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THE SUPREME COURT—OCTOBER 1959 TERM

*Bernard Schwartz**

A COUNTRY'S constitutional law is but a reflection of its political, economic, and social life. Not unnaturally, the external conditions of any particular period are bound to have their effects in the legal sphere as well—especially in the field of public law. This is as true of the United States as it is of other countries. From this point of view, the constitutional jurisprudence of the American Supreme Court is only the juristic mirror of the different stages through which American history has passed. 'Our jurisprudence is distinctive,' said Justice Jackson on the 150th anniversary of the Supreme Court, 'in that every great movement in American history has produced a leading case in this court.'"¹

With these words, the present writer began an article explaining recent developments in our constitutional law to a British audience. To one familiar with the work of the nation's highest Court, the statement quoted is almost a truism. Any commentary on a Supreme Court term is also a commentary on the life of the nation in the period covered.

During our generation, this country has gone through successive stages of both internal and external stress. Disastrous economic depression, world conflict, a period of cold war—these have furnished the constant crises with which government in our day has had to cope. Inevitably, these crises have all had their impact upon the constitutional law dispensed by the Supreme Court.

The constitutional decisions of the 1959 Term, like those of preceding terms, mirrored the events of the period during which the term took place. A nationwide strike in a basic industry brought forth a decision on the congressional provision intended to deal with such stoppages.² Strains in our federalism gave rise to holdings on the interplay of state and federal power.³ Our position as an overseas power was reflected in decisions on military jurisdiction beyond our borders.⁴ The struggle to vindicate civil rights had continuing judicial impact in a series of important cases.⁵

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¹ Schwartz, *Recent Developments in American Constitutional Law*, in PRESENT TRENDS IN AMERICAN NATIONAL GOVERNMENT 155 (Junz ed. 1960).

² Part II *infra*.

³ Parts V and VI *infra*.

⁴ Part III *infra*.

⁵ Part IV *infra*.

During the past term, the high bench remained a storm center in our governmental structure. An observer of the Court cannot, however, but note with satisfaction that the controversy about the Court has greatly diminished in intensity. In part, as in the 1958 Term, this has been due to the Court itself, which has been remolding its jurisprudence to meet much of the criticism directed against it. But, even more so, this quieting of controversy has reflected the acceptance among the vast majority of our people of the need for the performance by the Court of its constitutional role. With Justice Story over a century ago, most Americans would still say, "The universal sense of America has decided, that in the last resort the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments, so far as they are capable of being made the subject of judicial controversy."⁶ The most significant thing about the Supreme Court is, after all, the continued performance by it of its constitutional function and the continued acceptance by the mass of Americans of such performance. This remains the basic aspect of our system—as significant in an analysis of recent developments as it would be in an over-all historical account.

I. "ALL STATES ARE EQUAL"

Delivering the judgment in the now-classic equity case of *Penn v. Lord Baltimore*,⁷ Lord Hardwicke, L.C., declared that the case was "of a nature worthy the judicature of a *Roman* senate rather than of a . . . judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a *Roman* senate, that will correct it."⁸ What Lord Hardwicke said about the nature of *Penn v. Lord Baltimore* might be said with equal propriety about *United States v. Louisiana*⁹—though, in this country of course the members of the supreme tribunal can hardly console themselves with the thought about a higher corrective jurisdiction articulated by his Lordship.

The *Louisiana* case was an original action brought by the United States against the states of Alabama, Florida, Louisiana, Mississippi, and Texas, for a declaration that the United States was entitled to exclusive possession of, and full dominion and power over, the lands, minerals, and other things underlying the waters

⁶ 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1570 (1833).

⁷ 1 Vesey Sen. 444, 27 Eng. Rep. 1132 (Ch. 1750).

⁸ *Id.* at 446, 27 Eng. Rep. at 1134.

⁹ 363 U.S. 1 (1960).

of the Gulf of Mexico more than three geographic miles seaward from the coast of each defendant state and extending to the edge of Continental Shelf. The case itself was the most recent phase of the over twenty years' dispute between the coastal states and the federal government over their respective rights to exploit the oil and other natural resources of offshore submerged lands. In the earlier case of *United States v. California*¹⁰ the high Court had held that, as against California, the United States possessed paramount rights in such lands underlying the Pacific Ocean seaward of the low-water mark on the coast of California and outside of inland waters. Similar holdings were made in later cases against several of the Gulf states.¹¹

After these decisions Congress passed the Submerged Lands Act.¹² By it the United States relinquished to all coastal states the lands and resources under navigable waters extending three geographical miles seaward from their coastlines. In addition, the five Gulf states were granted the submerged lands as far out as each state's boundary line either "existed at the time such State became a member of the Union," or had been previously "approved by Congress." But in no event was any state to have "more than three marine leagues into the Gulf of Mexico."

The *Louisiana* case essentially involved the application of this statutory provision to the five Gulf states. Each of those states claimed a three-league boundary and grant. The Supreme Court denied such claim as to Alabama, Louisiana, and Mississippi, but held in favor of Texas and Florida. When Texas was an independent republic, it had asserted a three-league maritime boundary. This claim, the Court held, was recognized by the Congress both when Texas was admitted to the Union and when it was readmitted after the Civil War. Hence the Texas claim came within the Submerged Lands Act. Florida's constitution when it was readmitted to the Union following the Civil War contained a provision which described her Gulf boundary as extending three leagues. By readmitting Florida, Congress was held to have "approved" her three-league boundary within the meaning of the Submerged Lands Act. The Court, in other words, concluded that Texas and Florida had adequately proved the past existence of three-league boundaries recognized by the Congress, while the other three Gulf states had not.

¹⁰ 332 U.S. 19 (1947).

¹¹ *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

¹² 67 Stat. 29 (1953), 43 U.S.C. § 1301 (1958).

The difficulty of the problem presented to the Court by the Submerged Lands Act should be recognized first of all. The earlier decisions with regard to the offshore-oil lands met strong opposition in the political branches of the Government. The Eisenhower Administration requested Congress to state specifically, in proposed legislation, what rights in addition to those allowed by the Court the Gulf states were to possess. Congress was, however, too torn by conflicting political pressures to make the decision itself. Instead, it left the decision to the Supreme Court. The Solicitor General stated during argument, "It was a difficult political question, and Congress didn't want to have to choose one alternative or the other." To which remark, Justice Frankfurter interposed, "What's the Supreme Court for except to bail them out?"¹³

A statute passed to enable the high Court to "bail" the Congress out will rarely be easy for the Justices to apply. Hence, it may be somewhat unfair for a critique to be directed against their application of such law. If, indeed, the only doubts to be expressed were on comparatively minor matters of statutory interpretation,¹⁴ it might well be sounder to remain silent. But the *Louisiana* application of the Submerged Lands Act is based upon a view of the status of the states that does violence to the fundamental conception upon which the American Union is grounded.

In commenting to the press on the *Louisiana* case, a congressman from one of the losing states declared, "A state is in the Union or it is not in the Union. They should all be treated alike—or is that asking too much of the Supreme Court?"¹⁵ This comment strikes at the basic weakness of the *Louisiana* decision. It is not an answer to say that the test used by the Court is that chosen by the Congress, which imposed on the Court the duty of treating the states unequally. For overhanging both the *Louisiana* decision and the Submerged Lands Act itself is the question whether such inequality among the states is consistent with the theory upon which our federation rests.

Although the Constitution may not expressly so provide, it has always been basic that equality is the dominant theme of the Union. When once admitted, a new state stands upon an equal footing with all existing states, in all respects.¹⁶ "Equality of constitutional

¹³ N.Y. Times, June 2, 1960, p. 25, col. 3.

¹⁴ E.g., whether the Court is correct in interpreting admission claims to include "readmission" claims.

¹⁵ N.Y. Times, June 2, 1960, p. 25, col. 2.

¹⁶ This principle even antedates the Constitution, for it was first stated in the Northwest Ordinance of 1787, LAWS OF THE TERRITORY NORTHWEST 66 (1833).

right and power is the condition of all the States of the Union, old and new.”¹⁷ So strong has this principle been that the Court has consistently held invalid preadmission requirements imposed by the Congress upon new states, as conditions precedent to congressional consent to admission.¹⁸

The clear result of the *Louisiana* decision, on the other hand, is inequality of treatment for the states concerned. Texas may well have had the right to assert rights beyond the three-mile limit when it was an independent nation. However, by entering the Union Texas surrendered the right to claim more than her sister states. “If it were necessary for Texas to surrender all her property and political rights in the marginal sea in order to enter the Union on an ‘equal footing’ with the other States, pray how can she get back some of those rights and still remain on an ‘equal footing’ with the other States?”¹⁹ Nor is it an answer to say, as the Court does, that it is up to the Congress to dispose of federal property as it sees fit.²⁰ Congressional authority in this respect should not include the power to perpetuate or permit inequalities among the states.

In Justice Douglas’ words, “Our Union is one of equal sovereigns, none entitled to preferment denied the others. That is what the ‘equal footing’ standard means or it means nothing.”²¹ Under the *Louisiana* decision, indeed, may we not convert the “equal footing” standard into Orwellian terms: All states are equal; but some states are more equal than others.

II. JUDICIAL POWER AND NATIONWIDE STRIKES

To the foreign observer, the most striking feature of the American constitutional system is the doctrine of judicial supremacy. “No feature in the government of the United States,” writes Lord Bryce, “has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution.”²² Under the doctrine of judicial supremacy, it has been the highest Court that has determined conflicts between acts of government and the Constitution, and it has

¹⁷ *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883).

¹⁸ The leading case is *Coyle v. Smith*, 221 U.S. 559 (1911).

¹⁹ Justice Douglas dissenting in *Alabama v. Texas*, 347 U.S. 272, 283 (1954).

²⁰ 363 U.S. 1, 7, citing *Alabama v. Texas*, 347 U.S. 272 (1954).

²¹ *Supra* note 19, at 283.

²² 1 BRYCE, *THE AMERICAN COMMONWEALTH* 242 (1913 ed.).

done so through the technical forms of the lawsuit. Struggles over power that in Europe call forth regiments of troops, in this country call forth battalions of lawyers.²³

In the *Louisiana* case, the high bench resolved a dispute between conflicting sovereignties comparable to those ordinarily within the competence of international tribunals rather than ordinary courts of law. In *United Steelworkers v. United States*,²⁴ on the other hand, the Court was called upon to intervene in a nationwide strike in the steel industry.

The *Steelworkers* case arose from an action by the Attorney General for an injunction against the continuation of an industry-wide strike of workers in the steel industry. The President, after finding that the strike, if allowed to continue, would imperil the national health and safety, created a Board of Inquiry, under the relevant sections of the Taft-Hartley Act.²⁵ After the Board had proved unable to resolve the dispute, the President, reiterating his former pronouncement that the continuance of the strike constituted a threat to the national health and safety, ordered the Attorney General to seek an injunction. The action was brought under a Taft-Hartley Act provision²⁶ vesting the district court with jurisdiction to enjoin a strike if it finds that the strike affects an entire industry or a substantial part thereof and, if permitted to occur or continue, will imperil the national health or safety. The district court in the instant case made the necessary findings and issued the injunction.

The most significant question presented in the *Steelworkers* case arises directly out of the doctrine of judicial supremacy. A Court accoutered with the constitutional authority vested in our highest tribunal, which, at the same time, is endowed with neither the sword nor the purse wielded by the political branches, must move warily in exercising power. Above all must it be vigilant to ensure that it remains within the limits traditionally associated with judicial power, lest it otherwise appear to usurp the power to intervene directly in political controversies. It should not be forgotten that the Framers deliberately withheld from the high Court power that was purely political in form, such as a forthright power to veto or revise legislation. Instead, they delegated to the Court "the judicial power" alone—a power which, by the express

²³ JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* XI (1941).

²⁴ 361 U.S. 39 (1959).

²⁵ 61 Stat. 136 (1947), 29 U.S.C. §§ 151-188 (1958).

²⁶ 61 Stat. 155 (1947), 29 U.S.C. §§ 176-180 (1958).

language of Article III, extends only to the resolution of “Cases” and “Controversies.”

The result of the constitutional restriction is that the Supreme Court’s only power is to decide lawsuits between opposing litigants with real interests at stake, and its only method of proceeding is by the conventional judicial process. As Justices Frankfurter and Harlan stated, concurring in the *Steelworkers* case, “Judicial power could come into play only in matters such as were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”²⁷

Petitioner union in *Steelworkers* had contended that the grant to the district court of jurisdiction to enjoin strikes such as the steel stoppage was not a grant of “judicial power” within the meaning of Article III and was therefore beyond the power of the Congress to confer. This contention was rejected by the Court.

Although the Court’s reasoning was articulated only in a brief per curiam opinion, its conclusion on the point under discussion appears sound. Petitioner’s contention was, in effect, based upon the claim that the Taft-Hartley Act made the courts more or less administrative adjuncts of the President for the purpose of acting against nationwide strikes. If that were the situation, with the judiciary acting, in Justice Douglas’ phrase, only as a “rubber stamp for the President” or “as the President’s Administrative Assistant,”²⁸ Article III would clearly be violated. “If the federal court is to be merely an automaton stamping the papers an Attorney General presents, the judicial function rises to no higher level than an IBM machine.”²⁹ However, the district court in the instant case was not functioning as an automaton. Under the Taft-Hartley Act, the court, not the President, fashions the decree. Furthermore, the statute imposes upon the court the duty of finding, on its own judgment, whether the strike meets the statutory conditions of breadth of involvement and peril to the national health or safety. The availability of judicial relief under Taft-Hartley thus depends upon judicially-made findings of fact. Of the matters decided by the courts, there is no review by other governmental agencies.

Far from being foreign to the ordinary type of “judicial power,” the authority vested in the courts to issue a Taft-Hartley “eighty-

²⁷ 361 U.S. 39, 60 (1959).

²⁸ *Id.* at 71.

²⁹ *Ibid.*

day injunction" appears but to be a modern equivalent of the traditional power of the courts to abate public nuisances. The power to enjoin public nuisances at the suit of the Government has been a commonplace of judicial jurisdiction in the Anglo-American world. The criteria for judicial action under Taft-Hartley—peril to health or safety—are similar to those on which courts have customarily acted in public nuisance cases. "There can therefore be no doubt that, being thus akin to jurisdiction long historically exercised, the function to be performed by the District Courts under § 208 (a) is within the 'judicial Power' as contemplated by Art. III, § 2, and is one which Congress may thus confer upon the courts."³⁰

One can indeed, go further and wonder whether, absent the Norris-LaGuardia Act,³¹ the federal courts could not grant an injunction against a nationwide strike in an essential industry under their traditional equity powers, even without the Taft-Hartley Act. In the well-known *Debs* case,³² an injunction was issued against the 1894 Pullman strike partially upon the ground that the Government might invoke judicial power to abate what was in effect a nuisance detrimental to the public interest; the strike in question resulted in interference with the mail and interruption of interstate commerce. Under the *Debs* approach, there appears to be adequate legal warrant for action by the Government against a nationwide strike like that in the *Steelworkers* case, even without express statutory authorization. A fortiori, if Congress expressly authorizes an injunction in such cases, there should be no legal question of judicial power when such decree is actually issued.

III. MILITARY LAW AND THE CONSTITUTION

A problem that has grown in importance in an era dominated by war and cold war is that of the relationship between military law and the Constitution. Since the last war this problem has taken on a new dimension due to the presence of American forces in different countries for purposes of military occupation and to fulfill our defensive commitments to our overseas allies. Of course, those actually serving in the armed forces, whether at home

³⁰ *Id.* at 61-62 (concurring opinion of Justices Frankfurter and Harlan).

³¹ The Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-115 (1958), does not affect this, since, under *United States v. United Mine Workers*, 330 U.S. 258 (1947), that statute is not applicable in an action brought by the Government.

³² *In re Debs*, 158 U.S. 564 (1895).

or abroad, are clearly subject to military law and the provisions of the Uniform Code of Military Justice.³³ A difficulty arises, however, with regard to those who may accompany members of the armed forces abroad. May such persons, consistently with the Constitution, be subjected to the jurisdiction of military tribunals?

The Uniform Code of Military Justice itself contains a provision³⁴ under which all persons accompanying the armed forces outside the continental limits of the United States are made subject to the Code; this means, as a practical matter, that they are subject to court-martial jurisdiction. In the 1957 Term, in *Reid v. Covert*,³⁵ the Supreme Court held this provision unconstitutional when applied to civilian dependents charged with capital offenses. But *Covert* left open more questions than it answered. Under it, a civilian dependent of an American serviceman abroad may not constitutionally be tried for a capital offense by other than an Article III court. Is the same true where such dependent is charged with an offense less than capital? And what of civilian employees of the armed forces abroad?

These questions were answered in three cases decided during the past term. The first of them, *Kinsella v. United States ex rel. Singleton*,³⁶ dealt with the question specifically raised, though not answered, in *Reid v. Covert*—whether a civilian dependent abroad could be tried by court-martial for a noncapital offense. The *Covert* Court split evenly on this point.³⁷ In the *Singleton* case, on the other hand, a clear majority of the Court ruled that the *Covert* holding did extend to noncapital offenses.³⁸ Hence, a civilian dependent could not be subjected to court-martial jurisdiction in any case in time of peace, whether such case be capital or noncapital in character.

The opinion of the Court in *Singleton* was delivered by Justice Clark, who had dissented in *Covert*. This is not as inconsistent as it may at first glance appear, for, in his *Covert* dissent, Justice Clark had been emphatic in declaring that there was nowhere in the Constitution any basis for distinguishing between capital and noncapital offenses, so far as court-martial jurisdiction over

³³ 70A Stat. 36 (1956), 10 U.S.C. §§ 801-940 (1958).

³⁴ 64 Stat. 109 (1950), 50 U.S.C. § 552 (11) [now 10 U.S.C. § 802 (11)].

³⁵ 354 U.S. 1 (1957).

³⁶ 361 U.S. 234 (1960).

³⁷ Justices Black, Douglas, and Brennan, and Chief Justice Warren stated that a court-martial may not be used for a noncapital offense; Justices Clark, Burton, Frankfurter, and Harlan took the opposite approach. Justice Whittaker did not participate in the decision.

³⁸ Only Justices Harlan and Frankfurter dissented from this ruling.

civilians was concerned.³⁹ Thus, unless the *Covert* decision were to be overruled, its holding had to apply to all conduct proscribed by the Uniform Code, whether capital or noncapital in nature.

The principal question, as Justice Whittaker pointed out in a concurring opinion, is one of the *status* of the person accused. In his words, "courts-martial either do or do not have jurisdiction and, hence, power to try the accused for all offenses against the military law or for none at all."⁴⁰ Since, under *Covert*, Congress may not constitutionally provide for court-martial trial of civilian dependents in capital cases, neither can it do so in noncapital cases.⁴¹

In *Grisham v. Hagan*⁴² and *McElroy v. United States ex rel. Guagliardo*,⁴³ decided the same day as *Singleton*, the majority of the Court held that court-martial jurisdiction could not constitutionally extend to civilians employed overseas by the military services. *Grisham* involved a capital offense; *Guagliardo*, a non-capital one.

Grisham is based directly upon the *Covert* reasoning. Under *Covert*, said Justice Clark, the death penalty is so drastic "that a dependent charged with a capital crime must have the benefit of a jury. The awesomeness of the death penalty has no less impact when applied to civilian employees."⁴⁴ But, if that is true, then the *Singleton* rationale requires the same result in civilian employee noncapital cases. Hence *Guagliardo* holds that, like the civilian dependent, the civilian employee overseas is wholly exempt from military jurisdiction.

Justice Whittaker, in his dissent to these two cases, urged that the *Covert* case was limited to "civilian dependents." In his view, there was a marked and clear difference between such dependents and American civilians employed by the armed forces at military posts in foreign lands. The latter perform essential services for the military and, therefore, should be subject to the same rules of military justice as the "members" of the armed forces.

It must be admitted that the Court's decisions in *Singleton*, *Grisham*, and *Guagliardo* pose serious practical problems. It is now most difficult for Congress to frame a workable scheme for subjecting civilians living and working on American bases abroad

³⁹ 354 U.S. 1, 89 (1957).

⁴⁰ 361 U.S. 234, 263 (1960).

⁴¹ *Id.* at 248.

⁴² 361 U.S. 278 (1960).

⁴³ 361 U.S. 281 (1960).

⁴⁴ *Supra* note 42, at 280.

to necessary and proper rules governing their conduct. The various alternatives which may be possible⁴⁵ appear to be all but unworkable. Perhaps the only reasonable alternative is to subject our civilian dependents and employees to the exclusive jurisdiction of the countries in which the bases on which they live and work are located—a solution which is both workable and in accord with international law, even though it will hardly seem satisfactory to many Americans.

At the same time, to the constitutional observer, *Singleton*, *Grisham*, and *Guagliardo* will take their place in the line of cases starting with *Ex parte Milligan*,⁴⁶ which stand as constant reaffirmations of the basic separation of the military from the civil. Indeed, in *Covert* the Court asserted, "*A statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"⁴⁷ Certainly, that is the import of the cases which have been discussed. Under our Constitution, courts of law alone are given power to try civilians.⁴⁸

IV. CONGRESSIONAL POWER AND EQUAL PROTECTION

In few areas has the work of the highest tribunal in recent years been more consequential than in that of applying the equal protection clause. And in few respects has the Supreme Court of the past twenty years differed more from its predecessors than in its readiness to give full effect to the constitutional guaranty of equal protection of the laws for the Negro.

Before 1957, the function of ensuring that equal protection would become more than a mere political slogan was almost entirely assumed by the judicial branch of the Government. In that year Congress, for the first time in almost a century, assumed a positive role in this field by enacting the Civil Rights Act of 1957.⁴⁹ Like all other legislation, however, the civil rights statute is not a self-executing document. The *ought* laid down in 1957 must run the gantlet of judicial interpretation before it attains the practical status of an *is*. Are not Chief Justice Hughes' celebrated words, "We are under a Constitution, but the Constitution is what the

⁴⁵ Some of them are discussed by Justice Clark dissenting in *Reid v. Covert*, 354 U.S. 1, 87-89 (1957).

⁴⁶ 71 U.S. (4 Wall.) 2 (1866).

⁴⁷ 354 U.S. 1, 35 (1957), quoting *WINTHROP, MILITARY LAW AND PRECEDENTS* 107 (2d ed. 1920) (Winthrop's italics).

⁴⁸ Compare *id.* at 40.

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

judges say it is," true as well with regard to legislation? Any statute, in actual practice, is what the judges say it is.

During the past term, the Civil Rights Act of 1957 began its inevitable course through the gantlet of Supreme Court construction. Nor can it be gainsaid that the decisions rendered thus far have been of basic importance to implementation of the statute. The law itself, it can hardly be denied, was a watered-down compromise. If its terms were to be read by the high bench in a decimating spirit, it would surely lose all practical efficacy.

In this past term, however, the Supreme Court has clearly indicated that it will construe that statute with a benevolent eye in order to give it the full remedial effect that Congress intended. In *United States v. Raines*,⁵⁰ the United States brought an action against the members of the Board of Registrars and certain Deputy Registrars of Terrell County, Georgia. The complaint, seeking an injunction and other relief, charged that the defendants had, through various devices in the administration of their offices, discriminated on racial grounds against Negroes who desired to register to vote in elections conducted in the state. The district court dismissed the complaint, holding the relevant subsection of the 1957 statute unconstitutional. According to the district court the statutory language allowed the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color. Although the complaint in question involved only official action, the court ruled that since, in its opinion, the statute on its face was susceptible of application beyond the scope permissible under the fifteenth amendment, it was to be considered unconstitutional in all its applications.

The Supreme Court reversed, holding that since the instant case plainly involved a proceeding against official action within the meaning of the fifteenth amendment, the lower court had erred in ruling the statute invalid because of its possible scope in hypothetical cases not presented. As Justice Brennan stated, "[W]hatsoever precisely may be the reach of the fifteenth amendment, it is enough to say that the conduct charged . . . is certainly, as 'state action' and the clearest form of it, subject to the ban of that amendment, and that legislation designed to deal with such discrimination is 'appropriate legislation' under it."⁵¹ Because the complaint here called for a clearly constitutional application of the statute, that should have ended the question of constitutionality in this case.

⁵⁰ 362 U.S. 17 (1960).

⁵¹ *Id.* at 25.

Appellees in the *Raines* case went farther and urged that it was beyond the power of Congress to authorize the Government to bring an action in support of private constitutional rights. This contention, which went to the heart of congressional power to implement the post-bellum amendments, was also rejected by the Court. Said Justice Brennan, "[T]here is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief."⁵² Certainly, if, as already seen in our discussion of the *Steelworkers* case,⁵³ Congress can empower the Government to seek injunctions against nationwide strikes, it should be able to authorize the Government to seek decrees against violations of constitutional voting rights—particularly where the relevant constitutional provision expressly empowers Congress to enforce it by appropriate legislation.⁵⁴

While the *Raines* case dealt with a challenge to the validity of the Civil Rights Act itself, *Hannah v. Larche*,⁵⁵ on the other hand, involved a challenge to the functioning of the Civil Rights Commission, an agency of the executive branch of the Government set up under the 1957 statute. It concerned the validity of certain rules of procedure adopted by the Commission. The case arose out of the Commission's investigation of alleged Negro voting deprivations in Louisiana. The appellees, registrars of voters in Louisiana, having been summoned to appear before a hearing which the Commission proposed to conduct in Shreveport, Louisiana, petitioned the federal district court to enjoin the Commission from holding its anticipated hearing. It was alleged, among other things, that the Commission's rules of procedure governing the conduct of its investigations were unconstitutional. The specific rules challenged provided that the identity of persons submitting complaints to the Commission need not be disclosed, and that those summoned to testify before the Commission, including persons against whom complaints had been filed, might not cross-examine other witnesses called by the Commission.

The Supreme Court ruled that the challenged procedural rules were consistent with due process. This was true, said the Court,

⁵² *Id.* at 27.

⁵³ Note 24 *supra*.

⁵⁴ See also *United States v. Alabama*, 362 U.S. 602 (1960).

⁵⁵ 363 U.S. 420 (1960).

because of the nature of the functions vested in the Civil Rights Commission. As described by Chief Justice Warren, "[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action."⁵⁶

Whether due process demands a full adversary hearing depends entirely upon the nature of the governmental function involved. "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."⁵⁷ Since the rights claimed by appellees are those normally associated only with adjudicatory proceedings, and since the Civil Rights Commission does not adjudicate, it need not be bound by adjudicatory procedures.

One familiar with the practical realities involved in the enforcement of voting rights in the South well realizes that any other decision than that reached in *Hannah v. Larche* could render wholly ineffective the functioning of the Civil Rights Commission. "It is not a constitutional requirement that the Commission be argumentatively turned into a forum for trial of the truth of particular allegations of denial of voting rights in order thereby to invalidate its functioning."⁵⁸ The functioning of the Civil Rights Commission would be stifled if its hearings were transformed into trial-like proceedings and if an absolute right were given to cross-examine every witness called to testify. Nor is it hard to conceive what practical consequences would ensue if the identity of persons submitting complaints to the Commission had to be disclosed. "We would be shutting our eyes to actualities to be unmindful of the fact that it would dissuade sources of vitally relevant information

⁵⁶ *Id.* at 441.

⁵⁷ *Id.* at 442.

⁵⁸ *Id.* at 492 (concurring opinion of Justice Frankfurter).

from making that information known to the Commission, if the Commission were required to reveal its sources and subject them to cross-examination.”⁵⁹

V. COMMERCE AND STATE POWER

During the 1958 Term, the Court had expanded the permissible area of state taxation of commerce. In *Northwestern States Portland Cement Co. v. Minnesota*,⁶⁰ indeed, the high bench went so far in upholding state taxing power that the Congress enacted a statute expressly limiting the effect of the Court's decision, as well as providing for a general legislative study of the whole subject.⁶¹

In the *Northwestern Portland* case, the Court had upheld state power to levy income taxes upon foreign corporations engaged exclusively in interstate commerce. This past term, in *Scripto, Inc. v. Carson*,⁶² the Court dealt with state use taxes. The state power to impose such taxes even upon products brought in from other states has, of course, been settled since *Henneford v. Silas Mason Co.*⁶³ *Henneford*, however, left open the vital question of implementation of state power in this area. The effectiveness of a use tax depends upon the scheme by which it is collected. Such taxes are all but impossible to collect from the thousands of individuals who make purchases across state lines. To overcome these difficulties, the states have attempted to make the sellers collect use taxes for them.

The *Scripto* case involved such an attempt by the State of Florida. By statute, Florida required appellant, a Georgia corporation, to be responsible for the collection of a use tax on certain mechanical writing instruments which appellant sold and shipped from its place of business in Atlanta to residents of Florida for use and enjoyment there. Upon *Scripto's* failure to collect the tax, the appellee comptroller levied a use tax liability against it. Appellant then brought this suit to test the validity of the imposition, contending that the requirement of Florida's statute not only placed a burden on interstate commerce, but also violated due process. Appellant does not own, lease, or maintain any office, distributing house, warehouse or other place of business in Florida, or have any regular employee or agent there. Nor does it own or

⁵⁹ *Id.* at 489.

⁶⁰ 358 U.S. 450 (1959).

⁶¹ 73 Stat. 555, 15 U.S.C. §§ 381-384 (Supp. I, 1959).

⁶² 362 U.S. 207 (1960).

⁶³ 300 U.S. 577 (1937).

maintain any bank account or stock of merchandise in Florida. Orders for its products are solicited by advertising specialty brokers who are residents of Florida. At the time of suit, there were ten such brokers—each having a written contract and a specific territory.

The Court upheld the power of Florida to collect the use tax from appellant on the basis of property bought and shipped from its home office to purchasers for use in Florida. For the state to exercise such authority over the seller, there must, to use Justice Jackson's words from an earlier case, be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."⁶⁴ Such a nexus, said the Court, is present here. Where such nexus exists, the state can require that the out-of-state seller be its tax collector on orders from its residents.

Scripto greatly weakens the effect of *Miller Bros. Co. v. Maryland*,⁶⁵ where the Court had limited the power of the state of the purchaser to make the out-of-state seller its use tax collector. In *Scripto*, the Court, in effect, limits *Miller Bros.* to the case of a seller who makes no effort to sell his product outside his own out-of-state store. But any effort by the seller to solicit business or otherwise exploit the consumer market in the state of the purchaser provides a sufficient nexus to enable that state to require the seller to collect its tax.

Scripto may be understood as a logical successor of the 1958 Term decisions upholding state taxing power. But, as a practical matter, it goes much further than they in defeating a basic purpose of the commerce clause. The Court has upheld use taxes because their basic purpose is to create equality as between interstate and local commerce. Yet, in this respect, its effect is exactly that of a protective tariff. It may be advantageous for the state to be able to say to interstate commerce, "You may come into my borders, but your products must be subject to the same tax burdens as local products." There is no doubt that a sovereign country could make such a statement and levy tariffs to carry it into effect. In our system, however, the states are barred from laying such tariffs upon commerce from sister states. Under the Court's decisions upholding the use tax, nevertheless, our supposedly free-trade economy is now all but honeycombed with this type of "protective tariff."

Another area of state taxing power that is of great significance in a federal system such as ours is that which touches the area of

⁶⁴ *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954).

⁶⁵ 347 U.S. 340 (1954).

so-called intergovernmental tax immunities. In recent years, the high Court has been careful to limit such immunities to the governments concerned, and to withdraw the immunities that had previously been recognized in private individuals, such as government contractors, having dealings with government. The most recent of the cases indicating this trend was *United States v. Detroit*,⁶⁶ decided during the 1957 Term, which held valid a local tax imposed on a private lessee of federally-owned property.

Phillips Chemical Co. v. Dumas Independent School District,⁶⁷ decided this term, shows, on the other hand, that, although such private lessees no longer are sheltered by the protective umbrella of the federal government's tax immunity, they may not be subjected to *discriminatory* state taxation. The relevant state law in *Phillips*, granting the state and its subdivisions the right to tax the lessees of federal lands, was more burdensome than the statute granting the right to tax lessees of state lands. So substantial and transparent a discrimination against the Government and its lessees, said the Court, must fall. Nor is the discrimination justified by the state's power to classify. "Where taxation of the private use of the Government's property is concerned, the Government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself."⁶⁸ Though, as already stated, the recent trend is to remove the Government's tax immunity from private persons solely because they happen to deal with the Government, "it still remains true, as it has from the time of *M'Culloch v. Maryland* . . . that a state tax may not *discriminate* against the Government or those with whom it deals."⁶⁹

As pointed out last year,⁷⁰ closely related to the cases involving state taxation of commerce are those dealing with state regulation of commerce. *Huron Portland Cement Co. v. City of Detroit*⁷¹ is a case close to the line between valid and invalid state action in that area. It arose out of the application of certain provisions of a municipal smoke abatement code to ships operated in interstate commerce. The ships in question were equipped with boiler

⁶⁶ 355 U.S. 466 (1958).

⁶⁷ 361 U.S. 376 (1960).

⁶⁸ *Id.* at 385.

⁶⁹ *Id.* at 387. (Emphasis added.)

⁷⁰ Schwartz, *The Supreme Court—October 1958 Term*, 58 MICH. L. REV. 165, 184 (1959).

⁷¹ 362 U.S. 440 (1960).

stacks emitting smoke which in density and duration exceeded the maximum standards allowable under the relevant municipal code. Structural alterations would be required in order to insure compliance.

The Court upheld the application of the municipal regulation to the interstate ships, in the absence of conflicting federal prescriptions. Such state regulation, "which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."⁷² In the instant case, the appellant had argued that, in fact, this case was comparable to *Southern Pacific Co. v. Arizona*,⁷³ since other local governments might impose differing requirements as to air pollution. But, said the Court, appellant had pointed to none; the record contained nothing to suggest the existence of any such competing or conflicting local regulations.

The implication is that for the *Southern Pacific* holding to apply, it must be shown that there are actually conflicting state regulations in existence. One wonders whether this is not to misread both *Southern Pacific* and the test of *Cooley v. Board of Wardens of the Port of Philadelphia*⁷⁴ upon which it was based. In *Southern Pacific* itself, there was no showing that states other than Arizona had imposed train-limit requirements. Yet that did not deter the Court from ruling that the Arizona law was invalid. It was the possibility, not the actuality, of a "crazy-quilt"⁷⁵ of train-limit requirements that made a uniform regulatory system essential. The variety of requirements for equipment which the states may prescribe in order to meet their air pollution needs underscores the argument that the same considerations should apply in a case like *Huron Portland Cement Co. v. City of Detroit*.⁷⁶

VI. CRIMINAL LAW

In explaining the recent work of the highest Court to the English reader, Professor Carr states, "During the last decade the Supreme Court has increasingly found itself called upon to review criminal judgments. . . . Indeed, the number of cases of this type has increased to a point where the Supreme Court devotes a large

⁷² *Id.* at 448.

⁷³ 325 U.S. 761 (1945).

⁷⁴ 53 U.S. (12 How.) 298 (1851).

⁷⁵ The term used by Justice Frankfurter concurring in *Morgan v. Virginia*, 328 U.S. 373, 388 (1946).

⁷⁶ Compare Justice Douglas dissenting, 362 U.S. 440, 455 (1960).

measure of its time and energy functioning as the nation's highest court of criminal appeals."⁷⁷

In this respect, it should be pointed out that the role of the highest tribunal in the criminal field has two aspects. There is, in the first place, the Court's function in reviewing convictions appealed to it from the lower federal courts. In such cases, the high bench acts as the direct hierarchical head of the federal judicial system; its relation to the lower federal courts is that of chief to subordinates. The same is not true in the second area—the review of state court convictions. In performing this role, the Supreme Court's authority is essentially limited to the enforcement of the due process clause of the fourteenth amendment.

Several cases decided during the past term involve familiar exercises of the high bench's function of requiring that state convictions meet the standards of due process. In *Blackburn v. Alabama*,⁷⁸ a conviction based upon a confession was set aside, where the defendant, a Negro who was mentally ill, had confessed during an eight-to-nine-hour period of sustained solitary interrogation in a tiny room. Such confession, said the Chief Justice, "most probably was not the product of any meaningful act of volition."⁷⁹ Therefore, its use "transgressed the imperatives of fundamental justice which find their expression in the Due Process Clause."⁸⁰

Similarly, in *Hudson v. North Carolina*,⁸¹ the Court reversed a conviction for robbery because of a denial of counsel, where the defendant was eighteen years old and had only a sixth-grade education.⁸² The Court relied primarily upon the fact that midway through the trial a codefendant was permitted to plead guilty in the presence of the jury. This was not a case, said the Court, where the failure to appoint counsel resulted in a constitutionally unfair trial simply because of defendant's comparative youth. But the guilty plea of the codefendant left defendant entirely to his own devices at a moment of great potential prejudice. A layman alone could not be expected to be able to deal with such a situation. "The prejudicial position in which the petitioner found himself when his codefendant pleaded guilty before the jury raised prob-

⁷⁷ Carr, *Civil Liberties in the United States*, in *PRESENT TRENDS IN AMERICAN NATIONAL GOVERNMENT* 205 (Junz ed. 1960).

⁷⁸ 361 U.S. 199 (1960).

⁷⁹ *Id.* at 211.

⁸⁰ *Ibid.*

⁸¹ 363 U.S. 697 (1960).

⁸² Although he was characterized by the trial court as intelligent and familiar with criminal trials, *id.* at 701.

lems requiring professional knowledge and experience beyond a layman's ken."⁸³ The decision in this respect is but an application of the tendency noted last year⁸⁴ to hold the denial of counsel improper in all except the simplest cases. All but such cases may be said to raise "problems requiring professional knowledge and experience beyond a layman's ken."⁸⁵

A more striking case is *Thompson v. City of Louisville*.⁸⁶ Defendant there was convicted in a municipal police court of loitering and disorderly conduct. The conviction was based upon defendant's presence in a cafe for over half an hour, during which time he was "dancing by himself," "shuffling," or "patting his feet" in time to the music. A police officer arrested him for loitering and then, after he "argued" with the officer, for disorderly conduct. He was fined \$10 on each charge.

Since police court fines of less than \$20 on a single charge were not appealable or otherwise reviewable in any other court of the state, defendant sought review directly in the Supreme Court. Thus, the highest court of the land acted, in effect, as a direct appellate tribunal over a municipal police court in a case involving an almost insignificant amount. Yet, it is basic in our system that the importance of a case is to be found, not in its monetary impact, but in the legal principles involved in it. Justice Black rightly states, in his *Thompson* opinion, "Our examination of the record presented in the petition for certiorari convinced us that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments."⁸⁷

On the merits, the Court found that the charges against defendant were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause. On the facts presented, defendant could not validly be convicted either of loitering or disorderly conduct. "Decision of . . . [the due process] question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."⁸⁸ There could be no conviction for loitering where defendant was acting only as he had here. Nor could he be guilty of disorderly conduct

⁸³ *Id.* at 703-04.

⁸⁴ Schwartz, *The Supreme Court—October 1958 Term*, 58 MICH. L. REV. 165, 195 (1959).

⁸⁵ Note 83 *supra*.

⁸⁶ 362 U.S. 199 (1960).

⁸⁷ *Id.* at 203.

⁸⁸ *Id.* at 199.

only because he had argued with the arresting officer. Thus there was no evidence to support the convictions. "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."⁸⁹

Perhaps the most difficult criminal cases which the Supreme Court must decide are those involving the interplay of state and federal power. The very nature of our federalism makes such interaction frequent. During the 1958 Term, *Bartkus v. Illinois*⁹⁰ and *Abbate v. United States*⁹¹ concerned one aspect of the interplay between state and federal jurisdiction—that of multiple prosecutions for the same offense. During the last term, *Elkins v. United States*⁹² concerned another important aspect—that of the use of evidence in the courts of one jurisdiction which had been secured by officers of another.

Elkins arose out of a federal conviction for intercepting and recording telephone communications and divulging such communications in violation of the Communications Act. Defendants made a motion to suppress certain evidence which had originally been seized by state law enforcement officers from the home of one of the defendants under circumstances which were found by the courts of the state to render the search and seizure unlawful. The federal trial court denied the motion to suppress; the Supreme Court reversed.

As stated by the Court, the question presented in *Elkins* was: "May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, be introduced in evidence against a defendant over his timely objection in a federal criminal trial?"⁹³ To answer this question, a word must be said about the prior cases on this subject.

In *Weeks v. United States*,⁹⁴ the Court laid down the basic rule which excludes in a federal criminal prosecution evidence obtained by federal agents in violation of defendant's fourth amendment rights. At the same time, the *Weeks* decision dealt with articles used as evidence in a federal court which had been seized by local police officers acting on their own account. The Court held that

⁸⁹ *Id.* at 206.

⁹⁰ 359 U.S. 121 (1959).

⁹¹ 359 U.S. 187 (1959).

⁹² 364 U.S. 206 (1960).

⁹³ *Id.* at 208.

⁹⁴ 232 U.S. 383 (1914).

the admission of this evidence was not error for "the fourth amendment is not directed to individual misconduct of such [state] officials. Its limitations reach the Federal government and its agencies."⁹⁵ This second aspect of the *Weeks* opinion came to be called the "silver-platter" doctrine. It had been consistently applied in many cases prior to *Elkins*.

In *Elkins*, the Court reexamined the validity of the "silver-platter" doctrine and rejected it. In the Court's view, the reasoning upon which *Weeks* rested—that the fourth amendment is not directed against misconduct of state officials—has not been valid since *Wolf v. Colorado*.⁹⁶ That case, said the *Elkins* Court, determined that the "Federal Constitution, by virtue of the fourteenth amendment, prohibits unreasonable searches and seizures by state officers."⁹⁷ *Wolf*, in this view, removed the doctrinal underpinning for the silver-platter doctrine. "The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared. . . ."⁹⁸

Elkins consequently rejected the doctrine that freely admitted in a federal criminal trial evidence seized by state agents in violation of the defendant's constitutional rights. In its place, it substitutes the rule "that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial."⁹⁹

One cannot but sympathize with the Court's feeling in *Elkins* that the federal courts should not "be accomplices in the willful disobedience of a Constitution they are sworn to uphold."¹⁰⁰ Nevertheless, one may wonder whether *Wolf v. Colorado* does destroy the doctrinal underpinning of the express limitation of the *Weeks* exclusionary rule to cases of federal violations as clearly as *Elkins* indicates. The *Elkins* approach assumes that, as a consequence of *Wolf*, precisely the same rules are applicable in determining whether the conduct of state officers violates the Constitution as are applicable in determining whether the conduct of federal officers does so. But this ignores the basic distinction between the

⁹⁵ *Id.* at 398.

⁹⁶ 338 U.S. 25 (1949).

⁹⁷ Note 92 *supra*, at 213.

⁹⁸ *Ibid.*

⁹⁹ *Id.* at 223.

¹⁰⁰ *Ibid.*

specifics of a provision of the Bill of Rights and the generalities of the due process clause of the fourteenth amendment. *Wolf* itself, despite the *Elkins* opinion, did not make every technical state violation of the fourth amendment so contrary to basic standards of justice as to make it automatically a violation of the fourteenth amendment. *Elkins* appears to disregard the essential difference, so strongly emphasized only last term in the *Bartkus* case,¹⁰¹ between the particularities of the first eight amendments and the fundamental nature of what constitutes due process.¹⁰²

VII. FIRST AMENDMENT CASES

In the Supreme Court of recent years, one of the sharpest divisions has concerned the scope of the first amendment. More specifically, are first amendment rights to be treated like other constitutional rights and, as such, subject to legislative restraint in appropriate cases? Or, are such rights to occupy a "preferred position," with the absolute language of the first amendment given literal effect, so that they are subject to no legislative qualification whatever?

During the past term, the division in the Court on this subject appears to have continued unabated. The two wings of the high bench continued to express their own views on the matter. The actual first amendment decisions, however, found both wings in agreement in striking down three different state laws. The first of these laws was the municipal ordinance at issue in *Smith v. California*.¹⁰³ It made it unlawful "for any person to have in his possession any obscene or indecent writing [or] book . . . in any place of business where . . . books . . . are sold or kept for sale." The offense in *Smith* was defined by the state courts to consist solely of the possession, in appellant's bookstore, of a certain book found upon judicial investigation to be obscene. The definition included no element of *scienter*—knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing "strict" or "absolute" criminal liability.

The Supreme Court held that, as so construed, it was in conflict with the Federal Constitution. In 1957 *Roth v. United States*¹⁰⁴ had, it is true, recognized that obscene speech is not en-

¹⁰¹ *Bartkus v. Illinois*, 359 U.S. 121 (1959).

¹⁰² Compare Justice Frankfurter dissenting in *Elkins v. United States*, 364 U.S. 206, 233 (1960).

¹⁰³ 361 U.S. 147 (1959).

¹⁰⁴ 354 U.S. 476 (1957).

titled to first amendment protection. This decision was not, as such, altered by *Smith*. But *Smith* holds that although "traffic in obscene literature may be outlawed as a crime . . . one cannot be made amenable to such criminal outlawry unless he is chargeable with knowledge of the obscenity."¹⁰⁵ In Justice Brennan's words, "[O]ur holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."¹⁰⁶

Justice Brennan draws an instructive parallel between the ordinance at issue in *Smith* and familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged. The example given of such a penal statute is the modern food and drug law. In such cases, says Justice Brennan, the public interest in the purity of its food is so great that defendant's ignorance of the character of particular food is irrelevant. "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."¹⁰⁷ Such a requirement would result in a severe limitation "on the public's access to constitutionally protected literature. 'For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.' "¹⁰⁸ Interestingly enough, this intimation that speech occupies a preferred position, compared to the right to sell food and drugs, was expressly seconded by Justice Frankfurter.¹⁰⁹

In *Talley v. California*,¹¹⁰ a second municipal ordinance was condemned as an invalid restriction of first amendment rights. The ordinance in question prohibited the distribution of any handbill in any place under any circumstances, unless the handbills had

¹⁰⁵ Note 103 *supra*, at 161 (characterization of majority opinion by Justice Frankfurter, concurring).

¹⁰⁶ *Id.* at 152.

¹⁰⁷ *Id.* at 152-53.

¹⁰⁸ *Id.* at 153.

¹⁰⁹ *Id.* at 162.

¹¹⁰ 362 U.S. 60 (1960).

printed on them the names and addresses of the persons who prepared, distributed or sponsored them. Petitioner had been convicted for violating this ordinance. He had distributed handbills urging a boycott against certain merchants on the ground that, as one set of handbills said, they carried products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals." The handbills did not have printed on them the information required by the ordinance.

In the leading case of *Lovell v. Griffin*,¹¹¹ the Court held void on its face an ordinance that forbade any distribution of literature at any time or place without a license. Such ordinance amounted to a previous restraint upon publication and distribution of a type wholly inconsistent with the notion of freedom of speech. According to the Court, the *Talley* ordinance falls under the ban of the *Griffin* decision. The identification requirement imposed tends to restrict freedom to distribute information and thereby freedom of expression. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."¹¹² "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."¹¹³ An ordinance which has such effect is, like that at issue in *Lovell v. Griffin*, void on its face.

Another case illustrating that there are times and circumstances when states may not compel members of groups engaged in the dissemination of ideas to be publicly identified is *Bates v. City of Little Rock*.¹¹⁴ Petitioners there had been convicted of violating an ordinance of an Arkansas municipality by refusing a demand to furnish city officials with a list of the names of the members of a local branch of the National Association for the Advancement of Colored People. The municipality concerned had for some years imposed annual license taxes on a broad variety of businesses, occupations, and professions. In 1957, it added the requirement that any organization operating within the municipality must supply to the city clerk, upon request, specified information including a list of all members and contributors. Petitioners, custodians of the records of the local branch of the NAACP, had

¹¹¹ 303 U.S. 444 (1938).

¹¹² Note 110 *supra*, at 64.

¹¹³ *Id.* at 65.

¹¹⁴ 361 U.S. 516 (1960).

supplied the municipality with all the information required by the ordinance except that which would have required disclosure of the names of the organization's members and contributors.

The Supreme Court held that in the circumstances presented the requirement of disclosure constituted an invalid restriction of a first amendment right. The first amendment guarantees freedom of assembly, which includes the correlative right of freedom of association. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."¹¹⁵ Disclosure of affiliation with a group engaged in advocacy, like the NAACP, could constitute an effective restraint of freedom of association. "On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members."¹¹⁶

The holding that the ordinance thus restricts a first amendment right does not, however, of itself wholly resolve the case. Only under an absolutist view of the first amendment would that be true.¹¹⁷ To a Court which, in the main, rejects that view, a balancing of the interests involved is required. Justice Stewart, who delivered the *Bates* opinion, stated, "Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."¹¹⁸ In the instant case, no such showing is made. On the contrary, here there is no "relevant correlation between the power of the municipalities to impose occupation license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the" NAACP.¹¹⁹ Consequently, the municipality had failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause.

¹¹⁵ *Id.* at 523.

¹¹⁶ *Id.* at 523-24.

¹¹⁷ Such view is expressly taken by Justices Black and Douglas, concurring, *id.* at 527-28.

¹¹⁸ *Id.* at 524.

¹¹⁹ *Id.* at 525.

VII. THE COURT AS AN INSTITUTION

One who yearly analyzes the work of the highest tribunal well realizes the truth in Cardozo's famous statement that the law has its periods of ebbs and flow. Certainly, it will hardly be contended that the 1959 Term constituted one of the flood tides of Supreme Court jurisprudence. Indeed, compared to some of the more recent terms of the Warren Court, the one under review may seem relatively inconsequential.

Yet, even "ordinary" terms of the high bench are not without significance to students of the Court as an institution. If anything, in fact, such terms may be of even greater value from the point of view of day-to-day institutional functioning. Great cases, like hard cases, are prone to make bad law.¹²⁰ Cases decided in the glare of the *cause célèbre* are far more apt to distort the functioning of the deciding tribunal than those dealt with under calmer circumstances.

In a Court divided, as it is, between two polar extremes, however, even the seemingly run-of-the-mill case may lead to articulation of the sharpest differences, and even to expressions of acerbity among the Justices. The division between the rival judicial philosophies of Justices Frankfurter and Black, which has been the outstanding characteristic of the Court in recent years, has continued. And, as has been true of the terms since 1956, it has been the Frankfurter approach that has continued to command the allegiance of a majority of the Justices.

Wholly apart from the merits upon which the basic division in the Court is grounded, the most distressing aspect of such division is its constant articulation by the Justices concerned. Thus, Justice Black continues to seize every occasion to repeat his preferred-position philosophy on the first amendment. While, on his side, Justice Frankfurter does the same to reiterate his view on the same matter. It is rare for either to concur silently in a decision involving any of the points on which there is fundamental disagreement between them. The result, of course, is that it is all but impossible to obtain a single opinion of the Court—or even a single dissent—in cases involving such points.

One wonders whether the best way to win acceptance of judicial doctrine is to thrust such doctrine into every case where it may conceivably be involved. It may be doubted, on the contrary,

¹²⁰ Compare Justice Douglas dissenting in *United Steelworkers v. United States*, 361 U.S. 39, 62 (1959).

whether the constant proliferation of dissents and concurrences, which are only variations on the same theme, actually accomplish the purpose intended by their authors.

A dissent or concurrence, to paraphrase Chief Justice Hughes, is an appeal to the intelligence of a future day when a later decision may possibly adopt the reasoning urged.¹²¹ Such appeals can surely be made more effectively by judges who have not exercised overfreely their right of speaking to the future. Thus, the most effective dissents are surely not those rendered by Justices who have established a reputation for disagreeing with their colleagues.

In the immediate future the Court will continue to be divided along its present lines, even when the two principal polar figures themselves no longer actively participate. And, rash though it may be to attempt to predict, there is no reason to assume any real upset in the present posture in the Court. If anything, in fact, the Black approach should suffer the more severe blow when its chief exponent is no longer on the bench. For, far more than the school of self-restraint, it depends for its effectiveness on the personal forcefulness of those who articulate it.

In the long run it is hard to see how a high Court in a democratic society can long be activist in the Black sense. This is true regardless of the personnel that may compose such Court. In a system such as ours, it is the political branches, not the judiciary that must be endowed with the primacy. For the Court to assert the degree of power demanded by the activist philosophy would be for it to deflect responsibility from those on whom it must ultimately rest in a democratic society—the people. In Marshall's apt language, "The people made the Constitution and the people can unmake it. It is the creature of their wills and lives only by their will."¹²² Even in our system, the Constitution is what the judges say it is only if ultimately the judges say what most of the people want them to say.¹²³

¹²¹ HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

¹²² Quoted 309 U.S. xv (1940).

¹²³ Peltason, *The National Courts, the Federal System, and the States' Rights*, in *PRESENT TRENDS IN AMERICAN NATIONAL GOVERNMENT* 184 (Junz ed. 1960).