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THE UNIQUENESS OF THE WARREN AND BURGER COURTS IN AMERICAN CONSTITUTIONAL HISTORY

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INTRODUCTION

With the confirmation of four new justices President Nixon has now reshaped the Supreme Court along lines promised in 1968."[1] Few Americans, and least of all President Nixon, are likely to take issue with that judgment. "As a judicial conservative," the President had said, "I believe some Court decisions have in the past gone too far in weakening the peace forces as against the criminal forces in our society."[2] His attitude toward "activist" Warren Court decisions which were "soft" on criminals and promoted desegregation through school busing[3] was made clear to the electorate during the 1968 presidential campaign. Following his election, he felt justified in redeeming his campaign pledge "to nominate to the Supreme Court individuals" who shared his judicial philosophy.[4] This promise was presumably kept with the appointments of Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1971.[5]

The man on the street, editorial writers, policemen, county prosecutors and the Court's critics in Congress were not dismayed by the President's providing a new direction to the Court by appointing "strict constructionists." That which had been promised by Nixon in 1968 was in keeping with the law and order rhetoric of prior years and reflected the widespread resentment of the "activist" Warren Court, as shown, for example, in the popular tendency to place the blame for growing crime in the streets at the doorstep of the Supreme Court. *Brown v. Board of Education*[6] sparked a negative reaction

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1. Yoder, Book Review, Chicago Tribune, Jan. 23, 1972, Book World, at 1, col. 1.
2. N.Y. Times, Oct. 22, 1971, at 24, col. 4.
3. 26 CONG. Q. 2160 (1968).
4. N.Y. Times, Oct. 22, 1971, at 24, col. 4.
5. Powell and Rehnquist became members of the Court on January 7, 1972.
6. 347 U.S. 483 (1954).

which gained momentum in both public and private circles following the "prayer in school" cases[7] and the Court's limiting state authority in criminal proceedings. The latter was accomplished by extending the applicability of virtually all of the procedural safeguards of the Bill of Rights to the states.[8]

Those Americans who were so bitter in their denunciation of Chief Justice Warren must have taken comfort in knowing that President Nixon's appointees were strict constructionists. They may also have found satisfaction in the Nixon appointees' responses in procedural due process cases.[9] On the other hand, President Nixon's criticism of the Warren Court, his self-proclaimed judicial conservatism, and his promise to nominate persons who shared his judicial philosophy were reasons for dismay in liberal circles. This concern was shortly borne out by the Burger and Blackmun dissents in the *Pentagon Papers Case*.[10] Liberal, anti-war activists equated these dissents to a repressive pro-government, anti-free press position, and the unanimity of the four Nixon appointees in the *Death Penalty Cases*,[11] in *Laird v. Tatum*[12] and in several first amendment cases.[13]

7. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

8. *E.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trials in felony cases); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Griffin v. California, 380 U.S. 609 (1965) (prejudicial comment on the defendant's claiming the privilege of non self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (cruel or unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable searches and seizures).

9. Milton v. Wainwright, 407 U.S. 371 (1972) (pretrial confession given to policeman, posing as a fellow prisoner); Kirby v. Illinois, 406 U.S. 682 (1972) (no attorney present at lineup); Apodaca v. Oregon, 406 U.S. 404 (1972) (convictions by jury majorities rather than by unanimous verdict). *But cf.* United States v. United States Dist. Court, 407 U.S. 297 (1972) and Argersinger v. Hamlin, 407 U.S. 25 (1972).

10. New York Times Co. v. United States, 403 U.S. 713, 748, 759 (1971).

11. Moore v. Illinois, 408 U.S. 786 (1972); Furman v. Georgia, 408 U.S. 238 (1972).

12. 408 U.S. 1 (1972). The majority's rejection of the appellees' claim is firmly grounded in the Court's longstanding criteria, as identified by Justice Brandeis in Ashwander v. TVA, 297 U.S. 288 (1936). Standing to sue may only be claimed by those whose rights have been abridged.

The disposition of this case by a 5 to 4 vote was a principal reason for objections in the liberal community. Since the four Nixon appointees, including Justice Rehnquist, who had been elevated to the Court from the Department of Justice, had stood together against the appellees, liberals felt that there were ample grounds for requesting a rehearing. Specifically, they wanted Rehnquist to disqualify himself by reason of his

Our discussion to this point has underscored the apparent differences between the Warren and Burger Courts. However, it is my intent to show that both the conservatives and liberals have been reacting largely on what is perceived to be the President's design. Certain decisions of the Burger Court in civil rights and fundamental freedoms cases can be of little comfort to conservatives. Nor have liberals correctly judged the record of the Burger Court. What has not yet been perceived on either side of the political spectrum, even as Warren Burger begins his fourth year as Chief Justice, is that comparisons of the records of the two Courts, especially in criminal cases, do not tell the whole story. Beyond the procedural due process cases, in which the divergencies of the Burger from the Warren Court were most pronounced,[14] lie other constitutional developments which highlight the similarities between the two Courts.

Only brief mention of recent civil rights decisions is needed. Much more noteworthy because of their distinctive and unique character in American constitutional history are recent fundamental freedoms cases. These place Chief Justice Warren and Burger in a niche in American constitutional history never occupied by any of their predecessors. Of the fifteen men who have served as Chief Justice since 1789, only Warren and Burger may claim the distinction of having presided over Courts which invalidated national laws on first amendment grounds,[15] protected the right to travel under the due process clause of the fifth amendment[16] and dealt the executive branch a severe blow in declaring national security concerns insufficient to justify warrantless electronic surveillance of political extremists.[17] The last decision, *United States v. United States District Court,*[18] turned

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former post in the executive branch. Had Rehnquist not participated in the case, the Court would have divided 4 to 4, and the lower court ruling, against military surveillance, would have prevailed. Because of the publicly announced intent to request a rehearing and the disqualification of Rehnquist, the latter took the unprecedented step of submitting a later, published opinion as to why he did not believe that he should disqualify himself. 93 S. Ct. 7 (1972).

13. Branzburg v. Hayes, 408 U.S. 665 (1972); Kleindienst v. Mandel, 408 U.S. 752 (1972); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).

14. Cases cited note 9 *supra.*

15. Tilton v. Richardson, 403 U.S. 672 (1971); Blount v. Rizzi, 400 U.S. 410 (1971); Schacht v. United States, 398 U.S. 58 (1970); Subversive Activities Control Bd. v. Boorda, 397 U.S. 1042 (1970), *denying cert. to* 421 F.2d 1142 (1969); United States v. Robel, 389 U.S. 258 (1967); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

16. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

17. United States v. United States Dist. Court, 407 U.S. 297 (1972).

18. *Id.*

upon the fourth amendment's prohibition on unreasonable searches and seizures: but Justice Powell observed that internal "security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crimes."[19]

Burger's civil rights record is a continuation of the line of decisions which began with *Missouri ex rel. Gaines v. Canada.*[20] There the Court nullified the state's practice of paying tuition fees so that blacks could attend law school elsewhere. Later, the Court attacked Jim Crowism on interstate carriers,[21] state-enforced restrictive covenants,[22] other forms of "state action" in support of private discriminatory practices,[23] and discrimination in public accommodations.[24] There had been some exceptions within Burger's first three years as Chief Justice. In *Moose Lodge No. 107 v. Irvis,*[25] the Nixon appointees unanimously rejected a black's argument that the "state action" doctrine forbade a private club's discriminatory practices. In *Evans v. Abney,*[26] a narrowly construed historic legal principle was accorded preferred status over the blacks' claims of lost rights. And in *Sullivan v. Little Hunting Park,*[27] the Chief Justice joined the dissenters in what may be termed an anti-civil-rights stand. However, these decisions excepted, there is little to distinguish Burger from Warren in civil rights cases. Thus, by demanding immediate steps toward desegregation[28] (a decision that contradicted Nixon's "Southern strategy"), by eliminating a subtle, anti-black job placement practice,[29] by nullifying North Carolina's anti-busing statute[30] and by ruling that busing is one tool of school desegregation,[31] Chief Justice Burger continued the civil rights course set by previous Courts. More importantly, he placed himself in a position diametrically opposed to the Nixon Administration on two of these issues—immediate de-

19. *Id.* at 313.
20. 305 U.S. 337 (1938).
21. Morgan v. Virginia, 328 U.S. 373 (1946).
22. Shelley v. Kraemer, 334 U.S. 1 (1948).
23. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
24. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
25. 407 U.S. 163 (1972).
26. 396 U.S. 435 (1970).
27. 396 U.S. 229 (1969).
28. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).
29. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
30. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).
31. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971).

segregation and busing. Burger's civil rights record, as already revealed in these several decisions, suggests anything but "self-restraint" in that branch of American constitutional law.

Important though the Burger Court decisions have been in procedural due process and civil rights cases, they cannot compare in significance to the libertarian record established since the new Chief Justice assumed his post in 1969. In the remainder of this article we will focus chiefly upon eight decisions of the Warren and Burger Courts. These are constitutional landmarks for various reasons. First, they include the only cases in all American history in which the Supreme Court nullified national statutes which abridged first amendment freedoms.[32] Secondly, they made operational the preferred freedoms doctrine, which found its origin in a case footnote in 1938,[33] but which has been little more than a debate topic since that year.[34] Third, they fit into what we may call the Supreme Court's libertarian era, which began with *Tot v. United States* (1943)[35] and continues to the present. Fourth, they establish the Court as the "Keeper of our Rights," something that Professor Warren claimed

32. Cases cited note 14 *supra.*

33. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

34. Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring); C. BLACK, THE PEOPLE AND THE COURT 217-21 (1960); McKay, *The Preference for Freedom,* 34 N.Y.U.L. REV. 1182 (1959).

35. 319 U.S. 463 (1943). In addition to *Tot v. United States,* the list of procedural due process cases includes: United States v. Jackson, 390 U.S. 570 (1968) and United States v. Romano, 382 U.S. 136 (1965) (compulsory self-incrimination cases); Leary v. United States, 395 U.S. 6 (1969) (which actually struck down provisions of two laws); Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); and Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

Bill of attainder cases include United States v. Brown, 381 U.S. 437 (1965) and United States v. Lovett, 328 U.S. 303 (1946). Expatriation cases include: Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); and Trop v. Dulles, 356 U.S. 86 (1958).

In O'Callahan v. Parker, 395 U.S. 258 (1969), the Court limited Congress' power to "make rules for the government and regulation of the land and naval forces" (U.S. CONST. art. I, § 8, cl. 14) in holding that an enlisted member of the armed forces may only be tried in civil courts "for nonmilitary offenses committed off-post while on leave." Justice Douglas' opinion does not specifically nullify the several articles of the Uniform Code of Military Justice (10 U.S.C. §§ 880, 930, 934); but certainly this decision renders a construction which effectively limits the application of those statutory provisions. The *O'Callahan* decision had thus extended earlier limitations on Congress' power to bring civilian employees and civilian dependents of servicemen at overseas military installations within the jurisdiction of military court: McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

in 1935 was already the role of the Supreme Court,[36] but an assertion that has often been rejected by other scholars in the years since then.[37] Finally, on several occasions the Supreme Court rejected governmental claims that statutes[38] or actions[39] were essential to the preservation of national security. The phrase, "the war power," Chief Justice Warren said, "cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."[40] That the Burger Court agreed with this assertion as to both congressional and executive authority was shown in its disposition of *Subversive Activities Control Board v. Boorda*[41] and *United States v. United States District Court.*[42]

The foregoing points should be underscored, for they mark the distinctively libertarian character of the Warren and Burger Courts, and they contradict the claims of both liberals and conservatives that the Supreme Court has been reshaped along "strict constructionist" lines. By way of adding emphasis to these points, we may briefly consider various commentaries by legal scholars and note earlier instances in which individuals tried to persuade the Supreme Court to act as "Keeper of our Rights."

I. The Court as Guardian of Individual Rights

At particular times, emergencies, passions or prejudices may convince the majority to disregard the rights of a minority. "It is then," Professor Warren declared,

> that an enforceable Bill of Rights is essential to the citizen's liberty, and it is then that a Congress vested with uncontrolled power, and elected from the section or community of the majority, would

36. C. Warren, Congress, the Constitution, and the Supreme Court 149 (rev. ed. 1935).

37. *See, e.g.,* R. Dahl, Pluralist Democracy in the United States: Conflict and Consent 166 (1967); D. Lockard, Perverted Priorities in American Politics 211 (1971); Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy Maker,* 6 J. Pub. L. 279, 292 (1957); Latham, *The Supreme Court and the Supreme People,* 16 J. Pol. 207 (1954); Sklar, *The Fiction of the First Freedom,* 6 W. Pol. Q. 302 (1953).

38. Subversive Activities Control Bd. v. Boorda, 421 F.2d 1142 (1969), *cert. denied,* 397 U.S. 1042 (1970); United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

39. United States v. United States Dist. Court, 407 U.S. 297 (1972).

40. United States v. Robel, 389 U.S. 258, 263 (1967).

41. 397 U.S. 1042 (1970), *denying cert. to* 421 F.2d 1142 (1969).

42. 407 U.S. 297 (1972).

> be most likely to violate those rights. It is also not infrequent that a party in power denies to the minority that very liberty which, when itself in the minority, it ardently champions.[43]

Warren then identified the Court as the chief enforcing agency, since a historical survey revealed to him a number of instances in which Congress had violated constitutional rights, and "at least ten times has the Supreme Court saved the individual against Congressional usurpation of power."[44] If the record from the 1860's to the 1930's had been that impressive to a leading constitutional scholar, both advocacy of judicial supremacy and the characterization of the Court as defender of civil liberties would seem amply justified.

However, for roughly thirty-five years thereafter other scholars saw the Court in a different light. For example, in 1937, Judge Edgerton contradicted Professor Warren's findings. Taking issue with Warren and other supporters of judicial supremacy, Edgerton questioned the utility of a judicial power that left untouched those national laws which seriously affected civil liberties and were used largely to protect property rights or to promote the vested interests and rights of an overly narrow segment of society. Judicial supremacy, Edgerton contended, had served primarily "to entrench slavery," ensure the oppression of blacks, deny compensation to injured workmen, "protected the hiring of women and children at starvation wages" and in other ways do "harm to common men."[45]

In still later years other scholars questioned the ambivalence of justices, who were "activists" when it came to socio-economic legislation but "self-restrained" in civil liberties cases, or who failed to use their power in both kinds of cases,[46] and they challenged as largely illusory the notion that the Supreme Court stands in defense of constitutional rights against Congress.[47] The record has been such, Sklar wrote in 1953, as to warrant a reconsideration of "the importance of the First Amendment in American constitutional law."[48] He concluded: "So in political prosecutions the First Amendment is, as Justice Black sadly remarked, 'little more than an admonition to

43. C. WARREN, *supra* note 36, at 149-50.
44. *Id.* at 150.
45. Edgerton, *The Incidence of Judicial Control over Congress,* 22 CORNELL L.Q. 299, 348 (1937).
46. Latham, *supra* note 37.
47. Sklar, *supra* note 37.
48. *Id.*

Congress.' It was never more."[49] Except for a few decisions in procedural safeguard cases, Professor Dahl could find little in 1957 that would support a claim about the Court as protector of substantive and procedural rights. Moreover, he wrote, "[i]n the entire history of the Court there is not one case arising under the First Amendment in which the Court has held federal legislation unconstitutional."[50]

Apparently the long and unimpressive history of the Court in civil liberties cases had so blinded some scholars that they failed to see how radically that record had been altered between 1943 and 1971. For example, in 1967, Professor Dahl found scarcely any improvement upon the past record and even restated the point about the Court's never having used the first amendment to nullify national legislation.[51] His contention reveals either an oversight on his part or a failure to appreciate the first instance in which the Court did protect a first amendment right in *Lamont v. Postmaster General* (1965).[52] This error was further compounded in 1971, when Professor Lockard, citing Dahl as authority, claimed that "never has a piece of national legislation been declared unconstitutional" on first amendment grounds. Lockard went on to declare that insofar as the Court had stood as a bulwark, its decisions in national cases had involved matters of a "relatively minor" nature.[53]

Both the erroneous studies and the earlier scholarly publications, which perceived the Court in a negative and ambivalent role in civil liberties cases, serve to underscore how significantly the judicial position has been changed within the past three decades, a period of time that is only one-sixth of the total history of the Court. Instead of the Court's decisions of the recent past involving "relatively minor matters," as defined by Professor Lockard, they had imposed significant limitations on congressional and executive power to protect substantive rights and procedural safeguards.[54] Thus, by securing fundamen-

49. *Id.* at 319.

50. Dahl, *supra* note 37.

51. R. DAHL, *supra* note 37.

52. 381 U.S. 301 (1965). Since Dahl does cite United States v. Romano, 382 U.S. 136 (1965) and United States v. Brown, 381 U.S. 437 (1965), it is evident that he should have had access to the *Lamont* decision as well.

53. D. LOCKARD, *supra* note 37. Obviously Lockard relied upon the previously reported findings in Dahl's article of 1957 and book of 1967. Even though there may have been a time lag of as much as a year between completion of manuscript and publication date, this does not justify Lockard's having overlooked *Robel* and *Lamont*, cases which had been specifically decided on first amendment grounds.

54. *See* notes 14, 15, & 16 *supra*.

tal freedoms against Congress, the Warren and Burger Courts had carved for themselves a special place in that history.

We many now turn our attention to a brief exploration of the historical background in order to bring these recent fundamental freedom decisions into sharper focus.

II. The History of Fundamental Freedoms Decisions

"For almost two centuries," Warren stated in *United States v. Robel*[55] "our country has taken singular pride in the democratic ideals enshrined in its Constitution," the most cherished of which has "found expression in the First Amendment."[56] Assuming this to be true, one might question why the Court took so long in acknowledging first amendment rights. We can scarcely claim that the Court had no opportunity to do so, for there had been a number of cases in which first amendment issues were present, and some of these found their way to the Court.[57]

So few first amendment cases had been brought to the Court's attention between the enactment of the first national law, which adversely affected fundamental freedoms (Sedition Act of 1798[58]), and the passage of the Espionage Act of 1917,[59] and so many since *Schenck v. United States* (1919),[60] that it would appear that fundamental freedoms had only been abridged in this century. This was not the case, for, as this brief exploration of the historical record will show, fundamental freedoms issues had been present on earlier occasions, although some of them did not reach the Court.

For our purposes this history may be divided into three parts. The first begins with the passage of the Sedition Act of 1798 and ends in 1919. The second period is initiated by *Schenck* and ends with *Aptheker v. Secretary of State* (1964),[61] a case involving a funda-

55. 389 U.S. 258 (1967).

56. *Id.* at 264.

57. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

58. Ch. 78, § 1 *et seq.*, 1 Stat. 596.

59. Ch. 30, 40 Stat. 217.

60. 249 U.S. 47 (1919).

61. 378 U.S. 500 (1964).

mental freedom—the right to travel—but which was decided by reference to the fifth rather than the first amendment. Its significance, as will be shown hereafter, is not lessened by reason of its not being a first amendment case. The third era dates from *Aptheker,* the period in which fundamental freedoms were protected against congressional encroachment.

Serious though the abridgment of freedoms to speak and to publish had been in the Sedition Act cases, 1798–1800,[62] no one who had been convicted thereunder took an appeal to the Supreme Court. Indeed, since Federalists on the Supreme Court, in their concurrent capacities as judges of the circuit courts, had already presided over cases in which persons were convicted, there could "be no question what [their] decision would have been" had an appeal gone to the highest court.[63]

The Sedition Act incorporated the common law rule on seditious libel, the same rule under which Peter Zenger was tried in the well-known freedom of the press case in colonial America.[64] The Federalist-sponsored Sedition Act was sharply criticized by the Jeffersonians in the Virginia and Kentucky Resolutions of 1798[65] on the ground that it violated first amendment freedoms. Small wonder, then, that the Jeffersonians, upon acquiring control of the national executive and legislative branches following the elections of 1800, were not inclined to give renewed life to the Sedition Act. What was strange, contradictory, and in a sense more dangerous was the Jeffersonian Administration's use of the old common law rule on seditious libel, now devoid of legislative sanction, in bringing Hudson and Goodwin, the editors of the *Connecticut Currant,* to trial on charges much like the political charges made under the Sedition Act. At least in oblique fashion the Marshall Court protected freedom of the press on this occasion, albeit against executive rather than legislative action. There is no such thing as a federal common law crime, the Court declared. Before a person may be charged and brought to trial, Justice Johnson stated, Congress must define the act as a crime and prescribe

62. *See* J. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 98-138 (1951).

63. *Id.* at 139. *See also* S. FRIEDELBAUM, CONTEMPORARY CONSTITUTIONAL LAW: CASE STUDIES IN THE JUDICIAL PROCESS 525 (1972).

64. *See* S. MORISON & H. COMMAGER, 1 THE GROWTH OF THE AMERICAN REPUBLIC 115 (1942); A. WEINBERGER, FREEDOM AND PROTECTION 90 (1963).

65. *See* 4 ELLIOT'S DEBATES 529 (1888).

the punishment.[66] This was as close as the Court came in its earliest history to protecting a fundamental freedom.

The Sedition Act of 1798 marked one point in American history when Congress breached the first amendment. Not until the Civil War were there other laws violative of fundamental freedoms. One statute of 1862 which required the test oath or disclaimer affidavit for public officeholders[67] was specifically aimed at the Confederates and their sympathizers. Given recent decisions,[68] this act probably fell within the scope of the first amendment. However, in nullifying this statute (as amended in 1865) in *Ex parte Garland,*[69] the Court cited the constitutional prohibition on Congress' enacting a bill of attainder. However, that decision neither extended to ex-Confederates, who had been denied seats in Congress during Reconstruction, nor protected the right of a constituency to be represented by a man of its own choosing.[70]

Another law enacted in 1862 and a more recent statute of 1882 raised questions about two provisions of the first amendment in relation to congressional power: freedom of religion and the establishment clause. Anti-polygamy statutes of those two years[71] were obviously directed against Mormons in the territories of Utah and Idaho. They had been enacted under Congress' authority to "make all needful Rules and Regulations respecting the territory . . . belonging to the United States."[72] This authority, the Court admitted in *Reynolds v. United States,*[73] does not permit Congress to abridge the free exercise of religion. Congress may not regulate religious beliefs, the Court stated, but it is "free to reach actions" that are contrary to social duties or are "subversive of good order."[74] Since polygamy had "always

66. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). *See also* L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 61 (1963).

67. Oath of Office Act of 1862, ch. 128, 12 Stat. 502, *as amended,* Oath of Office Act of 1865, ch. 20, 13 Stat. 424.

68. Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964).

69. 71 U.S. (4 Wall.) 333 (1866).

70. *See* P. DIONISOPOULOS, REBELLION, RACISM, AND REPRESENTATION: THE ADAM CLAYTON POWELL CASE AND ITS ANTECEDENTS 83-92 (1970); Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases,* 17 J. PUB. L. 103, 144 (1968).

71. 48 U.S.C. § 1461 (1971); Act of July 1, 1862, ch. 126, § 2 *et seq.,* 12 Stat. 501.

72. U.S. CONST. art. IV, § 3, cl. 2.

73. 98 U.S. 145 (1878).

74. *Id.* at 164.

been odious" in the western world, its sanction by a religious order did not bring it within the protective cover of the first amendment.

Davis v. Beason[75] posed a different first amendment issue. The anti-polygamy act of 1882 denied to those having more than one wife the rights to vote and to stand for election to public office in any territory of the United States.[76] Since polygamy was one of the religious doctrines of the Mormon Church, the appellant argued, the act of 1882 violated the establishment clause of the first amendment. Again the Mormons' arguments were rejected, the Court claiming that the first amendment had never been intended "as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[77]

At least on the periphery of the first amendment was the issue posed in *Ex parte Jackson*[78] which dealt with the power of Congress to exclude certain publications from the mail (*e.g.*, birth control information, lottery tickets and obscene publications). While holding that Congress could deny use of the postal system "for the distribution of matter deemed injurious to the public morals," Justice Field also acknowledged that the liberty to circulate is as important to freedom of the press as the right to publish.[79]

There had been these few instances in the nineteenth century in which fundamental freedoms questions were either squarely before the Court or tangentially related to the first amendment. Much different was the situation in the second period, 1919 to 1964, when the Court was frequently called upon to answer first amendment questions. This was especially true after the Court began to incorporate provisions of the first amendment in the due process clause of the fourteenth amendment,[80] thus enlarging its jurisdiction over cases arising in the several states. The frequency with which such questions were brought to the Court's attention was quite different from the favorable responses to demands for protection of individual rights. The Court's unimpressive record, especially in national civil liberties

75. 133 U.S. 333 (1890).
76. 48 U.S.C. § 1461 (1971).
77. Davis v. Beason, 133 U.S. 333, 342 (1890).
78. 96 U.S. 727 (1877).
79. *Id.* at 733, 736.
80. While Gitlow v. New York, 268 U.S. 652 (1925), with its specific references to the fourteenth amendment's protections of free speech and free press, is ordinarily identified as the starting point, equally deserving of mention are Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923).

cases from 1919 onward, led to the critics' scorning "judicial self-restraint" and to their complaints about the ambivalence of the justices.[81]

It is not necessary to explore here a record that has already been discussed extensively elsewhere.[82] We need only allow that record to serve as a reminder that earlier constitutional history is so unlike that of the third epoch in which—under Warren and Burger—fundamental freedoms finally found that judicial protection long demanded by the Court's critics.

III. Protection of Fundamental Freedoms Under the Warren and Burger Courts

In approaching this discussion about the significance of the fundamental freedoms decisions since 1964, it is first necessary to advance and defend an argument about the relevancy of *Scales v. United States*[83] to developments of the past several years. At the outset it must be admitted that the *Scales* decision was not of the kind to be acclaimed by libertarians nor to be greeted by those scholarly critics who questioned the Court's role as protector of civil liberties. Nevertheless, while *Scales* favored the government's position as against individual rights, the Court introduced an important statutory construction that bore directly on later developments and contributed substantially to the Court's nullifying portions of the Internal Security Act of 1950[84] in *Aptheker, Robel* and *Boorda v. Subversive Activities Control Board.*[85]

At issue in *Scales* was the validity of the "membership clause" of the Smith Act of 1940. The Smith Act proscribed advocacy or encouragement of the violent overthrow of the governments of the

81. *See* notes 35, 37, & 38 *supra.*

82. H. Abraham, Freedom and the Court (1967); W. Berns, Freedom, Virtue & the First Amendment (1957); A. Bickel, The Least Dangerous Branch (1962); Z. Chafee, Free Speech in the United States (1941); Foundations of Freedom in the American Constitution (A. Kelly ed. 1958); A. Meiklejohn, Political Freedom (1960); P. Murphy, The Constitution in Crisis Times 1918-1969 (1972); C. Pritchett, The American Constitution (1968); O. Rogge, The First and the Fifth (1960).

83. 367 U.S. 203 (1961).

84. 50 U.S.C. § 781 *et seq.* (1971).

85. 378 U.S. 500 (1964).

United States and of its political subdivisions, and made it a crime to be or to become a member of "any such society, group, or assembly of persons . . ." knowing the revolutionary purposes thereof.[86] *Dennis v. United States*[87] had already sanctioned that portion of the Smith Act which proscribed advocacy. In *Scales* a divided Court could thus

> discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of [the First] Amendment.[88]

In reaching a decision about the validity of the "membership clause" in the Smith Act, the majority relied upon a distinction previously drawn by the Court between advocacy and the mere teaching of an abstract doctrine.[89] Building upon this prior distinction in *Yates,* the majority declared in *Scales* that the statute did not proscribe membership per se. The "membership clause" as construed by the majority distinguished between "active" and "passive" members; and this construction permitted the sustaining of Scales' conviction as an "active" member of the Communist Party, and the overturning of the conviction of Noto who was only a "passive" member.[90]

By rendering this statutory construction the five-judge majority saved the Smith Act's "membership clause" from a successful first amendment attack, an approach that was criticized especially by Justice Douglas in his dissenting opinion.[91] Although subject to vigorous criticism in some quarters, this statutory construction and the Court's distinction between active and passive membership may, in retrospect, be regarded as a breach in what appeared to be an impenetrable barrier—not around the first amendment but around legislation intended to safeguard national security. *Aptheker* was the first case to demonstrate this; and shortly thereafter, both *Robel* and *Boorda* revealed how wide the cleft had become. Because these several

86. 18 U.S.C. § 2385 (1971).
87. 341 U.S. 494 (1951).
88. 367 U.S. at 229.
89. Yates v. United States, 354 U.S. 298 (1957).
90. Noto v. United States, 367 U.S. 290 (1961).
91. 367 U.S. at 262-75. Separate dissenting opinions were presented by Justice Brennan and Chief Justice Warren, whose objections stemmed from a provision of the Internal Security Act of 1950 that specifically stated, "neither holding of office nor membership in any Communist organization" could be regarded "per se a violation," 50 U.S.C. § 783(f); and by Justice Black, who objected to balancing first amendment freedoms and national security interests as defined by the United States government.

cases involved a common question—the relationship of intensity of membership to proscribed conduct—they should be discussed in an order which temporarily bypasses *Lamont*,[92] even though this was the first instance of the Court's nullifying national legislation on first amendment grounds.

Although *Aptheker* involved the right to travel, a fundamental freedom which found protection in the fifth rather than the first amendment, it shared with all but two[93] of these recent civil liberties cases a common element in that the legislation in question was intended to foster or protect national security. Its special similarity to *Robel* and *Boorda* lay in the fact that in all three cases provisions of the Internal Security Act of 1950[94] were nullified because they abridged fundamental freedoms. Finally, *Aptheker* established the viability of derived rights as distinguished from the specified rights of the first and other amendments. This was not the first appearance of derived rights.[95] Prior to 1964, derived rights had been protected against state action by the fourteenth amendment.[96] However, not until *Aptheker* had such rights found protection against congressional encroachment.

The principal issue in *Aptheker* stemmed from the provision of the Internal Security Act of 1950 which denied American passports to certain categories of citizens. As soon as the Subversive Activities Control Board identified a group as a Communist-action organization and issued an order directing the officers of the organization to register with the Department of Justice, certain disabilities were

92. 381 U.S. 301 (1965).

93. Tilton v. Richardson, 403 U.S. 672 (1971); Blount v. Rizzi, 400 U.S. 410 (1971).

94. Another provision of this law, which required that individual members of Communist-action organizations, so identified by the Subversive Activities Control Board, register with the Department of Justice, was invalidated on the ground that this required compulsory self-incrimination in violation of the fifth amendment. Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

95. *E.g.*, freedom of association dates back at least to DeJonge v. Oregon, 299 U.S. 353 (1937) and had previously been advocated by counsel in New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 72 (1928), a case in which New York's anti-Ku Klux Klan statute was sustained. Among other derived rights are (1) the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); (2) academic freedom, Lamont v. Postmaster Gen., 381 U.S. 301 (1965); and (3) freedom of symbolic expression, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) and United States v. O'Brien 391 U.S. 367 (1968).

96. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963); *In re* Anastaplo, 366 U.S. 82 (1961); Schware v. New Mexico Bar Examiners, 353 U.S. 232 (1957); Herndon v. Lowry, 301 U.S. 242 (1937).

imposed upon the group's members. It became "unlawful for any member . . . to make application for a passport . . . or to use or attempt to use any such passport."[97] Acting under statutory authority the Department of State revoked the passports of two members of the Communist Party, Herbert Aptheker and Elizabeth Gurley Flynn. They initiated suits, challenging the validity of the law. They contended that it deprived them of their fifth amendment right to travel outside of the United States.[98]

The appellants' use of a constitutional provision other than one protected by the first amendment apparently was dictated by the Court's prior ruling in *Kent v. Dulles*.[99] On that occasion the Court stated that the right to travel is protected by the word "liberty" in the due process clause of the fifth amendment.[100] There was, however, an important distinction between *Kent* and *Aptheker* in that the former turned on the question of ultra vires: had the Department of State exceeded its statutorily-conferred authority in denying "passports because of alleged Communist beliefs"? The Court found an ultra vires act because Congress had not authorized State Department denials of passports on this ground.[101] This decision left unanswered the question of whether Congress could constitutionally reach the same national security objective by prescribing a similar prohibition in law.

In deciding *Aptheker* the Court did not question the power of Congress to safeguard national security. However, it did find several constitutional infirmities in the law, most of which related in some way to the intensity of membership issue, and any one of which might have been ground in itself for invalidating the statutory provision in question. First, the law indiscriminately embraced all members of the organization, including those who did not know of the ultimate aims of the Communist movement.[102] Second, the statute failed to distinguish between "the member's degree of activity in the organization and his commitment to its purpose."[103] Third was the possibility, as previously suggested by President Eisenhower, of adequately protect-

97. 50 U.S.C. § 785(a) (1971).
98. 378 U.S. at 501-04.
99. 357 U.S. 116 (1958).
100. *Id.* at 125.
101. *Id.* at 129-30.
102. 378 U.S. at 509-10.
103. *Id.* at 510.

ing national security through means "more discriminately tailored to the constitutional liberties of individuals."[104] Finally, the Court declared:

> The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed by the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe.[105]

Aptheker merely distinguished *Scales*. Nevertheless, the statutory construction that the Court presented in *Scales* made possible the tougher judicial stance in *Aptheker* and opened the door to the freedom of association decisions in *Robel* and *Boorda*.

Previous reference has been made to the disabilities imposed upon members of Communist-front or Communist-infiltrated organizations identified by the Subversive Activities Control Board. One such disability had been the prohibition on members' acquiring or using American passports. Another provision of the Internal Security Act of 1950 made it unlawful for a member of one of these organizations to "engage in any employment in any defense facility . . . ."[106] Eugene Robel, a member of the Communist Party and a machinist at a shipyard in Seattle, was indicted under this latter proscription. The suit initiated against him posed questions which ultimately reached the Supreme Court and made possible a judicial pronouncement regarding the constitutionality of this statutory disability.

In 1961, the Supreme Court sustained an order of the Subversive Activities Control Board which required that the Communist Party of the United States be registered with the Department of Justice as a Communist-action organization.[107] Thereafter the Board's registration order became final, and the several disabilities imposed by the law on members of the Party took effect. Since the Secretary of Defense, acting under statutory authority, had already designated the Seattle shipyard a "defense facility," Robel's continued employment there brought him within the purview of the law. The indictment charged that he did "unlawfully and willfully engage in employment"

104. *Id.* at 514.
105. *Id.*
106. 50 U.S.C. § 784(a)(1)(D) (1971).
107. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

at a defense facility, knowing that the Party had been ordered to register and that the employment disability provision was applicable to him.[108]

The previously announced statutory construction in *Scales* obviously governed the thinking of the district court judge, who dismissed the indictment. This provision of the law, the judge declared, is constitutionally infirm unless it can be construed to mean "active membership and specific intent . . . ."[109] Since neither condition had been alleged in the indictment, the case against Robel was dismissed.

A statutory construction of this nature appeared, at least on the surface, to be in accord with that whereby the Supreme Court had previously saved the Smith Act's "membership clause" in the *Scales* case. However, the Supreme Court refused to follow the lower court. Nor did it render its own statutory construction as a way of saving the employment disability provision from constitutional attack. "We cannot agree with the District Court," stated Chief Justice Warren, "that § 5 (a)(1)(D) can be saved" by permitting it to be applied only "to active members" whose purpose is to advance "the unlawful goals" of Communist-action organizations.[110] The job disability section of the law was in violation of freedom of association, a derived right "which is protected by the provisions of the First Amendment."[111]

The majority spoke with such regularity, embellishments, and vigor about the importance of first amendment freedoms and what they were designed to protect as to suggest the need for overruling *Scales* and for rejecting the practice of construing statutes to save them where fundamental freedoms are involved. *Scales* was not overturned, however, nor did the Court lose sight of the balancing test—a balancing of concerns about national security and fundamental freedoms. Warren stated that the majority was "not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries . . . ."[112] Therefore, the decision in *Robel* was not to be read as a denial to Congress of the power to prohibit employment in "sensitive positions in defense facilities [to any persons] who would use their positions to disrupt the nation's production facili-

108. 389 U.S. at 260.
109. United States v. Robel, 254 F. Supp. 291, 293 (W.D. Wash. 1965).
110. 389 U.S. at 262.
111. *Id.* at 263.
112. *Id.* at 266.

ties."[113] Obviously this concession meant that the majority had not moved toward the "absolutist" position so often advocated by Black and Douglas.[114] On the other hand, neither had the Court sought to save the law, as per *Scales,* nor had it been persuaded by the government's argument that in the past the justices had deferred to Congress' "war power." That phrase, Warren said, "cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."[115]

Therein lay the great difference between *Aptheker* and *Robel* on the one hand and earlier national security-war power cases on the other.[116] This point was not lost upon the dissenters, who acknowledged the Court's worthy motives in seeking to maximize individual liberties and to balance the latter against the demands of national security. However, Justices White and Harlan were also critical of the majority in that it arrogated "to itself an independent judgment of the requirements of national security."[117] In warning that judges should be wary of making such determinations, the dissenters subscribed to the government's argument that these matters are properly the concern of Congress and demand "self-restraint" on the part of the Court.

Boorda led to the invalidation of yet another provision of the Internal Security Act of 1950. Petitioners Boorda, Archuleta and Holley challenged the provision of the law which authorized the Board to make public the names of members of Communist-action organizations.[118] This provision, they contended, was unconstitutional in that it authorized public disclosure "without a finding that the individual concerned share[d] in any illegal purposes of the organization to which he belong[ed]."[119] This argument was in accord with the Supreme Court's prior holdings in *Scales, Noto v. United States,*[120]

113. *Id.* at 266-67. This apparent inconsistency was not overlooked by Justices White and Harlan in a dissenting opinion. *Id.* at 284-85.

114. *See, e.g.,* their concurring or dissenting opinions in New York Times Co. v. United States, 403 U.S. 713, 714-20 (1971); Garrison v. Louisiana, 379 U.S. 64, 80 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964); Yates v. United States, 354 U.S. 298, 339 (1957); and Beauharnais v. Illinois, 343 U.S. 250, 267 (1952). *See also* Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865 (1960).

115. 389 U.S. at 263.

116. Cases cited note 57 *supra.*

117. 389 U.S. at 289.

118. Internal Security Act of 1950, 50 U.S.C. § 788(b).

119. 421 F.2d at 1143.

120. 367 U.S. 290 (1960).

Aptheker, and *Robel.* Each of these decisions influenced the thinking of the District of Columbia Circuit. Chief Judge Bazelon declared "that mere membership in the Communist Party is protected by the First Amendment."[121] Some members of the Communist Party may be intent upon promoting illicit ends, but it may not be inferred from this that all members automatically share the same goals, nor that freedom of association permits an assumption of guilt by association. "[T]he fact that some members of the Communist Party may be engaged in activity not protected by the First Amendment does not mean that the [rights of] other members may be infringed."[122] To publicize the names of members would thus operate as an obstruction to the exercise of their freedom of association. Bazelon then declared the offending provision violative of the first amendment.[123]

By denying the government's petition for certiorari on April 20, 1970, the Burger Court sustained the lower court's ruling and further strengthened freedom of association as a right protected by the first amendment. Apparently, as in *Robel,* not even a statutory construction could save the provision in question. The emerging trend gave libertarians cause to hail that which was initiated by the statutory construction in *Scales* and which led to the securing of freedom of association against attacks in the name of national security in *Boorda.*

National security issues were also present in some form in three of the other cases, *Lamont,*[124] *Schacht v. United States*[125] and *United States v. United States District Court.*[126] It is not likely that those Americans most concerned about national security would see the first two cases as involving issues as explosive or dangerous as those in the Internal Security Act cases. Nevertheless, the remoteness of the issues in *Lamont* and *Schacht* from the more directly related national security questions in *Aptheker, Robel* and *Boorda* does not diminish their importance as fundamental freedoms decisions.

At issue in *Lamont* was a section of the Postal Service and Federal Employees Salary Act of 1962. Under this provision the Secretary of the Treasury was empowered to classify as "communist political propaganda" certain materials mailed from outside the United States.

121. 421 F.2d at 1147.
122. *Id.* at 1148.
123. *Id.* at 1149.
124. 381 U.S. 301 (1965).
125. 398 U.S. 58 (1970).
126. 407 U.S. 247 (1972).

Such mail was to be detained by the postal service and to be delivered "only upon the addressee's request . . . ."[127] Specifically exempted by the law were "sealed letters," materials "furnished pursuant to subscription," and mail which the Postmaster General had ascertained was "desired by the addressee."[128]

Two methods of construction were available to save this statutory provision from a successful first amendment attack. First, because of the exemptions prescribed in the law, the Court might have ruled that there had been no violation of fundamental freedoms. For example, an American scholar who was regularly engaged in the study of political, social and cultural affairs of the Soviet Union or the People's Republic of China could expect uninterrupted delivery of published journals or newspapers under the second and third exemptions. Secondly, the postal service might have been able to conceive a plan for delivering the mail without violating the rights of the addressee. Indeed, the postal authorities had initiated a new plan, after the Supreme Court agreed to hear appeals, and they had previously offered concessions to Lamont and Heilberg, after the latter sought to enjoin enforcement of the law. However, neither the manner in which the statute was implemented nor its exemptions saved it from successful first amendment attack.

Initially, to implement the provision that the mail be delivered at the request of the addressee, the post office maintained a file of the names of those who wanted to receive this kind of mail from communist countries. In March 1965, after the Supreme Court had agreed to hear an appeal on the constitutionality of the law, a new practice was introduced: an addressee was sent a notice which had to "be returned for each individual piece of mail desired." Mail was not delivered to those who did not return the card, the assumption being that the addressees wanted "neither the identified publication nor any similar one arriving subsequently."[129] The first practice smacked too much of maintaining political dossiers; but neither the changed practice nor a specific concession made to Corliss Lamont saved this provision of the law.

Rather than respond to a notice that a copy of the *Peking Review* was being detained, Dr. Lamont sought "to enjoin enforcement of

127. 39 U.S.C. § 4008(a) (1963).
128. *Id.*
129. 381 U.S. at 304.

the statute, alleging that it infringed his rights under the First and Fifth Amendments."[130] Postal authorities then notified Lamont that by instituting the suit he had signaled "his desire to receive 'communist political propaganda' and therefore none of his mail would be detained."[131] Dissatisfied with this concession in that his name would be included on the list of those who wanted to receive "communist political propaganda," Lamont amended his complaint to question the constitutionality of the statute. Since the impediment had been removed,[132] his suit was dismissed as moot by the district court.

Leif Heilberg was separately notified by the post office that his mail would not be detained. However, he also persisted in challenging the validity of the law, and a three-judge district court panel unanimously declared the statutory provision null and void under the first amendment.[133] Each case thus made its way to the Supreme Court, with Lamont as the appellant in one and the government the appellant in the other.

Speaking for the Court, Justice Douglas said that the new postal procedures had not rendered the issues moot and the constitutional question had to be answered. As construed and applied, Douglas stated, the statutory provision was unconstitutional. By requiring "an official act (*viz.*, returning the reply card)," the law imposed "a limitation on the unfettered exercise of the addresses' First Amendment rights."[134]

Exactly which first amendment rights had been violated? The exemptions in the law—such as the noninterference with mail "furnished pursuant to subscription" and mail ascertained by postal authorities "to be desired by the addressee"—assured delivery to these addressees. And the postal service's announcement that it was no longer maintaining a list of recipients of "communist political propaganda" removed the implication that a political dossier was being compiled. Nevertheless, the Court found the law to be constitutionally infirm.

Three first amendment rights are identifiable in the majority and concurring opinions. The decision turned in part on a derived right, academic freedom. Although scholars could subscribe to and receive communist publications without interference by the post

130. *Id.*
131. *Id.*
132. Lamont v. Postmaster Gen., 229 F. Supp. 913 (S.D.N.Y. 1964).
133. Heilberg v. Fixa, 236 F. Supp. 405, 410 (N.D. Cal. 1964).
134. 381 U.S. at 305.

office, nontenured teachers "might think that they would invite disaster if they read what the Federal Government says contains the seeds of treason." Others would also "feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' "[135] Freedom of speech was also threatened in that the statutory provision was inimical to "the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."[136] Still a third right—freedom to receive—was identified by Justices Brennan, Goldberg and Harlan in their concurring opinion. "It is true," they stated, "that the first amendment contains no specific guarantee of access to publications."[137] Nevertheless, the

> dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[138]

In identifying these several rights, both opinions enlarged the dimensions of the specified freedoms of the first amendment and demonstrated the significance that may be attached to derived rights. Although not specifically identified as such, academic freedom and the right to pursue knowledge could be inferred from Douglas' statement about the statute's "chilling effects" upon nontenured teachers and other prospective recipients. And his reference to debate and discussion showed their importance to all forms of freedom of expression. Finally, in recognizing the citizen's right to receive printed matter, the concurring justices expanded existing freedoms.[139]

Freedom of expression was also protected in *Schacht* another fundamental freedoms case which bore a relationship, however tenuous, to national security. Under section 702 of title 18 of the United States Code, it is a crime for *unauthorized* persons to wear "the uniform or a distinctive part thereof" of the American military services.[140] Section 772 (f) authorizes a person to wear the uniform of the Army,

135. *Id.* at 307.
136. *Id.*
137. *Id.* at 308.
138. *Id.*
139. Similarly, in *Ex parte* Jackson, 96 U.S. 727, 733 (1878), Justice Field had acknowledged that the liberty to circulate is as essential to freedom of the press as the right to publish.
140. 18 U.S.C. § 702 (1948).

Navy, Air Force or Marine Corps "in a theatrical or motion-picture production," providing "the portrayal does not tend to discredit that armed force."[141] On December 4, 1967, anti-war demonstrations were carried on within the vicinity of the military induction center at Houston, Texas. In a portrayal of a confrontation between American soldiers and a Vietnamese woman, Schacht and others sought "to expose the evil of the American presence in Vietnam . . . ."[142] Schacht's conviction and arrest came under the provision of the law which forbids the unauthorized wearing of a uniform. His defense and appeal were based on the statutory exception—the permission granted to use the uniform in theatrical productions. Whether this was a theatrical production within the meaning of the law was, in the estimation of White, Burger and Stewart, a matter properly "left to the determination of the jury."[143]

Most critical, of course, was the question of whether any of the armed forces could be portrayed only in a "good" or "favorable" light. All eight members of the Court[144] agreed, as stated in White's concurring opinion, "that Congress cannot constitutionally distinguish between" theatrical presentations that do or do not "tend to discredit" the armed forces. To find otherwise, Justice Black said, would be to leave "Americans free to praise the war in Vietnam," whereas such persons as Schacht would be sent "to prison for opposing it . . . ."[145] The discrediting proviso, he concluded, "cannot survive in a country which has the First Amendment . . . ."[146]

Domestic reaction to the war in Vietnam was also a principal issue in *United States v. United States District Court.* There was, however, an important element not present in the *Schacht* case—violence. The three defendants, John Sinclair, Lawrence Plamondon and John W. Forrest, were charged with conspiring to destroy government property, and Plamondon was also "charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan."[147] The issue in this case, Justice Powell announced, "involves

141. 10 U.S.C. § 772(f) (1956).

142. 398 U.S. at 60.

143. *Id.* at 69 (concurring opinion). Justice Harlan took issue with the Court only on a jurisdictional question raised by the government—the time limitation rule for filing a petition for certiorari. *Id.* at 65 (concurring opinion).

144. Harry A. Blackmun took the oath of office approximately two weeks after this decision was handed down.

145. 398 U.S. at 63.

146. *Id.*

147. 407 U.S. at 299.

the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval."[148] For our purposes, there are several relevant matters in this case. One, relating to internal security, is whether the executive branch may conduct warrantless, electronic surveillance of persons who seem intent upon attacking and subverting the existing governmental structure. Another is whether Congress may authorize the President to maintain warrantless electronic surveillance of such domestic security risks. A final issue which arises primarily under the search and seizure limitations of the fourth amendment is whether there is a blending of first and fourth amendment values by reason of the political character of the actions with which the defendants were charged.

The government contended that the warrantless surveillances were lawful "as a reasonable exercise of the President's power . . . to protect the national security."[149] The trial court answered that the surveillance violated the fourth amendment and that the government had to make a full disclosure to the accused of the intercepted conversations. This ruling was sustained by the Sixth Circuit, and the United States then appealed to the Supreme Court.

At the heart of the issue is whether the executive branch may claim authority to act by reason of the President's constitutional responsibility to protect national security. The government contended that an answer could be found in title III of the Omnibus Crime Control and Safe Streets Act of 1968,[150] which states:

> Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure of existence of the Government.[151]

The foregoing might be interpreted in either of two ways. Congress may have acknowledged that the President has the necessary authority under the Constitution to act as is needed to protect national security. Alternatively, Congress may have intended to except the executive

148. *Id.*
149. *Id.* at 301.
150. 18 U.S.C. §§ 2510-20.
151. *Id.* § 2511(3).

branch from the statute's carefully drafted limitations in national security matters.

Justice Powell rejected the government's claim that Congress intended to sanction "a constitutional authority in the President to conduct" warrantless surveillance in such cases. The statutory language and congressional colloquy at the time the bill was being debated made it clear that the government had not properly interpreted legislative intent. Rather than conferring any power upon the President, "Congress simply left presidential powers where it found them."[152] And instead of sanctioning presidential authorization of warrantless electronic surveillance, Congress honored the fourth amendment's limitation by stating that information intercepted by a presidentially authorized wiretap

> may be received in evidence in any trial hearing, or other proceeding *only where such interception was reasonable,* and shall not be otherwise used or disclosed except as is necessary to implement that power.[153]

The italicized language of this section is consonant with the fourth amendment's requirement that there not be "unreasonable searches and seizures," thus, no warrantless invasions of privacy, and it was in keeping with the Court's 1967 ruling in *Katz v. United States.*[154]

In fulfilling his constitutional responsibility to protect the government against subversion, the President could not claim power under either the Constitution or the statute to authorize warrantless searches. Nor could Congress undermine the fourth amendment by sanctioning use of warrantless electronic surveillance in internal security cases. Congress could distinguish between "ordinary" criminal activities and domestic security threats. "Different standards may be compatible with the Fourth Amendment," the Court advised, "if they are reasonable both in relation" to the needs of government to protect itself "and the protected rights of our citizens."[155] This represented something other than a judicial invitation to Congress to flaunt the fourth amendment.

While this decision turned on the fourth amendment, the Court saw the case's important bearing on first amendment freedoms. To

152. 407 U.S. at 303.
153. 18 U.S.C. § 2511(3) (1968) (emphasis added).
154. 389 U.S. 347 (1967).
155. 407 U.S. at 323.

some extent Justice Powell accepted as valid the arguments voiced in recent years by the New Left and black militants about "political" crimes. There is, Justice Powell observed, a convergence in national security cases "of First and Fourth Amendment values not present in cases of 'ordinary' crime."[156] Consequently, judicial vigilance under the fourth amendment is "more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."[157]

This concern about fundamental freedoms was in concert with the other recent developments discussed above, but dealt a blow to a presidential power which had been sanctioned by precedent. At least as early as May 1940, presidents had authorized their attorneys general to use wiretapping and electronic surveillance "in matters 'involving the defense of the nation.' "[158] The setback for the Nixon Administration was made more pronounced because (1) this was a unanimous decision, and (2) three of the Nixon appointees,[159] with Powell writing the opinion, voted against the President. Certainly, a "strict constructionist" Court would have deferred this national security question to the political branches.[160] There was this evidence, then, that the Burger Court was no more inclined than the Warren Court to accept *war power* or *national security* as a talismanic incantation to support all executive or legislative power which might be brought within its ambit.[161]

The Burger Court had two additional opportunities to nullify national legislation on first amendment grounds. *Tilton v. Richardson*[162] and *Blount v. Rizzi*[163] did not involve war power or national security issues, but their significance is not lessened thereby, as they contributed to Burger's distinctive record of presiding over a Court which nullified more national laws under the first amendment than any other Court in our history.

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156. *Id.* at 313.

157. *Id.* at 314.

158. *Id.* at 310-11 n.10. *See also* V. NAVASKY, KENNEDY JUSTICE 135-55 (1971).

159. Rehnquist did not participate, presumably because of his prior association with the Department of Justice. If that is the reason, there is a question about why he participated the following week in Laird v. Tatum, 408 U.S. 1 (1972). He explains the difference in his memorandum, Laird v. Tatum, 93 S. Ct. 7 (1972).

160. *See* cases cited note 57 *supra.*

161. United States v. Robel, 389 U.S. 258, 263 (1967).

162. 403 U.S. 672 (1971).

163. 400 U.S. 410 (1971).

Under title I of the Higher Education Facilities Act of 1963, federal funds were made available to church-related colleges for the construction of buildings and facilities used exclusively for secular educational purposes.[164] One provision of this statute stipulated that the "Federal interest" in any building would end after twenty years;[165] "therefore, a recipient institution's obligation not to use the facility for sectarian instruction or religious worship" would expire at that time.[166] In *Tilton,* the six-man majority accepted as constitutionally justifiable the stated legislative policy of educating "this and future generations of American youth" to promote the security and welfare of the United States.[167] But it also concluded that if,

> at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.
>
> To this extent the Act therefore trespasses on the Religious Clauses.[168]

Because the majority limited itself to this one provision, Justices Black, Douglas and Marshall dissented. They were not disappointed in the majority's nullifying the one section on first amendment grounds, but felt that all public funding of church-related colleges should have been nullified since, as Douglas stated, "even a small amount coming out of the pocket of taxpayers" and paid to a church is "not in keeping with our constitutional ideal."[169]

The issue, as presented in *Tilton,* was larger than what was specifically ruled upon by the majority. On other occasions, including two consolidated cases[170] decided on the same day as *Tilton,* the Court had used the establishment clause, as made operational through the due process clause of the fourteenth amendment, in striking down state policies and practices.[171] But *Tilton* involved the first national law to be found incompatible with the establishment clause.

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164. 20 U.S.C. § 751(a)(2).
165. *Id.* § 754(a).
166. 403 U.S. at 683.
167. *Id.* at 678.
168. *Id.* at 683.
169. *Id.* at 697.
170. Lemon v. Kurtzman, 403 U.S. 602 (1971).
171. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948).

Blount dealt with a congressional scheme to prohibit the sending of obscene materials through the mail. Section 4006 authorized the Postmaster General "to stamp as 'Unlawful' and return to the sender" any mail and "to prohibit the payment of postal money orders" if the evidence convinced him that the purpose was for "obtaining or seeking money through the mails for 'an obscene . . . matter' " or to distribute through the mail information on "how such items may be obtained."[172] Section 4007 empowered national district court judges "to order the defendant's incoming mail detained pending completion" of administrative proceedings and a showing of "probable cause."[173]

In *Freedman v. Maryland,*[174] a case originating in the state courts, the Supreme Court had established certain guidelines to govern administrative censorship, including prompt administrative proceedings and a judicial proceeding to evaluate the censor's claim that the material was not protected under the first and fourteenth amendments.[175] "These safeguards," the *Blount* Court announced, "are lacking in the administrative censorship scheme created by §§ 4006, 4007, and the regulations."[176] It thereby concurred in judgments already reached by three-judge panels of the Central District of California and the Northern District of Georgia. Both of the lower courts declared the provisions violative of the first amendment in light of the Supreme Court's previous ruling and guidelines in *Freedman.*[177]

The government made an effort to prevent the Court from reaching the constitutional question "by construing that section [4006] to deny the administrative order any effect whatever" until judicial review, as requested by the distributor, had been completed.[178] This was rejected by the Court because it failed to embrace the required guidelines and promptness and because "it is for Congress, not this Court, to rewrite the statute."[179]

By refusing to construe the statute to remove the constitutional infirmity, the Court moved far from the position it had adopted in *Scales.*

172. 39 U.S.C. § 4006 (1971).
173. *Id.* § 4007.
174. 380 U.S. 51 (1965).
175. *Id.* at 58.
176. 400 U.S. at 417.
177. *Id.* at 415.
178. *Id.* at 419.
179. *Id.*

CONCLUSION

Libertarians in the tradition of Justices Black and Douglas necessarily take issue with any Supreme Court decision that (1) fails to grant full, even "absolute," recognition to fundamental freedoms; (2) employs a "balancing test" when none is justified and when balancing will most likely end with the pendulum swinging in the direction of authority rather than individual rights; or (3) sees as the greater value the legitimate interests of society rather than the rights of the individual. In numerous instances there was ample justification for scholarly and libertarian criticism and for scorning as inconsequential the role of the Court as guardian of civil liberties.

The record prior to *Tot v. United States*[180] and *United States v. Lovett*[181] had scarcely earned the Court distinction in civil liberties cases. However, the radical changes in posture between 1958[182] and 1972[183] evidence an entirely new and libertarian period in the Court's history. The Court's decisions in compulsory self-incrimination[184] and other procedural due process cases;[185] its limitation of the jurisdiction granted to military tribunals by the Uniform Code of Military Justice;[186] its use of the bill of attainder prohibition in *United States v. Brown;*[187] and its protection of both procedural[188] and substantive[189] rights in expatriation cases should not be classified as "relatively minor matters."[190] Much of the credit for this libertarian record must go to the Warren Court which was responsible for protecting

180. 319 U.S. 463 (1943).
181. 328 U.S. 303 (1946).
182. Trop v. Dulles, 356 U.S. 86 (1958).
183. United States v. United States Dist. Court, 407 U.S. 297 (1972).
184. Leary v. United States, 395 U.S. 6 (1969); Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).
185. United States v. Jackson, 390 U.S. 570 (1968); United States v. Romano, 382 U.S. 136 (1965).
186. O'Callahan v. Parker, 395 U.S. 258 (1969); McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
187. 381 U.S. 437 (1965).
188. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958).
189. Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964).
190. D. LOCKARD, *supra* note 37.

civil liberties in twenty-one of the foregoing cases including *Aptheker, Lamont* and *Robel.* But the Burger Court, which came into being on June 23, 1969, and which did not become fully operative until the October Term, 1969, also shares in the distinction of protecting fundamental freedoms in *United States v. United States District Court, Schacht, Blount* and *Tilton.*

In all probability, President Nixon's four appointees—Burger, Blackmun, Powell and Rehnquist—will produce a "strict constructionist" Court in procedural due process cases, and they may persist in viewing narrowly the scope of the first amendment, as they did in *Central Hardware Co. v. NLRB,*[191] *Kleindienst v. Mandel*[192] and *Branzburg v. Hayes.*[193] However, there is also the possibility that the momentum in fundamental freedom cases may carry the Burger Court into yet judicially-unexplored corners of the first amendment. This latter prospect seems borne out by Blackmun's implied sanction of the notion that the first amendment, among others, protects the right of privacy.[194]

191. Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).
192. Kleindienst v. Mandel, 408 U.S. 752 (1972).
193. Branzburg v. Hayes, 408 U.S. 665 (1972).
194. Roe v. Wade, 93 S. Ct. 705 (1973).