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If law be science, and the practicing lawyer merely another breed of the specialized social scientist, it may be hypothesized that a careful study of legal methodology will be as fruitful to the profession as have been the analyses of methodology in the other social sciences.[1]

The problems which confront the scientist-lawyer appear much the same as those which face the scientist-sociologist; among the most prominent of these problems and perhaps the most difficult one of solution is the multiplicity of variables and the scarcity of constants.[2] The sociologist or psychologist attempts to minimize these by either observing life situations in which the conflicting forces are minimal, as in primitive societies, or by creating an experimental life situation in which at least some of the factors may be held reasonably constant.[3] The criterion of success of the social scientist is the same as that of the physical scientist, predictability.[4]

The successful formulation of scientific law usually emerges from the following process: some particular phenomenon has excited the curiosity of the scientist and he wishes to predict either its occurrence or non-occurrence. He hypothesizes that certain prior events in some fashion have influenced this phenomenon and further that certain of these events or factors are of greater importance than the others. He further hypothesizes that a relationship between these critical events is controlling and then goes on to determine whether this hypothesis will permit him to predict either what has occurred or what shall occur.[5] If he is a physical scientist or an experimentalist in the social sciences, it may be possible for him actively to arrange these events.[6] If not, he may either use the historical approach or may just have to wait until a significant configuration of events occurs.

The most comprehensive attempt to formulate the variables and the relationship between them in law-science is the recent book by Professor Karl Llewellyn on appellate decisions.[7] The appellate tribunal and its daily operation provides at least a workable environment for hypothesis-testing and prediction. The issues at the appellate level have frequently

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[1] KAUFMAN, METHODOLOGY OF THE SOCIAL SCIENCES 141-47 (1944).
[2] COHEN AND NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD (1st ed. 1934).
[3] PRATT, THE LOGIC OF MODERN PSYCHOLOGY 81-109 (1948).
[4] REICHENBACH, EXPERIENCE AND PREDICTION (1938).
[5] BRIDGMAN, THE LOGIC OF MODERN PHYSICS (1946); DEWEY, LOGIC. THE THEORY OF INQUIRY 66, 104 (1938).
[6] LINDSAY AND MARGENAU, FOUNDATIONS OF PHYSICS 4-6, 14 (1947); LEWIN, PRINCIPLES OF TOPOLOGICAL PSYCHOLOGY 8-13, 30-40 (1936).
[7] LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS (1960).

been narrowed; the composition of the bench remains reasonably constant over a fairly long time span; and perhaps of greatest significance is the pressure upon the tribunal to articulate the basis of their decisions in written opinions.

Professor Llewellyn has suggested a number of factors which might profitably be analyzed in order that the appellate lawyer may achieve some degree of success in predicting or reckoning the outcome of a particular case at the appellate level.[8] One of these factors is the methodology of the particular jurist.[9] This paper will attempt to explore the methodology of the late Justice Robert H. Jackson of the United States Supreme Court.

Justice Jackson actively and successfully practiced law before entering government service. He served as Solicitor General and later as Attorney General before his appointment to the Supreme Court and while on leave from the Court acted as Chief Prosecutor for the United States at the War Crimes Trials in Nurnberg.[10] The selection of the opinions of Justice Jackson was admittedly arbitrary; his prose style is superb; a casual reading of his opinions presents no clear picture of the man or his philosophical or sociological orientation. To the appellate lawyer, who appeared before that Court, he was another Justice who must be convinced. The analysis of the methodology of Justice Jackson is the basis of the hypothesis as to what arguments would convince him. Convincing justices is the proper role of the appellate lawyer.

Several prominent writers in jurisprudence have suggested that the composition of an appellate court may be analyzed in terms of those judges who are judicial activists and those who advocate judicial restraint.[11] The former are those who are goal-oriented and to whom a satisfactory decision will be that decision which is in conformity with their own social values and standards. They know what sort of world they want for their children and a proper decision will be another step toward achieving that world. They are opposed by the latter, who are functionally oriented, and to whom a satisfactory decision will be that decision which is in accordance with appropriate judicial standards. They know what a court's function is and a proper decision must adhere to their concept of that function. I feel that Justice Jackson probably is closer to this latter type of jurist than to the former; and, if nothing else, at least this hypothesis provides a general framework for this analysis.

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[8] *Id.* at 19-61.
[9] *Id.* at 34-35.
[10] GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON (1958).
[11] Weidner, *Jackson and the Judicial Function*, 53 MICHIGAN L. REV. 567 (1955); Jaffe, *Mr. Justice Jackson*, 68 HARVARD L. REV. 940 (1955); Fairman, *Associate Justice of the Supreme Court*, 55 COLUMBIA L. REV. 445 (1955).

Although judicial restraint is founded upon a positive and coherent concept of the function of courts in society, it tends to operate in a negative fashion. It is seen most clearly in opinions in which the jurist refuses to review the decision of a lower court, or refuse to evaluate the findings of an administrative body, or those in which a deference to the conclusions of a lower court or of another branch of the government is exemplified.

Judicial restraint is exercised when the standing of the parties to sue is questioned. *McCollum v. Board of Education*[12] raised the issue of the use of public school classrooms for religious instruction and the possible violation of First Amendment rights of those who objected. Justice Jackson in his concurring opinion stated that the petitioner did not have the standing to sue; as a taxpayer she had suffered no substantial property injury and the outcome of the case thus did not concern her. Similarly, in *Doremus v. Board of Education*[13] in which a declaratory judgment was sought to declare invalid a New Jersey law which required reading of the Old Testament, Justice Jackson, writing for the majority, held that the petitioner had graduated from the school and ". . . this court does not sit to decide arguments after events have put them to rest."[14] However, once the jurisdiction of the court has been established, it is the function of the court to decide cases and when the Court refused to decide *Eisler v. United States*[15] on the grounds that the judgment could not act upon one who had left the country, Justice Jackson dissented as follows:

> The case is fully submitted and all that remains is for members of the court to hand down their opinions and decision. . . . If ever there were good reasons to grant hm a review, there are equally good reasons for now deciding its issues.[16]
>
> I do not think we can run away from the case just because Eisler has.[17]

Standing to sue seems a relatively straightforward business. Justice Jackson's opinions appear cogent and consistent. *Parker v. Ellis*[18] raised the issue whether one who had been imprisoned by techniques clearly and admittedly violative of due process had the remedy of habeas corpus after he had been released from custody, although the petition was made while he was in prison. The court decided that the writ was not appropriate. Justice Jackson died four years before this case was heard by the Supreme Court. The question is whether or not his opinion could have been predicted.

[12] 333 U.S. 203, 232 (1948).
[13] 342 U.S. 429 (1952).
[14] *Id.* at 433.
[15] 338 U.S. 189, 195 (1949).
[16] *Id.* at 195.
[17] *Id.* at 196.
[18] 362 U.S. 574 (1960).

The questions involved in the construction and interpretation of statutes reflect an obvious area of judicial restraint or judicial activism.[19] To what extent can a statute be interpreted to mean something other than the plain meaning of the words therein? Does the re-enactment of a statute carry adoption of previous administrative regulations or court decisions? Does consideration of a statute without changing it mean Congressional approval of prior judicial interpretation? What attitude should be taken toward statutes that contravene common-law doctrine in a federal system where there is no general federal common law? These are some of the questions which confront the jurist who must decide the meaning of statutes. In *Western Union Telegraph Co. v. Lenroot,*[20] the question arose as to whether the words "produce and ship" in the Fair Labor Standards Act of 1938 encompassed the transmission of interstate telegraph messages. Justice Jackson writing for the Court stated,

> Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. . . . It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process.[21]

In his concurring opinion in *Schwegmann Bros. v. Calvert Distillers Corp.,*[22] Justice Jackson enunciated his attitude toward the use of legislative history as a guide to the interpretation of the Miller-Tydings Act:

> Resort to legislative history is only justified when the face of the act is inescapably ambiguous, and then I think we should not go beyond committee reports, which presumably are well considered and carefully prepared.[23]
>
> It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record.[24]
>
> For us to undertake to reconstruct an enactment from legislative history is merely to involve the court in political controversies which are quite proper in the enactment of a bill, but should have no place in its interpretation.[25]

And in *United States v. Public Utilities Commission,*[26] Justice Jackson stated, "I should concur in this result more readily if the Court could reach it by analysis of the Statute instead of psychoanalysis of

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[19] Jackson, *Problems of Statutory Interpretation,* F.R.D. 121 (1948).
[20] 323 U.S. 490 (1945).
[21] *Id.* at 508.
[22] 341 U.S. 384, 395 (1951).
[23] *Id.* at 395.
[24] *Id.* at 396.
[25] *Id.* at 396.
[26] 345 U.S. 295, 319 (1953).

Congress." Thus Justice Jackson exercises a semantic restraint; a desire to preserve the integrity of the language as well as the functional integrity of the court; a desire that the language will not be distorted by judicial interpretation from its everyday meaning—a position perhaps founded upon the experiences of one who must advise clients as to the meaning of statutes before judicial determination.

In his dissenting opinion in *United States v. Harriss*[27] in which the interpretation of the Federal Regulation of Lobbying Act was in issue, Justice Jackson expressed his attitude toward the interpretation of criminal statutes as follows:

> I agree, of course, that we should make liberal interpretations to save legislative acts, including penal statutes which punish conduct traditionally recognized as morally wrong. . . . But we are dealing with a novel offense that has no established bounds and no such moral basis.
>
> In matters of this nature, it does not seem wise to leave the scope of a criminal act, close to impinging on the right of petition, dependent upon judicial construction for its limitations.[28]

It might appear that the exercise of restraint leaves Justice Jackson with only the words of the statute for guidance. However, in *Morrisette v. United States* the defendant was convicted in a District Court for the conversion of some government bomb casings which he thought to be abandoned; the conviction rested on the government's theory that intent to steal, not being mentioned in the statute, was not an element of the crime. In reversing the conviction, Justice Jackson returned to the common law and its requirement of intent and imposed this requirement upon the statute.[29]

Although Justice Jackson has written numerous law reviews, of which a complete bibliography appears in the Stanford Law Review,[30] he has written only two books.[31] Both of these are concerned with the growth and place of the Supreme Court in American government. His image of the judiciary is that of an independent, non-political body whose function is solely to decide cases on the basis of reasonably clear mandates as to the desires of the legislative and executive branches. The court in a republican form of government does not evaluate the desirability of legislation and the road to totalitarianism is paved with courts eager to impose their scheme of social values. He quotes the role of the Soviet court from the writings of Stalin as follows:

> The court has been, and still remains, as it ought to be according to its nature, namely, one of the organs of governmental

[27] 347 U.S. 612, 633 (1954).
[28] *Id.* at 634-635.
[29] 342 U.S. 246 (1952).
[30] 8 STANFORD L. REV. 3 (1955).
[31] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1958).

power, a weapon in the hands of the ruling class for the purpose of safeguarding its interest.[32]

Justice Jackson's attitude toward judicial review of political decisions is exemplified by the majority opinions he wrote in *Chicago and Southern Air Lines v. Waterman Steamship Corp.*[33] and *Harisiades v. Shaughnessy.*[34] In the former case the court was asked to review an order of the Civil Aeronautics Board which granted overseas airline routes to domestic carriers. The grant was subject to presidential approval. In denying the jurisdiction to review, he stated,

> It would be intolerable that courts, without the relevant information should review and perhaps nullify actions of the executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.[35]

Similarly, in the latter case, where the court was asked to review a deportation order of the Attorney General, Justice Jackson in writing for the court held,

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[36]

His opinions which refuse to evaluate political decisions of other branches of government appear to be founded upon a rigid adherence to the doctrine of separation of powers. His attitude toward the scope and authority of administrative bodies is reflected in his dissenting opinion in *United States v. Carolina Freight Carriers Corp.*,[37] in which the majority of the court returned a case to the Interstate Commerce Commission on the grounds that it was not convinced that the I.C.C. should have limited a territory to the petitioner, who had applied for grandfather rights. Justice Jackson dissented as follows:

> . . . the Court refuses to tell the Commission what it thinks about the evidence, until the Commission tells what it thinks about the law. We cannot regard this as the most helpful use of the power of judicial review.
>
> We should not substitute our own wisdom or unwisdom for

[32] See *supra* note 19 at 122.
[33] 333 U.S. 103 (1948).
[34] 342 U.S. 580 (1952).
[35] See *supra* note 33 at 111.
[36] See *supra* note 34 at 588-89.
[37] 315 U.S. 475, 490 (1942).

that of the administrative officers who have kept within the bounds of their administrative powers.[38]

Justice Jackson in his majority opinion in *United States v. Morton Salt Co.*[39] further amplifies his attitude toward the power and function of administrative agencies as follows,

> Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function.[40]

This does not remove the operation of administrative agencies from the superintending authority of the courts, but merely places in perspective the appropriate judicial role. The function of the courts is to determine whether the agency has acted within its lawful mandate and, toward that question, Justice Jackson dissents as follows in *Securities Commission v. Chenery Corp.*,[41]

> I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law, must be determined by courts. . . .[42]

The discussion to this point has reflected a judicial restraint which asks the questions: Do these litigants appear properly before the court? Are the issues properly reviewable by this court or any court? How far may the semantics of the statute be distorted to encompass the case? The doctrine of "strict necessity" poses a further question, viz., must this matter be decided? Justice Jackson followed this doctrine and enunciated it as follows in *United States v. Five Gambling Devices:*[43]

> The principle is old and deeply embedded in our jurisprudence that this court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. This is not because we would avoid or postpone difficult decisions. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of Congress or the powers reserved to the several states. To withhold passing upon an issue of power until we are certain it is knowingly precipitated will do

[38] *Id.* at 492 and 495.
[39] 338 U.S. 632 (1950).
[40] *Id.* at 642.
[41] 332 U.S. 194, 209 (1947).
[42] *Id.* at 215.
[43] 346 U.S. 441, 448-49 (1953).

> no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question. Judicial abstention is especially wholesome where we are considering a penal statute. Our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation.
>
> This court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an act is within their delegated power or is necessary and proper to execution of that power.

Although in a sense the exercise of judicial restraint, as it has been considered thus far, denies to the court the power to hear the matter or limits the court's construction of a statute, the resolution of the case is a by-product, in much the same manner as the resolution is the by-product of denying certiorari. This differs somewhat from the presumption of constitutionality. If the methodology of Justice Jackson is viewed in broad outlines, two facets appear. The first goes to the question of the propriety of deciding the case at all, and the second bears more relevantly upon those considerations which are important once the case must be decided. The balance of this paper will discuss this latter aspect.

Justice Jackson has been considered by many to be a common law lawyer. The tradition of the common law is founded upon the decision of prior cases. The two types of cases which will influence the common law jurist are appellate decisions in prior similar cases, the doctrine of "stare decisis", and lower court decisions in the same case, or what might be called the doctrine of "deference to the lower courts." Both of these doctrines are accepted by and operate upon all jurists; every judge pays some attention to major appellate precedents and correspondingly some attention to lower courts which have heard arguments on the case at bar. It is a question of degree, and a question of emphasis in an appellate brief.

The attitude of Justice Jackson toward prior appellate opinions is elaborated in several significant cases. One of the most articulate of these expressions is found in the case of *Williams v. North Carolina*[44] in which the question of the validity of a Nevada divorce was raised in circumstances which indicated that the parties had established six-weeks residence in Nevada for the purpose of securing the divorce. Justice Jackson stated,

> This court may follow precedents, irrespective of their merits, as a matter of obedience to rule of Stare Decisis. Consistency

[44] 317 U.S. 287, 311 (1942).

> and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy.[45]

Again faced with the question of overruling prior case law which had determined that insurance was not commerce such that Congress had the power to regulate it, he dissented in *United States v. South Eastern Underwriters Assn.*[46] as follows:

> In contemplation of law, however, insurance has acquired an established doctrinal status not based on present day facts. For Constitutional purposes a fiction has been established . . . that insurance is not commerce.[47]
>
> A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.[48]

Where in *Helvering v. Griffiths,*[49] the Treasury Department had asked the court to overrule *Eisner v. Macomber,*[50] and hold as taxable income stock dividends on a class of stock, Justice Jackson writing for the majority followed the older cases and held,

> The court differs, however, from other branches of the government in its ability to extricate itself from error. It can reconsider a matter only when it is again properly brought before it in a case or controversy.[51]
>
> . . . a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change.[52]

Thus it appears that Justice Jackson is reluctant to overrule prior appellate decisions and is particularly concerned with the predictability of the law from the perspective of the practicing lawyer and his client. Bad law may be permitted to survive in order to achieve stability and consistency. Actions with legal consequences can only be intelligently undertaken against a fairly stable background of judicial thought. In the long run the ends of justice may be better served by sacrificing the particular petitioner; perhaps on the underlying theory that his fate was at least ascertainable before he took the action.

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[45] *Id.* at 323.
[46] 322 U.S. 533, 584 (1944).
[47] *Id.* at 588.
[48] *Id.* at 594.
[49] 318 U.S. 371 (1943).
[50] 252 U.S. 189 (1920).
[51] See *supra* note 49 at 401.
[52] See *supra* note 49 at 403.

The attitude of an appellate judge toward the weight to be accorded to the opinions of inferior courts, and particularly the trial court, is apt to be shaped by many jurisprudential as well as psychological factors. Although the scope of appellate review in theory may be limited to a re-examination of the conclusions of law, it appears that this may be begging the question in many instances. Where an appellate court feels strongly that the opinion of a trial court is erroneous, it somehow manages to reverse and frames its opinion within the accepted theory of appellate review. It does not seem particularly fruitful therefore to attempt to segregate those opinions in which the facts were viewed differently from those in which the law was viewed differently by the reviewing court. The parameter is the deference to the position of the lower court, *qua* position; in other words, how much weight should be accorded to the outcome in a lower court.

An analysis of the opinions of Justice Jackson indicates that the answer to this question depends to a large extent on whether the case came up through State Courts or through the Federal Courts. To the former he accords a great deal more weight than to the latter. Part of this attitude undoubtedly stems from the fact that he practiced law in New York and was probably exposed to as competent State jurists as there were. Another basis probably lies in his fundamental adherence to the belief that there are areas of the law reserved to the several states in which their opinions should be more or less conclusive. Still a third factor is his awareness of the supervisory or superintending function of the Supreme Court insofar as the lower Federal Courts are concerned; a superintending power not exercisable over State Courts.

In *Herb v. Pitcairn*[53] an action was brought in a City Court in Illinois for injury to a railroad employee under the Federal Employer's Liability Act and the Supreme Court of Illinois held that the City Court was without jurisdiction. In upholding the view of the Illinois court, Justice Jackson wrote,

> This court from the time of its foundation has adhered to the principle that it will not review judgments of State Courts that rest on adequate and independent State grounds.[54]
>
> Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions.[55]
>
> And in cases where the answer is not clear to us, it seems consistent with the respect due the highest courts of the States of the union that they be asked rather than told what they have intended.[56]

[53] 324 U.S. 117 (1945).
[54] *Id.* at 125.
[55] *Id.* at 125-126.
[56] *Id.* at 127-128.

Justice Jackson writing a dissenting opinion in *Ashcraft v. Tennessee*[57] in which the majority held that the prolonged questioning of a witness was inherently coercive, wrote,

> Heretofore the state has had the benefit of a presumption of regularity and legality.[58]
>
> In determining these issues of fact, respect for the sovereign character of the several States always has constrained this court to give great weight to findings of fact of State courts.[59]
>
> We must bear in mind that this case does not come here from a lower Federal court over whose conduct we may assert a general supervisory power.[60]

Again in *Watts v. Indiana*[61] on the question of State interrogation of a witness and alleged violation of Fourteenth Amendment rights resulting therefrom, Justice Jackson wrote,

> If the right of interrogation be admitted, then it seems to me that we must leave it to the trial judge and juries and State appellate courts to decide individual cases, unless they show some want of proper standards of decisions. I find nothing to indicate that any of the courts below in these cases did not have a correct understanding of the XIV Amendment, unless this court thinks it means absolute prohibition of interrogation while in custody before arraignment.[62]

In a series of opinions concerning the alleged unconstitutional restraint of free speech by the States, Justice Jackson consistently held to the position that the State Court was in a better position to evaluate the danger to the society; that the State Court was in a better position to weigh and balance the conflicting social interests; that it was in a better position to determine what steps were necessary to protect the rights of the remainder of the community. The cases of *Terminiello v. Chicago*[63] and *Kunz v. New York*[64] are typical of fact situations in which the effect of the speeches was to create civil disturbance. In both of these cases Justice Jackson in his dissenting opinion stressed the greater awareness of the State Courts to the problem. He wrote in his dissent in *Terminiello,*

> This court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its

[57] 322 U.S. 143, 156 (1944).
[58] *Id.* at 156.
[59] *Id.* at 157.
[60] *Id.* at 158.
[61] 338 U.S. 49, 57 (1949).
[62] *Id.* at 61.
[63] 337 U.S. 1, 13 (1949).
[64] 340 U.S. 290, 295 (1951).

> doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact.[65]

In *Saia v. New York*[66] and *Kovacs v. Cooper*[67] the restraint of free speech was again at issue; this time presumably by local ordinances which either prohibited or limited the extent to which sound trucks could be used. Again, Justice Jackson held that the community had the right to control these amplified utterances and wrote as follows in his dissentnig opinion in the former:

> I think it is a startling perversion of the Constitution to say that it wrests away from the States and their subdivisions all control of the public property so that they cannot regulate or prohibit the irresponsible introduction of contrivances of this sort into public places.[68]
>
> I disagree entirely with the idea "that courts must balance the various community interests in passing upon the Constitutionality of local regulations of the character involved here." It is for the local communities to balance their own interests—that is politics —and what courts should keep out of. Our only function is to apply constitutional limitations.[69]

His concurring opinion in *Douglas v. City of Jeanette*[70] again upheld the right of the state to interfere with a Watch Tower campaign of the Jehovah's Witnesses in which phonograph records were played to householders who admitted the campaigners.

Perhaps the most comprehensive statement of Justice Jackson's attitude toward deference to lower court decisions is found in his opinions in *Fay v. New York,*[71] *Stein v. New York*[72] *and Brown v. Allen.*[73] Each of these cases arose out of alleged Fourteenth Amendment violations in criminal proceedings in State Courts. Excerpts from these opinions follow:

> This court has long dealt and must continue to deal with these controversies from State Courts with self-imposed restraints, intended to protect itself and the State against irresponsible exercise of its unappealable power.[74]
>
> Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in State Courts, and these expressions of policy are not necessarily embodied in the concept of due process.[75]

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[65] See *supra* note 63 at 37.
[66] 334 U.S. 558, 566 (1948).
[67] 336 U.S. 77, 97 (1949).
[68] See *supra* note 66 at 567.
[69] See *supra* note 66 at 571.
[70] 319 U.S. 157, 166 (1943).
[71] 332 U.S. 261 (1947).
[72] 346 U.S. 156 (1953).
[73] 344 U.S. 443, 532 (1953).
[74] See *supra* note 71 at 282.
[75] See *supra* note 71 at 287.

> But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this court has always been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.[76]
>
> We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice.[77]
>
> It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federation Constitution, the weight of conflicting evidence to support a decision by a State Court.[78]
>
> When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the State's own decision great and, in the absence of impeachment by conceded facts, decisive respect.[79]
>
> The generalalities of the XIV Amendment are so indeterminate as to what State actions are forbidden that this court has found it a ready instrument, in one field or another, to magnify Federal, and incidentally its own, authority over the States. The expansion now has reached a point where any State Court conviction, disapproved by a majority of this court, thereby becomes unconstitutional and subject to nullification by habeas corpus.[80]
>
> However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a Super-Supreme Court, a substantial proportion of our reversals of State Courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[81]

There are numerous cases in which Justice Jackson has reversed lower Federal Courts on grounds for which he probably would not interfere with decisions of State Courts.[82] Although his general attitude toward the supervisory role of the Supreme Court toward the lower Federal Courts has been quoted from several opinions, these expressions appear to arise in cases which came from the State Courts and in which he is making the comparison.[83] Generally, his opinions in

[76] See *supra* note 71 at 294.
[77] See *supra* note 71 at 295.
[78] See *supra* note 72 at 181.
[79] See *supra* note 72 at 182.
[80] See *supra* note 73 at 534.
[81] See *supra* note 73 at 540.
[82] See, *e.g.*, United States v. Di Re, 332 U.S. 581 (1948); Krulewitch v. United States, 336 U.S. 440, 445 (1949); Shapiro v. United States, 335 U.S. 1, 70 (1948); United States v. Ballard, 322 U.S. 78, 92 (1944); Brinegar v. United States, 338 U.S. 160, 180 (1949); Jordan v. De George, 341 U.S. 223, 232 (1951); Frazier v. United States, 335 U.S. 497, 514 (1948); United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 540 (1950); Johnson v. United States, 333 U.S. 10 (1948); McDonald v. United States, 335 U.S. 451, 457 (1948); but *c.f.* Michelson v. United States, 335 U.S. 469, 486 (1948).
[83] *E.g.*, *supra* notes 60, 75.

those cases in which the lower Federal Courts are reversed, are confined to a discussion of the procedural irregularities which require reversal and the basis for the court's interference with the judgment is implied rather than articulated and justified.

A more complete analysis of Justice Jackson's opinions would certainly result in the emergence of other significant parameters and aspects of his judicial restraint. Cases such as *Musser v. Utah*[84] and *Kennedy v. Silas Mason Co.*[85] indicate his reluctance, in the former to determine the Constitutionality of a Utah statute until the Utah Supreme Court has rendered an interpretation of it and, in the latter his refusal to evaluate a record which he felt was not complete.

The foregoing analysis could have proceeded in one of two fashions. The first of these would be an *a priori* approach. Using this approach, hypotheses could have been formulated as to the significant parameters and then these hypotheses tested against the cases and opinions. The second approach, though proably somewhat less efficient, was the one employed. The opinions of Justice Jackson were read and then grouped according to the ratio decidendi. The consistency emerged from the data, rather than being hypothesized and tentatively imposed upon it. Unfortunately, there is no Shepard's to lead the researcher toward methodology. The structure of an opinion is frequently unrelated to the facts or the law. Professor Llewellyn's thesis that the opinions of appellate judges are for the most part reckonable, presupposes that the reckoner is aware of the substantive law of the case and the composition and history of the court. This paper is directed toward this latter presupposition, as sort of a pilot project in testing the reckonability of one Justice. "Knowing the judge" is a phrase which has fallen into disrepute. I suggest that it is an aspect of an appropriate methodology for the appellate attorney.

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[84] 333 U.S. 95 (1948).
[85] 334 U.S. 249 (1948).