have preferred some explanation, even if only that none is available.[24]

20. *Id.* at vii. The application of Hand's philosophy to contemporary problems is left to the reader.

21. *Id.* at 5. Ms. Griffith offers no authority for the quotation from Judge Hand.

22. *Id.*

23. Irving Dilliard, in his introduction to *The Spirit of Liberty*, seems to suggest that Judge Hand's behavior in these two instances can be attributed to his youthfulness. Dilliard, *supra* note 5, at xii. In 1909, when he was appointed to the bench, Judge Hand was 37 years old.

24. At about the same time, in 1916, in response to a request from the publisher, Judge Hand wrote a letter opposing the removal of *The Masses* from newsstands in New York City. A New York state legislative committee was then preparing for hearings on the publication's exclusion. Judge Hand must have foreseen the possibility that this matter might soon be litigated in the court on which he sat. Yet, he chose not to remain "uncommitted." *See* Gunther, *supra* note 12, at 723-24. When the constitutionality of

II.

In Part II, Ms. Griffith gets down to the main focus of her book, beginning with a discussion of Hand's views about the nature of man and man's values. Judge Hand rejected absolute and eternal truths, believing there to be "no absolute criteria by which [man] may judge the truth or wisdom of his choices. . . ."[25] Everyone must make his own choices for himself, and by his free choices, he creates and defines his own essence.[26] Free choice is necessary to man's creativity and, therefore, to his survival. This "importance of free choice to human life suggests the need for tolerance of other choices."[27] Yet freedom of choice and tolerance of other choices were not absolutes for Hand, but rather were limited by the necessity of society, a value which man must recognize and weigh in his personal choices.[28] Man must understand that he has an interest in a continuation of society[29] and that this interest limits his free choice.

The difficult question then becomes what is necessary for the continued existence of society and, consistent with the need for tolerance of the choices of others, how can one defend against what is perceived as a threat to the existence of that society?[30] Is that threat ever any more or any less than another's exercise of free choice? And if the answer is yes, then how can one decide when it is so? If everyone is to be allowed to search for his own truths, what happens when one

excluding this publication from the mails actually came before Judge Hand in 1917, he decided in favor of the publisher. Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

25. GRIFFITH 48. There is no "standard outside man by which [these values] can be measured." *Id.* at 52.

26. *Id.* at 50-51. While all men are not capable of truly creative choice, it is essential, and it is enough, "that the opportunity remain open to those who have the capacity and desire to create." *Id.* at 52.

27. *Id.* at 53.

28. But for society to persist, [Hand] thought that the concept of self-interest shared by its members must include an awareness that each gains certain advantages from the community and thus must contribute to its well-being. "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 process of dissolution . . . . No Utopia . . . will automatically emerge from a regime of unbridled individualism, be it ever so rugged.

Id. at 74, *quoting* L. HAND, *Liberty*, in THE SPIRIT OF LIBERTY 150.

29. *See* GRIFFITH 74. Even the necessity of "society" to the continued existence of man is not an absolute. Rather, Hand would leave room for the possibility that this necessity may not be universally true now or true in the indefinite future. "What is true today may be proved false tomorrow." *Id.* at 55.

30. *See id.* at 198-99.

person's exercise of that right infringes on another's exercise of that right? A person has the right to make determinations comporting with his own value judgments of how his society should be maintained, but what happens when these determinations conflict with the way another person believes that the same society should be maintained? Hand's answer

> appears to be found in the determination of community values through the democratic process. . . . His understanding of the procedure of democracy included the freedom of each to work within the prescribed framework to secure community acceptance of his personally chosen values.[31]

Thus, the line, which the individual's exercise of free choice may not cross, is drawn by a government responsive to majorities.[32]

> To Hand a workable balance between the needs of the individual for freedom and the requirements of society appeared to rest in distinguishing between areas of common interest and concern, which should be subject to common decisions, and those of individual concern, which must remain the sole province of the individual self.[33]

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31. *Id.* at 58. The author recognizes that there are differences, sometimes great differences, in the opportunities for expression of one idea relative to another. "Hand expressed great concern with the increasing tendency of the power of mass media and propaganda to destroy meaningful debate." *Id.* at 59. Ms. Griffith does not, however, suggest how to deal with this problem or how Hand felt this problem should be handled, other than to refer to "the right and necessity of society to protect itself." *Id.* at 60. This may be a workable answer if the propaganda is attempting to convince a minority to secure the desired end by violation of the will of the majority. The ultimate end to which this sort of propaganda is directed, however, presumably would be designed to convince a sufficient number of the members of society that a course of action against their interests is actually in their interests. Hand's protection against propaganda directed to this end would seem to be "the competition of the market." *Id.* at 59, *quoting* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

32. Hand did recognize that our government is often responsive not to majorities but to aggressive minorities, and that the strong dominate in a democratic society. He attributed this unresponsiveness to majorities to three causes: apathy, conformity, and mass media or mass propaganda. *See* GRIFFITH 70-72. With respect to apathy, Ms. Griffith states:

> [I]n place of intelligent attention and capacity [Hand] saw apathy so deep no scandal, no disclosures of corruption seemed to stir the voters. It was conceivable to him that things might become "uncomfortable enough to arouse them, but, given reasonable opportunity for personal favors, and a not too irksome control, they are content to abdicate their sovereignty and to be fleeced, if the shepherds will only shear them in their sleep."

Id. at 70, *quoting* L. HAND, *Democracy: Its Presumptions and Realities*, in THE SPIRIT OF LIBERTY 94. Nevertheless, Hand did not believe that this apathy was "necessarily destructive of democracy" so long as the channels for "political change through an accepted and peaceful process" are kept open. *Id.* at 77.

33. *Id.* at 68.

Our Constitution was designed, in part, to effect this balance between the individual and the various governmental structures, state and federal, of our society. But who is to decide how these constitutional provisions should be applied to a given set of facts—where lies the ultimate responsibility for the preservation of our liberty?

III.

"It is well known that Judge Hand believe[d] that the courts should not seek to play a significant role in the preservation of liberty."[34] Consistent with Judge Hand's personal values, and based on his interpretation of the Constitution, he felt that the legislature, the nearest representative of the will of the majority, should be the primary force to this end. It is this part of Hand's philosophy which is the primary focus of Parts III and IV of Ms. Griffith's book.

Contrary to Judge Hand's view of their proper function, our courts do "play a significant role in the preservation of liberty." In this endeavor they use the tools of judicial review and statutory interpretation. Judge Hand found constitutional justification, in the supremacy clause, for judicial review of state actions.[35] The Constitution is not so explicit, however, in regard to judicial review of actions of the congressional and executive branches of the federal government. To Hand, this latter type of judicial review violated the principle of separation of powers. Nevertheless,

> Judge Hand believed that there are good and sufficient reasons for inferring this power. The legitimacy of judicial review is to be found in the practical necessity for the function to be fulfilled. The primary purpose a constitution serves is to allocate political power, and it is necessary for some agency to have authority to declare when the allocation has been disturbed. If the judicial branch had not assumed this power it is likely either that the legislative branch [with its power of the purse] would have absorbed all power or that inconsistencies would have developed as each branch made independent judgments, so that coherent government would have been impossible.[36] Thus, on the basis of ex-

34. Jaffee, Book Review, 66 HARV. L. REV. 939, 941 (1953).

35. U.S. CONST. art. VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

36. Our recent experience with "Watergate" might suggest a third alternative, that is, that the executive branch might have "absorbed all power."

perience and necessity, the power is justified.[37]

Thus, although Hand did not deny the appropriateness of judicial review, his theories on its proper origin led him to believe that the court should use this tool with great restraint. The role of the court should be limited to considering the decision-maker's jurisdiction to make the decision, as opposed to the relative merits of the decision itself. This type of judicial review primarily serves to allocate power among the individual, the state, and the various branches of the federal government,[38] by determining who should exercise the authority, but not how it should be exercised.

This theory of judicial review would directly enforce the liberty of the individual only when the Constitution provides that the individual, and not the government, is the proper authority to make a particular decision. Government interference with that decision would be unconstitutional. Such a determination would seldom be made, however, at least in Hand's view, because he believed that the Bill of Rights was not sufficiently specific for judicial enforcement. "Hand referred to the general principles enshrined in the Bill of Rights as 'stately admonitions' which are beyond analysis"[39] and "believed that the fundamental

37. GRIFFITH 105-06.

38. *See id.* at 211; *cf. id.* at 223. As an example of contemporary problems illuminated by Hand's view of the court as an allocator of power, one might consider the recent and heated dispute between the executive and legislative branches on "executive privilege," culminating in the Supreme Court's allocation of federal power in United States v. Nixon, 418 U.S. 683 (1974). A second example, involving both separation of powers and federalism, is the controversy about impoundment. The abstention doctrine exemplifies judicial allocation of power between the federal government and the states. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971). The Supreme Court's decisions in regard to the constitutionality of anti-abortion statutes can be interpreted as the judicial allocation of power between the individual and the government. *See* text accompanying note 41 *infra*. Each of these are examples of courts declaring when the constitutional "allocation has been disturbed," thereby curtailing the "inconsistencies [developing] as each branch made independent judgments." *See* text accompanying note 36 *supra*.

39. GRIFFITH 131. Hand did believe, however, that certain provisions of the Bill of Rights created rights judicially enforceable on behalf of those accused of criminal acts. Ms. Griffith states:

> [W]hen the court was operating in what he regarded as its primary sphere, [Hand] was willing to exercise a full measure of judicial power. These areas included statutory interpretation; the amendments which are explicit enough to give guidance to the court in providing full rights to persons charged and standing trial for crime; the common law which is uniquely the responsibility for making judgments that might have otherwise been regarded as legislative (that is, antitrust, torts, patents, negligence, and care); and the First Amendment

political conflicts suggested by the Bill of Rights must be resolved by the legislative branch."[40]

Though Ms. Griffith does not discuss it, Hand's belief in the role of the court as the allocator of power must go hand in hand with his belief in the lack of judicial power to define and enforce the Bill of Rights. Were the former view to be adopted without the latter, the activist judge would hardly miss a step. To place the court in the role of preserver of individual liberties, the judge would simply find a constitutional protection for the individual's authority, as against the government's authority, to make a given choice. The individual's authority could no doubt be found in any number of Bill of Rights provisions.[41] Such an interpretation of the Constitution would, however, be open to the same charges of abuse and uncertainty as are substantive due process and the new equal protection.

But is the role of the federal judiciary to be limited to deciding whether the proper authority has made the decision and to interpreting that which the legislature has the jurisdiction to enact? If the legislature's resolution of the value conflicts involved in questions properly before that body must be allowed to stand, is there to be any assurance that all of the appropriate values, including the constitutional values, have been weighed into the legislative process? Do we simply assume from the fact of enactment that appropriate constitutional considerations have been addressed and resolved? Or is the fact of enactment by proper authority the only constitutional consideration that is judicially appropriate? If a legislature does not always weigh all of the appropriate constitutional values when it enacts a law,[42] Judge Hand believed that one benefit of judicial restraint would be to compel Con-

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cases which arise under statutory law.

Id. at 201-02.

40. *Id.* at 131.

41. For a discussion of the abortion decisions, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), in terms of allocations of decision-making authority, see Tribe, *The Supreme Court, 1972 Term—Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

42. For a discussion of the validity of such an assumption in regard to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, *as amended* Act of Jan. 1, 1971, Pub. L. No. 91-643, 84 Stat. 1880 (codified in scattered titles of U.S.C.), see Harris, *Reflections; The New Justice*, THE NEW YORKER, March 25, 1972, at 44, 57-59. Mr. Harris reports that some members of Congress were of the opinion that the bill was unconstitutional, but felt it politically unwise to vote against it. They voted for the legislation expressing the opinion that the Supreme Court would declare the statute unconstitutional and that they need not be troubled.

gress to assume its proper responsibilities in this regard. This legislative neglect of constitutional responsibility is seen as an effect of judicial review rather than a cause.

Ms. Griffith states that Hand believed that the courts had a responsibility, in regard to the interpretation of the Bill of Rights, "to satisfy themselves that the legislature has weighed the values implicit in the issue."[43] Presumably she means "the issue" before the court and that the courts have a responsibility to interpret statutes in light of constitutional values when the court is faced with a situation that the legislature had not envisioned.[44] When a literal reading of a statute requires its application to a situation that the legislature had not considered and, arguably, to which the legislature had not intended that the statute apply, the court's role is to interpret the statute by finding and applying the legislature's intent.[45]

Ms. Griffith concludes that this judicial "interpretation" differs from "judicial legislation" primarily because of the "spirit or philosophy with which a judge approaches his task."[46] She is either suggesting a rather

43. GRIFFITH 202. In regard to the legislator's responsibilities for constitutional interpretation, see Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585 (1975).

44. *See, e.g., id.* at 133. But Ms. Griffith also states:

> Learned Hand thought it proper to apply the same standard of constitutionality to all laws relating to the First Amendment, the due-process and equal-protection clauses: Has the legislature made a sincere attempt to evaluate the competing values involved?

Id. at 153. If Ms. Griffith is suggesting some broader rule for the court in deciding whether "the legislature has weighed the values implicit in the issue" before the legislature, that is, that the court will guarantee that the legislature is responsive to the constitutional values involved in a given piece of legislation, then she leaves us high and dry. She does not suggest how the court would determine whether the legislature has weighed the appropriate values and what the court is to do if it finds that the legislature has not done so. What can the court do in the face of a legislative statement that all appropriate values have been weighed? Can the court require that the legislature explain exactly what values have been considered? If not, is the court's role limited to those rare cases in which it is clear that certain values were not taken into account? But from what source could the court derive such a power without also deriving a power of judicial review? Such a power would in some ways be a greater violation of the principle of separation of powers than judicial review itself. If the court finds that the legislature has failed to consider appropriate values or if the court cannot determine whether or not certain values were considered, does it declare the act unconstitutional, does it remand to the legislature, or does it simply make an admonitory declaration? And what is the constitutional authority for any of these actions? Is not a judiciary exercising some control over legislative assessment of values likely to end up playing some "significant role in the preservation of liberty?" *See* text accompanying note 34 *supra.*

45. *See, e.g.*, GRIFFITH 171, 177.

46. *Id.* at 179.

Utopian view of how most judges approach their work or making a distinction without a difference. She leaves the impression that Hand substituted a potentially far-reaching theory of statutory interpretation for substantive due process.[47] The differences between the two, however, are significant. Judicial interpretation leaves the activist judge with a tool, the misuse of which is more easily recognizable as an abuse—a tool, therefore, which is less likely to be abused. In addition, it was Hand's view generally that if the legislature meant for the statute to apply to the situation before the court, it was irrelevant that a judge believed that the Bill of Rights forbade such application. The legislature's resolution of that value conflict must stand.

IV.

It is in Chapter XI (Part IV) of her book that Ms. Griffith reminds us that our own views on judicial review must be based on more than simply a determination whether the legislature or the judiciary is currently the better reflector of our own politics. Ms. Griffith reminds us, for example, that "[u]ntil 1954 the Supreme Court acted 'more like a brake than a motor in the social mechanism,' and the usual effects of judicial review were to retard change and to affirm the social, economic, and political relationships already existing in society."[48] Only since 1954, beginning with the desegregation cases, has the Court become the "motor." Ms. Griffith notes that the Court's "increasingly active role in the affirmative decision-making process of the community" was emphasized by the "[e]xtension of judicial power into the realm of legislative apportionment."[49] These cases, says Ms. Griffith, underscore "[t]he very important practical significance of the difference between the views of activism and restraint upon the American democratic system . . . . The proper definition of judicial review is not merely a theoretical problem."[50]

Ms. Griffith states that the shift to judicial activism has led to a court mainly concerned with the

> achievement of a specific goal and the right result in a controversy rather than [with] the judicial process by which the Court achieves that end. . . .

47. *See, e.g., id.* at 84-85.
48. *Id.* at 204 (footnote omitted).
49. *Id.* at 205.
50. *Id.* at 206.

> A judge who is dedicated to the exercise of judicial restraint also seeks just results, but he is bound more than the activist by limits on his freedom to judge . . . .
>
> An activist is more willing to declare acts of the legislature unconstitutional when they do not accord with his own philosophical beliefs or policy preferences than is the advocate of judicial restraint who often searches for some acceptable rationalization for doubtful legislation. . . .
>
> . . . .
>
> Judge Hand's philosophy and career represent the epitome of judicial restraint.[51]

Ms. Griffith recognizes the concern of Judge Hand, and others, that judicial activism will lead (and is leading) to a politicized court:

> Judge Hand believed that if the courts attempt too much they dissipate their effectiveness and that if they press their own policy views they invite their own destruction. He assumed that the courts should protect their energy and prestige for the adjudicatory function, which only they can serve in the American system.
>
> . . . .
>
> . . . The authority of law as finally announced by a court comes not from the person of the judge or any faction of society but from the belief that the judge, insofar as he has the capacity, voices the will of the community. . . .
>
> Hand feared that involvement in "political questions" would deprive the judges of their capacity for impartiality and deprive the courts of the people's confidence in their capacity to decide in accordance with the law.[52]

Not only are courts not responsible to the will of the people, they are not even in a position to gauge the will of the people—that not being their function, but rather the legislature's.[53] An additional danger that Hand recognized as flowing from a "politicized" court was that judicial

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51. *Id.* at 208-10.

52. *Id.* at 217, 219.

53. It was important to Hand that the courts exercise restraint partly because judges are not directly responsible to the public but more importantly because in the American system they should not be responsive to the immediate will of the people. Representation is the function of the legislature, and the people are free to bring whatever pressure or influence they can in the political resolution of issues. But when these same pressures and influences, no matter how sophisticated and subtle are brought to bear upon the nation's judges, they constitute an attack upon the judges' judicial competence and integrity. It is as much the responsibility of the judges to resist this pressure as it is the obligation of the legislator to take it into account.

Id. at 222.

appointments would become more and more political; the more political that the work of the judge becomes, the greater the role that politics will play in judicial appointments.[54]

It is Ms. Griffith's Chapter XI which I found to be her most interesting. The chapter addresses, though briefly, the practical application of Hand's philosophy, rather than simply reiterating and rehashing that philosophy itself. Indeed, the tightening and condensing of chapters III through X and the expansion of Chapter XI would, in my view, have substantially improved the book.

G. MICHAEL FENNER*

54. *See id.* at 220. In this regard, Ms. Griffith briefly discusses the move to impeach Justice Douglas, the controversies surrounding Justice Fortas, and the nominations of Judges William Haynsworth and G. Harold Carswell to the Supreme Court. There is no assumption that judicial selection in the past was not political, only that future selection may become more political, and more openly political. In one sense this may have something of a positive side in that it tends to bring into the open a previously little-discussed basis for judicial selection.

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