CONSTITUTIONAL LAW AND FREEDOM OF EXPRESSION: A CRITIQUE OF THE CONSTITUTION OF THE PUBLIC SPHERE IN LEGAL DISCOURSE AND PRACTICE WITH SPECIAL REFERENCE TO 20TH CENTURY AMERICAN LAW AND JURISPRUDENCE

by

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To my parents

Dr. Evangelos and Phaedra Douzina

ABSTRACT

Freedom of expression has been postulated in the American legal system as a constitutional right and the Federal Judiciary has undertaken to enforce it against legislative enactments that abridge it. Thus, the various liberal and democratic justifications for the free exchange of ideas, opinions and information have been moulded in legal theory and practice with the theory of constitutionalism.

Constitutionalism is analysed as the amalgam of the theories of natural law, legal positivism and popular sovereignty. In the 19th century the natural law element predominated and freedom was identified with property rights. But after the New Deal, the democratic element and political freedom asserted a central position in constitutional discourse. Constitutional theory, however, remained within a paradigm dominated by concepts of the classical political philosophy: power is presented as a unitary essence, law as a unified and coherent body of rules and legitimation as a normative characteristic of the sociopolitical order, while the Constitution represents the unity of these elements. The constitutional mode of discourse built around these concepts, seeks to emphasize the legal and social continuity guaranteed by the Constitution and the Supreme Court but is a poor description of the mass democratic-welfare state. Power should be examined as relational, law as a social process politically determined and contradictory and legitimation as a complex and contested characteristic not exclusively normative.

American law and jurisprudence on freedom of expression are then examined. The cases are analysed as the political claims of groups and individuals to enter the public sphere; judicial intervention is one of the means through which the latter is constituted. Issues, ideas, individuals and organisations claim participation in it and through their officially sanctioned admission/exclusion the parameters of public discourse are continuously contested and differentially demarcated in each historical moment. Four periods of free speech adjudication are distinguished, each of which presents thematic and doctrinal similarities.

The "bad tendency" of speech doctrine was utilised in the first quarter of the century against socialists, pacifists and syndicalists. In the 30s and 40s the contextual characteristics of expression became the subject of regulation and the legal persecution of political dissenters became relaxed. But in the 50s and 60s an attempt to purge the public sphere from radical or reformist ideas and people was undertaken, which was endorsed by the Supreme Court by means of the "balancing" doctrine. Finally, in the 60s and 70s the federal judiciary distinguished among the various methods of protest through a number of particularistic approaches and while it did not recognise a full right to protest publicly, it prevented an outright legal repression of public political dissent.

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INTRODUCTION

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble and to petition the Government for a redress of grievances."
>
> The First Amendment to the American Constitution adopted in 1791

1. The words of the First Amendment to the American Constitution encapsulate one of the most honourable traditions of the liberal constitutional state. They postulate positively that social discourse - the spoken and written word - should be left free and unhindered; they postulate furthermore, according to their democratic interpretation, that the needs and interests of society should be subjected to rational debate open to all citizens and that political power should be criticized, controlled and ultimately exercised by the reasoning and sovereign public, the body politic. In a negative way, the First Amendment constitutes an absolute-sounding injunction against (federal) governmental interference in the process of free debate. Its inclusion in the higher legal order of the Constitution transforms the injunction from a general political principle into a legally enforceable command and creates by implication an institutionally guaranteed individual right to free speech.

When the American revolutionaries declared the inalienable rights to "life, liberty and the pursuit of happiness" as self-evident, they believed that they were asserting no more than the ancient rights of "free-born Englishmen". Indeed, the concepts of individual rights pertaining against the secular powers and deriving from a higher moral-legal order, of the organisation and exercise of political power in accordance with the principles of public debate and of limited sovereignty

can all be traced to pre-18th century political traditions. But their peculiar amalgamation and symbolic enunciation in the great revolutionary documents of the 18th century constitutes a dramatic departure in political history. A large number of 19th century social struggles, particularly in Europe, were concerned with the extension of political and democratic rights, among which freedom of speech, of association and of the press ranked high. Some of the most eloquent treatises on the value of free speech originate in that period. John Stuart Mill's essay "On Liberty" remains the unsurpassed exposition of the liberal case for free speech.

In the United States, the enactment of the Alien and Sedition Acts in 1798 by the Federalists sparked off a major political controversy on the meaning of freedom of speech and of the press and contributed to the Republican victory in the presidential elections of 1800.[1] Jefferson let the Acts lapse and in his famous inaugural speech addressed the question of freedom of political expression.

> "And let us reflect that having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked and capable of as bitter and bloody persecutions...
>
> If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it".[2]

After the repeal of the Alien and Sedition Acts, no major free speech controversy occurred for some time. The Supreme Court ruled, in 1833, that the Bill of Rights does not apply to state and local authorities.[3] But the existence of various social and ethnic groups with their own divergent values and beliefs - religious, moral, political - gave the impression of a great diversity of opinion. In the period up to the Civil War, the suppression of unorthodox views was

effected mainly through local mob-violence rather than through legal means and processes. "The masses, charmed by this idea of the rule of the people, were convinced that it made small difference whether you downed the minority by ballots or by brick-bats, which they understood better".[4] Almost all Southern States passed laws prohibiting the discussion of the slavery problem, but "lynch law" was found a swifter and more effective deterrent. "The development of the mob as a means of suppressing abolitionism reached its climax during the period 1833-1840, receding in the North after 1845 and continuing with undiminished force in the South until the Civil War".[5] In the aftermath of the Civil War, the control of obscenity became the major free speech issue.[6] However, rapid industrialisation and massive immigration created new areas of political friction. Toward the end of the century, the struggles of the young trade union movement and the appearance of political radicalism, imported in the main from Europe, shattered the image of political and social tranquility which had followed the end of the Civil War. The political and legal reaction to the twin threats of unionism and radicalism was the prelude of a new era.

It is true, however, that during the 19th century America gave the impression of a society much freer than any comparable European one. Indeed, many European liberals and radicals saw the American arrangements as an example to be imitated. A. de Toqueville spoke with admiration for the flourishing press and for the tendency of Americans to form political associations in order to deal with a variety of issues. But he was apprehensive about the levelling and mediocrity that democracy would eventually impose and saw "the liberty of the press... [as] the only cure for the evils that equality may produce".[7] The young Marx, too, in his polemics against German censorship of the press pointed to America as an example of "the natural phenomenon of freedom of the

press... in its purest, most natural form" and insisted that "in North America... censorship, like slavery, can never become lawful, even if it exists a thousand times over as a law".[8]

At the beginning of the 20th century, however, as trade union and socialist activities gained momentum, federal and state governments started passing a series of laws prohibiting and punishing radical speech and political activities. These laws culminated in the Federal Espionage Act of 1917, the first federal seditious libel law since 1798, which was designed to suppress radical and pacifist dissent to WWI. Prosecutions under these laws soon reached the federal judiciary which was forced for the first time to define the meaning of the constitutionally protected right of free speech.

2. In a 1919 opinion, Justice O.W. Holmes of the Supreme Court ruled that the pacifist leaflets of a socialist leader created a "clear and present danger" to national security and affirmed his conviction under the Espionage Act. The origins of First Amendment theory and adjudication are usually traced to that opinion. In one of its latest contributions to the subject, the Supreme Court held, in 1981, that live nude dancing is an expressive activity protected by the First Amendment. In the meantime, American constitutional theory and practice have been increasingly preoccupied with freedom of expression, and a continuously expanding area of expressive conduct has come under legal overview and sanction.

Traditional party politics, radical dissent and protest, religious proselytising, trade union picketing, the press and the electronic media, artistic, scientific and academic expression, obscene and libellous speech, sit-ins and symbolic acts like flag-burning have become, among others, the subject of legal intervention. Categories of expression have been drawn, according to its content, its effects or the context

of the utterance; individuals and groups have been linked with certain categories of speech and their expressive activities have been endorsed or prohibited; means of communication have been distributed to some groups and withdrawn from others, access to them has been opened for some messages but not others. A proliferation of legal discourse dealing with social discourse has taken place. The spoken and written word, the speaking subject have increasingly come under public scrutiny. Opportunities for communication expand - after all we live in the era of the "communications revolution" - but at the same time it seems as if a certain logophobia, a fear for the dispersal of discourse has taken hold of the powers that be: the State and the law have tried to regiment the universe of social discourse, to put it under control, to have the final word about what is to be said or written.

But is this undeniable multiplication of legal discourse about expression and communication, a linear expansion of repression? Is it a universal negation that excludes, prohibits and punishes, an injunction to silence? Or has this expansion of legal discourse contributed, on the contrary, to a regulated licence, to a prompting and sanctioning of diversity of opinions and expressions, as many constitutional writers have argued? After all, constitutional decisions of the Supreme Court have declared speech free, picketing and other forms of expressive conduct have been construed as protected speech, publishers and editors have been allowed an almost absolute freedom in the running of the mass media. Indeed, many contemporary liberals and radicals this side of the Atlantic have been casting as admiring a glance to the American system of expression protection as Marx did in 1842.

To answer these questions, one needs a clear dividing line between free speech and repression and a definition of the theoretical meaning

and the practical import of freedom of speech. If such a line existed, then the concrete legal incursions in the area of expressive activities - the laws, administrative decisions and judicial rulings - could be classified and the "state of freedom" in each society and historical epoch could be assessed. In the United States, the Supreme Court has attempted to draw such a line, since 1919.

3. Two, analytically separate, approaches have been utilised by the Supreme Court in its effort to draw the line between protected and prohibited expression. The first addresses the question why should expressive activities be protected even though they lead to undesirable or harmful consequences. This approach looks for theoretical justifications for the institutional protection of freedom of speech and attempts to construct a consistent theory of free speech with practical intent.

Classical utilitarian political philosophers have justified freedom of expression as the means through which truth and knowledge may be arrived at and individual fulfilment and happiness achieved (English utilitarians - J.S. Mill). Social utilitarianism perceives the market place of ideas as the institutionalised medium of group competition and as the method for striking a balance between the antagonistic claims of competing social groups and interests (O.W. Holmes and the pluralists). Social contractarian democratic theorists, on the other hand, perceive the institutionally guaranteed exchange of ideas, opinions and information on matters of common interest, as the necessary condition for the realisation of the democratic scheme of self-government by a sovereign and - in principle - homogeneous body politic (Al. Meiklejohn and democratic humanism). Finally, independent non-consequentialist arguments have been put forward deriving from moral

philosophy and natural law theories. Freedom of expression is perceived as a species of the general category of individual freedom or autonomy, or as a moral right against the power of the state (T. Scanlon, R. Dworkin).

Although none of these theories has been adopted, in its pure form, by the Supreme Court, they have all been reflected in constitutional jurisprudence. But the inclusion of the First Amendment in the Bill of Rights has raised freedom of expression to the status of a constitutional right, i.e. a legal right of a higher order which the Supreme Court has been empowered to enforce even against legislative enactments. Thus, theories of freedom of expression have been intrinsically linked in constitutional adjudication and theory with general theories related to the nature of the American legal order and to the role of the Supreme Court in it.

4. The position of the Supreme Court within the American legal system is unique. Entrusted with the supervision of the application of the provisions of the Federal Constitution and the Bill of Rights, the Court has gradually asserted the role of the institutional guarantor of the federal scheme of government and of the principles of limited government and individual freedom. The Court did not address questions of free speech during the 19th century, but it did intervene in most important political disputes and acquired a reputation, as the spokesman for the spirit of the Constitution and the conscience of the nation, beyond the legal profession. This direct political role of the Supreme Court was facilitated by the twin theories of constitutionalism and judicial review.

Constitutionalism may be defined as the legal requirement that all state action is in accordance with the provisions of the Constitution

and the Bill of Rights; theories of judicial review acknowledge and justify the power of the federal judiciary to invalidate such action if it violates the Constitutional commands. Both theories can be seen as the gradually effected amalgamation of three separate - even opposing - theoretical trends: natural law, legal positivism and popular sovereignty, or theories of democracy. During the 19th century the natural law element predominated and freedom was identified with property rights. Federal and state measures of economic regulation were repeatedly invalidated as violations of economic freedom. By the 1930s, however, the democratic tradition and the protection of political and expressive rights acquired a central position in constitutional adjudication. Thus, the first period of free speech case-law coincided with a fundamental rearrangement of the constitutive elements of constitutionalism and with a reappraisal of the role of the Supreme Court within the new sociopolitical structure of the mass democratic-welfare state.

The first two chapters of this thesis examine the evolution of the theoretical justifications of freedom of expression and of the theories of constitutionalism and judicial review and attempt to place them within a broad historical perspective. The problems and concerns of the two approaches finally converged in the 30s when the Supreme Court undertook to define the parameters and guarantee the protection of the constitutional right to free speech. From that point, the task of line-drawing between protected and prohibited speech became increasingly influenced by the theoretical assumptions and differences which inhered in the two bodies of free speech and constitutional theory.

5. The increasing involvement of the Supreme Court in free speech constitutional adjudication led to an expansion of writings in this

field. Literally hundreds of books and articles have been written about freedom of speech and of the press which have become one of the most commented upon aspects of American constitutional law. However, the differences between the utilitarian and democratic justifications of free speech as well as those concerning the democratic character of judicial review have led to the production of a series of contradictory theoretical positions and practical - in terms of legal doctrines - recommendations.

Despite the changes in the arrangement of the constituent elements of constitutionalism and underneath the differences in their appreciation, constitutional theory - and its part dealing with freedom of expression - are still dominated by concepts of power, law and legitimation adopted from classical liberal political philosophy. Chapter III examines briefly the three concepts and argues that the promise of constitutionalism that relations of power and domination may be dissolved into legal-technical ones, ensuring thus the legitimation of the sociopolitical order, underrate the complexity of the contemporary reality. Power is presented as a unitary essence seated in a single sovereign centre - the state - that monopolises coercion; law as a unified and coherent body of public and positive rules (or values) arranged in a hierarchised fashion; finally, legitimation as a series of predominantly normative characteristics of the sociopolitical order, the existence of which creates a positive - political and/or moral - obligation of obedience for the agents of that order. This presentation was justifiable during early capitalism, but is less so after the social and political changes introduced in advanced Western societies, since the 30s.

The explicit or implicit adoption of these concepts from classical liberalism and their retention in constitutional theory, in a virtually unaltered form, have led to the creation of a particular <u>constitutional</u>

mode of discourse. This mode occupies a privileged position within American legal discourse and has been utilised by groups and individuals who wish to advance political claims within the relatively independent structure of the judicial system or in wider political struggles. However, beyond its tactical use in political struggles - particularly those which end up in the courts - the constitutional mode of discourse remains a poor paradigm for the description and explanation of contemporary sociopolitical reality. An alternative theoretical approach toward its main tenets is, therefore, tentatively suggested. Power should be seen as a relational concept and should be disarticulated from its complete identification with state/political power; law as a politically determined and therefore contradictory social process, which involves elements of repression and ideological planning as well as a protective role; and legitimation as a series of contested characteristics of the sociopolitical order, among which normative integration is not the sole or even the dominant one.

6. Constitutional theorists have tried to provide a consistent theoretical justification for freedom of expression and to build a general - in principles - and specific - in import - system of expression protection which would qualify both as a description of political and legal reality and as a normative blueprint for legislators and judges. The theoretical assumptions of the constitutional mode of discourse have hindered this effort and have given to the debate a repetitive and inconclusive image. But at the same time, the federal judiciary under the guidance of the Supreme Court has continued in earnest to draw in practice the line between prohibited and protected expression.

Judges share the theoretical assumptions of constitutional theory. But the institutional obligation to render a judgment, once a case has been properly brought before a court, often defies the ideological need of preserving the internal coherence of the law. The elastic use of legal doctrine and precedent in adjudication mediates between the need for consistency and reverence toward the law-as-given and the impossibility of subjecting new and conflictual sociopolitical situations to simple, uniform principles. (Chapter V). The various legal doctrines that have been developed and applied in free speech constitutional adjudication are examined as complementary, as a panoply of approaches which has allowed the courts to differentiate the various aspects of the diverse and multiform claims to free speech that have ended up and have been decided in courts.

The first four chapters of the thesis attempt to clear the way for the examination of 20th century American legal material - laws and judicial decisions - dealing with freedom of expression. The common thread that hopefully unites this first part is the suggestion that the field of legally sanctioned social discourse cannot be seen as realising some central principles which may be discovered through a theoretical enterprise undertaken within the respective paradigms of classical liberalism, contractarian or empirical democratic theories, moral philosophy or the constitutional mode of discourse. One could argue that there is no theoretically interesting way in which the line of protected/prohibited speech may be drawn in advance to be compared, in a second step, with the concrete institutional decisions which deal with the problem. As communicative and expressive activities come increasingly under political and legal sanctioning, state and legal practices and agencies with their own diverse determinationa and conditions of existence undertake the task of defining and demarcating the realm of social discourse itself. Thus, while state/legal intervention cannot be easily

placed on the one or other side of a theoretically determined and clearly defined divide between freedom and repression, it may be examined as an increasingly important factor in the constitution of the public sphere.

7. The constitution of the public sphere is examined as an ongoing and antagonistic social process. In each particular society and epoch the public sphere constitutes the historically specific articulation of a series of formal and substantive elements. The extent of formal political rights, the issues and alternatives admitted in public debate, the groups and individuals admitted in or excluded from participation in it, the distribution and access to the means of communication are all constitutive elements of the public sphere. Antagonistic groups and interests advance conflicting claims to commandeer the public sphere and state institutions have increasingly undertaken to balance these claims and sanction some against others. Thus, the parameters of the public sphere are continuously contested and differentially demarcated. The protection of the established sociopolitical order against radical challenges has been one of the paramount concerns of state agencies involved in the sanctioning process and structural inequalities among competing groups and interests have also contributed to their differentiated positioning and endorsement (Chapter IV).

While the constitution and sanctioning of the public sphere has remained the paramount concern of legislative and administrative agencies, in the United States the judiciary has been increasingly involved in its delineation. Facilitated by the theories of constitutionalism and the injunctions of the Bill of Rights it has participated in the process as an independent political actor. The second part of the thesis examines this process of judicial intervention

and through it the role of the state in the regulation and disciplining of the public realm. The legal material is classified in chronological order and four periods are distinguished which display a broad thematic unity.

During the first third of the 20th century, the legal institutions dealt with radicals, socialists and trade-unionists who challenged the American involvement in WWI and the corporate capitalist development that preceded and followed the Great War. In those cases, two legal doctrines appeared in constitutional adjudication which have dominated the field since, in various disguises and transformations. The first addresses the content of ideas and expressions and prohibits or punishes those deemed as inherently dangerous, undesirable, immoral etc. (the bad tendency test). The second examines the expressive activities in their context and makes their prohibition or punishment dependent upon the circumstances surrounding the specific communication (the clear and present danger test - Ch.VI and VII).

In the 30s and early 40s the legal persecution of political dissidents was relaxed and the courts adopted a more active stance of protection of expressive activities. The democratic justification of free speech became predominant and political and expressive rights became the judicially "preferred freedoms" replacing economic freedom as the main concern of constitutional adjudication. At the same time, the Supreme Court undertook a much more extensive role in the constitution of the public sphere and participated actively in the direct legitimation of the new sociopolitical order instituted by the New Deal (Ch.VIII).

The 50s and early 60s is the most important period in free speech adjudication. Under federal legislative and administrative guidance a wide-ranging effort was undertaken designed to purify ideologically the public sphere. A series of criminal prosecutions and administrative

and legislative punishments were employed against communists and more importantly against all radical or reformist individuals, groups or ideas. The line between private and public beliefs, opinions and activities became blurred and the central economic regulation initiated by the New Deal was complemented by a rigorous ideological planning The Supreme Court, through the use of the balancing technique virtually abandoned the field and extended constitutional legitimation to these measures (Ch.IX).

Finally in the 60s and 70s, the civil rights and anti-Vietnam war movements claimed the right to use public fora for the expression of militant - but mainly peaceful - political dissent. Original forms of protest, direct action and civil disobedience were utilised to put pressure on the political/legal system outside the bounds of the established modes of political action. The traditional theories and legal doctrines of expression protection were largely irrelevant to the new situation, and the judicial answer to the protest movement's challenge became ambiguous and particularistic. The Supreme Court did not recognise a constitutional right to protest, but a degree of protest protection was carved out based on the contextual characteristics of the dissenting activities. At the same time, the Court extended almost complete protection to the editorial freedom and autonomy of the mass media and in particular of the press (Ch.X).

The examination of the legal material of each period follows a brief historical introduction which places the law and judicial decisions within the historical conjuncture in which they evolved. The tendency to examine legal material independently from its proper historical setting, its causes and consequences is one of the characteristics of the constitutional mode of discourse. Furthermore, the use of methodological and substantive advances from the social

sciences is necessary in order to redress the essentialist and idealist assumptions of a large part of American constitutional law.

The legal materials critically reviewed in the second part of the thesis constitute one of the most comprehensive and up-to-date collections in constitutional literature.[9] However, certain areas which come under the main concern of the thesis have not been included. The most notable absentees are cases that come under the general title of obscenity; cases related to the application of the Freedom of Information Act and finally cases related to the regulation of the electronic mass media. Their inclusion would prolong an already overlong thesis. It should be noted here that some aspects at least of the obscenity law appear settled. First and most importantly, obscenity has been ruled outside constitutional protection. The free market of ideas does not include material which appeals solely to prurient interest and titilation. According to the most recent contributions of the Berger Court, obscenity is defined as material which appeals to prurient interest in a patently offensive way and constitutes an affront to the average person applying contemporary local standards. But it is redeemed if it has some literary, artistic, political or scientific value, a phrase that indicates the qualities that obscenity proper lacks. "Pandering" might make some material obscene, even if it is not such in the abstract, but private use cannot be wholly banned. "Thematic" or "ideological" obscenity, i.e. the advocacy of obscene or immoral conduct, cannot be banned however. Finally, a double standard exists toward obscene material addressed to minors and adults.[10]

8. At the end of the examination of the laws and judicial decisions no clear answers emerge as to the dividing line between freedom and repression. The problems encountered in the attempt to draw a

theoretically determined dividing line are present, too, in the effort to extract such a line from the legal material. It seems that in the place of the bipolar freedom/repression analysis a series of historically specific questions should be posed: Freedom of speech for whom or for what messages; when; and under what circumstances. Who has the power to define and sanction expressive activities; or their means and content; or to decide the distribution and access to the media of communication. The legal answers to these questions involve as many distinctions and differentiations among the ideas, the social and political groups that claim admission to the public sphere, the context and the means of communications as similarities and analogies. The theory and practice of freedom of expression may be seen, therefore, as the highly differentiated and historically evolving sanctioning (validation/prohibition) of a series of political claims and struggles. The importance of the constitutional right to free speech as developed in Supreme Court jurisprudence lies in the fact that a relatively independent agency (the federal judiciary) has asserted the role of a political actor which participates in the sanctioning of expressive claims - and the constitution of the public realm - through its own peculiar mode of technical discourse and institutional and procedural guarantees. The highly specific and historically determined intervention of the Supreme Court in the resolution of free speech conflicts displaces the freedom/repression problematic and makes difficult the drawing of any generalisable conclusions.

One Judge of the Supreme Court, Justice Jackson said once that "in this country... we rarely have a political issue made of any kind of invasion of civil liberty. The attitude seems to be, leave it to the judges. Years after the event takes place, the judges make their pronouncement and that ends the matter. Whether the political conscience

is relieved because the responsibility here is made largely a legal one, I cannot say".[11] Although Jackson's statement seems generally true, the Justice somewhat underestimates the judicial role. Judicial pronouncements are mostly footnotes in history, but sometimes they constitute, too, yardsticks for the future and the "matter does not always end" there. The attitude toward this ultimately political role and responsibility of the judiciary can only be formulated in the same way, i.e. politically. As Professor J. Griffith put it, we will not find "even temporary solutions in appeals to reference points like social solidarity, the conscience of mankind or justice or fairness or fundamental legal principles".[12]

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PART I

FREEDOM OF EXPRESSION IN POLITICAL AND CONSTITUTIONAL THEORY

CHAPTER I

A CRITIQUE OF THE THEORETICAL JUSTIFICATIONS OF FREEDOM OF EXPRESSION

1. John Stuart Mill and Individualistic Utilitarianism

John Stuart Mill's essay "On Liberty", included in its second chapter the most celebrated liberal essay on the justification of freedom of thought and discussion. Although Mill has been criticized for not providing any new and original ideas on the subject, his essay may be justly seen as a break from older notions about expression and his justifications are still canvassed by contemporary writers on the subject.[1]

The main points that differentiate Mill from earlier writers who defended speech may be summarized as follows.

As to the character of expression, most of the earlier liberals were mainly concerned with religious as against secular expression. Thus, Milton, possibly the best known early theorist of freedom of speech would extend religious toleration to all Protestant churches but "...Popery, (as) being idolatrous, is not to be tolerated either in Public or in Private".[2] His position toward criticism of the secular power was even more ambiguous. He acted as a censor for Cromwell and concluded his celebrated"Areopagitica"with the admonition that "those which otherwise come forth, if they be found mischievous and libellous, the fire, the executioner will be the timeliest and the most effectuall remedy that man's prevention can use".[3] John Locke was equally preoccupied with sectarian as against secular expression. He believed that no opinions contrary to human society, are to be tolerated by the magistrate. One clause of the "Fundamental Constitutions of Carolina" stated that "no person whatsoever shall speak anything in their

religious assembly irreverently or seditiously of the government or governors, or of state matters".[4] According to Professor L. Levy both Milton and Locke accepted the assumption that the state had the "...incontestable right to proscribe sedition, a commodious concept encompassing anything from mild criticism of public policy to attempted overthrow of government".[5]

J.S. Mill's principles on the contrary attempt to cover all forms of expression. He deals with religion as one subcategory merely in the field of moral, aesthetic and political ideas which are to be given full protection. Mill commences his tract by blandly stating that there is no more need to defend "liberty of the press" against a corrupt and tyrannical government. He assumes that the governments of constitutional countries will not attempt to control expression "except when in doing so it makes itself the organ of the general intolerance of the public".[6] His main concern, therefore, is directed at the intolerant public which either directly or indirectly, by making the government its organ may exercise coercion upon individual conscience and expression. For Mill, as for A. de Tocqueville in his earlier "Democracy in America", the greatest menace to freedom lies in the "tyranny of the majority", a deformation of majority rule which both see as the logical and inevitable outcome of the extension of representative democracy.

Mill's argument is not based like those of earlier liberals on the need for toleration of minority or dissenting views. Arguments for toleration are grounded on the acceptance of the basic correctness or truthfulness of certain received beliefs and toleration is usually defended on moral principles. Mill is based, on the contrary, on the epistemological position that knowledge and truth may be attained through a free clash of differing and opposing views. Although the truth about social, political and moral questions may be discovered,

there can never be absolute certainty about it and in any case not the same certainty as that, in principle, attainable in the natural sciences. All people are fallible and any suppression of an opinion on the ground of its alleged falsity implied an unacceptable assumption of infallibility on the part of the censor. However, his fundamental relativism does not go as far as to reject all rationally grounded capacity for action. Individual or state action may be rationally undertaken if its principles, justifications and grounds are open to counter-argument by those who oppose it. Mill, therefore, is less concerned with true opinions than with the conditions of attaining truth, of "being in the truth", as it were. Such conditions should pertain in all aspects of social life and are those of an open and public confrontation of ideas. They are not only the necessary and sufficient requirements for reaching truth but also for keeping the thus arrived at truths in a state of vitality, capable of being adapted to changing circumstances and contingencies and protected from dying out as dogmas. One could summarize the argument by saying that truth is an evolving notion which may be approximated through the principle of competition of ideas, the market place of ideas as it came to be known.

Secondly, the utilitarian Mill does not base his defence of speech on absolute principles and human or natural rights but on the concept of utility. Knowledge and truth, are conducive to human happiness and progress both individual and social. Free thought and expression enables people to attain the dignity of thinking beings. The principle of individuality that Mill defends in all his writings is seen as the outcome of the free competiton of ideas. The search for knowledge and truth and a critical posture toward received wisdom lead to the

full growth of individuality and hence happiness.

Both claims, that freedom of opinion is the only way to truth and that truth and knowledge lead to individual fulfillment and happiness have been criticized on empirical grounds, the basis on which Mill himself always attempted to ground his theories. Thus, in the realm of science, the obvious example of 19th century philosophers, 20th century epistemology and philosophy of science have questioned Mill's assumptions. To be sure Karl Popper's notion of falsification and defence of the "open society"[7] strongly resemble Mill's emphasis on the market place of (scientific in this case) ideas. Yet, according to Kuhn's "Structure of Scientific Revolutions"[8] the normal operation of science involves the unquestioned acceptance of a given paradigm and problem solution within its parameters. Religion, necessarily, involves truth claims not open to discursive validation or falsification, which, therefore, must be accepted on faith. But even in the realm of political and social issues, where Mill is at his strongest, his assumptions have come under criticism. Thus A.V. Dicey argues that freedom of expression does not necessarily lead to any "special vigour or originality either of intellect or of character".[9] Equally, Isaiah Berlin believes that the relation between freedom and individuality cannot be empirically proven, since as early conservative critics of Mill insisted integrity, love of truth and individualism grow equally in severely disciplined societies, among "the puritan Calvinists of Scotland or New England, or under military discipline".[10] Berlin goes on to distinguish this confused argument for liberty from what he believes to be the true meaning of the liberal concept of liberty, i.e. the prohibition of state intervention in private affairs which is for him the only mark of high civilization.

Mill's utilitarian premise that "knowledge makes man happy" has been equally criticized. Wolff in his radical critique of liberalism

shows that no empirical verification of the relation between knowledge and hapiness exists or is feasible: such a test presupposes an ab initio resolution of the question and the setting up of the conditions of a free society where the relation is to be examined.[11] Thus both the "conservative" Berlin and the "radical" Wolff believe that Mill's premises are not empirically provable and they must be seen as declarations of faith.[12]

The Millian defence of speech contained a third point, that has largely passed unnoticed in the literature. It could be called the principle or assumption of differentiated rationality.[13] Mill had accepted that people who are not fully rational cannot be entrusted to participate in rational debate. Freedom of speech "appli[es] only to human beings in the maturity of their faculties".[14] Minors and children are excluded as well as non-civilized peoples: "despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement...".[15] However, lack or diminished rationality is not restricted to these apparently "trivial" cases.

Mill's "On Liberty" was written at a period when the already established market society was increasingly coming under strain. The optimistic assumptions of the political economists and earlier Utilitarians (including Mill's father James Mill) that the workings of the market, once set free from state intervention, would naturally lead to ever-increasing productivity that would upset real inequalities were being challenged both in theory and practice. The conditions of the British working class had become insufferable; certain of its sections were moving toward trade union and socialist activities that

challenged the sanctity of private property, the cardinal principle of both liberal theory and society. The 1848 revolutions had marked the beginning of a new era in which the "spectre of communism" was to become a real threat for the recently victorious European bourgeoisie. Against that background Mill's theory may be seen as a further attempt within the English utilitarian tradition to answer a double political problem: That of conceiving and setting up a political system that "should both produce governments which would establish and nurture a free market society and protect citizens from rapacious governments."[16] Since, a representative government of sorts had already been established in England, the main issue at stake was the extent and genuineness of the franchise. Earlier liberals had consistently attached the franchise to the level of rationality of the electorate. As C.B. Macpherson has convincingly argued, liberal theory had associated since Locke the level of rationality with economic status. "Locke had always assumed fully rational behaviour to be accumulative behaviour, [so when] labouring and appropriating became separable [he could] find that full rationality lay in appropriating rather than in labouring".[17] For Locke, the labouring class, "the greatest part of mankind have not leisure for learning and logick, and superfine distinctions of the schools. Where the hand is used to the plough and the spade, the head is seldom elevated to sublime notions, or exercised in mysterious reasoning".[18]

J.S. Mill did not attribute full rationality and individuality solely to the propertied class and sincerely regretted the inhuman conditions of the working class which since Chartism had started agitating for the extension of the franchise. Yet in his "Representative Government" Mill too accepted that the rationality of the poor was less than full. Thus, although the full integration of the working class in bourgeois society and politics could not be resisted for long, the

adverse effects of such an eventuality should be upset through various institutional guarantees: in the long run the knowledge of the people should be raised through the extension of education, so that the poor would become more content with the existing state of things. In the shorter run, his model of democracy proposed an elaborate system of plural voting as a guarantee against the numerical strength of the working class which could use the franchise to "direct the course of legislation and administration by its exclusive class interest".[19] Plural voting by giving a greater say to "those whose opinion is entitled to greater weight"[20] would avert "class legislation" (Mill's term). Those who received poor relief or did not pay direct taxes or could not read or write were to be completely excluded. For the rest, superior intelligence and economic success would determine the number of votes. Thus an unskilled worker should have one, a skilled two, a foreman three, farmers, manufacterers and traders three or four, while professionals and the educated should have five or six votes.[21]

Examined against the background of his general political theory, Mills's defence of free speech takes on a meaning slightly different from that attributed to it by later liberals. Although the free clash of opinions is the necessary condition for the flourishing of individuality, entry to the political market place must be organised in such a way that the extension of the franchise to the uncultivated populace would not endanger the assumed higher rationality and ability to govern of the educated and propertied classes and the basic postulates of the capitalist market. His main concern and target of attack in the essay "On Liberty" is therefore the public opinion which, if democratically integrated on a "one man one vote" principle, would lead to a kind of coercion much stronger than that exercised by the most tyrannical government. Mill's theory written at the threshold of a new era of profound social change which the economically and politically entrenched

bourgeoisie apprehended with great fear can be seen as containing both the culmination of a great tradition in liberal political philosophy and the anticipation of the dangers to come.

The gradual destruction of an all-encompassing world view of a religious character that up to the Enlightenment had both described and explained the natural and social worlds and had sanctioned the static position of the individual within a religious-secular hierarchized continuum had already started with Hobbes and Locke and the transition from classical to rational natural law.[22] The answer to practical questions about social and political organisation, the ends of life and the rights and duties of individuals were not to be found any longer in an ossified tradition. Instead, they should be released and become subject of inquiry and debate, initially among the philosophers who were supposed to have a privileged insight into the workings of society and the human self. Social institutions were perceived as justified not by the mere fact of their existence and their religious sanctioning but by their utility to a rational plan to be worked out by political philosophers and carried out by enlightened secular authorities. Mill's theory on freedom of expression may be seen as the culmination of that process: all those qualified to participate in rational debate are the practical "philosophers" who think about, debate and confer about all important questions. The principle of the intellectual market, so forcefully advocated, does not accept any force other than that of the better argument in a presumably fully rational discourse. Yet, as soon as that principle becomes the organizing principle of a democratically integrated social power that understands itself as the <u>sovereign</u> political power, the fears of the 19th century bourgeoisie can be explained. The extension of the franchise would shatter the existing coherence of a

reasoning political public united by its common class interest in the maintenance of private property and the sanctity of the economic market. The extension of the political public and the introduction of the market model in the politics of a fully integrated electorate could, in principle, lead to the destruction of those institutions - alienable private property and the markets in commodities and labour- that came to liberate mankind from the yoke of an irrational tradition and a stagnating society. If the free market in ideas was celebrated as the only mechanism through which practical and normative questions could be answered; if no institution could be accepted as sacred and as being beyond criticism and debate; then there was no guarantee - and indeed a great likelihood - that even private property and the economic market would be criticized as irrational and unjust and would be abolished. Thus 19th century liberal political philosophers were caught in a dilemma. The extension of the franchise could not be resisted for long, but it should be so organised as to guarantee that the principles of the capitalist market would be accepted by the whole society as the final stage in the evolution of civilization.

Thus, Mill formulated the most advanced liberal defence of free debate, but qualified participation in the political market in accordance with the stakes that each class of the population presumably held in the maintenance of the background premises of capitalist organisation. The individualistic-utilitarian defence of the intellectual market is not necessarily an eccentric article of faith which should be attributed, as it has, to Mill's peculiar personal problems. It could be alternatively seen as a coherent justification referring to a public that necessarily shares a number of common background assumptions.

Around the turn of the 20th century the class coherence of that public was shattered through the extension of the franchise, as Mill had foreseen. However, his prescriptions on plural voting were nowhere adopted.

It was the shattering of the class coherence of that public that necessitated extensive state intervention in the organisation of the newly extended political market. The purpose of this essay is to trace the development of this intervention and the theoretical justifications offered for it. Thus, the critique of Mill's theory does not purport to dismiss the Millian political vision for its ideological-class character. The faith in the market of ideas as conducive both to knowledge and individual fulfilment may be profitably used as a starting point and a referent in order to examine how these principles fared in the radically changed social conditions of 20th century United States. Mill's legacy remained and still is the dominant trend within the discourses of political philosophy and constitutional law, so that it would not be illegitimate to take it as a yardstick for later developments.

2. Oliver W. Holmes and Social Utilitarianism

Turning from Mill and 19th century England to early 20th century America, it is the Supreme Court dissenting opinions of Justices O.W. Holmes and Brandeis written in the first quarter of the 20th century that have captured the imagination of contemporary liberals. The Holmes dissents in the Abrams and Gitlow cases along with Brandeis' dissent in Whitney have been hailed as the high point of democratic liberalism and used as the starting point for the elaboration of a

legal doctrine on freedom of expression in the United States. The most eloquent of these statements appeared in the dissenting opinion in the Abrams case:

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test for truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."[24]

and the famous aphorism that "if in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way", found in the Gitlow[25] dissent, is accepted as part of the same theory.

The praise of the opinion has been endless. It is "the most eloquent and moving defence of free speech since Milton's Areopagitica"[26] and has put the case for speech in "perhaps its most literary form for modern times".[27] Justice Frankfurter thought that "it is not reckless prophesy to assume that this famous dissenting opinion in the Abrams case will live so long as English prose retains its power to move".[28] For Professor T. Emerson the aphorism of the Gitlow dissent quoted above is the classic statement of liberalism,[29] while Max Lerner could "add little to what has been said of Holmes' language. It has economy, grace, finality, and it is the greatest utterance on intellectual freedom by an American, ranking in the English language with Milton and Mill".[30]

There are a few criticisms too. Meiklejohn (for his theory see infra 3.1) has attacked the passage as inadequate to "give us, as [Holmes] intends to do, the theory of our Constitution";[31] and a contemporary neo-conservative has remarked that "with all respect for those who have praised this statement, it is not at all evident that it can provide a sound foundation for the law of the First Amendment".[32] However, the overwhelming majority of the commentators agree with the assessments of the previous paragraph, and Holmes has been thus raised to the ranks of the hierophants of contemporary liberalism.

Holmes' use of the market place metaphor strongly resembles Mill's statement "On Liberty" although Mill himself did not literally refer to the market place. It could, thus,appear at first sight that Holmes' theory is a mere repetition of the liberal classics and particularly of J.S. Mill. This has apparently been the general understanding of his opinion and the reason why so much emphasis has been put upon the style and grace of the utterance: the greatest value of the repetition was to put it in an elegant and concise form and to enter it into the Supreme Court Reports. It can be argued, however, that Holmes' theory on freedom of expression put in the context of his general theoretical outlook and the historical conjuncture in which he wrote is not just a reformulation of earlier liberal doctrines.

(a) The market place, the universal principle of competition in an antagonistic society, is for Holmes more than a mere metaphor. It has already been fully implemented, it is the reality of life and "the theory of our Constitution". The principles of the economic market have been extended to the political and intellectual ones. While Mill had been somehow cautious about such an eventual extension, Holmes writes as if it has been accomplished and accepted by all. To the

extent that he refers to the social domination of the basic tenets of a capitalist market economy, Holmes' reading of the situation appears realistic and the Supreme Court had played a not inconsiderable role in upholding and extending "laissez-faire" economic measures (see infra, Chapter II). But as regards the political market Holmes was much less realistic than Mill. A large part of the population had yet to be fully admitted to the franchise (in particular blacks and women); even more significantly large parts of the working population had rejected the capitalist market assumptions around the turn of the century. Socialist and radical trade union activities were at a peak, never repeated in 20th century American history.

(b) For Mill, the intellectual market was necessary for the flourishing of individuality and the development of personality as well as for the testing of theories and ideas related to general practical and normative questions, to the "common interest". For Holmes, on the contrary, the market place is the mechanism through which isolated and antagonistic individuals and groups can carry out their "wishes". The competition of the market is the best or the only means for self-gratification. Holmes' "social darwinism" is evident in his theoretical writings: "For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine"[33] or again,"the ultima ratio of private persons is force, and ... at the bottom of all private relations, however tempered by sympathy, and all the social feelings, is a justifiable self-preference".[34] The intellectual and political markets can be seen, therefore, as providing a mechanism through which self-preferences backed by the state force can hold sway. The "fighting faiths" that compete and the resulting "truths" are nothing more than the publicly sanctioned

interest of the more powerful forces in society seeking their self-interest. After the establishment of the conditions of universal competition, Holmes' function as an influential Supreme Court judge is to sit back and see to it that if "his fellow citizens want to go to Hell, he will help them".[35]

(c) However, if the "truth" is no more than a private "wish", a self-interest that has won in the market, and "men have realised that this is the best way in which they may successfully press their claims" then any "truth" that loses out in the competition has no claim at all for protection. If the "political market" decides that a particular "fighting faith" is not in demand by the consumers, then its "persecution" appears and, indeed is, logical. It is based on the strict and ruthless logic of the ultimate and valid test of truth, the market. Seen in this light Holmes' Voltairian liberalism about the freedom of opinions that he "loathes and are fraught with death" and the protection of ideas in proletarian dictatorship sounds more rhetorical than substantive. Holmes, the judge, would protect anti-market "fighting faiths" (like those of the socialists Abrams and Gitlow and their associates) if their talk was "puny anonymities" without chance of success. Gitlow's left-wing manifesto was "the right of an ass to drool about proletarian dictatorship".[36] On the contrary, referring to the Debs case, in which he affirmed a 10-year imprisonment of a famous socialist leader, Holmes would dryly and dismissively state that there was "a lot of jaw about free speech".[37] (For analysis of the cases above, see infra, Chapter VI).

Thus, for Holmes the political market is not the same place as that defended by J.S. Mill. He, surely, shares a philosophical relativism,[38] which according to A. Hunt

derives from his acquaintance (as with all legal realists) with the pragmatic philosophy of William James.[38a] Although "all life is an experiment", the established political market which has been accepted by the dominant social forces can take care of all necessary reforms. But if the legitimacy of the market or of any of its outcomes is effectively challenged, Holmes who "despised any tinkering with the institutions of private property"[39] will give no help. To enjoy "the blessings of the market" to paraphrase the U.S. Constitution, one must fully accept its legitimacy.

Thus, when Holmes from a position of authority came to deal with the problem that Mill had faced - albeit as a future but inevitable eventuality - his answer appears at the surface as self-complacent. The 19th century fears about the incompatibility of democracy and the free enterprise system had proven unfounded. But underneath the rhetoric a lingering apprehension remained. The market system had to be protected, not through the undemocratic methods of plural voting and the like, but by imposing and propagating the intrinsic value of the existing social system and repressing those who challenged it. In the process, the market had changed from the test of truth into the "ultimate truth".

3. The Democratic Justifications of Freedom of Expression

3.1.1. The democratic humanism of Alexander Meiklejohn. The political theory

The most influential treatise in 20th century American theory on freedom of expression was the little book "Political Freedom" written in 1948 by the philosopher Alexander Meiklejohn. Meiklejohn attempts to ground both the function and justification for free expression in what he calls the plan of "government by consent" or "self government"

or simply political freedom. According to that "plan", there is no radical separation between rulers and ruled, the government and the people. The people through an original compact have pledged themselves to take all decisions on public policy collectively and have delegated their sovereign powers to the removable government of the day which is charged with carrying out the sovereign will. Since all laws and other governmental measures are the outcome of this process, seen as a continuous re-enactment of the social contract, their acceptance by the sovereign people is not a submission to some external rule but the very gist of self-control. The sovereign people obey these laws and policies that they themselves have enacted, through their delegates. Each individual has two roles: as a citizen he or she discusses issues bearing on the common good and thus governs. As a private person he pursues his own interest and is governed. The public interest, embodied in laws is not the simple aggregate of the individual antagonistic interests but compounded out of them is an "organisation of them, a selection, an arrangement, based upon judgments of relative values and mutual implications".[41]

Based on this version of democratic theory, Meiklejohn argues that freedom of expression is necessary in order to ensure that the process of self-government and its formal completion,voting, can take place. It enables citizens to inform themselves about the issues, exchange information and opinions, get "as wise as possible" and ultimately cast their votes. The rationale, therefore, of free expression lies on the right of the listening citizens. "The point of ultimate interest ... is the minds of the hearers".[42] This

interest is not based on "the need of Hitler or Lenin or Engels or Marx to express his opinion in matters vital to him if life is to be worth living"[43] but is a deduction from the basic American agreement that "public issues should be decided by universal suffrage". He draws a line between freedom of public discussion and a private right of speech. The former must never be abridged; no idea or doctrine referring to the common needs and interests of the republic may be ruled out as false or dangerous as they are all "relevant" to a self-governing, politically free nation. The government has the legitimate right to regulate the place, the manner and the time of expression, to put rules of order and procedure, but it may not forbid or discriminate against any idea because of its content.

The private right to speak, on the other hand, like "life" and "property" is an individual possession, related to the private person's quest for his own interest. It is one of the "most highly cherished private possessions",[44] but has nothing to do with the absolute prohibition of the First Amendment and may be denied or limited, as every other possession, in accordance with the "due process of law". Meiklejohn protests against the identification of the two "distinct" categories of freedom that results in the underestimation of political freedom and of the concepts of public or common interest.

Meiklejohn belongs to the pragmatist and idealist tradition in American political philosophy exemplified by Dewey and McIver.[45] Like them he believed in the basic soundness of the existing political institutions, which can be made to work towards the common good once

the "excessive individualism" of the American way of life has been mitigated. If people stop thinking as "farmers, trade-union workers, as employers, as investors and become more of citizens devoted to the common welfare",[46] the plan of self-government enshrined in the Constitution will be accomplished. He ascribed to individuals a dual rationality - a "higher" public and a "lower" private one - and believed that the process of civil education and political information would inevitably lead to the triumph of the former. People will then realize that they possess a public will and an overriding common interest which the existing institutions are capable of expressing.

Meiklejohn's political theory is the apogee of liberal democratic humanism: a eulogy for the harmonious state where the common interest will be acknowledged and guaranteed and human personality will develop and prosper, He, thus, returns to the Millian faiths on human rationality and dignity but in the process the reality of conflicts of antagonistic interests injected by Holmes and the Realists is lost. By borrowing from Rousseau an ahistorical concept of compact and an elusive sovereign "general will" and from Hegel the idealistic notion of "common welfare" that is moving forward toward its realization in a teleological fashion and is inscribed in the "citizen-part" of a divided self; and by insisting that the existing political arrangements are capable and destined to realize his vision, Meiklejohn's description of the political system was completely unrealistic. As C.B. Macpherson has said of Dewey and McIver,[47] it was those unrealistic assumptions that "left them wide open to the shattering attack of the mid-20th century empirical political theorists."

3.1.2. The theory of freedom of expression

Meiklejohn's main points on freedom of expression may be summarized as follows:

First, freedom of expression is grounded on the political plan of self-government embodied in the American Constitution and the existing political institutions. The "absolute" language of the First Amendment, its legislative history and its place - as the first - within the whole constitutional scheme indicate that an absolute protection of expression was intended by the Founding Fathers. Moreover, history and tradition have shown that political freedom is the paramount organising principle of the American Republic. Thus, the question becomes whether the actual institutional functioning matches up the postulated functions.

Secondly, the main function of the market place of ideas is neither to discover truth through the clash of opinions (as in Mill), nor - even more emphatically - to allow the imposition of private wishes through an ongoing give-and-take process. Its function is to enable citizens to govern themselves, not "a device for the winning of new truth ... [but] for the sharing of whatever truth has been won".[48] The main beneficiaries are the listeners and not the speakers, an idea that was later developed by the supporters of a right of access to the media and in particular by Professor Barron. Through its workings the initial compact gets re-enacted and a continuously renewed public consent becomes the principle and sole arbiter of state power.

Thirdly, the distinction between public and private speech - the latter is protected not by the First but by the Fifth "due process" Amendment - determines the degree of protection necessary. The drawing of the line

is unproblematic, since it has been included by definition in the constitutional plan and is implicit in the allegedly clear distinction between common needs and public good and private interests.

Within the postulated public speech category, full protection must be given to all propositional contents because they are all relevant. Regulation of the context of speech, though, is both permitted and desirable so that all messages may have a hearing. However, the legislature and the executive may, and have, tried to force the democratic process, so the Supreme Court must guarantee that those in power are denied the opportunity to coerce public consent. This idea was adopted in the 30's and 40's by a majority of Supreme Court Justices. Thus Jackson speaking for the Court in 1943 stated that: "There is no mysticism in the American concept of the state or of the nature or origin of its authority. We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."[50]

Finally, free expression of ideas on public matters, the very essence of the plan of self-government, can never endanger the safety of the state. Certain inconveniences that may arise in the short-run will be alleviated by the long-run benefits of the realization of the plan. Free public discussion <u>is</u> the safety of the Republic and the only way to progress.[51]

3.1.3. <u>The receival of democratic humanism in constitutional theory</u>

Meiklejohn's analysis provoked a fierce debate among constitutional authors,[52] intensified by the fact that its main tenets had been accepted by a majority of the post-New Deal Supreme Court. In particular Justice Black had become the most prominent exponent of the "absolute"

theory of speech protection from the bench. The main criticisms were addressed to the legal part of Meiklejohn's theory.

The attribution of the theory to the absolute language of the First Amendment and the unambiguously libertarian intentions of the framers has been challenged by the "revisionist shcool" of constitutional history (see infra, Chapter II). Following the publication of Professor L. Levy's influential book "Legacy of Suppression"[53] the belief that constitutional language, legislative history or tradition could yield a clear-cut libertarian meaning was discredited. Meiklejohn's reading of them and the two-tiered (First-Fifth Amendment freedoms) theory were ctiticized as arbitrary. But it was Meiklejohn's theoretical distinction between public and private speech which created the most controversy. Meiklejohn himself wavered in the enumeration of the categories of expression that should be included in each region. In the first edition of his book (1948) he included among the "forms of speech" that legislatures have both the right and the duty to prohibit "libel, slander, words that incite men to crime, sedition and treason".[54] In the second edition (1960) he wanted the sentence "sedition may be expressed by speech or writing" eliminated because sedition is a "tricky and misleading word" suggesting a crime where under the Constitution no such crime exists.[55] Professor Z. Chafee repudiated the distinction because it would put valuable forms of expression, like literature and the arts, under the private speech rubric and allow them restricted protection.[56] Meiklejohn replied in a later article[57] by including in the absolutely protected area of public speech, "education, philosophy and the sciences, literature and the arts". All these forms of speech are necessary,

according to the new version, for a successful public discussion on public issues and the formation of a citizenship capable to exercise its public power to vote. Thus, even for Meiklejohn, the line was somewhat elastic.

In its later version, Meiklejohn's theory came under attack by constitutional authors for its excessive liberalism, attributed to his ignorance of the workings of the law, and its inflated faith in the self-regulatory character of public opinion. However his main thesis that the justification for freedom of expression lies in democratic theory or the functioning of the political process (the two terms are used interchangeably) has been widely accepted. Thus "the social interest that the First Amendment vindicates is... the interest in the successful operation of the political process, so that the country may be better able to adopt the course of action that conforms to the wishes of the greater number whether or not it is wise or founded on the truth".[58] For Bork the only premise on which freedom of expression may be protected is the discovery and spread of the political truth.[59] Analogous statements can be found in all constitutional texts dealing with freedom of expression after the Second World War.

However, underneath the apparent unanimity on the main thesis, the consensus breaks up on two points:

(a) on the definition of democracy or the political/public.

(b) on the extent to which the actual functioning of the political institutions accords with the postulated theory and consequently on the necessity - if any - and direction of institutional reform.

The variations on the points (a) (b) above, provide an interesting matrix of opinions among the various constitutional authors and have led to an unprecedented inflation of books and articles on freedom of expression. At the one end Meiklejohn et al.[60] define democracy as a

"way of life", a process of public discourse on the common good that may be extended up to and including protection of "obscenity". Against such a yardstick he finds the actual protection of expression rather poor and calls for changes in legal doctrine (the adoption of the "absolute" doctrine in place of the "clear and present danger" one) so that the actual political process matches up with the theory. At the other end conservatives like Bork, Bickel or Berns define as political those activities that are directly related to governmental behaviour, policy or personnel.[62] Legally protected status should not be granted to other forms of expression (scientific, educational, commercial or literary) that only indirectly influence political attitudes. Their protection should be entrusted to the enlightened society and "obscenity" is a form of cultural pollution.[63] If the legal scales need any change it should be towards withdrawing protection from political expression that challenges the existing political order, and from non-directly political speech.[64]

Thus, questions about the theoretical justification of freedom of speech get linked with the practical line-drawing between protected and unprotected expression and both depend on the definition and understanding of the political process. It would be helpful, therefore, to take a closer look at the empirical theories of democracy that have dominated American political science after the last war and their implications for the theory of freedom of expression.

3.2. Empirical Political Science, Pluralism and Freedom of Expression

3.2.1. The pluralist and elite theories of democracy

Based on a number of empirical studies on political behaviour the revisionist school in political science questioned the assumptions of the "classical doctrine of democracy". Schumpeter, an

early and influential member of the school, in his book "Capitalism, Socialism and Democracy" rejected what he called the traditional definition of democracy as "an institutional arrangement for arriving at political decisions which decided the common good by making the people itself decide the issues through election of individuals, who are to assemble in order to carry out its will",[65] for being based on empirically unprovable postulates. The rationality of sovereign citizens, who assemble to debate on public matters and for whom participation in politics was one of the most gratifying activities, did not exist in reality as a long series of behaviouralist studies had, allegedly, proven. Citizens normally respond to political issues on the basis of emotions and not of rational argument. Both Schumpeter and later B. Berelson, P. Lazarsfeld and W. McPhee, in their influential book "Voting", concluded that a too active participation of people in politics was actually harmful to the stability of the system.[66] The "common good", the "general will" were fictitious abstractions and a new model of democracy emerged which could allegedly better describe and explain political reality. The empirical school, drawing from and refining Bentley's seminal 1908 study of the British political process,[67] defined politics as a pluralistic competition among interest groups. Such groups define and defend the interests of their members in a continuing process of give-and-take with other groups. Power is diffused among the various groups (for example, trade unions, employers' associations, churches, professional and leisure groups etc.) and this diffusion is the main guarantee against oligarchy: no group or sectional interest can perpetually dominate and impose its will upon the rest of society. According to Dahl, another prominent member of the school, the distinction between dictatorship and democracy is not one between a government by a minority and a government by a majority, but between "government by a minority and government by minorities".[68] Political

parties guarantee the democratic character of the model and of the societies it describes. They ensure a healthy dosage of stability and change, while a generalized consensus on the validity of the "rules of the game" holds the system together. Orderly change makes it move by acoommodating through institutionalized channels the evolving demands of the various interest groups. Thus, "institutionalized conflict" on the input side balances the output and leads to overall "system equilibrium". Democracy, far from being a "way of life" or a process of experimentation, is a formal method. Its political values form part of the process of political socialization and civil education; their active acceptance, however, is much stronger among the elites than the ordinary people whose main concerns are restricted to the work place, the family and the immediate peer group.[69]

The revisionist theory of democracy started as a reaction to the exalted claims of the "classical model". However, it soon took a justificatory aspect as well. The model as described was the only realistic one, it had survived, it was therefore the best and "anything loftier is unworkable".[70]

3.2.2. Sociological jurisprudence and legal realism

The theoretical framework of the empirical school was easily assimilated in mainstream American legal theory owing to the influence of Roscoe Pound's Sociological Jurisprudence and of Legal Realism. These two schools had dominated legal thought in the United States since the beginning of the century. Their main concern was directed at the role

of law and the judicial function, but their pragmaticism and empiricism as well as the "interest" theory of law to which both adhered, were moving parallel to empirical political science.

According to Dean Pound,an interest is"a demand or desire which human beings, either individually or through groups or associations or in relations, seek to satisfy".[71] These claims are satisfied by being officially granted legal status. The main hypothesis of the interests theory of law is of a society where a basic harmony among the various competing groups has been realized. "Social control theory ... tended to focus attention upon the factors leading to "stability" or "order" in society ... Law is conceived of as operating to achieve a positive social function through "eliminating friction and waste". It rests upon the assumption that the task of law is concerned with the "balancing of interests".[72] The theory has been criticized for its conservatism, its logical ambiguities and the obscure threefold classification of individual, social and public interests.[73] Its main postulates, however, were adopted by the Legal Realists who worked with a much more explicitly pluralistic model of society. To be sure, the Realists conceded that weaker groups were losing out in the market and proposed an activist role for legal institutions and the judges, in particular, in order to redress the balance by reconstituting what A.Hunt has called a "dynamic equilibrium".[74] "Social engineering" was the order of the day and many realists welcomed and participated in the New Deal. Legal institutions should not only aid and supervise the compromise of group interests but provide as well for the legitimation of the whole system. "The court decision reaches out beyond the

individual case and enters into moulding and channeling the action of the community".[75]

3.2.3. The pluralist justification of freedom of expression

These converging trends in law and political science had great importance for the theory of freedom of expression. They crystalized in the so-called "balancing" theory of expression, which dominated constitutional thought and practice from the late 40's to the early 60's. The main changes in the theoretical understanding of freedom of expression were the following.

First, expression is no longer seen as an end in itself, or as the vehicle through which individuals confer on political and practical questions, but is dealt with as one more interest that enters the terrain of competition with so many other interests and group claims.

Secondly, the status of that interest is somehow ambiguous. Julius Stone, the most influential disciple of Pound, thought that the free speech conflict was between the social interest in the preservation of existing political institutions and the social interest in political and cultural change.[76] For others any free speech claim refers to a mere individual interest which must be weighed against the various social and political interests. Thus "[w]here First Amendment rights are asserted ... resolution of the issue involves a balancing by the courts of the competing private and public interests at stake ... [T]he right of self-preservation [is] the ultimate value of any society"[77] stated the Supreme Court in a case involving the right of a witness to a Congressional Committee investigating communist activities to remain

silent. Such a balancing is "mere play on words" said Justice Black in dissent. The scale is rigged and can give only one result.

The variations in the conceptual status of the interest in expression, indicate that the latter has broken up from a generalizable category into a series of claims of varying validity. Each expression claim is bound to a particular group interest and such claims have to be weighed against other social interests and against each other. Their balancing leads not only to the hierarchization and sanctioning of certain claims but also to the placing of groups and individuals within a legitimate/legal - illegitimate/criminal space.

Thirdly, in the place of the discarded assumptions of the "classical democratic model" about the common will and interest a new concept emerges. That of the governmental or state interest in sustaining the institutional framework of society. The identification of free expression and progress and the market metaphor of truth break down. Expressive activity, in its various facets, may have serious disruptive effects and must be centrally regulated. The notion of the market place as competition for self-gratification was already implicit in Holmes' theory.[78] Yet, Holmes in his relativism was prepared, rhetorically at least, to take his arguments to their logical conclusion. If the social forces who wanted to go to Hell (have a "proletarian dictatorship") won in the market place, he would help them. In the revised theory, the framework of the pluralist competition has been firmly established; it allegedly

works for the benefit of all; and the alternatives have been seen through and rejected as totalitarian, or anti-democratic or simply anti-American.[79] A new "truth" claim is therefore readmitted. It is no more the outcome of the competition, since that is invariably seen as a temporary arrangement of group interests. To be sure, the market may malfunction in which case state intervention is necessary to neutralize the side effects. However, the market itself, the process of pluralist competition, becomes the truth that must be protected. As a constitutional writer has recently put it: "Many people trust the market mechanism to value goods and services when conditions of competition exist. Eliminate the market, however, and many become extremely uncertain of their abilities to place a value on a particular good or service, for they are suspicious of concepts like intrinsic value. It is the same with ideas and truth."[80] In other words if there exists any intrinsic value, it is that of the market. Others have put the same basic idea in a more particular way: "American citizenship and Communist Party membership are intellectually incompatible but physically possible"![81] or, "it is an important function of the law... to pin the label of illegitimacy on a group (the Communists) that is, by American standards, truly illegitimate".[82]

Alexander Bickel, one of the leading constitutional writers of the 60's and 70's, expresses in a paradigmatic way the change from Holmes' rhetorical market place to its contemporary equivalent.[83] Although much in human experience is random and no absolute proof for the validity of any truth exists, people need values and beliefs in the "foundation of their conduct". These are the values of the judges themselves and of the other "leaders of opinion". Judges must see to it that their values become the "true lies or indispensable illusions" that society adopts. The market place is "not the best place to test ideas like Communism or genocide".[84] Incidentally, one may note, the identification

between communism and genocide was in a text written in the immediate aftermath of the Vietnam War and was put impassively. Others have more cautiously kept to advocacy of genocide as the obvious example of an idea that cannot be admitted in the market.[85]

Thus by the mid-50's constitutional theory had accepted that the justification of freedom of expression lay predominantly in its relation to the successful functioning of democracy or the political process, as Meiklejohn had argued. The basic incompatibility, however, between his democratic humanism and the various versions of pluralism was obscured. Thus, Wellington[86] identifies Meiklejohn's theory with those of Bickel, whose nostalgic glances towards Burkean theories[87] belong to an opposing tradition, and Bork's neo-conservative pluralism.[88] Such unbridgeable differences have led others to despair[89] about the possibility of building a justificatory theory of freedom of expression with practical intent out of political philosophy or an existing liberal tradition. Finally Professor T. Emerson, who has set himself such a task, ends up with a compilation of justifications (individual self-fulfilment, and attainment of truth, and participation in decision making, and balance between stability and change)[90] with not much internal coherence.

The majority of those theoretical efforts, however, were made within the pluralistic model, without much elaboration of its premises with the notable exception of two authors,[91] who explicitly adopted and discussed it, before presenting their freedom of expression theory. It is to the reformulation of the justificatory theories in the 60's and 70's, when the pluralistic model came under strain, that the next part addresses itself.

4. Pluralist Theories in the 60s: The Two Versions of Pluralism

Even during the 40's and the 50's, some doubts remained as to the accuracy of the pluralistic model. The first objection questioned the extent to which citizen participation in the political process through voting and membership in the "intermediary" groups was formally guaranteed. A series of state "voter qualifications" like poll taxes allegedly discouraged poor people from voting; "malapportionment" was widely exercised in several states: through elaborate constituency boundaries drawing some areas (predominantly urban, poor and black) were given much less electoral weight than others (predominantly rural, rich and white). The Supreme Court,under Chief Justice Warren,moved carefully in the field and in a series of cases involving various aspects of the electoral system imposed the "one man - one vote" requirement.[92] The premise behind the Warren Court voting rights cases was to redress the inequalities and guarantee conditions of formal equality in voting power.

The second, deeper objection, however, questioned the basic assumptions of the model. The Supreme Court had accepted during the New Deal that certain groups were consistently losing out in the pluralist process and had indicated in a famous opinion that it would consider extending greater protection to particular religious or national or racial minorities. "Prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[93]

The Federal Government attempted during the 50's and early 60's through various programmes against racial discrimination and poverty[94] to ameliorate the worst side effects of the "ordinary" political process. The Supreme Court, equally, in the desegregation and positive discrimination cases[95] under the 14th Amendment to the Constitution moved in the direction the Carolene Products case had indicated. The success of these attempts, however, was not as wide as expected.

Direct protest action and widespread civil disobedience of an unprecedented scale became common in the 60's and early 70's. The Civil Rights movement first and the Anti-Vietnam War movement later took to the streets.[96] The Supreme Court had held, per Justice Roberts, in 1939, that "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[97]

The grievances aired in these turbulent years were as multiple as the methods used to communicate them. Protest was directed at local and state laws and policies (Southern discrimination and segregation practices), at national ones (the War and the draft) as well as at deepseated social causes of deprivation. The methods ranged from peaceful demonstrations and marches to sit-ins, sleep-ins, read-ins (and other original forms related to the circumstances of the particular protest), to symbolic newsworthy acts like draft-card or flag burning etc., to some violent protest. But whatever the objects or the methods, the protest movement shattered the optimistic assumptions of pluralistic political science. The vote had been extended and formally equalized but quite sizeable groups were choosing to press their demands

outside the postulated channels of lobbying, inter- and intra-party bargaining, pluralistic give-and-take, or voting. Bickel argued in 1970 that the Supreme Court had attempted to imprint on history its own vision of social progress. In so doing it had both violated the democratic process by usurping powers it did not have and had failed miserably even according to its own criteria.[98]

Bickel exemplifies the increasingly confused reaction of the academic world to the protest movements. The near-consensus of the 50's and early 60's that had declared the "end of ideology" broke down. Even the architects of the pluralist theory had to revise their initial optimistic assumptions.[99] But, according to a recent constitutional author, although "pluralism has come under powerful attack, as more stress has been placed on the undeniable concentrations of power and inequalities among the various competing groups, in American politics",[100] "much of the legal community continues to invoke [pluralism] in its original unqualified form".[101]

One can distinguish,however, two broad trends developing within constitutional theory in reaction to the protest movements which had serious implications for the theory of freedom of expression.

4.1. The School of "Unqualified" Pluralists

At the end a number of conservative and disappointed New Deal liberals retained the assumptions of the unqualified pluralist model. One could call this loose school the "unqualified pluralists". The political process proper is functioning satisfactorily, according to them, due not least to the Supreme Court's "equality under the law" decisions of the 60's. Any activity, therefore, that challenges the political process or its outcome - the concrete laws and policies seen as the result of the legitimate group competition - undermines the

"majesty of the law" and weakens the overall authority of the legal and political systems. Direct action and civil disobedience cannot be tolerated. Ex-Solicitor-General A. Cox has put the argument in a paradigmatic way: The "rule of law" depends on voluntary compliance. Although not every law is morally justifiable, there are three paramount moral justifications that require obedience to all laws. The "rule of law" secures maximum individual freedom, provides the best opportunities for peaceful change and aids the ultimate objectives of society "individual growth toward responsibility and freedom of choice".[102] The force of the legitimacy of law, that guarantees its "civilizing-liberalizing" influence, is undermined by civil disobedience which by attacking particular laws attacks at the same time the spirit of law. Equally for Bickel, free discussion is essential in American politics but it cannot be allowed when it "disrupts or coerces" the political process or breaches valid laws, "the majority decisions embodied in law".[103] In these cases the arguments for free expression are completely subordinated to general ones about the "rule of law", the morality of consent and dissent and "compelling state interests", in which the protestors of the 60's are simply substituted for the communists of the 50's.

A similar reaction is found in the civil rights opinions of Justice Hugo Black. Black had publicly accepted the premises of Meiklejohn's theory and had forcefully dissented in most of the anti-communist cases of the 50's. The so-called "absolute" protection of speech doctrine had been associated with him and in a famous interview he had stated that he would not limit such absolute protection to public/political expression like Meiklejohn but would extend it to all categories of speech.[104] Black, himself a Roosevelt appointee, had fully accepted the assumptions of

individualism and regulated market competition. He believed that if the government was made fully accountable to an equitably integrated popular will both harmony and social progress would be assured. He had complete confidence in the patriotism, decency and shared values of the American people and disagreed with the 50's persecution and harassment of Communists because "the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it".[105] The Great Depression, however, had shown that political reality was not in full accord with the ideals of popular sovereignty.[106] Certain "vested interest" (Black's phrase) combined to frustrate the legitimate interests of the underdog. Black, an activist "social engineer", saw his role as to ensure equality in the political market place (by sanctioning the equalization of voting rights and First Amendment protection of political dissenters) and pending the full democratic integration of society, to ameliorate the side-effects of economic competition (by supporting trade unions and welfare legislation).[107] However, by the late 60's, faced with the protest movements, Black's change could not have been more dramatic. The black protests challenged public order and threatened "mob violence", sit-ins in segregated establishments were unjustified trespass to private property, the anti-War movement was "the beginning of a new revolutionary era of permissiveness fostered by the judiciary".[108] To be sure, if the complaint had any justification it was his earlier opinions, in majority or in dissent, that had shown such "permissiveness". His deep seated confidence in the patriotism and common sense of Americans, which in the 50's had led him to believe that Communists, these "miserable merchants of unwanted ideas" would never win in an open political competition even if they were left free to disseminate them, was profoundly shaken: the people had rejected "character, morality, hard work and self-denial".[109] Respect for property,

privacy and the rule of law became the rallying cries of his opinions.

It would not be unreasonable to argue that the bitterness of Black's late opinions arose from a sense of personal betrayal. He had been at the forefront of the judicial effort to recognize the claims of the disenfranchised and deprived, a fact that had cost him many personal attacks and even attempts at impeachment. Yet, the protest movements and the conservative backlash came to halt and reverse the process of integration when it was coming close to its completion. In a way, Black had been convinced that "the end of ideologies" was at hand and a new era of national consensus and progress was dawning. Seen in this light, Black's change cannot be merely explained by a conservatism that took hold of him as he grew older.[110] His odyssey represents the road of many New Deal reformist liberals. It marks the end of a school of thought which believed that the extension of formal political rights and the amelioration of the economic and social conditions of the most deprived parts of the population through cautious reforms "from above" would dissolve the structures of domination and "domesticate" social conflict. According to a conservative critic of the Warren Court's reapportionment decisions (in which Black had participated wholeheartedly) its ideology can be described as the "guardian ethic": "the bureaucratic, elitist ideology of action-minded intellectuals in the modern age, most of whom thought they were beyond ideology".[111] Elliott claims that despite its democratic rhetoric, the Warren Court led to a transfer of power from legislature and parties to bureaucrats, judges and academics, the main constituencies of the Supreme Court.[112]

An interesting presentation of the premises of "unqualified pluralism" and its relations to legal developments appears in an

article by an American legal sociologist which appeared in 1972.[113] Truber examines the "instrumental approach to law" and its relation to democracy. He defines legal instrumentalism as the use of legal rules for social engineering and control, a technique whereby law is the tool or means for achieving preselected goals. The relation between law and democracy, therefore, depends on the way the ends are chosen. Truber believes that the state in America is not "distinct and superior" to society, but is "the process which organises the struggle between competing and conflicting groups and the policy output that results from it".[114] Constitutional law guarantees that all legitimate groups will be heard and the law output will thus be the contractual manifestation of the compromises struck in the political process. The ends that the "instrument law" serves arise from the functioning political process and their implementation through "purposeful legal reasoning"[115] limits governmental power to such compromises. Instrumentalism and pluralism reinforce each other and guarantee the enforcement of limitations on state power called for by liberal democratic principles. If the pluralist process is not functinning, however, as is the case with developing countries (Truber's main concern), instrumentalism might aid in the implementation of ends arbitrarily chosen and thus lead to totalitarianism.[116]

It is perhaps ironical that Justice Black who earnestly adopted the premises of legal instrumentalism and humanistic pluralism, as described by Truber, became late in his judicial career witness to the inaccuracies of the model and its failure in its ultimate claim that it would guarantee social peace through apolitical-technocratic social engineering. Justice Black and Professor Bickel, "a Robert Kennedy liberal [until] 1968",[117] represent the cnnservative solution. Others tried to revise the pluralist model in various ways. One may call them the "qualified pluralists".

4.2. The "Qualified" Pluralists

The "qualified pluralists" retained the assumptions of the pluralist model but qualified them in two principal ways. Either the model did not as yet fully represent social and political reality and/or some of its most optimistic premises about social peace and consensus, distributive justice, institutionalization of social conflict, and the like, were too exaggerated and should be modified in order to account for and help redress the continuing concentration and imbalances of power. They, therefore, call for a renewed effort to open up the formal democratic process and remove blockages that continue to keep sizeable parts of the population in its margins; and for a continuation and intensification of welfare programmes and greater protection of those "discrete and insular" minorities that keep losing out in the pluralistic process. To be sure the intellectual underpinnings within this loose group of reformist academics are quite varied: thus John Rawls[118] and Ronald Dworkin[119] put a renewed emphasis on practical moral philosophy and react strongly against the positivistic and linguistic philosophy that has dominated Anglo-Saxon philosophy departments since Wittgenstein and Austin; J.H. Ely[120] emphasizes the need for the strengthening of the formal political processes; while B. Ackerman,[121] building on economic analysis of law, calls for greater use of scientific concepts in law-making and adjudication. The common theme of all these trends may be traced to a liberal reaction against the conservative backlash of the mid and late 70's in the academic and political worlds, and on both sides of the Atlantic. The realism of the renewed pledge to the principles of the New Deal and Keynesian Welfare Liberalism cannot be discussed here.[122] The neoliberal reaction to the protest movements, however, and its implications for the justificatory theory of freedom of speech have some relevance to our concerns, though the official attitudes are still going the opposite - conservative - direction.

The main neoliberal concern is to work out a framework that would allow some room for protest action and civil disobedience within the existing legal framework. As one constitutional author put it, the problem is to work out a method of "accommodation between majority rule and consent".[123] "Majority rule" refers to the assumptions of democratic humanism and popular sovereignty as expounded by Meiklejohn and the pragmatist political philosophers. Thus, "the extension of the franchise, voting-rights legislation and one-man-one vote constitutional interpretation"[124] have transformed the assumptions of earlier democrats to political reality. The fear of "majority tyranny" remains, nevertheless. "No matter how open the process those with most of the votes are in a position to vote themselves advantages at the expense of others".[125] Pluralists insist that the "reality of majority rule is the existence of shifting majorities",[126] which ensure that no single minority is capable of permanently voting itself to power. The qualified pluralists, however, call for a safety-valve for those social groups that might find themselves in a permanent minority situation. Drawing from Hannah Arendt's essay on civil disobedience,[127] Professors Wellington and Bickel conclude that there is a second aspect in the "spirit of American law" deriving from the Lockean social contract theory and Tocqueville.

According to it, continuous consent to the laws and policies arising from the pluralistic process is a necessary condition for the maintenance and reproduction of the original contract that established the American republic. Since the right to dissent, combined with a failure to do so, amount to consent some "domesticated dissent"[128] must be allowed. To be sure, such dissent cannot be allowed against the "consensus universalis", the essential features of the socio-economic order, since its very function is to reactivate consent towards that

order; but solely, against specific laws and policies, the outcomes of the process. There are quite a few specific proposals for the practical implementation of this domesticated dissent. H. Arendt, more interested in the political side of the idea, proposes the admittance of political dissenters and disobedient minorities within the formal pluralistic process as one more "interest group, that, through their representations - that is, registered lobbyists - [will] influence and 'assist' Congress by means of persuasion, qualified opinion, and the numbers of their constituents".[129] The more legally minded constitutional authors propose constitutional methods that would protect some protest based on the First Amendment:[130] either by using the two-tiered character (state-federal) of the American constitutional order that allows some law violation so that the conformity of a state or local statute with the federal constitution and Bill of Rights may be tested by the Supreme Court;[131] or through the exercise of greater discretion and sensitivity by prosecuting authorities in initiating criminal prosecutions against protesters.[132] Various - and often contradictory - distinctions and definitions are proposed: between "direct action"/"civil disobedience", degrees of civil disobedience etc; or theories about the conditions that make civil disobedience legally protected protest.[133]

4.3. <u>The "Hyde Park" Theory of Legitimation</u>

The particulars of the proposals are of no direct interest here and, in any case, none of the more formal ones has been officially adopted. What is more interesting, however, is the explicit or implied appearance in all these contributions of an additional, and in some cases exclusive, justification for free expression. One could call it the "Hyde Park" theory of expression: allowing dissenters some measure

of legalized protest makes them, as one writer put it graphically, "let off steam".[134] The "soap-box orator" releases energy and political opposition is channelled into courses consistent with law and order. The same argument has been extensively used by the proponents of a legal right of access to the print and electronic media.[135] Thus, the Commission on the Press[136] concluded that free expression provides a "safety-valve" for minority groups which by publicly airing their grievances are prevented from turning into violence. According to T. Emerson this justification for free expression is part of the more general argument about political legitimation: if people believe that they had their say and were given a fair chance to persuade others to adopt a certain course of action, they will accept and obey the final decision as legitimate, even if it goes against their interests.[137]

4.4. Conclusions

One may conclude that despite the ritualistic references to J.S. Mill, Holmes, Brandeis and Meiklejohn the theory of free expression has moved quite a long way from its original bearings. This fact is not surprising, by itself, although the insistence of each new theory that it reinterprets the spirit of the classics is more so.

19th century liberals claimed that free expression would lead to the development of human personality, to the enjoyment of human life as an open process of experimentation and innovation and to social progress. J.S. Mill feared the "tyranny of the (working people) majority" and presented the most famous arguments for free expression in anticipation of such an eventuality. Although his fears did not materialize in the West, his exhortations have not lost their relevance for the 20th century. If direct coercion of beliefs is the order of the day in the states of "real socialism", administration and manipulation

of beliefs is not unknown in the West. According to the - far from radical - American philosopher C.S. Pierce:

> "If liberty of speech is to be untrammelled from the grosser forms of constraint, then uniformity of opinion will be secured by a moral terrorism to which the respectability of society will give its thorough approval. Following the method of authority is the path of peace. Certain non-conformities are permitted; certain others (considered unsafe) are forbidden; and thus a shade of prima facie doubt is cast upon every proposition which is considered essential to the security of society. Singularly enough, the persecution does not all come from without; but a man torments himself and is... most distressed... finding himself believing propositions which he has been brought up to regard with aversion..."138

Herbert Marcuse has equally pointed at the contradiction he finds between classical liberal theory and its contemporary application:

> "Tolerance which was the greatest achievement of the liberal era is still professed, while the economic and political process is subjected to an ubiquitous and effective administration in accordance with the predominant interests. The result is an objective contradiction between the economic and political structure on the one side and the theory and practice of liberation on the other."139

The democrats, on the other hand, from J.J. Rousseau to Meiklejohn viewed free expression as the method of integration of the general will of a sovereign and self-governing people. For the pluralist however, elites rule and the people must be content in periodically acclaiming them and accepting their scientific definitions of reality, normality, state, group and individual needs and interests.

> "In the modern representative, parliamentary or direct democracy the majority does not result from the development of independent thought and opinion but rather from the monopolistic administration of opinion... this majority is self-perpetuating, closed... it repels a priori any change other than changes within the system... [it is] all but the opposite of Rousseau's 'general will'."140

The main neoliberal addition to the classical liberal-democratic theory of expression, is a justification of free expression as the means of social control for those who could not see their lives as enjoyable or consider themselves as sovereign self-governing people. In theory, at least, the distance covered is not inconsiderable.

5. A Recent Philosophical Attempt to Formulate a Theory of Freedom of Expression: Thomas Scanlon and the Argument from Autonomy

A recent attempt to provide a philosophical justification of freedom of expression has been made by T. Scanlon.[141] His essay has attracted wide interest, particularly among neo-liberal constitutional authors, some of whom[142] have accepted the main points of the theory and tried to work out its implications for legal doctrine.

Scanlon starts from the assumption that a certain category of acts, acts of expression, enjoy greater legal immunity than other conduct, although they lead to harmful consequences. His main concern is to enquire whether the definition of the protected category of acts and the immunity afforded is based, as in most traditional theories, on consequentialist arguments (i.e. arguments about the benefits arising from free expression); or on arguments about individual rights; or, finally, on independent moral grounds, not identifiable with any particular constitutional order or provision (for example the American First Amendment), but generally applicable. He concludes that all three grounds are involved, but identifies as the core of the theory a non-consequentialist, non-rights-based justification, which he calls the "Millian principle". According to it "legitimate government is one whose authority citizens can reoognize while still regarding themselves as equal, autonomous, rational agents."[143] A citizen regards himself as autonomous if he "see(s) himself as sovereign in deciding what to believe and in weighing competing reasons for action ... he must apply to these tasks his own canons of rationality ... an autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[144]

This principle, therefore, organizes the relations between individuals and the state (when government is legitimate). Scanlon insists that it does not create an individual right but states a limitation on governmental power, which is also the basis of its exercise and acceptance as legitimate. To obey political power, citizens must feel autonomous and free.

The Millian principle, which is the legal particularization of the general theory, has two parts,both limiting the power of the state to restrict acts of expression: according to the first, the state cannot restrict acts of expression because of their, allegedly, false propositional content (such action would deny autonomous citizens the opportunity to decide freely what is true and false); the second stipulates that expression advocating harmful or illegal conduct cannot in itself be made illegal (that would deter citizens from deciding autonomously and on the basis of all available information, whether they should conform to some conduct required by the state).

Scanlon's area of interest and methodology is that of analytical philosophy. He contends that his theoretical defence of freedom of expression converges with notions of autonomy derived from Kant, Hobbes and J.S. Mill, but, his method for arriving at it is based on what he calls intuitions about (a) illegitimate justifications for state interference with acts of expression, and (b) notions of legal responsibility, which may be derived from real legal materials (laws and judicial decisions). He believes, correctly, that no "theoretically interesting" description of the protected category of acts exists: we may say that to the same extent that an "expressive act" (an act undertaken with communicative intent)[145] is also externally observable conduct (movement of the lips, writing or distributing a leaflet etc.), forms of conduct that do not involve speech may have an additional or dominant communicative component (for example picketing, burning a

flag or even a political assassination). Thus, any attempt to distinguish conceptually between speech and action[146] or between public/political and private speech[147] necessarily neglects both the illocutionary force[148] of speech acts and the communicative aspects of other conduct. Scanlon, equally rejects consequentialist arguments based on the function of expression as conducive to knowledge or truth (they are not verifiable).

Scanlon then attempts to define the justifications that the state may not legitimately appeal to, in order to restrict expressive acts. He lists those restrictions of expression considered as legitimate (assault, defamation etc.) and concludes that the crucial distinction emerging is between "expression that moves others to act by pointing out what they take to be good reasons for action and expression which gives rise to action in other ways, e.g. by providing them with the means to do what they wanted to do anyway".[149] The protection of the former category is supported by "normal views about legal responsibility" and philosophical notions about human agency: an agent is not legally responsible for certain harms, if his causal relation to them is restricted to providing to another person arguments and reasons for performing the harmful conduct or, alternatively, the responsibility of the former is superseded by that of the actor once the latter in full "possession of his faculties" has weighed up the offered arguments and decided to act according to his own uncoerced judgment.

Scanlon's interesting insight is that there does not exist an area of protected expressive acts that may be defined independently of what the state allows or prohibits. No original or essential realm of discourse may be identified through independent theoretical justifications

and definitions, to be afterwards measured up against the reality of state intervention. He thus reverses the assumption of most previous theorists who tried, firstly, to demarcate the principles of free expression in a social realm independent of state intervention and then, in a second step, compared the principle(s) with its realization/violation by state/legal practice. The state and its laws are always present, as it were, in the constitution or demarcation of what is discursively allowed or prohibited.

Having made this important departure from previous theory, Scanlon then reverts to his intuitions about legal responsibility and agency, and the edge of his critical reversal, as I understand it, is lost.

If there is no theoretical definition of expressive acts independently of state or legal intervention, there does not exist either any essential definition or single principle of legal responsibility included in all legal enactments or judicial decisions, as Scanlon implies. "The principles of liability ... are greatly influenced by changing moral and social ideas",[150] and many other factors, one could add (economic and political pressures), that disallow the notion of a single,uniform, across the board, principle of legal responsibility.

Equally, Scanlon's intuition that there is a coherent and "theoretically interesting definition" of the harms that the state may not prevent by curtailing expressive acts is at the theoretical level unwarrantedly essentialist and at the empirical level simply not true. The essentialism, characteristic of much legal philosophy,[151] is evident in Scanlon's attempt to discover a principle that permeates all state or legal activity related to expression. According to the "Millian principle" <u>all</u> state/legal intervention that prohibits and punishes expressive acts because of their content is <u>absolutely</u> prohibited.

The legal system, or its part related to expressive acts, is presented as a coherent, homogeneous whole that follows singular principle(s). This whole, independent of external influences, moves on its own, animated by the predicates of the Millian principle which are materialized in all its distinct parts be they statutory enactments or judicial decisions. Thus the "spirit of the law" (or this part of the law), presented as the two liberal injunctions on state activity, becomes the homogenizing force of the actual legal system inscribed in its parts. Stated as a normative proposition (what the state should do), Scanlon's principle would constitute as advanced a liberal position on free expression as any encountered in the literature. By prohibiting, in its second part, state control of advocacy of illegal action, it "taxes government patience"[152] greatly. But Scanlon presents it as an empirically discoverable principle as well, emanating from an examination of actual legal statutes and decisions. However, in this interplay between the "spirit of the law", as construed, and legal reality, the latter resists its reading according to any one principle, let alone Scanlon's extra-liberal one. At one point, he realizes the difficulty and he preempts a possible accusation that he is an anarchist: his principle is, in reality, "extremely weak" and "at any rate [he] would not call what [he is] maintaining anarchism".[153] He further insists that it is the legal material that yields the postulated principles, and not his philosophical predilections, anarchistic or not. I would suggest, however, that it is only a highly selective process of inclusion and exclusion of legal material in his list that makes the principles feasible at all. Laws relating to obscenity or seditious libel, for example, that reach out and control the content of expressive acts are not mentioned, although not unknown in contemporary legal history.

Even in the more limited area of political expression the list is arbitrary: "... advocacy of action or conduct enjoys less protection [than that he assumed] ... Scanlon seems to be concerned with advocacy of conduct [and] his claim about autonomy is factually incorrect in most situations".[154]

Having thus problematized the existence of a free "universe of discourse" (see infra, Chapter IV) that state and law seize a posteriori, he attempts to redeem freedom or autonomy as the principle of a homogenized legal corpus. According to Unger,[155] the concept that freedom is realized through obedience to the law is a main characteristic of the Kantian theory. However by conducting his argument within the existing legal system and ordinary legal discourse, while rejecting one of its cardinal premises, i.e. that law cannot earily permit law violation or its advocacy,[156] Scanlon ultimately fails in his task. Either autonomy as legally sanctioned is less than what he claims it to be: in that case since his conditions of autonomy are "extremely weak" what remains is no autonomy at all. Or his philosophically arrived at concept of freedom/autonomy is not in any sense materialized within the actual legal institutions: then the search for a "moral" justification of free expression which conforms with legal reality has not been, satisfactorily, concluded.

Scanlon's theory, however, presents much greater interest than the, somewhat tired, repetitions of the classics of liberalism often enoountered in the literature. To be sure, the philosophical notion of agency that he assumes without much discussion is not an uncontroversial one. The relation between agency and structure is one of the most vexed problems in social science. Scanlon bypasses it completely by accepting, in an unproblematized fashion, the full sovereignty of free will against the emphasis put by both Marxist and non-Marxist theory[157] on the

structural unacknowledged causes and unintended effects of human action. Even within legal philosophy, which after religion and theology, remains the area of free will par excellence, the trend has been away from naive notions of agency and responsibility.[158]

Yet Scanlon's theory, first, points toward the intrinsic relation between theories of freedom of expression and theories of legitimation of power in a much more consistent way than previously. It, secondly, stresses the importance of the state and its law for expressive activity. Any contemporary theory of freedom of expression that starts from an independent examination of the importance or function of speech and measures up its conclusions against state/legal intervention necessarily neglects the fact that state and law, with their own determinations and "conditions of existence", are at the root of any theory or legal doctrine about expression protection. No theory of free discourse, outside the bounds of pure philosophical speculation, can have any meaningful relation to reality, if it does not account for the role that the state, laws and judicial decisions play in the determination and demarcation of the realm of discourse itself. It, finally, points in a negative way to the problems created by conceiving "the law" as a homogenized whole permeated by singular principles, an attitude familiar to legal philosophy and constitutional law.

The implications of these remarks for constitutional theory, in general, and for the theory and practice of freedom of expression will be examined in the rest of this thesis.

CHAPTER II

CONSTITUTIONALISM AND JUDICIAL REVIEW

1. Introduction

The discussion on the nature and limits of free expression is linked in American legal theory, as all legal controversy, with the problem of the role and function of the Supreme Court within the constitutional order of the United States. Questions about the permissibility of judicial review of statutes and executive decisions within a regime of constitutionalism form an intrinsic part of all legal doctrines proposed; it has even been suggested[1] that two of the most prominent doctrines on freedom of expression (absolutism and balancing) must be seen as "tactical" answers to the question of the Supreme Court's role rather than as meaningful theoretical or practical elaborations on free expression. It is, therefore, necessary before examining the actual legal material to have a closer look at the evolution of theories of constitutionalism and judicial review.

Judicial review, in the broad sense, is the power of a court of law to decide authoritatively the applicability of a legal enactment to a particular situation, to construe its meaning in case of doubt and finally to apply it to the facts of the case brought before it. It constitutes the main component of judicial action or adjudication and it is traditionally based on the theory of separation of the unitary state power into institutionally and functionally differentiated parts. The mainsprings of the theory in the legal history of England as described and interpreted by Montesquieu in his "De l'Esprit des Lois" are well known as are the criticisms that have been raised against it both at

the theoretical and empirical levels,[2] particularly against its most extreme form the so-called "phonograph theory of adjudication".

The Supreme Court of the United States performs this task, as the final instance of statutory interpretation and application of Federal Legislative and Executive Acts. But what separates it from similar courts of the last instance, like the House of Lords, is its power to examine both federal and state action for their conformity with the federal Constitution and declare them null and void if they contravene the constitutional provisions. This power of the Supreme Court may be called judicial review in the strict sense.

The relevant constitutional provisions are of two kinds: first, those provisions that regulate the allocation of powers and competences among the various institutions of federal government and between federal and state governments; and secondly, the constitutional provisions that restrict federal or state power from invading certain promulgated areas, that are thus declared beyond the scope and reach of state power. Our main concern is with that second part of judicial review in the strict sense, stemming from the entrenched character of the Bill of Rights and in particular the First Amendment to the Constitution which postulates that: "Congress shall make no law... abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances".

Judicial review in the broad sense is coeval with the notion of legality, in the strict sense it is coeval with constitutionalism. They both postulate that state power is limited and the foremost of its limitations lies in its organisation and exercise in accordance with legal procedures and formalities. In their pure form, both theories are unconcerned with the source of legal rules as long as political power follows their demands. An entrenched Bill of Rights, however,

imposes additional requirements on state activity by, allegedly, withdrawing its power to intervene in those domains specified in the constitutional text. When these additional requirements take the form of individual rights as is the case with the American Bill, then beyond the legal formalities further substantive requirements are imposed. Not only the form but the content of state action becomes an issue of legal involvement. To be sure, this substantive demand is presented in a negative fashion: the state (or Congress) can or must not intervene in certain spheres of activity which must be left free from external constraint. To the extent that state action is presented as taking predominantly or exclusively legal form, the injunctions of constitutionalism are mainly addressed towards positive, state law, and whoever is competent to enact it.

I will later suggest that constitutionalism is a rather poor approximation of legal and political reality. It would be, however, instructive to start by examining the theoretical bases of constitutionalism, which, I would suggest, are three: Natural law, legal positivism (and in particular constitutional positivism) and notions of popular sovereignty or democratic theory. I will examine them, firstly, in turn, with particular emphasis on their understanding within American legal and political theory; and then the process of moulding them together in one whole, which may be called the "positivization of natural law", will be described in its stages.

2. The Theoretical Bases of Constitutionalism

2.1.1. Natural Law

All natural law and natural rights theories include two common themes. They, first, postulate that there exists an essence or content, a number of principles or ideas that permeate law, which

are always/already given and may be in principle revealed or discovered through human reason. The site of their existence differentiates the various schools that seek it out alternatively in God and the divine Word, in human nature or in society. Thus, the transition from classical Thomist natural law to modern natural law marks a change in the identification of the site where the invariable principles of law inhere and the method according to which they may be discovered.[3] The unifying theme, however, remains: such principles exist and are amenable to discovery, once their proper site has been identified.

The second theme is that natural law and its principles is the supreme law and controls (or should control) positive law. The classical tradition asserts the primacy of its principles, understood as realized within a continuum, that reaches out and regulates individual existence, communal life and external nature in a uniform fashion sanctioned by God. Modern natural law, however, since Hobbes and Locke revolts against the feudal hierarchized and immobile space and its sanctioning by the classical tradition. It discovers its principles by reasoning (change in method) and seeks them out in the empirically ascertainable behaviour of individuals (change of site). As C.B. Macpherson has convincingly argued,[4] both Hobbes and Locke after discovering their principles in the sociopolitical reality of their times, then postulated them as natural principles, eternally and invariably existing within the state of <u>human and social</u> nature, although corrupted (in the case of Hobbes) or potentially corruptible (Locke) by positive law. Thus the modern or rational natural law takes on initially a critical attitude towards the existing socio-political reality and asserts that positive law should be profoundly changed to accommodate the newly discovered principles. All means

toward that end are justified, even revolution and violent resistance to established authority.[5]

There is, therefore, an ideal (or superior) law comprised of a small number of ideas (or principles). Both themes may be found in theories of constitutionalism. Thus, according to a recent constitutional author, the Constitution is superior to ordinary law and both Constitution and law form one single corpus intrinsically connected and hierarchically organized. When the Supreme Court invalidates a law for being in violation of the Constitution "it reverts to the state of law as it would have been if the statute had not been passed".[6] This original "state of law" "contains a number of general principles describing the abstract ideals which the legal system is understood to further" and these principles or ideals "form a self-consistent whole... the rules of the system are... the product of legislative and judicial efforts to implement [them]."[7]

The relation between natural law theories and constitutionalism cannot be easily denied, although positivistically-minded constitutional authors have tried to do so.[8] Constitutionalism evolved as a reaction and answer to those problems that every natural law theory faces: what are the principles and ideals that should control state law; how and where can they be discovered; and finally what mechanism can ensure their supremacy over state law once revolution has outlived its usefulness. In order to understand the theoretical evolution of these problems and their gradual absorption in theories of constitutionalism, it would be instructive to look briefly at the political theory of revolutionary America.

2.1.2. Natural Law in Early American Political Theory

Thomas Paine's polemical philosophical tracts capture the liberal ideology of the American Revolution. His "Common Sense" had a great impact in pre-revolutionary times. According to the historian Henry Collins, "the declaration of independence... conveyed in thought and style, the indelible imprint of Common Sense"[9]. In his later essay on "The Rights of Man"[10] Paine presents his model political and constitutional system, which he believes has been accomplished by the American revolution and the establishment of the United States.[11]

Paine believes that society and civilization are the natural conditions of man while governments are artifices that "far from being always the causes or means of order, are often the destruction of it". In reality order has its origins in the principles of society and the natural constitution of man.[12] These principles are "those of trade and commerce" and are followed because it is "in the interest of the parties so to do, and not on account of any formal laws their governments may impose".[13] At the instant, therefore, that formal government is abolished, "society begins to act... common interest produces common security".[14]

The American revolution, however, created a new form of government whereby "by the simple operation of constructing government on the principles of society and the rights of man, every difficulty retires, and all parts are brought into unison... Government is nothing more than a national association acting on the principles of society".[15] This "new" system of government "is the most ancient in principle...

being founded on the original inherent Rights of Man".[16] Once established through a compact of the people with each other - the Constitutional Convention being presented as such a compact - the government must be based on the representative principle and majority rule as a guarantee that it will not usurp any powers not given it in the compact and resulting Constitution. "Every man is a proprietor in government, and considers it a necessary part of his business to understand. It concerns his interest, because it affects its property".[17]

Equally Jefferson foresaw a radicalization of democracy through the complete domination of public opinion that would make government and formal laws redundant: public opinion articulated and communicated through a flourishing press would itself become the law. Political power would finally return to society where it rightfully belongs.

The assumptions of an essentially harmonious society and an overriding community of interests and rights are also evident in the attitudes of the Founders toward political parties and factions. While society is naturally orderly "the spirit of party agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; forments occasionally riot and insurrection" warned President Washington.[18] Political parties and coalitions were seen as subversive and conspiratorial since they "revealed an abiding human perversity rather than a normal pattern of political exchange" writes an American historian.[19] For Jefferson, Madison and Hamilton society had its easily discoverable natural laws. Normal political controversy on issues of economic or foreign policy

was therefore interpreted as a deliberate attempt on the part of the political opponents to subvert them.[20]

All the revolutionaries, therefore, agreed that the principles of natural law coincided with the laws of society: the laws of "trade and commerce" and the natural and inalienable rights of man. Their discovery did not create problems. They were the "common sense" of the matter: the ancient rights of Englishmen and the principles of commodity exchange and social labour were understood by all Americans since they coincided with their interests. Their protection, accordingly, was equally unproblematic. It was only a matter of popular supervision of the government, lest it usurped their rights and invaded their interests.

However not all revolutionaries accepted fully the harmonious assumptions as exemplified by Paine's theories. Thus Madison, answering a delegate to the Pennsylvania Assembly who had asserted that poverty would be eliminated by the operation of the market economy, was more pessimistic: "An increase of population will of necessity increase the proportion of those who labor under all the hardships of life, and secretly sigh for a more equitable distribution of its blessings... How is this danger to be guarded against on republican principles?" and he proceeded to propose the establishment of a body in government that would represent property and, thus, avert any danger to freedom arising from the extension of the franchise to the unpropertied class.[21] Equally, A. de Tocqueville had said of the Americans that they displayed a love for property not encountered in any other country: "Nowhere does the majority display less inclinations for those principles that threaten to alter the laws of property".[22] In his more pessimistic mood, however, he had warned against the

"tyranny of the majority" that under the principle of the sovereignty of public opinion could impose a levelling equality perceived as the greatest of evils.[23]

Thus, although the "laws of nature" were conceived as self-evident, the problem of their full implementation and protection became a major concern in legal and political theory.

2.2. Legal and Constitutional Postivism.

Positivism in legal theory comes as a direct attack on all versions of natural law and in particular its modern, rational, version. Based on Humean epistemology, positivism, in general, argued that sensory experience, the only basis of scientific knowledge, cannot yield any moral judgments, values or principles. A radical divide is thus established between fact and value statements. For legal positivism, the sole theoretically interesting law is positive law, the legal enactments posited by the state; knowledge of the law can be achieved through the study of this state-created law. Laws as social facts stand in an instrumental relation to the values and ends of the lawmaker.[24] Law, instead of realizing some immutable essence, is the expression of the sovereign will, the voluntas of the state. There is no law to be found in the realm of ideas and metaphysical speculation, nor is there any law superior and controlling state/positive law.

Legal positivism, therefore, postulates as the object of its study questions of validity and effectiveness of legal enactments. The legal system is presented as an ensemble of rules and decisions. The validity of its parts depends solely on their source and the conformity of the law-making authority to a series of formal procedural requirements. Thus, legal validity becomes a statement "internal" to the whole body of rules which is presented as a

coherent, hierarchized and closed whole emanating in a pyramidal way from the central site of sovereignty. H.L.A. Hart has argued that each part of the legal system can be traced back, through a series of delegations of power, to a central set of rules that he has called the "rule of recognition".[25] Thus, the organization and exercise of state power conforms to a set of legal rules, and those at the top of the pyramid (the Kelsenian "Grundnorm" or the Hartian "rule of recognition"), the ultimate legal rules are, in the main, although not exclusively, embodied in the Constitution.

The constitutional text, therefore, itself a set of positive legal rules becomes the ultimate criterion for the testing of legal validity of any other component of the legal system, of its very existence. At the same time it imposes restraints and conditions on political power itself by prescribing the formal procedures (and substantive requirements in case of an entrenched Bill of Rights) that it must follow in order to create valid and obligatory laws. Thus legal positivism in constitutional theory examines political phenomena in the domain of legal discourse. Political reality is presented as conforming with legal discourse declared supreme.

A.de Tocqueville had remarked that in America all political problems end up in the courts and that lawyers and judges were the new American aristocracy. Justice Frankfurter writing some 100 years later agreed: "Scarcely any political question arises in the U.S. that is not resolved sooner or later into a judicial question".[26] Constitutionalism sanctions this belief: political problems are to be treated as legal. "They still are political [a concession not made by all constitutional authors] but courts must treat them as legal".[27] The idea that law is distinct from politics and politics follow legal rules is encapsulated in the famous American adage that "we are a government of laws and not of men". Combined with the theory of separation of

powers (or checks and balances) it creates the basis of judicial review in the strict sense. The mode of legal discourse that seeks to dissolve political power into legal relations but at the same time conceives law as positive state law emanating from a single sovereign centre, accepts judicial review as a logical conclusion. The theoretical antinomy of a political power bound by the formalities of a law that it (the state) can only create is thus resolved in definition. The Constitution itself is a law, like any other albeit superior, and a special institution is charged with the duty to guarantee that political power will behave in accordance with its own rules.[28] Thus, the constitutional historian McIlwain stresses that judicial review is an old as constitutionalism and essential for it. It is based on three assumptions: (a) that there exists a fundamental constitution that has the characteristics of every other law, (b) that judges, therefore, are competent to interpret it, as they do with all laws and (c) that in doing that they just interpret it and not "make or give law".[29]

To be sure, the antinomy cannot be easily wished away, through definitions and rhetoric. Thus, one constitutional author concludes that "it is a <u>naive but worthwhile</u> idea".[30] And Archibald Cox, a former Solicitor General, closes his passionate defence of constitutionalism in a similar note: "I cannot prove these points, but <u>they are the faith</u> to which we lawyers are dedicated".[31]

It is, therefore, reasonable to conclude that mainstream constitutional positivism retains strong aspects of natural law theories.[32] There is a superior law that controls state power, embodied in the Constitution. To be sure, even this superior law is

created by the state, and it is the normal function of judges to discover it, by interpreting the Constitution.

2.3. Popular Sovereignty and Constitutionalism

The modern democratic tradition, that can be traced back to J.J. Rousseau and the French Revolution, stands for equality and popular participation in the exercise of political power. It accepts the liberal notion of state sovereignty but demands the equal participation of all citizens in its ultimate expression, lawmaking. The role of public opinion and representative institutions is seen by Paine and Jefferson as mainly defensive: they are the means through which society ensures that the state does not abuse its strictly delineated power. The democrats, on the other hand, saw political participation as the positive means for the continuous integration of the will of sovereign citizens into the sovereign will of the state.[33] Marx calls democracy the "essence of all political constitutions",[34] and in his early critique of Hegel's"Philosophy of Right",describes his ideal of democracy, in Rousseauan terms, as an organic community like the ancient Greek polis, where there is no separation between the social realm and the state.[35] L. Colletti and others have suggested that the main thrust of Marx's political theory can be found in his early writings, which are influenced by "older traditions of... democratic thought [and] in particular Rousseau".[36]

Be that as it may, by the mid-nineteenth century, and while positivism was becoming the dominant tradition in legal theory, the democratic legacy, exemplified by President Jackson's simple maxim that "people rule" was gaining ground in American politics. Justice Story describing the 1828 Inauguration Ceremony of Jackson complained that the White House had been opened "from the highest and most polished, to the most vulgar and gross in the nation" and lamented that "the

reign of the King Mob"[37] had arrived. However democracy had come to stay: "within fifty years, democracy /that used to be a bad word/ became a good thing".[38]

The incorporation of notions of popular sovereignty in the theory of constitutionalism was facilitated by the social contract component of liberal political theory. As we saw,[39] Paine had presented the Constitutional Convention as a "compact of the people with each other" by means of which the United States had been established. The Constitution, therefore, as a written text formulated by the elected representatives of the people was not only the supreme law but also the supreme embodiment of the popular will. Its interpretation and application by the Supreme Court was but the implementation of the sovereign popular will. The invalidation of statutes passed by state assemblies had been authorized by the people themselves, in the form of the various limitations imposed upon state power in the constitutional text. Thus, parallel to the stipulation of a higher (constitutional) law and subordinate parts of the legal system, popular sovereignty was equally hierarchized. In its supreme expression, it enacted the Constitution and limited its future exercise. "The democratic argument of trusting the people is valid to the extent that people are trusted because they do not trust themselves... Judicial review is the institutionalized means of self-control."[40]

Arguments from democracy and popular sovereignty came to support and buttress the power of judicial review. The problems created by the gradual uncoupling of the essence of law - conceived as positive law embodying the popular will - from the natural rights of man had made the fears of Madison and Tocqueville about an omnipotent majority adversely inclined toward the laws of property more realistic. The proclaimed identity of these laws with the rights and interests of all men could not suffice in the new era of positivism and democratic

rhetoric. The democratic cult of the constitutional text demanded that all substantive limits on state power should be authorized by the text itself. The Supreme Court accepted the challenge: reinforced in its task by the mid-19th century claims of the political economists, who had pronounced the universal validity and scientific character of the laws of the market economy, the Court read these laws in the constitutional text. This process, which may be called the "positivization of natural law", sealed the moulding of the three disparate - and opposing - theories of natural law, legal positivism and popular sovereignty into the modern theory of constitutionalism.

3. The Process of "Positivization of Natural Law"

The process was completed around the turn of the 20th century in the now infamous Lochner case and its progeny. Its importance for legal and political discourse cannot be overemphasized. All 20th century constitutional theory revolves around the main assumptions and antinomies of constitutionalism and judicial review as they were developed during the previous century. It would be therefore instructive to retrace briefly, the main legal steps of this development. At the same time, the judicial construction of another liberal concept par excellence, that of freedom or liberty, will be dealt with.

There were three main stages in the legal-judicial evolution.

(a) The doctrine of judicial review. The doctrine was enunciated by Chief Justice Marshall in the famous Marbury v. Madison case.[41] In this case, probably the most commented upon in English-speaking legal literature, the Supreme Court asserted the right to decide finally on the authoritative interpretation of the Constitution and rule on the conformity of legal enactments with the constitutional provisions.

Marshall's doctrine was based on the social contract assumptions of the revolutionaries: "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness... This original and supreme will organizes the government...". This original will established limits on the powers of the various governmental branches and in order "that those limits may not be mistaken or forgotten, the constitution (was) written". The written constitution is a law as any other and "it is the province and duty of the judicial department to say what the law is... if two laws conflict... the courts must decide...". The Constitution, however, is superior and paramount, and in case of conflict "the constitution and not /the/ ordinary act /of the legislature/, must govern the case". The latter must be "obligatorily" declared void by the court.[42] Thus judicial review is the logical deduction from a series of assumptions already established in political theory: Social contract and original will, a written constitution that embodies this will and strictly circumscribes the exercise of state power and a special institution (the Supreme Court) that links the first two propositions.

(b) In the period up to the Civil War, the doctrine of vested rights[43] made the protection of property the prime criterion of constitutional validity of legislative acts. According to Professor E. Corwin this doctrine gave "notification that the courts would disallow any legislative act which they found to bear unduly harshly upon existing property rights, or else would construe the act in such a way as to avoid this effect".[44] The justifications advanced for this extensive protection of property were based on natural rights and social contract theories, while some reference to the "principles of republican government" were not lacking. Characteristically, Justice Story declared in 1830 that "government can scarcely be deemed to be free

where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and property should be held sacred".[45]

(c) The post-Civil War 14th Amendment to the Constitution gave the Supreme Court the opportunity to complete the process of positivization. The Amendment reads that no state "shall deprive any person of life, liberty or property without due process of law". The Supreme Court read the clause's reference to liberty as meaning freedom of contract in industrial disputes, and in particular freedom of the employers to impose upon their employees whatever terms they saw fit; in a series of cases it disallowed the first state welfare measures and union protective laws and with greater restraint federal measures, using the "due process" clause of the 5th Amendment.[46] "Liberty became assimilated to property... with investment capital, about which an immunity was cast... /that/ remained unmodified in our constitutional law until the War with Germany /W.W.I/."[47] And as the principles of economic laissez-faire and Social Darwinism had taken on the status of scientific truths "the Bar Association and the courts /Tocqueville's American aristocracy/ saw the constitution as giving legal and political sanction to Adam Smith and Herbert Spencer."[48]

The class character of the Supreme Court decisions of the late 19th century was as evident as its grandiose rhetoric was somewhat absurd. In the Pollock cases, the Court found that a federal tax on income derived from real estate, municipal bonds and personal property was a direct tax and should be apportioned among the States and invalidated the first federal income tax since the Civil War. The statute was attacked by an advocate before the Supreme Court as a "class law": "The Act of Congress... is communistic in its purposes and tendencies, and is defended... upon principles as

communistic, socialistic, populistic as ever have been addressed to any political assembly in the world" to which the Supreme Court's prompt reply per Justice Field was that "The present assault on capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness..."[49] On the same day the Court decided that the Sherman Anti-Trust Act did not apply to manufacturing monopolies,[50] but applied to trade unions.[51] And in the Lochner case, that has come to symbolize this period of constitutional adjudication, the Court declared that the workers are "in no sense wards of the state"[52] and therefore the state had no business to protect them. Ironically enough, this distinction between proteges and "no wards" of the state undermined the assumption of the universal harmony of interests that underlined all laissez-faire thinking. A. Wolfe has argued that a notion of "dual citizenship" was enhanced by the Supreme Court: "Workers were considered a class that would organize society only for their own ends... while industrialists were entitled to hold power because what was in their interest as a group would benefit everyone".[53] The role of the Supreme Court was accordingly the protection of capital presented as "...the preservation of public and private rights, notwithstanding the representative character of our institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities... against the power of numbers".[54] Another Justice expressed the same idea as a rhetorical question: "Are we all at the mercy of legislative majorities?"[55] The clear answer was no, by virtue of the Supreme Court.

Thus, at the end of this 100-odd year process all three threads of natural law/natural rights, positivism and popular sovereignty had been

woven into the complementary theories of constitutionalism and judicial review. Freedom should not be intruded by positive law, because that was the demand of the supreme law of the Constitution which embodied the popular sovereign will. Freedom was defined as property rights and the laws of a largely unregulated market in commodities and labour. In the Slaughterhouse cases of 1873, the Court introduced a notion of dual citizenship and held that the "privileges and immunities" clause protected the rights of federal citizenship, but not those of state citizenship. The Bill of Rights was not applicable to the states, through some doctrine of incorporation, and the federal authorities had no obligation to protect civil and political rights against state violation. Judtice Field, dissenting, argued that the 14th Amendment protected a man's "fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen".[56] But as R. McCloskey has remarked, the libertarian rhetoric related to the humble right of a few butchers to have a statute regulating the slaughtering of animals annulled. Field's theory on individual rights was that "the property right is the transcedent value; political ambition ranks next when it is relevant; and the cause of human or civil rights is subordinate to these higher considerations".[57] Political freedom had not captured the Supreme Court imagination. The first case in which the Court addressed itself to issues arising from the First Amendment, came as late as 1919.[58] When the Court was aksed, in 1897, to recognize a constitutional right of assembly and demonstration in public places its answer was that "for the legislature absolutely or conditionally to forbid public speaking in a highway or a public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house", affirming the opinion of - the later liberal hero - Justice Holmes, then a member of the Massachusetts Supreme Court. The 14th Amendment ruled the

Supreme Court "does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state".[59] By the 1930's, however, the Supreme Court changed radically its definition of freedom. It is to this change, and its relation to the theoretical bases of constitutionalism, as suggested above, that the next part addresses itself.

4. Constitutionalism in the 20th Century: From Economic to Political Freedom

4.1. The "Preferred Position" of Personal and Political Freedoms

The legal consensus established around the turn of the century was expressed by a federal judge, in 1922, who declared solemnly that "of the three fundamental principles which underlie government and for which government exists, the protection of life, liberty and property, the chief of these is property".[60]

Yet within the next 20 years the tenor of the Supreme Court rhetoric had changed completely. The origins of the new approach have been usually traced to a footnote in an opinion delivered by Justice Stone:

> "...There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced by the fourteenth... It is unnecessary to consider now whether legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most types of legislation... Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religions... or national... or racial minorities...; prejuduce against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial enquiry." [61]

Statements to the same effect case in clearer positive language can be easily found in a series of Supreme Court decisions of the late 30's

and 40's. Thus, Justice Black, turning completely on its head the earlier identification of freedom with property rights declared that "/he views/ the guarantees of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart of the human body. In fact this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death".[62] Equally, Justice Cardozo: "Of that freedom (of speech) one may say that it is the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history political and legal".[63]

Four years after the celebrated Carolene Products footnote, Justice Stone again put the final touch in the new apprach declaring that "the Constitution by virtue of the First and the Fourteenth Amendments has put those freedoms in a preferred position":[64] the preferred position of personal and political freedoms was the new orthodoxy in constitutional adjudication.

The change of heart that put personal and political rights at the forefront of judicial interest was generally praised by constitutional authors. M. Konvitz[65] called it a great improvement in civil liberty. Schwartz, thought that speech rights were "most suitable for inclusion in the preferred position theory".[66] To be sure, some judges and authors disagreed with the new faith. Justice Frankfurter called the title "preferred freedoms" a "mischievous phrase" that had no support in the constitutional text and pointed out, promptly, that its launching by Stone was made in a dissenting opinion.[67] Justice Jackson objected that if some freedoms were preferred, that meant that others would be, necessarily, relegated.[68] Equally Judge Learned Hand thought that the introduction of a double standard of judicial review would allow

governmental intrusion in economic freedoms, a quite unacceptable notion since "property is the matrix that must be conserved if other values are to flourish". P. Freund quoted approvingly John Adams, who had declared that "the moment the idea is admitted into society that property is not as sacred as the laws of God(!) and that there is not a force of law and public justice to protect it, anarchy and tyranny commence".[69] Analogous doubts were voiced by some constitutional authors.[70] According to P. Freund, the cases that extended First Amendment protection to industrial picketing arbitrarily transformed economic pressures into rights of free expression.[71]

It would be reasonable to conclude, however, that a majority of "learned opinions" was formed around the "preferred position" of personal as against economic freedoms in the period between the mid-30's and the mid-40's. Even Justice Frankfurter after attacking the preferred position theory, in the case referred to above, conceded that "First Amendment liberty came to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from economic arrangements".[72]

The main concern of constitutional theory against this background of - at least rhetorical - acceptance of the priority of personal freedoms moved to the role of the Supreme Court and the permissible extent of judicial review. The battleline was drawn between the theories of judicial activism, supported and practiced by Justices Black, Douglas and Chief Justice Warren, and of judicial restraint advocated mainly by Justices Frankfurter, Harlan and Judge Learned Hand.[73]

The activist position strongly resembled the earlier blend of property-inclined constitutionalism. It comprised all three ingredients of natural law, constitutional positivism and popular sovereignty. Although the arguments and counter-arguments usually draw from all three traditions, I will attempt for analytical purposes, to examine them in turn.

4.2.1. Natural Law and Positivism

a. The activists accepted that the limits imposed by the higher law of the Constitution on positive law create an assumption of unconstitutionality of the latter, if it touches upon the prohibited domain, or that they call, at the least, for greater judicial vigilance in case of conflict between the two. They are, therefore, inclined to relax the procedural requirements for the examination of questions of constitutionality. According to one of those, for example, a party to judicial proceedings could attack a statute only if it could show its unconstitutionality as applied to the particular situation and not its potential invalidity. The rule was adopted in the 30's, in relation to federal economic regulation programmes. It postulated that the objection of unconstitutionality could be raised only in cases of "absolute necessity".[74] The new activist judges, however, were prepared to invalidate legislative acts as "void on their face" or for having "chilling effects"[75] for the future exercise of the protected freedoms.

Talk of natural and inalienable rights is not hard to find either, although not as grandiose as in the earlier property cases. Thus, reversing the Davis case (see above, p. 69) the Court held that "Wherever the title of streets or parks may rest, they have immemorially been held in trust for the use of the public and time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the... rights and liberties of citizens."[76] Of course the 40-odd years between 1897 (when Davis was decided) and 1939 in no way can qualify as time out of mind. They can qualify, however, as the vital time in which a majority of the Supreme Court Justices changed their definitions about the "rights and liberties of citizens". The "notion of basic inalienable human rights... finds its expression in early Court decisions... It

also is as contemporary as last week's Court decision".[77]

The Constitution and the Bill of Rights is the supreme law but it is also a positive, written law; the meaning of its injunctions must be appropriately construed, therefore, to give the Supreme Court a clear mandate to enforce it. Thus, the question of the proper meaning of the constitutional text became one of the main points of the debate. Three main methods for discovering the meaning of the Constitution or any one of its clauses were advanced.

The first relies on the language of the text. Chief Justice R. Taney had declared, in the 19th century, that the Constitution "speaks not only in the same words but in the same meaning for all time".[78] The judicial function is, therefore, simple: "The judicial branch of the Government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares the former".[79] Justice Black referred to the First Amendment in similarly unequivocal terms: Words mean what they say. "No law" means no law.[80] But the theoretical understanding of language has moved a long way from Black's "naive" reliance on the indexical value of words. It is, indeed, through the rejection of such older notions of language-as-representation and its examination as a "form of life" that various schools in philosophy and the social sciences came to converge in their concerns.[81] This discrediting of linguistic fixity and transparency made formalism implausible in legal reasoning.[82] No constitutional author accepts Roberts' and Black's faith in words, in its unadulterated form.[83]

When the sovereignty of the language is challenged, the meaning of the text is sought in its legislative history. History may be used in two ways to confer meaning on terms, as "freedom of speech", "abridge" or even "no law". The first, adopted by constitutional historians, searches the record of the body that passed the particular constitutional

provision and attempts to extract from it the meaning that the clause or a word in it had had for its framers. Thousands of pages have been written about the debates and the intentions of the constitutional authors, in particular the authors of the controversial 14th Amendment, without much agreement.[84] But even the clearer sounding words of the First have not fared better: "the origins of the First Amendment are sphinxlike... the meager discussion [at the Constitutional Convention of 1791] seems to provide little guidance".[85] Even if they did, one could go on, that would have little or no relevance to the problems that a late-20th century court faces in dealing with the First or any other constitutional clause. As Justice Hughes put it: "if by the statement that what the Constitution meant at the time of its adoption is what is meant today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation, which the framers, with the conditions and outlook of their times would have placed upon them, the statement carries its own refutation".[86]

In answer to these objections a more sophisticated historical approach is proposed: The record should be examined not in the dry way of historiography but under a hermeneutically oriented methodology. The Constitution, after all, contrary to the literalist fallacy, was "intended to endure for ages to come and consequently to be adapted to the various crises of human affairs".[87] The role of historical research is accordingly to identify the broad principles posited or the categories of evils guarded against in a particular clause and draw the necessary conclusions for the contemporary problems. As expressed by a supporter of this line, the task is to determine "the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into the constitutional text".[88] It would be instructive to examine the usefulness of this method in relation to questions arising from the First Amendment.

One of the problems that has preoccupied the literature (and the Supreme Court) was whether the First Amendment was intended to abolish the common law crime of seditious libel. A number of Justices and scholars subscribe to the Holmesian position that "the First Amendment /did not leave/ the common law as to seditious libel in force. History seems... against this notion."[89] Justices Black and Douglas accepted the idea,[90] and some authors are even more emphatic: "One of the objects of the revolution was to get rid of the English common law on liberty of speech and the press".[91] However, following the publication by Leonard Levy of his influential history of the First Amendment, the historical verdict changed profoundly. Its meaning cannot be accurately ascertained and, moreover, the framers themselves were sharply divided,and understood it in their own differing ways. Levy concluded that if he was pressed to choose "between the two propositions, first, that the clause substantially embodied the Blackstonian definition and left the law of seditious libel in force, or that it repudiated... and superseded the common law, the known evidence points strongly in support of the former proposition."[92]

Interestingly, the Supreme Court itself put a footnote in the historical controversy. 166 years after the passage of the Alien and Sedition Act, which had sparked the debate, the Court declared in 1964 that "the attack on its validity has carried the day in the court of history,"[93] and the Act was, therefore, unconstitutional. To come to this conclusion, the Court cited both Holmes, Douglas, Cooley and Chafee (the traditionalists) and Levy (the revisionist), all with approval. "The central meaning of the First Amendment is that seditious libel cannot be made the subject of government sanction"[94] was the comment of one distinguished writer on the case. But if that was the central meaning in 1964, it was not in 1799, in 1919 or in 1951 when the three clearest examples of federal sedition laws, the Alien

and Sedition Act, the Espionage Act and the Smith Act were accepted as constitutional by the Supreme Court.

John Roche, a "revisionist" historian has argued that the successive efforts to read the constitutional text and history, through the varying predilections of each particular epoch and author, answer the need for "retrospective symmetry":[95] ideological needs of the present get authorized by being referred back to the unprovable or conflicting intentions of the framers. One could add that "authorization" thus regains its double meaning. The original author confers "authority" on the contemporary author's utterances. While something new is said each time, it must be presented as an incessant repetition of the original word. According to structuralism (borrowing from Lacanian psychoanalysis) this "double mirror image"[96] (Author-authors, Text-commentary) is one of the main characteristics of ideology.

Roche instead suggests that the judicial protection of freedom of speech should be seen as a developing tradition in which each stage builds upon and advances from the previous toward full protection. However, the canvassing of the notion of a teleologically progressing freedom in the place of the "inaccurate" reading of history (particularly during the late 50s when the "revisionist"school became prominent) is equally vulnerable to accusations of ideological bias. "[A]t the height of the McCarthyism controversy... [Roche] suggested that 'we never had more freedom'."[97] since each new stage is necessarily better than the previous.

b. The proponents of judicial restraint - who call for a minimization of judicial intervention in the form of judicial review - attack the activist position but often in an embarrassed way. Frankfurter after all, as a professor before he was appointed to the Court, had fully supported the New Deal principles of social engineering and judicial activism.[98]

One is constantly reminded of the debacle of the "old" property-inclined court, that led to Roosevelt's court-packing plan and the "judicial revolution".[99] Holmes' aphorism about the old Court, that had identified "Mr. Herbert Spencer's social statics with the theory of the Constitution",[100] is used as a warning against the tendency of the new activists to shape the Constitution according to their new interpretation of natural rights. As Cox put it, "invalidation should result only in the case of clear-cut constitutional provisions".[101] But, as has been indicated, such provisions are hard to come by. One way out has been suggested by Judge Learned Hand. He denies, almost completely, that the Constitution and the Bill of Rights impose any substantive demands on governmental activity, or can be compared with or treated as positive law. The Bill of Rights is a mere declaration of principles, like the Premable to the Constitution, and the Constitution itself should be treated as a scheme for the delineation of the jurisdiction and competence of the various federal and state institutions, as predominantly procedural. But judicial review in cases involving conflicting jurisdictional claims (which Hand accepts) necessarily involves substantive choices, too. On the other hand substantive judicial review has been an established part of the constitutional order - which Hand and Frankfurter allegedly want to protect from the unwarranted intrusions of the activists - since Marshall's Marbury decision in 1803. Thus the proponents of judicial restraint - particularly those on the bench - are caught in a dilemma which makes them behave, as one author put it,[102] like schizophrenics: they reject judicial review in theory but have to accept it in practice.

Thus the respective arguments about the higher status, the legal nature of the Constitution, the clarity of its meanings, its legislative history or the legal-political tradition, get repeated incessantly in a somewhat tired fashion. Within the parameters of

legal discourse, the only possible verdict of the controversy so far, can be a Scottish "not proven" one. At this point, the third line of argumentation related to questions of political theory and the role of judicial review in a democratic society, must be examined.

4.2.2. Democratic Theory

a. In the post-New Deal period of democratic rhetoric, the grounding of judicial review in political theory became the paramount concern of constitutional authors. Yet, the varying attitudes toward democratic theory and practice, indicated above in a different context (Ch.I, 3) led to differing conclusions on the present issue as well.

The proponents of judicial restraint accept the assumptions of empirical political science and "unqualified pluralism" (see Ch.I, 4 above). They identify the existing political process described as group pluralism and elite selection with the gist of democracy and take it as being fully operative. The Supreme Court, appointed and politically unaccountable, is therefore of a profoundly undemocratic character. When it invalidates a law passed by the democratically accountable branches, it thwarts the properly expressed popular will and contributes to the creation of political apathy by implying that the people are not capable or responsible enough to deal with the pressing political issues which should be entrusted to the hands of some neo-Platonic philosopher-kings.[103] Variations of this basic argument and additional points are not hard to find in the literature.

Thus, it is argued that the finality of a Supreme Court decision based on constitutional grounds, necessitates for its reversal the cumbersome process of constitutional amendment; that an extensive and frequent intervention would create "such wide-spread political reaction that the Court would be destroyed in its wake";[104] that the theory of separation of powers is violated when the judicial branch instead of merely interpreting and declaring existing law undertakes to make new law; that the notion of

law, as the organic outgrowth of the "community as a continuing society",[105] a process embodying the dominant values of society is undermined. The last argument has found much favour with neo-conservative authors[106] who have discovered in Burkean and Durkheimian notions of "organic solidarity" the best arguments against judicial activism. Finally, the realist strictures against a naive formalist jurisprudence that believed that the judiciary could maintain its neutrality and avoid the "prerogative of choice" and the ensuing value-imposition through literalism are used to reinforce the arguments about the undemocratic character of judicial review.

The proponents of restraint, however, cannot escape the antinomy identified above: judicial review is theoretically defined as undemocratic for violating the outcomes of the political process, but it has been traditionally accepted as an integral part of those democratic processes. The theorists who do not accept Learned Hand's near complete repudiation of judicial review, concede that some review is authorized but should be coupled with an assumption of constitutionality of state action. Only clearly "unreasonable" statutes should be invalidated. According to Justice Stone[107] the criterion of reasonableness should be an "objective" one: a considered judgment of what the community regards as within the limits of reason. The question, therefore, shifts from one about the law making or law declaring character of judicial review to whether laws should "be judged according to the [Justices'] own standards or those of the community".[108] To be sure, for the pluralists the best site to search for the standards of a society is its laws. And every law or policy seemed "reasonable", at least to those who enacted it. Thus, within the postulated pluralist premises, judicial review can never be fully justified. The search for objectivity appears as a chimera.

b. The proponents of judicial activism present an equally impressive selection of arguments deriving from political theory, answering point for point the objections of their opponents.

Judicial review in the area of personal and political freedoms, far from being an undemocratic incursion on the popular mandate, is the necessary prerequisite for the articulation of the popular will and its communication to the competent governmental bodies. The temporary ruling majorities cannot be entrusted to tamper at will with those processes that ensure the principles of political change. There can be no absolute guarantee that some majority will not attempt to preclude such change. The position of the Supreme Court, therefore, removed as it is from the immediate vicissitudes of the give-and-take of the pluralistic process, makes it the most competent body in the constitutional arrangement to keep the "channels of political change" open.[109] To be sure, the activism of the old Court that frustrated the federal programmes of economic regulation, is universally derided. But for the new activists, their version of natural law is based on the allegedly clear mandate of the First and Fourteenth Amendments, while the old was constitutionally unauthorized.

The more empirically oriented activists stress the unrealistic assumptions of any theory of strict separation of powers.[110] They claim that restraint proponents wrongly overemphasize the democratic character of the Congress and the Executive as against that of the Supreme Court;[111] that they exaggerate the power of the Supreme Court which in reality makes only "marginal contributions" on policy issues;[112] and that the Supreme Court as all other political agencies must select and protect certain interest groups and create its clientele mainly out of marginal groups under-represented or unsuccessful with other agencies.[113]

Thus, the overall picture that emerges from the rehearsal of the arguments from political science is of a basic disagreement on the definition and description of the political/democratic process. The activist position has been expressed in a simple - and rather naive way - by one writer: "if we accept the thesis that the government created by the Constitution is a democracy, and is therefore 'democratic', it follows that [judicial review] is consistent with democracy, and is therefore 'democratic' to confine and supervise majority rule".[114]

Justice Black's standard reply to the accusations of the undemocratic character of judicial review was that the people themselves had imposed checks on their own power by means of the Bill of Rights. Certain areas of action had been placed beyond majority control and the implementation of that mandate by the Court was the ultimate exercise of popular sovereignty. The simplicity and logical elegance of Black's position has been accepted even by writers who disagree with him: "...it supports judicial review while answering the charge that the practice is undemocratic... when a court strikes down a popular statute or practice as unconstitutional, it may also reply to the resulting public outcry: 'We didn't do it - you did'."[115] Black, however, was prepared to accept the normative implications of his views. Thus, in a famous interview he conceded that his activist protection of freedom of expression was based not only on the clear mandate of the First Amendment but also on his belief - old-fashioned as he put it - that the State <u>should not</u> invade personal and political freedoms.[116] But his more positivistically-minded followers shy away from such natural law resembling declarations of belief. They are, thus, caught in a different dilemma from that of the proponents of restraint. They theoretically reject natural law, but by defending an active judicial review they accept in practice its natural law premises.

Thus, on that point too, the arguments seem circular and the debate a barren one. A closer look at constitutional theory is, therefore, in order.

CHAPTER III

A CRITIQUE OF THE "CONSTITUTIONAL MODE OF DISCOURSE"

1. Introduction

The review of the development of theories of constitutionalism and judicial review undertaken in the previous chapter leads to two preliminary conclusions.

First, during the 19th century the theory evolved in a rather uninterrupted way, spearheaded by important Supreme Court decisions which were, in the main, favourably received and elaborated upon by the legal community, practising and academic.[1] However, around the New Deal, the consensus was broken and a proliferation of conflicting theoretical positions emerged. A parallel development has been traced as regards the theoretical justifications of freedom of expression (chapter I).

Secondly, the essence of constitutionalism that emerges from the review may be captured in three propositions: the Constitution is a positive law, it is the supreme law within a hierarchized body of rules and is related to notions of popular sovereignty. All three elements of positivism, natural law and democratic theory are involved in constitutionalism, although the interpretation of each of them as well as the overall mixture differs in each version. During the 19th century the naturalistic element predominates, freedom is identified with the rights of private property and a distrust toward popular sovereignty is expressed. After the New Deal the democratic element asserts the primary position, freedom is redefined as personal and political and the arguments revolve around the various versions of democratic theory and increasingly the role of the Supreme Court in a democratic society.

In order to account for the persistence of the main propositions as well as the changes in their understanding in legal theory that led to the theoretical "polyphony" since the 30's, it is necessary to examine constitutionalism in the context of classical liberal political philosophy and the social and political order it came to explain and justify; and then in the context of mass democracy and welfare capitalism that emerged in the West, in the aftermath of the First World War and the great Depression.

2. Power, Law and Legitimation in 19th Century Political and Legal Theory

Within liberal political philosophy, constitutionalism may be defined as the ensemble of legal doctrines and practices that, allegedly, restrain political power and ultimately attempt to dissolve all power relations into legal ones.[2]

This theoretical construction involves three themes: a representation of power in society, and in particular political power; a representation of law and the legal system; finally a relation between the two, which in classical liberalism was called "political obligation", while contemporary social science examines it under the broader concept of legitimation:[3] a theoretical assertion of the conditions necessary, so that a social and political order may be recognized as right and just by its subjects. Legitimation may be examined either as the claim of a political order to be recognized, advanced by the dominant groups in that order, or as the degree of acceptance (obedience) to that claim on the part of the ruled.

Each of these themes will be examined in turn, first in the setting of classical liberalism and the emerging capitalist society.

2.1. Power

All classical political philosophy understands power as a unitary essence seated in a single centre, the state, that monopolizes the means of coercion and exercises sovereignty. Treated as necessary and revered but at the same time as threatening and potentially dangerous, power is a Janus-like concept. All early political philosophers share this ambiguous attitude. Hobbes, Locke and the Utilitarians[4] are preoccupied in varying degrees with the problem of reconciliation between freedom and coercion and attempt to raise fences around power.

If classical liberalism is seen (as it is accepted[5]) as the polemical ideology of a rising bourgeoisie, then its ambiguous attitude toward political power can be historically explained. Revolting against the fixed institutional order of feudal society, in which political power, economic possession and personal status are inextricably linked under the sanctioning of a pervasive world view that explains and justifies the position of the individual and the organization of society according to a hierarchical and immutable model, classical liberalism comes to fight for and justify a profoundly different social order: a highly mobile one, based on an antagonistic civil society[6] of freely competing individuals, possessors of exchangeable commodities and alienable labour power, who relate to each other, solely, according to the exigencies of a universalizable market. Political power must, therefore, be separated from the social and economic domain and confined to a controlled centre,[7] leaving society - the area of freedom par excellence - to the instrumental calculations of individuals acting as "infinite appropriators and infinite consumers".[8] To be sure, the public power of the state must undertake certain central tasks, necessary for the emancipation of market forces that will reorganise the whole social order, once set free: it must guarantee the general conditions of a functioning market;

it must sanction contracts, so that economic transactions are calculable and reliable; it must prevent and punish transgressions against private property; finally it must provide for some central - though limited - economic needs of an infrastructural character. Thus, power conceived as solely political and condensed in the modern state must guarantee the conditions of freedom seen as economic. But, as the same time, the coercive apparatus of the state that monopolizes all force, remains a potential threat for the embattled bourgeoisie and its newly acquired freedom. The potentially disruptive element of a political power abstracted from society and entrusted in a separate and functionally demarcated realm, must be organized in such a way as to guard against its dreaded self-aggrandizement or its capture by social forces inimical to economic freedom and capitalist property.

The ambiguous attitude of early liberals towards power and the state can, thus, be explained.[9] Civil society can flourish only if set free from political power, but civil society cannot survive without state intervention which must serve the needs of the emancipated market. The state must perform a few central tasks but must be limited only to those. According to M. Friedman, who has recently repeated the arguments of the 19th century liberals, the state must "maintain law and order, define property rights, adjudicate disputes about the interpretation of rules, enforce contracts, promote competition, provide a monetary framework, protect the irresponsible whether madman or child"[10] and do nothing else.

The suggested arrangements for the reconciliation of power and freedom vary according to the historical epoch, in which each theorist wrote, from Hobbes' authoritarian liberalism to Locke's property emphasizing liberalism to Paine's somewhat anarchistic beliefs.[11] But all liberals as well as J.J. Rousseau[12] the founder of the rival democratic tradition agree as to one means that may effecuate the reconciliation: law.

2.2. Law

The concept of law that gradually dominates liberal thinking is that of a public and positive rule.[13]

The publicity of the legal rule implies the acceptance of the capacity of the state to order a secular, profane social order in accordance with the objectives of power holders. According to Habermas,[14] this attitude is the result of a profound methodological change in the study of politics initiated by Machiavelli and completed by Hobbes. Politics become transformed from the philosophical study of "good life", to a workmanlike technical knowledge, a science "which will regulate the affairs of men with the reliability that a clock regulates the motions of time".[15] Such a profound reorganisation requires a strong central power that will enforce the scientifically determined prescriptions of the theorist.

The formal characteristics of the positive rule and the liberal legal system (generality in content, uniformity in application) ensure equality of individuals before the law irrespective of their personal circumstances:[16] they open up morally neutral areas of personal autonomy within which self-centred individuals may pursue their interest by means of instrumental judgments. The main way in which these spheres of personal autonomy may be reconciled is through external constraint. Thus positive law by divorcing morality from legality, becomes the law of freedom and at the same time of external coercion. Criminal law is the reverse side of the law of property and contract. Self-interested autonomy is coupled with state violence or psychologically motivated self-restraint (obedience).[17]

Thus, in liberal legal theory, law is the language of the unitary state power. Internally, law is unified through its formal characteristics and it is these latter that make it the principal emancipating force of the new social and political order.[18]

2.3. Legitimation

The distinction between morality and legality made the problem of "political obligation" or legitimation a fundamental concern of liberal theorists.[18a] Formal, positive law answers partially only the problem created by the gradual destruction of the ancien regime which led to its own genesis: its characteristics described above create and reproduce the conditions necessary for an expanding capitalist economy. Both in its formal and substantive aspects the law of freedom (property law) and the law of coercion (criminal law) contribute in the organization of a dynamic economic system which according to Habermas is capable of self-legitimation, as long as the politically active agents perceive market society as the best mechanism for the fulfillment of self-interested purposive action. Thus, the relations of production and economic activity become themselves legitimate for the first time in history, and political power is justified in terms of them.[19] Formal law becomes the essence of freedom, an idea examplified in Kantian legal and political theory and retained strongly in the continental versions of legal positivism.[20]

The legitimatory or ideological function of law has been, recently, extensively commented upon particularly by writers in the Marxist tradition.[21] Thus, E.P. Thompson states that "the law assumed unusual pre-eminence in [the 18th century], as the central legitimizing ideology".[22] Although this is a welcome corrective to the earlier reductionist Marxist approach to law as solely legalized violence, it should be stressed that the legitimatory role of law in an expanding capitalist economy is mainly indirect: through its form and content it serves the needs of expansion of the "economic subsystem of purposive-rational action".[23] Max Weber's identification of legality as the form of legitimacy in 19th century capitalist states comes into

its own under the perspective suggested above.[24]

However, the formal characteristics of positive law - which to be sure retain strong naturalistic elements in its assertions of universal validity, rationality and realization of values like equity and justice, as is clearly borne out by historians of 17th and 18th century England like E.P. Thompson and Douglas Hay[25] - leave unanswered the question of the substantive or "material" content of legal rules. Negative freedom,[26] the freedom of property par excellence, may be accommodated by both an absolutist monarchy and a parliamentary democracy as the comparison of 19th century Germany and England or the United States indicates.[27] Once formal positive law has been accepted by the dominant forces of Western societies as the language of the sovereign state, the organization of the state became the paramount concern of the victorious bourgeoisie.

The democratic and socialist traditions call for the full popular integration of the law-making sovereign power of the state. A new concept of freedom emerges, that of <u>active</u> or <u>political</u> freedom according to which, through the extension of the franchise and political rights, political power will be guided by the whole of society, a body politic comprised of politically equal self-determining citizens. The concept of equality changes, too: from that of formal equality before the law to that of substantive equality of social conditions and opportunities. Most of the political and social struggles of the 19th century centred around these conflicting concepts. The labour and socialist movements adopted the demands of active freedom and substantive equality, while the bourgeoisie resisted and qualified them, fearing the capture of the state by social and political forces inimical to negative freedom and capitalist property. The conflict and eventual

compromise of the two traditions of liberalism and democracy around the turn of the century led within legal discourse to the creation of the modern theory of constitutionalism.

The state itself is presented as a fictitious legal person (most explicitly in the German theory of Rechtsstaat) in the form of public or constitutional law. All its interventions in society must follow legal formalities. Thus, the legality of private transaction frees civil society for the instrumental calculations of antagonistic individuals; while the legality of public transactions (constitutionality) promises the dissolution of power relations, among the branches of the state and between the state and civil society, into legal-technical ones. In legal positivism, the legal system is a unified whole through (among other things) its emanation from a single sovereign state; in constitutionalism the sovereign state is unified through its organization and exercise according to legal formalities.

2.4. Legal and Constitutional Theory

Keeping this analysis in mind, one may re-examine the process of "positivization of natural law", as described above in 19th century constitutional theory and practice.

(a) The Supreme Court intervention in the field of property rights cannot be explained as an answer to extensive state curtailment of them during the 19th century. As Tocqueville had accurately foreseen, respect for property and economic competition fanned by the untapped riches of the West, was the dominant American ideology. "There would seem to be no question that conditions of life have fostered among us a rather special regard for property and the property right... Great riches have represented with us some sort of personal achievement".[28] On the contrary both federal and state law had extended full protection to

property rights, a fact that was not always fully appreciated: "...the special favours of the law have gone unnoticed or have been treated as the spoils of those who knew their way about".[29] The federal judicial intervention may be better explained as a process of nationalization or homogenization of property law that broke down the barriers for national corporate expansion created by the existence of 49 jurisdictions regulating property rights at state level. E. Corwin praised the Supreme Court for its role in this process: "The spread of capitalistic industry made... palpable... the fact that industrially, commercially, economically we were one people... [The] Supreme Court... under the "commerce" and "due process" clause... clear[ed] the field for nation-wide industry and commerce".[30] By helping to open up the national market, the Supreme Court created the legal conditions for rapid economic expansion and capitalist accumulation. At the same time it reinforced the achievement ideology of the property order. The property order does not only engender its own legitimation, it also legitimizes the political and legal orders and institutions that create and reproduce its conditions of existence.

(b) The identification of freedom with the property order of a nationally expanding capitalist economy within the constitutional discourse of the Supreme Court, had in itself, accordingly, a secondary significance. However, the identification of the Supreme Court as the national protector of freedom enhanced its authority within the federal system of government as well as against state legislatures and executives. Of equal importance was the identification of the democratically accountable institutions as potential enemies of freedom, if they were to lead through majority rule to tampering with

the property order. Madison's quest for a "body in government sufficiently respectable for its wisdom and virtue to aid" against demands of the people for a more equitable distribution of property's blessings, was resolved in practice by the Supreme Court.[31]

(c) The process of giving positive status to natural law through the Supreme Court's reading of the 14th Amendment had a great importance for the development of American constitutional theory. It protected the Supreme Court from accusations of undemocratic behaviour and lack of respect for popularly elected assemblies. At the same time it inserted substantive criteria in the determination of validity of legal enactments. The legal system was, thus, presented as permeated by a number of principles or ideas, the faithful and uniform application of which the Supreme Court undertook to ensure. The importance of that development cannot be underestimated, particularly at a time when continental jurisprudence (particularly German) had identified legal validity with the following of formally correct procedural requirements. During the 19th century the fundamental value of the legal system was the protection of property rights, and the role of the Supreme Court as a creator of legitimation was mainly indirect. But the change of the freedom theme indicates that the Court undertook in the 30s a more active role in the direct legitimation of the new social and political order.

3. 20th Century Changes in Political and Legal Theory

3.1. Legitimation

The institutionalization of the welfare, mass democratic state, symbolized in the U.S. by the New Deal and the Roosevelt administration, led to changes in all three main themes of constitutionalism.

The identification of political power as the sole threat to freedom becomes qualified. Economic and social arrangements, the site of freedom par excellence in liberal political philosophy, are reluctantly conceived as inhering structures of domination which if left unregulated would, and did in the Great Depression, lead to extensive de-stabilizing social problems. The state undertakes to intervene in the economy, to channel and regulate economic conflicts and to redress deficiencies thus leading to an increasing politicization of the previously private domain of economic and social transaction. Similar policies had been followed by the Republicans during the reconstruction era, particularly in banking, tariffs and transport. But the Republican plan of a centralized urban-industrial development was resisted and mostly abandoned in the 1870s and 1880s. In the 1930s, however, the great liberal divide between public and private started breaking up.[32] The older liberal concept of freedom, as absence of deliberate, man-made constraint, in which the individual is assumed as distinct and independent from the political order of society, is supplemented with a new one according to which individuals and groups advance claims for the improvement of their economic and social conditions and circumstances which the state has the capacity and duty to meet.

However, once the naturalness of a social and economic order, that is reproduced and expanded if kept free from state intervention, has been questioned and the concept of freedom has been divorced from the economic freedom of the capitalist entrepreneur, the traditional notion of letitimacy becomes eroded as well. The formal legitimacy of legality is based, as we saw, on the self-legitimizing potential

of the economic order and the generalizable ideology of equal exchange realized in the commodity and labour markets. The demise of both legitimatory functions of the economic system in the 30's reactivated the need for direct legitimation of the political order that now directly and openly intervenes in the economic system while maintaining its basic feature, i.e. private ownership of productive means albeit in new corporate forms. The formal correctness of legal procedures does not suffice and the existence of some substantive values that permeate state intervention, making it acceptable must be canvassed. The solutions that have emerged as an asnwer to the need for direct legitimacy of the politically integrated post World War Two society are of relevance to the constitutional debates.

The first theme is that of democratic legitimacy: it postulates that the procedures for state intervention in the economy and in society should guarantee, on top of and sometimes against legal formalities, the representativeness and, therefore, substantive correctness of the decisions reached. The various democratic theories, we have examined above, may be seen as a response to this need for democratic legitimacy. The more humanistic and reformist thinkers call for the unblocking of the political processes, wherever barriers to their capacity to represent social interests accurately still exist (e.g. vote restrictions, "malapportionment" etc.). The more empirically oriented political and constitutional autnors ascribe democratic credentials to the existing process of group and elite competitions accepting with greater complacency its representative-legitimate character. Overall, however, the existence and degree of representativeness of political decisions becomes the paramount concern of political science. Democracy, from mob-rule, gets transformed

into something to be fought for.

The second legitimatory theme may be called the technocratic one: the residue of social conflict, which to be sure has, in the main, been institutionalized by means of the pluralistic process, may be in principle eliminated through scientific-technological progress. This latent social conflict is perceived as antagonistic claims over the distribution of the national income among social groups; a technologically administered expansion of national wealth will, therefore, bring about the end of the already virtualized social conflict. The substance of political problems can be reduced to technical ones, not accessible to the lay citizen, which should be left to the unquestionable wisdom of scientific planners and elite politicians. Politics accordingly take on a predominantly symbolic function:[33] their importance lies not in the creation of a public opinion on issues of general interest but in the procurement of an administered societal acclamation to the imperatives of technocratic regulation; certain issues and interests must be kept outside the threshold of opinion formation (military planning is here a prime example). According to M. Edelman's well known study of the "symbolic use of politics"[34] such ideals as justice, equality and freedom are used as symbolic reassurances to people in respect of insoluble social problems. Of course, technocratic legitimacy may be reconciled with the most formal - and therefore devoid of any substantive content - theories of democracy which postulate political apathy as a positive virtue and necessary condition of the political process.[35] Thus, according to the radical critics of pluralism, a new antinomy is created: political intervention in economic and social life - their direct politicization - depends on the existence of what Habermas has called a "depoliticized public"[36] that should accept the new integrated system of political authority and restrict its

political participation to a recurring ritual acclamation or removal of ruling elites.

3.2. Law and Legal Theory

To the extent that state intervention retains a largely legislative character, the new functions of law lead to profound changes in both its form and content. From a body of abstract and general rules, it is transformed into a series of highly specific regulations and open-ended standards by means of which the state carries out its economic and social policies. However, the erosion of the axiomatic and formal characteristics of legal rules undermines the separation that the liberal concept of law had purportedly achieved between legality and morality and between law and politics. Laws are for the first time clearly perceived for what they always were: the outcome of political conflict among antagonistic groups and interests. "The... assumption... that everyone's interests are essentially identical, is obviously a hard one for our generation to swallow"[37] writes a contemporary constitutional author. Law cannot be presented any more as the embodiment of the public good or common interest, a homogeneous body of rules permeated by the supreme values of the political order. Laws and regulations are instead seen as the means through which social groups secure the backing of state power for their interests.

Faced with the polyphony of laws, administrative regulations and judicial or semi-judicial decisions, legal and constitutional theory has attempted to reconstruct the notion of the "rule of law" as a coherent, closed ensemble of rules and values. The neo-conservative writers decry the "decline of law"[38] and long for a renovation of the 19th century faiths in the harmony of interests and strict procedural guarantees. The neo-liberals, on the other hand, attempt to discover new principles that permeate the contemporary legal order and give it its apparently

lost coherence and claim to legitimacy. Two such attempts that have justifiedly attracted widespread interest are those of H.L.A. Hart[39] and Ronald Dworkin.[40]

Hart constructs the legal system as a closed ensemble of legal rules, empirically observable. They derive in a pyramidal fashion from a basic rule which in a way akin to Kelsen's "Grundnorm" ascribes validity to the various parts of the legal system. This base rule, the "rule of recognition" exists as a Durkheimian social fact and may be observed in any existing legal system. The question of its validity cannot be posed, since it is its very existence that makes the notion of legal validity theoretically intelligible and ascertainable. He distinguishes the validity of law from questions of morality and obedience which are treated as largely metalegal.[41] Thus, in a way resembling empirical political science, Hart claims that the legal order, which derives from and depends upon the rule of recognition, is legitimate not because it contains any substantive values but simply because it exists. Legitimacy from a normative claim becomes an empirically ascertainable fact.

Dworkin, on the other hand closer to the natural law tradition, attempts to discover a fundamental value or ideal that permeates and, therefore, homogenises the legal system. Dowrkin's quest ends up to a ground value, instead of a ground rule: the "vague but powerful"[42] value of human dignity and the individual moral right to equal respect and concern. Dworkin claims that these values may be discovered both through philosophical speculation and empirical observation of the American legal order (but see the criticisms of the parallel position on the theory of freedom of expression of T. Scanlon above).[43] The legal and political order is legitimate if it furthers the postulated moral values.

3.3. The Effects of the Changes on Constitutional Practice and Theory

Both these trends, the positivist and the value-orientated, inhere within the American tradition of constitutionalism. As we saw, the constitution is presented as both the source of validity of the whole legal system, a kind of written rule of recognition which the Supreme Court has undertaken to enforce through judicial review; and as the depository and guarantor of the fundamental values of the legal system.

It may be argued, therefore that the stake behind the long debates in constitutional theory about strict constructionism, judicial activism and restraint or the fundamental values of the constitution - and their echo in the theory and practice of freedom of expression - is the attempt to reconstruct the claim of existing unity or potential homogeneity of the transformed legal system, an attempt conceived as intimately linked with the problem of legitimation of the contemporary social and political order. Both legitimatory themes, distinguished above, are indeed to be found in the constitutional discourse on and off the Supreme Court bench: The procedural-democratic in the debates about the preferred position of personal and political freedoms,[44] judicial activism or restraint on First Amendment issues[45] and the increasingly dominant democratic justification of freedom of expression.[46] The technocratic, in the reformist decisions of the Warren Court in desegregation, voting rights and reapportionment cases. According to its critics, the Court attempted through constitutional adjudication, to remould political and social reality by imposing over and against the political process proper, principles that future generations would accept as progressive.[47] The Justices took on the role of Platonic guardians. The "guardian ethic" promises to link knowledge and power and entrusts the "experts" with the necessary power to carry out their scientifically arrived at policies. However, the expansion of both

knowledge and power potential leads to an increase in "opportunities of manipulation".[48]

Thus, the Supreme Court already identified as the protector of freedom and the spirit of the Constitution played an important part in the process of social and political reorganisation both by adopting and popularizing the new legitimatory themes and by cautiously participating in post New Deal social reform. While its 19th century intervention has been described as aiding the nationalization of the capitalist property order and market economy,[49] its 20th century role must be seen as an answer to the need for direct legitimation of the reconstructed social and political order. This process - which may be called the nationalization of legitimation, was embarked upon in the Gitlow case (see infra, Ch.VI,5). In that case the free speech clause of the First Amendment, which is addressed, in terms, to the federal government (Congress shall make no law) was read, against previous rulings,[50] as applying to state governments too, by being incorporated in the "due process" clause of the 14th Amendment. From that case onwards, the Supreme Court undertook an increasingly active role in the determination of the political ideologies and groups that could be admitted as legitimate or excluded from the political process, insisting on the democratic character of its interventions. The examination of this process is the object of the second part of this thesis.

Constitutional theory in its part, faced with the theoretical antinomy between the vocal democratic rationale and a technocratic tendency, that thrives in expert activism, secrecy, ideological planning and distrust for popular participation, both expressed in Supreme Court jurisprudence, attempted to reconcile them in a consistent whole and to exorcise parts of the legal material that did not fit into the postulated scheme. The persisting issues and ongoing controversies

that mark much post-New Deal legal and constitutional theory, may be explained as the effort of theorists to account for a profound change in social, political and legal realities within the terms and presuppositions of an older notion of rule of law and constitutionalism and reassert the continuity, coherence and centrality of law.[51] This effort to reconstruct constitutionalism, admittedly a "naive faith"[52] even in its old version, led both to the persistence of the old themes of constitutionalism and to the inconclusive - even acrimonious - character of the debate. The new social and political reality puts up an even stronger resistance to its reduction to singular principles and moral values, formally correct procedures, the clear meaning of the constitutional text, an unfolding liberal tradition or a universally acceptable moral philosophy.

The continuously expanding and largely contingent regulatory intervention of the state, in which the Supreme Court plays its own distinct part, is asked to yield fundamental values that the Court does or should enforce. The neo-conservative dislike for social reforms is transformed into a seemingly insoluble debate between proponents of judicial restraint and judicial activism in which both sides draw their arguments from differing accounts of the political process; in the field of freedom of expression the contradictory demands of democratic legitimation and ideological planning are translated into the legal doctrines of absolutism and balancing, the first of which asserts the primary importance, constitutional derivation and historical tradition of political freedom while the latter relegates it to one social interest at a par with all other state concerns, to many of which it has to give way.

There emerges, accordingly, a proliferation of legal theories, global and regional, that set themselves the task to regularize the legal material, exorcise the antinomies and pacify the conflicts that

permeate legal and political activity. It would not be untrue, however, to conclude that so far they have not fully achieved their aim, which, in a confused way, has been declared by one author to be the answer to the question "when authority is legitimate" (sic).[53]

4. The "Constitutional Mode of Discourse"

The problem underlying all versions of constitutionalism is that of the legitimacy of political power, although it has been only recently acknowledged by constitutional authors. It is usually presented as a normative problem in the following form: what are the conditions that make political power appear to its subjects as right and just, thus creating a valid obligation of obedience as an internalized-psychological motivation that minimizes the need for external restraint.

I would like to argue that: it is a certain (wrong) way of presenting social and political reality, that has dominated constitutional theory, which has necessitated both the primacy attributed to the concept of legitimacy and has made its use theoretically uninteresting and empirically hardly verifiable; further that this (normative) concept of legitimacy is intrinsically connected with essentialist concepts of power and law, according to which the legal system is, unwarrantedly, presented as a unified whole; therefore, in order to examine and explain the legal material, the concepts of power, law and legitimacy must be placed within a different problematic freed from the assumptions of constitutionalism (below, § 5).

The importance of the concept of legitimacy in constitutional theory can be traced to the legacy of classical liberal political philosophy to which constitutionalism owes its parentage and basic concepts.

Classical liberalism has been built around a postulated distinction between the individual and the organized collectivity, private life and public power, the individual and the state where the first pole of the dualisms represents the domain of freedom or autonomy, while the second represents that of constraint, force or power. The classical problem was to reconcile, therefore, in theory and in the practical arrangements of social institutions, the two antagonistic notions of freedom/power-force, to answer as T. Parsons has put it the "Hobbesian problem of order":[54] How can organized life become possible, bearing in mind the fact that the wants, desires and interests of individuals are incompatible, and hence that the natural condition of social life is a war of all against all. Put in other words, how can political obligation to the sovereign state that monopolizes organised force, be validly grounded, leaving at the same time enough room for the free action of antagonistic individuals. Whatever the solutions provided (some have been examined above, Chapter II), the way of putting the problem inhered the following theoretical problematic: If legitimacy, a normative characteristic of the political order, exists, then the subjects of that order are assumed to have a moral commitment toward the commands of that order <u>in toto</u>, toward the whole order as constituted. Inversely, to the extent that such commands take on a legal form, it follows that a legitimate order creates an internalized, moral "ought" toward its legal commands.

It is not hard to find the same problematic in contemporary legal theory: "Since a system of political authority is most clearly identified by its legal system, the range of questions which can be grouped under the head of legal obligation... is more or less co-extensive with the queries traditionally discussed under the heading of political obligation: 'Why and to what extent ought men to obey their rulers

and the law?'",[55] or according to another writer: "What we believe about the law is related directly to the legitimacy of our political institutions".[56] Legitimate power (political authority) is identified with the legal system, the law is the only form of power and power should always be exercised according to the form of law.[57]

This power-law construct resides in and emanates from a single sovereign centre, the state or a designate locus within the state (the monarch, the Constitution, the people, the legislature, the executive or the ruling class, the capital etc.). The state is the site of power, power materializes the sovereign will that possesses it, law is the language and the form of organization of power. Once this representation of reality has been accepted the problem of legitimacy takes one of two forms: it either becomes a question of the values and procedures that ensure the continuity and coherence of Law, thus ascribing power its form and limits; or it becomes a question of the constitution of the Subject that possesses and exercises power, of the organization of the Sovereign that decides the content of law. Freedom and power, voluntary acceptance and external constraint are, thus, reconciled either through the unity of the legal system or the unity of the sovereign Subject that controls the state and possesses power.

The Constitution is the symbol of the unity of the triptych sovereignty, unitary power object of possession, law as a hierarchized whole. The Constitution is accordingly the supreme law: as supreme it decides the question of validity of all parts of the legal system; as a law, it is a rule comprised of clear words, and in case of "open-textured" words the intentions of their authors should decide their proper meaning; as a legal rule, it has a normative content of a negative character: it bars political power from undertaking certain activities. The unity of the Law is found in the original text that authorizes all laws.

But if the Constitution does not have a settled meaning, to be discovered in its words or the authors' intentions, as the Legal Realists insisted, then the Constitution is "what the Supreme Court says it is".[58] In this case the unity of the legal system must be found in the jurisprudence of the Supreme Court; the question of legitimacy of power is reduced to that of the legitimate Supreme Court intervention and constitutionalism comes to be preoccupied with questions of judicial review: the quest then starts for the values or principles that the Court does or should impose.

Alternatively, legitimacy is sought in the identification of the sovereign power of the state with the natural sovereignty of society conceived either as a body of atomized citizens, or, of interacting interest groups. The will of the state <u>is</u> the will of the sovereign people, state action follows the social consensus or the societal compromises and shifting group constellations attained in the pluralistic process. Law then becomes the "neutral" instrument by means of which such consensus or compromises are expressed. The principle of unity of the law is found in its embodiment of the value consensus of society reflected in the value-dispositions of its individual members. Legitimacy gets, accordingly, transformed from a continuously contested mormative claim into an empirically observable social fact.

Thus, the unity of law becomes the symbol of the unity and legitimacy of power and is successively sought in the sovereignty of the text (constitution or constitutional decisions); the sovereignty of the author (the Framers or the Justices); the sovereignty of some moral principle or value [Justice (Rawls), moral rights (Dworkin), neutral principles (Wechsler),[59] science (Ackerman)[60] etc.]; or the sovereignty of the people.

Although, as it will be argued in the next part, power, law and legitimacy should be examined in a different theoretical framework which questions their postulated unity or unifiability, constitutionalism can be seen as a unified body of discourse. The various, conflicting theories and doctrines discussed above bear resemblance to the procedures of organization of discursive practices as defined by M. Foucault. According to Foucault[61] the production of discourses in every society is controlled and guided by a number of procedures, a "discursive police" so to speak, that unify discursive subject, object and practice. Among these, the "internal" procedures have as their task the classification, ordering and distribution of discursive "events": the new and random ones are neutralized by being attributed to a small number of generative principles, thus presenting the discourse as a coherent and disciplined one. Such internal procedures that "master the random event" and "rarify the discourse" are those of the commentary of a major text: it permits the construction of new propositions on condition that the new is presented as the repetition of a meaning always-already existing in the major text, which is thus cloaked in prestige and reverence; of the author in which the new and random is integrated in the discourse by being attributed to an individual originator. Knowledge of the author's historical life is mobilized to decode the hitherto "hidden" meaning of his work; finally discipline: new propositions are admitted if they follow strict conditions in the form of rules, so that each new event is presented as a reactualization of a limited body of rules, as inhering, in other words, in these rules.

I would suggest, therefore, that the constitutional text and the legislative history, the constitutional decisions and the opinions of judges, the legal doctrines and the political theories can be seen as the procedures that taken in conjunction attempt to construct and

present power in the language of law and thus present it as a unified essence, exercised for the benefit of the whole society. To be sure the non-rational element of power is non-reducible to law as F. Neumann[62] has warned. This impossibility guarantees that the increasingly sophisticated attempts of constitutional theory to account for political and legal reality cannot fully succeed. But on the other hand the intellectual odyssey and the continuing controversies are the sign of a success: the building of a body of discourse which may be called the constitutional mode of discourse.[63] In its incessant, albeit conflicting repetitions, in its singular but competing values and doctrines, in the known and yet unknowable intentions of its authors, the reality of a social and political domination both presents its evolving, contradictory image and conceals itself under the promise that it may be, in principle, tamed by the principles of law or identified with the values of an assumed solidarité sociale.

5. Theses for an Alternative Theoretical Construction

5.1. Power

The analysis above indicates that a critique of the constitutional mode of discourse should accept that the sovereign origins and unitary principles of constitutional theories must be seen as both enabling the extension of the reach of power in society; and as restricting, unifying and rarifying its discursive representations and thus presenting social reality as a totality in which stability and orderly change, consensus and institutionalized conflict, common and individual or class interest, rulers and ruled form an organic, harmonious whole. In such a critical approach power cannot be seen as an essence, object of possession seated in a single centre of sovereignty, the state or some location in it. As Professor Griffith put it "the state is yet another metaphysic invented to conceal the reality of political power".[64]

Power should be treated, as recent advances in social science indicate, as a relational concept: it involves "reproduced relations of autonomy and dependence in social interaction".[65] The resources, however, that are mobilized by social agents in interaction, in order to produce desired outcomes, are drawn from structures of domination and are asymmetrical. Relations of power and domination inhere in economic arrangements and structures as well as in cultural and social practices as writers in the Marxist tradition have insisted. Claus Offe has suggested,[65a] indeed, that one of the criteria of the repressive character of a political system is the extent to which it excludes certain spheres of action from its intervention (as the 19th century "nightwatchman" state extensively did) thus sanctioning as natural and inviolable the interests of particular social classes and the mundane domination of economic structures. And as the changes in the understanding of the various constitutional clauses, described above, have indicated, even "meaningfullness" is constantly negotiated and not just a simple communication of pre-existing meanings.[66]

5.2. Law

The essentialist concepts of the state and law should be equally rejected. To be sure, the state exercises an ever-increasing interventionist role in contemporary society (see above §3) and its institutional "materiality"[67] is only too well known. But instead of being a unitary locus of power or agent, the modern state is a "realm of institutions and arenas of struggle subject to internal connections and relations to other institutions and forces".[68] Neither law nor the legal system can be conceptualized as a unitary whole transversed by principles or expressing the values of social consensus. Law must be examined as a social process: comprised of divergent and inconsistent

legislative enactments, administrative decrees and judicial decisions, couched in terms of a specific technical discourse and emanating from diverse institutions and agencies within the state on which various and conflicting determinations and pressures are brought to bear. A social process that translates these pressures and determinations in its own language and, on its own part, influences and reproduces the social and political order on which it is based. Law defines reality and backs up this definition with the force of the repressive apparatus of the state. As such, law is the privileged social discourse par excellence: its descriptions (obscure as they sometimes are) and prescriptions shape reality to a greater extent and more directly than any other discourse. Legal concepts are not lenses "through which to observe a process that is independent of them". They participate in the construction of social and political life - as the second part of this work will attempt to show for one specific part of it, the "public sphere" - they "make it what it is";[69] the law accepts or rejects political claims of groups or individuals and by subsuming them under generalizable legal rights and duties conceals the existence of social conflict; it sanctions certain values as those of the community or the "reasonable man" and thus participates in the process of production and mobilization of normative consent toward the established order, a process called by A. Hunt as "ideological domination".[70]

But, at the same time, law organizes and contains real concessions that dominated groups and classes have achieved - a clear example being trade union protective legislation. Its formalities and technical requirements impose some constraints on the all intrusive claims of power. As E.P. Thompson put it "legal rhetoric and rules may disguise realities of power but they also check power and its intrusions".[71] Finally, by protecting civil rights and political freedoms it opens the

formal possibility that dominated groups could gain access to power.[72] To be sure, these rights and freedoms are not the object of an unquestionable and complete legal protection as traditional constitutional theory asserts. They are, too, contested political claims accepted or denied, extended or restricted.

5.3. Legitimation

Finally, the concept of legitimacy must be emancipated from its excessively normative undertones that persist both in traditional political and in constitutional theory (and in the Marxist theory of ideology as "false consciousness"[73]). Thus, a political order is, either legitimate if it materializes certain criteria (freedom, justice, equality, civil rights etc.); or not and only widespread repression can keep it stable (the various theories of totalitarianism[74] are based on that assumption). Legitimacy and its reverse, political obligation are treated solely as moral/normative concepts. According to much empirical political science they have been achieved in advanced Western societies through the correspondence of the values of society and the value-dispositions of its individual members.[75]

The various attempts of constitutional theory to discover the ultimate values of the legal system are based on this normative concept of legitimacy. It is true that the relative stability of Western societies indicates some measure of acceptance of the established order on the part of the people. There is no reason, however, to attribute this stability solely to a social acceptance of certain values or moral principles. Force or the threat of force, amelioration of social conditions, positive inducements and material concessions gained in political conflicts, as well as resignation and apathy have played an equally important role. To be sure, the acceptance of a political and

social order as morally justified by a large part of society, plays a major role toward its stability and ruling groups in every society strive to attain such legitimacy; but it appears that it is value consensus among political rulers and dominant social groups that is the most important factor for social stability. "The level of normative integration of dominant groups within social systems may be a more important influence upon the overall continuity of these systems than how far the majority have 'internalized' the same value standards".[76] The same conclusion can be reached from a reading of H.L.A. Hart's analysis of law.

Hart attempts to redress the emphasis put by Austinian theory and legal realism on the coercive aspect of law. He underlines what he calls the "internal" aspect of rule following: according to it a valid law creates a normative obligation to abide by it quite apart from the specific threats and punishment in case of law violation. The internal aspect, which distinguishes rules from habits, consists of a "... critical reflective attitude to certain patterns of behaviour as a common standard, [which] display[s] itself in criticism... demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'."[77] As we have already seen, the validity of a law depends on its conformity with the "rule of recognition" which itself is not valid, but merely exists. Thus, the existence of a political-legal order, identified by its rule of recognition, is depicted by this normative disposition, on the part of its citizens, towards its valid legal commands. However, for a legal system to exist, valid rules must be generally obeyed "from any motive whatever": "The law he [the ordinary citizen] obeys is something which he knows of only as 'the law'. He may obey it for a variety of different reasons and

among them... the knowledge... that there are officials who may arrest him and others who will try him and send him to prison..."[78] But the "officials of the system" must display a normative commitment toward the fundamental rules conferring authority. A system of political authority exists if "the common public standards" identified by the rule of recognition are "effectively accepted" by the courts and the other officials.[79] And Otto Kirchheimer[80], a most profound observer of the German, and - after his exile in the United States, along with other leading figures of the Frankfurt School - American legal systems maintains that the officials of the political and legal order are at the same time witnesses to and creators of continuity, in the sense of legal continuity. And this continuity is a "major certificate" toward social continuity.

Thus, although the close link between legality-legal continuity and legitimacy is a useful hypothesis for the analysis of the 19th century liberal state (see above §2), it is arguable that it should be retained, in its strong sense, only in relation to the attitudes and value-dispositions of officials and dominant groups, in contemporary Western societies. The role of the Supreme Court in both representing and constructing this official-dominant group's value-consensus is extremely important. Its dogged resistance against welfare measures in the first quarter of the century and its dramatic volte-face in 1937[81] can, thus, be interpreted as its acceptance - with a time-lag - of the new articulation of official-dominant values of the New Deal. At the same time the Court's reinterpretation of the 14th Amendment provided a "major certificate" of legal continuity.

But for the rest of society, acceptance or assent to power must be seen as an ongoing, contested process involving both normative (legitimacy in the classical sense) and non-normative elements, like

repressive sanctions, disciplinary measures,[82] material concessions and real social and political gains.

It is to the examination of this process and the Supreme Court's role in it, in the field of freedom of expression, that the second part of this study addresses itself. The next chapter introduces the concept of the "public sphere" according to which the legal material will be examined.

CHAPTER IV

FREEDOM OF EXPRESSION AND THE PUBLIC SPHERE

1. The "Universe of Discourse" in A.V. Dicey and Zechariah Chafee

"A community is a universe of discourse in which the members participate by speaking and listening, writing and reading... the society in a continuous enterprise of inquiry and discussion gropes its way... the individual even if not free from pressures of his own circumstances can feel 'free' by participating in this enterprise. The First Amendment takes the universe of discourse for granted"[1] wrote in 1947 Chafee the greatest American constitutional author on matters of freedom of expression. For Chafee the "universe of discourse", a public opinion that "grows", is an unquestionable assumption. The process of growth of opinion is strong in the United States and the sole concern of the massive report on "Government and Mass Communications" in which these statements appear is according to its author Chafee to "preserve the essential conditions of healthy public opinion".[2]

Public opinion, which is also the sovereign opinion, grows in an organic way and if its conditions are guaranteed "man's ultimate ends, the standards of their behaviour, and their application to concrete issues" will be discovered through human reason, the "best guide we have".[3] One of the essential conditions for the "two-way process" in which public opinion grows and, by being communicated to government, becomes the sovereign opinion, is the rigorous enforcement by the courts of the demands of the First Amendment. According to Justice Black "[t]hat Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public".[4]

Yet, writing some 40 years earlier, Prof. A.V. Dicey had taken a less sanguine and, arguably, more realistic stance toward public opinion in his lectures on "Law and Public Opinion in England".[5]

For Dicey, laws embody the "legislative opinion" as distinct from the public opinion. The former is created by "statesmen of special insight" and popular leaders[6] and has to fight "the dullness and stupidity of Englishmen",[7] particularly those without the vote, to become accepted. The legislative opinion, the "reigning or predominant opinion", which gets translated into legislation incorporates the interests of the dominant class.[8] To be sure, Dicey presents those interests as the common or public interest and understands that counter-claims and interests must equally try to be presented as universal ones: when people resist beneficial laws that hurt their "sinister" interests, they "unconsciously delude" themselves and claim that the changes are harmful to the interests of the whole society.[9]

By being translated into law, the dominant opinion conditions the general, public opinion. Once the truth of an idea has been accepted by men of special insight the public usually "accepts it on authority". Indeed the true importance of laws "lies less in their direct result than in their effect upon the sentiment and convictions of the public".[10] Thus, the Poor Laws impressed upon the poor "pride in independence" and popularized the faith that "in the battle of life men must rely for success, not upon the aid of the state, but upon self-help", by linking "pauperism with disgrace".[11]

Dicey studies the historical record of 19th century England and America, and concludes, contrary to the earlier fears expressed by J.S. Mill and Toqueville about the "tyranny of the majority", that democracy has shown a singular tolerance and admiration for social inequalities; indeed "privileges have been better safeguarded through democracy".[12] For the politically conservative Dicey, therefore, the future danger

lies not in the extension of democracy, but in the disintegration of the belief in laissez-faire and the increasing reliance on state intervention that had been adopted by the dominant-legislative opinion of his time. Socialism, which he saw as the natural extension of Benthamite utilitarianism, was becoming the dominant opinion and would eventually destroy social inequalities, with which Dicey's preferences lay. Incidentally, it should be noted here that Chafee shared Dicey's opinion - although not the strong distaste - about the socialist character of welfare and economic regulation measures. He found it incomprehensible that governments pursuing "socialist" policies were at the same time persecuting, through the various sedition laws of the 20's and 30's, socialist parties and people.

Thus, Chafee, like his friend Meiklejohn, presupposes the existence of a reasoning and **homogeneous** public which, through the institutional supports of a free press and a judicially enforced right to free expression becomes the true sovereign power and dissolves political and social domination into an ongoing decision-making process: through the institutionally guaranteed discursive construction of the will of this homogeneous public, that mediates between society and the state, the power of the latter is put at the service of the common interest. To be sure, Chafee stresses the need for strengthening these institutional guarantees and his passing remark about people "feeling free" as against "being free" somewhat qualifies his analysis. However, his main thrust remains: the public opinion functions and grows, the common interest exists and through free debate the "ultimate ends of life" may be discovered and implemented.

But I would like to argue that this presentation of public opinion and the common interest is one more "naive faith" like others encountered in constitutional theory (see above, ch.II). They cannot be assumed or taken for granted and then witnessed as unfolding in a teleological way.

On the contrary, they are in a continuous state of flux, of conflictual construction and reproduction. According to Dicey, public opinion is created by philosophers and politicians, class interests, the dominant legislative opinion and its constructs, the laws. It was the social coherence of the 19th century "legislative opinion", achieved mainly through its class exclusivity, which created the greatest and noblest liberal fiction: that political and social domination can be dissolved once political power is made to follow public opinion, thus being exercised according to a common interest that exists and can be, in principle, discovered.

But after the shattering of the class exclusivity and ideological coherence of the "dominant-legislative" opinion, around the turn of the century, the fiction could be seen through. Dicey, to his credit, did not fully accept it even when it was the received wisdom. Chafee, in his New Deal, neoliberal enthusiasm, reiterated it as a faith, at a time when his experience with and reaction against the repressive legislation of the 20's and the late 40's should have told him otherwise.

2.1. The Concept of the "Public Sphere"

The concept of the "public sphere" is central in Habermas' work[13] and is related to similar concepts used by Sheldon Wolin[14] and Hannah Arendt.[15] According to Habermas, the public sphere is "a realm of our social life in which something approaching public opinion can be formed... Citizens behave as a public body when they confer in an unrestricted fashion... about matters of general interest".[16] A political public sphere exists when individuals, organized as a body politic according to legal rules of inclusion-exclusion in citizenship and political rights, confer, discuss publicly and supervise matters connected with the activities of the State.[17] Thus, the political

public sphere mediates between the society and the state, it is not a part of the state. In it, the public organizes itself as the bearer of public opinion which state authorities must, in principle, follow and execute.

In this sense, the public sphere is a historically demonstrable social institution which arose in the 18th century in Western Europe and the United States, along with the concept of the public opinion. The emergence of the public sphere is demonstrated by the creation during the 18th century of numerous fora of public discussion like clubs, societies, political newspapers and polemical and critical journals. In the Greek polis, the debate about public affairs took place in a spatially specified forum, the marketplace or agora. But the formation and communication of public opinion, or rather of opinions on public matters in the modern state, requires the existence of a large number of means of communication which replace the classical marketplace. The multiplication of these metaphorical fora of opinion formation and the change in the function of the press indicate an important change in the organisation of political power. "Newspapers changed from mere institutions for the publication of news into bearers and leaders of public opinion - weapons of party politics".[18] Immediately before and after the great revolutions the press became a mediator and intensifier of public discussion and joined the struggle for freedom, public opinion and the principle of the public sphere.

The principle of the public sphere, as distinct from its institutional manifestations, promises the replacement of the older rule of tradition by the rule of reason. All consequential political and practical - in the sense of action-orientated - decisions should be examined in free and public debate and state power should follow the discursively arrived at will of the sovereign citizens. Thus,

the principle of the public sphere presupposes the existence of a reasoning public which, through a dialectical, discursive will formation - a debate free of constraint - criticizes, and through periodic elections supervises and controls state power. This principle is, therefore, a critical one. It subjects "persons or affairs to public reason and makes political decisions subject to appeal before the court of public opinion".[19]

The emergence of the first institutions of the public sphere and the fight for its principle is related to the gradual separation of political power and civil society and the need for mediation between the two realms. Its social basis lay in the creation of an expanding free market economy. Bourgeois private individuals (merchants, professionals etc.) were excluded from the exercise of political power and the political institutions, although they occupied an increasingly important role in the privatised realm of societal transactions. The prerevolutionary bourgeoisie stood in opposition and contrast to the traditional, hierarchized forms of state authority; but at the same time, civil society became increasingly an area of public concern as the "reproduction of life in the wake of the developing market economy had grown beyond the bound of private domestic authority".[20]

The revolutionary documents and constitutions encapsulated the formal victory of the liberal model of the public sphere. They ensured the final separation between state and society and the restriction of public authority to a few central tasks, thus opening up society to the instrumental calculations of private individuals freed from the personal, social and political bonds of feudal authority. At the same time they guaranteed institutionally the mediation of the two separated domains. Freedom of speech and of the press, freedom of assembly and of petition, the right to form and join political parties and the right to vote -

albeit restricted - were the legal-institutional guarantees of the principle of the public sphere and the means through which society could form and communicate its opinions on matters of common interest to the competent state authorities, leading thus ideally to the rationalisation of the state machinery and the transformation of political into rational authority. "The general interest, which was the measure of such a rationality, was then guaranteed... when the activities of private individuals were freed from social compulsion in the marketplace and from political pressure in the public sphere."[21]

The promise of the rationalisation of power through the medium of constraint-free public debate implies the existence of a community of interests among all those entitled to participate in the public sphere, the bearers of public opinion which, by being transmitted to and executed by the public authorities, becomes the sovereign opinion. The principle of the public sphere is universalistic: access to it should be open to all citizens. However, the dissolution of power into a discursive will formation is predicated on the acceptance of certain basic background assumptions by those eligible to participate in the debate. It was argued above,[22] that the American revolutionaries believed that there existed in society a small number of principles which had the character of laws of nature. They were the principles of "trade and commerce" and were universally adhered to because it was "in the interest of the parties to do so" and not because of external compulsion. While Paine and Jefferson accepted that the background assumptions of market society were shared by all citizens and would eventually lead to a fully harmonious society, others like Madison, Tocqueville and J.S. Mill understood that those principles would not be necessarily accepted by the working class and the poorer sections of the population and warned against a levelling extension of democracy, which could lead to the tyranny

of a majority hostile to the social laws of trade and commerce. J.J. Rousseau, the founder of the modern democratic tradition, was equally concerned with the establishment of a polity in which the volonté générale - the will of the community qua community - would be best articulated and would become the sovereign will. Rousseau's understanding of the general will bears similarity to the principle of the public sphere. However, Rousseau predicates his utopian political system on two requirements. First, on the creation of small states like the classical polis, in which all citizens would be able to assemble in the same forum to debate and decide the public affairs avoiding thus the distortions of all systems of representation. His second requirement refers to the social basis of the ideal city-state. The common interest which the general will expresses exists only if property is distributed equally and there are no differences in economic power and privilege, distinctions between rich and poor. "Do you want coherence in the state? Then bring the two extremes as close together as possible; have neither very rich men nor beggars, for those two estates, naturally inseparable, are equally fatal to the common good."[23]

Thus, the principle of the public sphere is based on the existence of an overriding common interest which allows the resolution of secondary, sectional conflicts of interest through civil and free public debate and social compromises. The bourgeoisie, which fought for that principle and created the first institutions and media for debate, initially as oppositional fora and after the victory of the revolutions as the means of transmission of the needs of society, shared the background assumptions of an overriding common economic-class-interest. However, the universalistic character of the principle meant that full participation in debate and decision-making would be

claimed by social classes and strata that did not share the same assumptions. The eruption of the masses in politics around the turn of the 20th century shattered the homogeneity of the hitherto politically active classes. According to Habermas, "the liberal model of the public sphere... cannot be applied to the actual conditions of an industrially advanced mass democracy...[T]he public body expanded beyond the bounds of the bourgeoisie. The public body lost not only its social exclusivity; it lost in addition its coherence created by bourgeois social institutions and a relatively high standard of education. Conflicts hitherto restricted to the private sphere now intrude into the public sphere."[24]

The loss of the social exclusivity and ideological coherence of the participants in the public sphere, through the extension of the vote and of political rights and the creation of working class parties and institutions, led to a radical transformation in its function and institutions. The press became commercialized and gradually abandoned its role as forum of debate on the practical and political questions of the day, as the representative of political commitments and the articulator of norms for political action. Social and economic conflicts erupted into the public sphere and antagonistic private interests and demands were recognized as calling for state intervention and regulation.

> "The public sphere, which must now mediate these demands, becomes a field for the competition of interests, competition which assumes the form of violent conflict. Laws which obviously have come about under 'the pressure of the street' can scarcely still be understood as arising from the consensus of private individuals engaged in public discussion... With the interweaving of the public and private realms, not only do the political authorities assume certain functions in the sphere of commodity exchange and social labour, but conversely social powers now assume political functions. This leads to a kind of 'refeudalization' of the public sphere. Large organizations strive for political compromises with the state and with one another, excluding the public whenever possible. But at the same time they must secure at least a plebiscitary support among the mass of the population through the development of demonstrative publicity (demonstrative Publizität)."[25]

The public sphere as a political institution starts declining. This analysis is shared by two other major political philosophers in the Aristotelian tradition, Arendt and Wolin.[26] The "political" loses gradually its specificity as a dimension of human existence of free debate and participation in practical and communicative action and is replaced by the instrumental logic of the supposedly value-free ends of efficiency and security. The Aristotelian concept of politics which was related to the attainment of the "good life" is reduced to a new politics "which is adapted to technical problems and brackets out practical questions".[27] While the principle of the public sphere remains as a main legitimatory theme in late capitalism, its institutions lose their previous function and a general trend toward the depoliticization of the public sets in.

The principle of the public sphere was therefore mitigated once its social basis and requirements were gradually transformed. While the means and media of communication multiplied, the importance of "publicity", of debating and deciding publicly issues and affairs was reduced. The concept of an organically growing public opinion, as exemplified by Chafee, remained dominant in American constitutional theory on freedom of expression, but Dicey's belief that the opinions of ruling political and social elites help shape public opinion seems to correspond more to the realities of the 20th century. Thus, one is presented with two concepts of public opinion and of politics more generally, one in which its formation and communication is understood as a consensual process the other as a conflictual one involving power relations and asymmetries.

2.2. The "Public Sphere" as a Methodological Hypothesis

The attempt to draw a clear dividing line between freedom and repression, based on theoretical justification of free speech, on the

language of the constitutional text or on the institutional decisions of the courts and the legal doctrines that evolved there, is related to the concept of a consensual public opinion which, if institutionally guaranteed, may discover and elaborate the common good and through rational debate and decision-making dissolve the relations of power and domination. These demands give a sense of continuity and homogeneity to legal interventions in the field of freedom of expression and cannot be dismissed as irrelevant. But on the other hand, the basic conflicts of interest and the antagonistic political claims put forward by individuals and groups, wishing to exercise expressive activities and participate thus in the process of formation of public opinion and the exercise of political power, make the task of extracting singular principles from the legal material, which both describe and prescribe the legal intervention, extremely difficult. According to Professor Griffith "all I can see in the community in which I live is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement... [A] society is endemically in a state of conflict between warring interest groups, having no consensus or unifying principles sufficiently precise to be the basis of a theory of legislation [or adjudication]."[28] Thus, once the assumption of a homogenized, harmonious public that strives discursively to discover the common good or common interest has been qualified, the search for the dividing line between freedom and repression is replaced by an open field of institutional decisions and legal materials which may be examined under the methodological hypothesis of the public sphere, a hypothesis broader and more open and political than that of the public opinion.

In the way used here, the public sphere hypothesis is a tool for the examination of the legal material that has come to be examined

since the 1910s, in the United States, under the general heading of freedom of expression. It is broader than the concept of public opinion, because the latter is formed within the confines of the public sphere. However, the public sphere involves elements like legal and material procedures, institutions and practices which although relevant to the process of opinion formation cannot be reduced to it. Control of and access to the mass media or other fora of public discussion, for example, influence the views and ideas admitted into public debate but are determined by legal and economic factors which are distinct from a theory of free expression. Equally, individuals and groups may be admitted or excluded from the public sphere and from the process of opinion formation on the basis of factors other than their beliefs and ideologies. Thus, while the process of opinion formation on public issues constitutes the core of the public sphere, the hypothesis allows us to examine the conditions of creation, existence and sanctioning of such opinions.

On the other hand, the public sphere hypothesis is an open one. It rejects the claim that public opinion develops in a teleological fashion and realizes the common good as well as the claim advanced by many radicals, that it is the object of continuous manipulation. Instead of being the realm of an evolving freedom or of an all-encompassing repression the public sphere must be seen as an ongoing process (as Chafee does) but a contentious one (as Dicey sees it), in which certain groups and interests are better placed and equipped in the fight for the definition of its parameters and substance. In this antagonistic process, legitimate subjects of discourse and of political rights, objects of discourse, ideologies and beliefs and the means and media of communication are continuously constituted, demarcated, sanctioned and distributed. Drawing from the legal material related to expressive

activities, the public sphere hypothesis may be formulated as follows: The public sphere is constituted by the combination of a number of elements: the formal conditions of participation in it; the issues that are raised and the alternative solutions admitted as legitimate and open to debate and decision (and negatively the "unspeakable" issues and alternatives); the individuals and groups admitted or excluded from it; the spatial and temporal context of legitimate discourse (these aspects are usually examined under the heading of the "public forum"); finally the distribution of control and access to the means of communication necessary for participation in the public sphere.

Each of these constitutive elements involves competing claims and interests of a political character which strive to obtain admission and legitimacy and/or to negate them to others. In each society and historical period these contradictory claims are resolved - permanently or temporarily - by authorized institutions entitled to sanction them. Legal institutions are major fora for the resolution of such disputes. To the extent, therefore, that certain of these claims end up and are decided by courts, the latter play a significant role in the process of construction of the public sphere.

Thus, if one rejects the naturalistic concepts of freedom as something intrinsic in social arrangements or of fundamental and inalienable rights inherent in human nature, the legal right to free expression may be defined as those political claims related to expressive activity (and thus to the construction of the public sphere) that have been effectively upheld by the designated state institutions. As Professor Griffith put it, "as an individual (or a group I may add) I make claims on the authorities who control the society in which I live. If I am strong enough my claim may be recognized within certain limits. It may even be given legal status".[29] It is through the granting/denying of legal status to such claims related to expressive

activities that courts participate in the construction of the public sphere.

According to an American author the underlying philosophy of democratic America is encapsulated in the popular saying "it's a free country, isn't it? - so I can darn well say what I please".[30] If the equation is accepted the question then becomes "who" can say "what" and "when", and "what" one pleases to say at a particular time and place and is free to say it. Thus, the public sphere hypothesis is used as a methodological tool for the examination of the laws and judicial decisions that deal with expressive activities, their context and conditions of existence. Legal decisions with their own determinations and procedural and substantive guarantees participate in the constitution, legitimation and sanctioning of the discursive practices of the society at large. Their intervention is historically specific and often politically contentious. The attempt to present them as following some central unifying principle is related to the principle of the public sphere, as described above. However, as the theorists of the public sphere have argued, this principle was transformed into an ideal once its social basis radically changed. Legal doctrines, justificatory theories, the "clear" meaning of the constitutional text give to the legal intervention its consistent character; but at the same time, the conflicting nature of the claims that brings about this intervention means that the latter continuously introduces differentiations and distinctions among subjects, objects and contexts of legitimate discourse. The public sphere hypothesis, related to the case-study at the end of each chapter, is an attempt to study the dialectic between the continuity and coherence in legal discourse and the distinctions constituted by its interventions.

Although such questions are not decided, solely or even mainly, in court chambers, the examination of the cases that reached the courts

and the legal doctrines that emerged there shows how the judiciary under guidance from the Supreme Court answered them when asked. However, the limited role of jurisprudence, precedent or legal doctrine in the determination of expression claims must be emphasized against the tendency of many constitutional authors, whose writings imply that freedom depends solely on the way that Supreme Court jurisprudence develops. If, for example, a demonstration is stopped by a local police officer, the reversal of that decision several months or even years later by a court does not help much the original protestors. On the other hand, the procedural requirements that restrict the judicial process to the facts of the case at bar, allow the police authority of a different state or locality at a later date to ban a similar demonstration by using a different statute or regulation or by asserting that the circumstances of the new case are different from those to which the courts addressed themselves. Legal procedures and formalities, whose protective role must be emphasized (see below Chapter V) contribute ironically to the limited import of the judicial enterprise. As Otto Kirchheimer has forcefully argued,[31] the amount of freedom does not depend on the formal existence of legal remedies or even of clear liberal legal precedents. The interstitial character of criminal justice as well as its focussing on the factual details of a particular past event reduce the obligatoriness of legal precedent and doctrine for enforcement officers.

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me these are false hopes" wrote Judge Learned Hand[32] in 1944. For Hand freedom lies "in the hearts of men and women". One may disagree with the second part of Hand's statement. Yet his admonition about "false hopes" being put on the courts, coming from

the judge who sent to long imprisonment the entire national leadership of the Communist Party,[33] has a curious truth about it. Freedom, under any definition of it, does not indeed depend mainly on courts and judges. But when expression claims take on legal form the courts have an important role to play: in sanctioning them, courts participate in the construction of the public sphere, and in that case the "amount" of freedom, and freedom itself, becomes a function - along with many other factors - of their intervention.

3. The Supreme Court, Legal Doctrines and the Construction of the Public Sphere

Thus, the cases involving expression claims and the doctrines developed and applied by the Supreme Court may be examined, as the specific judicial participation, in the process of constitution and sanctioning of the public sphere. Such approach would have several implications.

(a) It denies the essentialist approaches that postulate freedom either as the spirit of the law supervised by the Supreme Court, or as the evolving principle of the public realm which the law is made to serve. Laws, judicial decisions and the "universe of discourse" must be examined in their historical specificity, and their "reality" is a contradictory one. The official-constitutional discourse, determined by the "dominant opinion" which it helps articulate, determines in its own part the public sphere. In this sense, the constitution and freedom of expression is no more than "what exists"[34] in each historical conjuncture.

(b) It draws attention to the fact that there does not exist any a priori distinction between some parts of the state (the legislature or the executive as the case may be) necessarily or habitually inclined

toward restricting expression, while the judiciary stands in its defence. Most constitutional literature overflows with the assumption (even in its most critical and liberal parts) that, in the perennial freedom/coercion divide, the courts are the protectors of freedom and the individual against the all-intrusive claims of power. To be sure, the function, procedural conditions and specific character of judicial action (interstitial and externally initiated, oriented toward past events) differentiate it from the legislative and executive ones. However, by construing criminal laws and the constitution, by interpreting the facts of cases before them and giving them their official signification against possible alternative ones, courts participate both in the creation of sanctioned codes of meaning[35] and in the shaping of the future. In that, the outcome of their intervention does not differ much from that of other state institutions.

(c) The Supreme Court, in particular, as the head of the judicial machinery is neither a tool of suppression (as some radicals and "Marxists" have claimed[36]) nor the paragon of freedom. It is a political actor, in its own right, within a complex institutional structure; its decisions in First Amendment cases may be seen as political interventions which, under specific procedural requirements, translate historical events in the terms of legal discourse and thus uphold and make legally enforceable the claims and interests of one of the parties in situations of social and political conflict. One could say that in First Amendment cases, a specific discourse, that of laws, legal decisions and doctrines, which among all social discourses is privileged with the backing of the repressive apparatus of the state, seizes and attempts to construct, regularize and sanction the social universe of discourse.

(d) It rejects the notion of the legal doctrine as a uniform formula that gives, or can in principle give, simple answers to complex

socio-political situations. However quickly and with whatever conviction one utters, for example, the words "clear and present danger" no unequivocal answer to a new and unique situation arises. To be sure, legal doctrines give the Supreme Court jurisprudence an element of continuity. However, instead of being mutually exclusive and applicable in all kinds of expression cases, legal doctrines may be seen as complementing each other, as each of them emphasizes and deals with different aspects of expression claims and, thus, as providing the courts with a panoply of approaches. Additionally, as both the academic controversy over the meaning of the danger test (below Ch.V) and the varying and even conflicting results that accompany its use in case law clearly show, the outcome of the particular case (conviction or acquittal) is as important as the verbal or conceptual formulation utilized to reach it.

The case-study in the second part of the thesis is, therefore, dealt with in two ways. Legal discourse is first examined as regards its internal dynamic and development according to theoretical justifications and legal doctrines; then, the effects of legal intervention on the universe of social discourse are addressed to at the end of each chapter.

PART II

AN EXAMINATION OF THE AMERICAN JURISPRUDENCE ON FREEDOM OF EXPRESSION: LAW AND THE CONSTRUCTION OF THE "PUBLIC SPHERE"

CHAPTER V

ON LEGAL DOCTRINE IN GENERAL

All theories on the justification of freedom of expression can be seen as answering the question: why should communicative activity, i.e. activity involving as one or its main aspect an intent on the part of its actor to communicate with other people, be afforded a greater legal protection than other human conduct? But wnen one moves from abstract justificatory theories to the concrete legal material included in legislative acts, administrative and judicial decisions, the question changes to one about the limits of such protection. Drawing the line between protected and prohibited expression depends, to be sure, on the specific justificatory theory that each constitutional author or judge holds, as well as on the respective position on the role of the judicial process and the Supreme Court. Those writers who subscribe to a clearly defined theory of expression are often prone to draw the protected/prohibited line accordingly and then criticize the legal material. Equally those preoccupied with judicial review and the function of the Supreme Court draw the line in accordance with their attitudes on judicial activism or restraint. As a result, explicit or implicit theoretical differences enter the discussion of the various legal doctrines and lead to opposing attitudes toward particular decisions of the Supreme Court and lines of precedent (legal doctrines) extracted from such decisions.

The profoundly conflicting views of constitutional authors on the most famous legal doctrine on freedom of expression, the "clear and present danger" test, may be seen as an indicative example. The danger test (for an analysis see below, Chapter VI) has been so excessively praised by some authors that "one would think that it had taken its

place alongside the writ of habeas corpus.."[1] Thus, according to Professor Chafee one of the most prolific writers in the area of freedom of expression,"Holmes' inestimable service to free speech consisted in his getting a unanimous Supreme Court to accept his test of guilt"[2] which placed a great area of discussion beyond the reach of government.

Yet, for others the test is either too strong: "The clear and present danger requirement... is improper not... because it provides a subjective and an inadequate safeguard against the regulation of speech, but rather because it erects a barrier to legislative rule where none exists";[3] or too weak: The danger test "stands on the record of the Court as a peculiarly inept and unsuccessful attempt to formulate an exception to the principle of freedom of speech"[4] and "with rare exceptions the doctrine has been used to deny free speech";[5] or simply useless because indeterminate and vague: to use the danger test as the touchstone of constitutional adjudication is "to take a felicitous phrase out of the context where it arose and for which it was adapted".[6] And for Kalven its alleged repudiation by the Supreme Court was a great victory for intellectual clarity.[7]

But more recent writers find that the test has still some teeth in it and is still used by the Supreme Court. Thus, Professor Wellington writing in 1979 concludes that "if there is no time for dissuasion through talk, a clear and present danger test... is appropriate"[8] and Professor Ely that in certain cases "courts... should employ the strictest available sort of specific harm test, one that seriously insists on a clear and present danger of a serious evil".[9] Both believe that the resurrection of the test in a 1969 sedition case[10] was a great advance in the judicial protection of expression;[11] but Professor Linde registers a "dissent" as he puts it to the "Brandenburg concerto" and concludes that the danger test "is no help with the constitutionality

of laws directed against words."[12]

Thus, the danger test has been praised and derided, proclaimed extinct to rise again in order to be praised and condemned ad infinitum. Although this particular test has provoked most controversy, the same pattern of criticism and praise appears in the treatment of all other judicial doctrines, that have been used by the Supreme Court as line-drawing tools in the adjudication of cases involving free expression claims.

A review of the academic literature on the various legal doctrines reveals similar characteristics to those encountered above in the analysis of the constitutional clauses. The Justices' opinions and intentions are substituted for those of the Framers and the search is on, again, for the meaning of this or that test. Thus Professor Cushman in one of the most well received reviews of the danger test distinguishes three meanings: the meaning that it carried for its originator Justice Holmes, a different one held by Holmes' fellow Justices and a third one attributed to later Justices.[13] The same ambiguities and controversies are found in the reviews of the other main tests: There are "as many 'balancing' approaches as Justices"[15] concludes one author, while the absolute test is found to have different meanings even for its two main proponents Meiklejohn and Justice H. Black.[16]

Thus, there is no generally agreed upon opinion on the meaning, usefulness or even the existence of any one doctrine, to be found in the literature. One writer maintains that no judicial rule on free expression has succeeded in surviving for more than a decade,[17] and Thomas Emerson introduces his attempt to formulate a general doctrine on freedom of expression by stressing that "no one concerned with freedom of expression in the United States today can fail to be alarmed by the unsatisfactory state of the First Amendment doctrine".[18] Emerson believes that this lack of a coherent legal doctrine, the "sharp conflict"

in the courts and the legal profession and the resulting serious confusion of the public "threaten the First Amendment with distintegration".[19] To help prevent this "disintegration" (whatever that means) Emerson undertakes the onerous task of building a legal doctrine, general enough, in order to account for the function of expression in a democratic society and specific enough to provide courts with the guidelines necessary to perform their judicial function, in a uniform way, in all possible cases involving free expression claims.[20] Emerson's fears can be explained by his liberal ideology: according to his doctrine (almost all expression should be protected - only action is punishable) the bulk of constitutional adjudication is found dangerously conservative. But his concern to build a general theory, a "system" of freedom of expression, as he calls it, is widely shared by the American academic community. Faced with an ever increasing body of laws and decisions dealing with expression issues, the search of constitutional authors for a small number of principles and standards, either theoretically formulated or extracted from case law and precedents, which would guarantee and certify the coherence of this particular area of law, has been going on for 60-odd years.[21]

To the extent that this concern of constitutional authors resembles similar trends (described and criticized above)[22] inhering in general theories of constitutionalism, analogous criticisms apply also to these "applied", so to speak, efforts of "system building". At this point, however, I would like to refer to a different aspect of those theoretical and methodological attitudes in constitutional theory, which relates to the question of legal doctrine. It may be called, following the interesting analysis of Professor Campbell,[23] the subordination of legal and constitutional theory (or science as it has been recently named) to law-as-art, or the law as understood by judges and practising lawyers.

Practising lawyers and judges deal with the legal system as a meaningful "scheme of interpretation of reality applicable to fact situations". Legal language and concepts are such an artificial scheme of construction and interpretation, and legal officials participate in their creation and administration. But at the same time, they treat their constructs as given and real, as something that exists and develops on its own, as it were. Thus, a profound difference exists between legal thought and the modes of thought and analysis employed in other social sciences stemming from the judge's obligation to "make a decision, to state reasons for it, to pay attention to the internal coherence of the law and to protect his decision and reasoning from attack".[24] M. Cain similarly argues that one of the prime characteristics of legal ideology is the tension facing judges and lawyers who themselves create legal categories and concepts but treat them at the same time as having an independent life of their own within the total object of law.[25]

Thus, for the judge, the ambiguity between a notion of law, as something he construes and creates which must, in principle, be capable to translate all social practices in its own technical language, and law as a given and real entity deserving reverence, is a permanent characteristic or, even, a professional hazard. However, for the common-law judge, in particular, the obligation "to make a decision" once a case has been properly brought before him is the paramount one and necessarily takes "priority over fidelity to any particular rules of proof, deduction or interpretation".[26] The sovereign prerogative of choice often defies the ideological demand to present the Law as a coherent body of rules or principles. At this point, the legal theorist steps in and undertakes to normalize the legal material. One could argue that he often sees his role as that of a judge or advocate in an ideal, super-Supreme Court, which must iron out the inefficient or

inconsistent rulings of the real-lower courts and make good the claim that the prescriptions of law are the sole descriptions of the real world and that they always follow some common evolving standards. However, in accepting "the legitimacy as prius, in seeking for the validity of legal norms, jurisprudence defines out of its remit some important questions... Law is accepted as a cohesive force... an impartial resolver of disputes."[27]

In a similar fashion, the part of constitutional theory that deals with freedom of expression tries to present judicial intervention as a unified, or in principle unifiable whole. An interesting illustration of this point occurred in an exchange between a constitutional author and a Supreme Court Justice in the mid-60's. Harry Kelven, commenting on the Supreme Court Times v. Sullivan[28] decision, suggested that in it the Court repudiated earlier legal doctrines (particularly the danger and balancing tests) and fully accepted the Meiklejohn doctrine of absolute protection of freedom of expression, as applicable across the board in all expression cases.[29] But Justice Brennan, who was the author of the decision and was himself sympathetic to the Meiklejohn thesis,[30] retorted that Kalven's reading was unrealistic and misrepresented the judicial process. Radical shifts, as that suggested by Kalven, rarely occur in judicial practice, said the Justice, and anyway the Court was utilizing at least four different doctrines in dealing with expression cases.[31]

The critique of the way in which constitutional theory has generally treated legal doctrines, constructed and utilized by the Supreme Court in its involvement with expression cases, does not intend to underplay the relevance or even the importance of legal doctrine and precedent in constitutional adjudication. To be sure, legal realists in their valid attempt to reject the exaggerated assumptions of formal jurisprudence have proposed the "predictive" or "bad-man" theory of law, according to which, law is merely a prediction of what a Court will decide in a particular case.[32] In its most extreme

form, legal rules and precedents are treated as entirely irrelevant to the operation of the judicial function. Judges decide the issue at stake on the basis of intuitions or "hunches" and only afterwards dress their decisions in legal language and refer them to some authority, easily discovered in the mass of precedents. Although this approach might explain a few sudden and dramatic reversals of a previous line of precedents, such changes are rather rare. The need to present the Law as a unified whole, that contains within itself the conditions of its growth and change, would be completely undermined by such an unprincipled approach to adjudication. Moreover the reverent attitudes of judges toward the construct-and-given law cannot be explained away as a mere "hypocrisy" of people who know that "in reality" their work fundamentally differs from its official presentation and understanding. On the other hand, there is not, nor can there be easily discovered, a single or a small number of principles and standards that can dispose in a facile and homogenous way, the various situations involving expression claims that reach the courts. It is, therefore, suggested that legal doctrines must be seen as <u>mediating</u> between the <u>need</u> for uniform and principled adjudication and the <u>difficulty</u> in subjecting social and political situations extracted from a changing and conflictual reality to the vagaries of simple, sovereign principles. As such, the legal doctrines on freedom of expression will be examined in their specificity as indicators of those aspects of an expression claim that are treated by the courts and the Supreme Court as the relevant or decisive ones, in determining the outcome of concrete cases. But as the dialectical-adversary character of the common law judicial system and the numerous dissenting opinions in Supreme Court decisions clearly show, neither the approach to be adopted nor its linguistic formulation (clear and <u>present</u> danger or clear and <u>probable</u> danger etc.), nor the outcome of any case are solely predetermined by precedent, legal

doctrine, the constitutional command or some strict rules of legal logic "the ultimate in human rationality". All these elements are themselves contested claims and as such they become an intricate part of the main substantive claim in the case at hand. It is this characteristic that gives the Western liberal system of adjudication its main protective role as against the systems of fascist states or the states of "existing socialism". The moulding of technical, procedural and substantive elements makes it possible that "the forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless".[33] Contrary to the assertions of some orthodox Marxists and the radical New Left,[34] political justice and the involvement of courts in political cases is not a mere sham or facade: its importance lies in the fact that legal doctrines and procedural formalities, with all their ambiguities, are there, and that the courts are asked to participate in a process that has serious political repercussions.

These suggestions and their relevance to the field of freedom of expression will be further elaborated after the examination of the first cases involving expression claims that reached the Supreme Court and the doctrines that emerged in its case law.

CHAPTER VI

THE FIRST PERIOD OF JUDICIAL INTERVENTION IN FREEDOM OF EXPRESSION CASES: WORLD WAR I AND AFTER

The Supreme Court dealt for the first time with expression cases, in a systematic way, in 1919. The development of jurisprudence and legal doctrine is, therefore, relatively recent. What is, however, startling is the expansion and reach of cases dealing with First Amendment issues in the intervening 60-odd years. Most constitutional authors agree that the starting point of this expansion, which has been welcomed as libertarian both in intention and in result, was Justice Holmes' opinion in Schenck v. U.S. in which he enunciated the "clear and present danger" test, which is still today "object of much liberal nostalgia".[1]

It would be helpful before examining the first cases and doctrines, to place them within the historical background in which they arose, an exercise necessary in order to understand the import and significance of the legal material in its specific historical setting.

1. The Historical Background

In the aftermath of the 1893-96 Depression various trends and tendencies in the American labour movement started to converge toward a common political identity of a populist and socialist inspiration. The American Federation of Labour (A.F.L.) adopted, in its 1893 convention, a programme closely resembling that of the British Independent Labour Party including in "plank ten" a policy of "collectivization of industry" in similar lines to Clause 4 of the British Labour Party's 1918 Constitution. The American Railroad Union under the socialist leader Eugene Debs led the Pullman strike in 1894, "one of the three or four most climactic labor battles in American history".[2] And the

Farmers Alliance which in 1892 became the People's Party united black and white tenants in the South in an unprecedented surge of agrarian radicalism. The purported unification of the trade union movement and the socialist political tendencies around the People's Party in the lines of the British I.L.P. did not materialize. However, a new wave of industrial mass strikes erupted between 1909 and 1913; the Marxist inspired Socialist Party under Debs became the third largest national political force replacing the Populists; and the Industrial Workers of the World (the famous Wobblies), a union that managed to organize migrant workers and farmers and which was widely accused for anarchistic tendencies and for the sabotage of crops and agricultural machinery in California, grew in strength. The passage to corporative capitalism, advocated by Henry Ford and Frederick Taylor[3] in the early 20th century, was facing serious resistance. "Arising from the deprived condition of large numbers of people who were left behind in the rushing advance of industrial society or in the agrarian backwashes was a challenge to free enterprise and in part to democracy".[4]

The outbreak of the War and later the victory of the Bolsheviks in Russia gave federal and state governments the opportunity to mount a concerted attack against the labour and socialist movements. "The government encouraged people to identify Germany and Communist Russia as common enemies. It also identified the American socialist party with these enemies".[5] The Federal Espionage Act was passed in a hurry and was implemented with ferocity by the courts. The Postmaster-General Burleson declared that he would exclude, under the Act, from the mails all written material which claimed "that this Government got in the war wrong, that it is in it for the wrong purposes, or anything that will impugn the motives of the Government for going into the war. They cannot say that this Government is the tool of Wall Street or the munition-makers. That kind of thing makes for insubordination in the

Army and Navy and breeds a spirit of disloyalty through the country".[6]

The end of the War did not result in a relaxation of repressive measures. The "Red Scare"[7], intensified by the consolidation of Soviet power and the watershed steel strike[8] in 1919, set in. Raids into private houses and union meetings led to the arrest of thousands. "The accused were held without bail, denied lawyers, and often beaten after being chained and marched through the streets".[9] These raids were organized and led by the Attorney-General Palmer who set himself the task to halt "the continual spread of the seeds of evil thought, the continual inoculation of poison virus of social sedition, poisonous... to the very heart and soul of all that by our standards is integrity or citizenship or personsl character".[10] To accomplish it, he set up a special "antiradical division" in the Department of Justice headed by J. Edgar Hoover.

The New York Assembly expelled 5 duly elected socialist members stating that the Socialist Party is "an antinational party whose allegiance is given to the Internationale and not the United States",[11] and its leader Debs fought the 1921 presidential election from the prison but still polled the highest return that any socialist has managed in American history. The same state had passed in 1902, following the assassination of President McKinley, the New York Criminal Anarchy Act[12] which outlawed the advocacy of anarchy but was never used.[13] But, between 1917 and 1921, two-thirds of the states adopted similar criminal anarchy and criminal syndicalism laws which were used not against "19th century bearded bomb throwers" but left wing socialists who is no way adhered to anarchistic methods (see below § 5).

The novel character of these laws and the resulting prosecutions cannot be overemphasized. Today, laws against subversives and political dissenters, mental hospitals and archipelaga have become quite common phenomena. Ruling elites, both in the East and the West, convinced about the righteousness of their respective socio-political set-ups, tend to

view radical dissent as common crime. The alternatives have been "tried", allegedly, and they are "exhausted" and a feeling of universal insecurity has set in.[14]

This was not the case, however, during the 19th century. The political dissenter was assumed to be sincere, and an effort was made "to harmonize the need to defend the established order with the recognition of its historical relativity and the political offender's ill-guided but well-intentioned claims were respected".[15] The separation between legality and morality meant that, to a certain degree, the duty to accept the established order was not perceived as the paramount moral duty. In the U.S. the Alien and Sedition Act lapsed in 1801 and the next sedition laws were enacted in the 1910's. In the latter part of the 19th century the main preoccupation in the area of expression was with obscenity and pornography.[16] "Real or imagined threats to national existence, of the kind that were to follow world war in the 20th century, were lacking".[17] This belief in historical and political relativity is still encountered in Justice Holmes' aphorism that proletarian dictatorship ideas should be given a fair chance and be enforced if the majority accepted them,[18] although his decisions did not always match the rhetoric.

However, the entry of the masses in mainstream political life, and the increasing strength of trade union and socialist activities around the turn of the century, completely changed the scene. The "threat to national existence" identified with free enterprise became the paramount concern of ruling elites and the panoply of the law and the repressive apparatus of the state was fully mobilized to meet it. The Espionage Act and the anarcho-syndicalism laws were the first signs of the new era. It was in cases arising out of the implementation of those laws that the first judicial involvement in expression cases took place.

2. The Espionage Act (1917)

The Espionage Act of 1917, as amended in 1918, was the major federal legislative attempt aimed at curbing pacifist, pro-German, anti-war and socialist ideas during World War I. The Act,[19] the first sedition law since the 1799 Alien and Sedition Laws, incorporated a wide-ranging variety of anti-subversion measures, but it was the third section of Title I of the Act that was mainly used in order to punish undesirable political beliefs and communications. It introduced three new classes of criminal offences:

> "Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies,
>
> and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States,
>
> or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States,
>
> shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."20

Section 4 of the same Title punishes conspiracies to violate Section 3, and Title XII provided:

> "Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind in violation of any of the provisions of this Act is hereby declared to be non-mailable matter and shall not be... delivered from any post office."21

This formidable armoury at the disposal of local prosecuting officers, trial judges and juries was not considered sufficient by Attorney-General Gregory. He was worried by the "narrow" construction given by some District Courts to the term "obstruct" in clause [3] which,

allegedly, removed "most of the teeth we tried to put in".[22] He also thought that individual casual anti-war utterances were not satisfactorily covered by the original version of the Espionage Act. Thus he proposed that "attempts" to obstruct the recruiting service should become punishable alongside actual obstruction, as well as any effort to hamper the flotation of war loans.

The challenge was taken up by the Senate Committee on the Judiciary promptly, and on May 16, 1918 the amendment was passed inserting "attempts to obstruct" in the third clause and adding nine new offences.

> [4] saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice;
>
> [5] uttering, printing, writing or publishing any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States;
>
> [6] or the Constitution;
>
> [7] or the flag;
>
> [8] or the uniform of the Army or Navy;
>
> [9] or any language intended to incite resistance to the United States or promote the cause of its enemies;
>
> [10] urging any curtailment of production of any things necessary to the prosecution of the war with intent to hinder its prosecution;
>
> [11] advocating, teaching, defending, or suggesting the doing of any of these acts; and
>
> [12] words or acts supporting or favoring the cause of any country at war with us, or opposing the cause of the United States therein. 23

The 1918 Amendment came too late in the War and it became known as the "Sedition Act". Only a few major cases were brought under it. It was repealed in 1921.

Attorney-General Gregory, a key figure in the passing of the Act and its Amendment, was not slow to launch and supervise personally a wide range of prosecutions under it.[24] Most of the prosecutions involved expression of opinions critical to America's entry and conduct of the War. It is noticeable, however, from the Text of Title I of the original Act, above, under which most prosecutions were launched, that with the exception of its first clause, the Act was directed against certain consequences, or "substantive evils" as Holmes put it (insubordination, mutiny or obstruction of recruitment) and not against any specified categories of expression. Even its first clause proscribes "false reports and statements", a term which can be easily construed as referring to statements of fact (for example false reporting of war operations) and not to political doctrines, pacifist, socialist or whatever else. It was, therefore, through the specific judicial construction of the key terms of the Act, that certain categories of expression came under its measures and the parameters for the creation and development of the legal doctrine of freedom of expression were established.

It would be instructive, accordingly, to examine the legal problems posed by those key terms and the considerable ingenuity of the various federal courts in construing them.

3. The Espionage Act and the Federal Judiciary

3.1. The Problem Posed

The offences created by Title I of the Espionage Act included two common elements.

(a). An objective element (actus reus) of the offence. It postulates certain undesirable results (interference, insubordination, mutiny or refusal of duty; obstruction of the recruiting and enlistment services) and severely punishes whoever brings about through

intentional conduct such effects. These prohibited effects may come about through a variety of means. For example enlistment may be obstructed by destroying draft cards sent out to conscripts or by preventing a person called up for enlistment from joining the services. In both cases, however, according to ordinary notions of criminal liability conviction can be secured if a causal relation is established between the conduct of the offender and the proscribed consequences.

(b) A subjective element (mens rea) or intent.

Intent (or wilful intent) denotes a certain mental and psychological attitude on the part of the actor: he should know what he is doing; he acts voluntarily, i.e. he wishes to carry out the criminal conduct; in cases where the criminal offence prescribes certain specified consequences he must desire to bring them about or expect them to occur.

The wrongdoer's intent defined as knowledge and expectation of the criminal consequences (subjective element), plus the employment of adequate means which may effectively bring about the proscribed effects (objective element),are, therefore, the decisive elements of Section 3 offences. If the consequences have come about as a result of the defendant's conduct and intent has been found, then guilt is proven. But when such consequences have not actually occurred or cannot be proven to be a direct result of the conduct, then the construction of "intent", of the requirement of causal link (or proximate causation) between conduct and consequences and of their relationship becomes the crucial factor in determining guilt. These problems are usually treated in the theory of criminal attempts.

If, however, the conduct is solely oral or written communications, in which case the proscribed results come about through the activities of a third person who is persuaded to act by means of such communications, the already difficult problems involved in the theory of criminal attempts and other inchoate crimes become even more daunting.

According to an early Espionage Act case:

> "Words are not only the keys of persuasion, but the triggers of action, and those who have no purport but to counsel violation of law cannot by any latitude of interpretation be a part of that public opinion which is the finest source of government in a democratic state."25

Thus, the problem was posed in the following terms: Words may be "triggers of criminal action" and the punishable means of violation of the Espionage Act. The line drawing between permitted expression and criminal offence depended heavily upon the construction of such formidable legal subtleties as "intent" and "proximate causation".

3.2. The Construction of the Espionage Act by the Lower Federal Courts

(a) Intent

> "Intent in doing an act, speaking words or writing them... is made up, among other things, of what a person thinks and desires and wishes to accomplish or to bring about by means of the doing of the act, or the speaking of the words, or the writing of them." 26

Under this, mainstream, definition of intent, the actual consciousness of the defendant seems to be an independent element in determining guilt. It may well be that somebody did not desire or wish the possible, probable or even direct consequences which, arguably, emanated from the conduct. Intent, therefore, cannot be simply implied from the effects or tendency of the conduct, but calls for some independent corroboratory evidence.

Some of the district court judges asked the jury in their instructions to examine the element of intent independently from the natural, possible or probable consequences of the utterances of the defendants. Thus, Judge Wolverton in U.S. v. Ramp:

> "Upon the question of intent you are instructed that the law presumes that every person intends the natural consequences of his act knowingly done; and in a case like the present case, in which a specific intent accompanying the act is a necessary element of the offence charged, the presumption is not conclusive, but is probatory in character. It is to be considered by you in connection with all the evidence given in the case, considering all of the circumstances... including the kind of person who made the declaration, the person or persons who were present and all the circumstances attending it, to the end that you may judge the real intent with which these statements were made." 27

In a case brought against the socialist editor of the journal "Masses" Max Eastman, for an article he had written expressing admiration for the courage of those who had resisted conscription on moral grounds, Judge Augustus Hand placed great emphasis on the proper construction of the element of wilful intent. He insisted that the jury should be satisfied that the purpose of the statements was specifically to obstruct the recruitment services and obstruct the war effort; in the absence of such a clear determination Eastman would be convicted for the expression of political opinions which, although contrary to the war policy, were perfectly legitimate:

> "Every citizen has a right, without intent to obstruct the recruiting or enlistment service, to think, feel, and express disapproval or abhorrence of any law or policy or proposed law or policy, including the Declaration of War, the Conscription Act, and the so-called sedition clauses of the Espionage Act;... The word 'wilful' denotes the will or desire on the part of the doer of an act that it shall have a certain effect or effects - in this case, the effect of obstructing the recruiting or enlistment service... It excludes carelessness or indifference to prohibited or illegal result. It excludes unconsciousness of the possibility or likelihood of prohibited or illegal results. It excludes inattention... If it was the conscious purpose of the defendants to state truth as they say it; to do this clearly and persuasively in order to lead others to see things in the same way, with the object to bring about modification, reconstruction or reshaping of national policy in

> accordance with what they believed right and true, and obstruction of the recruiting and enlistment service was not their object, the jury cannot find them guilty." 28

Judge Hand's emphasis on the proof of specific intent was, therefore, the means for drawing a distinction between those statements which directly urged the obstruction of the war effort and those honest dissident opinions which attempted to influence public opinion and thus change the government's policy. Following these instructions the jury was unable to reach a verdict, with eight jurors voting for acquittal and the case against Eastman was not pursued further. A similar construction of the Espionage Act was proposed by Judge Learned Hand in his Masses opinion (see the next part).

However, under the dominant construction of the Act "a man is presumed to intend the reasonable and natural consequences of his acts, and... he cannot say he did not intend them".[29] Statements to this effect can be found in many of the judges' instructions to Espionage Act juries. Thus, Judge Elliott in U.S. v. Wolff:

> "The color of the act determines the complexion of the intent. The intent to injure is presumed when the unlawful act, which results in the thing prohibited by the terms of this statute, is proved to have been knowingly committed. If, therefore, you find... that the language used... had the natural and necessary tendency to do the things prohibited in this Section 3... then you have found the intent as the Court has attempted to define it to you." 30

Judge Buffington in U.S. v. Krafft:

> "...[A] man who undertakes to lead his hearers to adopt his spoken views must, in reason, be held to have intended that his words should have, if followed, the effect in action which his counsel in words advised... A man who has thus spoken with deliberation must be held to have intended the natural and probable consequences of his words." 31

Judge Dayton in U.S. v. Kirchner:

> "The law presumes that a man intends that which he does, and it is from statements made and the acts done that his intent is to be determined. It is not material that his declarations may not have accomplished the purpose designed - may not have actually interfered with the operation and success of the military and naval forces of the United States..." 32

In the line of cases decided under this construction of intent, the important element of the theory of criminal attempts, that the unsuccessful effort must come close to success, was not emphasized. The intent of the defendants to bring about the prohibited consequences became the main test of guilt. But as it may be argued that all dissident opinions could persuade someone in the future to obstruct or resist the war effort and thus bring about the harmful effects, the distinction between urging the violation of the law and criticizing the war policy was somehow blurred. According to Chafee "[i]ntention thus became the crucial test of guilt in any prosecution of opposition to the government's war policies, and the requirement of intention became a mere form since it could be inferred from the existence of the indirect injurious effect... The District Court test left [the jurors] nothing but speculation upon the remote political and economic effect of words and the probable condition of mind of a person whose ideas were entirely different from their own".[33] Thus, under this construction, all those who expressed pacifist or socialist ideas could be prosecuted and convicted if found to have intended to obstruct the war. As actual obstruction was not, and in most cases could not be proven, the judicial understanding of the - causal and chronological - link between the statements and the prohibited effects became extremely important. The question was in what cases the literal or metaphorical expression of opposition to the war could be construed as leading naturally and reasonably to its obstruction.

(b) Proximate causation. A few leading cases can provide an insight of the judicial approach to the question of causality.

The Socialist leader Pastor Stokes had sent a letter to a newspaper with wide and general circulation stating that "she is for the people while the government is for profiteers". Judge Van Valkenburgh instructed the jury as to the tendency or sufficiency of the letter to cause insubordination, disloyalty or mutiny and refusal of duty in the forces in these terms:

> "You are to judge what the possible, if not the probable effect would be of communicating to these men... of informing and advising them that the government at whose behest they were fighting, or about to fight... was not... but for the profiteers - a term of reproach... Anything that lowers the morale and spirit of our forces, which serves to depress, to damper the ardor, to chill enthusiasm, extinguish confidence and retard cooperation, may very well cause insubordination." 34

In U.S. v. Motion Picture Film "The Spirit of 76",[35] the Stokes construction of proximate causation went even further, bordering on absurdity. The film attempted to portray some of the more important phases of the American war of independence, and special scenes, like Paul Revere's ride and the signing of the Declaration of Independence were given particular mention and prominence. But in addition atrocities committed by the British army were realistically presented. Judge Bledso first praised the historical and artistic merits of the film and went on to state:

> "We are engaged in a war in which Great Britain is an ally of the United States. It is a fact that we were at war with Great Britain during the Revolutionary times, and whatever occurred there is written upon the page of history and will have to stand, whomsoever may be injured or hurt by the recital of it. But... whatever may be the excuse... this is no time... for the exploitation of those things that may have a tendency or effect of sowing dissension among our people and of creating animosity or want of confidence between us and our allies." (Underlinings mine)

The film was seized and the producer Robert Goldstein was convicted to 10 years' imprisonment for attempting to cause insubordination etc. in the armed forces.[36]

The same approach was used in the construction of other key terms of the Act.

(c) Thus, obstructing recruitment was defined as impeding, hindering, retarding, restraining or putting an obstacle in the way of recruiting. It was not necessary to prove physical obstruction. That "one may willfully obstruct the enlistment service without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or is in one's interest seems to us too plain for controversy".[37] Under this sweeping interpretation any pacifist or socialist idea addressed to one or a number of potential volunteers, in private or in public, became punishable.

(d) The military and naval forces of the U.S. were declared to consist of the actual members of the army and navy plus those who had registered and received their serial numbers. Walter Nelles, anxious to push forward a more liberal interpretation of the Act, rejected this definition as too broad.[38] But even wilder interpretations were on offer: "The military forces of the U.S. means all the able-bodied men of the U.S."!![39]

Finally, (e) the false reports and statements of clause 1 were ingeniously construed to cover all socialist and pacifist ideas. Nelles, a civil rights lawyer and active member of the National Civil Liberties Bureau, was insisting in 1918 that a statement of opinion as to a matter resting upon a value-judgment cannot possibly be a false report or statement. "To be criminal a false statement must be of facts as to which truth is ascertainable."[40] But Nelles' interpretation was not accepted by the courts.

Thus, in Pierce v. U.S. et al.[41] a socialist pamphlet was repeating the claim common among the left about the capitalist nature of the war in these words: "Our entry into it was determined by the certainty that if the Allies do not win, J.P. Morgan's loans to the Allies will be repudiated,

and those American investors who bit on his promises will be hooked." Citing this passage the Court said:

> "That is a falsehood and its falsity is shown absolutely by the address made by the President to Congress, in which... he declared the purposes, and the necessities, and the reasons why we entered the war..." 42

The pamphlet's assertinns were an allegorical statement of the socialist thesis on the ultimate determination of wars by economic factors and as such were closer to value judgments than to statements of fact. Any attempt to show them as factually wrong would have to discuss and repudiate the tenets of a complex economic and political theory. But the court, in the facile way indicated, found that such assertions were simply "false statements and reports" and duly convicted.

One important case of that period illustrates the construction of the Act by the lower federal courts and points towards a more liberal construction, the main thrust of which was later to be adopted by the Supreme Court.

It came under the provisions of the Espionage Act that declared non-mailable any publication which violated the substantive provisions of section 3 of the Act. The August 1917 issue of "The Masses", a montly socialist journal, was excluded from the mails after a decision of the New York Postmaster. The editor asked the Postmaster to specify the offensive contents of the issue in order to delete them, to no avail. Following a civil suit brought for a mandatory injunction requesting that the Postmaster accepts and transports the copies, he specified four cartoons, a poem and three articles admiring the sacrifices of conscientious objectors. He argued that they tended to encourage the enemies of the United States and hamper the conduct of the War. Judge Learned Hand for the District Court of New York granted the injunction.[43]

On the first count (false statements), Hand relied on the distinction between statements of fact and opinions or criticisms. Although he recognised the constitutionality and the necessity of the Act he concluded that "the right to criticize either by temperate reasoning, or by immoderate and indecent invective which is normally the privilege of the individual in countries dependent upon the free expression of opinion as to the ultimate source of authority" had not been curtailed or modified by the provisions of the Act. The scope of the Act was to hinder interference with the conduct of military affairs and not to prevent every kind of propaganda "honest or vicious".

The most important contribution of Judge Hand's came on the second count of the indictment. The socialist ideas expressed on the specific passages of "The Masses" selected by the Postmaster, Hand argued, may lessen the enthusiasm of their readers. Nevertheless "to interpret the word 'cause' (insubordination ec.) so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument", a power which so far Congress had not decided to exercise. The original Act did not have such a "revolutionary" intention.[44]

Judge Hand's criteria were simple: advising or counselling others to violate the law is punishable, this is a long established principle of common law (the law of incitement); but if one stops short of such advice, then the need to protect freedom of expression, the ultimate source of authority, requires that a very strict test be applied to determine the workings of causality. In Hand's words:

> "Detestation of existing policies is easily transferred into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not

> a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom. If one stops short of urging upon others that it is their duty to resist the law, it seems to me one should not be held to have attempted to cause its violations."45

A test relying on the "general tendency" of words, is for Hand, therefore, clearly wrong. He would replace it with what he thought was an "objective test". The decisive element was the dangerous nature of the utterance and not its political non-conformism. He did not accept, as the majority of judges, that insubordination in the forces or obstruction of the recruiting services is the natural and probable consequence of the communication of "unpopular" beliefs, nor did he identify the adoption by Americans of pacifist or socialist ideas with direct violation of the law. On the contrary such occurrence is rather unnatural and improbable.[46]

For Learned Hand, the determination of guilt cannot rely on the effects of the expression, an approach that necessarily leads to difficult questions of causality, aggrevated by the fact that these effects did not actually occur. He, instead, believed that his doctrine provided an "absolute and objective test", "a qualitative formula, hard, convenient, difficult to evade".[47] It focussed on the language, the content of the expression: if it directly incites or advocates illegal action, it is punishable. The anticipated effects (possible, probable or whatever) being a quantitative, subjective element should not become the ultimate test of guilt.

Winding up his opinion, Judge Learned Hand replied to the Government's assertion that "the general tenor and animus of the paper as a whole were subversive to authority and seditious in effect" with a statement coming from the best tradition of English-speaking legal theory:

> "The tradition of freedom has depended in no small part upon the <u>merely procedural</u> requirement that the state point with exactness to just that conduct which violates the law. It is difficult and often impossible to meet the charge that one's general ethos is treasonable; such a

> latitude for construction implies a personal latitude in administration which contradicts the normal assumption that law should be embodied in general proportions capable of some measure of definition."

Judge Hand was reversed, however, by the Circuit Court of Appeals with Judge Rogers speaking for the Court[48] and refuting one after the other all conclusions reached by Judge Hand.

To the thesis that one should not be held to have attempted to cause a violation of the law, if one stops short of urging upon others that it is their duty or their interest to resist the law, Rogers replied:

> "If the natural and reasonable effect of what is said is to encourage resistance to law, and the words are used in an endeavour to persuade to resistance, it is immaterial that the DUTY to resist is not mentioned or the INTEREST, of the persons addressed, in resistance is not suggested. That one may wilfully obstruct the enlistment service without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest seems to us too plain for controversy."

Thus what seemed to Judge Hand to be an unusual exception seemed to Judge Rogers to be the rule, i.e. that communication of non-conformist ideas and beliefs would lead to violations of the law. While the former would have approved of the Postmaster's action only if there were strong evidence to the effect that the matter excluded from the mail was criminal, the latter would have enjoined the Postmaster only if his decision was "clearly wrong".

> "Indeed the Court does not hesitate to say that considering the natural and reasonable effect of the publication it was intended wilfully to obstruct recruiting. And even though we were not convinced that any such intent existed, and were in doubt concerning it, the case would be governed by the principle that the head of a department of the Government in a doubtful case will not be overruled by the courts in a matter which involves his judgment and discretion and which is within his jurisdiction." 49.

But before the Supreme Court's involvement in Espionage Act cases (see below §4), the majority of federal judges adopted Judge Rogers' construction of the Act.

3.3. The Espionage Act and Constitutional Objections

Many Espionage Act defendants raised the objection that the Act or its judicial construction was in clear conflict with the constitutional command of the First Amendment. At a period during which the judiciary was all too ready to invalidate federal or state welfare and labour legislation on grounds of unconstitutionality, the question of the conformity of the Act with the First Amendment was both logical and topical since most prosecutions related to expression.

Many Judges sidestepped the issue, but quite a few felt obliged to dispense with the objection, by trying to demarcate the line between constitutionally protected speech and unprotected punishable expression. The image emerging from the brief and scattered judicial statements amounts to no more than the declaration that the Constitution protects solely lawful expression, i.e. that Congress may render criminal any sort of expression it thinks fit. Explicit statements to this effect are not lacking:

> "This is not a question of free speech. Free speech is guaranteed to us under the Constitution. No American worthy of the name believes in anything else than free speech; but free speech means not license, not counselling disobedience of the law." 50

> "In this country it is one of our foundation stones of liberty that we may freely discuss anything we please, provided that that discussion is in conformity with law, or at least not in violation of it." 51

> "Congress felt that in order that we might prosecute this war properly and with honour that there must be some law... prohibiting anyone, who for any reason or motive, no matter what, from in any manner attempting to weaken the thing (sic) the forces upon which the Government has to rely..." 52

One Judge distinguished between "constructive" and "non-constructive criticism". The latter may be constitutionally curtailed, but he did not explain the criteria of this, original, distinction.

> "In fact it is a matter of common knowledge that every newspaper in this country today and all along... have been indulging in criticisms of men in Congress... Nobody interferes with them because their criticism appears to

> be intended to help... The government never (sic) passed any law with that sort of criticism, but, being at war and it being the experience... of this government... that... there are few people who will not submit to lawful authority in this country... passed... the Act not intended and not necessary for 95% of the American people, but necessary for the few who will not heed the judgment of the 95%." 53

Thus, the federal judges anxious to dress criminal convictions in constitutional gloss were not prepared to discuss the meaning or legal import of the First Amendment.

One Judge Lewis, who reflected on the problem is reported as saying, in his instructions to the jury:

> "Your attention has been called in the argument to the constitutional guarantee of free speech, but you are instructed that this guarantee cannot be successfully invoked where the honor and safety of the nation is involved. And this statute... is a constitutional and proper enactment to safeguard the national honor and safety."

and in broader terms:

> "The free speech secured federally by the First Amendment means complete immunity for the publication by speech or print of whatever is not harmful in character when tested by such standards as the law affords."54

What such statements actually come to is that the First Amendment offers complete protection to expression, except when the law denies such protection. In which case the constitutional provision is completely undercut as an independent legal provision.

Even Judge Hand's lonely opinion was that Congress had not such "revolutionary purpose in mind" to render all agitation illegal. He did not say that, even if it had such purpose, it could not be enforced for being unconstitutional. He, thus, implied that Congress was entitled to cut back political agitation, if it only framed its intentions, in unambiguous language. To be sure, the best indication of the "mind of the Congress" was the 1918 Amendments which went a long - and explicit - way down that road. And the dominant judicial interpretation of the Act, as case after case shows, was that of

Rogers and not of Hand. As Hand himself conceded his Masses opinion "seemed to meet with practically no professional approval whatever".[55]

Thus, prior to the Supreme Court involvement with Espionage Act cases, the Act had been authoritatively interpreted and enforced by the lower federal courts. Although these courts did not concern themselves much with First Amendment theory, by rejecting the objection of unconstitutionality of their construction of the Act, they did draw a line between protected and punishable expression. The test of general (or bad) tendency and presumptive intent used to send political dissenters to prison, was at the same time the first consistent judicial construction of the First Amendment itself. According to Professor Chafee "the pre-war courts in construing clauses (related to expression) did little more than placing obvious cases on this or that side of the line... But when we asked where the line actually ran and how they knew on which side of it a given utterance belonged, we found little answer in their opinions."[56]

The Espionage Act gave an opportunity for such line-drawing. The method followed was to define the area where Congress could abridge freedom of speech and to delineate the categories of unprotected expression and, by implication, the area and categories of protected speech. For Chafee, Nelles and a small number of liberal authors and lawyers the line was wrong and the result of an atmosphere of hysteria, which Chafee decried, in 1941, in these terms:

> "It became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional though the Supreme Court had not held it yet valid... to urge that a referendum should have preceded our declaration of war, to say that war was contrary to the teachings of Christ. Men have been punished for criticizing the Red Cross and the Y.M.C.A... it has been held a crime to discourage women from knitting by the remark "No soldier ever sees these socks".. One judge even made it criminal to argue to women against a war by the words "I am for the people and the government is for the profiteers" because what is said to mothers, sisters and sweethearts may lessen their enthusiasm for the war, and "our armies in the field and our navies upon the seas can operate and succeed only so far as they are supported and maintained by the folks at home"." [57]

Although most contemporary liberal writers agree with Chafee's dismissive and lucid description, those early cases set the framework within which the legal doctrine of freedom of expression later developed.

4. The Espionage Act and the Supreme Court

The Espionage Act reached the Supreme Court in 1919, two months after the armistice. It fell to the Court to re-examine the lower courts' construction of the Act, amid a more relaxed atmosphere, and to embark upon its search for the meaning of the First Amendment for the first time in its history.

The first case decided by the Court was Schenck v. U.S.[58] Schenck, the then general secretary of the American Socialist Party, and others, were indicted for conspiracy to obstruct recruiting and cause insubordination in the armed forces and duly convicted. Schenck had mailed a leaflet that opposed the war and the draft and some of the copies had reached men already drafted.

Justice Oliver Wendell Holmes speaking for a unanimous court described the contents of the leaflet:

> "In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity, in the interests of the Wall Street's chosen few. It said 'Do not submit to intimidation', but in form at least confined itself to peaceful measures, such as a petition for the repeal of the act. The other... side... was headed, 'Assert Your Rights'. It stated... that anyone violated the Constitution when he refused to recognize 'your right to assert your opposition to the draft,' and went on 'If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the U.S. to retain.'... It denied the power to send our citizens away to foreign shores to shoot up the people of other lands... winding up, 'You must do your share to maintain, support and uphold the rights of the people of this country.'" 58a

These statements were but a mild presentation of the unequivocal anti-war position of the Socialist Party. Immediately after President

Wilson's address to the Congress declaring war on Imperial Germany, the A.S.P. convened an emergency national conference which overwhelmingly endorsed the Party's full-hearted opposition to the conflict; blamed America's entry on Wall Street capitalists, and adopted a seven-point programme of opposition. Point 5 promised "extension of the campaign of education among the workers to organize them in strong... political and industrial organisations, to enable them by concerted and harmonious mass action to shorten this war and to establish lasting peace". Point 6 resolved that the Party would undertake "wide-spread educational propaganda to enlighten the masses as to the true relation between capitalism and war, and to rouse and organise them for action, not only against present war evils, but for the prevention of future wars and for the destruction of the causes of war".[59]

The point at issue at Schenck's trial was the whole anti-war policies of a legal political party, whose presidential candidate in 1912 had polled 6% of the vote (Debs, who was later prosecuted and imprisoned under the Act for similar statements).

The objection of unconstitutionality of the prosecution was raised by Schenck's counsel but was quickly disposed of by Justice Holmes, in language destined to become the most quoted in First Amendment theory and litigation. It deserves quoting at some length:

> "We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. It seems

> to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The Statute of 1917, in §4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success along warrants making the act a crime. Goldman v. U.S., 245 U.S. 474... Indeed, that case might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words."60

On the question of intent, Holmes stated briefly:

> "...[T]he document would not have been sent, unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."

Justice Holmes found that the contents of the circular and the act of sending it out to men already called up for military service were enough evidence of the defendant's intent to cause insubordination and of his part in the conspiracy to cause it. The claims of the pamphlet could be construed as a direct interference with the work of the recruiting services.

Schenck's conviction for conspiracy was, therefore, affirmed; although there was no evidence that actual obstruction had occurred, the jury findings, on the defendant's intent and the tendency of his act to influence persons subject to the draft to refuse it, were not unreasonable. But in the face of the First Amendment, Justice Holmes introduced a further requirement that should be met in cases of prosecution of expressive activities: the utterances and the motives of the defendants cannot be punished in the abstract, but solely if and when they come dangerously close to harming an important governmental interest. This constitutional limitation is, in essence, a test of proximity between the utterances and the apprehended consequences similar to that used in the theory of criminal attempts.

The week following Schenck, Justice Holmes delivered two more judgments, for a unanimous Court.

The defendant in the first case was prosecuted for conspiracy to prepare and publish 12 articles[61] in a German-language newspaper (Missouri Staats-Zeitung), and for attempting to cause disloyalty, mutiny and refusal of duty in the armed forces by these publications. Justice Holmes overruled the constitutional objection against Frohwerk's conviction citing Schenck, but without reference to the danger test.

> "...[T]he 1st Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language... [N]either Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder... would be an unconstitutional interference with free speech."62

The Justice went on to describe in some detail the contents of the pro-German articles and concluded that there was not "much to choose between expressions to be found in them and these... in Schenck". There was no evidence on the record that Frohwerk had made any specific efforts to reach men who were subject to the draft nor that any hindrance to the war effort had actually occurred. Holmes indicated that on a better prepared record Frohwerk's conviction might have been reversed:

> "It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war... But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied on by those who sent the paper out..."63

Thus, Frohwerk's obvious intention to obstruct the war with Germany, ("the fact was known and relied on") and the volatile environment in which the newspaper was circulating ("a little breath

was enough to kindle a flame"), sufficed for his conviction even though no actual obstruction of the war was shown, on the inadequately prepared record.[64]

On the same day, Justice Holmes handed down judgment in the case of Debs v. U.S.[65] The national prominence of the appellant has made Debs one of the most commented upon and controversial early free speech cases. Eugene Debs, the leader of the Railroad Union and of the American Socialist Party and its presidential candidate in the 1900, 1904, 1908 and 1912 elections, had been staging a national anti-war campaign in accordance with the official policy of his party. He was arrested in June 1918, after he delivered a speech in Canton, Ohio in which he made several attacks on war in general, but did not refer specifically to the World War. The main part of the speech was a defence of socialism and an appeal for unity in the A.S.P. Debs' most offensive statements, according to the record, were the expression of sympathy and solidarity with other socialists who had been convicted under the Espionage Act for obstructing the war effort. Referring to Rose Pastor Stokes, convicted of attempting to cause insubordination in the armed forces, Debs stated that "if she was guilty, so was he, and that he would not be cowardly enough to plead his innocence". Debs was charged with inciting and attempting to incite and cause insubordination in the armed forces and with attempting to obstruct the recruiting services.

Debs used his trial as a forum for expressing his anti-war sentiments; no defence witnesses were called and no arguments were offered on the evidence. In an impassioned two-hour plea, he declared:

> "I have been accused of having obstructed the war. I admit it. Gentlemen, I abhor war. I would oppose war if I stood alone. When I think of a cold glittering steel bayonet being plunged into the white, quivering flesh of a human being, I recoil with horror."[66]

Judge Westenhaven instructed the jury that, in order to convict, they should satisfy themselves that Debs' speech had as its "natural tendency and reasonably probable effect" to obstruct the war, and that he had "the specific intent to do so in mind". Proof of actual obstruction was not deemed necessary.[67] He was found guilty as charged and sentenced to 10 years imprisonment.

Debs' appeal to the Supreme Court was based on the ground that the section of the amended Act, that limited free speech, was in violation of the First Amendment. Justice Holmes, for a unanimous Court, overruled the constitutional objection, citing Schenck but without reference to the danger test. He argued that the advocacy of socialism, the main theme of the speech, was constitutionally protected. But "if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruitment service, and if in passages such encouragement was directly given", then the speech was not covered by the constitutional immunity.

Justice Holmes went on to review parts of Deb's speech, and found the expression of sympathy for socialists convicted under the Espionage Act its most objectionable part. He concluded that the purpose of the speech, "whether incidental or not", was to oppose not only war in general but the particular one, and this opposition would have as its "natural and intended effect" to obstruct recruiting.

> "If that was intended, and if, in all circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expression of a general and conscientious belief." 68

As Debs had publicly approved the Socialist Party's "Anti-War Proclamation and Program", there was enough evidence that if he had used in his speech "words tending to obstruct the recruiting service, he meant that they should have that effect". Justice Holmes concluded

that the jury had been properly instructed and that the requirement of specific intent had been explicitly mentioned. Thus, Debs' obvious intent to obstruct the war, which he freely admitted during his trial, became the most important element for the affirmation of his conviction. However, as Justice Holmes' extensive quotations of Debs' speech indicate, at no point did Debs urge his audience directly to resist the draft. According to the historian David Shannon, Debs' speech "does not seem to be a strong criticism of America's role in World War I".[69]

While serving his term, Debs stood again as the A.S.P. presidential candidate in the 1920 elections and received 920,000 votes. President Wilson refused repeatedly to pardon him. He was finally released on Christmas 1921, by President Harding. He was then 65 years old.

According to Chafee, the Schenck trilogy "came as a great shock to forward-looking men and women, who had consoled themselves through the war-time trials with the hope that the Espionage Act would be invalidated when it reached the Supreme Court".[69a] "To know what you may do and what you may not do, and how far you may go in criticism is the first condition of political liberty, to be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift" wrote Ernst Freund.[70] Amos Pinchot remarked that "if the decision in the Debs' case had been the law in England during the Boer War, David Lloyd George would about now be getting out of jail".[71] Professor Chafee, a great admirer of Justice Holmes and of his Schenck ruling, thought it "regrettable" that the Justice "felt unable to go behind the verdict. Judge Westenhaven's charge gave the jury such a wide scope that Debs was probably convicted for an

exposition of socialism merely because the jury thought his speech had some tendency to bring about resistance to the draft".[72] Robert R. Black labelled the case "a judicial milepost on the road to Absolutism".[73] And Harry Kalven remarked in 1973 that the Debs case was "somewhat as though George McGovern had been sent to prison for his criticism of the [Vietnam] War".[74]

But despite some contemporary and a great amount of later criticism, the Debs decision, delivered by the liberal hero of the Supreme Court, was received favourably by the judiciary and the government. Even Judge Learned Hand, whose Masses direct incitement test is still regarded, by some,[75] as more liberal than Holmes' clear and present danger, agreed in a letter to Holmes that "Debs was guilty under any rule conceivably applicable".[76]

Thus, in the Schenck trilogy, the Supreme Court overruled the constitutional objections against the use of the Espionage Act for the prosecution of political dissent against the war. To be sure, Schenck contained a considerable tightening up of the element of proximate causation between the utterances and the apprehended evils. But it was the obvious anti-war intent of the defendants and the tendency of their utterances to obstruct the war effort which decided the issue in those early cases. Justice Holmes himself referred to his ruling in Schenck, in a letter to Sir Frederick Pollock, in these words:

> "There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case Schenck v. U.S... As it happens I should go further probably than the majority in favour of it, and I daresay it was partly on that account that the Chief Justice assigned the case to me."77

It was only after some time, when Holmes moved from spokesman of the Court to the dissenting position along with Justice Brandeis, that he started reflecting publicly on the theoretical rationale of

freedom of expression and the need for stronger judicial protection of political dissent.

The first famous dissent came 8 months after the Debs case.[78] Abrams and others were prosecuted under the 1918 Amendments for printing and circulating - by throwing out of a window - two circulars attacking American intervention in Soviet Russia. The Supreme Court judgment revolved mainly around the issue of the intent necessary for conviction. The Act required a specific intent to cripple or hinder the United States in the prosecution of the war against Germany. Abrams' leaflets were calling for industrial and other protest action against intervention in the Soviet Union and in support of the Bolsheviks. His anti-German feelings were made clear.

Justice Clarke for the majority addressed exclusively the question of the required intent. His main argument was as follows:

> "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realised defeat of the war program of the United States..."[79]

The Justice agreed that the meetings, strikes and other measures were advocated by the appellants as means of protest against the Russian expedition; but he insisted that their inevitable result was the frustration of the war with Germany. He argued that this effect must have been foreseen by the defendants and was, therefore, intended under the traditional view on intent. The findings of the jury to that effect were not unreasonable and the convictions were affirmed.

Justice Holmes, joined by Brandeis, rejected this interpretation. He stated that the 1918 Amendment, under which the case arose, required the proof of specific intent to hinder the prosecution of the war with Germany. He then stated his theoretical and doctrinal position.

> "I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent... It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion... Congress certainly cannot forbid all effort to change the mind of the country."80

Thus, according to Justice Holmes, the constitutional command sets a limit on Congressional power; political dissent can be restricted in two cases: if there is an immediate danger of substantive harm to a societal interest or if there is a specific intent to bring about such harm.

Justice Holmes then turned to the evidence, construing the statute in accordance with these limitations allegedly imposed upon the legislative power of Congress. On the question of the relation between the leaflets and the apprehended evils, he was characteristically dismissive. "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger...". But if the publication was accompanied by an intent to obstruct the war, then the danger would be greater and the act would amount to an attempt. In that case, the element of the intent to bring about the illegal result becomes the dominant issue. The Justice gave a strict definition of intent.

> "...[W]hen words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed - unless the aim to produce it is the proximate motive of the specific act..." 81

He argued that proof of actual intent becomes even more important when the success of the attempt depends upon actions performed by third parties, as was the case in Abrams. But since the defendants' avowed aim was to protect the young Russian revolution and their

hatred for the policies of Imperial Germany was all too evident, the subjective element of the offence was lacking. The intent required could not be implied by selecting arbitrarily certain phrases of the text against the general spirit of the whole. In opposition to Justice Clarke, Justice Holmes stated that an intent to aid the Russian Revolution could have been satisfied without any interference with the war against Germany. Thus, under both tests the convictions should be reversed. The leaflets created no present danger and the required specific intent was lacking. The contrary result meant that the defendants were punished not for what the indictment alleges, "but for the creed they vow". Justice Holmes concluded with one of his most famous passages on free speech arguing that the First Amendment was intended to repeal the common law on seditious libel. Thus, for the two dissenters, both the subjective and objective elements of the offence were lacking. The majority, however, satisfied that the required intent was proven returned Abrams to a 20-year term of imprisonment.

Following Abrams, Justices Holmes and Brandeis dissented in two more Espionage Act cases using "danger" language.[82] However, during Justice Holmes' term of office, the test never attracted a majority of Justices prepared to upset criminal convictions through its use. Indeed, in the last three Espionage Act cases (Abrams, Schaefer and Pierce) the majority did not mention the test at all.

Shaefer and Pierce reached the Supreme Court in early 1920 and this time Justice Brandeis was the spokesman of the two dissenters. In both cases the prosecution came under the first clause of Section 3, which proscribed "false reports and statements".

In Shaefer, Justice Brandeis described the test as a "rule of reason" and stated that its origins may be found in the law of incitement and criminal attempts.

Pierce was the last Supreme Court judgment under the Espionage Act. As noted above,[83] the main issue in that case was whether the assertion, that American's entry into the war was motivated by the desire to protect Morgan's loans to the allies, could be qualified as a "false report or statement" conveyed with the intent to interfere with the operation of the American war effort.

Justice Brandeis, joined by Holmes, tried to establish the proper construction of the clause in a similar way to Learned Hand's Masses opinion. He distinguished between reports or statements and opinions, because the latter cannot easily be proven to be false. He asked for specific evidence to the effect that those statements were false in fact, and known to be false to the defendant at the time of their communication. Although he, personally, disagreed with the socialist assertions, he thought that the allegedly criminal statements were matters of opinion and judgment and not descriptions of facts to be subjected "like a chemical combination in a test tube, to qualitative and quantitative analysis".

> "This so called statement of fact... is merely a conclusion or deduction from facts... In its essence, it is the expression of a judgment - like the statements of many so-called historical facts... Historians rarely agree in their judgment as to what was the determining factor in a particular war... For individuals and classes of individuals, attach significance to those things that are significant to them."

The Justice concluded that the practice of declaring statements of conclusions or of opinions to be statements of facts and to be false and punishable, "would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental".[84]

The majority of the Justices were not impressed by Brandeis' protest. Justice Pitney, for the majority, ruled that the reasons of the American entry to the war, included in the Presidential Address to Congress in 1917, were common knowledge; the assertions of the Socialist pamphlet distributed by Pierce were, therefore, "grossly false" in fact. Such statements could be construed as having a "tendency to cause insubordination, disloyalty, and refusal of duty", and furthermore were "evidently intended" to bring about these consequences. It is one of the ironies of history that during the hearings of the Nye Committee of the Senate in 1934, it was considered almost a crime to say that America did not enter the war to save Morgan's loans.[85]

5. The Supreme Court and the Criminal Anarchy and Criminal Syndicalism Laws

With Pierce the ventures of the Supreme Court in the interpretation of the Espionage Act came to an end. The series of expression cases, that occupied the Supreme Court in the aftermath of the Great War, were related more directly to the protection of the established political and social order. The fears and anxieties survived the Armistice and were grouped under the paramount threat of the "Red Menace".

The German threat was out of the way and the convenient grouping together of socialists, pacifists, trade unionists and other radicals under the title of actual or notional German spies could not continue. In its place the concept of the "internal enemy" inimical to free enterprise and democracy (see above §1) took shape. Borrowing the notion of the "advocacy of overthrow of the government by force or violence" from a disused anti-anarchist state law, two-thirds of the states passed various sedition laws. They were directed against socialists (and later communists) and radical unionists. They were, accordingly, of two general types.

(a) Criminal anarchy laws. Their main provision taken from the New York Criminal Anarchy statute punished any person who "by word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organised government by force or violence, or by assassination of the executive head or any of the executive officials of government, or by any unlawful means."

(b) Criminal syndicalism laws, exemplified by the California Criminal Syndicalism Act, which stipulated criminal syndicalism as the doctrine of "advocating, teaching or aiding and abetting the commission of crime, sabotage... or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing change in industrial ownership or control, or effecting any political change".

Federal deportation laws were also amended to exclude aliens "advocating" the use of force or violence. Attorney General Palmer supervised their enforcement vigorously. "We must purify the sources of America's population and keep it pure" he declared.[86]

The most conspicuous difference between this type of statute and the Espionage Act was that while the latter punished words because they might bring about certain undesirable consequences, which the Act sought to prevent, the former singled out a certain category of speech and punished it without any reference to specific consequences. In the first case, words were proscribed because they were supposed to lead to criminal action through the workings of the rules of causation. In the second, words per se were classified as criminal acts, a certain content of expression was proscribed.

The first case which reached the Supreme Court was Gitlow v. New York.[87] The Court dealt in that case with the constitutionality of

the New York Criminal Anarchy statute, as applied to the facts of the case by the lower courts. Gitlow, a leader of the left-wing section of the Socialist Party, had been convicted for publishing a "left-wing Manifesto" which among its 34 pages included references to the "Communist Revolution", the "dictatorship of the proletariat" and the "imminent" destruction of the bourgeois parliamentary state through the evolution of "mass industrial revolts" into "mass industrial and revolutionary action". It has been remarked about this long-winded revolutionary broadsheet that "any agitator who read these 34 pages to a mob would not stir them to violence, except probably against himself. The Manifesto would disperse them faster than the Riot Act".[88] There was no evidence, according to the record, of any effects resulting from the publication and circulation of the Manifesto.

The appeal to the Supreme Court was based on the ground that the statute was in violation of the "liberty" clause of the 14th Amendment; according to counsel's argument, which heavily relied on Schenck, free expression is punishable only "in circumstances involving likelihood of substantive evil", while the New York law penalised the mere utterance of abstract doctrines, without reference to the context of the expression or its causal relation to some evil "consummated, attempted, or likely".

Justice Sanford, speaking for the majority, upheld the convictions. He held that the Manifesto was not "the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement". The jury were justified to find that it did not advocate abstract doctrine, but violent and illegal action. To be guilty under the law, it was not necessary to find that the defendant advocated "some definite or immediate act or acts" of violence, the immediate execution of such acts, or that the language used was

"reasonably and ordinarily calculated to incite certain persons".[88a]

Turning to the constitutionality of the Act, the Justice set out in some detail the grounds on which free speech may be restricted.

> "...[A State] may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace... And... a state may punish utterances endangering the foundations of organised government... Freedom of speech and press... does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties..."[89]

He went on to say that the legislature had determined that "... utterances advocating the overthrow of organised government by force... are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power". The balance had been struck and "[t]hat determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute."[89a] The statute, a legitimate exercise of police power, could be declared unconstitutional only if it was unreasonable or arbitrary. The Justice then overruled the objection, that a close chronological and causal relation should exist between the utterances and the apprehended evils. Such utterances by their very nature endangered the security of the state.

> "[T]he immediate danger is nonetheless real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot be reasonably required to measure the danger from every such utterance in the nice balance of a jeweller's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration... [The state] cannot reasonably be required to defer the adoption of measures... until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction, but it may in the exercise of its judgment, suppress the threatened danger in its incipiency..."[90]

The only question open to consideration was whether the language used came under the statutory prohibition. All non-trivial utterances

made with intent and of a nature that brought them under the statute were punishable. There was no need to examine whether they had created any clear and present danger.

> "... When the legislative body has determined generally... that utterances of a certain kind involve such danger of substantive evil and they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil is not open to consideration."

Indeed, the Court distinguished the Espionage Act from the New York statute and insisted that the danger test was applicable, solely, to statutes of the former type. The Espionage Act prohibited certain acts involving danger of substantive evils without reference to language, and the danger test sought to apply the statute to language used to bring about the prohibited results. On the other hand, the test "has no application... where the legislative body itself has previously determined the danger of substantive evils arising from utterances of a specified character".[91] A general category of expression had been prohibited statutorily and the Manifesto fell within its bounds. The question of any concrete danger created by it was, therefore, irrelevant. Thus, the danger test was rejected as a test of constitutionality of statutes expressly directed against the advocacy of revolutionary doctrine since the latter was held dangerous in itself, or as a rule for the examination of evidence in cases coming under such statutes.

Justice Holmes, joined by Justice Brandeis, dissented. He thought that the danger test was applicable in the present case. He conceded that the test had not been relied upon in the Abrams and Schaefer cases, but he insisted that those judgments had not settled the law. There was only a small minority who agreed with Gitlow's views and his "redundant discourse... had no chance of starting a present conflagration". As the indictment alleged

publication and no more, and no evidence was provided that there was a present danger of an attempt to overthrow the government by force, Gitlow should be acquitted. He answered the assertion that the Manifesto was an incitement to revolutionary action, in those terms:

> "Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweights it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement... is the speaker's enthusiasm for the result." 92

If the indictment alleged an attempt to bring about an immediate, rather than a future uprising the result could have been different. But in that case too, the danger would have to be judged as not futile or too remote.

Thus, the Supreme Court accepted the validity of the Act, as applied, and fully endorsed the antisocialist legislative programme. It also declared that the danger test could be used to decide whether a particular expression could be construed as violating a general statute not addressed, in terms, against expression. But when a category of expression had been declared criminal, the test was of no use. At the same time the Gitlow case initiated a doctrinal change of great importance. The Court accepted unanimously that it was competent to examine the question of conformity of the New York Act with the First Amendment.

Now, the First Amendment is directed expressly to the federal and not state legislatures (Congress shall make no law). The Court, therefore, accepted for the first time, and against precedent,[93] that freedom of speech and of the press was one of the "liberties" protected by the 14th Amendment against impairment by the States "without due process of law". Thus, "liberty" would no more be construed as meaning solely economic freedom and freedom of contract. To be sure, the Court hastened to add that in cases involving personal freedoms, in contrast to laws regulating economic matters, only arbitrary or unreasonable statutes would be declared void. "Every presumption is to be indulged in favor of the validity of the statute". However, by incorporating the First into the 14th, the Supreme Court assumed the role of the ultimate referee of both federal and state activities related to expression, linking thus questions of First Amendment theory and practice with problems of legitimate judicial review (see above Ch.II).

The last important case of the period was Whitney v. California.[94] It came under the model California Criminal Syndicalism Act of 1919. The purpose of the statute and other similar acts was to suppress trade unionist activities considered inimical to economic growth and politically subversive. It was mainly used against the I.W.W.

Miss Annita Whitney was a temporary member of the break-away from the A.S.P., Communist Labour Party. She attended a Convention of the Party in Oakland, which was held publicly in 1919 and was open to the press. At the Convention she fought for the adoption of a policy-resolution pledging that the new party should strive to acquire political power by constitutional methods. She was defeated, however, and after attending a few committee meetings the following month, she withdrew from the Party. The indictment was brought under the main provision of the statute and another which penalised persons who had

become members of a criminal syndicalistic organisation, as defined by the statute.[95] The jury had acquitted her on the first count but she had been found guilty on the second and convicted to a term of one to fourteen years. Thus, the only evidence against her was that she had participated in a public political convention and, for a short time, in a party while disapproving its adopted programme. The conviction was based on her "association" with the party and not on any criminal acts or expressions.

Justice Sanford basing himself on his Gitlow reasoning declared that the mere membership in an organisation was punishable if a state legislature had found that this organisation presented such a danger to state security as to warrant its suppression. The legislative determination to that effect should be given just weight and it should be declared void only if it had been clearly arbitrary or unreasonable. The party was a "criminal conspiracy" and as such involved greater danger to the "public peace and security" than isolated utterances and acts of individuals. Curiously enough, however, the Communist Labour Party had not been banned.

Justice Brandeis, joined by Justice Holmes, concurred on procedural grounds but his opinion had all the qualities of a dissent. He set himself the task to explain the import of the First Amendment particularly in relation to political expression.

He started like Sanford with the familiar statement that "although the rights of free speech and assembly are fundamental, they are not in their nature absolute". But unlike Justice Sanford he thought it necessary to analyse why those rights are "fundamental" before examining when and how they have to give way, since they are not absolute.

It was, therefore, through a theoretical understanding of the function of free political speech that the proper limits could be

drawn. Brandeis attributed the importance of speech protection to the successful functioning of democracy, and stated that that was the intention of the Constitutional Framers. We have, already, seen (above, p.75) that constitutional historians have recently questioned Brandeis' (and Holmes') theories about the intentions of the Framers and the attempts to ascribe a certain meaning to the First Amendment that way.

Be that as it may, Brandeis' main argument was the following:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies;.. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."96

These premises led him to two further conclusions:

(a) The enactment of a certain statute and the inherent in it conviction of the legislature about the existence of a danger to state security does not automatically resolve the question of its validity. "The powers of the courts to strike down as offending a law [because it is unnecessary] are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly."

(b) The courts must, therefore, exercise the power of judicial review using the danger test as adopted in Schenck. However, the Court had not yet fixed the standards determining when a danger should be deemed clear and present and what sort of evil should be considered as substantial. Thus, Brandeis thought it necessary to define the terms of the test:

a. There must be reasonable ground to fear that serious evil will in fact result if speech is practised.

b. There must be reasonable ground to believe that the danger apprehended is imminent. 'If there be time to expose through discussion the falsehood and fallacies... the remedy to be applied is more speech, not enforced silence."

c. There must be reasonable ground to believe that the evil to be prevented is a serious one. Trivial or speculative harms cannot justify "a measure so stringent" as prohibition of speech.

Additionally, the difference between advocacy and incitement to law violation should be borne in mind (Brandeis agreed in that with Learned Hand but see Holmes' opinion, above, p.178). Ineffectual advocacy cannot be made criminal.

Brandeis' Whitney opinion remains the most liberal and detailed elaboration of the danger test. It differs from the Holmesian formulation, in the importance it attributes to the gravity of the evil that the government may attempt to prevent and its, not fully elaborated, suggestion that the test may be used to decide the constitutionality of statutes and not merely their application. Even in this, more expansive version, however, the test would not keep Whitney out of jail. Brandeis concurred with the conviction-affirming majority on procedural grounds.

Later the same year, however, the Supreme Court set aside a conviction under a state syndicalism law for the first time.[97] The

only evidence produced in the trial of Fiske, an I.W.W. organizer, was the Preamble of the I.W.W. constitution, which allegedly proved the union's illegal purposes. The conviction was reversed on 14th Amendment grounds, since no independent evidence was produced to the effect that the I.W.W. advocated "any crime, violence, or other unlawful acts or methods as a means of effecting industrial or political changes or revolution".[98] The danger test was not mentioned, nor was the question of "guilt by association" discussed.

After the examination of the first expression cases, the legal doctrines that emerged in Supreme Court case law may now be concretely examined.

CHAPTER VII

THE FIRST LEGAL DOCTRINES

The social interest that the Espionage Act sought to protect or, according to Holmes, the "substantive evil" it meant to prevent was, on its face, the protection of national security during wartime. Section 3 of the Act did not prohibit any specified political expressions opposing the war. The only utterances prohibited were wilful false reports and statements made with criminal intent. The rest of the section prohibited the intentional obstruction of the war effort and attempts at such obstruction. In the conditions of "total mobilization" introduced in the Great War for the first time - and since the characteristic of most wars - the Act does not appear to be excessively repressive. It was the construction of the Act by some federal courts which criminalized the expression of dissent to the war and grouped together pacifist and socialist opinions in one all-inclusive category branded as enemy espionage that turned the Act into an exemplary piece of repressive legislation and qualified the justice meted out by the courts as an early precursor of what Kirchheimer has called "political justice".[1]

As it was described above, the construction of the Act under which dissenting expression was admitted as the principal means of its violation revolved around the requirements of proximate causation and intent. Since no direct link could be established in most cases between the concrete expressive activity and the consequences or evils that the Act sought to prevent, the court judgments took the character of a hypothesis about the probable or possible future consequences of past expressions: The expression of certain ideas <u>could</u> lead to violations of the Act, presumably through the agency of persons persuaded by

those ideas to undertake criminal action, although in reality it did not lead to such violations. If the violations had taken place, if the historical hypothesis was a historical reality borne out from the record, the political dissenters would have been easily convicted as accomplices or associates of the criminal principals.

1. The "Bad Tendency" Doctrine

The Espionage Act, 1917 imposed two requirements for conviction: a subjective one (intent) and an objective one (some causal connection between the conduct of the offender and the prohibited consequences, Ch.VI parts 3.1 and 3.2). In most of the cases brought under it, the conduct of the defendants consisted of utterances opposing the war, while there was no evidence that the apprehended effects had actually come about. According to Chafee "[n]oone reading the simple language of the Espionage Act of 1917 could have anticipated that it would be rapidly turned into a law under which opinions hostile to the war had practically no protection".[2] The question posed was, therefore, under what conditions the expression of opposition to the war qualified as the means of violation of the law. Proof of evil intent, without anything else, did not suffice for conviction as the criminal law does not punish simply for a seditious state of mind. Equally, as intent was specifically mentioned in the Act, the existence of some expressive acts, without corroboratory evidence of the will or desire on the part of the defendant to bring about the consummated offence, should be insufficient for conviction.

In the majority of the lower federal cases, which were decided under the formula which came to be known in the literature as the "bad tendency" test, the two relatively independent elements were collapsed into each other. The gist of the test was that it relaxed the requirement of some causal and chronological link between the utterances and the apprehended -

but not materialized - consequences, assuming that all expression of opposition to the war could set in motion a chain of causation which would result eventually in someone being persuaded to undertake the prohibited action. When the element of intent was emphasized, the inquiry had to assume the widest scope and to extend to the political and personal beliefs of the defendant. In some cases intent was presumed from the mere utterance of the dissenting views under the doctrine that "a man is presumed to intend the natural and probable consequences of his speech".[3] In those extreme cases, the test led to the criminalisation of certain political and economic beliefs which dissented from the official policies. While pacifism, socialism or opposition to the war were not prohibited as such by the Act, they were thus made sui generis crimes with little concern about the likelihood in reality that their propagation would or could lead to the prohibited results. A certain confusion encountered in the early construction of the Act may be attributed to the fact that it was meant to prevent serious actual or attempted interferences with the operations of the armed forces and the prosecution of dissenting views under it created technical difficulties. Under this interpretation some concepts used by the district courts in cases brought under the Act may be explained.

(a) Intent. If certain political beliefs are prohibited then the requirement of specific intent may be either inferred from their mere utterance, since one is assumed to hold his beliefs conscientiously and intentionally; or alternatively it may become an all-important test of guilt, since proof of the remote consequences of the propagation of certain beliefs is extremely difficult.

(b) In the case of prosecutions coming under the first clause of Section 3 proscribing false reports and statements, the conceptual character of a statement internal to the prohibited body of discourse becomes secondary. Dissenting beliefs, opinions and value judgments -

like the assertions about the capitalist nature of the war - may be declared to be statements of fact and as such false.

(c) Conspiracy[4] and "guilt by association". If certain ideas and beliefs are prohibited, any organisation promoting and propagating them becomes a criminal conspiracy, much more dangerous than any single individual holding them. Membership of such organisation becomes the legally relevant proof both of holding the illegal beliefs and of participating in the criminal conspiracy to spread them.

It must be noted that the "bad tendency" test was resisted by some judges like Augustus and Learned Hand, who asked for independent evidence of the required intent and for proof that the utterances had come dangerously close to becoming criminal acts. These were the elements most emphasized by Justice Holmes' "clear and present danger" test. On the other hand, the 1918 Amendments to the Espionage Act and the various anarcho-syndicalist statutes prohibited expressly certain specified categories of political expression. In these cases the determination of guilt was made independent from the examination of the consequences - imminent or remote - of the utterances. In Gitlow, against Justice Holmes' dissent, the Supreme Court adopted the most restrictive construction of those statutes, ruling that if the defendant had intentionally uttered the "unspeakable" he had no defence under the First Amendment. This interpretation was short-lived, however. In the 30s, the danger test and the preferred position of freedom of speech came to replace the older interpretation and thus afford much greater protection to political dissent.

2. The "Clear and Present Danger" Test

The clear and present danger test was enunciated in the same period as the bad tendency one. Its adoption by the Supreme Court was a clear advance from the lower courts' position, but during that period its use

did not lead to the reversal of any convictions for political dissent. Its fame outlasted the tenure of its initiators and, during the 30's and 40's, it was widely used in First Amendment litigation. It would be, therefore, instructive to compare the approach advocated by Holmes and Brandeis in dissent with that consistently adopted by the majority of the Court.

According to the original formulation of the test:

> "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree..."

The danger test, therefore, determines - as the bad tendency does too - when "words" become prohibited and punishable. The method followed for the drawing of the line between prohibited and protected expression is the same: the test demarcates the conditions that make expression criminal and by implication the protected area. These conditions are the following.

2.1. The Existence of a Clear and Present Danger

The first element of "clarity" was never defined in the opinions. It presumably means that the expression must be prima facie capable to bring about the evil. It must be examined in the concrete situation of each case. When, for example, some "puny anonymities" are communicated to elderly people not subject to the draft, then a clear danger of obstructions of the recruiting services cannot be reasonably said to exist. The receivers of the communication must be capable physically and legally to perform the criminal acts.[5]

The second element of a "present" danger which introduces an element of chronological link, became the yardstick of the test in those early years. In Abrams "immediate" was substituted for "present", and in Whitney Brandeis explained that "there must be reasonable ground to believe that the danger apprehended is imminent". And he went on:

> "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evils by the processes of education the remedy to be applied is more speech not enforced silence."

Similarly Holmes in Abrams stated:

> "We should be eternally vigilant against attempts to check the expressions of opinions... unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

In accordance with Homles' belief in the "market place of ideas" the process of free debate can be trusted to lead to the right answers in all the pressing problems of the day. However, on some occasions the process itself comes under strain and cannot be left unregulated.

Holmes implied that such malfunctioning of the market that makes the danger "present" and intervention necessary is more likely during emergencies.

> "...Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants any exception to the sweeping command (of the First)... The power (to suppress expression) is undoubtedly greater in time of war than in time of peace.
> ... Only an emergency can justify suppression."6

2.2. The Requirement of Specific Intent

The second element of the test is the requirement of proof of specific intent.[7] The bad tendency test made proof of intent an important element for the determination of guilt but, somehow, underplayed its specificity. In a number of cases the line of reasoning was that "men must be held to have intended, and to be accountable for the effects which their acts were likely to produce";[8] as socialist and pacifist utterances were held to have a tendency to obstruct the war effort, the element of intent was linked more with the defendants' general opposition to the war policy than with their specific will to bring about the prohibited effects. In the Schenck trilogy, Justice Holmes reviewed the record and found that the requisite intent for conviction had been proven, but he did not discuss at length the question.

However, in the Abrams case, the question of intent became one of the main issues. The statute required intent to cripple or hinder the war effort against Germany, while the defendants wanted to frustrate the expedition against Soviet Russia. The majority fully accepted the notion of presumptive intent. Holmes in his dissent thought that it was a great stretch of imagination to accept that the defendants intended to hinder the war with Germany because "every imaginable interference with the production of ammunition had such an effect". As Chafee remarked, under the Abrams majority "Irish munition workers could not have been urged to strike had the American government been sending arms to Dublin Castle, because this would have lessened munitions for France,

since a machinist could not be sure that any particular shell or gun was going to Ireland".[9]

2.3. The Danger Test and the Theory of Criminal Attempts

The insistence of Justice Holmes on the proximity of the danger and on the proof of specific intent indicates the immediate source of the danger test. It lies in the law of criminal attempts. Holmes was interested in this part of criminal law both as a scholar and as a judge. He had devoted a considerable part of his lectures on common law to the law of attempts and introduced criminal attempt concepts in several non-attempt cases.[10]

Forty years before Schenck, Holmes had argued in his lectures on "Common Law" that intent actual or imputed cannot be punished by criminal law if it is not materialized through an overt act. Nevertheless, intent constitutes a substantial element in cases of criminal attempts. Some acts may be attempts of substantive crimes, although they could not have brought about the crime, unless followed by more acts. In such cases, proof of specific intent to commit the substantive crime becomes necessary in order to show that those other acts indispensable for the harmful effect would have followed, but for some break in the chain of causation.[11]

The second element of the Holmesian theory of attempts is based on his understanding of the general function of criminal law. He subscribed to the utilitarian school, according to which criminal punishment is meant to protect valid social objectives, endangered by certain action, and is not based on any notion of moral guilt or retribution. The

purpose of criminal law is, therefore, to deter harmful behaviour and until behaviour becomes sufficiently dangerous there is no adequate reason for its suppression. Thus the degree of the actual injury or danger of a social interest will determine the scope of prohibitive and punitive intervention.

Among the many theoretical endeavours to establish an acceptable criterion for the distinction between a harmless preparatory act and a dangerous attempt, Justice Holmes' doctrine is an empirical one, relying heavily on the concrete circumstances of each case.

> "That an overt act, although coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanour, although there is still a locus poenitentiae, in the need for a further exertion of the will to complete the crime."12

In another opinion, Holmes summarized all the elements of his criminal attempts doctrine.

> "An act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. As the aim of the law is not to punish sins, but is to prevent certain external results the act done must come pretty near to accomplishing that result before the law will notice it. But on the other hand, irrespective of the statute, it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of the natural forces but for some casual and unexpected interference... Every question of proximity must be determined by its own circumstances and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the results, and the seriousness of apprehension coupled with the great harm likely to result... would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected that might be the case with lighter crimes... In the case of crimes exceptionally dealt with or greatly feared, acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts;... the considerations being... the nearness of the danger, the greatness of the harm and the degree of apprehension felt."13

The elements of the English theory of criminal attempts are therefore the following:

(a) An overt act. An attempt may be described as an act regarded as a step towards another proscribed act.[14]

(b) A specific intent to perform the consummated criminal act. Neither a mere preparatory act nor an evil intent per se may be punished as a criminal attempt.[15]

(c) The attempt must come sufficiently near completion before the law steps in.

(d) The act performed must stop short of accomplishing the allegedly attempted crime.

All four elements are present in the danger test.[16] Justice Holmes asks, therefore, the trial courts to treat criminal expression defendants in the same manner they treat other criminal attempts defendants. If certain conditions must be satisfied for a criminal attempt conviction, the same conditions need be proven, when a person is charged with uttering words intended to effect harmful action which however was not performed. In the face of the First Amendment, the criteria for regulation of expression must not be harsher, at least, than those established for similar cases involving criminal action.

Thus, the test places expression within the structure of mainstream criminal law.

2.4. A "Substantive Evil" that the State may Prevent

The final element of the test refers to the objectives to be protected from expression, or the evils to be prevented. Justice Holmes spoke initially of "substantive evils"and repeated the phrase verbatim in all later cases. But he did not elaborate on the obvious question: how substantive is substantive and what evils may be deemed so substantive as to justify a wholesale suppression of expression? Although the early cases came under statutes purportedly

protecting national security, Holmes did not indicate that the test he emunciated was applicable, solely, to such cases.[17] The evil was any that "Congress has a right to prevent". Congress had expressed its value-judgment, by passing the restrictive legislation, which was not to be questioned. Its use was to aid juries and judges to bring expressive activities under the general terms of the relevant statute. Thus, the test embodied a strong presumption of constitutionality[18] in favour of the legislative enactment, and in that it did not differ from the bad tendency test.

Such an approach is in accord with Holmes' general attitude toward judicial review. He fought against extensive judicial invalidation of legislative enactments through the 14th Amendment. He stated, in one case, that:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a decision whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law."19

Thus, Congress and state legislatures may prohibit and punish any expression they think fit, in the exercise of their powers. The courts under the guidance of the Supreme Court must restrain themselves to finding, whether the facts of the case before them reveal, that harmful consequences could be attributed to expressive acts.

It must be noted, however. that the Holmesian test constituted something of a departure from the accepted procedure of Supreme Court adjudication. Fact-finding rests with the trial court,while the Supreme Court may upset such findings only if they cannot be reasonably supported by the evidence in record. But the danger test dispenses with this requirement. Its predominantly evidentiary character narrows the gap between questions of fact and law, enabling thus the Supreme

Court to examine the record independently and reach its own conclusions on a new appraisal of the facts.[20]

The danger test, therefore, combined Holmes' theory of criminal attempts, his distaste for what he thought of as abuse of judicial power by the Supreme Court, in cases involving economic regulation, and his stronger liberal inclinations than the majority of the Court. The Gitlow case indicated the limitations of the mixture. As described above, it involved a statute that had fully accepted the bad tendency logic, by outlawing a specified category (or content) of expression. As such, it did not require any link between the expression and subsequent criminal action. The role of the courts was limited to the examination of the facts in order to decide whether the prohibited expression had been uttered. The only conceivable method open to a court willing to uphold the rights of a particular speaker to utter the "unspeakable", was to challenge the validity of the statute and, subsequently, of the concrete prosecution under it. But Holmes disliked judicial activism and did not intend his test to go this far. Thus Sanford's opinion and his refusal to use the test in Gitlow seems more justified than Holmes' insistence on using it. Caught between his tendency for judicial restraint and his greater liberalism, which motivated him against Gitlow's conviction, Holmes attempted to apply the test to the facts of the case. He found that there was no danger of illegal acts and asked for the reversal of the conviction. However, the prosecution had not argued that any such danger existed nor needed any such argument. The defendants were charged with uttering forbidden words and the Supreme Court majority, quite consistently with Holmes' original danger test, duly obliged.

Justice Brandeis, in his Whitney dissent cast in danger terms, indicated a way out of this logical difficulty. In a passage which passed unnoticed at the time, Brandeis stated:

> "The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protection measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity."[21]

This statement strikes at the heart of the assumption of validity of legislation on which the danger test is based. Where the legislature directly prohibits acts of expression, the Court is not obliged to accept this determination as conclusive. On the contrary, it is implied that the Supreme Court must content itself, through an independent examination, that the necessary conditions for such a measure exist. Thus, Brandeis suggests that a statute may be held unconstitutional by the Court for incompatibility with the First Amendment. To be sure, in cases of Whitney-type statutes, the Court has to assess general historical, economic, social and political facts as well as the full import of the prohibited expression, usually a political doctrine, in order to perform the task of independent examination of the conditions justifying the statute. The Court undertook this task in the 30's and 40's and in the Communist cases after the Second World War.

Justice Brandeis' advocacy of a more activist approach is also indicated in his attempt to define more precisely the terms of the test.

> "Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is serious. Prohibition of free speech and assembly is a measure so stringent, that it would be inappropriate as a means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh, or oppressive... There must be the probability of serious injury to the state."[22]

The "substantive" evil is transformed into a "serious" one. If the social interest sought to be protected is not important per se then any compromise of the interest in free expression may be unconstitutional on its face. This approach implies some sort of ranking of the social interests claiming protection in important and secondary ones,

alternatively of the social harms apprehended in serious and trivial. Brandeis did not attempt to make such a classification himself, but he gave an example of his approach. The social interests he employed were those of public order and private property. If a statute punished trespass on private land, any enactment prohibiting advocacy of such trespass would be clearly unconstitutional "even if there was imminent danger that such advocacy would lead to trespass".

It was, after Brandeis' ideas had been accepted by the majority of the Court, that the latter started working out a hierarchy of interests and values, that it would protect against governmental encroachment.

3. The Legal Doctrine and the Quest for Judicial Neutrality

The danger test involves the same sort of speculative historical hypothesis about future consequences of past expression, that in reality did not materialize, as the bad tendency one. However, in contrast to the latter test, which tends to underplay the element of causation between expression and its evil consequences, the danger test purports to re-establish it and to examine expression in the specific context (the circumstances) of its appearance. A strict causal link (clear danger) and a chronological proximity (present, imminent danger) in the sequence expression-subsequent criminal activity must be extracted from the circumstances in which the expression took place. The character of this link is based on the assumption that the audience of the spoken or written "words" may be persuaded by it and led to undertake some prohibited action. The danger, therefore, must be in fact and always linked with some undesirable or criminal conduct.

The idea behind the test is not original. J.S. Mill, in his tract "On Liberty", had stated that even opinions lose their immunity, when the circumstances in which they are expressed are such as to make their expression a positive instigation to some mischievous act.[23]

And again "instigation to [tyrannicide], in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation".[24] Mill accepted the suppression of the opinion that "corndealers are starvers of the poor" from being delivered to a crowd assembled in front of a corndealer's house, an example that strongly resembles those used by Holmes and Brandeis.

The applicability of the danger test in the corndealer's house example and other similar face-to-face situations, where the apprehended harm is serious criminal offences (like physical injuries and destruction of property) seems unproblematic. Yet, beyond these rather simple cases, the construction of the concepts of "danger" and "substantive evil" become the determining factors for criminal conviction.

> "Once you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude [as his own fears may require] that the jig is at once up. Besides even their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' today may seem very remote next year even though the circumstances surrounding the utterance be unchanged"25

wrote Judge Learned Hand to Zechariah Chafee in 1921. Hand's criticism indicates that a widely accepted communal standard of danger which judges could ascertain and enforce does not exist. If such a standard could be discovered, a detailed analysis of the factual evidence, of the sort suggested by Holmes, would yield the degree of the danger's imminence and justify suppression. It would, equally, bestow the judge with the legitimacy of an impartial arbiter.

But in cases involving political and social conflict, as all cases dealing with political expression claims necessarily are, the judge must

take parts: not because he is already and always in favour of the status quo and/or biased, but because there is not any commonly accepted standard to guide him. The standards themselves are at issue. Thus, in deciding what expression is dangerous, or what evil is a serious one the judge upholds one of two or more conflicting claims. If the conflict has already run its course, the judge merely adds on a posteriorifootnote on history. If it is still going on he throws his weight - a quite considerable one - on the side of one claim, thus participating in the further unfolding of the historical course. "All impersonal ethical theories derived from general principles exist in a social and psychological vacuum"[26] writes Cambridge philosopher Bernard Williams. The same applies, one could argue for those impersonal, neutral legal doctrines. They leave out the question of who is laying down the principles for whom and when.

Even Judge Learned Hand's "objective" test between incitement to criminal action or revolution (the Holmesian "counselling of murder") and mere abstract advocacy, which he proposed instead of the "subjective" danger test and has recently enjoyed something of a revival, in no way resolves the problem and bestows the criminal officer or judge the much sought-after, but elusive prize of impartiality. It refutes the assertion that the judge can play the role of the objective observer and interpreter of the social consensus, which however is assumed as existing in the text of the criminal law that, allegedly, embodies it. However where the criminal law is in itself a politically contentious one, and most laws under examination are such, suppression of propaganda against them puts the judge on the side, of those groups and interests that have transformed their claims into law.

Consider the danger test's claim to provide a strict notion of causality lacking in the bad tendency one. The problem of causation in history and the social sciences is a highly contentious one in

itself. The existence of rigid laws in social relations, resembling the laws of nature, has been generally rejected and social phenomena and processes are attributed to a variety of multiform causes both intentional (brought about through human agency) and unintended or structural. Causal analysis must, therefore, tread a narrow path between two unacceptable courses: the first leads to analytical indeterminacy (each effect has various causes and each cause in turn is the effect of various others and so on); the second attributes a notional causal primacy to a single social phenomenon and virtualizes all others, laying itself open to criticisms of arbitrariness. The former creates analytical-logical problems; the latter does injustice to the complex empirical reality.

The danger test or any other doctrine that purportedly determines in a uniform way the causal primacy or relevance of expression in any chain of events can be accused of conceptual arbitrariness and empirical reductionism. Even in the simple corndealer's house example one may imagine many situations in which the incitement or advocacy or plain statement that the "corndealers are starvers of the poor" is neither the main nor a cause of the ensuing ransacking of the house. It is again the duty to decide which the judge cannot easily avoid, the sovereign prerogative and demand of choice, that takes precedence. By interpreting what is a danger or an evil, for legal purposes, the judge both chooses one of more competing claims and presents it as the "common good" or "public interest", and participates in its fight to be presented as such. Equally by insisting that, in the circumstances, a particular event is or could have been the primary cause of a certain effect he, sometimes, violates history conceptually and, at the same time, leaves a yardstick for the future. As an official observer of the historical past and as a participant in the creation of the official present and future, the judge must always claim neutrality and remoteness but in cases of political conflict the result of judging is not neutral.

4. The "Bad Tendency" and Danger Tests and the Public Sphere

As we saw, at the end of the first period of consistent judicial involvement in expression cases two legal doctrines had emerged. The bad tendency one used by many district courts in Espionage Act cases and the clear and present danger test enunciated by Holmes in Schenck for a unanimous Court and further elaborated by Holmes and Brandeis in dissent. The Supreme Court agreed to the danger test only when its use led to affirmation of convictions and solidly rejected its later interpretation which would have led to some reversals of lower courts and acquittals.

Although questions of free expression either as an individual constitutional right or as a constitutional limitation upon the legislative and executive branches, imposed by the First Amendment to the Constitution, were not extensively discussed (with the exception of the dissents), the Supreme Court undertook in earnest the task of drawing the line between unprotected and punishable and legally immune expression. Thus, by construing the Espionage Act and the various state anarcho-syndicalist statutes, in cases involving expression claims, the Court construed the First Amendment as well, which in its "absolute" language imposes strict limitations on federal and (from Gitlow) state power and, accordingly, confers a constitutional right to expression.

These early cases indicate a typical manner in which claims to free expression arise and are legally sanctioned (affirmed or denied) or, in other words, the existence and degree of a constitutional right to free expression is determined. In the Espionage Act cases, the question asked was whether and under what conditions political dissent could be construed as the means for the violation of the Act; in the later cases, when did certain concrete statements come under the blanket criminal prohibition of a general category of expression.

In both cases, the question was under what conditions human conduct which has as its main aspect a communicative intent may be prohibited or punished and, by implication, when it is allowed. The public sphere was demarcated, in a negative way, through the placing of certain groups, interests and ideologies outside its legal-legitimate bounds.

The bad tendency test seizes a certain category or content of expression and declares it unprotected. The judicial and legislative intervention seeks to ban a sort of idea in toto from the political public sphere. They are declared criminal and punishable, but at the same time, they are identified with commonly accepted moral evils (socialists are spies, they adopt force and violence as political methods), and are thus presented as morally suspect. The legal ban and moral opprobrium cast upon political doctrines results in their complete identification with those invividuals and groups who, allegedly, hold and propagandize them (thus "guilt by association" and the emphasis on presumed intent). Thus, through the prohibition of political doctrines, the punishment of those who hold them, and finally the intrinsic linking of the two, the modern notions of heresy and the heretic take shape. The heretic is "excommunicated" and repressed, the all-contaminating character of heresy is reaffirmed and the outer limits of permissible ideology are constituted. Both functions of political justice, that of defining and repressing political deviation and of "implanting desirable ideologies"[27] are exemplarily served.

Against that approach, the danter test draws attention to the fact that political expression and activity, as all expressive activity,[28] is temporally and spatially - contextually - situated. It is the reaction of the audience to the "message", in its specific context, that constitutes the danger. Thus, regulation of the time, the manner or the place where the expression takes place or is received, can neutralize its content without an outright ban of the latter. Once

the danger-in-context approach is accepted the determination of what is or might be endangered becomes the paramount concern.

It was after the Supreme Court's adoption of the danger approach and, at the same time, of the democratic justification theories of expression, that it started dealing, positively, with the determination of the specific social interests that are threatened by expression, and of the social value expression itself carries. It, thus, embarked upon a more independent and positive demarcation of the public sphere. This change coincided, roughly, with the second Roosevelt administration and the launching of the New Deal.

CHAPTER VIII

THE PUBLIC SPHERE UNDER THE NEW DEAL: FREEDOM OF EXPRESSION FROM 1930-1950

1. Introduction

In February 1930, after the resignation of Chief Justice Taft, President Hoover appointed Charles Evan Hughes, as the new Chief Justice. The period between 1930 and 1941, when Harlan Stone was appointed by President Roosevelt as Chief Justice, was one of the most dramatic in the history of the Supreme Court. The Great Depression, which Brandeis had called an emergency "more serious than war", had created a sense of national catastrophe; Roosevelt's early New Deal measures meant that the welfare-interventionist state which judges like Field and constitutional authors like Cooley and Dicey had dreaded was hesitantly becoming a federally administered political reality. In the two judicial terms of 1935 and 1936 the Supreme Court in a series of cases attempted to frustrate the New Deal programme: in Schechter Poultry Corp. v. U.S.[1] it declared the National Industrial Recovery Act unconstitutional for improper delegation of legislative power to the executive; for the same reason a federal act regulating coal production was equally invalidated (Carter v. Carter Coal Co.[2]); the Agricultural Adjustment Act was annulled in 1936 (U.S. v. Butler[3]); and in Morehead v. New York ex rel.Tipaldo[4] a New York statute providing for minimum wages for women was invalidated: "The state is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages paid". According to R. Jackson, one of the Roosevelt Supreme Court appointees, in those decisions "the Court allowed its language to run riot... (it) cast doubt upon all federal aid to agriculture...

(it) struck at all national effort to maintain fair labor standards... and deliberately attempted to outlaw any form of state legislation to protect minimum wage standards".[5]

But in November 1936, Roosevelt was re-elected in a landslide victory with a clear promise to press on with the New Deal measures. In February 1937, he announced a plan that would give him the opportunity to appoint six new Supreme Court Justices and thus create a pro-New Deal majority. However, this "court-packing" plan, as it became known did not have to go through.[6] In a single judicial term (1937), the Court in a dramatic change - brought about by an unexplained switching of vote by Justice Roberts - overruled comprehensively its few months old decisions and upheld in succession a Washington minimum wage law (West Coast Hotel Co. v. Parrish[7]); the new National Labor Relations Act and the Social Security Act (Steward Machine Co. v. Davis[8]). Thus, the New Deal and the power of the executive to regulate the economy was reluctantly accepted by the judiciary. The Court indicated that it would not use the weapon of extensive judicial review any longer to challenge regulatory and welfare measures. This volte-face was called the "judicial revolution".

But, at the same time, another change had started taking shape. In the late 30s and early 40s, the Court under Chief Justices Stone and Vinson (appointed in 1946) embarked on a new activist line in the field of personal and political rights. Its involvement in free expression cases multiplied in an unprecedented way. References to the "preferred position" of personal and political freedoms and the democratic justification of expression became standard parts of its opinions and "danger test" phraseology was often used to reverse lower court decisions and uphold expression claims. All clauses of the First Amendment were gradually incorporated in the 14th and in this way the Court asserted the power to review all kinds of state action

related to expression. It started, thus, to participate actively and positively in the construction of the public sphere.

It is to these cases that this chapter turns. The period covered in it spans from 1930 until the early 50s. With the exception of laws and cases dealing specifically with communism, the Communist Party, communists and related topics which started appearing during that period, but are examined in the next chapter, all other important cases of these two decades are dealt with below. However, the proliferation of cases related to the various aspects of expressive activities is such that instead of examining them in strict chronological order an approach based on thematic unity is preferred. Thus the legal material will be classified in the following way:

(a) Cases coming under various federal and state sedition laws similar to those that preoccupied the Court in the previous period.

(b) Cases related to the promotion and implantation of desirable ideologies and the identification, discouragement and weeding out of alien, hostile or Un-American ones.

(c) Cases related to the various aspects of the Constitution and regulation of the "public forum".

(d) Finally cases dealing with press freedom.

In conclusion the cases and legal doctrines discussed will be related to the public sphere hypothesis advanced above.

2. The Sedition Cases

The first expression case (Stromberg v. California[9]) reached the Hughes Court in 1931.

The Stromberg case involved the California "red flag" statute. Under its provisions it was a felony to display a red flag in a public assembly "(1) as a sign, symbol or emblem of opposition to organised government,

or (2) as an invitation or stimulus to anarchistic action, or (3) as an aid of propaganda that is of a seditious character".

Yetta Stromberg was a Communist supervisor of a summer camp for children. Every morning she was running up a red flag with the hammer and sickle, while the children were saluting and reciting an oath of allegiance to the working-class cause. No other evidence was produced against her. She was charged and convicted, however, under all three clauses of the statute.

Chief Justice Hughes focussed his attention on the first clause of the statute, refusing expressly to examine the constitutionality of its two other clauses. "Opposition to organised government" is a perfectly legal attitude, the gist of the democratic state, if confined to peaceful methods. The first and most vulnerable clause of the statute was declared void, because it deprived Stromberg of her Fourteenth Amendment rights:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the 14th Amendment."10

No direct link between the expressive act and subsequent criminal conduct was required by the statute. Nevertheless, the statute was found "vague and indefinite"[11] as regards its first clause which did not distinguish between peaceful (legal) means of political opposition and violent (illegal) opposition. Thus, for the first time, part of a statute was declared void for abridging "free political discussion". The decision clearly implied, however, that the two other clauses could be construed within the limits of the First Amendment (if the flag was displayed as a symbol of anarchy or sedition).

To be sure, a flag is not speech as one of the dissenting Justices remarked. But the Court extended to the act of raising a falg the protection afforded by the First Amendment to speech. It indicated, thus, that it was prepared to examine conduct of a symbolic character as expressive activity that could, in principle, claim the protection of the First. In so doing, it embarked on a still continuing attempt to define the parameters of "speech" for legal purposes.

The two other important cases of this period[12] in relation to freedom of political expression involved members of the Communist Party, and came under old sedition statutes.

De Jonge had presided at a meeting of the Communist Party called in solidarity to a current longshoremen's strike. The meeting was orderly and no evidence was produced to the effect that criminal syndicalism was advocated by De Jonge. Nevertheless he was convicted and sentenced to 7 years' imprisonment, under the Oregon Criminal Syndicalism Act which made it an offence to preside at or assist in conducting a meeting of an organisation that advocated "crime, physical violence... as a means of accomplishing... industrial or political change or revolution". The Supreme Court of Oregon held that the actual purposes or conduct of the meeting were immaterial. The fact that the meeting was called by the Communist Party sufficed for conviction. Thus, De Jonge was convicted for participation in a meeting called by the Communist Party, a fully legal party, regardless of what had occurred at that meeting.

The case resembled strongly the earlier Whitney one, but this time the Court adopted, unanimously, the theoretical rationale and legal approach advocated by Justice Brandeis in dissent.

> "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental... These rights may be abused by using speech or press or assembly in order to incite to violence or crime. The people through their legislatures may protect themselves against that abuse. But the

> legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights... in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means... It follows from these considerations that consistently with the Federal Constitution peaceable assembly for lawful discussion cannot be made a crime..." 13

Chief Justice Hughes condemned the application of the statute by the state courts in terms which disapproved strongly the theory of "guilt by association".

> "The broad reach of the statute as thus applied is plain... A like fate [conviction] might have attended any speaker, although not a member [of the Communist Party], who 'assisted in the conduct' of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party." 14

The Court did not invalidate the Criminal Syndicalism statute (it did so for the first time in 1968),[15] but condemned its application to the case at bar. Chief Justice Hughes argued that if De Jonge had committed some other crime he should have been indicted accordingly. His sole participation in a meeting organised by the Communist Party was not a crime. "The question... is not as to the auspices under which the meeting is held but as to its purpose." Even if it was assumed that the Communist Party advocated criminal syndicalism, the Party's illegal activities did not automatically incriminate members who had not advocated crime or violence.

Thus, the broad reach of the construction below and the complete lack of evidence of any illegal acts, utterances or intentions by De Jonge led to a unanimous reversal of his conviction. At the same time,

the process initiated with Gitlow was further extended: the right to peaceful assembly was incorporated in the Fourteenth Amendment and was thus made applicable as against both Federal and State governments.

The next major syndicalism case,[16] decided in 1937, was the first in which the danger test, expressly adopted by the majority of the Justices, led to the acquittal of the defendant. The first successful claimant under the test, Herndon, was a black communist who had tried to organise the Communist Party and campaign for civil rights in Georgia. When arrested in Atlanta, he carried on him a number of Communist Party membership blanks and pamphlets. One of the pamphlets was entitled "The Communist position on the Negro question", and argued for a semi-independent black state extending across several southern states. There was no evidence that he had distributed any of these pamphlets or that he had advocated criminal anarchy or illegal resistance to the authorities.[17]

However, under the clause of a pre-civil war Georgia statute,[18] punishing insurrection,which postulated that "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state shall constitute an attempt to incite insurrection", Herndon was convicted and sentenced to 18 years' imprisonment. Under the statutory construction by the Georgia Supreme Court, the defendant should have contemplated the use of force but its imminence or likelihood were held to be immaterial. On the question of the required intent, the Court had held that proof that the defendant intended to bring about an insurrection "instantly or at any given time" was not necessary for conviction; it was sufficient that "he intended it to happen at any time, as a result of influence, by those whom he sought to incite". Herndon's pamphlets were found to be sufficient evidence of his intent to stir up a future revolution.

The case was brought to the Supreme Court on a writ of habeas corpus. The State argued in court that the statutory construction by the Georgia courts was in accordance with Gitlow which, allegedly, had upheld "state statutes making criminal utterances which have a 'dangerous tendency' towards the subversion of governments".[19]

Justice Roberts, for a 5-4 majority, reversed. He accepted that the 14th Amendment allows the punishment of incitement to violent and illegal action and other legislative measures which do not go beyond "forefending against 'clear and present danger'...". But he distinguished the Georgia statute from the Espionage Act, (the statute "...does not deal with a wilful attempt to obstruct a described and defined activity of the government") and from the criminal anarchy act involved in Gitlow, which punishes "...utterances advocating the overthrow of organized government by force..."[19a] The Justice rejected the contention of the state that the applicable standard of guilt was the "dangerous tendency" of words and went on to state the "preferred position" doctrine and the related prohibition of vague and indefinite statutes, in the area of First Amendment rights.

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organised government. The judgement of the legislature is not unfettered... And where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained..."20

Justice Roberts examined next the evidence on the record. He found that, in the circumstances, Herndon's solicitation of members for the Communist Party and the pamphlets he carried on him, but had not distributed, failed to "establish an attempt to incite others to insurrection". Having found that the conviction was not supported by the evidence, Justice Roberts turned to the statutory construction by the Georgia courts. He held that under the Georgia doctrine, the jury

and judge could not appraise the circumstances and the character of the defendant's utterances as begetting a clear and present danger of forcible obstruction of a particular state function, and no ascertainable standard of guilt was provided. He objected particularly to the dissolution of the requirement of some direct causal and chronological link between the utterances and the apprehended consequences.

> "To be guilty under the law as construed, a defendant need not advocate resort to force... If by the exercise of prophecy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophecy and abstain, under pain of punishment... Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction... The question thus proposed to a jury involves pure speculation as to future trends of thought and action... The law as thus construed, licenses the jury to create its own standard in each case... The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen that his words would have some effect in the future conduct of others." 21

Thus in Herndon the main elements of the danger test were linked with the preferred position of political freedoms. To be sure, the Georgia statute was not invalidated. In this linkage, the strong assumption of constitutionality of legislative acts, an integral part of the Holmesian test, was eroded. The danger test was confirmed both as a rule for the examination of the evidence and as a potential test determining the constitutionality of statutes prohibiting specified categories of expression.

During World War II, suppression of anti-war dissent in no way resembled the Great War situation. The main left-wing groups and in particular the Communist Party fully participated in the war effort in accordance with the policy of the Third International. A typical Communist Party leaflet ran: "Advocates of strike threats or strike actions in America in 1945 are SCABS in the war against Hitlerism, they are SCABS against our Armed Forces, they are SCABS against the labor movement".[22] Thus, during the War, the draconian provisions of the 1940 anti-communist Smith Act were invoked only twice against a pro-Nazi group and the

Trotskyist Socialist Workers Party in Minneapolis. The former prosecution was eventually dropped,[23] while in the latter 18 leaders of that party were convicted and certiorari was denied by the Supreme Court.[24] It was a tragic irony and a text-book example of intra-left fratricide that the Communist Party which was later to receive the full Smith Act treatment, supported in its newly-found loyalty, the anti-Trotskyite application of the Act.[25]

In the two war-time sedition cases which the Court agreed to review, the lower courts were reversed and the defendants acquitted. The first came under the 1917 Espionage Act (Hartzel v. U.S.).[26] Hartzel was convicted, under the second and third clauses of §3 of the Act, for distributing three pro-German racialist articles, critical of American participation in the war. Justice Murphy, for the Supreme Court, held that under the Act two elements were necessary for conviction. The subjective of "a specific intent or evil purpose... to do the acts proscribed by Congress", and the objective of "a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent".[26a] The Justice then examined the record, in some detail, for evidence of the required intent, and concluded that neither the contents of the articles nor the circumstances of their distribution provided proof beyond reasonable doubt on the requisite "narrow intent". The conviction was reversed and the question whether the publications had created any danger to the war effort was not examined.

The second case (Taylor v. Mississippi)[27] came under a Mississippi anti-sedition statute which prohibited the teaching of doctrines "designed and calculated to encourage violance, sabotage or disloyalty to the Government of the United States or

the State of Mississippi". Two Jehovah's Witnesses had been convicted under it for expressing their anti-war sentiments. The Supreme Court, per Justice Roberts, unanimously reversed.

> "The statute as construed in these cases makes it a criminal offence to communicate to others views and opinions respecting government policies, and prophecies concerning the future of our own and other nations. As applied to the appellants, it punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or to have threatened any clear and present danger to our institutions or our Government. What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs."28

The rationale of the decision is not very clear. Justice Roberts found errors in the broad construction and application of the act by the lower courts; he held that the Witnesses were entitled to preach what they did, that they lacked the required specific intent for conviction, and that they did not create a clear and present danger. Thus, all the major doctrines used until that time in order to reverse convictions for expressive activities were referred to in Taylor. However the Court refrained again from using the preferred position rationale to invalidate the sedition law.

It is reasonable to conclude, nevertheless, that the Second War was fought in a more relaxed internal atmosphere than the First. The scarcity of prosecutions initiated indicates that contingent political circumstances were the causes of that fact as much as the newly found liberalism of the Supreme Court and the federal

and state judiciary which often receive all the praise in constitutional writings.[29]

3. The Establishment of Loyal/Undesirable Ideologies. The First Cases

The obvious front-runner in the field of alien and hostile ideologies, in the period under examination, was communism and assorted related beliefs. Cases dealing with communists are not lacking particularly towards the end of that period. However, the communist related legal material will be dealt with in the next chapter. Here, earlier Supreme Court interventions in the area of ideology-planning will be examined.

While the "red flag" statutes encountered above,[30] identified a particular symbol with a subversive or disloyal ideology, another series of statutes passed after the Great War demanded the symbolic public proclamation of adherence to ideologies stipulated as patriotic and American. A 1919 pamphlet of the National Civil Liberties Bureau on "War-time Prosecutions and Mob Violence" included, as one of the recurring categories of mob violence, the listing "forced by mobs to kiss the flag".[31] This practice was after the War turned into a statutory requirement of various forms: public oaths, gestures and salutes and other such symbolic public affirmations of loyalty were introduced by various states. The commonest type of statute made the ceremony of flag salute compulsory for all school children and teachers.[32] A number of such statutes came up for review by the Supreme Court in the 1940s.

In Minersville School District v. Gobitis,[33] the local Board of Education had compelled students and teachers to salute daily the flag proclaiming that "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all". A Jehovah's Witness family objected to the ceremony on religious grounds and their children were accordingly expelled from the School.

When the case reached the Supreme Court, Justice Frankfurter writing for the majority, with only Justice Stone dissenting, treated the case as related solely to the religious freedom of the pupils which had to be "balanced" against the interests that the ordinance, supposedly, promoted.

> " The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization... The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate."[34]

National unity is "an interest inferior to none in the hierarchy of legal values" and clearly outweighed the social interest in the religious freedom of a few schoolchildren. The demand of the local educational authorities was a reasonable one and the Court should refrain from invalidating such a reasonable measure furthering the paramount social interest. The injunction requested was refused.

By 1942, however Justices Black, Douglas and Murphy had joined Stone in dissent (Jones v. Opelika[35]) and had indicated that their concurrence in Gobitis and the principle of judicial deference expressed there by Frankfurter were erroneous. In 1943 Gobitis was explicitly overruled.

The West Virginia State Board of Education v. Barnette[36] case that reversed Gobitis is often presented as one of the most important in Supreme Court jurisprudence. The case deserves a detailed examination because it presents the two lines developing on expression theory and doctrine as well as on the role of judicial review.

Justice Jackson wrote the prevailing opinion, while Roberts, Reed and Frankfurter dissented and retained their Gobitis position. Jackson relied on the free expression issues involved rahter than on religious freedom. The case was treated as the reverse equivalent of the earlier Stromberg case. As in that case the fundamental question was whether the government and its officials are permitted to coerce upon the people a uniform attitude towards all the important political and social matters and suppress non-conformist opinions.

The majority of the Court answered in the negative:

> "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority... [We] apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organisation... We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes... Freedom to differ is not limited to things that do not matter much... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (U.m.) 36a

A substantive part of the opinion is therefore devoted in discussing the justification of free expression: it is the basis of democratic government and of the development and flourishing of individual personality. To this extent, it may be regarded as the judicial pronouncement best encapsulating the tenets of J.S. Mill's individualism and of democratic humanism. Expression claims start their contest with other social interests in a "preferred position". The existence of a mere link of "reasonableness" between the legal restriction and a social interest

will not suffice when the paramount interests in an "open society" are endangered.

> "...[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." 36b

National unity may be fostered by persuasion and example but not by coercion. In the Barnette ordinance the power of compulsion was invoked without any allegation that remaining passive during the ceremony created a clear and present danger, a necessary requirement for any effort to muffle expression:

> "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."37

Justice Frankfurter filed a lengthy and impassioned dissent. He wrote one of his typically well researched expositions on the virtues of judicial self-restraint. Judicial review "prevent[s] the full play of the democratic process" and must be used with the "greatest caution"; he repudiated the rationale of the preferred position doctrine: "...even though legislation relates to civil liberties, our duty of deference to [the legislature] is no less relevant or less exacting"; and he complained that the danger test led the Court to assume "a legislative responsibility", and in any case the test was applicable solely to situations similar to that in Schenck. Its use in Barnette was "to take a felicitous phrase out of the context of the particular situation in which it arose".[37a] Judges may deem the compulsory flag salute a foolish measure, but their task is not to pass on its wisdom or its capacity to "inculcate concededly indispensable feelings". By invalidating it, the Court abused the rules of democracy and declared the "consciences of a minority [as] more sacred and more enshrined in the Constitution than the consciences of a majority".[38]

Finally, an interesting wartime case related to the - now infamous - compulsory relocation of Japanese-Americans and their internment should be included within this category. Although it did not refer exclusively to First Amendment issues, the wholesale loyalty of a large group of people and their freedom were at stake.

Following Pearl Harbor the Roosevelt administration was alerted to the existence of some 110,000 people of Japanese extraction in the West Coast, any number or all of whom seemed to loyal, white Americans to be an actual or potential fifth column. Under the promptings of various military and political figures, Roosevelt initiated the relocation programme in 1942. The American-Japanese were forcibly uprooted from their homes and land which they had to sell cheaply and were transferred to inland refugee camps and internment centres where they stayed throughout the war.[39] Earl Warren who became later the celebrated liberal Chief Justice, was instrumental in the affair: testifying, as the California Attorney-General, to a Congressional Committee he declared that all West Coast strategic locations and installations had Japanese-Americans in their vicinity. "It is a situation fraught with the greatest danger and under no circumstances should it even be permitted to exist." And after the relocation, the then California Governor, Warren insisted that "if the Japs are released, no-one will be able to tell a saboteur from any other Jap".[40]

In Korematsu v. U.S.[41] a Japanese liable to relocation had remained in the restricted area and was accordingly criminally prosecuted and convicted. When his conviction came up for review by the Supreme Court the constitutionality of the whole programme became the prominent issue of the case.

The Court affirmed in a 6-3 decision written by its leading liberal Justice H. Black. Black examined the rationale of the whole programme and found it commensurate to the "gravest imminent danger to public safety" posed by the potential espionage and sabotage activities of the interned Japanese. To the accusation that the measure was a racist imprisonment of a whole group without any evidence concerning the disloyalty of the individuals concerned, Black answered that the military authorities considered "the danger great and the time short for

individual inquiries". The gravity of the danger disposed of any objections of harshness or violation of individual rights.

Frankfurter concurred but thought that Black's exercise in examining the merits of the programme was unjustified. This was the "business [of the executive and military authorities] not ours".

The dissenters Murphy and Jackson stressed that not even one prosecution for espionage or sabotage had been brought against any Japanese-American before the relocation. They objected to the granting of constitutional legitimacy to military orders which involved a subtle construction of the due process clause according to which the Constitution "for all time validated the principle of racial discrimination in criminal procedure and of transplanting Americans".

Whatever the military considerations on the necessity of the measure, the importance of the Korematsu case for the evolution of the judicial notions of loyalty and personal freedom cannot be underestimated. A whole group of people, in this case racially demarcated, was accepted as inherently dangerous and consequently deprived of all the normal guarantees of criminal law and procedure. Dangerousness, in this case racially construed, becomes an inheritable vice. This principle of intrinsic dangerousness attributed to a certain social group "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need", to quote Justice Jackson's dissent. Thus, while in earlier cases people were punished for advocating certain dangerous ideologies, here a whole group is exorcised, as such, irrespective of any specific ideology. Dangerousness gets transformed, from being predominantly a function of a certain "subversive" ideology, to a function of the mere membership of a group and all the more repressive since such membership is involuntary. The construction of a notion of "universal guilt" that follows either adherence to a specific ideology or/and social belonging

irrespecrive of specific individual beliefs, received in Korematsu its first judicial approval. In the 50s the "loaded weapon" was used in much more extensive, pervasive and subtle ways. Jackson, too, would enthusiastically approve its use against communists and others. To that extent Korematsu may be seen as a crucial link connecting the pre- and post-War notions of guilt.

4. Aspects of the "Public Forum".

4.1. On the "Public Forum" in General

Public meetings, marches, demonstrations, picketing, canvassing and leafleting are kinds of expressive activity in which the "market place of ideas" is encountered in its most direct and less metaphorical form. Equally the intervention of state or local-administrative and police-authorities to prohibit or permit the event a priori, to halt or protect it on the spot, or to prosecute and punish participants after its occurrence - usually under the rubrics of public peace and order or simply law and order - is one of the most direct ways in which the public realm is officially constituted and sanctioned.

Professor H. Kalven has introduced in the examination of cases related to such problems the concept of the "public forum". According to it "in an open democratic society the streets, the parks and other public places are an important facility for public discussion and political process; they are in brief a public forum that the citizens can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom".[42]

The same concept has been utilized by other constitutional authors.[43] Although it is more limited than that of the public sphere introduced here, it may be profitably used as one important element or component of the latter, referring to the regulation of its spatial

and temporal context.[44] But as with the broader concept, that of the public forum and its judicial construction cannot be seen as involving certain common principles actually applied or applicable across-the-board and for all times. As Emerson admits "the formulation of legal doctrine on this subject presents some special difficulties".[45] However, both Kalven and Emerson attempt again to construe such commonly applicable principles and doctrines, with liberal intentions admittedly and an eye at the mid-60s' use of the public forum by the various protest movements.

If one agrees with Professor Kalven's statement that the use of the facilities of the public forum is an "index of freedom", here again questions like "what" citizens, when and how have been actually allowed to "commandeer" them, may give an insight into the dynamic historical constitution of the public forum and the role of the judiciary and the Supreme Court in this process.

4.2. Jehovah's Witnesses in the public forum

The Supreme Court started dealing in earnest with cases, which may be conveniently brought under the concept of the public forum, in the late 30s. Until the early 50s, some 30 cases of that kind had been decided. The majority of them involved activities of the millenarian religious sect of Jehovah's Witnesses "distinguished by great religious zeal and astonishing powers of annoyance" according to Chafee.[46] Indeed a great number of all cases related to expression claims during that period involved the Witnesses, so that the 30s and 40s have been called the Jehovah's Witnesses period of constitutional adjudication.[47]

I will examine some of the most characteristic cases of that period in chronological order, indicating the issues tackled and approaches used in them.

The first two cases (Lovell v. Griffin and Schneider v. State)[48] involved the use of city ordinances and regulations which, in order to restrict religious canvassing and distribution of leaflets, required the prior licensing of such activities by the police authorities.

In Lovell, a municipal ordinance required the permission of the city manager for the distribution of any kind of literature in the streets. In Schneider, the ordinances involved required a similar police permission in order to canvass or distribute literature from house to house. Both Lovell and Schneider performed their religious duty to recruit new members for the Church with great zeal but without the required licence. The two cases reached the Supreme Court within one year's time.

The city of Griffin's main arguments was that Lovell's right to speak freely had not been affected. The permission was required only for the public distribution of printed matter which, arguably, was not covered by the First Amendment.

Chief Justice Hughes writing for a unanimous Court, found the ordinance unconstitutional:

> " The ordinance is not limited to 'literature' that is obscure or offensive to public morals or that advocates unlawful conduct... The ordinance embraces 'literature' in the widest sense.
>
> ...We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to licence and censorship."

Freedom of the press is not confined to newspapers and periodicals. It includes every sort of publication that is used as a medium of information and the communication of opinions. As to the last defence of the city of Griffin, Hughes stated:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value.' Ex parte Jackson 96 U.S. 727, 733..." 49

The ordinance was invalidated as an overbroad and total prior restraint on freedom of the press.

In Schneider, the cities argued that the licensing systems involved, intended to prevent the littering of the streets and fraudulent collections of money. A stringent police examination of the applicants - including the taking of photographs and fingerprinting - was required in order to ascertain their "good character".

Justice Roberts, accepted that such objectives were valuable but that the courts should independently "weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation".[50] There were alternative, less radical, means available to the local authorities: they could increase their budgets for cleaning the streets and prosecute littering, fraudulent solicitations and trespasses. But the request that "all who wish to disseminate ideas must present them first to police authorities for consideration and approval", was a measure that allowed police to discriminate against groups and ideas and was disproportionate to the objectives sought. The preferred freedoms of speech and press and their exercise in "the streets [which] are natural and proper places for the dissemination of information and opinion"[51] were violated by the ordinances, which were accordingly annulled.

In Cantwell v. Connecticut,[52] decided in 1940, a state law postulated that groups wishing to solicit money for "religious, charitable or philanthropic causes" should obtain the previous approval of a state official.

Again, Roberts stated that "the state may by general and non-discriminatory legislation regulate the times, places and manner of solicitation upon its streets, and of holding meetings thereon" but the "determination by state authority as to what is a religious cause"[53] was an unwarranted incursion upon constitutional liberties.

Cantwell had been also convicted under common law for inciting a breach of the peace. He had played to two Catholics in the street a record that attacked the Catholic religion and church. No fight had followed and Cantwell was arrested afterwards.

Roberts reversed the conviction. There were two interests involved that had to be balanced: that in public order and tranquility, which the state should uphold when "clear and present danger of riot, disorder, interference with traffic, or other immediate threats to public safety, peace or order occurred"; and that in the "free communication of views, religious or others".[54] The common law offence was not a "narrowly drawn" statute and left an unacceptably wide discretion to administrative and police authorities; anyway Cantwell's utterances did not create a clear and present danger to public peace and order.

Here a parenthesis should be opened. When 2 years later another Witness was convicted for calling the Rochester, New Hampshire, city marshall and council "racketeers" and "fascists" the Supreme Court affirmed unanimously. In this case the indictment was brought under a statute punishing any "offensive, derisive or annoying word to any other person who is lawfully in any street or other public place". The Court ruled that the statute was not vague and in language much repeated and extended to other situations later it said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."55

The term "fighting words" resembled the Holmesian expression about "words that have all the effect of force" (Schenck) which are not entitled to the stricter protection afforded by the danger test. The

Court indicated, thus, in Chaplinsky, that certain categories of expression, certain "messages" have no "social value" and cannot be accorded the status of "preferred freedom", the assumption from which most decisions of the period started. To be sure "lewd", "obscene" or "fighting words" are not self-interpreting terms as the different results of Cantwell and Chaplinsky indicate. In Cantwell the prosecution came under the common law crime of inciting a breach of the peace which was found too vague and indefinite, unlike the Chaplinski statute. But beyond the statutory differences, Chaplinski contained an important doctrinal point. Certain well and narrowly defined categories of speech - the lewd, profane, libelous and "fighting" words - were excluded from constitutional protection, since they do not appeal to reason and cannot be deemed as essential in the market place of ideas.

Thus, with the exception of Chaplinsky, most Jehovah's Witnesses cases of the period were related to the definition of forms of public conduct that could qualify as protected expressive activity; and to the Supreme Court's supervision of state regulation of its contextual (time, place and manner) characteristics[56] initiated in Cantwell and Schneider.

In Cox v. New Hampshire[57] a city ordinance that required a police permit for any public parade or procession was found unobjectionable, if it was granted with regard solely to "considerations of time, place and manner so as to conserve the public convenience... and afford opportunity for proper policing". If the police authorities were not discriminating against some particular group but exercised "uniformity of method of treatment upon the facts of each application"[58] - a dictum which, to be sure, left open the door for a wholesale, non-discriminatory banning of all marches - then, the Court would uphold them.

In a later case,[59] the licensing system was found lacking standards and narrowly drawn limitations and was declared an unacceptable prior restraint on expression and a denial of equal protection. The convictions following an unlicensed meeting after "a completely arbitrary and discriminatory refusal to grant the permits" were reversed.

In Martin v. Struthers[60] a city ordinance prohibited persons distributing leaflets, circulars, or other advertisements to ring the door bells or otherwise to summon the occupants of houses. Justice Black speaking for the Court invalidated the ordinance. He thought that normal police and health regulations were sufficient and a general proscription of the kind involved, ran counter to the constitutional command that freedom to distribute information "must be fully preserved".

Expressing an idea that was repeatedly echoed in the Witnesses cases, Black stated that "door to door distribution of circulars is essential to the poorly financed causes of little people". The conflicting interests for Black were those of privacy and of prevention of health hazards. But as "freedom to distribute information... is so clearly vital to the preservation of a free society" it may be restricted only by reasonable regulation of its time and manner.

> "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibitions can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[61]

In Murdock v. Pennsylvania[62] the city had imposed a licence tax upon persons canvassing orders for goods or merchandise. Members of the Jehovah's Witnesses again, who were selling religious literature, attacked the ordinance. With four Justices dissenting, Douglas spoke for the Court. The activities of the Witnesses were not of a commercial advertising character, which had been already excluded from

preferred freedom status.[63] The statute was therefore infringing freedom of speech and of the press by imposing the so-called "taxes on knowledge":

> "[This tax] restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise... it may not be said that proof is lacking that these license taxes... have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment." 64

The four dissenters in Murdoch and a follow-up case,[65] argued that a flat non-discriminatory levy for all publications, of the sort envisaged in Cox for licensing demonstrations, would be intact. But the "poor man's medium" argument won the day - albeit precariously. By 1951, a similar ordinance was upheld in relation to solicitation of subscriptions for a weekly journal.[66]

Finally, in Marsh v. Alabama[67] the Witnesses' evangelical forays led to violationsof the regulations of that all-American institution the privately owned company town. Many of these towns were run by local company bosses as feudal demesnes; an American historian has remarked that many of the industrial struggles of the '30s and '40s involved demands for "democratization at the work-place and civil liberties in company towns".[68]

The ordinances of such a town prohibited all solicitations in its streets, and the Witnesses were accordingly prosecuted and convicted under a general Alabama criminal trespass law. Justice Black for the Supreme Court, with only Justice Reed dissenting, reversed the conviction. He argued that had the town not been privately owned, the expressive rights of the Witnesses would have been indisputable. But Chicasaw, the town in question, functioned like any other

municipality; its public function, therefore, determined the extent of state regulation, and private ownership did not entitle the company to insulate the town inhabitants from all public debate. Alabama had argued that the company's powers were coextensive to those of a homeowner regulating the conduct of his guests. But

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 69

Justice Black resolved this early conflict between freedom of expression and private property in favour of the former: "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position".[69a]

Marsh introduced a radically novel principle; it was accepted that a person could remain on private property against the wishes of the owner for the purpose of exercising First Amendment freedoms. Thus, for First and Fourteenth Amendment purposes, the company town was found to be equal to any state municipality; the determining factor was its public function rather than its private title. The ramifications of this rule were further explored, in the 60s and 70s, in cases involving the admission of trade unions and protest movements in the public forum.

4.3. Trade-unions in the public forum

4.3.1. Historical background

The '30s were, arguably, one of the most important periods in the

history of the American Labour movement for various reasons. Between 1933 and 1937 . a great upsurge of spontaneous strike action, unauthorized by the official American Federation of Labor (the "wildcat strikes") engulfed America. A series of mass picketings (symbolized by the 11-mile long picket line of the Goodyear plant in 1936), factory occupations and "sitdowns", unheard of before either in scale or inventiveness of method, culminated in the "spring fever" of 1937 in which 477 factories were occupied.[70]

A number of radical labour leaders, led by John Lewis of the Mineworkers, broke away from the A.F.L. in 1935 and launched the Committee for Industrial Organisation (C.I.O.), a federation committed to industrial unionization. The C.I.O. put a strong challenge to the old, corrupt and collaborationist leadership of the A.F.L.[71] By 1941, the C.I.O. had attracted some 3 million members against 4,5 million of the A.F.L.[72] Through its political organization (the Labor's Nonpartisan League), the C.I.O. helped Roosevelt win the 1936 election and consolidate his position against the Southern "Dixiecrats" and right-wing opposition within the Democratic Party. Roosevelt, on his part, pressed by the strikes and the effects of the Depression introduced a series of measures - against strong corporate reaction - intended to provide some minimum security for workers and old people and a junior-partner negotiating position for the unions.

In 1935, Congress passed the National Labor Relations Act, which established a National Labor Relations Board with some uninn participation in it, the Fair Labor Standards Act and the Social Security Act, all three of which were ultimately and painfully upheld by the Supreme Court after the "judicial revolution"; The N.L.R.A. in N.L.R.B. v. Jones and Laughlin Steel Cor.,[73] the F.L.S.A. in U.S. v. Darby[74] and the S.S.A. in Steward Machine Co. v. Davis.[75]

While in the previous period the Court had declared that workers were "in no sense words of the state" and that trade unions were covered by the anti-trust provisions of the Sherman Act but not the manufacturing monopolies,[76] official attitudes toward them changed in the '30s and '40s and the Court, hesitantly, followed them.

4.3.2. The trade-union cases

This change was echoed in Supreme Court decisions related to the trade unions' position in the public forum. In 1911, the Court had said in a case involving the publication of the name of an anti-union company, in the official A.F.L. journal, under the headings "Unfair" and "We don't patronize", that:

> "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'unfair', 'don't patronize' or similar expressions, a force not adhering in the words themselves, and therefore exceeding any possible right of speech... Under such circumstances they become what have been called 'verbal acts' and as such subject to injunction as the use of any other force whereby property is unlawfully damaged".77

Ironically, the losing appellant in that case was Gompers the early right-wing leader of the A.F.L., who was instrumental in the eventual failure of left-wing unions and Debs' attempts to build a nationally based socialist party.[78] For the old Court all unions - whatever their political complexion - were equally reprehensible conspiracies.

But in 1937, the Supreme Court examining the constitutionality of a state statute authorizing union picketing of a non-unionized establishment, in an attempt to create a union branch, found that picketing was a 14th Amendment protected freedom.

> "Members of a union might, without special statutory authorization by a state make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The state may in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets."79

Following that case, the Court started reviewing a series of legal measures used by various states, to halt organisational and other

trade union activities. To be sure, "physical harassment" as Emerson euphemistically calls it[80] was also extensively used by local authorities to that effect. The National Guard and private police forces were repeatedly brought out to break strike action (for example in the Memorial Day massacre of the striking Chicago steel workers in 1938) particularly after the cooling of the Roosevelt-Lewis relationship in 1937 and the pro-A.F.L. turn of the President.[81]

Be that as it may, the Supreme Court started defining the union activities which could be construed as protected freedoms of speech and assembly and those which could be constitutionally suppressed.

In Hague v. C.I.O.,[82] a New Jersey ordinance required that all public meetings should be licensed by the Director of Safety who could turn down any application if there were fears of "riots, disturbances or disorderly conduct". Mayor Hague had consistently used the ordinance to prevent public C.I.O. recruitment meetings.

Justice Roberts, overruling an earlier decision, rejected the claim that the city authorities, as the owners of streets and parks, could exclude therefrom activities deemed undesirable. In a much quoted phrase, referred to above,[83] he stated that public places were "immemorially" used for assembly, communication and public discussion. The ordinance was held "void on its face" for being a vague instrument of "arbitrary" and "uncontrolled official suppression" of an ancient privilege and immunity. The city's duty was to maintain order but not through the prohibition of all public speech.

The 1940 case of Thornhill v. Alabama[84] marked the high water point of judicial protection of public union activities, although against a rather simple background.

An Alabama statute proscribed all going near to, loitering about or picketing "the works or place of a business... for the purpose of hindering, delaying or interfering with or injuring such business".

Thornhill, the president of a union striking against a no-union company, was convicted by the state courts under the law, for forming a one-man picket line outside the factory. There was no question of any violence and only one employee had been persuaded not to enter the premises.

Justice Murphy reversed the conviction, speaking for the Court with only one Justice dissenting, and declared the statute unconstitutional. All the constitutional standards devised and employed until that time were mentioned in his opinion.

He first stated that the substantiality of reasons advanced in support of the challenged regulations must be independently appraised by the courts. Then, he mentioned the principle of "voidness for overreach". A statute must aim specifically at evils within the allowable area of state control and not sweep within its ambit other activities that in ordinary circumstances constitute as exercise of freedom of speech or of the press. Having thus declared his premises, he went on to examine concretely the statute in question.

He started by saying that the dissemination of information concerning the facts of a labour dispute is an exercise of expression guaranteed by the First Amendment. And picketing is a mode of expression within this protected area of expression. While the state cannot abridge the right by proscribing altogether a certain class of expression - for example expression related to industrial disputes - it may nevertheless regulate the forms which this expression may take. He indicated that such regulation should take into account the number of pickets, the peaceful or violent character of the activity, the nature of the dispute and the accuracy of the assertions made. But the Alabama statute prohibited all picketing without any specific considerations.

> "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern... Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests... We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the statute]."85

The Thornhill rhetoric reminds one of the contemporary Jehovah's Witnesses cases, although the enumeration of the relevant considerations to be taken into account sounded more menacing than corresponding statements in Witnesses' decisions. When more complicated industrial disputes started reaching the Supreme Court, the liberal-democratic rhetoric and the expanding protection afforded to the sect was not forthcoming.

In a 1941 case,[86] the Drivers' Union was involved in extensive peaceful picketing of shops trading in cut-price milk distributed by non-unionised drivers. There was some violence against the dairies and shops but as Justice Black remarked, in his dissenting opinion, there was no evidence whatsoever connecting the picketing with any violence. But Frankfurter found, for the majority, that a court injunction against the continuation of picketing was valid:

> "Acts of picketing in themselves peaceful [can be enjoined] when they are enmeshed with contemporaneously violent conduct... [A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."87

Justice Frankfurter held that an individual injunction against future picketing and communication of industrial grievances based on

the evidence of past violence connected with the dispute was within State power; in accordance with his theory of judicial deference, he argued that a reversal of the injunction would be an intrusion "into the realm of policy-making by reading our own notions into the Constitution".[87a]

Justice Black, dissenting, thought that the injunction, which prohibited all future union communications on the subject of cut-price milk deliveries, was an overbroad restriction of free speech in violation of the First Amendment; from his reading of the reocrd, he insisted that the violence was not related to the picketing and in any case it was not the reason for which the injunction was issued by the State courts.

In Bakery and Pastry Drivers v. Wohl,[88] a union had picketed some bakeries which sold products to two non-unionised peddlers, in an attempt to convince them either to join up or to employ an unemployed relief driver for one day in a week. The New York courts granted an injunction against the picketing which was reversed by the Supreme Court. Justice Jackson held that a "state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual";[88a] in the case at bar however, the union was communicating its legitimate grievances to the public, no violence or coercion was involved and the means used - only two pickets at a time - had slight repercussions only on third parties not involved in the dispute.

Justice Douglas, concurring in the result, felt that the list of the occasions, in which picketing could be constitutionally enjoined under the majority ruling, constituted a drastic departure from Thornhill. Under these rules only ineffective picketing was allowed. He went on to state that picketing was something more than pure

expression, "speech plus", or "speech brigaded with action" as the idea became known later:

> "Picketing by an organised group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."

Those aspects of picketing which involved action were subject to regulation under the normal police powers of the state, but such regulation touching on the expressive aspects of the activity should be "narrowly drawn, of general application and regulating the use of the streets by all picketeers."[89]

The last case in which union rights in the public forum were upheld, in the period under examination, came in 1945.[90] Justice Rutledge's opinion, however, that found for the union attracted only three more votes (Black, Douglas, Murphy) and the necessary fifth was given on different grounds by Jackson while the rest of the Justices dissented.

The case came under a Texas law which stipulated that all trade union officials should apply for an "organiser's licence" before soliciting members for their union. Thomas, a C.I.O. president, defied an injunction and addressed a workers' meeting where he asked the audience to join the union.

Rutledge's prevailing opinion combined "danger" phraseology with the preferred position of expression claims.

> "/A/ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but, by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation."91

The danger test in this construction is no more a vehicle for the scrutiny of the particular circumstances (the context) of the expression

claim but a yardstick for a judicial evaluation of the legislative determination of the conflicting interests. In every case of conflict between the interest in expression and some other social interest, the balance struck by legislatures must be examined by the court in general in order to determine whether a high degree of necessity links the restriction and the state concern.

> "That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this". (U.m.)

In this judicial evaluation the interest in expression starts from a favoured position.

> "Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our system to the great, the indispensable freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." (U.m.) 92

Four Justices dissented from this opinion, in which a uninn came closest at receiving the full protective treatment of the religious sects. They included the Chief Justice and Frankfurter who rejected both the rationale and the reversal of conviction. It was their line that soon prevailed, making, thus, the admission of unions in the public forum a chequered one.

In the aftermath of the War, a relative industrial peace was superseded by a strike wave in 1945-6 which "surpassed anything of its kind in any capitalist country, including the British General Strike".[93] On the other hand, the Congress fell to the Republicans in 1946 and the left-wing New Dealers were on the defensive. The Taft-Hartley Act,

passed in 1947, combined measures for the purging of communists from the unions (examined in the next chapter) and a frontal attack on unionism, as such, by outlawing solidarity strikes and boycotts as well as union contributions to political campaigns.

Following these developments, the Supreme Court, in a series of cases under the intellectual leadership of Justice Frankfurter, reassessed its definition of picketing as a constitutionally protected expressive activity, which had emerged in the Thornhill to Thomas line of decisions.

In Giboney v. Empire Storage and Ice Co.,[94] a Union had launched an organisational drive trying to attract a number of non-unionised ice peddlers. To achieve its objective it obtained agreement from all wholesale ice distributors, but the appellee, that they would sell ice exclusively to union members. The Empire Company refused to agree and the union started picketing its premises causing a 85% reduction in Empire's trade. The company obtained an injunction under Missouri's anti-trust law which the Supreme Court affirmed unanimously.

Justice Black started by rejecting the union's argument that anti-trust laws are not applicable to trade unions. He argued that the power to regulate trade and commerce rests with the legislatures and Missouri's decision to apply its anti-trust laws to all combinations in restraint of trade, including those in which unions are parties, could not be challenged under the scheme of the separation of powers. He then examined the union's objection that the injunction was an unconstitutional prohibition of the peaceful communication of truthful facts about a labour dispute. But as all activities of the appellants were intended to compel the company to stop selling its goods to non-unionised peddlers, thus entering into an illegal combination, they "constituted a single, integrated course of conduct, which was in

violation of Missouri's valid law".[95] The fact that the main means of the union's action was the carrying of placards did not immunise the otherwise illegal conduct from state control. The power of the labour union and its allies was "irresistible" and would render the state's anti-trust law into a "dead letter". Thus, in the special circumstances of Giboney, the picketing was enjoined for putting unwarranted economic pressure on a company which could lead to the violation of a valid law. Picketing in order to achieve an illegal objective was not constitutionally protected.

The Giboney ruling was relied upon in three more cases, all decided on the same day in 1950.

In the first (Hughes v. Superior Court),[97] which was to be repeated in the '60s in various forms, the Supreme Court upheld an injunction by the California Supreme Judicial Court which enjoined picketing by a black organisation of a shop that employed less black people than the proportion of black customers. For Frankfurter, the defender of legislative supremacy, the fact that the court injunction was not based on any clear statutory provisions did not matter. The "policy of California" was validly expressed by the judiciary and the difference between judicial and legislative determination was "immaterial". Industrial picketing is more than "free speech" and the 14th Amendment cannot be construed "as prohibiting California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy".[98]

In the other two cases,[99] picketing of a non-unionised business and of a hotel, whose owner refused to sign a contract with the union as the recognised representative of the staff, were prohibited. In

the first case, the owner of a garage had refused to abide by the union demand to close his business at nights and during weekends. The local branch of the Teamsters sent a single picket to patrol outside the garage, and as a result unionised drivers refused to deliver goods to the business. The owner obtained an injunction, which the Supreme Court upheld.

Justice Frankfurter, for the majority, opened his opininn by stating that picketing "cannot dogmatically be equated with the constitutionally protected freedom of speech". He approached the case as one involving a conflict between two competing interests: the interest of the union not to have working conditions undermined by non-union shops and that "of a democratic society of encouraging self-employer economic units as a counter-movement to the dangers inherent in excessive concentration of economic power". Thus, the admittedly truthful and peaceful character of the picketing was not given any special consideration. Picketing may by allowed or prohibited by a state, the Justice insisted, as a matter of policy, and not because of the constitutional demands of the First and Fourteenth Amendments. In accordance with his views on judicial restraint, the Justice concluded that it was not for the Court to question the balance struck by the state. "[T]he solution of these perplexities is a challenge to wisdom and not a command of the Constitution..."

Justice Minton, dissenting, wrote that the majority's approach was a departure from the earlier picketing cases which "were rooted in the free speech doctrine".[99a] The accepted doctrine, which protected "peaceful picketing and truthful publicity", was seriously undermined, and the states were notified that they could outlaw all picketing and not solely the abuse of picketing.

In the second case, the picketing was found to have an unlawful objective, namely, "coercion by the employer of the employees' selection of a bargaining representative" which violated the "statutory policy against employer coercion of employees' choice". Thus, in accordance with Giboney, picketing for the purpose of forcing an employer to violate state law or policy, could be enjoined.

The line of decisions which had started with Thornhill came to an end in a 1957 case,[100] involving picketing by the Teamsters Union of a non-unionised gravel pit in Wisconsin. Justice Frankfurter upheld an injunction against the picketing, after reviewing some of the cases examined above. The Justice made clear his disenchantment with the Thornhill ruling that picketing was a constitutionally protected expressive activity. "[T]he broad pronouncements... of Thornhill had to yield 'to the impact of facts unforeseen', or at least not sufficiently appreciated". The picketing disputes involved not so much a question of free speech, but a review of the balance of the competing interests of the unions and the states. He concluded his review of the cases, by stating what he thought as the applicable doctrine:

> "This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether pronounced by its legislature or its courts, could constitutionally enjoin peaceful picketing, aimed at preventing effectuation of that policy." 101

Justices Douglas, Black and the Chief Justice dissented. They protested that the decision was overruling an established principle,

and was taking the Court back to its position before Thornhill. "Today the Court signs the formal surrender... State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing".[101a] Under the majority's doctrine, all picketing could now be enjoined, if a court found its purpose to be contrary to some state policy, without more. Justice Douglas insisted that solely the conduct involved in picketing could be controlled or prohibited, and as no evidence of violence or coercion existed in the present case the injunction should be reversed. He relied on his Wohl "speech plus" and Black's Giboney "single and integrated course of conduct" definitions of picketing. However, these were two of the main authorities,used by Frankfurter too, in order to uphold the injunction.

Finally, an important union rights case of that period should be mentioned. It does not relate strictly to public forum aspects but to more general considerations of the political sphere. It came under section 9(a) of the Hatch Act passed by Congress in 1939.[102] Its second sentence provided that:

> "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or political campaigns. All such persons shall retain the right to vote... and to express their opinion."

The Act was extended in 1940 to all state or local government employees. According to its rigorous enforcement by the Civil Service Commission,the Act "operates as a broad prior control, cutting off

beforehand 'political' conduct of almost every description except voting".[103]

A number of federal employees, joined by a Civil Service Union, asked the Supreme Court to reverse a Federal Court injunction enjoining them from undertaking political activities and to declare the relevant clause of the Act unconstitutional for violating among other constitutional provisions the First Amendment. In United Public Workers of America v. Mitchell[104] the Court declined the request for a declaratory judgment of unconstitutionality and examined the merits in relation to the sole appellant, a roller at the federal mint, who had violated the Act by engaging in political activities during the 1946 Congressional elections.

Justice Reed, for the majority, balanced the interests purportedly protected by the prohibition. He speculated on the various reasons that Congress might have considered in passing the Act and found that these could have been the need for service efficiency or for political neutrality. Answering the obvious objection that neutrality is not a necessary requirement for a good engineer - if possible at all, for anyone, one could add - Reed stated that "if in free time [the appellant] is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors". All these reasons made the Act nothing more than "reasonably deemed by Congress", which, to be sure, begs the question: if the judicial function is to judge the "reasonableness" of a legislative measure, this task cannot be fulfilled through mere speculation about the possible or probable reasons that Congress could have had in mind. One "reasonably" assumes that every legislature has some reason or other for passing that or any other Act. In this sort of approach the question surely is, whether the

reasons were sufficient, not whether any reason at all could be found to fit into the Act.

In any case, according to the majority, the loss in expression rights was minimal since "expressions, public or private, on public affairs, personalities and matters of public interest... are unrestricted".

Black, Ruthledge and Douglas dissented. For Black, the Act deprived all civil servants of their right to bring about "changes in their lives, their fortunes, their happiness". He disputed the "reasonableness" (in the sense of sufficiency) of all the possible reasons advanced and thought that they could have been served by other less drastic means.

> "It makes honest participation in essential political activities an offense punishable by proscription from public employment. It endows a governmental board with the awesome power to censor the thoughts, expressions, and activities of law-abiding citizens in the field of free expression, from which no person should be barred by a government which boasts that it is a government of, for and by the people - all the people. Laudable as its purpose may be, it seems to me to hack the roots of a Government by the people themselves; and consequently I cannot agree to sustain its validity."[105]

Douglas would have found the Act constitutional, if it was construed to cover solely administrative employees, leaving blue-collar government workers free to engage in politics. It has been estimated that by 1966 the number of people affected by the Act was 8 million.[106]

4.4. The problem of the "hostile audiences"

Towards the end of the period under consideration, the Supreme Court dealt with cases relating to the use of the public forum for political expression by groups and individuals at the margins of the spectrum of "party politics". According to the Court's Mitchell decision, above, "party politics" has been construed as the legitimate definition of politics, tout court.

Two cases (Terminiello v. Chicago and Feiner v. New York)[107] were decided in a span of two years and make an interesting comparison. They

relate to questions of public order and police involvement in "face-to-face" situations where public speeches arouse immediate animosity from parts of the audience and, thus, lead to actual or potential breaches of the peace.[108]

In the first case, Terminiello, an ex-priest, had held a meeting in a Chicago Hall where he "vigorously, if not viciously" attacked Communists, Jews, Negroes and liberals alike and called a hostile crowd gathered outside the hall "slime", "scum", "snakes", "bedbugs" and similar niceties. There was evidence of some ensuing violence described by Douglas as "several disturbances" and by Jackson as a "riot", a not-inconsiderable difference that underlines the problems of attributing a self-evident or self-interpreting character to the facts of a criminal case.

Terminiello was convicted for breach of the peace construed, by the trial court, to include among other elements "speech that stirs the public to anger and invites dispute".

The circumstances of Terminiello (a derogatory speech, hostile groups facing each other, some violence) made it a good case for the use of the danger test, as applied to face-to-face situations.

Douglas, however, writing for a 5-4 majority reversed the conviction without even considering whether public disturbances were likely to occur because of Terminiello's speech - although they did actually occur. He would have done that only if he was satisfied that the statute, as construed, fulfilled the stringent standards set out by the preferred position attributed to expression in the scale of social values. But the construction of the statute which, according to him, would silence expression, as soon as it promoted "diversity of ideas" and hostile reaction, was defying one of the main functions of expression:

> "...[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech though not absolute... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts or dominant political or community groups."[109]

Justice Jackson, in his dissent reiterated the Schenck formula and accused the court for silently abandoning the "long-standing" test and substituting it with a "dogma" of absolute freedom for irresponsible and provocative utterances. In a somewhat exaggerated language, if one takes into account the trade union decisions, he decried the fact that the Court had gone "far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact"![110]

In the second case, Feiner, a member of the left-wing Young Progressives had made a speech in a street corner of Syracuse, a predominantly black area in New York. In it, he publicised a meeting of his group and protested the revocation of a permit to use the hall of a local school for it. He attacked President Truman (the Young Progressives were the youth organisation of the presidential candidate H. Wallace' Progressive Party), called the American legion a "Nazi Gestapo" and denounced the Mayor of Syracuse who "does not speak for

Negro population". There was a "little excitement" in the audience but the majority of 80 onlookers were sympathetic and no disturbances were reported. One bystander threatened that he would remove Feiner himself, if the police did not intervene. Two attending policemen asked Feiner twice to stop speaking, to no avail, and then arrested him without giving him, however, any reasons for the arrest. He was later tried and convicted for disorderly conduct.

Chief Justice Vinson, for the majority, did not find any reason in the record to reverse the conviction. He referred to the danger test but concluded that Feiner's arrest was not the result of over-zealous police efforts to silence a particular speaker and halt an otherwise lawful meeting:

> "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace (sic)... The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."[111]

Black's dissent points again to the impossibility of any "innocent", so to speak, reading of the facts. For him the evidence showed no "imminent threat of riot or uncontrollable disorder". The policeman should have protected the speaker, if there were any threats against him, and should have explained the reasons for his demand that Feiner stops his speech. In doing neither he had created his own law "on the spot" and deliberately defied "ordinary official duty as well as the constitutional right of free speech".[112]

The contrast between Terminiello and Feiner becomes even more pronounced if one takes into account a case decided the same day as Feiner. Kunz v. New York[113] involved the conviction of a Baptist minister who had held a public religious meeting without a permit from

police commissioner, required under a New York ordinance. Kunz, a fascist, was frequently preaching in public and was given to such statements as "Jews are Christ killers" and "all the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't", which had led to repeated disturbances and scuffles. The police finally denied the required statutory licence and his arrest and conviction followed an unlicensed meeting.

The Court found the ordinance invalid as a blanket prior prohibition on expression and for lacking the necessary administrative standards that would have made the licensing system a non-discriminatory exercise of police discretion. Jackson, the most consistent Justice in all these cases, was the sole dissenter. Kunz, as indeed Terminiello, Feiner, Niemotko (another case decided on the same day too[114]) and Saia and Kovacs (see below), were not exercising constitutional rights but the "consecrated hatreds of sect". Interestingly, Jackson was the author of one of the most praised judicial exposes on the meaning of free speech, only a few years previously[115] in the Barnette case.

4.5. The "Poor Man's" Media

Finally, two cases of the period in which the regulation of the tenor of speech, in the public forum, was at stake should be included in the list. They both related to the use of loudspeakers in public places (a park and a street) to communicate messages to passers-by.

The first (Saia v. New York[116]) decided in 1948 involved the conviction of a Jehovah's Witness who had preached in a park using sound amplification devices, after the police denied him a permit required by a New York ordinance. The ordinance was meant to protect people in public places from undue annoyances.

Douglas found the regulation "invalid on its face, for it establishes a previous restraint on the right of free speech". The

licensing system gave wide discretion to the police to ban all communications "because some persons were said to have found the sound annoying". But "annoyance in ideas can be cloaked in annoyance at sound". The decibels, hours and place of speech could be regulated, but an outright ban defied the fact that "loud speakers are today indispensable instruments of effective public speech".

The following year, however, the Court reversed its position completely. Interestingly, in Kovacs v. Cooper,[117] the New Jersey ordinance was must harsher than the New York one. It imposed a complete ban on the "use or operation... of any device known as sound truck, loud speaker or sound amplifier... or instrument... which emits therefrom loud and raucous noises". Predictably, Kovacs, the losing appellant, was a trade unionist who had been publicising an industrial dispute using a sound truck. His conviction, in a police court, was affirmed by the New Jersey courts and was based on the undisputed fact that he had used the proscribed sound amplifying device.

The Supreme Court's eagerness to uphold the ordinance (and conviction) against its recent invalidation of a much more lenient one while at the same time affirming its faithfulness to the doctrine enunciated in Saia, makes the Kovacs prevailing opinion a piece of judicial reasoning bordering closer to sophistry and "language games" rather than any acknowledged method of logical deduction. It also illustrates the point advanced above,[118] about the ambiguous character of precedent and legal doctrine.

For Justice Reed, Saia should decide the present case, as well. That decision allowed state regulation of the tone, hours and places of amplified speech. The New Jersey ordinance was a good example of such valid regulation since it dissallowed only "loud and raucous" noises in the streets. "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners, and to do so there

must be opportunity to win their attention. [But] it is an extravagant extension... to say that because of it a city cannot forbid talking on the streets through a loudspeaker in a loud and raucous tone". One wonders what sort of noises a "loud" speaker can emit other than loud. As the dissenting Justice Black put it, "The record reflects not even a shadow of evidence to prove that the noise was either "loud or raucous" unless these words of the ordinance refer to any noise coming from an amplifier whatever its volume or tone".[119]

For Black, public meetings which necessitate the use of sound amplifiers, are the "poor man's press". Their prohibition discriminates against a medium of communication predominantly utilised by under-privileged groups: "There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios or chains of show places". The fact that these powerful channels of communication (and television was not, as yet, one of them) must be under the "control and guidance of comparatively few people" was an unobjectionable consequence of "our economic system". But, as long as the poor were allowed their loudspeakers, they could compete with the organised media and redress the imbalance created by the fact that the "press, the radio and the moving pictures owners have their favorites... [and are not] at all times fair"![120]

5. The Supreme Court and the Press

To close this period of constitutional adjudication, a look at the Court's treatment of the "organized media" and, in particular, the press, is necessary.

It should be noted at the outset that during that period a growing awareness of the power of the print and electronic media, and of the

effects of the trends towards concentration and monopolization in their ownership, started developing in the U.S. Lack of competition and hence uniformity of information available, likemindedness of the media barons and near-unanimous support of the established order, excessive commercialism and poverty of debate on public issues, themes that were later to become standard criticisms of the modern media, were aired publicly for the first time. In 1947, the media sponsored Commission on Freedom of Press published its report on "A Free and Responsible Press"[121] and sparked off a still continuing debate. The Commission, mainly academic, included among other well-known figures, Chafee, Niebuhr and Schlesinger and by no means could it be described as a radical one. It found, however, that "the press has become big business with its policies directed by owners as owners...; that much important and relevant information is suppressed by the press itself; and that the vehicles of information have changed for the most part into vehicles of entertainment. It is because the number of owners has decreased in fewer and fewer hands, that competition in the presentation of news has broken down, and the worst of all monopolies - a monopoly of information - has been effectively established... in numerous and extended areas across the country",[122] and all this before the importance and reach of the - privately owned - TV networks was reckoned with. The report called for greater responsibility from the owners and some mild governmental regulation - mainly through the sparing use of anti-trust legislation. Any more extensive regulation would imply that "present owners of the press [would cease] to be owners - or at least... owners at the existing level" a prospect completely repugnant to the Commission. However, the report "was attacked heavily by the press as unfair, badly informed, and unfriendly to freedom of the press"[123] and none of its mild recommendations was acted upon.

The Court's involvement in freedom of the press cases must be placed against this background. Starting in 1931, it consistently removed or relaxed all sorts of legal impediments or regulations of the press.

The 1931 case (Near v. Minnesota[124]) has been universally and deservedly assessed as a "milestone decision" and a "major breakthrough". It came under a Minnesota press law, according to which a newspaper could be labelled "a public nuisance" for being of a "malicious, scandalous and defamatory" character. A suit could be brought by the state or a private citizen "to enjoin perpetually the persons committing or maintaining any such nuisance". Upon such evidence as the court thought sufficient, a temporary or permanent injunction could be granted against the publication.

The "Saturday Press" of Minneapolis had run a series of articles that had charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering, and most importantly that law enforcing officers were in collusion with the gangsters. The county attorney, himself, had been accused for failure to take adequate measures and in reply he obtained a permanent injunction against continuation of publication of the paper.

When the case reached the Supreme Court Chief Justice Hughes spoke for the 5-4 majority, which included both Holmes and Brandeis. He examined in detail the statute and the way it worked and concluded that it was "of the essence of censorship" and not - as alleged - justifiable subsequent punishment. Then he went on to review the history of English licensing laws and of the First Amendment, quoting from Blackstone, Madison and Cooley's "Constitutional Limitations". Concluding his historical survey he said:

> "The importance of this immunity (from previous restraints and censorship) has not lessened... The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity

> of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privileges."[125]

He added that in some exceptional cases previous restraints may be permitted to prevent obstructions to the conduct of a war, obscenity and incitement to crime. He finally declared the Minnesota statute void on the additional ground that it was designed to prevent scandal, breaches of the peace etc. while the theory of the constitutional guarantee is that "even a more serious public evil would be caused by authority to prevent publication".

In Grosjean v. American Press Co.[126] a tax imposed upon the larger Louisiana newspapers was declared void as a "tax on knowledge" designed to "suppress the publication of comments and criticisms objectionable" to the government, and "to prevent, or curtail the opportunity for the acquisition of knowledge by the people in respect of their governmental affairs". Interestingly enough, the unanimous opinion was written by Justice Sutherland, one of the archenemies of the New Deal and one of the four dissenters of the Near decision, which had been denounced as declaring "Minnesota and every other state powerless to restrain... periodicals... that have been adjudged to be a public nuisance" and as giving to "freedom of the press a meaning and scope not heretofore recognized" (per J. Butler dissenting in Near v. Minnesota, Sutherland concurring in dissent).

In the present case, however, Sutherland found that the First Amendment "was meant to preclude the national government, and by the 14th the states, from adopting any form of previous restraint upon printed publications".

This sudden change and rather rare accord between anti- and pro-New Deal Justices should be put into perspective. The statute at issue had been sponsored by the radical Louisiana senator Huey Long, a

politician who had consistently attacked President Roosevelt's lack of concern for the poor and through his 27,000 "Share-Our-Wealth" clubs had demanded minimum wage legislation and pensions for all retired to be financed by heavy income taxation. The larger Louisiana newspapers, affected by the tax, had organized a sustained campaign against Long and his policies and their contention was that the statute intended to cripple that campaign.[127] It may be argued, therefore, that in joining forces the two camps of the Supreme Court were combatting a common enemy: Roosevelt himself had once declared "I am fighting Communism, Huey Longism, Coughlinism, Townsendism. I want to save our system, the Capitalist system",[128] and had joined together as enemies of capitalism , communists, radicals and fascists. (Father Coughlin was a fascist priest and agitator.) Appropriately, Father Coughlin's magazine "Social Justice" was the only one to be excluded from the mails during the Second World War under the procedure provided in the 1917 Espionage Act.[129]

Following the Near decision, the Court in a series of cases in the '40s seriously undermined the applicability of contempt citations against press comment on pending judicial proceedings and the administration of justice in general.

The authority in the field (Bridges v. California)[130] involved contempt citations against three Los Angeles Times leading articles and a union leader's telegram to the Secretary of Labor, all related to a pending trial of several trade unionists.

Justice Black, speaking for a 5-4 majority, started his opinion with an approving review of the majority and minority opinions, which had employed the danger test. He summed up his review stating that:

> "[W]hat finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished..."(U.m.),

and that

> "Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. <u>They do no more than recognise a minimum</u> compulsion of the Bill of Rights"131

a conclusion closer to the Brandeis formulation of the test in <u>Whitney</u>. Having, thus, stated his own version of the danger test, he proceeded to apply it, by considering how much these contempt citations would affect freedom of expression "as a practical matter". The social harms apprehended in contempt cases are possibly two: firstly, out-of-court criticisms may bring the judiciary into disrepute and secondly, they may lead to disorderly and unfair administration of justice by putting pressure on one of the parties to the case and leading to a prejudiced and partial determination of his rights. But since the contempt powers curtail freedom of expression significantly, the danger test comes into operation. Its main requirement is the "extreme seriousness" of the social harm apprehended.

The first social harm is evidently not serious, according to Black. An enforced silence intended to preserve the dignity of the bench, would create greater evils than those averted - "resentment, suspicion and contempt much more than it would enhance respect".[132]

The second was more serious, however, because it could lead to unfair <u>action</u>. In that case, the second requirement of the test must be shown to exist, i.e. a strict proximate causation between the act of expression and the likely result. It has to be examined in the light of the concrete content of the act of expression and all other relevant circumstances. Accordingly, Justice Black went on to examine the statements of the newspaper and the labour leader concretely. He found that neither created an "extremely high" degree of imminence of the substantive evil. Both convictions were reversed.

Justice Black's formulation of the test retained much of its original evidentiary flavour. But this aspect was relegated to a secondary position. The test was employed to examine the concrete facts, once the Court had been satisfied that the conflicting social interests could be put on an equal footing, and freedom of the press should start from a preferred position.

Four Justices under Frankfurter dissented, but in a later case (Pennekamp v. Florida),[133] two editorials of a Florida newspaper criticizing the local court and judges in general were found by a unanimous Court not to have the clearness and immediacy necessary for closing the door of permissible public comment. Similar language was used by Justice Douglas in a later case (Craig v. Harney)[134] concerning several articles and a newspaper editorial on a pending civil suit:

> "Giving the editorial all the vehemence which the court below found in it, we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion of rehearing."

The question of compatibility of contempt convictions with the free speech guarantee came back to the Supreme Court 15 years later. The case of Wood v. Georgia[135] arose out of the contempt conviction of Wood, an elected sheriff, who had issued to the local press three statements accusing the judges of the county court of "race agitation" and "judicial intimidation" of blacks. The judges had publicised, during an election campaign, their instructions to a grand jury concerning the conduct of an investigation into alleged black "bloc voting" and other corrupt electoral practices.

The Supreme Court, *per* Chief Justice Warren, reversed. Warren started by reviewing the cases of *Bridges*, *Pennekamp* and *Craig*, and concluded that under these rulings contempt convictions could be upheld, if it was shown that the utterances in question created a clear and present danger for the administration of justice. No evidence of such danger could found on the record. On the contrary, "[t]he type of 'danger' evidenced... is precisely one of the types of activity envisioned by... the First Amendment". The Chief Justice, seemingly, approached the controversy between the - elected - judges and the sheriff as political rather than judicial. He emphasised that the case did not involve an individual on trial, nor a petit jury, but a grand jury investigating "into a matter touching each member of the community". In the circumstances, there was no "showing of a substantive evil designed to impede the course of justice".[135a]

Thus the applicability of the danger test in contempt of court cases became firmly established during the period and, according to various commentators, this is the main area in which it has been consistently utilized since.[135b]

Those early decisions set in a trend in constitutional adjudication which, according to Justice Black, gave "an over-powering influence to views of owners of legally favored instruments of communication"[136] among which the press ranked first. And according to a contemporary media lawyer and personality, the Supreme Court has extended such protection to editorial autonomy, that the press has been virtually placed "outside the law".[136a] The same author argues that this attitude is in accordance with J.S. Mill's and the classical liberals' defence of individual autonomy.

However, the equalization of the protection of the eccentric individual or of the persecuted, minority social group with that of the Hearsts, Murdochs and Rowlands is a far-fetched proposition and the attempt to justify the latter, in terms of the former, is somewhat less than intellectually honest. But, whatever the justifications, the zealous judicial protection of the mainstream media has been one of the main features of the American legal system and this is probably the main reason why the latter has been generally praised as the most liberal, in relation to free expression claims. To be sure, all constitutional commentators call for a commensurate "responsibility"[137] or "self-discipline"[138] on the part of the press, in the use of the near carte-blanche delivered them by the courts. According to one of them, who quotes B. Dylan, "to be outside the law you must be honest".[139]

Of course, the question of "honesty" or "responsibility" of the media cannot be answered in an objective, non-partisan way. The commentators referred to above usually find a high degree of them in the American press, while those on the left denounce the system of "distorted communication"[140] and its effects in modern societies. As Marcuse put it "under the rule of monopolistic media - themselves the mere instrument of economic and political power - a mentality is created for which right and wrong are pre-defined wherever they affect the vital interests of society".[141] To be sure, even mainstream political scientists have moved some considerable way from the most exuberant claims of the constitutionalists. Thus, the pluralist Professors Lazarsfeld and Merton: "Increasingly the chief power groups, among which organized business occupies the most spectacular place, have come to adopt techniques for manipulating mass publics through propaganda in place of more direct means of control... through the mass media of communication... These media have taken on the job of rendering mass publics conformative to the social and economic status quo."[142]

These are open questions and cannot be tackled here. What is of great interest for our purposes, however, is the differentiated attitude adopted by the Supreme Court when dealing with expression claims, advanced by the established mass media, as against those of other groups and interests claiming analogous rights. It would not be inaccurate to suggest, that the press has been consistently adopted as the most prominent constituency and clientele of the Supreme Court in the area of expression since the '30s; on its own part, the press has not wasted any occasion to take its grievances to the courts and to popularize and publicly commend, in return, the liberal role of the Supreme Court.

6. Legal Doctrines and the Construction of the Public Sphere

6.1. The Preferred Position of Freedom

The proliferation of cases dealing with expression claims is perhaps the most striking characteristic of the period under consideration. According to the received opinion, the second characteristic is that the Supreme Court's jurisprudence was "clearly libertarian in spirit and effect"[143] and heralded "a period of achievement" for freedom of expression.

The liberal and democratic tenor of many of the opinions and decisions examined is an indisputable fact. It is, indeed, one of the major differences of the case-law as compared with that of the previous period. The discussion of the meaning and history of freedom of the press in Near, of the grounding of freedom of expression in democratic theory and the exercise of power by the consent of the people in Barnette, of the need for protection of minority and eccentric ideas in the Jehovah's Witnesses cases clearly distinguish this period from earlier and later ones as well as from the jurisprudence of similar

courts of last instance of other Western states. The Supreme Court became something of a popular philosophe and its reports remind one more of textbooks on civic education rather than of the dry, legalistic pronouncements of the French Conseil d'Etat or the British House of Lords.

The legal doctrines and tests utilised multiplied accordingly as well. The bad tendency test that dominated the previous period disappeared almost completely. The clear and present danger was gradually expanded from a rule of evidence (or reason) for the examination of factual evidence in simple face-to-face situations, into a full-fledged constitutional standard: it became a requirement of existence of a high degree of necessity linking an apprehended serious evil and an expression-restricting law, if the latter were to pass successfully constitutional muster (Cantwell, Thornhill, Taylor). It also retained its early evidentiary flavour but could not be seen any longer as a mere "rationalisation for putting people in jail"[145] (Bridges, Terminiello). The proscription of prior restraints on expression was extended from the press, with which it was traditionally linked since Blackstone, to cover indiscriminate, vague and overbroad licensing systems related to public parading and canvassing (among others Martin). The use of alternative means, less drastic than blanket prohibitions of all expressive activities, was indicated as a valid exercise of legislative and police power in support of social interests like public cleanliness and health, privacy and repose or even public order and peace (Schneider, Saia). Statutes and ordinances were struck down as "void on their face", although for many petitioners a mere reversal of conviction would have been as good. The doctrine of "absolute" protection of expression was canvassed even though it never achieved judicial endorsement.

On the other hand the concepts of "speech" and the "press" were expansively defined to include a greater number of expressive activities: the use of symbolic objects and gestures (Stromberg, Barnette), all sorts of activities in the public forum, the circulation and distribution as well as the publication of printed material. The whole First Amendment was incorporated in the 14th "due process" clause and was accordingly declared as limiting state as well as federal power.

The common denominator of all these developments can be traced to the "preferred position" of freedom of expression doctrine, the "firstness of the first"[146] as one author put it, that was adopted by an - admittedly fluctuating - number of Justices. It called for - at the least - an increased judicial vigilance in cases involving expression claims, and - at the most - an assumption of invalidity of all measures touching on First Amendment issues, the burden of which was to be borne by the prosecuting authorities.

To be sure, as the multiplication of dissenting opinions, of 5-4 decisions and of dramatic reversals of recent precedents showed, the trend was not evolving in a unanimous or uncontroversial manner [for examples of reversals see Near - Grosjean (unexplained change of four Justices), Gobitis - Barnette, Saia - Kovacs]. In some cases a single vote gave the victory to one side, thus making it precarious.

It cannot be denied, however, that a change took place; an increasing number of expression claims ended up in the courts; the Supreme Court was more willing to review such cases and a number of claims were vindicated and sanctioned. What must be critically examined, nevertheless, is the frequently recurring assertion that "for thirty-five years (i.e. 1930-1965) it (the Supreme Court) had proved to be the nation's foremost agency of the furtherance of freedom".[147]

6.2. The Supreme Court and the Construction of the Public Sphere

A profound change took place, therefore, in the period under consideration. It was hinted at, in a programmatic way, in Justice Jackson's opinion in the important Barnette case:

> "The principles (of the Bill of Rights) grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints and that government should be content with few controls and only the mildest supervision over man's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs and social advancements are increasingly sought through closer integration of society and strengthened governmental controls."148

It is recalled that in that case, Jackson went on to argue for intellectual individualism, cultural diversity and the abolition of orthodoxies in "politics, nationality, religion or other matters of opinion"; the principles of laissez-faire should guide the intellectual and political markets once their reign in the economic market had, allegedly, "withered away". To be sure, the degree of acceptance of Keynesian principles of economic regulation by the Roosevelt and later administrations has been a matter of some controversy among economists[149] and, in any case, economic laissez-faire has withered away in the U.S. much less than in any other advanced Western country.

Be that as it may, it can be argued that contrary to Jackson's assertions, the evidence of the cases examined points towards a strengthening of governmental controls over the operation of the intellectual and political markets. Indeed, Jackson's later opinions[150] - notwithstanding his Barnette one - were instrumental in that process both in general and in helping to demarcate the Supreme Court's role in it. Bearing in mind the public sphere hypothesis advanced above, it would be helpful to re-examine briefly the cases reviewed.

(a) While the formal enfranchisement of black people was much less than complete during that period, groups of people formerly admitted to the full status of citizenship were to varying degrees deprived of it. Federal and state civil servants as well as local government employees and their families were excluded from all political activities except the vote. The much smaller group of Japanese Americans were excluded completely - albeit temporarily - from all political rights and procedural guarantees and were equalized to hostile aliens or to persons with no formal citizenship, who since the rise of the modern nation-state are not covered by any state protective jurisdiction. The modern equivalent of the "barbarians" or the aliens of ancient Greece are fair game for the "Hellenes", the inhabitants of the polis.

The formal admission of individuals and groups to the status of full political subjects/citizens with all the relevant rights and procedural guarantees (vote, other political rights, criminal law guarantees) cannot be, therefore, seen as a teleologically evolving and irreversible process leading to the continuous extension and equalization of such rights for the whole social body (the "body politic"). Even this most commonsensical assumption of constitutional theory must be examined concretely in each historical period. To be sure, a wholesale exclusion of a group from the most rudimentary formal guarantees - as was the case with the Japanese-Americans and later with the communists - is a rare and exceptional occurrence. Interestingly enough, however, a conservative constitutional author has recently gone to great lengths to prove that the concept of "citizenship" was never a part of American law nor should it become in the future.[151]

(b) On the other hand, the dicta on the importance of public debate on all issues affecting the welfare of the state, moved from the dissenting opinions of Holmes and Brandeis to the majority opinions of

the Court during that period. The social interest in free speech, described as the communication to others of views and opinions "respecting governmental policies" and "trends in national and international affairs", was highly valued and favourably handicapped in its competition with other social interests. Yet, it was the freedom to differ in religious matters and express publicly sectarian religious views that got the full treatment and was presented as the case of allowable public controversy par excellence.

The conclusive destruction of the notion of religious heresy and the heretic is not an insignificant achievement. As one of the most important, although relatively neglected historians of freedom of speech, J.B. Bury remarked in 1913 in his "History of Freedom of Thought": "I have been considering, almost exclusively, freedom of thought in religion, because it may be taken as the thermometer for freedom of thought in general".[152] If his diagnosis was still correct in the '40s and after, then freedom of thought "in general" had finally won. Indeed, the complete reversal in the field of religious tolerance is highlighted by the frequency with which fringe religious sects have been turning to the judiciary for protection (some recent examples include the Scientology Church, the Unification Church (the "Moonies") and Reverend Jones' Church); the Jehovah's Witnesses - this most litigious sect - were instrumental in this development.

Yet, the identification of public/political speech with freedom of speech on religious matters, the amalgamation of political and religious speech, in which all arguments used for the democratic justification of freedom of expression were mobilized in order to protect religious eccentricity, in no way meant that political speech <u>propre</u> received the same treatment. At about the same time a new secular orthodoxy had started to establish itself.

(c) "National unity", an "interest second to none", was substituted for religious unity. Professor Chafee calls this new orthodoxy an "American party-line" and observes that since 1945 a tendency to establish and promote it was gaining strength in the United States.[153] It included its hard-core dogma - the Constitution "contemplates a free enterprise system"[154] - its high priests and its heretics. Arthur Miller's play "The Crucible" effectively and dramatically drew the parallel between McCarthyism and 18th century witch hunting. As every quasi-religious dogma it carried strong moral undertones: "Honest differences of [political] opinion are treated like moral differences".[155] The participation of the Supreme Court in the establishment of this "American party-line" is examined in the next chapter which deals with the various aspects of McCarthyism. But the trend toward balancing of social interests and group claims, already established in Supreme Court jurisprudence in the period under examination bore the seeds of later developments.

Balancing interests, either in general - the so-called "definitional" balancing of Black and Douglas which was coupled with the preferred position doctrine - to which the more liberal Justices were given, or in the context of the particular claim - the "ad hoc balancing" of Frankfurter - meant that the Justices undertook to work out for themselves a hierarchy of social values and political claims. For a brief period around the '40s, the preferred position majority opinions gave the Court both the appearance and the reality of the protector of minority claims. The liberal-democratic rhetoric accompanied all opinions, equally those about the right of a few schoolchildren to refrain from saluting the flag on religious grounds, of religious sects and clerics to preach their millenarian messages and those about the rights of trade unionists to organize and picket or of political groups to campaign and criticize the powers that be. However, two qualifications of the Court's libertarian attitudes should be entered.

Firstly, the new activism poorly resembled that of the old, property-minded Court. The proponents of judicial restraint tended to identify the two and to remind the new activists of the old Court's debacle, but the differences were not insignificant. While the old Court consistently frustrated federal policies, the new Court never challenged a federal measure. Its forays were directed at local ordinances and some state statutes, dealing in the main with various licensing systems and other aspects of local regulation of activities in the public forum. However, as the diversity of the relevant cases reviewed shows, local authorities possess a formidable arsenal of legal weapons: criminal prosecutions for common law or statutory offences after the event, police intervention and halting of a public manifestation while in progress or the various licensing systems may all be used interchangeably toward the same effect of frustrating a particular group or message. Consequently, however swift and drastic the later judicial intervention was, in no way could it guarantee the unhindered or equal use of the public forum, as some other equally effective avenue could be explored. It may be argued, indeed, that the Court activism manifested in invalidations of local measures, however liberal, it was merely cosmetic if compared with its earlier manifestations.

Secondly, the differentiated status attributed to the various groups claiming a position in the public sphere was equally characteristic. Thus, all Jehovah's Witnesses' activities were gradually equated with public debate and given full protection. On the other hand trade union claims were treated with greater caution. H. Kalven, in his review of the early cases related to the public forum referred to above, concentrated on the Jehovah's Witnesses ones and added in a footnote: "I am, perhaps somewhat cavalierly, putting the complex story of the labor picketing cases to one side... since there is no argument here

that speech in public places is beyond the reach of any regulation, it is not clear what the picketing cases would add".[156] However, it is the Supreme Court's differential endorsement of the religious and union claims to "commandeer" the public forum that, arguably, colours its intervention. Eclecticism is a method frequently used in order to present complex social situations as following single principles and as such, it is a recurring phenomenon in constitutional theory.[157] The problem with Kalven's eclectisism - cavalier or not, and admittedly liberal in purpose - is that it presents a distorted image by implying that union cases were ruled by the same - liberal - principles as the religious ones. This wrong implication, however, seriously undermines the theoretical interest of the concept of the public forum.

To be sure, during the period under examination, unions were for the first time admitted as legitimate bodies that have a role to play in the pluralistic process, as the cases reviewed clearly indicate. But as the influential constitutional author P. Freund warned, public union activities should not be transformed into "rights of free expression". Religious speech, "righteous peaceful aggression", was public speech but communication of union grievances was "economic pressure".[158] Thus, while all sorts of public activities were construed as speech, it was industrial picketing that was found to be "speech plus", a consistently used phrase that allowed the Court to differentiate among the means of publicity utilized and accordingly among the social groups that habitually use the differentiated means.

The protection extended to right and left wing political groups was somewhat differentiated, too. The cases of Terminiello and Feiner may be taken as an example. In the former a fascist was freed, in the latter a radical jailed. According to a commentator,[159] the difference in result, although the circumstances were broadly similar, was due to the demise of the clear and present danger test. In Terminiello the

fascist was freed although there was some danger of violence, in Feiner the radical was jailed although there was no such danger. The final victory of Frankfurter's line of judicial deference to state authorities was, allegedly, instrumental to the inconsistent outcome of the two cases. However, on the same day as Feiner, the Court decided Kunz, in which a New York licensing system was voided as applied to a right wing Baptist minister and Frankfurter concurred in the result. It is reasonable to suggest that such differences cannot be attributed, exclusively, to the different understanding of the danger test or of the role of judicial review. Even if the argument of our author was accepted, the reasoning that the Justices have consistently applied to everybody else's actions, namely that "one is responsible for the reasonable and probable consequences of one's actions", could be equally applied to their own actions as well: the "reasonable and probable" consequence of, among others, the Terminiello - Feiner and Saia - Kovacs duets of cases, was the introduction of an effective differentiation - irrespective of its specific motivations - among the various groups of the political spectrum.

(d) Finally, as regards the distribution and control of the means of communication, it may be observed that Jackson's exhortation of the principles of intellectual laissez-faire was best approximated in the Court's attitude toward the ownership and control of the established, mass media. However, as Adam Smith, the greatest exponent of the free market, had found a long time ago, the application of laissez-faire principles to monopolistic or oligopolistic markets leads to the stifling of competition and the complete extinction or administered sharing-out of the market. The preaching and application of classical political and economic liberalism and of the principles of individualism, in the socio-economic realities of modern media, surely differs from their original conception and application or their most perfect expression by J.S. Mill.

(e) In conclusion, two remarks should be made in relation to the public sphere hypothesis advanced above, borne out by the reviewed case law.

First, as far as the discourse of the Supreme Court is concerned, it appears that the construction for legal purposes, of such simple sounding terms as "speech" or "the press" is far from a self-evident enterprise: it involves contending claims and the power of the courts and the Supreme Court, in particular, to subsume some and not others of them under their elastic definitions, is one of the major ways in which they participate in the regulation of the public sphere. Irrespective of the method followed, either that of the a priori theoretical understanding according to which some expressive activities are construed in definition as "non-speech", "speech plus", "fighting words" etc. or "public speech", protected speech or simply speech; or that of the balancing technique, according to which some social interest is ranked higher or lower than that in free expression, the outcome is similar: certain expressive activities are declared protected conduct or speech, certain others non-protected action.

As an English constitutional author has remarked of the Supreme Court's definition of certain categories of expressive activities (the "fighting words", libels and obscenity) as not "constitutionally protected forms of speech", if such conclusions "figure as arguments [which they do], they [are] obviously question-begging".[160] It is exactly this fact, i.e. that "question-begging" definitions acquire immediate normative consequences and are backed by sanctions, in other words, that what is defined as speech becomes also a protected activity and vice versa, that gives to the legal-constitutional discourse its privileged position within the "universe of social discourses": its definitions and conclusinns, even if "question-begging", become prescriptions backed by sanctions and thus help shape social reality.

Secondly, the constitution and regulation of that aspect of social reality that has been defined as the public sphere must be seen as a process involving continuous differentiations and distinctions as much as uniformities and analogies. Its formal conditions, the issues and alternatives admitted or proscribed, the groups and individuals protected or punished, its contextual regulation and the distribution of the means of communication in it, are continuously contested and differentially demarcated. It was the increasingly active participation of the courts and the Supreme Court among them, in this demaraction, that gave this period of constitutional adjudication its radically new character.

Thus, it may be concluded that in the Jacksonian "new soil" of closer economic integration of the society and of strengthened economic controls, the principles of laissez-faire were in retreat in the process of constitution of the public sphere as well. The Supreme Court involvement may be seen as active participation both in the process of the restructuring and regimentation of the extended public sphere; and - through its persistent liberal and democratic rhetoric - in the effort to mobilize popular assent towards the new economic and political structures, a process defined above[161] as the nationalization of legitimation.

CHAPTER IX

POLITICAL JUSTICE IN THE FIFTIES

1. Introduction

During the First War and in the "Red Scare" that followed it, the federal Government refrained from passing a federal sedition law banning the advocacy of "subversive" ideologies or punishing membership in allegedly subversive organisations. The Espionage Act 1917 was concerned, in the main, with subversive action rather than utterances. It was its broad "bad tendency" construction, by the federal courts, that made the actual operation of the Act resemble that of a sedition law. On the other hand, the various State criminal anarchy and syndicalism Acts were clear-cut sedition laws and were, accordingly, administered by the courts.

By 1940, however, this pattern had started to change. While the Supreme Court late 30s and early 40s decisions went a long way towards incorporating the First Amendment into the Fourteenth, thus making it applicable to the States, a parallel process involving the federal government was under way: a series of federal laws and executive decrees adopted and extended the sedition rationale of the earlier State laws and started building up a formidable arsenal of federal anti-sedition measures. Indeed, if the process of judicial incorporation of the First into the 14th was meant to extend to the States federally administered standards of free public debate against particularistic state and local repressive measures, this second process of "reverse incorporation" was giving the federal Government an increasingly strategic role in delineating those standards by incorporating in federal laws and policies earlier state measures and imposing them in a uniform fashion across the country.

Thus, since 1940, the "protection of the Republic" has been undertaken, in the main, by federal authorities - legislative, executive and judicial - either directly; or indirectly, through the passing and enforcement of some federal measure, which state and local authorities were quick to repeat and implement within their respective jurisdictions. Indeed, in one mid-50s case,[1] the Supreme Court declared that once a particular anti-sedition measure had been adopted by the federal authorities, the field had been pre-empted and analogous State measures were redundant.

The process of breaking down of State barriers on federal economic regulation, initiated by the New Deal, was repeated in the field of political discourse and in the constitution of the public sphere. If the former measures brought home to the States that Americans were "industrially, commercially, economically... one people"[2] and nationalised the regulation of the economy, the latter emphasized that they were - or should become - one people in the realm of politics and ideology, too.

This chapter examines the wide variety of federal and state laws, policies and measures through which an "American party-line" was developed, propagated and imposed, between 1940 and 1960, and the judicial attitudes toward them. The main body is divided in three parts. Each of them starts with the examination of a different aspect of the laws or policies of the period, which are put within their historical perspective. It then goes on to review the main test-cases in the field, with particular emphasis on the jurisprudence of the Supreme Court.

The first part sets out the general historical background of the period, and examines in an indicative way some of the causes and effects of the phenomenon that became known as "McCarthyism"; the main federal sedition laws directed against the Communist Party and committed

Communists and their application by the federal courts are then reviewed.

The second part examines the federal and state loyalty programmes and the third the practices and activities of legislative committees investigating subversive activities. A detailed and critical review of the case-law, arising from the activities of this loyalty-security complex, follows the description of its respective components.

I would like to emphasize at this point that the critical examination of the anti-communist laws and cases does not imply support for the practices of American communists. Its main purpose is to indicate how the official - legal and constitutional - discourse, articulated around the concept of the "communist danger", participated in the radical reconstitution of the public sphere and of the "universe of discourse" in the post-War period.

A. The Sedition Laws and the Communists

2.1. The Smith Act

The first federal sedition law, since the Alien and Sedition Acts, was passed in 1940. Its official name was the Alien Registration Act, but it became known as the Smith Act.[3] Its provisions outlawed incitement of disloyalty in the armed forces; added new grounds of deportation among which violation of the Act and past subversive beliefs and associations of the alien, even when subsequently repudiated; and section 2(a) of the Act introduced a new federal crime.

Section 2(a) stipulated that:

> "...it shall be unlawful for any person
> (1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any Government in the United States by force or violence or by the assassination of any officer of any such Government;...
> (3) to organize or help or attempt to organize any society, group, or assembly of persons, who teach, advocate, or encourage the overthrow or destruction of any government in the U.S. by force or violence, or to be or become a member of, or affiliate with, any such society, group or assembly of persons, knowing the purposes thereof;..."

an offence punishable with a maximum of 20 years imprisonment.

The Act was passed, by Congress, without any substantive debate with a vote of 328-4. According to one Representative "any bill

containing dreadful provisions against the alien would pass the House... like a dose of salts" and another stated in the debate that "the mood of the House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it".[4]

The language of the Act (advocacy of forcible overthrow of the Government or of the assassination of governmental officials) indicates its parentage in the earlier anti-anarchy laws. Although the main target of the Act was the Communist Party, which in the wake of the German-Soviet pact was following an active line of neutralism, its formulation was rather inept. The Communist Party constitution, following the "popular front" tactics of the Third International, launched at its 1937 7th Congress,[5] was threatening with expulsion any member who conspired to subvert or overthrow American democratic institutions.[6] The bomb-throwing and political assassinations of the early anarchists had no place in the strategy of Western Communists.

The Smith Act was followed in 1940 and 1941, by other federal anti-communist measures included in the Selective Services Act,[7] the Nationality Act (1940), the Voorhis Act (1940) - providing for the registration of subversive organisations - and in acts regulating the War Industries.[8]

By the end of 1941, however, after the German attack on the Soviet Union, the Communist Party became one of the staunchest supporters of American participation in the War and lost no opportunity to exhibit its newly-found support for all federal policies. "When rank and file workers struck for higher wages or against inhuman conditions on the assembly-line, the party was the first to defend the [WWII union leadership] no strike pledge".[9] The Party supported the use of the Smith Act against pro-Nazi and Trotskyite groups and in 1944,

following the Teheran Conference, its leader Earl Browder announced the voluntary dissolution of the party and the creation in its place of a Communist Political Association. "We are ready to co-operate in making capitalism work effectively in the post-war period" Browder is reported as stating,[10] expressing the pious hopes, that existed both in the West and the East, for the continuation of the Alliance, both internationally and internally, beyond the Armistice.

As a result of these developments, the Communist Party became, during the War, a somewhat tolerable political organisation, for the first time in its history. Browder, who had been imprisoned in 1940 for an earlier "passport fraud", was pardoned by Roosevelt in 1942. An attempt to have the California Party secretary denaturalised for having taken his 1927 naturalisation oath in "bad faith" was quashed by the Supreme Court.[11] The investigation into communist activities, conducted in earnest by the special House Committee on un-American Activities (H.U.A.C.) which was established in 1938, lost its intensity and publicity.[12] The Soviet Union and Stalin - "the heart and soul of Russia" according to Roosevelt in 1943[13] - were portrayed in a more favourable light. By 1945, the C.P. membership reached its peak of between 75,000 and 85,000, with analogous gains within the C.I.O. affiliated unions.[14] But as Chafee dryly remarked, even in their peak, the communists were "less than one-twentieth of one per cent" of the American population.[15]

This interlude, however, was not to last for long. In 1950, both Houses passed easily, against the veto of President Truman, the Subversive Activities Control Act (the McCarran Act) which according to one historian was "one of the most massive onslaughts against freedom of speech and association ever launched in American history".[16] The Act is often taken as the official starting point of the McCarthy

era, and under its terms the C.P. was, virtually, outlawed. The process of the change and of the establishment of the "McCarthyite hysteria" as well as some of its main characteristics are examined in the next part.

2.2 The causes and effects of McCarthyism

The causes and effects of McCarthyism are still a matter of historical investigation.[17] The remarks that follow, therefore, are not meant as an exhaustive description of the phenomenon. The indicative reference to some of the contributing factors and to the manifestations and effects of McCarthyism is undertaken in order to place the extensive review of the legal material of the period that follows, within its proper historical perspective. Consequently, the repercussions of the growing atmosphere of repression for the legal system and constitutional freedoms are particularly emphasized.

(a) The initial cooling and subsequent complete breakdown in American-Soviet relations is generally accepted as one of the main causes of internal repression. The Truman and Marshall doctrines, the Chinese revolution, the Berlin blockade, the events in Greece and Czechoslovakia and the Korean War were some of the crucial factors that led to the Cold War. On the other hand, the massive economic aid, given to Westerm Democracies by the U.S., was instrumental to the American plan of post-war economic and military hegemony. General Marshall stated, in 1948, that "it is idle to think that a Europe left to its own efforts... would remain open to American business in the same way that we have known in the past".[18]

Thus, the establishment and stabilisation of two military blocks, demarcated along ideological lines, facilitated the perception of American Communists and radicals as parts of an international conspiracy, threatening the vital interests and security of the United States.

(b) Following the Yalta Conference, the Communist Party U.S.A. was reconstituted in 1945, allegedly under instructions from the French Communist leader Jacques Duclos. The party purged Browder from its leadership - he was later expelled from the party altogether - and the short-lived policy of accommodation with capitalism was over. It increasingly concentrated on a propaganda campaign against Truman's foreign policy, which put it in an extremely vulnerable and isolated position. This fact, coupled with the frequently recurring revelations of Soviet espionage, made anti-communism a cause out of which considerable political mileage could be made again.

(c) The continuing right-wing attack on New Deal measures never stopped using the communist card. Accusations of communist infiltration of the New Deal Young Turks were often made by Republicans and right-wing Democrats in the 30s. Thus, a Republican member of the H.U.A.C. had claimed, in 1938, that "the many steps taken by our Government in recent years constitute a prelude to dictatorship";[19] Dies, the first chairman of the H.U.A.C. had called Roosevelt's Secretaries of Interior and Labour and their associates "socialists", "communists" and "crackpot radicals", and had accused Eleanor Roosevelt as "one of the most valuable assets which the Trojan Horse organisations of the C.P. possess".[20] Dies' linking of Communism and the New Deal had enamoured him to big business and, in 1941, Henry Ford offered him corporate financial support to "wage an all-out patriotic campaign".[21]

The identification of the New Deal and Communism gained new currency after 1945. "How much more are we going to have to take? Fuchs and Acheson and Hiss and Hydrogen bombs threatening outside and New Dealism eating away the vitals of the nation" exclaimed an enraged Republican Senator[22] in 1950. After that year, "most new federal economic programmes were gradually abandoned, as the administrative agencies feared to "push plans that might be damned as socialistic".[23]

(d) The other great Republican fear, the trade unions, came under increasing attack, particularly after the 1946 landslide Republican victory in the Congressional elections. The big 1945-6 strike wave had moved the Truman administration - never a great friend of unions - closer to the Republican anti-union sentiments. The Taft-Hartley Act (1947) joined the evils of communism and union power and "sought generally to curb the power of labor and specifically to eliminate communist influence from the labor movement".[24] It contained provisions banning the closed shop, secondary boycotts and mass picketing; imposing long "cooling-off" periods in industrial disputes; and prohibiting union - but not management - contributions to political campaigns. Furthermore, the benefits extended by the National Labor Relations Act to unions - in relation to organisational and bargaining activities - were restricted to those unions that would file an annual affidavit from each of their officers stating "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods".[25] The National Labor Relations Board (N.L.R.B.) immediately announced that it would not deal with cases brought to it by non-complying unions. In all, the Taft-Hartley Act has been called "the most important conservative triumph of the post-war era".[26]

The anti-union provisions of the Act met with strong reaction from the two federations, particularly the C.I.O. The prohibition of union-funded political campaigns was particularly resisted and challenged in the courts. Two cases reached the Supreme Court, a test case in 1948 (U.S. v. C.I.O.)[27] and another in 1957 (U.S. v. International Union of United Automobile Workers),[28] as an outcome of which a precarious and

Judicially supervised union right to participate in political campaigns was recognised.[29] The anti-communist provisions, however, were not resisted. On the contrary, the C.I.O. leadership launched in 1949 its own mini loyalty programme of its affiliated unions, which led to the expulsion of 11 left-wing unions.[30] Thus the unions, weary of their identification with communism, which was used to erode their newly-found role of junior partner in national economic life, became anxious to show themselves ready to cleanse, as drastically as any, their own house. "I think we can all freely confess a bias against communism as such, just as we are biased against murder, arson or rape" declared a C.I.O. official, while conducting a hearing against a radical union.[31]

Thus, in relation to the New Deal measures and union power, the communist issue proved an expedient weapon at the hands of right-wing politicians and business circles wishing to contain and roll back the reforms initiated in the 30s.

(e) Finally, the increasing ambiguity - or complete capitulation - with which the identifiable liberal institutions reacted toward the onsetting climate of repression contributed, in a negative way, to its consolidation in the decade of the 50s.

1. Although President Truman vetoed the Taft-Hartley and McCarran Acts, he himself used extensively the red-baiting tactic. In 1947, he launched by executive order the first loyalty programme of all federal Government employees.[32] And in his effort to contain Henry Wallace's campaign to build a third radical party and contest the 1948 presidential elections, he followed the tactic of identifying the Progressive Party with the Communists. He thus "stole the thunder of the Republicans on the communist issue"[33] and defeated Wallace's challenge. Thus, while the various sedition laws and loyalty programmes were introducing the concept of "guilt by association", their enactment

was often related to what may be called as "guilt for political convenience".

2. The American Civil Liberties Union, a frequent object of attack of the Dies Committee on Un-American Activities, passed in 1940 a resolution banning "supporters of totalitarian dictatorships" from its staff and immediately expelled from its Board Elizabeth Flynn, a communist founding member of the Union. Following that, the A.C.L.U. support of persons accused of communist sympathies became reluctant and all legal briefs were followed by a statement of the Union's opposition to communism. In 1953 the A.C.L.U. leadership tried, unsuccessfully, to amend its constitution in order to expel from membership all those "whose devotion to civil liberties is qualified by adherence to Communist, Fascist, K.K.K. or other totalitarian doctrine". On one bizarre occasion, in 1953 too, the Union declined to take up the case of C. Lamont, a Board member and known non-communist, who was subpoenaed by McCarthy's Senate Committee on Government Operations, after his books were found in overseas American libraries.[34]

3. The House of Delegates of the American Bar Association passed a resolution in 1950 asking the legislatures, courts or other appropriate authorities of each state to require all members of the Bar to file "within a reasonable time and periodically thereafter", affidavits stating "whether he is or ever has been a member of the C.P... or a member or supporter of any organisation that espouses the overthrow by force, or by any illegal or unconstitutional means... of the U.S. Government".[35] If the lawyer refused to take the oath or answered positively, the A.B.A. called for his disbarment. If he answered in the negative and "at any time later" was established that he had "wilfully sworn falsely to the facts" he should be the "subject of immediate disbarment proceedings".

Many local authorities adopted the A.B.A.'s suggestions and the resulting court cases will be examined later. Following these developments political dissenters met serious problems in finding lawyers to defend them in courts or committee rooms. In one Smith Act case, 30 lawyers refused to defend a communist and in a state case the defendant had to represent himself after 700 lawyers were approached in vain.[36] The National Lawyers Guild, a small group of radical lawyers, was investigated in the 50s for inclusion in the Attorney-General's list of subversive organisations, a fact that "stigmatized the body sufficiently to destroy its further respectability".[37] And according to Chafee, behind the various loyalty oaths required from lawyers lay "the notion, now rather prevalent among lawyers, that it is one of the primary functions of the legal profession to be teachers of the community about political and economic doctrines which happen to be favoured by an influential portion of the Bar... lawyers ought to be drastically sifted out so that they will pour only the pure milk of the Gospel down the throats of American citizens".[38]

4. Self-purging operations took place in other institutions and groups, too. Thus, following the 1947 H.U.A.C. investigation of the film industry, 50 leading film executives dismissed ten employees who had refused to cooperate with the Committee, and declared that "no-one would be rehired until he had purged himself of contempt (of the Committee) or been acquitted or declared under oath that he was not a communist".[39] A blacklist of communists in the film industry was compiled in 1947 and was superseded in 1950 by "Red Channels", a renewable list of show business people with left-wing affiliations, which "quickly became a 'bible' to the broadcasting industry".[40] And in his effort to clear himself from suspicion of left-wing sympathies, characteristic of all public personalities during that period, the well-known actor Jose

Ferer asked the Justice Department to "set up a warning service to keep people like him out of trouble".[41]

5. Universities and other colleges did their own housecleaning too. The first famous cases were those of the California University loyalty oath, required from all members of the staff by the Board of Regents in 1949; and the dismissal of two professors from the University of Washington, which sparked off a long series of internal loyalty investigations of the staff and numerous firings. Following these incidents, universities and colleges across the country tried to outdo each other in ensuring and proclaiming their loyalty.

Thus, the President of Southern Illinois University declared that "the advantages of our way of life ought to be set forth so persuasively that only the keenest minded students would be thinking over and above what they were taught about government".[42] Norman Thomas, the leader of the Socialist Party and a prominent member of the A.C.L.U. Board stated, in 1953, that "the right of the communist to teach should be denied because he has given away his freedom in the quest of the truth".[43] And, in March of the same year the Association of American Universities resolved that communists have no right to a university position and that a professor who invokes the Fifth Amendment (against self-incrimination) in loyalty hearings puts a "heavy burden of proof [on his] fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualification for membership in its society".[44]

Thousands of public school and university teachers were dismissed throughout the period for alleged subversive affiliations and beliefs, and bizarre cases were not lacking. A professor was dismissed from Oregon University, because he had supported the views of the Soviet biologist Lysenko. In California, a history textbook was condemned

because it stated that the Supreme Court's eventual upholding of the New Deal measures was prompted by the wishes of the people, a statement which was "subtly hidden communist propaganda".[45] The California University regents stated that no one of the 56 members of staff who were dismissed or forced to resign was a communist, and when they discovered they had not themselves taken the oath required from their staff, "they immediately made a gala event of the sign-in and the society pages soon reported oath-signing parties as the rage".[46]

The publishing industry and the press responded in a similar fashion. Most of the loyalty committees were interested in maximum publicity of their activities, and the popular press, in particular, was their best ally. The Hearst press empire - "ever partial to the Committee" - commented of the Hollywood investigations, characteristically, in the editorial of one of its leading newspapers: "The need is for FEDERAL CENSORSHIP OF MOTION PICTURES. The Constitution PERMITS it. The law SANCTIONS it. The safety and welfare of the Republic DEMAND it".[47]

Thus, a combination of federally initiated repressive measures and a hesitant - at the best - reaction of the liberal constituencies led to a spiral of new more repressive measures followed by further capitulations and so on. The hope that the spiral would be broken by the courts, to which many victims of the loyalty practices resorted for protection, did not materialise. The judicial reaction and the legal doctrines which were developed in these cases, the main subjects of this chapter, will be extensively reviewed and commented upon later. We now turn to the other federal sedition laws that completed and extended the anti-subversive armoury launched by the Smith Act.

2.3. The Internal Security Act

The second major federal sedition law was the Internal Security Act, 1950.[48] It owes its parentage to the so-called C. Mundt-R. Nixon Bill of 1949, which was amended and extended by Senator McCarran, and enacted by Congress against President Truman's veto. It remains the sole legislative measure that resulted from the work of the H.U.A.C., allegedly a legislative committee, which however never successfully proposed any other legislative measure.

A striking feature of the McCarran Act was its long preamble. It consisted of a long series of "legislative findings," purporting to describe the history, aims and function of the international communist movement. It was stated, in a simplistic but solemn language, that the movement was controlled by the government of the Soviet Union and its aim was to establish the communist totalitarian dictatorship "by treachery, deceit, infiltration, espionage, sabotage, terrorism and other means", in countries all over the world. The American members of the movement had repudiated their allegiance to the United States, and transferred it to the Soviet Union.

It concluded:

> "The recent successes of Communist methods in other countries and the nature and control of the world Communist movement itself present a clear and present danger to the security of the United States and to the existence of American institutions"

and added that "nothing in this Act shall be construed... in any way to infringe upon freedom of press or of speech as guaranteed by the Constitution".

The procedure set up by the Act was complicated and cumbersome. The Act itself occupies 26 pages of the U.S. Code Annotated. Its main feature was the establishment of a 5-man Subversive Activities Control Board. That Board was authorized to conduct administrative

proceedings, upon petition by the Attorney-General, to determine whether an organisation was a "Communist-action" or a "Communist-front" one. If the Board so found, it would order the organisation to register with it.

A "Communist-action" organisation was any organisation in the United States which

(i) is substantially directed, dominated or controlled by the foreign government or foreign organisation controlling the World Communist movement and (ii) operates primarily to advance the objectives of such World Communist movement,

while an organisation is a "Communist-front" if it

(i) is substantially directed, dominated or controlled by a Communist-action organisation, and (ii) is primarily operated for the purpose of giving aid and support to a Communist-action organisation, a Communist foreign government, or the world Communist movement.

Upon the order becoming final, the registration statement should include detailed lists of the officers and members, the finances and printing facilities of the organisation. The repercussions of such a registration for both the organisation concerned and its members were so severe that one author likened them to a death sentence.[49] The members of a registered organisation could not apply for passports; they were not eligible for employment in Federal Government posts or defence facilities; all usual tax benefits were denied to the organisation and its members; forbidding barriers were put upon the use of the mail or the mass media by such an organisation. Those severe restrictions were imposed under the threat of heavy criminal punishment.[50]

Section 4(a) of the Act created a new political crime, independent of the registration mechanism:

> "It shall be unlawful for any person knowingly to combine, conspire or agree with any other person to perform any act which could contribute to the establishment within the United States of a totalitarian dictatorship... the direction and control of which is to be vested in, or exercised by or under the dominion or control of, any foreign government, foreign organisation or foreign individual."

According to other provisions, the Attorney-General was authorized in case of emergency to detain without judicial supervision persons who "probably will engage in, or probably will conspire with others to engage in acts of espionage, or of sabotage". Six internment camps were set up in 1952, among which the California one had been previously used for the detention of the West Coast Japanese Americans during the Second World War.

Finally, the immigration regulations were tightened up by the Act. Persons who had, at any time, been members of a Communist Party anywhere in the world, or who advocated "any form of totalitarianism," or whose entry would endanger the "public interest, welfare, safety or security of the U.S." were barred from entry and made deportable.

The Magnusson Act of the same year, 1950, barred all seagoing employment, unless the Coast Guard was satisfied "that the character and habits of life of the applicant are such as to authorize the belief that the presence of such individual on board a vessel or within a waterfront facility would not be inimical to the security of the U.S.".[51]

2.4. The Communist Control Act

The final major federal sedition law of the 50s was the Communist Control Act, 1954.[52] The Act started its career as the Republican Butler Bill which created the new category of "Communist infiltrated organisations" directed against the few remaining radical trade unions. Once a union was declared "infiltrated" by the

S.A.C.B., it lost all rights under labour law and 20% of its membership could start a process to remove its leadership.

A number of "liberal" Democrats, led by H. Humphrey, proposed instead a Communist Control Bill, which would outlaw the C.P. and make membership an indictable offence punished with a 5-year imprisonment. According to the varying recollections[53] of its sponsors, the Humphrey Bill had three main objectives: a liberal one, to fight off the new anti-union legislation, and by making communism a straightforward criminal offence to place anti-communist persecution under judicial supervision; a "political convenience" one: Humphrey had stated while introducing the Bill "I am tired of reading headlines about being 'soft' on communism. What is sought... is to remove any doubt in the Senate as to where we stand on the issue of communism". And, in 1959, he admitted that the Bill had saved several "liberal" senators who would have been, otherwise, defeated in the 1954 elections;[54] finally, the obvious repressive one of completely outlawing the Communist Party.

The Humphrey proposal set off an extraordinary course of events. The Eisenhower administration, through its Attorney-General, and the F.B.I., through Hoover, objected to the banning of the C.P. Interestingly, an earlier Attorney-General had stated, in 1950, that the F.B.I. "knew every communist in the U.S.".[55] And Hoover, who used to provide the various investigating committees with the "exact" number of C.P. members - 21,500 in 1955[56] - had consistently rejected similar proposals throughout the period. In 1947, he had stated to the H.U.A.C. that outlawry would make martyrs out of communists,[57] and similar sentiments were expressed by Senator McCarran, who was afraid that the Humphrey Bill would emasculate the Smith Act and his own Internal Security Act.

The final compromise, which was enacted by a unanimous vote, was unique. The Act did not ban the Communist Party, but declared that, as a matter of policy, it "should be outlawed". Instead, it deprived it of "the rights, privileges and immunities attendant upon legal bodies". It did not make C.P. membership a crime, but stipulated, rather redundantly, that all communists and members of subversive organisations "shall be subject to all the provisions and penalties of the Internal Security Act of 1950". The Act also contained 14 criteria, to be used as evidence of subversive affiliations, one of which was whether the accused "had conferred with officers or other members of the (subversive) organisation in behalf of any plan or enterprise". It finally incorporated the whole anti-union Butler Bill, as a reaction to which Humphrey had, allegedly, proposed his own act. The administration used those provisions in 1955 in order to destroy the two remaining big radical unions.

According to T. Emerson, the Act, which was minimally invoked in judicial proceedings, "remains on the books as a monument to the incompetence, irresponsibility, and hysteria of the Eighty-third Congress".[58] Furthermore, it was a perfect example of what we called "guilt for political convenience". The saga of its enactment, in which liberal Democrats were boasting that they were the staunchest anti-communists; while the C.I.A.-funded American Committee of Cultural Freedom was joining forces with the remnants of the radical civil liberties groups, in opposition to it, indicates that the threat from the Communist Party itself was perceived as minimal. Indeed, one may argue that the rationale behind the widespread anti-communist measures must be sought, only secondarily, in any real or honestly apprehended fear of a violent communist revolution. Equally, their function and effects - even though instrumental to the permanent

incapacitation of the Communist Party - were much more crucial for mainstream social and political life. The tendency of liberal constitutional authors and historians to view the period as a short illiberal "spasm" or as the effect of an irrational "hysteria" arguably misses the much wider the subtler consequences of that period for all aspects of post-war American society. It is not unreasonable to suggest that the anti-subversive measures of the period involved an attempt at restructuring and regulating the public sphere, which was as fundamental and radical as the New Deal measures were for the economy.

2.5. State sedition laws

Following the federal lead, many states and localities started enacting sedition laws, which imitated, combined and extended the Federal ones. Forty-five states, in all, put various sedition laws in their statute books between 1947 and 1954. Some states passed registration laws, like the Internal Security Act and set up their local Subversive Activities Boards. A Texas law required the officers of listed organisations to provide the names of "any person who has attended its meetings in the State of Texas". Eight states banned the Communist Party and, by 1958, thirty-five state s barred advocates of violent overthrow of the government from the ballot, while eighteen barred the C.P. by name.[59] A Tennessee law threatened "subversives" with the capital punishment. R. Cushman remarks that "a sort of competition" was going on among the states for the passing of the toughest legislation against communism.[60]

Two of the most famous and widely imitated laws, which became involved in Supreme Court litigation, were the 1949 New York Feinberg Law, which required local education boards to compile their own lists of subversive organisations, membership in which meant automatic disqualification from "appointment or retention in any office or

position in the public schools", and to draft annual loyalty reports on all public school members of staff; and the 1949 Maryland Ober Act which combined provisions from the Smith Act, the Internal Security Act and the federal loyalty programmes, and was copied by eleven states.

Cities and localities participated in the hunt for subversives with equal fervour. 150 municipal ordinances, many of them enacted after the outbreak of the Korea War, dealt with various aspects of subversive activities. Some of them, finding the field pre-empted by federal and state measures, attempted to keep their geographical perimeters free from infection, by banning the physical presence of subversives within their jurisdictions, imitating thus in a way the Middle Ages efforts to keep the plague outside the bounds of the City. Communists and other subversives were asked to register with the authorities or leave the towns involved or both. A New Rochelle, New York ordinance required registration with the police of any member of a communist organisation who "resides in, is employed in, has a regular place of business in or who regularly enters or travels through any part of the city"; and a, widely imitated, Birmingham, Alabama ordinance punished Communists with fines and 180 days imprisonment for each day they remained within the "corporate limits of the town".[61]

Thus, a series of sedition laws - federal, state, and local - sometimes overlapping and sometimes complementing each other created a formidable and intricate net, which could trap all those, even remotely, connected with the Communist Party. However, these laws were not compatible with the constitutionally protected freedoms of expression and association, as they were construed by the Supreme Court in its 30s and 40s decisions. When, therefore, the main test

cases of the anti-communist programme reached the Supreme Court, the latter had to take a close look at both the sedition laws and its earlier liberal legal doctrines. To these cases and the legal doctrines that resulted from them, we now turn.

3. Political Justice and the Communists

3.1. The Case of Dennis v. U.S.

As mentioned above, the Communist Party re-established itself in 1945 under the leadership of William Foster. The short truce between the party and the federal authorities came to an abrupt end. During the same year the Criminal Division of the Department of Justice started building a Smith Act case against the C.P.U.S.A., while the F.B.I. intensified its investigations of communist activities.

However, it was only in July 1948 that the Attorney-General, Tom Clark, obtained an indictment in New York against 12 members of the C.P.U.S.A. top committee, the National Board. The timing of the prosecution was connected with the mounting Republican national security campaign led by Republican Congressmen Mundt, Nixon, McCarran and McCarthy. The Democratic administration felt politically threatened by the repeated Republican accusations that it had shown an unacceptable and suspicious leniency towards domestic communism.[62]

The indictment charged the 12 communist leaders with conspiracy to organize the C.P.U.S.A., and conspiracy to knowingly and willfully advocate and teach the duty and necessity of overthrowing and destroying the Government of the U.S. by force and violence. The trial lasted for 9 months, and the record extended to 20,000 pages. The "Newsweek" journal called it "the longest, dreariest and most

controversial" proceeding in the history of criminal law. The publicity which surrounded the trial both in America and abroad was enormous. One of the trial's main characteristics was the continuous confrontation between the trial judge Harold Medina and the defence attorneys which finished with severe contempt citations for all attorneys. All defendants were found guilty. The convictions were upheld by the Court of Appeals[63] and the Supreme Court.[64]

The case of Dennis v. U.S. was of great importance for the further development of the theory and practice of freedom of expression in the U.S. It involved the centrepiece of the federal anti-communist armoury, the Smith Act. Questions of its proper construction and constitutionality were fully addressed to by the courts for the first time. Additionally, although the defendants were twelve well known communists, the construction of the Smith Act was of direct relevance to the whole expanding field of loyalty-security legislation. As one of the most important cases ever decided by the Supreme Court, Dennis requires a detailed examination.

3.1.1. The legal problems of the communist prosecution

The main problems that all three judicial instances were called upon to confront were the following.

(a) The communist leaders were not charged with any overt criminal act, nor with an attempt or conspiracy to commit any criminal act. If the authorities had evidence on any communist plan to engage in illegal activities, they would have prosecuted under the relevant statutes, primarily for seditious conspiracy.[65] The indictment charged the communists merely with acts of expression - teaching and advocating the violent overthrow of the government - under the Smith Act.

(b) The defendants admitted that they were leaders of the Communist Party and that they . . . propagated "the

principles of Marxism-Leninism." The prosecution therefore embarked in an arduous endeavour to prove that the basic tenet of "Marxism-Leninism" is the violent overthrow of capitalist government and the setting up in its place of an alternative dictatorial regime; and that the "teaching and advocacy" of Marxism-Leninism by the communists, far from being the innocuous expositions of a political doctrine, was preparation for illegal and violent action, that it was criminal action rather than protected expression.

To achieve its purpose the prosecution introduced and attempted to interpret a number of books: The Communist Manifesto (by Marx and Engels, written in 1848); State and Revolution (by Lenin, 1917); The History of the Communist Party of the Soviet Union (by Stalin, 1925); Foundations of Leninism (by Stalin, 1924), and other similarly dated works from the vast bibliography which may be vaguely defined as the "Marxist-Leninist" theoretical corpus.

The record showed complete lack of any evidence that revolutionary theory was about to be transformed into violent action. The government concentrated on the interpretation of the nature of the works of Marxist classics, but it could not produce analogous "inflammatory" material emanating directly from the defendants or the C.P.U.S.A. literature.

A typical exchange in the trial court between a defence attorney and a prosecution witness ran as follows:

> "Defense attorney: Did [the defendants] ever openly come out in so many words that they wanted to advocate overthrowing the government?
>
> Witness: No - the Marxist-Leninist implication was there."66

Thus, most of the evidence was given by "expert witnesses" (ex-communists and F.B.I. agents) purporting to interpret, authoritatively,

the classics of Marxism, and prove the existence of specific statements advocating future violent action by the defendants. It should be noted in passing, however, that in an earlier case the Supreme Court had confronted the same line of argument. After it had considered The Communist Manifesto, State and Revolution and The Foundations of Leninism, all introduced by the prosecution, it had stated:

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner..."

and furthermore as to the validity of evidence derived solely from theoretical works:

> " Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written. Philosophies cannot generally be studied in vacuo. Meaning may be wholly distorted by lifting sentences out of context, instead of construing them as part of an organic whole. "67

(c) A further problem was created by the use of the conspiracy provisions of the Smith Act and not of the substantive ones. In that way, the prosecution absolved itself from the need to prove that the individual defendants advocated, specifically, the violent overthrow of the U.S. Government. It sufficed that any of them had engaged in conduct which aided the proscribed act (in that case the teaching and advocacy) or had somehow indicated his agreement with the aim of the conspiracy. Thus, the balance of evidence was removed from the specific acts and words of the defendants and placed upon the activities of the C.P.U.S.A., as a whole. Although the party remained formally legal, its nature, as the tool of the alleged conspiracy, became the prominent issue of the trial. Belknap remarks that 90% of the prosecution's attention was devoted to

building a case against the C.P. and only the remaining 10% to establishing the defendants' specific guilt in the conspiracy.[68] The line of illegality was therefore pushed a further step back: the defendants were not charged with the actual teaching of Marxism-Leninism (taken to mean violent overthrow) but with conspiracy to teach and advocate that theory at a later date.

The judicial answers to the extraordinary circumstances of the communist prosecution should be reconciled, additionally, with such a reading of the First Amendment, that would exonerate the Act and the prosecution under it, from suspicions of unconstitutionality.

3.1.2. The lower federal courts

The judicial consideration of the case started with the charge to the jury, by the trial judge, Judge Medina.[69] The judge interpreted the Act, and posed three necessary conditions for conviction under it: (a) intent on the part of the defendants to overthrow the government "as speedily as circumstances would permit"; (b) a finding of "teaching or advocacy" of violent overthrow, as "a rule or principle of action" rather than as an "abstract doctrine"; and (c) use of language "reasonably and ordinarily" calculated to incite persons to such action. Medina went on to reject the defence request for a specific jury determination of the existence of a clear and present danger of violent overthrow of the government, arguably a constitutional requirement. The judge ruled that it was for him, and not the jury, to decide whether a danger existed and he added that "as a matter of law" if the statute, as construed, was found to have been violated, then "there was sufficient danger of a substantive evil that Congress [had] a right to prevent to justify the application of the statute under the First Amendment of the Constitution".[69a]

Thus, since the judge precluded any independent factual examination of the existence of a danger of revolution, the causal and chronological elements inherent in the danger test were reduced to the requirement of overthrow "as speedily as circumstances would permit". Such a yardstick dispensed with the element of chronological closeness completely, and transformed the causal link into a requirement of intent. The bridge between advocacy and revolution was built on the fact that the defendants intended to change the government forcibly. A seditious "state of mind" became the determinant of causality and guilt, irrespective of any consequences.

The trial ended with the conviction of all defendants and the imposition of the maximum penalties, provided for in the law.* The convictions were upheld by the Court of Appeals in a unanimous decision written by Judge Learned Hand.

Learned Hand made a determined effort to tackle the problems created by the continuous reference of the defence to the danger test, which by that time had acquired the status and prestige of a constitutional provision. He had followed the evolution of the test since its launching by Holmes, and had attempted in the 20s and 30s to promote his own test of advocacy/incitement in the place of the Holmesian formulation.[70] Thus, he dismissed all procedural objections and reached the constitutional issues, where his most important contribution was the redefinition of the danger test:

> "In each case courts must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposedly substituted 'improbability' for 'remoteness' because that must be the right interpretation. Given the same probability, it would be wholly irrational to condone future evils which we should prevent if they were immediate; that could be reconciled only by an indifference to those who come after us..."[71]

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* Only 11 defendants were tried. The case of W. Foster was severed on health grounds.

Hand declared that that revision of the danger test was in accordance with its nature as a "comparison between interests which are to be appraised qualitatively". He went on to apply his test to the facts of the case. The main factual problem was the relation between the "Marxist-Leninist" teaching and the violent overthrow of government requirement of the Smith Act. According to Hand the proper meaning of "Marxism-Leninism" was that:

> "Capitalism rests upon... oppression...; that to it in time there will succeed a classless society...; but there must be an intermediate and transitional period of 'dictatorship of the proletariat' which can be established only by the violent overthrow of the existing government; the transition period involves the use of 'violence and force', temporary it is true, but inescapable; and although it is impossible to predict when a propitious occasion will arise, one certainly will arise". (U.M.)

All these were extremely serious evils and the probability of their occurrence, even if slight, should be completely precluded. To be sure, the logistics of the comparison between gravity and probability, are not as easy as Hand thought. Indeed his protest that the danger test was "not a slogan or shibboleth to be applied as though it carried its own meaning" could be levelled against Hand's formulation, too.

Hand completed his version of the danger test by borrowing and elaborating on the two elements which Judge Medina had relied upon: external circumstances and intent.

These circumstances consisted of (a) the international tensions since 1945. Since any border incident, diplomatic misunderstanding, or difference in the interpretation of treaties could start a war, the probability of danger was taken to be fully established. The link between the bleak international situation and the 11 defendants was presumably their alleged complete dependence on Moscow; and

(b) the character of the C.P.U.S.A. as a rigidly organized and disciplined group which conducted many of its activities in a semi-secretive way.

Those two factors plus the intent of the defendants to overthrow the government at the "propitious" moment - something which the defendants had vehemently denied - made their conspiracy to teach Marxism a punishable offence.

Thus, the communists were convicted not for what they did, not even for what they said. They were punished because the Soviet Union was an aggressive power, which abolished democracy in countries under its influence. The American authorities could not punish communists in Czechoslovakia for overthrowing the legal democratic government of that country, so they convicted American communists in their place.

3.1.3. The Supreme Court

The Supreme Court granted certiorari, but limited its review to constitutional questions.

Chief Justice Vinson wrote the majority opinion for the Court, joined by Justices Reed, Burton and Minton.

Vinson started with an examination of the previous expression cases, which had been decided upon by the Supreme Court. He endeavoured to show the differences existing between Dennis and those earlier cases in which the danger test had been born and developed. He focussed on the social interest involved in the Dennis prosecution (internal security) and stated that the threat to the nation from communist activities was of a novel kind and gravity not encountered before to such an extent. He agreed that these activities did not result in an attempt to overthrow the government, nor was there any proof that the defendants prepared for or advocated any specific

unlawful or violent act. The danger lay in the external circumstances:

> " ; The formation by petitioners of such a highly organised conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. "72

He quoted approvingly the Hand version of "clear and probable danger" test adding that "more we cannot expect from words". Thus, it was the world crisis and the highly disciplined nature of the Communist Party that created the extreme "gravity" of the evil and dispensed with the need to measure the probability of its occurrence. Indeed, an examination of the second part of the equation was deemed unnecessary. The Government need not "wait until the putsch is about to be executed, the plans have been laid and the signal is awaited... We must, therefore, reject the contention that success or probability of success is the criterion".

The only conclusion that could be drawn from those statements was that the danger lay in the "contamination of subversive ideas", something that could be perceived as a slow process in time and which could not be, adequately, controlled by legal doctrines emphasizing the chronological link between the expression and the illegal consequences. Significantly, Chafee had agreed, in 1947, that the "principal worry is that the traditional American way of life will be undermined by the infection of public opinion. Although there may be no clear and present danger of violent revolution... the threat of a diseased morale is immediate".[73] He, accordingly, proposed the substitution of a clear and <u>probable</u> danger test for the clear and present one, a suggestion fully endorsed by Learned Hand and the Chief Justice in 1951.

The Vinson opinion was joined by three more Justices. Frankfurter and Jackson filed concurring opinions. Black and Douglas dissented.

Justice Frankfurter's opinion was an elegant essay on the virtues of judicial restraint and on the relevance of the balancing process in First Amendment cases as well as an attempt to apply both in the communist case.

According to Frankfurter, every social situation which asks for some sort of assessment or regulation involves conflicting interests. These interests are not quantitatively comparable. The question, therefore, of who is going to do the balancing and reconciliation is more important than the method of balancing or any of its particular outcomes. In a democracy this task has been assigned to the legislature and the courts should respect the results "unless outside the pale of fair judgment". The problem with formulas, like the "preferred freedoms" or the danger test, is that they ascribe an inflated role to the judiciary and "convey a delusion of certitude when what is most certain is the complexity".

The judicial role in the area of expression consists of a "careful weighing of conflicting interests". But certain categories of speech "rank low in any scale of social values". The Supreme Court had already included in the list "the lewd, the obscene, the profane, the libellous and the fighting words". Frankfurter added to the list the advocacy of force and violence.

Following these principles, Justice Frankfurter set off to apply his balancing formula to the situation before him. The conflicting interests were those in national security and in free speech. He, first, enumerated the factors on the side of security in which he included jury findings, judicial notice, common knowledge and "whatever is relevant to a legislative judgment". These factors were

that "communist doctrines... are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness (sic) to the institutions of this country"; that the C.P. had 60,000 members; and that, according to a Canadian Royal Commission, the communist movement was the basis of an espionage network.

On the other hand the second basket included the fact that communists had made some criticisms of actual defects of American society; that "there may be a grain of truth in the most uncouth doctrine"; that suppressing advocates of overthrow inevitably will silence critics who do not advocate overthrow but fear that their criticism may be so construed; that liberty of thought "soon shrivels without freedom of expression".

But when he came to the promised balancing of the two sets, he had drawn up, he declined the prospect of re-weighing these legislative considerations:

> "It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends. Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice?"74

The only consolation he offered to the communists was that they could still take their case to the people with which "power and responsibility remained". The democratic process remained unimpaired for Frankfurter, despite the fact that the Court fully upheld the political excommunication of the C.P. Indeed the "propensity" of the communists for clandestine activities could only be enhanced by that decision.

Jackson's concurring opinion was, arguably, the most interesting, although it received, generally, a "bad press"[75] for its illiberalism. He expressed in a most accurate way the intellectual problems posed by the application of any legal doctrine based on some notion of pending dangerous consequences (be they present, probable or remote). The anticipation of future consequences in a highly complex national and international political situation was idle speculation. Consequentialist doctrines were relevant to trivial cases only, or those cases which had run their course before ending up in the courts. He gave his Barnette decision as an example of the latter case. But, in the case of communists all consequentialist arguments were prophesies "in the guise of legal decision", and if honestly applied they should lead to their acquittal, something clearly undesirable. For Jackson the way out lay in the law of conspiracy: "A conspiracy may be an evil in itself independently of any other evil it seeks to accomplish... Congress may make it a crime to conspire with other to do what an individual may lawfully do on his own".[76]

It is interesting to recall that Justice Jackson had protested against the majority in Korematsu[77], that they had created a "loaded weapon ready for the hand of any authority". In his Dennis opinion he proposed the adoption of the conspiracy provisions against the communists, even though they were, admittedly, "a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary".

One could argue that Jackson was not less liberal than the rest of the majority; but that he was more honest, intellectually: although the Communist Party was effectively designated as a conspiracy, the Justices seemed to him "to discuss anything under the sun except the law of conspiracy". The question, far from the verbal

pyrotechnics of present or probable consequences and the suspect attempt to link remoteness with success was much simpler. A declared conspiracy incriminates all conspirators. Thus, once the C.P. had been so declared, all normal procedural guarantees could be relaxed and the need to prove the existence of danger would resign.[78] Equally, the need to attribute specific acts to the conspirators would vanish. A situation of total danger called for a total reaction. Jackson's opinion was the closest to the way in which the German Constitutional Court dealt with the C.P. of that country in 1956.[79]

Justices Douglas and Black joined in dissent, as they were to do in many of the cases against subversives.

Douglas was the only Justice who applied the danger test as a rule of evidence and a constitutional principle to the facts of the case. He relied heavily on the expression/action distinction and the principle that "free speech is the rule not the exception", which could be reversed only in cases of a clear and present danger. He, accordingly, attacked the fact that the prosecution had charged the communists with conspiracy to organise and teach Marxism-Leninism and not with conspiracy to overthrow the government; and he was distressed by the fact that no evidence was presented of any acts, attempts or even preparations for a revolution. He went on to draw a somewhat tenuous distinction between teaching and indoctrination, and to suggest - correctly - that since the teaching of Marxism was allowed in universities but not in Party offices, the crucial element lay not on <u>what</u> was taught but on <u>who</u> taught it. Douglas' remark was supported by the elevation of the element of intent as the basic requirement of guilt.

On the question of the existence of a danger of violent revolution because of communist activities, Douglas was unequivocal: no such

danger existed. The political and organisational strength of the C.P. was minimal, equally its ideological appeal. The economic depression had been overcome, successfully, and "the country is not in a despair... the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it".[80]

Thus, Douglas made the only effort to apply the danger test in its original form to the facts of the case. He did not question the constitutionality of the Smith Act but found its concrete application a clear abridgement of freedom of speech and association. To be sure, it was exactly that fact, i.e. that theapplication of the danger test would lead, inescapably, to acquittals, that had led to its reformulation by Learned Hand and Vinson.

Justice Black's short dissent was the only one that questioned the constitutionality of the conspiracy provisions of the Smith Act. He found them a kind of prior restraint on freedom of speech, like those annulled by the Court in the 30s and 40s. He indicated that he did not consider the danger test, even in its original form, the "furthermost constitutional boundaries of protected expression in the realm of public matters, but just a minimum guarantee", and he concluded:

> " There is hope, however, that, in calmer times, when present pressures, passions and fears subside, this or some later Court will restore First Amendment liberties to the high preferred place where they belong in a free society." 80a

Thus, at the end of one of the most important court cases in American history, the Smith Act was accepted as consitutionally valid,. the Communist Party was declared a conspiracy but was not fully banned and its entire national leadership was sent to prison for terms of up to twenty years.

3.2. The Case of Yates v. U.S.

The Dennis decision paved the way for a long series of prosecutions against second-string state leaders of the C.P.U.S.A., under the Smith Act. By 1957, 15 prosecutions had been brought under the conspiracy provisions of the Act, involving 121 defendants; additionally eight prosecutions had been brought under the membership provisions of the Act which resulted in the acquittal of 10 defendants and the conviction of 4. In all 96 defendants were convicted under the various provisions of the Smith Act.[81]

This drive came to an end with the Supreme Court Yates[82] decision. The Yates case involved 14 leaders of the California Communist Party. They had been convicted by the state courts under the same provisions as Dennis: conspiracy to advocate the overthrow of the Government by force and violence and conspiracy to organize the Communist Party.

The Supreme Court reversed the convictions. Justice Harlan, who wrote the majority opinion, avoided phrasing it in constitutional terms. He based his opinion on three grounds:

(a) A limited construction of the "organizing" charge. He argued that this term refers, solely, to the process of the initial setting up of an organization. Accordingly, the three-year statute of limitations required the withdrawal of that part of the indictment from the jury's consideration, since the "organization" of the C.P. had started in 1945 with its reconstitution.

(b) The trial judge's instructions to the jury as to the proper interpretation of the "advocacy" provisions, and

(c) the sufficiency of the evidence for conviction of the defendants under the Act.

The Court's opinion on the second count was a masterly exercise in judicial semantics. Harlan insisted that his opinion was a mere

cnnstruction of the statute, in accordance with Dennis, and not a constitutional decision. He found the trial court instructions to the jury inconsistent with the instructions in Dennis, as upheld by the appellate courts.

Trial Judge Mathes had charged the jury that in order to find the defendants guilty under the Smith Act "advocacy and teaching" provisions, they should be satisfied that they had urged the "necessity and duty" to overthrow forcibly the government, and not merely the "desirability or propriety" of such act; he had not added, however, the proviso that there should have been "advocacy of action by the use of language reasonably and ordinarily calculated to incite persons to such action". To be sure, the difference between an "advocacy of the action of violent overthrow" and an "advocacy of its duty and necessity" is not immediately apparent. On the other hand, the Dennis decision had already removed the element of "presence", or of the direct and immediate chronological relationship between speech and subsequent action, of the danger test, and had substituted it for a mere causal relationship between the communication of opinions and beliefs and the creation of a "state of mind" by the receiver of such communications. As Justice Clark said, in dissent, "the trial judge charged in essence all that was required under the Dennis opinions... the charges... are without material difference... the distinctions [between them] are too'subtle and difficult to grasp'".[83]

For Harlan, however, the difference in the verbal formulation was one of substance. The terms "teaching" and "advocacy" were used by Congress as "terms of art"(!), not in their "ordinary dictionary meaning". These terms proscribed expressive activities if (a) they advocated "Presently, the taking of forcible action in the future"

not merely "the abstract doctrine of overthrow", and (b) if the tenor of the language was such that people could have been moved to action by it:

> " The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than to believe in something "84

To be sure, as Holmes had observed in the 20s "every idea is an incitement". The addition of an incomprehensible distinction between "abstract" and "concrete" ideas - the gist of Harlan's opinion - further underlined the accuracy of the Holmesian pragmatism.[85]

Having reversed the decision on two grounds, Justice Harlan went on to examine whether a new trial was called for each of the 14 defendants, on the basis of the evidence on record. Dennis had established two propositions, as to the appraisal of the facts:

(a) that the Communist Party in itself constituted a continuous conspiracy; active membership in the Party had been relied upon, without more, as the sufficient nexus between the activities of the various defendants and the alleged Smith Act conspiracy; and

(b) that Marxism-Leninism - the Party's ideology - was equal to the teaching and advocacy of the violent overthrow of Government.

On the first point, Harlan stated that if "advocacy" and "teaching" were correctly constructed to mean "a call to forcible action at some future point", then the record would have appeared to be "strikingly deficient" as proof of the nature of the Communist Party as a purveyor of such a conspiracy. Thus, the Government could not rely any longer, in its effort to obtain convictions of individual defendants for conspiracy, upon the assumption of the conspiratorial character of the Party. This approach placed much greater importance on the specific evidence against each one of the defendants.

Turning to the specific evidence against the defendants, Harlan rejected the second equation, too. Although all 14 were leaders of the California C.P. he found that for 5 of them there was neither sufficient evidence that they were parts of the alleged conspiracy nor proof of the requisite intent, and acquitted them outright. He then ordered a new trial for the remaining 9.[86]

Justice Black, joined by Douglas, stated that all defendants should have been acquitted on First Amendment grounds. The Smith Act was unconstitutional on its face; and the trials under it were openly political trials which would eventually lead to a similar kind of society as the one the Smith Act had been allegedly drawn up to prevent. The only dissenter in Yates was Justice Clark, the man who nine years earlier as the then Attorney-General had launched the Smith Act prosecutions.[87]

Behind the verbal pyrotechnics, the "terms of art" and the subtle distinction, the fact remained that Yates placed an enormous burden on prosecutions under the Smith Act advocacy and conspiracy provisions. The indictment against the 9 Yates defendants who had been remanded for retrial was dismissed in December 1957.[88] The outcome of the pending cases against various leading communists was similar: either the judges acquitted the defendants, or the prosecution moved for dismissal for lack of evidence which could satisfy the Yates requirements.[89]

3.3. The Smith Act and Membership of the Communist Party

The two last cases under the Smith Act that reached the Supreme Court related to its membership clause and were decided in 1961. Under this clause 4(f), it was an offence to knowingly become or be a member of any organization that teaches or advocates the forcible overthrow of the government.

In Scales v. U.S.[90] a 6-year imprisonment for violation of the clause was affirmed, while in Noto v. U.S.,[91] decided on the same day, the conviction was reversed. Both Scales and Noto had been indicted in 1954.

The questions raised by the "membership" prosecutions were crucial in relation to both expression and association rights. Under section 4(f), conviction was based not on any wrongful activities or even illegal advocacy - as interpreted by Dennis and Yates - but on the mere fact of membership in an organization which remained technically legal. It was the best example of the "guilt by association" doctrine.

Justice Harlan wrote the majority opinion for a 5-4 split Court and affirmed Scales conviction. He upheld the constitutionality of the clause and laid down guidelines for its interpretation and application.

According to Harlan's opinion, the clause should apply to "active" members of the Party only and not to merely "nominal, passive, inactive or purely technical" ones. A defendant qualifies as an "active" member if he is proven (a) to have knowledge of the proscribed advocacy and (b) to specifically intend to accomplish the aims of the organization as speedily as circumstances permit.[92] Harlan then turned to the evidence produced in the trial related to the nature of the Communist Party as an organization, membership of which was punishable under the clause. He found that the standards he himself had set up in Yates were satisfied. The Party had been engaged in illegal advocacy of future violent action and in present legal activities which would facilitate the future illegal undertakings; and that that advocacy was not "sporadic" but broadly based and attributable to the Party as a whole. Thus, as he had already found that Scales

possessed the required knowledge and intent, he upheld his conviction.

On the same day, Harlan reversed the conviction of Noto, based on the same membership clause. Noto was as high-ranking an officer of the Communist Party as Scales (curiously Scales had left the Party in 1961). He presumably had the knowledge and intent required for conviction. However, the Court found that the Noto evidence failed "to establish that the Communist Party was an organization which presently advocated violent overthrow of the government now or in the future." That holding referred to the very same organization which had just been declared to be "as a whole" seditious. According to Justice Black, the difference in the outcome of the two cases was caused by the professional incompetence of the informers who gave evidence in Noto.

The ambiguous character of Communist Party membership was further evidenced in another case decided in 1961. Killian v. U.S.[93] came under the "non-communist" labour affidavit provisions of the Taft-Hartley Act. Killian, a left-wing union official had been convicted for perjury in taking the oath. The activities that had led the jury to find him guilty of swearing falsely that he was not a communist were, according to Justice Douglas' opinion, his opposition to American foreign policy in Indo-China, to colonialism and war and his support for some C.P. functions.

The Supreme Court reversed the conviction on technical grounds, but went on to consider substantive questions on the elusive notion of C.P. membership. Counsel for the defence had asked the Court to rule that membership required "a definite objective factual phenomenon" or "a formal act of joining". The majority, per Justice Whittaker, rejected the request.

According to the decision, membership "connotes a status of mutuality between the individual and the organisation. That is to

say, there must be present the desire on the part of the individual to belong to the Communist Party and the recognition by that Party that it considers him a member". Proof of this "ultimate subjective fact of membership" was all that was required.[94] This subjective fact could be proven from "statements and acts" that were "wholly innocent in themselves and even protected by the First Amendment". It would be a strange doctrine, the Court held, to say that C.P. membership "a lawful status - cannot be proven by evidence of lawful acts and statements".[95] Affiliation with the C.P. existed "when there is shown to be a close working alliance or association between [an individual] and the organisation, together with a mutual understanding or recognition that the organisation can rely and depend upon him to cooperate with it, and to work for its benefits, for an indefinite future period upon a fairly permanent basis." Thus, according to Killian, every cause, idea or statement, however legal or innocuous in itself, was tainted if it was supported by the Communist Party.

The opinions of Justice Harlan, examined above, and the decision in Killian were characteristic of the general approach toward communists, throughout the 50s. The C.P. was perceived as a conspiratorial vehicle of seditious propaganda but it was not banned, in which case membership of it would be made a straightforward crime. Instead of such a frontal attack - adopted by many other countries, and by some opinions in Dennis - a war of attrition was preferred, waged against individual communists, sympathisers and fellow-travellers, other non-communist radicals and directed, ultimately, at the hearts and minds of all Americans. In Scales, this tactic led to the full legalisation of the "guilt by association concept," and as Douglas protested: "Nothing but beliefs are on trial in this case"; and Killian authorised a notion of "guilt for proximity of ideas".

But, at the same time, this approach permitted a certain flexibility to the Justices. They could, within the parameters of the repressive legislation never challenged for unconstitutionality, reconstrue a "term of art"; distinguish away the facts of a case from those of an authority; or insist on some procedural nicety (as in Killian) not fully adhered to by the lower courts, and thus reverse some convictions. This particularistic approach, which required some specific evidence for conviction - even if it were mere beliefs, expressions or past associations - enlarged the space of judicial intervention. Yates, Scales and Noto were the contradictory results of a similar attitude. The trials of the period, conducted in a flurry of publicity, had as their target not only those immediately involved, but more importantly all the others, the "audience" of the dramatic acts.

3.4. The Communist Party Registration Case

The last major political trial of the period was appropriately the case of the Communist Party v. The Subversive Activities Control Board.[96] The case came under the registration provisions of the Internal Security Act. The petition requiring the registration of the Communist Party as a "communist action" organization had been filed with the Subversive Activities Control Board in 1950. The Board ordered the Party to register in 1953. After prolonged judicial proceedings which involved two trips to the Supreme Court, the latter rendered its final judgment in 1961. The Court upheld the Board's finding, validating the order for the registration of the Party.

The Supreme Court opinion was written by Justice Frankfurter, the leading member in the camp of judicial modesty and the main exponent of the balancing technique throughout the 50s.

The Party had attacked the order on six constitutional grounds, but the Court pronounced only on two of them, dismissing the remaining, including the important objections of self-incrimination and bill of attainder, without discussion. The most important part of the decision was that which dealt with the compatibility of the Act and its application with the constitutional guarantees of freedom of speech and association. Frankfurter accepted that freedom of expression could be jeopardized by the registration provisions of the Act. But he added swiftly that this requirement was not attached to the incident of speech but "to the incidents of foreign domination and of operation to advance the objectives of the world communist movement". This brief sentence constitutes the gist of the Court's majority opinion. Frankfurter reiterated the same point some paragraphs later while rejecting the objection that if the Act, as constructed, passed the constitutional test, then Congress would be given a free hand to impose similar restrictionson any other political group it saw fit:

> "Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to foreign-dominated organizations which work primarily to advance the objectives of a world movement controlled by the government of a foreign country."97

The only real problem, according to Frankfurther worthy of the Court's scrutiny, was the restriction of associational rights of Party members caused by the ordered disclosure of the names of such members. Having posed the question as one of disclosure, the Justice went on to resolve it employing predictably his balancing technique.

He agreed that the disclosure might entail certain restraints on speech and associational rights; he listed the public opprobrium and obloquy that disclosure would attach to Party members; the angry

public opinion and the evils which it might spawn, the existence of an ugly public temper.

On the other hand the social interest endangered was paramount: the very existence of the United States as a "sovereign independent nation". He listed the various Congressional findings about the threat that the international and native communists posed to the U.S. The outcome of such a weighing was a foregone conclusion. Congress had exercised its power to reconcile these "competing" interests, by passing the Act. According to Frankfurter, the courts should not re-examine the validity of these legislative findings - the "product of extensive investigations over more than a decade and a half" - and reject them.

The Party was, thus, finally ordered to register, a half-way measure between legality and illegality. However, the registration order was never enforced. All administrative and judicial attempts to force members of the Party either to register it or to be registered themselves according to the provisions of the Act failed on self-incrimination grounds. Equally ill-fated were the attempts to force "Communist-Front" organizations to register.[98] Out of 23 applications which were filed with the Board under the Front provisions only two reached the Supreme Court; in both cases the orders were reversed in 1965 on the ground that the records were "stale";[99] First Amendment questions were not dealt with by the Court.

Thus, no organisation ever registered with the Board. However, the prosecutions under the Smith Act, the proceedings under the Internal Security Act and the persecutions under the various loyalty-security measures had a devastating effect on the organisation involved. The Communist Party "collapsed into a tiny sect of a few thousand members", but the efforts against it did not subside. An extensive

"counter-intelligence" programme was launched by the F.B.I. in 1956, purporting - according to Department of Justice revelations in 1974 - to create "acrimonious debates", "suspicions", "jealousies" and lead to "disillusionment and defection among Party members and increased factionalism on all levels".[100]

Anti-communist hearings went on, too, in the various investigating committees. Against the clear signs of the communist collapse, the anti-communist impetus was maintained by the invention of a new theory. In the 40s and early 50s, the threat from the Party lay in its alleged strength and influence. "It's a lot better to wrongly accuse one person of being a communist than to allow so many to get away with such communist acts, as those that have brought us to the brink of World War Three", H.U.A.C. chairman Velde had stated in 1953.[101] But, by 1956, the communist danger lay in the small number of communists: "A conspiratorial force may actually weaken itself when it increases in size"[102] warned the H.U.A.C., and in 1958 Hoover, who had always resisted the banning of the C.P. declared that the Party was "well on its way of achieving its current objective, which is to make you [the H.U.A.C.] believe that it is shattered, ineffective and dying. When it has fully achieved its first objective, it will then proceed inflexibly toward the final goal".[103] There is a curious logic behind this argument: the best proof of guilt is the lack of evidence; if there is no evidence at all, that means that the suspects hid it and, therefore, they are both guilty and dangerous.

On the other hand, out of the twenty-four organisations whose registration was sought by the Attorney-General, nineteen ceased functioning at some stage of the proceedings. The death sentence imposed by the Internal Security Act on "communist fronts" was fully

successful, although it was not the formal punishment itself (registration - it was never achieved), but the proceedings leading to it that had achieved it. By the early 60s, the formidable anti-subversive arsenal was used by the Southern states, to curb the growing new danger, the civil rights movement.

3.5. The State Sedition Cases

As it was mentioned above,[104] states and municipalities followed and sometimes surpassed in ingenuity the federal lead by passing various anti-sedition measures. The Supreme Court dealt with a state sedition law, for the first time, in Pennsylvania v. Nelson[105] in 1956.

The Pennsylvania law, involved in that case, resembled the Maryland Ober Law and both were modelled after the Smith Act. Nelson, a leading local communist, had been convicted under the law for alleged seditious propaganda against the U.S. Government. The Supreme court, affirming the State Supreme Court, reversed the conviction.

Chief Justice Warren found that the state law had been superseded by the federal legislation, and listed three reasons for the federal pre-emption in the field. (a) "Federal regulation was so pervasive... that Congress left no room for the states to supplement it"; (b) The federal interest involved was so dominant that precluded enforcement of similar state laws. The federal anti-sedition measures covered all American authorities and such regulation was not "a local enforcement problem". Finally, "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program" and could also create double jeopardy problems.[106]

As a result of Nelson, several prosecutions under state sedition laws were abandoned, since the court had included in the field pre-empted by the federal authorities all major loyalty measures.[107] But in a 1959 case, the Nelson ruling was partially overruled.

Uphaus v. Wyman[108] involved the one-man legislative committee of New Hampshire, conducted by Attorney-General Wyman. Wyman asked Dr. Uphaus, the director of the World Fellowship Inc., a much persecuted organisation, to produce a record of all those who had attended a summer camp organised in the state. The official reason for the request was that the state legislature wanted to inform itself on the presence of subversives within its boundaries and, possibly, to enact relevant laws. Uphaus objected on First Amendment grounds, was convicted for contempt and committed to prison until he complied.

Justice Clark, for the majority, upheld the conviction. He stated that Nelson had not stripped the states of the right to protect themselves, and that the state had the power "to proceed with prosecutions for sedition against the state itself" and "internal civil disturbances". According to Clark, Nelson's meaning was to prevent "a race between federal and state prosecutors to the court-house".[109]

Following Uphaus, Southern state authorities started using again local sedition laws - of the earlier criminal anarchy and criminal syndicalism variety or the more recent anti-communist ones - against black and civil rights organisations. Institutionalised racism and the black reaction to it were localised geographically, and the reference to "internal civil disturbances" in Uphaus pinpointed at the new danger that had succeeded the communists.

The Supreme Court's intervention, however, in state sedition cases in the 60s was cautiously in favour of federal regulation of the civil rights issues involved. In the few cases it agreed to review, parts of state laws were struck down as unconstitutinnal and various doctrines were used to that effect.

In Louisiana ex rel. Gremillion v. N.A.A.C.P.,[110] a statute intending to harass the N.A.A.C.P., the moderate black rights organization, provided that "non-trading" associations could not function in Louisiana if they were affiliated with "out-of state" associations which had as officers or board members communists or other members of subversive organisations. This part of the statute was declared void for vagueness, since the local N.A.A.C.P. branch was not in the position to ensure that none of the officers of the federal or state N.A.A.C.P. branches was covered by the blanket prohibition.

In Dombrowski v. Pfister[111] a Louisiana anti-communist statute was used against another civil rights association, the Southern Conference Education Fund. The Supreme Court voided, as unconstitutionally vague, the statute's definition of a "subversive organisation". It also struck down another provision of the statute, according to which, once an organization had been cited by the Attorney-General, the S.A.C.B. or any Congressional committee, it was assumed as a "communist front" without any further evidence.

In another 1965 case (Stanford v. Texas[112]), the Court invalidated a blanket Texas warrant under the Texas Suppression Act that allowed the seizure of all "written instruments concerning the C.P. of Texas, and the operations of the C.P. in Texas". Among the items seized were books by Sartre, the Pope and Supreme Court Justice H. Black.[113]

B. The Loyalty Programmes and the Loyalty Tests

4.1. Federal and State Loyalty Programmes

Loyalty programmes link the acquisition or retention of a position, right, benefit or privilege by an individual or a group, to a loyalty

qualification. The existence of this qualification is either affirmed by the individual or group concerned, through oath-taking, signing of affidavits etc., or is investigated and decided upon by an official - mainly administrative - body designated by the programme.

Thus, loyalty programmes involve the following elements: (a) A specified position or status that depends on a loyalty qualification; (b) a yardstick according to which the loyalty of the individuals concerned can be measured: such yardsticks are, usually, comprised of the affirmative holding of specified beliefs, and/or the disclaiming and repudiation of others; (c) finally, a procedure for the corroboration of the presence or lack of the qualification. The procedure often takes one of two forms, and sometimes combines both: it is either an individual statement affirming the presence or lack of the loyalty standards or an investigating procedure propre, in which the individual concerned may act as witness before a designated body which decides upon the existence or lack of the required qualification. In the case of a negative finding, the consequences provided for in the programme take effect automatically.

The most common loyalty programmes are those related to public employees. They were not unknown in the U.S. before the 1940s, but it was President Truman's Executive Order 9835 of 1947 that launched the first comprehensive loyalty programme for all federal employees.[114] Under the order a loyalty investigation, of all present and prospective employees, was to be conducted by the F.B.I. and the Civil Service Commission. In certain cases hearings were to be conducted by loyalty boards established within each governmental department. "Disloyalty", the ground of a dismissal or denial of employment, was not defined exactly, but six relevant areas of investigation were set out by the order. The first five referred to already existing criminal offences

(sabotage, espionage, treason, advocacy of illegal overthrow of government etc.) which were grounds of dismissal under the ordinary disciplinary procedures. The sixth, under which the majority of investigations were conducted, introduced a new ground of disloyalty:

> "(f) Membership in, affiliation with or sympathetic association with any foreign or domestic organisation... designated by the Attorney General as totalitarian, Fascist, Communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence... or as seeking to alter the form of Government of the U.S. by unconstitutional means."

The standard of proof required was whether "on all evidence, personable grounds exist for the belief that the person involved is disloyal". In 1951, however, the Truman administration again changed the standard from "reasonable grounds", as to an employee's disloyalty, to "reasonable doubts" as to his loyalty. Following the change all cases that had led to a favourable outcome for the employee were reopened and persons who had been repeatedly cleared under the previous standard were dismissed. Finally, President Eisenhower's order 10450 of 1953 changed the standard again, and led to a new reopening of all cases, now, examined under the old ones. Employment or its retention should now be "clearly consistent with the interests of national security". "Nobody is ever really cleared under the security programs" Chafee commented.[115] The heads of all agencies and departments were given the power of summary dismissal. "Disloyalty" was joined with "security risks" in an all-inclusive category, which demanded dismissal, among other grounds, for lack of reliability, excessive use of intoxicants, sexual perversions and mental disorders. Following that order, all dismissals were ordered on "security grounds", but the public saw little difference between a dismissal on security or loyalty grounds.

In 1949, the loyalty programme was extended to all private employees of Defense Department contractors, affecting some five million non-government employees. The total number of persons whose employment depended on a loyalty clearance, at any one time, has been estimated at some thirteen and a half million people, excluding the armed forces personnel.[116] The number of employees actually dismissed was rather small: 11,000 in the period 1947-1957; and according to Bontecue not one prosecution for an indictable offence, uncovered through the various programmes, was initiated.[117]

The hearings, whenever they took place, were based on the past and present beliefs and associations of the persons investigated, rather than on criminally punishable conduct. Thus, some of the formal charges issued were: "You have during most of your life been under the influence of your father, who was an active member of the C.P.". "Communist literature was observed in the book shelves and communist art was seen on the walls of your residence".[118]

The notification of specific charges could be omitted, altogether, as well as the names of the accusing "confidential informants", on security grounds. One such informant stated that he was present when the employee "advocated the Communist Party line, such as favouring peace and civil rights". Another was of the opinion that the employee's convictions "concerning equal rights for all races and classes extend slightly beyond the normal feeling of the average individual".[119] Chafee reports a case in which the F.B.I. interviewed a Pentagon shoeblack 70 times, because his mother had contributed ten dollars to the Scottsboro Defense Fund before he was born.[120]

In accordance with the requirement of the loyalty programme, the Attorney-General started publicising, in 1947, a list of subversive organizations.[121] The organizations entered the list without any

previous notice or hearing. One organisation is reported as trying for six years, unsuccessfully, to have a hearing on its listing which, however, remained valid.[122] Entry in the list meant certain destruction for the organisations, and serious disabilities for their members since membership in a listed organisation was used as evidence in all public and private security programmes. Such members were excluded from public housing and war veterans members lost their benefits; the mass media terminated all contracts of employment of such people; and the question of membership in any listed organisation was a standard part of all loyalty oaths and affidavits, and created a perjury trap: the rapidly expanding number of the listed groups - 87 in 1948, 197 in 1950, 62 new were added in 1953 alone[123] - included extinct and small ad hoc organizations, and "membership or support" was often identified with the mere inclusion in a group's mailing list. Such "membership" was deemed incriminating irrespective of the time it had occurred, or of how long it had lasted. As Chafee put it, the oathtaker "has to try to remember every peaceable group with which he had any conceivable connection since he was old enough to be a cub scout, and decide for himself which he has to mention to escape a charge of perjury".[124]

All in all, as one early study of the loyalty programmes concluded "the only safe course is to refrain from joining"[125] all organizations but the most innocuous or right-wing ones. Thus, the Attorney-General was given "the most arbitrary and far reaching power ever exercised by a single public official in the history of the U.S.".[126] He could blacklist, at his discretion, any organisation for its "bad ideas" and force it out of existence; at the same time, the most diverse activities of people who had the slightest connection with that organization, were adversely affected.

While such wide ranging and expensive loyalty programmes were undertaken by the federal government, state and local authorities as well as non-governmental organisations relied heavily on affirmatory or exculpatory oaths. The loyalty oaths and affidavits requested from trade unionists, lawyers, academics and school teachers have been referred to above.[127] Virtually no aspect of human activity remained free from their reach.

In order of severity, some state and local loyalty programmes requiring oath-taking may be enumerated in an indicative and impressionistic manner. Some sort of loyalty oath was required from: candidates for elections (among others by Maryland); voters (Alabama); non-elective local employees (Los Angeles); unemployment benefit claimants (Ohio); jurors (New York); college and university students (Texas); applicants for tax exemptions (California and Los Angeles where the oath was inserted in the standard tax form); applicants for supplementary benefits (New York); insurance and piano salesmen (Washington); schoolboys (Louisiana); accountants (New York); boxers, barbers, wrestlers (Indiana); fishermen in public reservoirs (New York). Texas demanded the taking of loyalty oaths by the authors of all books used in public schools, to be taken by the publisher when the author was dead, and Alabama extended the oath to the authors of all works cited in textbook bibliographies! By 1956, forty-two state and two thousand municipalities required some kind of loyalty oath.[128]

4.2. Subversive Aliens and the Insulation of American Space

Finally, the insulation of the physical American space from subversive infection was intensified throughout the period, by means of denaturalisations of naturalised Americans, deportation of aliens and refusals of visas to visiting "subversives".

The McCarran-Walter Immigration Act 1952, which extended the relevant provisions of the Internal Security Act, provided that the President could ban the entry of any alien, whose entry was "detrimental to the interests of the U.S."[129] Under this and similar provisions entry was denied among others to Picasso, Chaplin, a famous Austrian conductor - because he had conducted in Moscow and Leningrad - M. Polanyi and various famous physicists who had been invited to an International Conference organized by the American Atomic Energy Commission.[130]

In 1953 it was announced that 10,000 citizens were investigated for denaturalisation and 12,000 aliens for deportation.[131] Two of the most famous cases involved a Greek, who had left the C.P. in 1929 and was deported in 1952, and the indefinite consignment in the Ellis Island detention camp of a Hungarian who on returning to the U.S., where he had lived since 1929, from a brief travel in Europe, was refused entry and no country could be found to accept him.[132]

Subversive beliefs and associations became a ground for refusal of passports to Americans wishing to travel abroad. Passports were denied by the State Department if it had reasons to believe that the applicant was a communist or "his conduct abroad is likely to be contrary to the best interests of the U.S.". In the 1952 passport regulations, issued by the State Department, various loyalty grounds were set out for denial of passport and the taking of a non-communist oath could be required from the applicants. And according to the Internal Security Act, members of organisations registered as "communist-action" or "communist fronts" could not apply for or use a passport. Several well-known personalities were caught by these provisions and denied passports: among others, the black singer Paul Robeson, the Nobel price winner L. Pauling and the economist

P. Nathan. As Chafee put it, the granting of passports has been treated as a "gracious favour from the State Department, to be withheld whenever it did not like the cut of a man's mind".[133]

Printed matter, coming into the U.S. from abroad, became the subject of the most stringent tests carried out by customs, postal and F.B.I. officers, who excluded all books and magazines which contained undesirable "political propaganda".[134]

Thus, while the sedition laws, examined above, dealt with the activities of the C.P., communists and other avowed radicals, the loyalty-security complex permeated all areas of life, and affected people belonging to a much wider political spectrum. The next part will examine the judicial reaction to the various loyalty oaths, loyalty tests and loyalty-security investigations.

5. The Loyalty Programmes in the Courts

5.1. Loyalty Programmes and the Trade Unions

The purification of all areas of civil society from subversive individuals and subversive ideas, started with the unions. The identification of union power and communism had been a permanent theme in Republican propaganda since the New Deal; right-wing opinion could not as yet be reconciled with the - limited - rights that the Wagner Act and other labour legislation had given to the unions. The Taft-Hartley Act,[135] combined measures curbing union power with others intending to purge all communist and subversive influence from the unions. The second objective was mainly served by the annual non-communist affidavit required from all union officers before any union claim could be dealt with by the National Labour Relations Board.

The constitutionality of the oath came up for review by the Supreme Court in the important 1950 case of American Communications Association v. Douds.[136] The Court, per Chief Justice Vinson, upheld the affidavit's constitutional validity and opened, thus, the way for the imposition and judicial acceptance of similar measures in all walks of life.

The National Labor Relations Board, expressing the paternalistic outlook of many New Dealers, argued in court that the facilities it provided to the unions were a "privilege" gratuitously granted; they could be, accordingly, made dependent upon any conditions the Government saw fit. The unions argued that the oath was an unacceptable violation of the First Amendment rights of freedom of belief of the officers involved and freedom of association of the unions.

For Vinson, however, the oath was intended to prevent political strikes, and other kinds of direct action designed to interrupt interstate commerce. The Communist Party was using its influence within unions to exert political pressure.

Having said that, Vinson went on to recognize that some incidental problems concerning First Amendment rights were created by the provision, but declined to use the danger test, as suggested by appellants. The evils guarded against by the oath were not the products of speech at all. The measure of section 9(h)"... does not interfere with speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs../F/orce may and must be met with force. Section 9(h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and

are likely to do again. "[137] Instead of the danger test, Vinson's approach was to weigh the substantial public interest, created by the fact that unions were given by government power which is "never without responsibility" against a "relatively small" incursion in First Amendment rights: the oath touches "a handful of persons" and, moreover, "leaves those who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions."[138] As in all cases of the period, where the balancing test was utilized, the outcome was inherent in the way in which the relative weights were set up.

The second part of the oath, that required an affirmation that the union officers did not believe in the overthrow of the U.S. Government by force or by any illegal or unconstitutional methods, created more problems for the Court. The 5-1 majority on the constitutionality of its anti-communist part broke down into a split 3-3 vote. For Vinson, this provision could be construed, in an unconstitutionally broad way - if it were read "very literally" - but it need not be. If it was construed to refer to those persons and organisations who believed in the violent overthrow of the government "as it presently exists under the constitution and laws thereof"; and who advocated this belief as an objective, and not merely as a prophesy, then the oath was constitutional.

Frankfurter and Jackson joined Black in dissent on that point. They thought that the authorization of the probing in personal beliefs - other than C.P. membership - was going too far toward an authoritarian regime. Frankfurter, always mindful and apprehensive about the role of the Supreme Court, found that asking people whether they favoured illegal or unconstitutional means was opening "the door too wide to mere speculation or uncertainty", considering that

"constitutionality or legality is frequently determined by this Court by the chance of a single vote".[139]

Douds fully endorsed the federal loyalty programme for the unions. The effort of the Court to present the issue, as one related to the prevention of political strikes, was somewhat hollow since no evidence was produced or reference made to any past political strikes - communist-led or not. Indeed, the climate of hostility that American labour had to face throughout its history helped make the "political strike" a phenomenon almost totally unknown in the U.S. It seems that the attempt was related more to the Court's - rapidly retreating - wish to present its decision in terms that could be reconciled with the action/expression distinction, rather than to any existing evidence. Within a year's time, however, even the rhetorical reference to the earlier doctrines had faded away.[140]

Following Douds, a few casts of perjury convictions of union officers taking the oath were reported. In a 1957 case (Jencks v. U.S.[141]) a perjury conviction was reversed. C. Jencks' perjury conviction was based on "classified" F.B.I. information which was not communicated to the defendant, a usual practice in similar cases. In the Jencks case, one of the paid informants was H. Matusow, who had publicly admitted in 1955 that he had lied in a series of cases in which he had appeared as government witness.[142] In the trial court, counsel for the defendant had requested the judge to examine the informer's reports, and give to the defence those that were relevant and material, but the request was overruled.

Justice Brennan reversed the conviction and stated that in the future witnesses and defendants should be granted the right to examine the charges against them. Justice Clark, the ex-Attorney-General was furious: "Unless the Congress changes the rule announced

by the Court today, those intelligence agencies... may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets",[143] a suggestion that the Congress took up by passing a so-called "Jencks law".[144]

A further perjury case (Killian v. U.S.) that reached the Supreme Court in 1961, was examined above.[145] In the meantime, however, section 9(h) of the Taft-Hartley Act had been repealed in 1959. A new provision was passed that made it a direct criminal offence for any person who was or had been a member of the Communist Party during the previous 5 years to serve as an officer or employee of a trade union.[146]

This provision was found an unconstitutional bill of attainder in a 1965 5-4 Supreme Court decision (U.S. v. Brown[147]). Chief Justice Warren partially overruled both Douds and Killian. For Warren, incitement of political strikes and Communist Party membership were not "semantically equivalent phrases". The suggestion that membership in the C.P. "can be regarded an alternative, but equivalent expression for a list of undesirable characteristics" was fallacious. Members of a Party do not "subscribe unqualifiedly to all of its platforms or asserted principles".[148] The fact that the Communist Party was specifically named, made the section akin to a bill of attainder and closer to the judicial rather than legislative functions.

Following Brown, government efforts to prosecute and purge unions from communists came to an end. However, the combined efforts of government and union leaderships had driven radicals from the unions. As a neo-conservative writer lamented in 1980 in a somewhat exaggerated fashion: "with the exception of the labour movement, it

is no longer considered respectable to use the term communist as a term of opprobrium".[149]

5.2. Loyalty Programmes and Lawyers

Law was the other profession in which loyalty tests and qualifications became an almost universal practice.. These loyalty programmes were imposed by state or professional authorities, and were of two kinds. According to the first, lawyers admitted to the Bar were later liable to disbarment if found, by the designated bodies, to advocate the forcible overthrow of the government or simply to be "subversive", a practice fully endorsed by the American Bar Association, in 1953.[150] The most common practice, however, was the investigation of the loyalty of all applicants for admission to the Bar. The loyal disposition of the applicants had to be proven either through the taking of an oath, or in front of some committee investigating the "morality of their character". A denial to take the oath or a negative committee finding automatically barred admission.

The Supreme Court in a series of cases throughout the 50s dealt with such proceedings extensively.

The first case (In Re Summers[151]) involved a Quaker who was a conscientious objector to military service, and would not take the required oath to support the constitution of Illinois. The Supreme Court found that admission to the Bar was a privilege and therefore "the responsibility for choice as to the personnel of its bar rests with Illinois". This responsibility had not been exercised in a discriminatory way. The refusal of the state authorities to admit the Quaker was upheld.

In 1957, however, the Court upheld two applicants who had been turned down by the local Bar Committees.

In the first case (Schware v. Board of Bar Examiners[152]) the New Mexico Bar had turned down an application in 1953 because, among other reasons, the applicant had been a communist from 1932 to 1940, although his record since 1940 had been found "exemplary". The Court found that past radical activities could not "justify an inference that [Schware] has bad moral character" fifteen years later. The case was greeted as a "high water mark of official forgiveness for former communists".[153]

In the first Konigsberg Case, the applicant had been turned down by the California Bar after he had refused to answer questions relating to his past beliefs and associations, on First Amendment grounds. The Supreme Court, per Justice Black, in a 4-3 decision reversed the California S.C., on the same grounds as Schware.

On remand, the California Court returned the case to the Bar Committee which held further hearings. Konigsberg introduced new evidence as to his good moral character, but again refused to answer questions about his political beliefs. He stated, however, that he did not and would never advocate the violent overthrow of the government. His application was again turned down on the ground that he "had obstructed a proper and complete investigation of his qualifications" and this time the Bar Committee decision was upheld by the Supreme Court (Konigsberg v. State Bar of California[155]).

Justice Harlan, writing for a 5-4 majority, stated that freedom of speech and association are not "absolutes". The state interest in the character qualifications of applicants for admission to the bar should be balanced against the degree of the deterrence on speech and association, brought about by their compulsory disclosure.

Similar problems were addressed in the various cases involving legislative investigating committees.

Harlan found that the state interest "in having lawyers who are devoted to the law in its broadest sense including not only its substantive provisions, but also its procedures for orderly change" was clearly the heavier. The effects on speech and association were "minimal" because the interrogations were conducted in closed session, and the applicant was, therefore, shielded from further private action against him; additionally, the Bar decision was subject to judicial review, a fact that, allegedly, precluded arbitrary executive persecutions. The disclosure of "prior speech or association" was instrumental for an investigation "on such items as character, purpose, credibility or intent".[156]

Black's dissent was a powerful attack on the "penurious" balancing test, in general, and its application in the present case. The only state interest involved was the satisfaction of the committee's "curiosity with respect to Konigsberg's 'possible' membership in the Communist Party two decades ago" while the effects on association rights were understated. The Bar Committee was not required to treat the information given to it as confidential, and the possible judicial hearings would further widen the publicity of the proceedings. "/T/he only safe course for those desiring admission", Black concluded, "would seem to be scrupulously to avoid association with any organisation that advocates anything at all somebody might possibly be against..."[157]

On the same day as Konigsberg II, the Supreme Court upheld another rejection of admission to the Bar (Re Anastaplo[158]). Anastaplo was a strange case in that the applicant had refused to answer questions about his political and religious beliefs ("Do you believe in a Supreme Being?"), on the sole ground that they violated his conscience and constitutional rights. All the witnesses had testified about

Anastaplo's "exemplary" character and the Supreme Court accepted that no suspicion whatever existed about any possible subversive beliefs. However, Justice Harlan again stated that the applicant's refusal placed the Bar Committee in the untenable position "of having to certify an applicant without assurance as to a significant aspect of his qualifications which the applicant himself is best circumstanced to supply". He went on to assure Anastaplo that he did not find anything "to suggest that he would not be admitted now, if he decides to answer... In short /he/ holds the key to admission in his own hands." To be sure, that was a somewhat strange assurance, since the majority of the Bar Committee had stated that Anastaplo's answers raised "serious questions" as to his fitness to practice law.[159]

Anastaplo's application was turned down by the Bar Committee in 1951, and the Supreme Court rendered its final judgment in 1961. In 1979 he was awarded by the Chicago Council of Lawyers for "commitment to ideals in both word and deed" and was commended by the General Assembly of Illinois, but he was still not admitted to the Bar.[160]

5.3. Loyalty Programmes and Public Employment

The pervasive character of the loyalty-security programmes, on the prospects of appointment or continuation of employment in the federal, state or local sector has been already noted.[161] The loyalty standards stipulated in these programmes, and the procedures followed for their corroboration, were highly questionable as regards the constitutional rights of expression and association and the normal procedures of criminal justice. It was reasonable, therefore, that the courts were, from an early date, called upon to pass judgment upon the various aspects of such programmes.

The first case in which the courts dealt with the federal loyalty programme was Bailey v. Richardson.[162] D. Bailey, a training officer, had been accused of being a communist and dismissed from the Federal

Security Agency. The names of the F.B.I. informers who had testified and the evidence offered against her were not disclosed at the hearings; Bailey challenged the Loyalty Board's decision on procedural and constitutional grounds. The Court of Appeals held that Government employment is not "property" or "liberty" and the "due process" clause does not apply; nor does the First Amendment since the Constitution does not prohibit "the dismissal of government employees because of their political belief, activities or affiliations... The situation of the government employee is not different in this respect from that of private employees".[163] The Supreme Court affirmed the decision without writing an opinion.

But in two other cases, one immediately before and one after Bailey, involving loyalty programmes of state employees, the Supreme Court clarified its position. The first case, Garner v. Board of Public Works of Los Angeles,[164] involved a Los Angeles ordinance that required all city employees to take an oath to the effect that they had not advocated or taught the forcible overthrow of the government, or belonged to or were affiliated with any subversive organization within a period of five years before 1949; and further to execute an affidavit stating their relation to the Communist Party.

Justice Clark upheld the dismissals of seventeen employees who refused to sign the affidavit or take the oath. He found the affidavit constitutional since "past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment".[165] As to the oath, it was "reasonably designed to protect the integrity and competency of the service". He further rejected the appellants'

objections that the ordinance was an ex post facto law and a bill of attainder: "standards of qualification and eligibility for employment" do not impose punishments and there was no difference between this oath requirement and a statute "forbidding the practice of medicine by any person who had been convicted of felony". Justice Frankfurter thought that the oath requirement was over-broad and Black, Douglas and Burton would have invalidated the whole ordinance as a bill of attainder. "Petitioners were disqualified from office... for what they once advocated. They are deprived of their basic livelihood by legislative act, not by judicial process".[166]

In the second case, Adler v. Board of Education,[167] the Supreme Court upheld the New York Feinberg law, the centrepiece in a series of nationwide measures designed to eliminate "subversive persons from the public school system".[168]

Monton for the majority found that the "guilt-by-association" principle that the law was introducing was unobjectionable, as applied, in particular, to such a sensitive area as the schoolroom, which "shapes the attitude of young minds toward the society in which they live". The school authorities had a duty to ensure the fitness of schoolteachers and "one's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial one's reputation has been determined in part by the company he keeps". For Minton, disqualification from employment, based on membership in one of the organisations listed by the school authorities, was not a denial of freedom of speech. The teacher's "freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice".[169] Black and Douglas

dissented again. They castigated the principle of "guilt by association" introduced, the power vested on government officials to decide the acceptable ideas of people, and the procedural irregularities of the loyalty programmes. "The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms - all long forgotten - become the ghost of a harrowing present".[170]

Despite their elegance, the essays of the two Justices throughout the period were completely ineffective. It is characteristic that they are still much more frequently and extensively quoted, in constitutional treatises, than the more dry legalistic opinions of the majority. By 1952, however, the various loyalty programmes had been fully authorized by the courts. A virtual carte blanche was given to the various legislatures to extend their hunting of subversives in all fields of public employment. Only in two early cases did the court overrule some of the most exaggerated characteristics of these programmes. In Joint Anti-Fascist and Refugee Committee v. McGrath,[171] it ruled that the Attorney-General could not place an organization in the "subversive" list without a prior hearing. However, according to Pritchett, "the list continued to be used during the Truman administration and no procedural reforms were instituted".[172] And in Wieman v. Updegraff,[173] the Court invalidated an Oklahoma oath for all state employees. According to the Supreme Court of that state, dismissals should follow the oath taking "solely on the bases of organisational membership, regardless of the employees' knowledge concerning the organizations to which they belonged". This blurring of the distinction between "innocent and knowing" association, a distinction that, as we saw, was used for various purposes and received as many interpretations during the period, led the court

in a rare unanimous decision, to declare the oath as offensive to the due process of law and as stifling "the flow of democratic expression and controversy".

The Bailey problems of loyalty dismissals, without the normal guarantees of criminal procedure, came up for Supreme Court consideration in the 1955 case of Peters v. Hobby.[174] Dr. Peters of the Yale Medical School, had been removed from his position as Special Consultant to the U.S. Public Health Service. Peters' appeal was based on the Loyalty Board's refusal to disclose the evidence presented against him. The Attorney-General supported the practice: "A large area of vital government intelligence depends on undercover agents, paid informers and casual informers who must be guaranteed anonymity. Thus, evidence which would be rejected in a criminal proceeding could well be the compelling reason for dismissal of an employee on loyalty grounds".[175] The Supreme Court reversed the dismissal on technical grounds (lack of jurisdiction of the Board) but did not rule on the constitutionality of the secret witness procedure, which went on unchallenged. "The operations of the loyalty programe are shrouded in obscurity. Proceedings are not made public. Decisions, containing findings of fact and reasons, are not available. There is no way of knowing... what is going on. Even [employees who have been through the process] do not usually know the full story".[176] And Edgar Hoover defended the widespread practice of use of secret witnesses and informers in those terms: "It is through the efforts of confidential informants that we have been able to expose the communist conspiracy in the past, and through which we must stake much of our future security of the United States".[177]

While Peters was dismissed under the federal loyalty programme, two 1958 decisions dealt with state programmes.[178] In Beilan v. Board of Education[179] the Court upheld the dismissal of a Philadelphia school teacher who had refused to answer questions about his possible

communist affiliations, first to the Superintendent of Schools and later to the H.U.A.C., relying on the Fifth Amendment. In Lerner v. Casey,[180] a New York subway conductor had refused to answer similar questions before the City Commissioner for Investigations. The Court found that the teacher was validly dismissed on grounds of "incompetency"; and the conductor for being a person "of doubtful trust and reliability", which, as the dissenters argued, was a mere euphemism for suspected disloyalty and the invocation of the self-incrimination Amendment. Similar decisions were rendered in two more 1960 cases[181] involving a Los Angeles social worker and a temporary employee of the city. They were both dismissed after invoking the First and Fifth Amendments before the HJJ.A.C.

Finally two further cases of that period should be mentioned, relating to the industrial security programmes, under which the private employees of government contractors were vetted.

In Greene v. McElroy[182] the security clearance of an aeronautical engineer, employed by a private manufacturer specializing in defence projects, had been revoked by the Personnel Security Board which had relied on unrevealed confidential information. The revocation meant, according to the Court, that "for all practical purposes the field of aeronautical engineering was now closed to Greene". The Court reversed the decision in an opinion written by Chief Justice Warren. His dislike of the proceedings in which a decision of such great importance for the applicant was taken without the safeguards of "confrontation and cross-examination" coloured the opinion. However, the reversal could attract the necessary support on the technical ground that the procedure had not been explicitly authorized by the President or the Congress. Justice Clark, in dissent, found the Court action against all precedent and "indeed strange... at this critical time of national emergency".

But in the next case (Cafeteria and Restaurant Workers Union v. McElroy[183]) no technical fault could be found and the substantive validity of the procedure was upheld by the Court. In this case, the identification badge of a short-order cook, at a privately operated cafeteria on the premises of the Naval Gun Factory, had been suddenly revoked by a security officer. No notice was given and no hearing ever took place; the only explanation given was that she had failed to meet "the security requirements of the activity". The Court found that the private interest involved was "a mere privilege subject to the Executive's plenary power", the revocation of which need not conform with due process requirements; any way, the cook's interests were not seriously impaired. "Security requirements" cover many matters other than loyalty, according to the court, and one could assume that the cook's pass was revoked because "she was garrulous, or careless with her identification badge" and not disloyal. Thus, the Court accepted that, if the officials assert a "valid" security requirement without further elaboration or hearing, all employment could be immediately terminated, leaving the person concerned liable to prove to future employers the difference between "security risk" and disloyalty.

In the early 60s, the Supreme Court started, cautiously, to restrain the worst excesses of the state loyalty programmes, in a series of cases brought by teachers and academics.

The first case (Shelton v. Tucker[184]) involved an Arkansas statute, which compelled all teachers and professors in state colleges to sign an annual affidavit listing all organisations they belonged or had contributed to, within the preceding five years. The statute was used to harass and expose Southern "advocates and supporters of civil rights"[185] and, in particular, members of the National Association for the Advancement of Coloured People. Shelton, a teacher,

refused to file the affidavit and was dismissed. The state courts upheld the dismissal, when they found that he was a member of the N.A.A.C.P.

The Supreme Court, per Justice Stewart for a 5-4 majority invalidated the statute as over-broad. The state had a vital interest in the fitness of its teachers and could investigate or force disclosure of their associational ties. It could ask certain teachers about all their affiliations; all teachers about certain organisations or about the number of organisations they belong to and the time they spend in similar activities. But to ask "everyone of its teachers to disclose every single organization... every conceivable kind of associational tie - social, professional, political, avocational or religious", was a demand of "unlimited and indiscriminate sweep" and had "no possible bearing upon the teacher's occupational competence or fitness".[186]

The Court's rationale for reaching this decision was not fully clear. It held that the state could enquire about any organisation, but not in the broad terms of the Arkansas statute. Nevertheless, as Justice Harlan objected, it was impossible for the school authorities "to fix in advance the terms of their inquiry that it will yield only relevant information".[187] The decision can be seen only as an attempt by the Court to protect the N.A.A.C.P. from Southern harassment, by excluding it from the wide-ranging anti-communist measures, while the latter were kept intact. As such, it "lacked meutral principles because it lacked intellectual coherence".[188]

The next case (Cramp v. Board of Public Instruction[189]) involved a Florida statute, according to which all public employees were required to take an oath stating that "I have not and will not lend my aid, support, advice, counsel or influence to the C.P.". The oath was found, again, over broad. Justice Stewart suggested that

under its terms, no-one could ever be sure about his "purity" and take the oath without fear of a later perjury conviction. All causes that had been espoused by the C.P. were declared contaminated, and the burden placed upon the oathtakers was unreasonable. Interestingly enough, a similar perjury conviction of a trade unionist was not found substantively offensive by the Court in Killian,[190] decided in 1961 too.

The next loyalty oaths struck down by the Court, as overbroad, were imposed by two Washington statutes.[191] 64 members of the University of Washington attacked a 1951 oath required from all teachers, according to which they swore to promote respect for the flag and the institution of the U.S. "by precept and example", and a 1955 one required from all state employees, who should swear that they were not "subversive persons". In one of the numerous attempts at an all-inclusive definition of subversion, the statute provided that a subversive person is "anyone who commits, attempts to commit or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit etc. any act intended to overthrow, destroy, or alter, or to assist in the overthrow etc. of the constitutional form of the Government of the United States... by revolution, force or violence".

The Court cited various absurd examples of "guiltless knowing behaviour" that could come under the terms of the oath: a professor teaching a communist student, another participating in an international conference along with scholars from communist countries, etc. It concluded that under any construction of its provisions "consistent with a proper respect for the English language" the oaths were unconstitutionally vague.

In Elfbrandt v. Russell[192] an Arizona oath was statutorily interpreted in such a way so as to avoid the deficiencies found by

the Supreme Court, in the cases above. Dismissal was threatened for oathtakers who were "knowing" members of the C.P. or any other organization that had as "one of its purposes" the overthrow of the Government. Justice Douglas invalidated the oath because of its membership provisions, which, allegedly, violated the requirements imposed on such provisions by Scales and Noto.[193] Membership in an organisation could become a ground for dismissal, only if it was active and followed by knowledge of the illegal purposes of the organisation and "specific intent" to carry them out. Thus, for the first time, the Court indicated that loss of employment should be imposed under the same conditions that were necessary for criminal punishment.

In Keyishian v. Board of Regents,[194] four provisions of the New York Feinberg law, which had been upheld in Adler fifteen years ago, were voided for vagueness. These provisions set out various grounds for the dismissal of school teachers suspected of subversive beliefs and acts.

The first required removal for "treasonable or seditious" utterances. The term "seditious" was found excessively vague, even under the Penal law definition. The second clause barred employment to persons who advocated or advised the doctrine of forceful overthrow of the government. It was found susceptible of sweeping and improper application, since it did not distinguish between advocacy of doctrine in the abstract and incitement to action. The third required the removal of all those who distributed written material advising the doctrine of forceful overthrow. Justice Brennan, for the majority, offered the examples of a history teacher speaking on Marxism or the French and Russian revolutions and of the college librarian advising on books on similar subjects, who could both be prosecuted under this clause.

The Justice remarked that these clauses had not been challenged in the Adler case for vagueness; however, his dislike for the earlier judgment and the anti-subversive programme of the Feinberg law was evident. He emphasized the importance of academic freedom, "... a special concern for the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom", and stated that keeping teachers guessing what conduct or utterance might lose them their position created a "chilling effect" on the exercise of vital rights.

The fourth challenged clause made Community Party membership prima facie evidence for disqualification. Justice Brennan expressly overruled Adler on that count, remarking that the "constitutional doctrine which has emerged since that decision has rejected its major premise". Building upon the recent doctrinal developments, the Justice stated that freedom of expression could be infringed by the denial of positions and benefits or the placing of conditions for their attainment, a theory explicitly repudiated in the 50s. The clause under consideration failed to stipulate that the suspect should have knowledge of the Party's unlawful purpose and a specific intent to carry them out - the conditions necessary for criminal conviction since Scales - and had, accordingly, an overbroad sweep even as a condition for employment. It "... bar[s] employment both for association which legitimately may be proscribed and for association which may not... consistently with First Amendment rights".[195]

For the four dissenters "[n]o court has ever reached out so far to destroy so much with so little". Justice Clarke protested that

the majority was overruling, without saying so, not only Adler but a long series of precedents like Garner, Beilan, Nelson and Konigsberg which had upheld identical or similar procedures and programmes. The majority had "by its broadside swept away one of our most precious rights, namely, the right of self-preservation".[195a]

In Whitehill v. Elkins,[196] the Maryland Ober law oath, upheld in Gerende,[197] was invalidated for similar reasons as those used in Elfbrandt and Keyishian. The oath requested teachers to state that they were not engaged "in one way or another" in an attempt to overthrow the Government. The provision was invalidated by Justice Douglas for having "an overbreadth that makes possible oppressive or capricious applications as regimes change".

Throughout the line of cases examined above, Justices Clark, Harlan, White and Stewart dissented consistently and denounced the attempts of the majority to restrict state loyalty programmes, without explicitly overruling the decisions of the 50s that had upheld them. As Harlan stated in Whitehill "the only thing that does shine through the opinion of the majority is that its members do not like loyalty oaths", and repeating the 50s theme of judicial restraint, "it is not within the province of this Court to pass upon the wisdom and unwisdom of Maryland's policy in this regard".[198] By 1967, however, when Whitehill was decided, the fear of the communist danger had receded, and new threats had captured the limelight which will be examined in the next chapter.

5.4. Loyalty and Other Activities

Beyond public employment, the loyalty programmes pervaded other areas of life. Some of the most important cases, examined in chronological order, were the following.

The much imitated Maryland Ober law required that all candidates for public office should file with their nomination certificates, affidavits that they were not "subversive persons", and barred the candidature of subversives in all elections. In Gerende v. Board of Supervisors of Elections of Baltimore,[199] a candidate for a municipal election had refused to sign the affidavit, and was accordingly denied a place on the ballot. The Maryland Court of Appeal affirmed, and construed the term "subversive" to mean any person engaged "in one way or another in the attempt to overthrow the government by force or violence", or who was "knowingly a member of an organisation engaged in such attempt". The Supreme Court, as well as most commentators on the case,[200] found that the state Court's definition was quite precise and affirmed in a unanimous per curiam decision.

Of much greater importance was the trend, increasing throughout the period, to deny tax and welfare benefits to "subversive persons", and to link such benefits to various "non-subversive" oaths and affidavits. Thus, a federal housing law denied accommodation in housing estates to members of subversive organisations, a federal veteran's law denied veteran benefits

to subversives, and the Ohio unemployment law denied subversives unemployment benefits.[201] The Supreme Court dealt with similar laws in two cases.

The first (Speiser v. Randall)[202] involved a California law which denied subversives a property tax exemption for honourably discharged veterans. According to the tax regulations, all claimants of the exemption should take a "non-subversive" oath; the tax assessor was empowered to deny the exemption, in which case the claimant could take his decision to the courts.

Justice Brennan, writing for the majority, invalidated the oath requirement trying, at the same time, to differentiate the case from the loyalty oaths for public employees which were sustained by the court, in two cases decided on the same day (Beilan and Lerner). Thus he accepted that the state could validly deny tax exemptions to subversives, but found that the procedure involved was a violation of due process of law. The burden of proof of the applicant's loyalty of character was placed squarely on his shoulders and the circumstances made the onus extremely difficult to bear. The tax assessor could reject the truthfulness of the oath arbitrarily, in which case the claimant had to prove his lawfulness in court. But "how can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements?". Brennan admitted that the fact finding and the legal standards in such court cases were "but shifting sands on which the litigant must maintain his position";

the procedural and substantive problems involved would lead all claimants to steer clear even from legitimate beliefs and expressions, a "result which the state could not command directly". The procedure, therefore, was not motivated by a valid "state compelling interest".[203] For Justice Clark, dissenting, the tax procedure was not a criminal one involving fines or punishments, or regulated by "due process rules". The exemption was "legislative largesse" and the state could extend or refuse it, as it saw fit.

However, two years later the Court accepted Clark's position that denial of welfare benefits was not "punishment" and could be constitutionally effected because of a person's subversive beliefs.

Flemming v. Nestor[204] was one of the most bizarre cases of the period, evidence according to Kirchheimer of the "competetive pressure to outdo one's colleague in vociferously rabid anti-communism".[205] Nestor, a non-American, had lived in the U.S. since 1913 and was a member of the Communist Party from 1933 to 1939 when the Party was formally fully legal. He was deported in 1956 because of his past communist membership and his old-age pension was terminated under a 1954 Amendment to the Social Security Act.

Justice Harlan upheld the provision overruling objections for denial of due process, bill of attainder, ex post facto law and punishment without trial. For the majority, the provision was related solely to the administration of the social security system! Benefits could be terminated if they were not used within the United States.

Finally, in 1960 again, the anti-subversive practices of the Federal Communications Commission came up for judicial review. The Commission, established under the Federal Communications Act, is empowered to issue and renew radio and television operators' licences.

During the 50s the Commission used to ask the applicants and licensees whether they were members of the Communist Party and other subversive organisations. One licensee refused to answer such questions during the hearings for the renewal of his radio operator licence, and following that the licence was revoked. The Court of Appeals for the District of Columbia affirmed[206] finding that no question could be more "relevant or more material to the qualification of a radio operator". The Supreme Court denied certiorari, thus accepting the Court of Appeals' ruling.

5.5. The "Subversive" Alien in the Courts

While the judicial protection of Americans who were caught in the intricate web of the huge loyalty-security complex was less than whole-hearted, the treatment of aliens who were trapped in it was probably the most cruel aspect of the period.

One of the early cases, U.S. ex rel. Knauff v. Shaughnessy[207] (1950) involved a German woman who had fled from Nazism to England, where she had served in the R.A.F. In 1948 she was married to an American veteran working in the U.S. base in Frankfurt, but later that year she was refused entry to the U.S. by the immigration authorities without a hearing. The ground given for the refusal was that her admission would be "prejudicial to the interests of the U.S.".

The Supreme Court upheld the exclusion and stated that since the woman had no right of entry, she was not entitled to a "due process" hearing. Entry to the country was a privilege regulated at wish by Congress and the executive decision was not subject to judicial review. Knauff spent three years in the no-man's land of Ellis Island, a detention centre for aliens and was finally admitted in 1951 after the House of Representatives passed a bill permitting her to stay. In Knauff, Justice Minton had differentiated the case of exclusion

of an alien from that of deportation, and indicated that in the latter case a more extensive judicial protection would be forthcoming. This promise was not fulfilled, however.

In Harisiades v. Shaughnessy[208] the Supreme Court upheld the deportation order of a Greek national, who had come to the U.S. in 1920, and was a member of the Communist Party from 1923 to 1929. The deportation was ordered under the provisions of the Smith Act, which authorised the deportation of legally resident aliens for C.P. membership, even if such membership had been terminated before the enactment of the statute.

Justice Jackson found that no violation of First Amendment rights was involved in that case.[209] Douglas dissented vigorously stating that the Act, as construed, allowed the deportation of aliens not for what they were but for what they had once been. In an opinion joined by Justice Black, typical of the high rhetoric associated with the two Justices, Douglas concluded that the "principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who have once erred".

In Carlson v. Landon[210] the Court upheld the indefinite detention without bail of five alien communists, pending the completion of deportation proceedings. One of the five was the mother of three American-born children, who had been a communist from 1919 to 1936; another was a 56 year old Pole, who had resided legally in the U.S. since the age of 17.[211] The only ground offered by the immigration authorities for the denial of bail was that they were security risks. The district judge accepted the official request and stated that "I am not going to turn these people loose if they are communists, any more than I would turn loose a deadly germ in this community".[212]

The Supreme Court affirmed, per Justice Reed, ruling that Congress could constitutionally delegate to the immigration authorities the power to order the indefinite detention without bail of deportable aliens. The fact that bail was denied did not violate the relevant constitutional provision (the Eighth Amendment) because a deportation "is not a criminal proceeding nor punishment".

Finally, in Shaughnessy v. U.S. ex rel. Mezei,[213] the concept of indefinite executive detention was fully upheld by the Supreme Court, which consented to the permanent confinement of Mezei to Ellis Island, when no country was found which would accept him.[214]

In the meantime, the 1950 Internal Security Act had made Communist Party membership a ground of deportation, and dispensed with the need to prove in each case that the alien did, in fact, advocate the violent overthrow of the government. In Galvan v. Press,[215] the provision was upheld in a case involving an ex-communist who had claimed ignorance of the party's advocacy of violent overthrow. Frankfurter stated that the fact of joining up was sufficient for deportation. The power of Congress to regulate the entry and residence of aliens was not a "page of history" but a whole volume. It was too late for the courts, maintained the Justice, to start invoking "due process" and "ex post facto law" guarantees against this judicially accepted and unrestricted power of the legislature. Black and Douglas found the ex post facto law implications of the decision the most disturbing: "For joining a lawful political group years ago - an act which he had no possible reason to believe would subject him to the slightest penalty - petitioner loses his job, his friends, his house, and... his children..."[216]

The only case in which the Supreme Court reversed a deportation order of an ex-communist during the period was Rowoldt v. Perfetto.[217] In that case, Frankfurter changed camps against vigorous dissents by

his hitherto colleagues. He found that an alien who had joined the Communist Party for one year in 1935, during which he worked in a communist bookshop, was covered by an exception clause of the Internal Security Act according to which joining for purposes of "obtaining employment, food or other essentials of living" was not a sufficient ground for deportation.

Only in the 60s, the Court moved to put certain procedural guarantees on the discretionary power of immigration authorities.[218] It upheld, however, the deportation of homosexuals on the ground that "they were affected with a psychopathic personality".[219] By that time, communists, native or alien, had become an extremely rare species.

The 1952 passport regulations of the State Department came up for review by the Supreme Court[220] in the 1958 Kent v. Dulles[221] case. Before that case most denials of passports had passed unchallenged by the courts. In Kent, the applicant wanted to travel to England and Finland to attend a meeting of the World Council of Peace, but the passport was denied on grounds of communist affiliations. The Supreme Court held in a 5-4 decision, per Justice Douglas, that the "right to travel is part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment"[222] and that the State Department was not statutorily authorised to deny passports because of the citizen's "beliefs and associations". After the Kent decision the State Department started granting passports to persons who had been previously denied one.

However, the 1961 Supreme Court ruling that upheld the order against the Communist Party to register under the Internal Security Act, put into effect section 6 of that Act under which it was a criminal offence for members of registered organisations to apply for or use a passport. The famous question "are you now or have you ever been a member of the Communist Party?" was reintroduced as a standard

part of all passport applications. In Aptheker v. Secretary of State[223] (1964) the Supreme Court invalidated section 6. Justice Goldberg found that the linking of free travel with lack of membership in a certain organisation violated the constitutionally protected right of freedom of association. Membership in the Communist Party was made a ground of denial, without the conditions introduced by Scales[224] for criminal conviction for C.P. membership. The Court further objected to the indiscriminate character of the passport denial and suggested that the security needs, allegedly served by the ban, could be covered by "less drastic" means. As it stood, the section was a wide and indiscriminate violation of the "due process" clause of the Fifth Amendment. Communists should be able to travel abroad for a "wholly innocent purpose".[225]

In the meantime the Kennedy administration had initiated a policy of restrictions of passports for travel to particular sensitive areas or countries, which was used to ban travel to Cuba. In Zemel v. Rusk[226] (1965) this restriction came up for review, and was upheld by the Supreme Court. The appellant had argued that the right to travel is a First Amendment right and its restriction impairs the free flow of information. Chief Justice Warren rejected that argument. The right to travel involved "liberty" to act protected by the Fifth "due process" Amendment, and not rights of expression. Similar area restrictions were later imposed on travel to North Vietnam but certain procedural restrictions were upheld by the courts.[227]

Finally, another question of restrictions upon the flow of information was reviewd in the case of Lamont v. Postmaster General[228] (1965). It involved the attempt to stop the flow of "foreign communist propaganda" in the U.S. through mail restrictions administered by the postal and customs services. Some of the books confiscated under the programme included "Lenin's Selected Works" and "Happy Life of

Children in the Rumanian People's Republic".[229] The Kennedy administration stopped the programme in 1961, but in 1962 Congress passed a new law under which "communist political propaganda" was seized by the postal authorities and delivered only upon the specific request of the addressee. The list of the persons that requested delivery of such material was passed to the H.U.A.C.

Four Justices agreed with Douglas' opinion that the compilation of the list and its communication to various security-loyalty watchdogs had a serious deterrent effect upon the "uninhibited, robust and wide open debate and discussion contemplated by the First Amendment".[230] People in sensitive positions as well as all others included in the list were compelled to steer clear from any publication designated as communist propaganda lest they "invite disaster".

Justice Brennan concurring, added that the First Amendment guaranteed the fundamental right to receive information. "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".[231] Although the case was related to a minor aspect of the loyalty-security complex the judicial rhetoric and action fully coincided for once. The Supreme Court invalidated the statute as violating the First Amendment and thus, for the first time in its history, a federal law was voided on such grounds in 1965.

C. The Legislative Investigating Committees

6. Historical Background

The unquestionable stars of the period, in terms of publicity, were the various Congressional Investigating Committees. Their activities offer a panorama of all else that was going on during that period.

The most famous of all was the House Committee on Un-American Activities (H.U.A.C.).[232] It was first established in 1938, from the efforts of New York Representative Dickstein who wanted a full investigation of the growing pro-Nazi and anti-semitic propaganda. The term "Un-American" was coined by Dickstein himself, but by the time the proposal for the new Committee was passed, its predominant anti-radical, anti-New Deal and anti-union bias had become evident and Dickstein was not elected a member.[233] This bias coloured the hearings of the Committee under its first Chairman Dies, from 1938 to 1944. During those years, the Committee was preoccupied with the alleged communist infiltration of the Roosevelt administration and the trade union movement. Thus, its first hearings involved the testimony of an A.F.L. leader, who asserted that the C.I.O. was ruled by communists, and named 284 C.I.O. communist organisers, without, however, providing any sources for his allegations. The accused were never invited by the Committee to testify. That became a standard practice of the hearings and was repeated throughout its history. The next target was the Works Progress Administration's Federal Theatre and Writers' Project, a New Deal programme of federally subsidized art. The Theatre Project was discontinued in 1939, after the Committee accusation that it was "sheer propaganda for communism and the New Deal",[234] while federal funds were cut off from the Writers' Project. Prominent New Dealers (like Secretaries Ickes and Perkins and W.P.A.'s administrator Hopkins) were accused as "purveyors of class hatred and Stalin associates".[235] The Board of Economic Warfare, established after the outbreak of the War was found communist-infiltrated. Thirty-five names of communist top administrators of the Board were promised, and ten were finally named to the press. Dies's main accusation was that one of those, an economist, had published a book on "Nudism in Modern Life". The author

was fired but all others were later cleared by the F.B.I.[236] "By the end of 1938 hundreds of organisations and thousands of individuals had been named before the Dies Committee, without any right of advance notice or rebuttal, as communists".[237] In 1939, Dies started playing a "number's game": he promised that his Committee would force the deportation of no less than seven million aliens, while in 1940 he claimed that he was going to publish the names of six million people who were members of organisations controlled by Germany and the Soviet Union. During the same year, the Committee issued with great publicity a report on communist plans to sabotage American industry, which turned out to be a compilation of classic Marxist writings from K. Marx to E. Browder [238]

During the War years the activities of the Committee were somewhat subdued, but in 1945 it was upgraded into a permanent House Committee and its annual appropriation reached $200,000, the highest sum allotted to any House Committee.

The next major phase of the activities of the Committee started in 1947 with the much publicised investigation of communist infiltration of the film industry during the war. At the beginning of the hearings, that took place in Hollywood,[239] "friendly witnesses" testified about the alleged infiltration and gave names of suspected communists, ex-communists and fellow-travellers. The Committee "indulged the witness in rumour, speculation and surmise, allowed them to enter numerous names of alleged communists into the record... documentation, and spurted (them) to ever more fevered denunciations of communists, in Hollywood and everywhere else".[240] Next, some of the named were subpoenaed, and ten of them refused to answer any questions about their past affiliations and contacts, by invoking the constitutional rights of the First and the Fifth (self-incrimination) Amendments. The ten were dismissed and charged as communists. They were later cited for contempt of Congress and imprisoned.

This pattern of examination of friendly witnesses and of informers - ex-Communists and F.B.I. agents in the C.P.[241] - and then of the hostile witnesses who refused to answer, was repeated throughout the 50s. The H.U.A.C. was supplemented by two Senate Committees, the Senate Internal Security Sub-Committee (S.I.S.S.) and the Committee on Government Operations chaired by Senator J. McCarthy. All areas of life came eventually for investigation by one or more of the Committees: trade unions, education, the church, the press, governmental agencies and all sorts of foundations and research units. The political profit of the various highly publicized investigations was such that the various Committees were "colliding as they snatched at star witnesses".[242]

The extraordinary character of the Committee hearings lay in their semi-judicial character which was coupled with an almost complete absence of the normal procedural guarantees attendant upon the criminal process.

Thus, the Committees were granted, in 1946, the power to subpoena any witness they wanted to investigate and put to him any questions, even if "most of the information sought... was already on the hands of the Committee". According to Chafee, the questions put by Committee members "rove over everything, and need prepare nothing".[243]

The procedural rules were set by the various chairmen as the hearings went along and the hostile witnesses were treated in a worse manner than the defendants in criminal trials. Dies, the first Chairman of the H.U.A.C., encapsulated the gist of the procedural rules, in a statement before a Senate Sub-Committee, in 1953: "Primarily, if you get a good chairman and a good Committee you will have a good investigation. Outside of that, all you need is a few general rules to see that <u>the witness and the public get a fair break</u>".[244] According to a Circuit Judge the witnesses were under a "triple threat",

particularly those who had been named as subversives, in a previous hearing, without any supporting evidence: "Answer truly and you have given evidence leading to your conviction for a violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment".[245]

Despite all this formidable investigatory armoury "not a single person [went to] prison for spying or sabotage or urging violent revolution, because of evidence dug up in a Committee investigation".[246] But quite a few people were imprisoned for offences related to the hearings (perjuries and contempt of Congress). Indeed, it may be argued that the main task of the hearings was to punish people who could not be convicted in judicial proceedings, even under the draconian sedition laws of the period. The Committees did not uncover offences, they created them. But, even though Congress cited for contempt more people between 1952 and 1954 than in its whole previous history, it is reasonable to suggest that the pickings of a few hundred perjury and contempt convictions could not match the extent of the exercise. The main aim behind the proceedings was to expose ideas, groups and people as subversive, rather than to unearth, prosecute and punish a few individuals.

President Truman's Committee on Civil Rights had recommended, in 1947, the tactic of exposure of individuals as "the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups".[247] This recommendation, which appeared in a Government report entitled "To Secure these Rights", became the guiding principle of the various Legislative Committees. According to a historian of the H.U.A.C. "the presence in this land of every individual communist and fellow

traveller and former communist who would not purge himself was intolerable; the just fate of every such creature was to be exposed in his community, routed from his job, and driven into exile".[248] The H.U.A.C. Chairman Walter said as much. He hoped to expose all subversives before their neighbours and fellow workers and expressed "confidence that the loyal Americans who work with them will do the rest of the job".[249] With the wholehearted support of the media - from 1955 the hearings were transmitted live from television - the "loyal Americans" answered the challenge. Uncooperating witnesses were dismissed from their jobs and hustled out of factories by fellow workers; hundreds of teachers and professors were fired after the 1953-4 investigation of education; when local "vigilantes", physically attacked persons named in a hearing, a Committee member stated that "this is the best kind of reaction there could have been to our hearings";[250] and most of the unions and other groups investigated were destroyed.

As a result of McCarthy's investigation of the Voice of America, hundreds of books were withdrawn from American Information Libraries abroad and some were burnt. They included Barth's "The Loyalty of Free Men" and Hammett's "Maltese Falcon". "Small state H.U.A.C.s" imitated the Congressional Committees and surpassed them in ingenuity. The California Tenney Committee was particularly ferocious. Once it had named somebody as a communist or fellow traveller, it then tried to excommunicate him completely. Lawyers were warned that they should not defend him; employers that they should dismiss him; landlords that they should not rent him a house; and the whole community that they should not join any group he was a member of, read any books, attend any play or film written by him, or even support any cause he espoused.

Thus, the ordinary citizen learnt that he should not join any group, lend his name to any cause, or say anything that could be construed as unorthodox or Un-American by the Committees. It was this pervasiveness of suspicion, the concept of "universal guilt", that called upon each individual to scrutinize and cleanse not only his public acts and affiliations but even his most private thoughts and activities, that was the most dramatic result of the various loyalty programmes and Committee investigations. "I don't say yes to anything now except cancer, polio and cerebral palsy appeals" and "something would have to happen to some of the cells of my cerebrum before anybody could persuade me ever to touch politics" were typical answers of suspected subversives to Committee questions.[251] And according to Gellhorn, the only way in which scientists - one of the main targets of the Committees - could avoid scandal was to confine their interests "to their laboratory, their flower garden and their golf game".[252]

The next part examines the court cases that arose from the investigations of the legislative Committees.

7.1. The Judicial Upholding of the Practices of the Committees

The courts came to review the various activities of the Legislative Investigating Committees when they dealt with the criminal prosecution of witnesses unwilling to testify, in all or in part, before the Committees. According to federal law, it is a misdemeanour for any witness summoned by either House to "wilfully make default, or, having appeared to refuse to answer any questions pertinent to the subject under inquiry". On the other hand, the House concerned may by a majority vote directly cite the recalcitrant witness for contempt of Congress, and imprison him, a procedure that may come under judicial review through a writ of habeas corpus. In both cases the courts are

called upon to decide, whether the legislative power to compel the testimony was validly exercised.[253]

Under its mandate the H.U.A.C. - and under similar ones the two Senate Committees - were empowered to investigate on

(1) the extent, character and objects of un-American propaganda activities in the United States;

(2) the diffusion within the U.S. of subversive and un-American propaganda; and

(3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

In an 1880 case[254] the Supreme Court had held that Congress could not investigate a subject on which it could not validly legislate.

The early challenges to the legislative investigatory power were based on that doctrine. Witnesses unwilling to testify on their present and past political beliefs and associations argued in court, either that Congress could not validly legislate in the field of political beliefs and, therefore, investigations on that field were barred as well; or that freedom of conscience and freedom from inquiry in political beliefs, allegedly protected by the First Amendment, were directly violated by the Committee's questions.

Five cases dealing with H.U.A.C. investigations, and decided by appellate courts between 1947 and 1950, rejected both objections. In U.S. v. Josephson[255] the Court of Appeals argued that since the House had stated in mandating the Committee that it was set up for a "legislative purpose" the courts could not doubt it. The First Amendment could be violated only if Congress passed legislation that violated it.

In Barsky v. U.S.[256] the Court of Appeals for the District of Columbia held that investigations were not restricted to "activities which might be regulated". A question, therefore, as to the relation

of a witness to the C.P., still in 1948 a fully legal party, was valid and refusal to answer it was a contempt of Congress.

Equally, in Lawson v. U.S.[257] a case arising out of the "Hollywood Ten" investigation, the Court held that questions about communist affiliations were pertinent when addressed to people who "by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions". Investigation into communist affiliations was directly pertinent to an investigation into un-American propaganda. In four of those cases the Supreme Court denied certiorari, while in the fifth involving the famous composer Hans Eisler, the Court abandoned review after the defendant fled the U.S.[258]

Thus, the courts gave in those early cases full notice that they did not intend to intervene in the way in which the Committees were carrying out their investigations. On the other hand, Congress carried with overwhelming votes the contempt citations with which it was presented by the Committees. "Where the courts had deferred to the Congress, the Congress now deferred to the courts like two gentlemen bowing each other through a door which neither wishes to enter... The authority of Committee Chairmen to pursue their own goals in their own ways was left unimpaired".[259]

In the meantime, the increasing enactment of federal and state sedition laws that attached various punishments and disabilities to current and past membership of the Communist Party or other "subversive" groups, led witnesses before the Committees to start invoking the constitutional right against self-incrimination, provided by the Fifth Amendment.[260] From 1950, the H.U.A.C. started to prosecute witnesses who employed that plea, which is fully operative in all sorts of judicial proceedings. In Rogers v. U.S.[261] the Supreme Court seriously undercut the right as applied in legislative investigations. Chief

Justice Vinson held that a witness who gives some initial answers waives the right to remain silent and cannot invoke it later. The right of a witness to select "any stopping place in the testimony" would distort the facts. But as Black remarked, in dissent, witnesses were put in an impossible position: "/o/n the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question".[261a] The road to self-incrimination and betrayal of associates and friends was thus made a slippery slope. In another 1951 case (Tenny v. Brandhove[262]), arising out of the activities of the California H.U.A.C., the Supreme Court denied a civil suit for damages by a witness who had been unsuccessfully prosecuted for contempt of the Committee. Brandhove had refused to give evidence to the Committee and had argued that he was subpoenaed, not for a "legislative purpose", but so that he would be deterred from criticizing it.

The suit was brought under Section 43 of the Civil Rights Act of 1871, which provided a civil remedy for the deprivation of rights guaranteed by the Constitution. Justice Frankfurter, for the majority, gave a detailed exposition of English and American constitutional history on legislative privileges and concluded that the Civil Rights Statutes did not intend to reduce these privileges. Immunity from suit was intended to protect Congress and its committees, by giving them freedom in the conduct of their legislative functions. The Committee concerned was acting within the sphere of legitimate legislative activity, and the privilege was not destroyed by the fact that it had, allegedly, used its

investigative powers for an unworthy purpose: "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."[262a]

Only in 1953 did the Supreme Court reverse a contempt conviction arising from the acitvities of the minor House Select Committee on lobbying activities.[263] Frankfurter found that the Committee was not authorised by the House to compel the secretary of an organization to disclose the names of all persons who had made bulk purchases of specified books and pamphlets to be distributed by it. Thus, in that case the Court indicated that the authorization of the particular Committee qualified the extent of the legal duty of disclosure of the summoned witness.

The Supreme Court, under Chief Justice Warren, started reversing convictions of uncooperating witnesses and indicating a willingness to check the worse excesses of the various federal and state legislative investigations only after Senator McCarthy's censure and downfall in late 1954. Thus, in 3 cases decided in 1955, the Court upheld the right of witnesses to invoke the "self-incrimination" Amendment before Committees and reversed citations for contempt of the Congress arising out of H.U.A.C. hearings. In Quinn v. U.S.[264] Warren held that the power of investigation should not be extended "into private affairs unrelated to a valid legislative purpose" and warned that such investigations "should not be confused with any of the powers of law enforcement".[265]

By 1955, therefore, the conviction of witnesses who had taken the Fifth Amendment for contempt of Congress was barred by the Supreme Court. But the main purpose of the various Committees was neither legislative nor investigative in the sense of being particularly interested in unearthing indictable offences (see above). Their main concern in exposure and public opprobrium was an extra-legal one. For such purposes invocation of the Fifth Amendment was sufficient for the Committee. The concept of the "Fifth Amendment Communists" actively espoused by Senators McCarthy and Nixon and the popular press had captured the public imagination. "By 1953 the various Committees appeared to regard their enquiries as successful whenever they produced a claim of immunity from a witness because of the widespread assumption that such claims are made to hide C.P. membership".[266]

While the punishment of Fifth Amendment Communists was left mainly to their community - "once a man took refuge in the Fifth he thereby lost all claim to the ordinary needs of life"[267] - several states started imposing additional legal impediments on such people. Thus, the New York State Senate passed a law, according to which employers could dismiss any employee who pleaded self-incrimination and the New York City Charter ordered the dismissal of all city employees who utilized the plea. In Slochower v. Board of Higher Education[268] a college professor was summarily dismissed after invoking the Fifth Amendment before the Senate Internal Security Sub-Committee in relation to a question about his relation to the C.P. in 1940. The New York Court of Appeals held that the "assertion of the privilege against self-incrimination is equivalent to a resignation". The Supreme

Court reversed. Justice Clark condemned the practice of imputing a "sinister meaning" to all invocations of the Fifth. "In practical effect the questions asked are taken as confessed and made the basis of the discharge". Clark, a consistent supporter of the loyalty-security complex, distinguished Slochower from those decisions upholding the loyalty programmes for teachers and public employees. The Board of Higher Education had full knowledge of Slochower's past activities and the Fifth was invoked in Committee hearings completely unrelated to the fitness of teachers or the official conduct of city employees. The summary dismissal was found in violation of due process of law.

Nevertheless, it was in two 1957 decisions that the Supreme Court tackled favourably and directly, for the first time, the ordeal unwilling witnesses had to go through. Watkins v. U.S.[269] involved the 1954 testimony before the H.U.A.C. of John Watkins, vice president of a Farmers Union. Watkins testified fully as to his own involvement with the Communist Party from 1942 to 1947 and was willing to answer questions related to people he knew and had reason to believe they were still communists. But he refused to answer any question about people who might have been communists in the past, but had reasons to believe that were not any more at the time. In answer to such questions he repeatedly stated that they were not relevant to the work of the Committee investigating communist infiltration in the unions and that the Committee had not the right to expose publicly people for their past activities.

The Supreme Court reversed Watkins' contempt conviction, per Chief Justice Warren. Warren opened his opinion by indicating the hazards to freedom of expression created by a legislative investigation into subversive activities. These included the effects on the witness himself: forced revelation of beliefs, expressions and associations

had disastrous consequences for his life, particularly harsh when they involved past conduct which was legal at the time it took place; on those whose names were revealed by the witness: they became subject to public stigma, scorn and obloquy; finally, to the public at large: they were warned to stick to the most "orthodox and uncontroversial views and associations" to avoid similar fate in the future.[270] Having said all that, Warren went on to reverse the conviction only on the narrower ground that Watkins was not informed as to the pertinency of the question to the matter under investigation. It was not some inherent fault of the procedure but the fact that the particular hearings were conducted in an inadequate manner that made the conviction a violation of due process of law. "The actual scope of the inquiry that the Committee was authorized to conduct and the relevance of the questions to that inquiry must be shown to have been luminous at the time when asked and not left, at best, in cloudiness".

The other case decided on the same day (Sweezy v. New Hampshire[271]) involved a contempt conviction of Professor Paul Sweezy, perhaps the most famous contemporary American Marxist economist. Sweezy had refused to reply to questions about the Progressive Party and the content of a lecture on socialism delivered at the University of New Hampshire before the one-man New Hampshire committee on subversive activities. The Court dealt with the case mainly as one of academic freedom, without which "civilization will stagnate and die". There was a prima facie violation of that freedom; and, since the State Legislature had not indicated any wish to be informed on the matters Sweezy had refused to reply, no state interest underlay the Attorney General's action. The conviction, consequently, violated both constitutional rights and the due process of law. Frankfurter reached the same result by using the balancing process. It was the only case

in which this doctrine was used and the individual rights upheld during the period, due perhaps to the academic freedom overtones of the case, and Frankfurter's academic past. In view of the "grave harm resulting from governmental intrusion into the intellectual life of a university", the "subordinating interest of the state" to discover whether Sweezy had taught subversive theories was not "compelling" according to Frankfurter.[272]

Sweezy and Watkins were decided on June 17, 1957 on the same day as Yates, which came to be known as the "Red Monday". A strong right-wing reaction to the Court's cautious but liberal rulings started building up. The Chicago Tribune wrote that "the boys in the Kremlin may wonder why they need a fifth column so long as the Supreme Court is determined to be so helpful",[273] and Representative Jackson stated that the Court had made the Committees "innocuous as two kittens in a cageful of rabid dogs".[274] In 1958 the Conference of the Chief Justices of the States and the Special Committee on Communist Tactics, Strategy and Objectives of the American Bar Association also criticized strongly the Court for those and some other decisions, like Nelson[275] and the desegregation onss. The Court was accused of violating state rights and embarking upon the road of creating and implementing its own judicial policy. Various bills were proposed in the House, purporting either to limit the appellate jurisdiction of the Supreme Court in the loyalty-security field or to reverse certain of the Court's judgments - in particular the Nelson federal pre-emption doctrine. The House passed such bills which were, however, narrowly blocked in the Senate. Thus, none of the anti-Court measures was finally enacted.[276]

Following these attacks the Supreme Court retreated from its Watkins and Sweezy position. In Barenblatt v. U.S.[277] decided in 1959,

the Supreme Court, after an exhaustive analysis of the various objections that had been levelled against the Committees, overruled all of them, and delivered the Committees a virtual carte blanche.[278] The case arose out of the refusal of Barenblatt, a psychology instructor, to answer questions about his association with the Communist Party or with the Michigan Council of Arts, Sciences and Professions, before the H.U.A.C. Barenblatt based his refusal on the First Amendment, and specifically disclaimed reliance on the Fifth Amendment.

Justice Harlan, writing for the majority, stated that when First Amendment rights are asserted as a ground for keeping silent in legislative investigations, the conflict should be resolved through the balancing of the private and public interests involved. The public interest was the right of self-preservation, "the ultimate value of any society", and therefore the investigation was based on a valid legislative purpose. The questions were pertinent and "the strict requirements of a prosecution under the Smith Act are not the measure of the permissible scope of a congressional investigation into "overthrow", for of necessity the investigatory process much proceed step by step". Further, the contention that the purpose of the Committee enquiries was simply to expose people, was overruled without argument. All these compelling reasons were reinforced by the fact that the Committee was not attempting "to pillory witnesses" and that Barenblatt's appearance did not follow "indiscriminate dragnet procedures". The "balance was struck" in favour of the Committee, without even a discussion of the "private interests" involved.[279]

The usual four (Black, Douglas, Warren, Brennan) dissented. For Black the authorising resolution was vague, balancing was

inappropriate in First Amendment cases, and in any case, it was misapplied in the present case. The only reason for the Committee's existence was "exposure purely for the sake of exposure". Barenblatt was the lowest point in the story of "balancing against the left" of the fifties. As the cases that followed Barenblatt showed, under its doctrine virtually no aspect of the activities of the investigating Committees was open to judicial challenge.

In the case of Uphaus v. Wyman (1959),[281] decided on the same day, the New Hampshire "legislative" Committee, comprised by the Attorney-General of that state Wyman, was upheld, in circumstances similar to Sweezy. The "government interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy" stated Justice Clark, sending Dr. Uphaus to prison for refusing to turn in a list of all guest speakers at a camp he was running.

Two further cases decided in 1961 were related to the H.U.A.C. investigations of communist activities in the South. The hearings were held in Atlanta in 1958, and the reluctant witnesses were F. Wilkinson and C. Braden. Wilkinson was an official of the Emergency Civil Liberties Committee, a group that had disassociated itself from the A.C.L.U. following the latter's reluctance to campaign for the protection of civil liberties of communists. Braden, the secretary of the Southern Conference Educational Fund, a black rights organisation, was organising opposition through a petition to the Atlanta hearings of the H.U.A.C. Wilkinson went to Atlanta to help and coordinate the anti-committee campaign. They were both summoned by the Committee and refused to answer any questions about their possible communist affiliations. In Wilkinson v. U.S. (1961)[282] the Supreme Court upheld Wilkinson's contempt conviction. Justice

Stewart held that the Committee had grounds to believe that Wilkinson's organisation was a communist front and his presence in Atlanta indicated that he was connected with communist propaganda; his invitation and the questions put to him were therefore pertinent to the matter under investigation. There was "probable cause for belief that he possessed information which might be helpful to the sub-Committee."[283]

The second case, Braden v. U.S. (1961)[284] was ruled by Barenblatt too. Justice Stewart, speaking for the same majority as in Wilkinson, rejected Braden's contention that he had been engaging in a constitutionally protected activity (preparing a petition for redress of grievances), which could not become the subject of investigation. All areas of life were subject of investigation for the discovery of communist infiltration and propaganda, according to Stewart: "...[T]he petitioner... had been actively engaged in propaganda efforts... Information as to the extent to which the Communist Party was utilising legitimate organisations and causes in its propaganda efforts"[285] was within the constitutional reach of the Committee. To the obvious objection that the invitation of both defendants by the Committee was intended as a form of harassment for their opposition to its operations, Stewart answered that courts could not speculate on the motives of Congressmen.

7.2. The Judicial Restrictions on the Committees

The Court started drawing back from the extreme Barenblatt position in the mid-60s. By that time the powerful weapon of the legislative investigation was being employed - along with other measures tested in the anti-communist campaign - by the Southern states against various civil rights organizations fighting for negro rights.

The Florida legislature had since 1956 established a committee investigating the actuvities of N.A.A.C.P. By 1959 the Committee was authorized to investigate organizations operating in the field of race relations and of "coercive reform of social and educational practices and mores", an obvious reference to local attempts to enforce the Supreme Court school desegregation decisions. All organizations whose "principles or activities include a course of conduct on the part of any person or group which would constitute violence, or a violation of the laws of the state, or would be inimical to the well being and orderly pursuit of their personal and business activities by the majority of the citizens of this state" were to be scrutinized, and the N.A.A.C.P. was the first. Gibson, the president of the Miami branch refused to produce a list of the members, or to confirm from it whether fourteen alleged Communists were or had been members of his organization. Following these events Gibson was convicted for contempt and sent to prison. The Supreme Court in a 5-4 decision reversed the conviction in 1963 (Gibson v. Florida Legislative Investigation Committee).[286]

Justice Goldberg who had recently joined the Court wrote the opinion. He reviewed extensively the precedents on the field, and concluded that the principle emanating from those decisions was that the validity of an investigation depended upon the adequacy of its "nexus" or "foundation" with a valid legislative purpose "or subject of overriding and compelling state interest". He agreed that questions about a witness' own past or present membership in the Communist Party, or another subversive organization were pertinent, since such activities were, in themselves, a proper subject of legislative investigation. On the other hand the N.A.A.C.P. had since 1950 purged itself of communists and subversives. There was, therefore, no

substantial connection between the N.A.A.C.P. and communist activities and the investigation lacked an "adequate foundation". The free trade in ideas and beliefs should not be infringed upon slender grounds, particularly when the "challenged privacy is that of persons espousing beliefs already unpopular with their neighbors". Goldberg concluded by emphasising again that the Court was not challenging the legislative right to investigate or legislate "with respect to subversive activities by communists or anybody else".[287] But groups not engaged in "subversive or other illegal or improper activities... are to be protected in their rights of free and private association".

Justices Black and Douglas would declare the whole exercise of probing into associational and expressive activities unconstitutional, while the four dissenters stated that the effect of the decision was to insulate from investigation "the time-proven skills of the C.P. in subverting and eventually controlling legitimate organizations".[288]

In another decision during the same year (Yellin v. U.S.)[289] the Supreme Court reversed for the first time a contempt conviction on the ground that the H.U.A.C. had not complied with the procedural rules that it had set up for its operations.

Finally, in two 1966 cases the Court reversed convictions for contempt, one involving the legislative committee of New Hampshire (De Gregory v. Attorney General of New Hampshire)[290] for staleness of the basis and subject matter of the investigation and the other on grounds of lack of authorization of the hearings of a subcommittee of the H.U.A.C. The latter case (Gojack v. U.S.)[291] was the conclusion of a long running battle between the H.U.A.C. and the United Electrical, Radio and Machine Workers of America, one of the few remaining left wing unions, expelled from the C.I.O. in 1949. The original contempt conviction of its vice-president Gojack was obtained in 1956. It was

finally reversed after 10 years, but on that occasion, the Supreme Court explicitly refused to overrule Barenblatt. In the meantime the combined attack of the C.I.O. and the loyalty machinery had all but destroyed the U.E. In 1948 it represented all electrical workers. By 1953, 80 different unions had cut into U.E.'s membership, and the C.I.O. had authorized a rival international union (U.E.-C.I.O.). On one day alone in Chicago, three electrical companies fired more than 500 U.E. shop stewards and were later upheld by the N.L.R.B.[292]

Thus, in this area too, as in those previously examined, the main objectives of the legislative committees had been accomplished before the Supreme Court moved in and put some restraints on their worst excesses.

D. Conclusions

8.1. The "Clear and Probable Danger" Test. The New Danger and the Communists

The Dennis case was discussed and decided along the lines of the danger test. Both the Vinson majority and the Douglas dissent as well as the trial court's instructions to the jury and Learned Hand's opinion for the Court of Appeals, addressed the problems created by the communist prosecution under some version of the danger test. With the exception of Douglas, however, all other judges discussed and decided the case on the basis of the "gravity" of the danger rather than its immediacy. Thus, the hallmarks of the test, as introduced by Holmes and developed by the decisions of the 30s and the 40s, the "clarity" and "presence" of the danger, were discarded and the test was completely transformed.

The danger did not lie in the possible adoption by people of ideas that would lead them to undertake acts of violence in the

foreseeable future, but in the ideas themselves, irrespective of consequences. This was the meaning of the changes in the clear and present danger introduced by Judge Medina - "present" means as "speedily as circumstances would permit"; Learned Hand - the gravity of the evil outweighs its improbability; and Chief Justice Vinson - "we must reject the contention that success or probability of success is the criterion".[293] In all these formulations, an improbable eventuality - communist insurrection - coupled with circumstances extraneous to the activities of the defendants - the worsening world situation - made the full suppression of the communists permissible. Some other factors, like the highly disciplined character of the Party - a perfectly lawful characteristic in itself - and the suspicion of some clandestine activities, were mentioned too. Their secondary character, however, was revealed by the rather scant reference they merited in the opinions and the lack of any evidence of illegal activities in the trial court.

Thus, it was the teaching and advocacy of the doctrine of violent overthrow of the government that was declared dangerous and illegal; and furthermore, since even that formulation of the indictment created the problem of identifying Marxism-Leninism as a doctrine of violent overthrow, a complex exercise in textual analysis and political speculation, the communists were prosecuted for <u>conspiracy</u> to teach and advocate revolution. That way, the need of proof of specific acts on the parts of the defendants was further relaxed.

Nevertheless, in its attempts to attribute some concrete expressive activities to the communists and in its repetition of a verbal formulation resembling the danger test, the Supreme Court indicated that it was not prepared to follow the road of the complete banning of the Communist Party. Thus, both the protracted examination

of party records and the evidence given by ex-communists and informers in the trial court; and the attempt to reformulate rather than abandon the danger test, may be seen as efforts to retain the distinction between punishable action and protected expression, inherent within the original test. To be sure, the only realistic threat that could be attributed to American communists was that they were parts or "proxies" of a world communist movement which had overthrown or attempted to overthrow governments politically and ideologically close to the U.S.

Thus, as regards the Communist Party and the avowed communists, the notion of "danger" became completely enmeshed with the official appreciation of the international situation and the state of the global American interests. The reaction against the party was an indicator of the way in which the American Government would answer any incursions upon its sphere of influence. The external danger was perceived as global and total and a similar total reaction befell its local - albeit impotent - representatives.

The obsession with the "foreign" character of the internal communist challenge was found in all specific measures taken against the Communist Party. Frankfurter's opinion in the Communist Party registration case[294] revolved around the dual characteristics of the monolithic character of the communist movement and its domination and control from a foreign centre. To be sure, by 1961 both those elements were in retreat and the judicial determination was somewhat at odds with the new trends in American foreign policy. But the fascination of the Supreme Court with the international dimensions of the problem remained.

Seen in this way, the shortcomings of Jackson's concurring opinion and Douglas' dissent in Dennis may be put in perspective.

Justice Jackson argued, it is recalled, that the communist prosecution was a simple conspiracy case and "conspiracy is not a constitutionally protected right". The Party had been proven to be a conspiratorial vehicle and its leaders were convicted on that basis; the debates about present, probable, future or eventual consequences were, therefore, irrelevant. In terms of legal doctrine and technique, Jackson was right. But a technical conspiracy conviction would have lacked the paradigmatic qualities of a decision based upon and elaborating the quite novel characteristics of an international and global danger. The results would have been the same, but the emphasis on the novelty of the danger and the formulation of the decision in terms of an identifiable freedom-protecting doctrine (the danger test) would have been lacking.

At the other extreme, Douglas' attempt to apply the danger test, as evolved in the 40s, to the facts of the case was an anachronism. Noone had argued that there was a present danger of a revolution or even of an attempt to insurrection. Furthermore, the strong evidentiary flavour of the test required the ascription of concrete acts to the defendants. As Douglas consistently concluded, after a detailed review of the record and a liberal invocation of judicial notice, no such evidence existed and the communists should be acquitted. Such an approach, however, was placing the Communist Party at a par with any other soap-box orator or insignificant radical sect and extended to it all the normal constitutional guarantees. It, therefore, underestimated both the gravity of the new evil that could not be accommodated by the pious old formulas and the severity of the required reaction.

Thus, the Supreme Court resolved the problem of facing a global danger with a total reaction, which was both paradigmatic and retained some constitutional scruples, by creating the new danger test. In Dennis, the particularistic approach of the original test was completely undercut. But its remnants were revitalised in the Yates and Scales cases.

In those later cases, through the reconstruction of the terms "advocacy and teaching" and of "knowing membership"; and the request of concrete evidence of illegal activity by the defendants, the wide import and applicability of the Dennis doctrine was reduced.

The whole story of the persecution of the Communist Party may be seen, therefore, as moving on a line, the one end of which called for the total destruction of a paramount threat and all those associated with it, while the other emphasized the importance of concrete evidence of illegal activities, even if the latter were merely seditious utterances, for the conviction of individual communists. The first strategy, with its inherent assessment of the national and international sociopolitical situation was closer to the legislative function, the second to the traditional judicial one. The extent of the Supreme Court's protective role throughout the period was a function of its adoption, respectively, of the former or latter approach.

8.2. The Loyalty-Security Complex and the Balancing Test

The concept of the external global danger, personified within the United States by the Communist Party was developed in the various Smith Act prosecutions of the Communist Party and committed communists. If the analysis above is correct these prosecutions had a significant symbolic character. This aspect is further underlined by the fact that the federal legislature and agencies always stopped

short of banning the Communist Party.[295] The frontal attack on it was coupled with a strange interest in its survival. Extensively infiltrated, wrecked by internal schisms and conflicts, it was preserved on its death bed. If the Party was such a danger, as it was repeatedly and publicly pronounced to be, a final blow would have been both desirable and irresistible. Interestingly enough, it was E. Hoover and the other professional communist-hunters who always resisted the "final solution".

It seems, therefore, that while the communist prosecutions had certain symbolic undertones, the main thrust of the whole anti-communist campaign was directed at a much more realistic danger: the danger of the "infection of the public sphere" with subversive, radical or simply Un-American people, groups and ideas. All areas of social and political life, all organisations and individuals, the whole "body politic" was potentially susceptible to that threat. The loyalty programmes, the administrative and legislative investigations, the lists of subversive groups, individuals, books and ideas, all this complex machinery that we may call the "loyalty-security complex", had as its main task to combat this much more extensive but less conspicuous danger.

It was in cases challenging aspects of this complex that the Supreme Court introduced and extensively utilized the balancing test. Indeed, if some version of the danger test with its inherent distinction between expression and action was used in criminal cases against communists, the overwhelming majority of cases involving the activities of the loyalty watchdogs were decided by means of the balancing technique.

The origins of the balancing test lie in the "preferred position" doctrine, that had been adopted by the Supreme Court in the 30s and

40s. According to it, when a statute was challenged on constitutional grounds for violation of the First Amendment, the Court weighed the competing interests in free speech and those protected by the enactment and decided accordingly. However, as the name of the doctrine implied, the interest in freedom was placed on a preferred position within the hierarchy of social interests, and important state interests only, threatened clearly and presently by speech could tip the scales. Thus, the preferred position-danger test approach gave notification of a greater judicial activism in expression cases as well as of a judicial determination to protect expression claims.

The balancing technique retained, in theory at least, the element of independent judicial examination of the competing interests involved in each expression case. Thus, loyalty standards and qualifications were usually challenged and examined as potential violations of the constitutional freedoms of expression and association; the various loyalty procedures as violations of the "due process of law" requirements of the Fifth and the Fourteenth Amendments; and the punishments and other incidental consequences on various grounds related to the specific nature of each case, and as indirect violations of the First and Fourteenth Amendments. Faced with such challenges, the Supreme Court started redrawing the hierarchy of social interests.

The interest in national security was declared as "second to none", and as clearly outweighing most claims stemming from the First Amendment. The programmatic statement to that effect was made in the Dennis case, where the gravity of the evil was strongly emphasised. Dennis was decided at the end by a mixture of the danger and the balancing test. In the loyalty-security cases, however, where the undiluted balancing technique was utilised the

main contribution of the Supreme Court lay in the framing of the interest in expression, that was to be comparedwith that in national security.

Thus, in Douds the purging of trade unions from subversives was a "relatively small" violation of free exprssion rights: the destruction of trade unions that had subversive officials was positively desirable and the forcing of trade unionists out of their jobs was unimportant. Once they had lost their positions, they were free to maintain their affiliations and beliefs. The same applied to teachers and lawyers: they were "free to choose" between membership in listed organisations and their profession, but all freedom of choice involved similar restrictions (Adler and Konigsberg II). And, since all public employment was a privilege, its denial on security grounds did not impair private employment prospects nor did it involve any violation of freedom of expression (among others C.R.W. v. McElroy).[296]

The wide-ranging scrutiny in past beliefs and associations carried out by administrative and legislative committees was found to be an insignificant incursion of expression rights, too. Loyalty and professional fitness could be determined through a total examination of the individual's character, purpose, morality or intent, and such characteristics depended "from time immemorial" on past and present beliefs and the "company one keeps" (Konigsberg, Garner, Adler). Even perfectly legal statements and acts could be used as proofs of an overall disloyal character (Killian, Braden) and were not, therefore, beyond the scope of investigation.[297]

When the constitutional challenge involved activities of the Legislative Investigating Committees, the judicial reaction was particularly cavalier. Thus, if the Committee was set up for a "legislative purpose" - whatever that purpose (Josephson); and the questions put to the witnesses were pertinent to that purpose

(Watkins), then anything could be legally asked and refusal to answer justified a contempt conviction. The interest of the witnesses in not disclosing their past and present beliefs and their moral duty not to betray their friends and associates were clearly outweighed by the interest in self-preservation, "the ultimate value of any society" (Barenblatt). Even the slender procedural guarantees afforded to communists prosecuted under the Smith Act were not available to witnesses unwilling to cooperate with the Committees (Barenblatt, Wilkinson, Braden). Furthermore, the Court was unwilling to extend any procedural guarantee whatsoever, or to restrict in any way the power of the administrative authorities to deal at will with aliens (Harisiades, Carlson). In that area, there was literally nothing that could be weighed against national security (Galvan).[298]

Finally, the Court's reluctance to enforce the minimum procedural guarantees of due process of law, and in particular, the rights against self-incrimination and the constitutional prohibitions of bills of attainder and ex post facto laws, was reinforced by the way in which it defined the various loyalty programmes and their consequences. Thus, the administrative and legislative investigations and deportation proceedings were not criminal proceedings stricto sensu, in which the normal legal guarantees are applicable; nor were their effects criminal punishments, according to the Supreme Court: union rights and powers were due to the government's benevolence (Douds); public employment was not "property" or "liberty" (Garner, Bailey); in particular, employment as a teacher and admission to the Bar were privileges (Adler, Konigsberg II); tax exemptions and welfare benefits were "government largesse" (Justice Clark in Speiser and Flemming v. Nestor); the right to travel or the issuance of a passport were subject to the unlimited discretion of the State Department. All these privileges, therefore, could be revoked to various degrees without any procedural guarantees and in some cases without knowledge

of the charges made against the applicant, or of the names of their accusers. And whenever the ultimate sanction was mentioned - the certain destruction of groups and the public opprobrium that followed individuals who were caught in the loyalty-security complex - the courts bypassed it: such effects were either idle speculation, or not intended by the loyalty watchdogs and the courts could do nothing about them (Barenblatt, C.R.W.U. v. McElroy, Braden).[299]

We may conclude, therefore, that the use of the balancing test in the loyalty-security cases led to the abdication by the judiciary of its protective role. The emphasis put by the test on the importance of the general and comprehensive interest protected by the loyalty-security complex, and the underestimation of the interest in expression presented in a particularistic manner, meant that the excesses of the various programmes went on unchallenged. Indeed, any weighing between the interest of the "safety of the Republic" and that of an individual to remain silent before an investigating committee for example, inhered its outcome in the way in which the respective claims were set out. Justice Frankfurter's exercises in balancing were quite characteristic. In his concurring opinion in Dennis, for example, the Justice enumerated the social interests involved in the communist prosecution. But when he reached the point of balancing them, he stated that a task of such complexity and enormity belonged to the legislature and not to the judiciary, and the courts were not entitled to question the legislative determination.

8.3. Changes in the law and the reconstitution of the public sphere

1. The importance of these developments for the concepts of criminal guilt and punishment and for law, in general, cannot be over-estimated.

(a) Criminal liability was disarticulated from specified acts and expressions or even from attempts at acts, and was attributed to an undesirable "state of mind". To be sure, the concept of undesirable

or un-American ideologies is a vague one, and demarcation of its parameters is hardly a task suitable for the traditional judicial function. Equally, the search for disloyalty could not be limited to the discovery and punishment of specific indictable offences. The existence of loyalty/disloyalty perceived as an attribute of the total individual personality, or as a character trait according to Wolff,[300] was sought out in present acts and expressions as well as in past associations and friendships and past and present ideas and opinions on various subjects: only through such a pervasive review which reached out and searched the most personal and private activities, a determination about the total commitment toward the sociopolitical order and its dominant ideas could be made. Consequently, the past of the individual was investigated in order to reveal the present and future tendencies of his character and apportion guilt.

(b) The determination of guilt was undertaken by various administrative and legislative agencies acting as semi-judicial bodies, which were freed from any extensive judicial intervention.

(c) Finally the novel character of the loyalty-security complex was highlighted by the nature of the punishments attendant upon a finding of actual or potential disloyalty. Such penalties varied in accordance with each particular programme but some common trends may be traced.

First, a finding of disloyalty put under severe strain the relations of the individual with the government, federal, state or local. Public employment became the most obvious area that depended on the prerequisite of loyalty. But as the relationship between society and the state had changed dramatically since the New Deal, and an ever-increasing part of the individual's life had become dependent upon public provision, the effects of the loyalty programmes became even more pervasive. Governmental licences necessary for all sorts of

activities, from professional to recreational; certificates of professional fitness or ability necessary for certain kinds of private employment; and tax exemptions and all kinds of welfare benefits were granted or denied on grounds of loyalty. Thus, in the more closely integrated economic and social life of the post-War period, the promised minimum economic and social security for the working class and the poorer sections of the population was qualified by an important proviso: the "benevolent" state would extend its protection to those individuals and groups who accepted fully the legitimacy of the reconstituted socio-political order.

Secondly, since the "battle of loyalty" was fought for the hearts and the minds of the overwhelming majority of the Americans, the loyalty-security programmes had a predominantly paradigmatic character: conducted in maximum publicity, they were meant to involve the public at large in an ongoing effort to weed out subversive ideas, groups and individuals from all walks of life. Thus, while the exposure of subversives was made so that the resulting public outcry and opprobrium would complete their excommunication, it acted at the same time as a reminder and incentive for the audience of the proceedings to purge themselves from any "bad" ideas.

The utilitarian concept of punishment was, therefore, radically transformed: from a rationally predictable, clearly known in advance and commensurate to the offence sentence, meted out in accordance with non-discretionary laws and rigid procedural guarantees, punishment became unpredictable, total and irregular. A certain element of theatricality, which according to writers like M. Foucault and M. Ignatieff[301] had withered away from modern criminal justice, was reintroduced. The severity and inconclusiveness of the punishment of those caught up in the loyalty-security web was followed by its

highly visible and symbolic character for the rest of the society.

We may conclude that the three main characteristics of the loyalty-security programmes were (a) the vague and elastic definitions of disloyalty they contained, (b) the creation of a concept of loyalty as a personality trait, the verification of which called for an unlimited scrutiny of all aspects of the life of the person under investigation and (c) the total character of the penalties that followed a finding of disloyalty and the pervasive effects of the loyalty proceedings for the whole of society.

These developments marked the introduction of a series of administrative and legislative punishments of a semi-criminal character. The involvement of criminal courts and the use of normal legal procedures in those cases became secondary. Indeed, while the "decline of law" since the War[302] and the blurring of the distinction between state and civil society[303] have been predominantly discussed for their effects in the fields of private and property law, an equally important change took place in criminal and constitutional law. The courts virtually vacated the area of loyalty-security, in favour of the executive and the legislature, thus leading to a politicization of criminality and a real decline in law's role. Furthermore the displacement of the public/private line, the publicization of the private, was repeated in the most "private" of areas: that of beliefs and ideas, the explicitly political ones but also the more personal and intimate. Thus, a certain ideological planning was undertaken, administered centrally by the federal authorities. And to repeat C.S. Pierce the path of individual peace lay in "following the method of authority".[304]

On the other hand, the cases in which the Supreme Court using narrow technical points - the mandate of a particular committee, the

pertinency of a question to the matter under investigation, the verbal formulation of a loyalty test or oath etc. - limited the worst excesses of the loyalty watchdogs, indicate the important protective role that courts and legal proceedings can play. To be sure, these decisions did not challenge the overall rationale of the loyalty-security complex and the procedural improvements imposed by the court could be accommodated without fundamental changes in the practices of the Committees. Nevertheless, in this area too, as in the cases of criminal prosecutions of communists, the difference between a gen ral approach that attempts to assess the whole rationale of a broad legislative or administrative practice, and a particularistic one focussing on its technical and procedural details, was underlined: whenever the former approach was proposed by the liberal dissenters of the period, it failed to attract the majority of the Court in favour of freedom of expression; but when it was adopted under the guise of the balancing test, it always resulted in a full judicial legitimation of the loyalty-security complex. The second approach, however, led to some reversals of convictions and, indirectly, to the imposition of certain substantive restrictions.

Thus, the role of the Supreme Court, during that period, appears as a complex one: it receded in importance, whenever the judicial discourse became general in import, and it became more protective when it dealt with substantive rights in procedural terms. As indicated above,[305] the Supreme Court is neither the paragon of freedom nor the instrument of suppression, but an independent political actor. During the 50s, its main contribution lay in the legitimation of the whole repressive loyalty programme, by bestowing upon it the status of constitutional validity. In doing so, however, it forfeited its independence to a great extent, and contributed towards the politicisation of criminality. At the same time, the concepts of constitutionality and constitutional rights were

reconstrued.

The claims to free and unhindered expression of political ideas or to free association for political purposes were differentially demarcated and denied to certain groups and ideas. In the few cases in which they were judicially upheld, it was because of violations of technical and procedural points by the various loyalty watchdogs. In those cases, the substantive constitutional rights became coeval with procedural correctness, as defined by the judiciary: the judicial evaluation of its presence or lack, in each particular case, determined at the same time the existence and the degree of freedom. Beyond these cases, constitutionality and freedom were fully and finally decided by the loyalty-security complex.

2. The main target of all the measures examined above was political ideas. Starting from the hard-core of communist ideology which was banished as effectively as possible, a whole range of other radical ideas and political objectives were declared subversive or un-American and were excommunicated. The term "subversive ideas" was a quite elastic one. Various attempts at a precise definition made both by the loyalty watchdogs and by the courts have been encountered above. In 1945, the chairman of the H.U.A.C. sent out letters to hundreds of public figures asking them to define the term "un-American activities". "Unless it is held that there is no such thing as un-American activity, Americans should be able to agree on what it is and our Committee could then expose it" reasoned K. Mundt.[306] Nevertheless, this as all other efforts remained unsuccessful. The expediency of the accusation of "un-Americanism" lay exactly in its openendedness and elasticity. It lay as a dragnet all-inclusive device that came to cover anything which the powers that be did not like.

Thus, union power, welfare and reform measures, leftist third parties outside the bipartisan mould of American politics, civil

rights campaigns and organisations and all other traditional targets of the right wing were, at one time or another, branded as subversive and un-American. Important ideological qualifications were imposed on organisations, social groups, demands and issues claiming admission in the "pluralistic" public sphere.

Only the groups who had acquitted themselves of any accusation of subversive ideas were admitted as legitimate participants in the market. Characteristically, the Communist Control Act (1954) that created the category of "communist-infiltrated" unions exempted the C.I.O. and its constituent parts from its terms. By that time, the C.I.O. had completed its own purge of radical unions, and in 1955 it merged with its old rival, right wing A.F.L.

Reform measures were attacked as socialist or communist and were mostly abandoned. As H.S. Commager put it the paramount meaning of loyalty was conformity: "It rejects inquiry into the race question or socialized medicine, or public housing, or into the wisdom of foreign policy. It regards as particularly heinous any challenge to what is called "the system of private enterprise" identifying that system with Americanism. It regards America as a finished product, perfect and complete".[307] This perfect product, however, did not accept any questioning of its premises. Only those were lawful who accepted the legitimacy of the whole socio-political order.

A radical reconstitution of the public sphere took place during the period, accordingly. A continuum consisting of "bad ideas", "bad people" and "bad organisations" was created. Ideas were declared morally wrong and factually incorrect, people who held them criminally punishable. Moreover, such ideas and people infected whatever or whoever they came in contact with. Groups were subversive because some

of their members were communists. Individuals were subversives because they were members of subversive groups. Causes and ideas were subversive because they were espoused by subversive people or groups. In this intimate linkage between the "enunciator" and the "enunciated" in which the one was subverted by the other and vice versa, the modern notion of heresy and the heretic - which was introduced around the turn of the century[308] became fully established.

Thus, at the time when the paramount validity and moral superiority of the free market became the ultimate principles of "Americanism" and the hallmarks of the global divide, the internal political market was the object of a wholesome ideological regulation and planning. It is ironic that while the social and economic organisation kept within the broad parameters of economic liberalism, the principles of political liberalism, as expounded by J.S. Mill, were in retreat. This process of centrally administered ideological planning, which accompanied the New Deal measures and was fully consolidated during the 50s has been called the nationalisation of legitimation. The role of the Supreme Court in it was justificatory, in the main. By extending to the repressive reconstitution of the public sphere, constitutional and democratic credentials, the Supreme Court became one of the principal federal legitimatory agencies.

During the period under consideration the main legitimatory theme was democratic: the pronouncement and celebration of the American democratic polity and its protection from an inherently anti-democratic, totalitarian challenge. But democratic legitimation has been traditionally linked with active political participation and the equalisation of social conditions and opportunities. Moreover, the breakdown of the public-private divide, perhaps the greatest contribution and legacy of the liberal state, led to the politicisation

of areas of social life which had been hitherto outside the terrain of politics propre. It may be argued, therefore, that the protest movements of the 60s were related to the constitution in the 40s and the 50s of the "social" and the "personal" as legitimate areas of direct state intervention. The "democratic distemper" of the 60s - a phrase coined by Samuel Huntington-may be attributed, in part at least, to the contradictory demands of a profoundly political legitimation theme - the superiority of democracy - and the apolitical practice of technocratic social engineering. The response of the legal order to this "excess of democracy" will be examined in the next chapter.

CHAPTER X

THE SIXTIES AND SEVENTIES: YEARS OF PROTEST

A. The Civil Rights Movement and the Right to Protest

1. Historical and legal background

The Kennedy administration with its theme "we need to get America moving again" gave the impression of a new urgency and vigour for the protection of civil liberties. The Communist Party had been discredited and destroyed. The international situation appeared more stable and less threatening than during the fifties. The demand for civil liberties for the blacks became the paramount political issue of the early sixties. Kennedy had pledged to create an "affirmative new atmosphere in which to deal with racial divisions and inequalities which threaten both the integrity of our democratic faith and the proposition, on which our Nation was founded, that all men are created equal".[1]

In its 1954 decision of Brown v. Board of Education of Topeka[2] the Supreme Court had held that the "doctrine of 'separate but equal' has no place" in the field of public education. Despite that ruling, education and most other public activities and establishments in the South remained segregated. The persistent indifference of the federal government, and its impotence at the face of Southern resistance to redress blatant discriminatory practices led to the creation of a strong black movement, which took to the streets in protest by the early sixties.

The early civil rights movement was competely peaceful. Exemplified by the "love and non-violence" sermons of Martin Luther King, it attempted to publicize the discriminations against the Southern Negro

and to exert pressure on state and local authorities. Institutionalized racism and discrimination pervaded all areas of life and the means of protest utilised varied accordingly. Thus, one of the seminal events in the development of the movement was the black boycott of the city buses of Montgomery, Alabama, in 1955, after the imprisonment of a black woman who had refused to obey the ordinance segregating bus rides. But the means of protest most widely utilised in those early years was the sit-in at segregated establishments. The first such incident took place in February 1960, when four students asked to be served at a whites-only lunch counter in Greensboro, North Carolina. After they were refused service they sat silently down forcing the restaurant to close. The tactic spread and within twelve months 50,000 people participated in similar sit-ins which led to 3,600 convictions for various offences.[3] The sit-ins were extended to all sorts of segregated facilities and a student organisation was formed to coordinate the black protest (the Student Non Violent Coordinating Committee).[4] Another popular protest tactic was the so-called "Freedom Rides" of integrated buses through the Southern States which were met with considerable local hostility and violence. A series of local mass demonstrations, marches, picketings and vigils were organised too, which culminated in the 1963 march to Washington.

The civil rights movement with its massive protest and self-help tactics posed serious legal questions. The post-Civil War 14th Amendment to the Constitution declared that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws". These provisions were interpreted as banning discriminatory practices against blacks and other minorities on account of race.[5] Certain segregation practices had been

additionally condemned by federal executive and judicial authorities. The federal denunciation of racial discrimination put the old problem of the relationship between federal and state government at the centre of the civil rights debate.

Civil rights organisations asked for federal intervention against hostile or reluctant state authorities. Federal courts, in particular, were often relied upon to take affirmative action for the protection of the federal constitutional rights of the black population. The Southern states on the other hand interpreted all federal action in the field as an unjustifiable intrusion in state rights, as guaranteed by the Constitution.

The southern resistance to reform was massive. The U.S. Commission on Civil Rights reported, in 1963, that eight years after the original Supreme Court desegregation decision less than one half of one per cent of Southern blacks attended desegregated schools.[6] But racial discrimination was not limited to public authorities. Southern private establishments open to the general public and many professionals practised segregation and discrimination under the pretext that they were compelled to do so by "state action". Invoking local laws or long established community practices they argued that segregation was imposed on them by state law. Under the dominant interpretation of the constitutional clauses only official discrimination was prohibited. Thus, the various sit-ins and other self-help tactics employed by the Southern blacks raised the legal question about the meaning of "state action": the courts were called upon to determine in which cases private discrimination was compelled by "state action" to such an extent, that the unconstitutionality of the latter vitiated the former too.[7]

More importantly for our purposes, the black protest movement posed serious questions related to expressive activities and rights. The demonstrations, marches, picketings and vigils brought back to the courts the problems dealt with above under the concept of the public forum.[8] The earlier liberal decisions grew out of the missionary zeal of religious sects and in particular the Jehovah's Witnesses. But as a constitutional author remarked these cases were "a sign of how tolerant toward a sharply dissident minority our society could be, if the minority was small and eccentric".[9]

The claim of the civil rights movement to "commandeer the public forum" was directly political, however, and was raised by far greater numbers of people. Additionally, the sit-ins and other related practices, while intending predominantly to air publicly deeply felt grievances, carried undertones of force to the extent that they disrupted the "normal" running of the facilities in which they were taking place. Accordingly, the line of cases dealing with union rights in the public forum, and in particular with union picketing and boycotts, with their distinction between "pure speech" and "speech plus", seemed particularly apposite.

The picture was complicated by two further factors. First, many of the protest activities were directed at local laws and practices which had been declared unconstitutional by the Supreme Court; and in some cases the protest involved elements of civil disobedience: the protestors were willing to break local laws and suffer arrest and imprisonment in order to challenge their constitutionality in federal courts, presumably more sensitive to black grievances. In such cases law-breaking <u>per se</u> became the protest activity: beyond the constitutional question it sought to raise in the federal judicial forum, it was an attempt to publicize and communicate in a dramatic

manner the inequity of Southern practices. Nevertheless, until the first outbreaks of rioting in Harlem (1964) and Los Angeles (1965), the black movement remained non-violent. According to H. Kalven, although the black protest had "the muscle tone of revolution... it has been executed with an astonishing sense of tact and legality. It has often seemed... to be the first revolution in history conducted, so to speak, on advice of counsel."[10]

2. The early protest: the sit-in cases

Various legal weapons were employed by Southern authorities to harass and frustrate this "peaceful and legal revolution". It was an indication of the interest of federal authorities in the field that the federal judiciary and the Supreme Court were uncharacteristically quick in undertaking judicial review of various cases arising from the early civil rights movement.

The first case (Garner v. Louisiana)[11] involved the conviction of a group of blacks for "breach of peace". They had silently sat down at the segregated lunch counters of two department stores and a bus terminal, but in the two cases, at least, the owners had implicitly consented to the sit-in fearing loss of the "Negro patronage".[12] The Supreme Court in a unanimous decision reversed the convictions. Chief Justice Warren wrote the opinion but avoided tackling the constitutional and legal problems created by the sit-in tactic. The silent protest of the blacks could not be construed as "violent, boisterous or disruptive" nor did it involve behaviour which could "unreasonably disturb or alarm the public". The state had not presented any evidence that could support the conclusion that violence was imminent and the conviction violated, accordingly, the due process requirements of criminal justice.

In concurring opinions, Justices Harlan and Douglas tackled the wider issues involved in the case. Harlan addressed the free speech dimensions of the sit-in. The protesters intended by their action to publicize the segregation practices and "[t]his Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment... to mere verbal expression". The Jehovah's Witnesses cases had extended protection to many kinds of conduct which carried a predominantly communicative intent, and the sit-ins were similar: "Such a demonstration... is as much a part of the 'free trade in ideas'.. as is verbal expression, more commonly thought of as 'speech'. It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion'."[12] To be sure, the fact that made the sit-ins in private facilities protected speech was that the owners had not asked the protestors to leave. If they had objected "..the Fourteenth Amendment [does not protect] demonstrations conducted on private property over the objection of the owner..."[13]

Douglas' approach was the most radical. The Justice addressed the civil rights rather than the expressive aspects of the case. The blacks had a constitutional right to be served at the restaurants which was violated by the segregation practice. Such practices had all the force of law in Louisiana, and amounted to unconstitutional "state action". The Court majority, however, was not prepared to face these wider issues as long as it was able to upset the convictions on technical grounds.

The next major case (Edwards v. South Carolina)[14] arose out of the convictions of 187 black students under a breach of peace statute. The students had marched to the South Carolina State House in Columbia while the legislature was in session. When they entered the premises of the House, they started walking silently and displaying pickets protesting against discriminatory laws. A crowd of bystanders gathered

around the protesters and the police, which were present in force, asked the students to disperse. When they refused and started singing the "Star Spangled Banner" they were arrested and "marched off to jail". As Kalven remarked"one cannot but be impressed with the grace and tact of the performance".[15]

Justice Stewart writing for the Court reversed the convictions. He accepted that there was enough evidence of violations of the breach of peace statute, as construed by the state courts. But he went on to examine the constitutional claims involved in the case. He stated that the protesters were exercising the rights of assembly and petition for redress of grievances "in their more pristine and classic form".[16] Since such paramount rights were at stake the Court should review the whole record anew. He found that the convictions were motivated by the unpopularity of the views expressed and that the statute concerned was not narrowly drawn. The students were convicted on "evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection".[17]

While Edwards was decided on First and Fourteenth Amendment grounds and seemed to move toward the rationale of the Jehovah's Witnesses cases, three other 1963 decisions extended the concept of unconstitutional state action. In Peterson v. City of Greenville,[18] ten blacks had been convicted under a criminal trespass law after they had refused to leave a segregated lunch counter, although they had been specifically requested by the manager to do so. The Court reversed the convictions but avoided the challenge to examine the conflict between property and expressive and equal protection rights. Chief Justice Warren argued that since a city ordinance required segregation in restaurants, the decision to opurate a segregated lunch counter was coerced on the

management and indirect unconstitutional state action wea, therefore, involved.

In Lombard v. Louisiana[19] no statutory segregation was involved but the New Orleans Mayor and police authorities had publicly stated that they would not tolerate black protest against segregated services in restaurants. The Court found that the official statements had all the force of the city ordinance condemned in Peterson. "Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct.../The State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance".[20] The convictions of four students under the Criminal Mischief Statute for sitting-in at a segregated restaurant were reversed.

In May 1963, too, the Supreme Court reversed the convictions of two black ministers who had advocated a sit-in at a Birmingham, Alabama lunch counter.[21] The Court found that since the sit-in itself had been cleared from criminal prosecution,[22] the conviction of the priests for aiding and abetting could not stand.

In June 1964, the Supreme Court decided a series of sit-in cases. Nine were disposed of summarily and five received opinions. In one case (Robinson v. Florida)[23] restaurant segregation was found unconstitutional state action, because the Florida Board of Health required separate toilet facilities for blacks. This provision was construed as indirectly imposing restaurant segregation and the convictions of the protesters were reversed. In Griffin v. Maryland[24] the segregation of a private amusement park enforced by an employee, was construed as state action, because the park bouncer was also a deputy sheriff. In Barr v. City of Columbia[25] the convictions of the protesters for breach of peace were reversed for lack of adequate evidence as in Garner.

In Bouie v. City of Columbia[26] a criminal trespass statute prohibited "entry [to a private establishment] after notice from the owner prohibiting such entry". The protesters were requested to leave the segregated lunch counter of a drug store after they had entered and sat down. The state courts interpreted the statute as prohibiting the act of remaining in the premises after a request to leave had been made. Justice Brennan for the Supreme Court, however, held that the petitioners had not received fair notice of the import of the statute at the time of the sit-in. The Court stated that the later "retroactive judicial expansion of narrow and precise statutory language" amounted to a denial of due process of law.

Finally, in Bell v. Maryland[27] a number of black students had sat down at a segregated Baltimore restaurant and were convicted under a general criminal trespass law. The segregation was not statutorily imposed in that case, but was a long established community practice. Justice Brennan again reversed the convictions and remanded the case to the state courts on technical grounds. While the convictions were still on appeal, the state and city authorities had enacted legislation banning segregation in places of public accommodation. Invoking the common law rule that pending proceedings are dismissed when the relevant law is repealed, Brennan argued that the crime for which the defendants had been convicted was abolished and the state courts should vacate. The general clause saving convictions that have not been specifically repealed was found inapplicable in that case, because the change in the law was "dramatic" and the petitioners had acquired a positive right to desegregated services.

Thus, in all sit-in cases examined above the Supreme Court reversed the convictions of the protesters finding that unconstitutional state action was involved, or that the defendants had not had fair notice of the offences they were committing, or that some procedural rule had

been violated. The questions about the legal status of civil disobedience in the form of unauthorized sit-ins in privately owned establishments, and the First Amendment rights involved in the protest activities were largely avoided. The criminal trespass cases gave the Court an opportunity to tackle these problems and it was Justice Black in dissent, joined by Harlan and White, who addressed them. Interestingly, Black and Harlan had been consistently in opposing camps throughout the 50s in the loyalty-security cases. But by the mid-60s, Justice Black became the spokesman of a growing dissatisfaction with the Court's protection of the protest movement. The Court was accused that, through its early decisions, it underwrote a threatening and increasing tendency of disrespect for the law and the rights of private property. Black would have upheld the convictions of the protesters in all three criminal trespass cases (Bell, Bouie and Barr). In a long dissenting opinion in Bell, the Justice made his position clear. For Black, the erstwhile protector of the underdog par excellence, no right to expression and protest existed in privately-owned premises, even if they were open to the public. In his earlier opinions, he had emphasized the paramount importance of the open and unhindered market place of ideas (see among others Martin v. Struthers, Kovacs v. Cooper and Dennis[28]); but in Bell civic order, the majesty of the law, private property and public convenience take pride of place. In Kovacs he had introduced the concept of the "poor man's media" essential to the "poorly financed causes of little people"; now the claim that the sit-ins were an exercise of expressive rights was seen as a "bootstrap argument". The laws and the convictions were "directed not against what the petitioners said but what they did". In another case of the 40s, Black had argued that "the proponents of the First Amendment... were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests

whose power they might challenge".[29] In Bell it is private property that must be absolutely protected to prevent civil chaos.

> "The experience of ages point to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others... the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons."[30]

Black concluded his opinion by addressing the civil disobedience aspects of the sit-in cases in the following words found "superb" by H. Kalven, the most prolific constitutional writer in this area.[31]

> "At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both 'Liberty' and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass law does not depart from it. Nor shall we."[32]

Justice Black became increasingly disenchanted with the protest movement itself, but he remained a firm advocate of officially supervised desegregation. In Griffin v. Prince Edward County,[33] a case decided just before the sit-in cases, Black writing for a unanimous Court strongly condemned the Virginia 5-year old practice of completely closing down public schools to avoid desegregation. The states should accelerate the process of school desegregation ordered by the Court in Brown, Black stated and he warned that the Court would not tolerate any further delays.

3. The protest cases of the late sixties

Two weeks after Bell, Congress passed the Civil Rights Act of 1964.[34] Title II of the Act banned discrimination in establishments of public accommodation which affect commerce as well as discrimination supported by state action. Other titles of the Act covered education and other

public services and provided various means designed to facilitate a federally administered racial integration. The measure had been the centrepiece of President Kennedy's effort to "incorporate the Negro revolution into the democratic coalition".[35] When it was first introduced in Congress, in 1963, it had faced considerable Southern reaction and it was accused as a violation of the property rights of owners of segregated establishments. The Act was finally passed in July 1964, after an effective campaign by President Johnson who "proved a more effective champion (of civil rights) than Kennedy had been".[36] To be sure, the old communist menace made an appearance in the Act. Communists and members of organisations under final order to register with the S.A.C.B. were exempted from protection against employment discrimination.

The passing of the Act brought to an end the line of sit-in cases. The Supreme Court used its provisions to abate trespass convictions of sit-in protesters which had occurred prior to its enactment.[37] Justice Black who had become the foremost observer of legal niceties replacing his old rival Frankfurter furiously rejected the retroactive effect attributed to the Act: "The idea that Congress has power to accomplish such a result has no precedent, so far as I know, in the nearly 200 years that Congress has been in existence".[38]

The protest movement did not end, however, with the passing of the Civil Rights Act. While peaceful mass demonstrations and marches went on a newly found militant mood became evident in the black ghettoes of large cities. The 1964 New York and 1965 Watts riots were a turning point in the black movement. The report of President Johnson's National Advisory Commission on Urban Disorders found that the main cause of the riots was the "pervasive discrimination and segregation in employment, education and housing... growing concentrations of

impoverished Negroes in our major cities, create a growing crisis of deteriorating facilities and services and unmet human needs... A new mood has sprung up among Negroes, particularly the young, in which self-esteem and enhanced racial pride are replacing apathy and submission to the 'system'". A continuing neglect of social reform, the Commission argued, would lead to a situation in which "a rising proportion of Negroes in disadvantaged city areas might come to look upon the deprivation and segregation they suffer as proper justification for violent protests, or for extending support to now isolated extremists who advocate civil disruption by guerrilla tactics".[39]

The threat of civil disorder and chaos came to replace the communist danger of the 50s. In this atmosphere the inevitable cries for "law and order" were echoed in Supreme Court jurisprudence. The first traces of a new defensive attitude toward the use of public fora by protesters can be found in the important 1965 case of Cox v. Louisiana.[40]

The case arose out of a protest march and demonstration in Baton Rouge, Louisiana, in 1961. Some 2000 students had marched to the local courthouse protesting against segregation, in general, and the arrests of some fellow students the previous day who were being held in a parish prison located in the premises of the court. The protesters were told by the chief of the police that they could stage their demonstration as long as it was confined to the sidewalk across the street from the court. The students conformed and started walking up and down the pavement bearing pickets. They prayed, sang symns and "God Bless America". As the Supreme Court admitted the whole affair was peaceful and orderly. Their leader, Cox, a black minister made then a speech in which he urged the students to stage sit-ins at segregated lunch counters. Following the speech the police ordered the group to disperse and when they

refused started using tear gas against them. Cox was arrested the next day and was subsequently convicted for breach of the peace and for violation of two ordinances prohibiting the obstruction of public passageways and picketing "near a courthouse".

The breach of peace conviction was reversed by the Supreme Court on grounds similar to Edwards. The protest had not created any fear of violence and the interpretation of the breach of the peace statute by the state courts was unconstitutionally vague and overbroad: "...[I]t sweeps within its broad scope activities that are constitutionally protected free speech and assembly".[41]

On the obstruction count, the Court found that since city officials had permitted some marches, the administration of the ordinance, which on its face prohibited all "street assemblies and parades", lacked the proper non-discriminatory standards required from all licensing and permit systems. The majority went on, however, to examine the question of expressive rights involved in public marches and demonstrations. Justice Goldberg found that such activities in public fora were not a "pure form of expression", but expression mixed with action, and he concluded:

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."42

Justice Black went even further. Patrolling and marching are pure conduct, as distinguished from speech, and the state may constitutionally prohibit them. The right of protest may be exercised only in those places "where people have a right to be for such purposes". Linking his dislike of protest in both privately owned and public places, Black concluded:

> "[The First and Fourteenth Amendments do not] grant a constitutional right to engage in conduct of picketing or patrolling whether on publicly owned streets or privately owned property."43

Black concurred in the result on the ground that the statute explicitly excluded trade unions from its blanket prohibition and fell, thus, foul of the Equal Protection clause. He made it clear, however, that he would have upheld an across the board non-discriminatory prohibition of all public protest and assembly.[44]

The conviction on the final ground (picketing near a courthouse) was reversed in a 5-4 decision. The suggestion of the police chief to the protesters that they could stage their demonstration opposite from the law court was an on-the-spot official construction of the statutory term "near" which precluded subsequent prosecution and punishment. Justice Clark in an outraged dissent accused the Court of condoning "the use of such anarchistic devises to influence the administration of justice" and of promoting anarchy and lawlessness. "...I never knew until today that a law enforcement official - city, state or national - could forgive a breach of the criminal laws".[45]

Thus, the Court adopted in Cox the two-tiered theory of expression protection introduced in the industrial picketing cases. "Pure speech"

was declared a constitutionally protected right. But the loyalty-security cases of the 50s which dealt mostly with such "pure speech" were too close for comfort. Expressive activities in the public forum, on the other hand, were construed as a mixture of speech and conduct or as "speech plus" and according to Black's theory at least they could be allowed or prohibited by the state authorities at will.

The next case (Brown v. Louisiana)[46] involved the conviction of five blacks for sitting-in at a segregated public library before the enactment of the Civil Rights Act. The protesters had been convicted under the Louisiana breach of peach statute found overbroad in Cox. The Supreme Court reversed the convictions, in a 5-4 decision, which followed the earlier sit-in rulings.

> "As this Court has repeatedly stated [freedom of speech, assembly and freedom to petition for redress of grievances]... embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."47

Black, who wrote the dissent, was more concerned with the protest movement, at large, rather than with the facts of the particular case.

> "It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb... The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in."48

It was not long after Brown that Justice Black found the necessary fifth vote for his position. In Adderly v. Florida[49] his "no right to protest" rationale was fully adopted by a five Justices majority and led to the affirmation of the convictions of 32 black students. The students had marched to the prison of Tallahassee, Florida, to protest

the arrests of fellow students the day before for picketing outside segregated theatres. They staged their vigil on an open ground which was part of the prison premises but outside the prison proper. As the dissenting Justices emphasized "the evidence is uncontradicted that the petitioners' conduct did not upset the jailhouse routine". The sherriff asked the students to leave and when 32 refused they were arrested, tried and duly convicted for "malicious and mischievous trespass upon the premises of the county jail".

Black's opinion distinguished the protest from that involved in Edwards on the basis of the respective places on which they were held. "Traditionally, state capitol grounds are open to the public. Jails, built for security purposes are not". To be sure, as T. Emerson remarks, "the jailhouse grounds were an open area, not devoted to inconsistent (to the protest) uses, and affording a peculiarly relevant location for the demonstration".[50]

Black was not interested, however, in condemning the protest on such narrow grounds. In the criminal trespass cases he was prepared to uphold the rights of property owners against all expressive claims. In Adderly he extended the private property rationale to publicly owned property too.

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated... petitioners' argument that they had a constitutional right to stay on the property... has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept..was vigorously and forthrightly rejected in... Cox v. Louisiana,.."[51]

The dissenting opinion was ironically written by Justice Douglas, Black's most consistent colleague in earlier expression cases. In a series of pointed remarks borrowed from Black's opinions, Douglas reminded the preferred constitutional position of expressive rights and

the "poor man's media" analysis. "Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may make only a more limited type of access to public officials". The demonstration was a constitutionally protected "petition for redress of grievances" and its identification with criminal trespass violated the First Amendment.

> "To say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government, not to private proprietors."[52]

Douglas went on to castigate the use of general statutes - like criminal trespass, disorderly conduct, breach of the peace and vagrancy ones - in order to penalize dissenters and minority groups for their unpopular views. He concluded by stating the "legitimation" justification for free speech: "By allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us".[53]

The next case (Walker v. City of Birmingham)[54] involved an instance of civil disobedience. On this occasion, it was not property rights - private or public - but the "majesty of law" that was at stake.

The case arose out of the prolonged civil rights demonstrations in Birmingham, Alabama in 1963. The Southern Christian Leadership Conference, its national leader M.L. King and various local leaders had been twice refused permits to demonstrate in the streets, under a city ordinance. The two rallies went ahead and many protesters were arrested for parading without a permit. Following these developments the black organisations announced two mass rallies for Good Friday and Easter Day, 1963. The city authorities, in response, obtained a temporary ex parte injunction enjoining the groups and 139 named individuals from

participating in or encouraging parades without a permit. The demonstrations went ahead again as planned and as a result King and eight more black ministers were cited for contempt of court.

Despite the passage of the Civil Rights Act and the relevant precedents of Hamm and Brown, the Supreme Court upheld the convictions. Justice Stewart found that the city ordinance on which the injunction was based raised substantial constitutional problems. (The ordinance was found unconstitutionally vague as applied, in a decision rendered two years after Walker.)[55] The breadth and vagueness of the injunction were, too, constitutionally suspect and there were additional doubts about the arbitrary and discriminatory manner in which the permit system had been administered. Nevertheless the cardinal error of King and his followers was that they had not challenged the injunction in the courts. To be sure, there was only one day between the granting of the injunction and the scheduled demonstration and the Alabama authorities were known for their determination to prevent the marches by all means. The injunction and contempt proceedings themselves were initiated in order to harass the protesters, and to avoid a constitutional challenge against the suspect permit system.

Notwithstanding these facts and his own doubts about the conduct of the city authorities, Justice Stewart found for the state. His concluding remarks were an elegant essay on the merits of the rule of law.

> "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."56

The dissenting Justices castigated the Alabama ploy of using the method of judicial injunction in order to avoid the invalidation of the ordinance. Brennan found it an "inscrutable legerdermain", while Chief Justice Warren stated that ".. giving this Court's seal of approval to such a gross misuse of the judicial process is [not] likely to lead to greater respect for the law any more than it is likely to lead to greater protection for First Amendment freedoms". He was prepared to accept a qualified right to civil disobedience. "..[I]t shows no disrespect for law to violate a statute on the ground that it is unconstitutional and then to submit one's case to the courts with the willingness to accept the penalty if the statute is held to be valid". Douglas went even further. "The right to defy an unconstitutional statute is basic in our scheme... An ordinance - unconstitutional on its face or patently unconstitutional as applied - is not made sacred by an unconstitutional injunction that enforces it. It can and should be flouted in the manner of the ordinance itself".[57]

However, the message of the Supreme Court was clear: the claims of the civil rights movement to commandeer the public forum would be judicially upheld only when all legal niceties had been scrupulously adhered to. According to one author "the Court has sounded the tocsin for those who would protest after the judicial process has been engaged".[58]

But the tocsin was partial. In its next term, the Court reversed an ex parte injunction enjoining an extreme white racist organisation from holding any rallies or meetings for ten days in Princess Anne, Maryland. (Carroll v. President and Commissioners of Princess Anne).[58a] The group had already held an "aggressively and militantly racist" rally and the local authorities obtained the injunction in order to prevent a new demonstration for which there was some fear of violence. The Court reversed relying on the ex parte character of the injunction. It

stated that in the area of basic freedoms guaranteed by the First Amendment "there is no place for such orders, which are granted without notice or effort to invite the concerned in the proceedings".[59]

The next black protest case (Cameron v. Johnson)[60] involved the validity of a Mississippi anti-picketing law. The statute prohibited all picketing and demonstrations which obstructed or unreasonably interfered with access to public premises and with the free use of adjacent streets, sidewalks or other public ways. The statute was passed in an effort to stop a three-month black campaign against racial discrimination in voters registration. The protesters defied the statute and were arrested.

The Supreme Court upheld the constitutionality of the law in a unanimous decision. Justice Brennan found it a valid, narrowly drawn regulation of the conduct involved in public rallies and picketing, relying on the Cox rationale that public protest was a "second category" speech. Petitioners had also argued that the statute had been applied against them in "bad faith" and in an attempt to harass their protest campaign and had asked the Court to grant an injunction enjoining its further invocation against their activities. In an earlier case (Dombrowski v. Pfister)[61] the Supreme Court had ruled that federal courts could intervene in state proceedings if state laws were justifiably challenged on constitutional grounds and the federal abstention could result to "irreparable injury necessary to justify a disruption of orderly state proceedings"; it had also noted the "chilling effect on free expression of prosecutions initiated and threatened".[62]

In Cameron, however, the Court found that the statute had been applied in good faith and not in order "to discourage the exercise of protected rights", without any detailed examination of the evidence. Even if the criminal prosecution of the protesters failed, that could not prove that the state authorities intended to harass them. The two

dissenting Justices (Fortas and Douglas) examined the record in detail and stated that no interference was caused by the picketing. They cnncluded that Mississippi had engaged "in a deliberate plan to put an end to the voting rights demonstration".[63]

The last major cases arising from the civil rights movement were decided in 1969. In Gregory v. City of Chicago,[64] a group of demonstrators protesting against the persisting practice of school segregation had marched from the Chicago City Hall to Mayor Daley's house where they started a vigil around the block. A hostile crowd gathered around them and the police ordered the protesters to disperse and arrested them for disorderly conduct after they refused to obey the order. Chief Justice Warren reversed the convictions finding no evidence of disorderly behaviour on the part of the protesters.

The last case (Shuttlesworth v. Birmingham),[65] a companion case of Walker, arose out of the 1963 Easter protest in Birmingham, Alab. Martin Luther King, the leader of that protest had been assassinated in the meantime, in 1968. The case involved the conviction of a black minister to 90 days' imprisonment at hard labour for violation of a city ordinance which prohibited all parades, processions or other demonstrations without a prior licence by the City Commission. The Supreme Court found that the ordinance lacked "narrow, objective and definite standards to guide the licensing authority" and allowed the licensing officials to grant or refuse the permits according to their own arbitrary standards of "welfare", "decency" or morality of the community. The Supreme Court of Alabama had construed the statute in 1967 and by a "remarkable job of plastic surgery" had added some administrative standards in the licensing system, making the issuance of permits dependent upon the need for traffic regulation. The Supreme Court found that although the state court construction had saved the statute

from the constitutional challenge, its application four years before that ruling had been completely discriminatory and unconstitutional and reversed the convictions.

It would be interesting at this point to compare the protest cases examined above with a case decided in 1968 which raised similar problems. In Amalgamated Food Employees Union v. Logan Valley Plaza Inc.[66] a trade union had been banned from picketing in the mall of a privately owned shopping centre open to the public, through the use of a criminal trespass statute. Thus, in Logan Valley Plaza the problems of the constitutional status of picketing and of the conflict between property and expressive rights, both familiar from the sit-in and black protest cases, came back to the Supreme Court, the main difference being in the subject of the protest.

Justice Marshall, writing for a 6-3 majority, reviewed the early public forum cases and concluded:

> "The essence of those opinions is that streets, sidewalks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly or absolutely." 67

Picketing involved more than pure speech, but the regulation of its non-speech elements should not amount to outright prohibition. The fact that the shopping-centre was privately owned was not sufficient for the creation of a "cordon sanitaire" around it, that would insulate it from all protest. Justice Marshall relied upon and expanded the rationale of the earlier Marsh decision, involving

the exercise of constitutional rights in a company town.[68] Based on a use theory of private property, he argued that the shopping centre was the functional equivalent of a public business district, and stressed the increasing importance of shopping centres for suburban communities; he concluded that the total prohibition of picketing there, even though carried out "in a manner and for a purpose generally consonant with the use to which the property is actually put"[69] would be at total variance with the goal of free expression.

Justice Black, the author of Marsh, disagreed completely with the application of the rationale of that case to shopping centres. Company towns, unlike shopping centres, had all the attributes of a town, and the majority was creating "court-made law wholly disregarding the constitutional basis on which private ownership of property rests".[70] Justice White protested that, under the Court's ruling, all speech on private property, which could be designated as serving a public function, should be permitted.

However, the Court explicitly refrained from ruling on the permissibility of picketing and other expressive activities "not thus directly related in its purpose to the use to which the shopping center was being put". An extension of the Logan Valley Plaza rationale, in the way envisaged by Justice White, would put private owners "in the same position as the government" for First Amendment purposes,[71] contrary to existing constitutional doctrine. Logan Valley did not go as far, and the question was left open until a later day.[72]

B. The Anti-War Movement: Radical Protest and Dissent in the Late Sixties and Seventies

4. The historical background and the laws against protest

The student generation of the fifties has been called the "silent generation". But by the early sixties a new mood of militancy became discernible among students. The first signs came in May 1960, when a three-member subcommittee of the H.U.A.C. started investigating communist and subversive activities in San Francisco. Students from Berkeley and other California colleges gathered in force outside the City Hall, where the hearings were held, and protested against the H.U.A.C. activities. They were denied access to the building and on May 13, the second day of the hearings, the police attacked and dispersed them using water cannons. The hearings ended in disarray and both the H.U.A.C. and Hoover claimed that the demonstrations were communist-planned and "the worst communist coup for twenty-five years".[73] No known communist had participated in the events, and all sixty arrested students were later acquitted in court.

Between 1960 and 1964 radical students became involved in the civil rights and peace campaigns. Many white students participated in the "freedom rides", the sit-ins and other protest activities, but student activism was concentrated mainly on the college campus. Various campaigns for exucational reform were organised and culminated in the 1964 Berkeley "Free Speech

Movement". In 1961, students at New York City College boycotted their classes protesting against a ban on communist speakers and similar events took place at the Ohio State University. The Berkeley F.S.M. was created to fight a college regulation which banned political activities on the campus relating to non-student issues. The movement culminated in a mass sit-in at Berkeley which was broken up by the police and led to the arrest of 814 students.[74] In the meantime, a small radical student organisation, the Students for a Democratic Society (S.D.S.) which had been established in 1960 grew in strength and started addressing general social issues outside the campus.[75] In the mid and late sixties, the S.D.S. became a mass organisation which played a leading role in the anti-Vietnam War campaign. The S.D.S. acquired national notoriety and press coverage for the first time, in April 1965, when it organised the first anti-war march to Washington, in response to the escalation of the war and the bombings of North Vietnam ordered by Johnson. Protest demonstrations and other anti-war activities mushroomed within a few months and various umbrella organisations were created to coordinate the national campaign.[76]

As the protest movement grew from strength to strength the Johnson administration and other federal authorities started passing a series of laws and measures designed to harass and suppress the protest movement. In 1965, several hundred University of California students burned publicly their draft cards in protest against the American intervention in the Dominican Republic. The tactic was soon adopted by

anti-war demonstrators as a standard means of protest. Under the Universal Military Training and Service Act (1948) the possession of the draft card at all times was obligatory, but the provision which was inserted in the Act for administrative reasons was not vigorously enforced. After the first draft card incidents, the Joint Armed Services Committee of the Congress proposed a bill which would make draft card burning a federal felony. The bill was passed by both houses in 1965, as an amendment to the original Act. It punished the knowing destruction or mutilation or in any manner change of a Selective Services Certificate with a $10,000 fine and imprisonment of up to five years. The few speakers on the floor of the House made clear that the amendment purported to stop the public displays of lack of patriotism and to satisfy "the desire to obtain a measure of retribution against those who would so openly and defiantly attack the military effort of the United States".[77]

Resistance to the draft and draft card protests became a central point in the anti-war campaign. The S.D.S. adopted an anti-draft programme and started encouraging men liable to the draft to register as conscientious objectors and proposing various other ways and means designed to hinder the work of local draft boards. Mass demonstrations, draft card burnings, induction refusals, boycotts of draft boards and other similar tactics became common during 1967 and 1968.
The originality of some of the methods of protest ensured nationwide media coverage for the protesters. The Solicitor General E. Grisword admitted that the bizarre protest tactics were employed in order to attract media attention since the more traditional protest activities were not found newsworthy.[78] During the nationwide Days of Protest of October 1967, several University of Michigan students sat in at the local draft board office and were arrested by the police. Following these events the Selective Services Director-General L. Hershey sent a letter to the draft boards of the arrested students recommending the

withdrawal of the student deferments of participants in "illegal demonstrations" and suggesting their reclassification for immediate induction. Twelve of the Michigan protestors were reclassified accordingly.

Two of the reclassified students took the case to the federal courts. In Wolff v. Selective Services Local Board No.10,[79] Judge H. Medina ruled that draft boards could not punish registrants through reclassification on the sole ground that they had protested against the war. The decision was prompted by the case made by the counsel for the Justice Department who did not argue that the protestors' action had interfered with the Selective Services operations. Thus, the possibility of punitive reclassification for protest activities which had arguably led to the disruption of the service was left open. Director Hershey, undeterred by his partial defeat, changed his tack and issued a new directive based on the analysis of an article which had appeared in the American Bar Association Journal in February 1967.[80] According to the article and Hershey's directive deferments were given on the basis of national interest considerations; the protestors and the draft card burners should be reclassified under the existing regulations for delinquent behaviour. Hershey ordered the immediate induction of anyone who had interfered with the Service or had impaired the morale of the armed forces. Within one year 537 students who turned in their draft cards were declared eligible for induction.[81] The Justice Department under Attorney-General R. Clark was not enthusiastic, however, about the method of punitive reclassification which left the punishment of violations of the Selective Services Act to local draft boards. In December 1967, a compromise was worked out between Clark and Hershey under which the Justice Department would vigorously prosecute violations of the draft Act; local draft boards were notified that "lawful protest activities" should not subject registrants to reclassification.

Immediately after the compromise the Justice Department initiated the "single most repressive action of the Johnson administration", by indicting Dr. Benjamin Spock and four others for conspiracy to counsel, aid and abet evasions of the draft. As one of the Justice Department lawyers assigned to the case explained "the prosecution came about as a result of our flap with Hershey about his October 26 letter to the draft boards".[82] However, in 1968 alone, R. Clark prosecuted "over 1500 draft cases in federal courts" and was "as vigorous in this respect as any other Attorney General".[83] In an appearance before the House Committee Clark stated that there was an "element of treason" in draft card burnings.[84]

When cases of reclassification reached the federal courts, the latter disapproved the practice. In Oestereich v. S.S.B., the statutory exemption from military service granted to divinity students was revoked by Oestereich's local board which reclassified him as a "delinquent" and ordered his induction. The reclassification was based on the ground that the student had returned his registration card to the government in opposition to the war, and had thus violated the requirement to keep it in his possession at all times. Oestereich lost a suit to restrain induction and appealed to the Supreme Court.

Mr. Justice Douglas reversed and remanded. He felt that the arbitrary use of the delinquency classification was "blatantly lawless" and rendered "... the Boards freewheeling agencies meting out their brand of justice in a vindictive manner".[84a] The exemption had been granted statutorily and could not be revoked for conduct unrelated to the merits of its granting. The Justice indicated that the delinquency regulations had no statutory authorization in the Selective Services Act.

Gutknecht v. U.S. involved the use of the reclassification procedures in order to accelerate induction. Gutknecht had left his registration and classification cards on the steps of a federal building along with a statement of opposition to the war. When subsequently his appeal for exemption on conscientious objector grounds was refused, the board classified him as a delinquent for failure to possess his draft card and ordered him to report for induction immediately. Gutknecht reported to the centre, but refused to follow the induction procedure. He was prosecuted and found guilty of failure to "perform a duty" under the Military Selective Services Act; he was sentenced to four years' imprisonment.

The Supreme Court reviewed the legality of the delinquency regulations, which accelerated Gutknecht's induction by depriving him of his previous standing in the order of call. Mr. Justice Douglas reversed the criminal conviction by finding error in the application of these regulations. He stated that the punitive reclassification of exempt and deferred registrants should not be used as a quasi-criminal sanction in cases of violation of the Act. Congress had not authorized such a power and its exercise was "... a broad, roving authority, a type of administrative absolutism not congenial to [American] law-making traditions".[84b]

Finally, an important federal case (U.S. v. Falk) related to the criminal prosecution rather than reclassification of an anti-war protestor for violation of the Selective Services Act. Falk, an active member of a Chicago draft resisters organisation and anti-war campaigner, was prosecuted for refusing to submit to induction in the army and for failure to possess his registration and classification cards. He was convicted and sentenced to three years' imprisonment. Falk's appeal was based on the ground that he was singled out for selective and

discriminatory prosecution because of his political activities; furthermore, he argued that his prosecution had an "unlawful purpose", namely to "chill" the exercise of his and others' constitutionally protected expressive activities. The Court of Appeals, per Judge Sprecher, reversed and remanded.

The judge argued that opposition to the war was protected by the First Amendment and that the Constitution, through the Fifth and Fourteenth Amendments, prohibited discrimination against members of a "...group unpopular with the government". Arbitrary criminal prosecutions could amount to such discrimination. "...[E]qual protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws".[84c] A number of facts and allegations made out a prima facie case that Falk's indictment was intentionally discriminatory: many registrants who had returned their draft cards had not been prosecuted; Falk's prosection had been considered and decided upon by a succession of high-placed officials; the case was initiated three years after Falk's return of his registration card and after the local board had "arbitrarily and without ground" refused to classify him as a conscientious objector, forcing him to refuse induction. However, evidence on the discrimination contention had not been admitted at the trial. The judge ordered a retrial, in which Falk should be allowed to argue his case and ruled that the burden of proof of a non-discriminatory enforcement of the law rested with the government, since a prima facie face had been successfully made by the appellant.

1968 was a vintage year for new repressive measures. The Internal Security Act which had not been used for some time was revived. The registration provisions of the Act had been rendered useless by the courts because of the self-incrimination problems involved. But under an amendment to the Act, approved by Johnson in January 1968, the Subversive Activities Control Board was empowered to list organisations as "communist action" or "communist fronts" and individuals as members of communist action groups without the requirement of self-registration. The amendment expanded further the definition of a communist front organisation and provided that the S.A.C.B. would cease to exist unless a new proceeding was instituted until the end of 1968. Attorney-General Clark duly obliged in July by asking the Board to designate seven individuals as communists. Three of them were registered as communists by the Board but the Court of Appeals for the District of Columbia set aside the orders on the ground that punishment for mere membership in the C.P. was a violation of the First Amendment.[85] However the whole elaborate machinery of the Internal Security Act was given a new lease of life. The H.U.A.C. tried to revive the concentration camp provisions of the Act and suggested that they should be used for the "temporary imprisonment of warring guerrillas";[86] the Committee claimed that communist-led groups and the S.D.S. were seriously considering the possibility of instituting armed insurrection. Nixon revitalised the S.A.C.B. by executive order in 1971. But as the communist danger had been eliminated and the majority of the federal measures against it had outlived their

purpose, the S.A.C.B. was quietly wound up in 1973 when Nixon omitted all funds for it from his budget.

The major piece of repressive legislation of the period under examination was the 1968 Federal Anti-Riot Act.[87] The Act was passed as a rider to a "fair housing" bill, enacted in the aftermath of Martin Luther King's assassination. The Act punishes anyone who "travels or uses any facility of interstate commerce with intent to incite a riot, or to organize, promote, encourage, participate in or carry on a riot and then or thereafter performs or attempts to perform any other act other than crossing state lines" for any of the purposes listed above and anyone who aids and abets such acts. Despite the objections of the Justice Department and the recommendations of the Commission on Civil Disorders (the Kerner Commission)[88] the Act defined the term riot as "a public disturbance involving (1) an act or acts by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person... or (2) a threat or threats of the commission of (such acts)". Senate liberals and the Attorney General had initially objected the Act, but later accepted it as "part of the price for open housing legislation, fearful of jeopardizing the fragile coalition supporting the civil rights bill".[89]

The anti-riot bill is on its face more draconian than the Smith Act. "Evil intent" was made the main determinant of guilt and any use of interstate facilities - even a long distance telephone call -

could be used as evidence of violation of the Act. The Smith Act guarded against the evil of teaching and advocating revolution; in the anti-riot bill the mere thought of participating in a disturbance created by an "assemblage of three persons" was made punishable. Additionally as many peaceful civil rights and anti-war demonstrations had led to disturbances from hostile crowds, the measure put under the threat of heavy federal penalties virtually all mass protest. J. Doar, the head of the Civil Rights Division of the Department of Justice, pointed out in a testimony before a House Subcommittee that under the law "local right-wingers could attack law-abiding out-of-state demonstrators and thereby make their targets, but not themselves, subject to federal imprisonment and fines, or, for that matter, such people as the police, could accomplish the same purpose by creating a riot, as they have in the past".[90] The comprehensively repressive character of the measure was soon proven. While the bill was enacted as a reaction to black rioting in the aftermath of King's assassination, the first prosecution under it came in the famous Chicago Eight conspiracy trial of eight leaders of the anti-war movement.

In the meantime, after the televised burning of a flag at a New York rally - another common means of symbolic anti-war protest - Congress created the new federal crime of "publicly mutilating, defacing, defiling, or defying, trampling upon or casting contempt" at the American flag. "Who can vote against something like this", a Congressman exclaimed, "it's like motherhood".[91] Similar flag desecration statutes were passed and vigorously enforced in many states. Any unorthodox display of the flag was made a crime and the

A.C.L.U. reported, in 1971, that it had easily one hundred flag descreation cases in its files.[92]

University students, the most identifiable group of the anti-war movement, received special legislative attention during 1968. After the incidents at Columbia University, during which the campus was closed down by a massive student strike, the old warrior of the anti-communist campaign, L. Wyman of New Hampshire, introduced a bill in Congress which would terminate federal grants, scholarships and loans to all students who participated in campus protests. The bill that was finally enacted by Congress, in September, gave college authorities the power to cut federal aid to students if they had been convicted for violent crimes during campus disturbances or if they had disobeyed college regulations. Similar measures were enacted by Congress in subsequent years and the states followed the federal lead.[93] In 1969 and 1970 thirty two states passed a wide variety of campus unrest laws. Under some of them students who participated in protest activities were immediately expelled from college. The most common penalty, however, was the withdrawal of state aid from individual students or whole colleges where disturbances had taken place and the administration had not reacted in a tough manner. According to one historian "many of these provisions were extremely vague; thus any student receiving aid would have no way of knowing exactly what kind of activities might lead to a termination of his support".[94] Disciplinary expulsion from college meant almost immediate induction. But as Solicitor General E. Griswold, a former Dean of the Harvard Law School stated, "We must... make it plain that those who are to stay in our educational institutions are those who are worthy to join the company of educated men".[95]

Thus, the Nixon administration inherited a wide variety of federal anti-protest measures from the Johnson years. The old star of anti-

communism did not lose any opportunity to put them to use against the new radicals. H.S. Commager remarked in 1970 that "not since the days when Senator Joseph McCarthy bestrode the political stage, have we experienced anything like the current offensive against the exercise of freedom in America. If repression is not yet as blatant or as flamboyant as it was during the McCarthy years, it is in many respects more pervasive and more formidable".[96] The Chairman of the Association of American Publishers spoke in a similar tone about the attack by Nixon and Agnew on the liberal mass media: "It is a critical fact that we are now faced with defending the First Amendment. Nothing like this has happened since the days of J. McCarthy".[97]

Old criminal syndicalism and criminal anarchy laws were revitalized and used against protestors. At the local level arrests and prosecutions under laws of general applicability - breach of peace, criminal trespass, criminal damage, disorderly conduct etc. - increased dramatically. In three days alone in May 1971, thirteen thousand protesters were arrested during the anti-war demonstrations in Washington but only twelve valid convictions were obtained. The A.C.L.U. stated that the protestors were illegally detained, illegally charged and deprived of the rights of due process of law, fair trial and assistance of counsel. "The scale of arrests - and of official illegality - was unprecedented in Washington. Indeed it has few equals in the 20th century history of our country".[98] Assistant Attorney General W. Rehnquist justified the arrests under the doctrine of "qualified martial law", hitherto unknown in constitutional law. Rehnquist was appointed to the Supreme Court by Nixon in 1972. In 1975, District Court Judge Waddy ruled that massive civil rights violations and unnecessary police violence had occurred in all major demonstrations in Washington, since 1969, and ordered the erasure of illegal arrest records for the entire period.[99]

One of the innovations of the Nixon administration was the transformation of the grand jury into a tool of harassment of radical dissent and of gathering of political intelligence, in similar ways to the legislative investigating committess of the fifties and sixties.[100] Witnesses were subpoenaed, forced to testify without aid of counsel under threat of severe contempt convictions, and asked wide ranging questions about their political beliefs and associatinns. Under a 1970 federal law, which was upheld by the Supreme Court, the immunity previously granted to the testimony of grand jury witnesses was revoked, if similar incriminatory evidence was derived from independent sources. Although a small minority of the resulting indictments led to valid convictions (10%) one commentator remarks that "this is to be expected in the light of the Administration political strategy which is based on harassment of the opposition. If the time, money, energy of... leading critics... can be diverted from affirmative action to defending themselves against grand jury inquisition and if in the process these critics can be publicly stigmatized as outlaws, the Administration may prove to have won the political war while losing the legal battle".[101]

Finally, throughout the sixties and seventies an elaborate network of covert intelligence was developed which became the trademark and the legacy of the Nixon years. The F.B.I. continued gathering information on political dissenters and extended its activities to all politically active organisations and individuals. According to one report 250,000 people were under active intelligence in the late sixties and seventies and the methods used varied. Informants, agents provocateurs, wiretapping and bugging, mail opening and refuse searches were all employed against the various "subversives" of the civil rights movement, the New Left, the S.D.S. and

all other radical and dissenting organisations. The surveillance extended to all those "who do not operate within the confines of the two major parties to all organisations who take a militant or strong dissenting position, to all groups who are considered by the Bureau potentially disruptive and to all persons associated with these".[102] The F.B.I. was assisted in its operations by the C.I.A., the National Security Administration, the Army Intelligence and the Internal Revenue Service. In 1967, R. Clark established an Interdivisional Information Unit to coordinate and computerize the mass of information coming from the diverse intelligence sources.

By the early 70s, a siege mentality overtook the Nixon administration and the surveillance was extended beyond its hitherto "legitimate" targets in the left and radical groups. Democratic Representatives and Senators, liberal journalists and other prominent members of the establishment were investigated and had their telephones tapped. In 1973, Justice Douglas stated that he was "morally" convinced that even the Conference Room of the Supreme Court had been "bugged".[103] Indeed the Watergate scandal and the resulting outcry which led to Nixon's resignation was not a reaction against the use of wide ranging surveillance practices, which had been accepted as legitimate, but against their extension and use against an established party. In acting against the Democrats as if they were the communists, the Socialist Workers or the Black Panthers, Nixon violated one of the rules of the game, namely that intelligence gathering and harassment may be directed only against those outside the established political consensus and thus contributed to his own downfall.

The wealth of new and old laws employed against protest and dissent in the 60s and 70s, led to an expansion of court cases dealing with aspects of expressive activities. The following

sections examine the most important of these cases. The first three deal with protest and dissent cases. The fourth with loyalty-security cases and the fifth with the judicial constitutionalisation and relaxation of libel law.

5. The Conspiracy Trials

When in the mid-60s the protest started becoming more violent two of the most powerful legal weapons employed against the protestors were the prosecutions for criminal anarchy and syndicalism and for conspiracy to commit serious substantive crimes. The first such case arose out of the Harlem riots of 1964 (People v. Epton).[104] William Epton, a black leader of the Progressive Labor Party, a small leftist group of Maoist orientations, addressed a small crowd in Harlem in August 1964. He protested against police brutality and the killing of a 16-year old black youth by a policeman. His speech was recorded by F.B.I. agents in the crowd and was used as the main evidence for the prosecution in the subsequent trial. It was an emotional address and among other things, Epton said: "The cops declared war on us damnit, we'll kill one of them... We will take our freedom. We will take it by any means necessary and any means necessary as we know the beast that we are dealing with is that we have to create a revolution in this country and we will create a new government that is run by the people". Some time after Epton's speech riots broke out in Harlem but no evidence was produced in the trial of any "direct, causal connection" between Epton's speech and the riots. He was prosecuted under the New York Criminal Anarchy law - which had been used for the last time, in 1919 in the Gitlow case. He was charged with advocacy and conspiracy to advocate the violent overthrow of the New York Government; conspiracy to riot; and committing the crime of riot. The last count was

dismissed in the trial court for lack of evidence but he was convicted under the other charges. The prosecution case against Epton consisted of the transcript of his Harlem speech, some leaflets he had distributed bearing the picture of the policeman who had killed the youth and allegations that he had formed an organisation dedicated to armed revolution. All the evidence, therefore, was based on Epton's public statements and some informers' reports. Under the doctrine of Yates[105] advocacy of violent revolution is punishable if it consists of incitement to action rather than the teaching of the abstract doctrine of revolution. Both the trial judge and the New York Court of Appeals rejected this interpretation. Epton's public statements qualified as "overt acts" and were sufficient proof of the criminal conspiracy. Thus, the technical guarantees that the Supreme Court had gradually built up in the communist cases were undermined under the conspiracy theory.

The Supreme Court denied certiorari and endorsed the lower court's construction.[106] Justice Douglas dissented. The trial judge's instructions had "made no qualification whatsoever as to the permissive range of the use of speech and publication as overt acts". The jury should have been asked "to determine that the particular speech or publication was not constitutionally protected" since the evidence against Epton was based almost exclusively on expressive activities.[107]

The pattern established in Epton was utilized extensively in later conspiracy trials. Expression of political dissent was combined in one indistinguishable whole with some evidence of illegal acts and as a result the individuals, groups or ideologies on trial were completely discredited and severely punished. Furthermore, as the F.B.I. had put the P.L.P. on the top of the list of groups to be investigated and

harassed, Epton gave full backing to such activities. The combination of conspiracy prosecutions and covert surveillance led to the destruction of the P.L.P. and was a good example of what Justice Jackson has called the most dangerous weapon at the hands of the prosecutor: "He will pick people that he thinks he should get, rather than pick cases that need to be prosecuted... In such cases, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking a man and then searching the law books, or putting investigators to work, to pin some offense on him".[108]

The Epton logic was put into full effect in the famous Spock-Coffin conspiracy trial. In September 1967, a number of well-known war dissidents signed a document entitled "A Call to Resist Illegitimate Authority". In it, they described many methods of resistance to the draft and of refusal to "obey illegal and immoral orders" by those already in the armed forces in Vietnam. They declared that "we believe that each of these forms of resistance against illegitimate authority is courageous and justified"; they pledged their support to those who "undertake resistance to this war" and concluded: "Now is the time to resist". They stated that the declaration was protected by the First Amendment but accepted that a final determination on that point rested with the courts. Among the original 150 signatories of the Call, who were joined later by thousands, were Dr. Benjamin Spock, a well known paediatrician, the Yale Chaplain William Coffin and the author Mitchell Goodman.

During the October 1967 march to the Pentagon, the three leaders attempted to present to Justice Department officials a briefcase full of draft cards which had been gathered in a previous meeting. Addressing the gathered protestors, Rev. Coffin declared that "we

hereby publicly counsel these young men to continue in their refusal to serve in the Armed Forces as lnng as the war in Vietnam continues and we pledge ourselves to aid and abet them in all the ways that we can".

In late December, after the compromise between R. Clark and Hershey on the punitive reclassification issue, the Justice Department brought conspiracy indictment against the three leaders and two more. The charge was for conspiracy to "counsel, aid and abet diverse Selective Services Registrants to... neglect, fail, refuse and evade service in the armed forces". Although all five had helped in the gathering and returning of the draft cards they were charged with conspiracy to counsel and aid violations of the Selective Services Act, in general. The evidence against them was based on their public activities in support of the Call - the signing of the Call itself, and various press conferences and letters advertising and promoting the declaration . Thus, the widely publicized trial was presented and was probably intended by the Justice Department as an indictment of the whole anti-war movement. The Department's prosecutors made it clear during the trial that all signatories of the Call as well as those who had heard and applauded the defendants at anti-war rallies were liable to conspiracy prosecutions. When one attorney was asked why those particular five defendants were charged he replied that the situation was similar to the enforcement of laws against speeding: "One of the reasons for enforcement of the law is deterrent to others - you can't get everybody in the speed trap, but you are going to get enough so that everybody knows. If it's a real bad speed trap... there comes a point where may be you will have to have enough police there to stop everybody who speeds".[109] And according to a Law Professor the government increased the risk of ultimate judicial defeat by charging

"a loosely knit, widespread and uncircumscribed conspiracy" in order to have "the greatest impact on discouraging organised opposition to the Vietnam War".[110] R. Clark expressed some doubts about the case, after his replacement by Nixon, but he explained: "Conspiracy charges are fairly common legal devices - to a degree, because they're easier for the prosecution".[111]

At the end of the trial the three main defendants and M. Ferber, a student, were found guilty and sentenced to two years imprisonment while the fifth, M. Raskin, was acquitted. All four appealed arguing, in the main, that their public activities were protected by the First Amendment.

The Court of Appeals ruled that the appellants' activities were "a bifarious undertaking, involving both legal and illegal conducts".[112] The Court accepted that some political expression "within the shadow of the First Amendment" was involved and went on to balance the conflicting public and private interests. The state interest lay in the "maintenance of an army in peacetime"; since a "registrant may be convicted for violation of the draft laws", it follows that "a man may be punished for encouraging the commission of the crime". The defendants had called for immediate action in resistance to the draft and they had therefore forfeited the protection of the First Amendment. To be sure, General Hershey himself had admitted that there was no evidence of any concrete resistance acts instigated by the activities of the defendants.[113]

On the conspiracy aspects of the trial, the Court ruled that the open and public character of the agreement to oppose the war could not bar a conspiracy conviction. It added, however, that the mere signing of "the Call" was not sufficient evidence. It should be supported by evidence about the specific intent of the defendants to adhere to the

illegal portions of the agreement. The Court offered three criteria for a finding of "evil intent": a. the defendants' prior or subsequent to the agreement unambiguous statements; b. the subsequent commission of illegal acts contemplated in the agreement; or c. the subsequent undertaking of lawful acts "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated". Under these criteria public statements and acts - themselves legal and constitutionally protected - could become the basis of convictions for criminal conspiracy.

The convictions of all four were reversed, however, on technical grounds. The Court insisted that Coffin and Goodman, at least, who were found to have the required evil intent could be retried without constitutional problems. One Judge dissented in part and stated that he was "tempted to say that the law should recognize no overt conspiracy in the sensitive area of public discussion and opinion". Judge Coffin reviewed the criteria for the proof of criminal intent and found the third, in particular, objectionable: "To say that 'subsequent legal acts' render retrospectively conspiratorial the earlier protected ambiguous advocacy is to say that two rights make a wrong". He concluded that the decision allowed the Government to use "the conspiracy weapon... again on another day in another court" against other protestors. The Government did not retry any of the defendants, so all five of them went finally free. In response to the increasing use of symbolic forms of protect by the anti-war protestors, the Spock-Coffin and the later conspiracy trials had a largely symbolic character too.

The next major conspiracy trial became known as the "Chicago Conspiracy" or the "Chicago Eight" trial. It arose from the disturbances in Chicago during the 1968 Democratic Convention. The Government sponsored study of the incidents (the Walker Report) concluded that

"despite the presence of some revolutionaries the vast majority of the demonstrators were intent on expressing by peaceful means their dissent either from society generally or from the administration's policies in Vietnam". The report found that police violence "was a fact of Convention week" and that the police were "violators of sound police procedures and common decency".[114] The dogged refusal of Mayor Daley to grant permits for marches and the occupation of a park has been assessed as one of the major factors that contributed to the escalation of violence.[115] Attorney-General R. Clark tried to convince the local authorities to adopt a low profile but he failed. After the events, Clark refused to bring prosecutions under the recently enacted Federal anti-riot Act and started proceedings against various policemen in a Chicago grand jury. But the new Attorney-General Mitchell moved swiftly against the demonstrators. He obtained grand jury indictments against eight nationally known leaders of the anti-war movement. The most famous among them were Tom Hayden of the S.D.S., the pacifist D. Dillinger and the Black Panther's Chairman Bobby Seale. No prosecution was brought against any police officer despite the findings of the Walker Commission.

All eight were charged with conspiracy to cross state lines with intent to incite a riot and six of them with actually crossing state lines to incite a riot. Five of the defendants had acquired national notoriety a few months before the Chicago incidents when they had appeared before the H.U.A.C., which was investigating the anti-war movement, and had attacked and ridiculed the Committee. During the trial they started calling themselves "the Conspiracy" and they were contemplating the creation of a party under that name.

The trial lasted five months and was one of the less dignified chapters of American criminal justice. The defendants were determined

to make their trial a forum for the public denunciation of the injustices of American society and the war. They were faced by an equally determined and openly antagonistic Judge. The evidence against all eight relied largely on their public speeches and private conversations, the latter obtained through police informers and extensive electronic surveillance. Judge Hoffman, however, overruled all objections based on the First Amendment. He accepted the prosecution's argument that the various statements of the defendants were not at issue and that they were used as evidence of their criminal intent to incite the riot. According to one historian of the trial, the prosecution's attitude was that "the punishable crime, under the anti-riot statute, occurred within the minds of the defendants and the Constitution says nothing about states of mind".[116]

One of the most dramatic moments of the trial was when Bobby Seale - who continuously protested because he was not allowed to conduct his own defence - was chained on a metal chair and had his mouth gagged with muslin and later with adhesive tape.[117] The trial went on for a few days with Seale chained and gagged and then Judge Hoffman summarily sentenced him to an unprecedented imprisonment of four years for contempt of court and severed his case.

At the end of the trial the remaining seven were found not guilty on the conspiracy charge; five of them were found guilty of crossing state lines with intent to incite a riot and were given maximum sentences of five years imprisonment. After sentencing, Hoffman added 175 contempt citations against all seven and two of their lawyers. One lawyer was sentenced to four years and thirteen days in prison. Among various other counts, he was sentenced to six months imprisonment for asking Mayor Daley "objectinnable questions".[118]

All substantive and contempt convictions were later reversed by the Court of Appeals. During the retrial of some of the contempt

convictions the judge stated that Hoffman had been guilty of "condemnatious conduct" and had from the beginning "telegraphed to the jury his contempt for the defendants".[119]

Prosecutions for conspiracy continued under the Nixon administration which "prosecuted virtually every prominent anti-war leader".[120] The "Pentagon Papers" and the "Gainesville Eight" conspiracy trials were two of the most famous cases. The first was declared a mistrial when the government refused to reveal the illegal wiretap records on defendant Ellsberg, who had leaked to the press a Defense Department study on American policy in Vietnam between 1950 and 1967. In the second, eight members of an anti-war organisation were prosecuted for conspiracy to disrupt the 1972 Republican Convention but were all acquitted when the main prosecution witness, an F.B.I. "plant" in the organisation was found to have serious mental and psychiatric problems. A number of other conspiracy prosecutions were brought against various dissenting groups but failed either for lack of evidence or because of the Government's refusal to disclose the surveillance records on which the prosecutions were based.[121]

6. The New Criminal Anarchy and Criminal Syndicalism Prosecutions

The successful prosecution of W. Epton, in 1964, led to a revival of the old criminal anarchy and criminal syndicalism laws. They had remained in the state statute books as relics of an earlier era of moral panic, but by the mid-60s they started being invoked again, against black militants whose public speeches had allegedly triggered disorders and riots. In 1969, the Supreme Court reviewed this revival in a case that has since become famous as one of the liberal milestones in First Amendment theory.

Ironically, the victorious petitioner in Brandenburg v. Ohio[122] was a Ku Klux Klan leader who had been convicted under the Ohio

Syndicalism Act for "advocating the duty, necessity or propriety of crime, sabotage or violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform". The prosecution was brought for a speech that Brandenburg had made in a typical K.K.K. meeting among the ritual "nigger" and Jew-bashing of such occasions. The most objectionable part of Brandenburg's speech, according to the record, was his statement that "if our President, our Congress, our Supreme Court continue to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken".

The Supreme Court in a per curiam opinion reversed Brandenburg's conviction and expressly overruled the 1927 Whitney decision which had upheld a similar California statute. "Whitney has been thoroughly discredited by later decisions" the Supreme Court ruled and cited Dennis, Yates and Noto among others to that effect. According to the Court, these decisions had "fashioned" the principle that advocacy of violence and law violation could be constitutionally punished only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".[123] The Ohio statute fell short of that standard, on its face and as applied to the facts of the case and was therefore invalidated.

Under the Brandenburg test the advocacy/incitement distinction was revived and a contextual requirement (advocacy likely to produce imminent lawless action) was added to it. The principle emerging was that the nature of the particular speech as incitement, examined within the context of its delivery and of the likely results that it could produce, would determine the extent of the constitutional protection. To be sure, the analytical problems that inhere in the independent forms of the incitement/advocacy distinction and the clear and present danger test remain in their combined version as well.[124]

The enthusiastic reception of Brandenburg by the constitutional commentators is perhaps more interesting than the decision itself. The Court insisted that the principle enunciated was the "theory" of the Smith Act and of Dennis.[125] The "clear and not improbable danger" test of Dennis, which distorted the original danger test "beyond recognition"[126] cannot be assimilated to the much stricter linguistic formulation of Brandenburg, by any stretch of imagination. It has been suggested, accordingly, that, in reality, Brandenburg overruled Dennis and opened the road for an extensive protection of radical speech.[127] Such an interpretation cannot be sustained, however, on the face of the Court's explicit reliance on Dennis. The "Brandenburg Concerto"[128] may be seen as a further example of the effort of constitutional theorists to iron out the less liberal decisions of the Court and to present them as the exceptions within an otherwise consistent discourse of liberal decision making. The Court's decisions immediately before and after Brandenburg[129] clearly indicate that major doctrinal revolutions, as Brandenburg was supposed to be rarely, if ever, occur.

Justice Douglas concurring sounded a cautionary note amid the general euphoria. He stated that the line of criminal responsibility is that "between ideas and overt acts" and that a long line of Court decisions fell far short of that principle. The Government had too often invaded "the sanctuary of beliefs and conscience" with judicial approval and the return to the danger test or the abstract doctrine/ advocacy of action distinction was not a reason for rejoicing. The decisions of the 70s justified Douglas' caution.

In Younger v. Harris,[130] the appellee was a black militant who had distributed some leaflets calling for radical change in industrial ownership through political action. He was indicted under the California

Criminal Syndicalism Act which had been condemned by the Supreme Court in Brandenburg. When the State Courts dismissed his constitutional objections, Harris brought a federal suit challenging the constitutionality of the Act. Under the Dombrowski v. Pfister[131] rule the District Court declared the Act void for vagueness and overbreadth and granted an injunction enjoining the District Attorney from further prosecutions. Harris was joined in his action by two members of the Progressive Labor Party and a history professor who claimed that their political activities, and his teaching of Marxism respectively, were threatened by the Act.

The Supreme Court reversed and ruled that the District Court should not have exercised jurisdiction. Justice Black, for the Court, discussed the jurisdictional and procedural aspects of the case. He disposed of the claims of the additional appellees, stating that they had no "acute, live controversy" with the state,[132] since they had not been arrested or indicted. He went on to distinguish Harris from Dombrowski. He stated that when proceedings have been initiated in State Courts the normal practice of the federal judiciary is to refrain from intervening. Federal action could be initiated only if "both great and immediate" irreparable injury was shown to threaten the parties. According to Dombrowski, Federal equitable relief was available whenever a state statute was found to be a vague or over-broad violation of the First Amendment, on its face. Justice Black ruled, however, that "such statements were unnecessary to the decision" of Harris and that Dombrowski "..should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief..."[133] He denounced, too, the tendency to examine statutes, on their face, for their constitutionality and added that the judicial power ".. does not amount to

an unlimited power to survey the statute books and pass judgments on laws before the courts are called upon to enforce them".[134]

Having decided the case on those grounds, the Justice did not fully address the question of the constitutionality of the Criminal Syndicalism Act. He came closer to pronouncing on the issue when he stated that "Where a statute does not directly abridge free speech, but - while regulating a subject within the State's power - tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so".[135] Thus, the Act was declared an incidental only limitation on political rights and Harris' prosecution for mere advocacy of political change was allowed to go on. As Douglas wrote in dissent "..in times of repression... interests with powerful spokesmen generate symbolic pogroms against nonconformists..."[136]

In Samuels v. Mackell,[137] Black denied declaratory relief to the appellants who had been indicted under the New York Criminal Anarchy Act, on similar grounds. The Court made clear in those cases, that the procedural techniques it had devised, in order to protect the early civil rights movement, were not available to its more militant successors. And despite its procedural overtones, Harris indicated that the Brandenburg euphoria was, at the best, premature.

7. New Forms of Protest: Symbolic and Offensive Speech

While the Supreme Court was prepared to uphold the protest activities of the early civil rights movement, its attitude toward the anti-war and peace movements was much more ambiguous. The prosecutions of protestors multiplied, in the mid-sixties, and the

Court was forced to deal with the new forms of protest and the federal and state reaction against them.

The first case in which the Court dealt with the new protest was U.S. v. O'Brien.[138] O'Brien was prosecuted under the 1965 amendment to the Selective Services Act which prohibited the knowing mutilation or destruction of draft cards. The case turned out to be a seminal one: the Court addressed in it the issue of symbolic protest and clarified its doctrinal approach toward free speech in general.[139] The scene for O'Brien was set by the contradictory decisions of two district courts on the constitutionality of the amendment. In U.S. v. Miller[140] the Court of Appeals for the Second Circuit upheld the amendment using the balancing test: the state had a paramount interest in raising armies and the regulation did not restrict protest. In O'Brien,[141] however, the First Circuit ruled that the amendment suppressed free speech and it was, therefore, unconstitutional. Chief Judge Aldrich found that the amendment had no proper legislative purpose, since it did not add anything to existing law. Additionally the act of public destruction of draft cards was protected "symbolic speech" and its prohibition "strikes at the very core of what the First Amendment protects". O'Brien's conviction was upheld, however, on the basis of the Selective Services Act requirement that registrants keep their certificates, at all times. The Supreme Court granted certiorari in the second case and reversed the Court of Appeals, ruling the amendment constitutional.

Chief Justice Warren, writing for the Court with Justice Douglas dissenting, viewed the amendment as a valid regulation related solely to the administrative needs of the Selective Services system. O'Brien had challenged his conviction on two counts: he had argued that its application against him was in violation of the constitutionally

protected right to free speech and further that the amendment as such was unconstitutional on its face because it had been enacted for an improper purpose, namely the suppression of free speech.

On the first count, Warren stated in a somewhat elliptic fashion that "we cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea".[142] He did not elaborate, however, on the criteria that could qualify some conduct with communicative intent as protected symbolic speech, and which differentiated O'Brien's draft card burning from other symbolic forms of protest which were accorded a degree of protection (the sit-ins were the latest example of "silent" symbolic speech). Having said that, the Court went on to examine O'Brien's challenge, on the assumption that his conduct was "sufficient to bring into play the First Amendment". It stated a general legal doctrine applicable in cases where conduct and expression are intertwined. Four criteria were offered under which a regulation which limits incidentally First Amendment freedoms remains nevertheless valid:

> "[I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."143

All four conditions were satisfied in the present case, according to the Court. The substantive governmental interest lay in the smooth and proper functioning of the Selective Services. The Court indicated the various administrative functions performed by the draft cards and insisted that the purpose of the amendment was to prevent harm to the efficiency of the Services. The preservation of "every last draft card in perfect shape" was crucial for that purpose. On the other hand, O'Brien was convicted for the "noncommunicative impact of his

conduct and nothing else".[144] Thus, the Court closed its eyes to the facts of the case and concluded that since the amendment did not appear to interfere with expressive activities, on its face, its application was unobjectionable, too. Reversing its earlier position, according to which vague or overbroad statutes are unconstitutional if their specific application leads to violations of expressive rights, the Court effectively ruled that a narrowly drafted statute would withstand constitutional challenge even if its application clearly infringed expressive rights.

The Court was equally cavalier on O'Brien's second challenge. It underplayed the obvious reason for the passage of the amendment and stated that since there existed a valid governmental interest in the efficient functioning of the draft system, the legislative purpose to muffle protest was insignificant. Interestingly enough, during the brief congressional debate, the only reason given for the amendment was the suppression of the unpatriotic draft card burnings.

All in all, the Supreme Court's performance in O'Brien was not impressive. Through a series of subterfuge and rhetoric, it failed to address the main problem involved both in the enactment of the amendment and its application in the particular case. Despite the emphasis put on the administrative aspects of the draft card law, the tenor of the opinion and its result showed a growing judicial intolerance toward the new forms of protest.

The next case in which aspects of symbolic protest were discussed was Tinker v. Des Moines Independent Community School District.[145] A group of high school students had protested against the war by wearing black armbands in school. The school authorities asked them to remove them and, when they refused, suspended five of them until they returned without the armbands. The parents of the students sought a

court injunction restraining the authorities from disciplining the students which was refused. In this case the Supreme Court reversed the Court of Appeals and granted the injunction.

Justice Fortas held that the silent protest of wearing armbands was "closely akin to pure speech" entitled to comprehensive constitutional protection. He reviewed the facts of the case and found that the protest had not caused any interference with or disruption of the normal school functions. The only reason for the action of the school authorities was a wish "to avoid controversy which might result" from the symbolic expression of opposition to the war. Symbols of other political parties and campaigns were not affected by the school's order, a fact that made the school attitude unconstitutionally discriminatory.

Justice Black dissented. He thought that the Court decision was an injustified incursion in the schoolroom and would undermine "school discipline, [which] like parental discipline, is an integral and important part of training our children to be good citizens". High school students do not carry "into a school... a complete right to freedom of speech" and the armband wearing had disrupted the lessons because it "took the students' minds off their classwork and diverted them to thought about... the Vietnam War". In a somewhat exaggerated fashion, Black denounced the decisions as "the beginning of a new revolutionary era of permissiveness fostered by the judiciary".[146]

The Court continued to review cases involving the public expression of protest and the effort of authorities to suppress them. In Street v. New York,[147] Street had cursed and burned an American flag in outrage after he had learned about the shooting of James Meredith, the civil rights activist. He was convicted under the New York flag desecration statute which prohibited the public casting of the flag in contempt "by word or deed". The Supreme Court ruled that the expression

of public criticisms of the flag was constitutionally protected speech and invalidated the "contemptuous words" part of the statute. But it refrained from passing on the flag mutilation part. Since the lower courts had not made clear whether Street was convicted for his critical remarks or the flag burning, the Supreme Court reversed his conviction. Thus, the question of the constitutionality of the flag desecration laws was left unresolved against the dissent of three Justices who argued that the Court should explicitly uphold the statute.[148]

In Watts v. U.S.[149] a small group of demonstrators had been discussing police brutality on the Washington Monument Grounds after an anti-war rally. According to an army intelligence agent, petitioner Watts, an eighteen year old youth stated to the group that "I have already received my draft classification as I-A and I have got to report for my physical this Monday coming. I am not going. If they every make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers". Watts was convicted under a 1917 statute which prohibited the utterance of threats to kill or injure the President. The Supreme Court in a per curiam decision reversed this. The political hyperhole of the statement did not constitute the statutorily prohibited threats and, in any case, public debate "should be uninhibited, robust and wide open, and it may well include vehement, caustic and sometimes unpleasant sharp attacks on government and public officials".[150]

A different kind of speech was involved in Cohen v. California.[151] Cohen had been convicted for breach of the peace for walking about in a law court wearing a jacket with the words "Fuck the draft". The Supreme Court reversed his conviction in a 5-4 decision.

The state had argued that the inscription in Cohen's jacket constituted "offensive conduct"; it should be excised from public

discourse for being either a "fighting word" that inherently provokes violent reaction or as an immoral and obscene word. To the amazement of some authors the Court spelt out "that Chaucerian term"[152] which denotes an "act of unlawful carnal knowledge".[153]

Justice Harlan rejected one after the other all contentions of the state. "Fighting words", a category of speech placed outside constitutional protection since Chaplinsky, were defined as words that led "substantial numbers of citizens... to strike physically"[154] at those who utter them. The expression in question could provoke only "a hypothetical coterie of the violent and lawless". As to the immoral and obscene character of the word used, the Court remarked dryly that "one man's vulgarity is another's lyric".[155] Words convey both cognitive and emotive messages; in some cases the emotive content of a particular message, which cannot be expressed by precise and "detailed explicatinn", is the predominant element. Words that express it are, therefore, protected by the First Amendment. In some cases the suppression of words may be used as a guise for the censorship of unpopular views.

Although the case seemed rather trivial, Justice Harlan went on to make a general statement on the justification and function of free speech in a democratic society:

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests... To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."156

The interesting fact about Harlan's opinion is that it constitutes an emphatic restatement of the Millian premises of individualistic utilitarianism. The importance attributed to the protection of individual eccentricity, to the function of free public debate which contributes to the development of the human personality and the statement that the state cannot cleanse the public vocabulary on the highly subjective grounds of morality are reminiscent of the great liberal decisions of the 30s and 40s. According to some constitutional authors, the Court's Brandenburg and Cohen decisions have established a legal doctrine of speech protection according to which public statements may be suppressed, on account of their propositional contents, in a few and clearly delineated cases.[157] Justice Harlan, however, the author of the Cohen opinion had been one of the most consistent supporters of the loyalty-security programmes of the 50s and 60s. The difference between O'Brien and Cohen, both in theoretical approach and in result, indicates that the "pure speech" element of Cohen and the limited impact of the protest may have been the determinant factors in deciding that case.

The question of "fighting words" came up again in Gooding v. Wilson.[158] Wilson had made certain offensive remarks to police officers during an anti-war picketing in Georgia. He was prosecuted and convicted under a Georgia statute which prohibited the "use to or of another, and in his presence... of opprobrious words or abusive language, tending to cause a breach of peace". The Supreme Court, affirming a District Court decision on a writ for habeas corpus, invalidated the statute as a vague and broad enactment in breach of the First and Fourteenth Amendments.

Justice Brennan, writing for the Court, did not review the facts of the case and indicated that the appellee's conduct could be constitutionally

punished under a narrowly drafted statute. He examined, solely, the statutory language according to the principles of Chaplinsky and Cohen on the permissible punishment of "pure speech". Counsel for the state argued that Georgia's statute had been narrowly drawn and was directed at "fighting words" as defined in Chaplinsky; furthermore, that the state appellate courts had consistently construed the statutory language to such effect. The Supreme Court rejected these arguments. The dictionary meaning of "opprobrious" and "abusive words" gave them "greater reach than fighting words". Brennan went on to review a number of Georgia appeallate decisions which had construed the terms and concluded that according to the decisions a breach of peace was "...merely to speak words offensive to some who hear them, and so sweeps too broadly".[159] The judicial interpretation did not distinguish adequately between legal and illegal speech and the standard of criminal liability was left to the discretion of prosecuting authorities and juries. Thus, in Gooding, the statute was invalidated, on its face, because of its overbreadth, an approach much more radical than those encountered before in the same field. The dissenting Justices thought that the Court had exceeded its power and had unwarrantly disarmed the state. As Justice Blackmun concluded his dissent "/t/he Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty".[160]

Not before long, however, the Court retreated from the "void for overbreadth" doctrine of Gooding. In Broadrick v. Oklahoma,[161] a case dealing with the prohibition of political activities of state employees, the Court rejected the constitutional challenge against the relevant provisions, on vagueness and overbreadth grounds. When elements of speech and conduct are intertwined in a particular case, the "overbreadth of a statute must not only be real, but substantial as well, judged in

relation to the statute's legitimate sweep".[162] The employees had argued that the prohibition of partisan political activities was so broad that it excluded them from virtually all political life. The Court accepted that the restrictions could be improperly applied on occasion. But the fact that "some persons' arguably protected conduct may or may not be caught or chilled by the statute" did not suffice for its invalidation on grounds of vagueness and overbreadth.[163]

A similar conclusion was reached in Parker v. Levy.[164] In that case a military doctor had been convicted by a court martial for "conduct unbecoming an officer or gentleman" and for "disorders and neglects to the prejudice of good order and discipline in the armed forces", both criminal offences under the Code of Military Justice. Levy's "unbecoming behaviour" had been his public expression of opposition to the war. The Court of Appeals reversed the conviction finding the two clauses of the Code vague and broad, but the Supreme Court reversed.

The clauses gave enough notice of the proscribed behaviour and were not overbroad under the Broadrick ruling. The Court stated that it would not "strike down a statute on its face where there were a substantial number of situations to which it might be validly applied".[165] In any case, even if these clauses appear vague to others they are models of clarity to "practical men in the navy and army".[166]

While the Court did not extend the theoretical rationale of Cohen or the legal doctrine of Gooding to other forms of expressive activity, it continued to upset breach of peace and disorderly conduct convictions for foul language. In Hess v. Indiana,[167] a small number of anti-war demonstrators at Indiana University were ordered by the local sheriff to clear a street and were subsequently pushed off it by the police. Hess was arrested and convicted for disorderly conduct for shouting

"Fuck" and "We'll take the fucking street later". The Supreme Court in a per curiam opinion reversed. The remarks did not fall in any of the "narrowly limited classes of speech" which are punishable. They were neither obscene, nor a personal insult to the sheriff and could not be construed as "fighting words". Additionally, according to the evidence, they were not likely to produce imminent lawless action by the crowd.[168]

In Papish v. University of Missouri,[169] a student had been expelled from the University for distributing on campus an underground newspaper. The offending issue carried a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice and an article entitled "Motherfucker Acquitted" on the trial of the leader of an organisation called "Up gainst the Wall, Motherfucker". Papish was expelled under a college regulation which prohibited "indecent conduct or speech". The Supreme Court ruled that the two items were not obscene and that the expression of opinions on campus cannot be "shut off in the name alone of 'conventions of decency'". The Court made clear in Papish that the restrictions on the criminal prosecution of offensive or foul language could not be relaxed by university authorities claiming some special powers of supervision of the conduct of students.[170]

In 1974, the Supreme Court returned to the various flag desecration laws. In Smith v. Goguen,[171] the Massachussets statute at issue punished the contemptuous treatment of the flag. Goguen had been convicted to six months imprisonment for going around with a small flag sewn on the seat of his trousers. The Supreme Court found that the statute involved was unconstitutionally vague.

Justice Powell for the Court ruled that the statutory language did not give fair notice of the proscribed conduct and "men of common intelligence" were forced to guess at the meaning of the criminal offence. Furthermore, the statute's "standardless sweep" allowed policemen,

prosecutors and juries to enforce it according to their personal predilections.[172] Justice White, concurring, found the "contemptuous treatment" provision a violation of the First Amendment since "neither the United States nor any state may require any individual to salute or express favourable attitudes towards the flag".[173] At the other end, three Justices including Chief Justice Burger found the statute necessary and valid.

In Spence v. Washington,[174] a student had hung a flag from the window of his house and had attached a peace symbol on it. He was convicted under the Washington flag desecration statute which prohibited the exhibition of flags on which any words, figures, marks, pictures, designs etc. were attached. In a per curiam opinion the Supreme Court reversed.

The Court accepted that Spence's conduct was "symbolic speech", a "pointed expression of anguish" triggered by the invasion of Cambodia and the Kent State shootings. The state had a valid interest in "preserving the national flag as an unalloyed symbol of our country". But as the flag had not been disfigured or destroyed the state interest was outweighed by the protected character of the expression. Three Justices dissented and differentiated the Washington statute from the usual desecration ones. It prohibited the improper use of the flag in a non-discriminatory way by outlawing both communicative and non-communicative, political and commercial, respectful and contemptuous uses of the flag. "It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications."[175]

These decisions which were based on particular aspects of the various flag protective laws involved did not stop the prosecutions and convictions for flag desecration. In 1974 two teenagers were convicted in a juvenile court for burning a flag and, in 1975, a man was convicted to four

months imprisonment in New Hampshire for having sewn a flag on his jacket.[176]

8. Anti-War Protestors and Trade Unions in the Public Forum

As the anti-war and peace movements became more massive and militant toward the end of the sixties, a series of cases arising from mass demonstrations and other protest activities in the public forum started arriving at the Supreme Court.

In Bachellar v. Maryland[177] a number of protestors, who had participated in an anti-war demonstration in front of a Baltimore army recruiting station were convicted for disorderly conduct. The judge instructed the jury that they could return a guilty verdict if they found that the protestors had engaged in the "doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area". The Supreme Court unanimously reversed and remanded the case. Although the conviction could stand on a number of grounds the "doing or saying" instruction had violated the Constitution by basing the determination of guilt on the unpopularity of the views of the protestors. Since it was impossible to know the ground on which the guilty verdict was actually returned, the convictions were set aside.

In Coates v. City of Cincinnati,[178] a student involved in a peace demonstration and several pickets related to a labour dispute were convicted under a city ordinance which prohibited "three or more persons to assemble... on any of the sidewalks... and there conduct themselves in a manner annoying persons passing by". The Ohio Supreme Court had held that the term "annoying", is a widely used and well understood word" and the ordinance could not be, therefore, challenged on vagueness and overbreadth grounds.

The Supreme Court reversed. Justice Stewart found the ordinary unconstitutionally vague, because it did not give fair notice as to the standard of conduct it was prohibiting. Its violation depended entirely on "whether or not a policeman is annoyed". Furthermore, the ordinance qualified the rights of speech and assembly in a potentially discriminatory way. People could be annoyed because they resented the "ideas, lifestyle or physical appearance" of the protestors. The Cincinatti ordinance was declared as unconstitutional on its face, against the dissent of four Justices.

In Police Department of the City of Chicago v. Mosley,[179] a Chicago ordinance prohibited all picketing and demonstrations within 150 feet of any school during school hours, but exempted the picketing of schools involved in labour disputes. Mosley had conducted a seven month solitary vigil and picketing outside a Chicago school protesting against "black discrimination". After the passage of the ordinance above, he brought a suit for declaratory and injunctive relief against its enforcement. The Supreme Court granted the injunction.

Justice Marshall held that the essence of the First Amendment is to forbid the control of the contents of messages. "...[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its contents".[180] Quoting from Meiklejohn and Kalven, he went on to state that once a public forum had been opened for a particular group or idea "equality of status in the field of ideas", the gist of the First Amendment, and the Equal Protection Clause barred the government from selectively excluding other groups and messages. The city could exclude all picketing from outside its schools to prevent disruption to their functions but it could not pursue this valid objective "by the wholesale exclusion of all but one preferred subject".[181]

Mosley is one of the most definite judicial statements on the need of content neutrality in the regulation of the contextual characteristics of public expressive activities. As Chief Justice Burger remarked however, the "discussion of the First Amendment could, if read out of context, be misleading". Burger was concerned about the possible liberal implications of the decision. On the other hand, Mosley left open the possibility of a wholesale non-discriminatory exclusion of all groups and ideas from the public forum. Additionally, the loyalty-security decisions explicitly and a large number of protest decisions implicitly had sustained the position that certain ideas are dangerous and should be discriminated against. Despite the (conservative) fears and the (liberal) hopes,[182] Mosley's rhetoric did not mark a radical departure in First Amendment theory.

On the same day as Mosley, the Court handed down its decision on the similar case of Grayned v. City of Rockford.[183] A number of black students and their parents had marched and picketed outside a Rockford, Ill. school protesting against racial discrimination practised by the school authorities. Forty of them were arrested and convicted under an anti-picketing statute identical to that involved in Mosley and an anti-noise one which prohibited "the making of any noise or diversion in grounds adjacent to schools which disturbs or tends to disturb the peace or good order" of the school. However, as Justice Douglas said, there was no evidence that the appellants had "yelled or made any noise whatsoever". The only noise was created by police loudspeakers and the entire picketing "was done in the best First Amendment tradition".[184]

The Supreme Court invalidated the anti-picketing statute on the same grounds as Mosley but upheld the convictions under the anti-noise one. The statute was neither vague nor overbroad: although its terms were marked by "flexibility and reasonable breadth rather than meticulous

specificity" they were clear and comprehensible. Justice Marshall reviewed the various public fora decisions of the Court and stated the basic principles that ruled expressive activities in places not traditionally used for such purposes.

> "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulation of time, place and manner that are reasonable'.. Although a silent vigil may not unduly interfere with a public library... making a speech in the reading room almost certainly would.. The crucial question is whether the manner of the expression is basically incompatible with the normal activity of a particular place at a particular time."185

Thus, by assimilating the streets around a school to a library, the Court ruled that any demonstration there, even those related directly to the operation of the school and staged by the pupils and their parents can be constitutionally prohibited.

In 1972, too, the Supreme Court returned to the controversy about the right of protest in privately owned places which are open to the public. A number of protestors had distributed leaflets advertising a anti-war meeting in the mall of a large shopping centre. The centre covered a massive 50 acres and its main area had a perimeter of almost one mile which enclosed a number of sidewalks, stairways, statues, benches, bridges, gardens and some 60 businesses, to which the public had unrestricted access. The management allowed the Salvation Army, the American Legion, the Volunteers of America and mainstream presidential candidates to speak and solicit money in the centre. The anti-war protestors were ordered to leave, however, by security guards enforcing a management rule which prohibited the distribution of handbills in the premises. The protestors sought an injunction against the shopping centre, which was granted by the District Court and was affirmed by the Court of Appeals on First Amendment grounds. In Lloyd Corporation v. Tanner,[186] the Supreme Court reversed.

Justice Powell, for a 5-4 majority, was faced with two clear, albeit controversial, precedents. In the early Marsh case, a privately-owned company town had been identified with state municipalities for First Amendment purposes. The Court had held that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it";[187] in Logan Valley Plaza, decided in 1968 and involving a shopping centre similar to that owned by the Lloyd Co. although more remote from the city, the Marsh rationale had been extended to shopping centres which were found "functional equivalents of a public business district", in which expressive activities could be rightfully exercised.[188] These precedents, seemingly, ruled the present case, a fact that had been canvassed, by one of the dissenting opinions in Logan Valley, agains t the Court ruling in that case. However, under the well-established principle of constitutional law, the constitutional guarantees of the First and Fourteenth Amendments guard against the abridgement of free speech by federal and state governments, not by private parties. Marsh and Logan Valley had been based on the fact that the private property involved had been dedicated to public use, but in the latter case the Court had stopped short from declaring private shopping centres as fully open public fora.

The Court's answer to the dilemma was to distinguish the two precedents out of existence, without explicitly overruling them. Justice Powell distinguished Tanner from Marsh on the ground that the company town was a unique phenomenon, "an economic anomaly of the past". Private interests had undertaken there the customary functions of government, and there were no publicly owned places, where First

Amendment rights could be exercised. The difference between Tanner and Logan Valley was that the picketing in the latter was related to a labour dispute, affecting a store located in the centre, while the "hand-billing by respondents in the malls of the Lloyd center had no relation to any purpose for which the center was built and being used".[189] There was no open-ended invitation to the public, which was invited to the centre for the purpose solely "of doing business with the tenants"; the selected public functions allowed, purported to "bring potential shoppers, to create a favourable impression, and to generate goodwill". Furthermore, the centre was surrounded by public streets and sidewalks, in which expressive rights could be exercised.

> "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." 190

The attempt of the Court to reconcile its decision with the two precedents was somewhat tenuous, but its answer to the main doctrinal questions involved was clear. The theory that the function of the property determines its character for First Amendment purposes was rejected as well as any suggestion that private shopping centres could be brought under the doctrine of "state action", which was used in the sit-in cases:

> "The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only...
>
> The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use... nor does property lose its private character merely because the public is generally invited to use it for designated purposes." 190a

The importance of Tanner cannot be underestimated. Private shopping cnetres, of the scale involved there, have become the meeting places of entire communities, as the opinion in Logan Valley has documented in some detail. "As governments rely on private enterprise, public property decreases in favor of privately owned property... /and/ it becomes harder and harder for citizens to find means to communicate with other citizens" wrote the four dissenters. Recalling the "poor man's media" rationale of earlier cases, Justice Marshall emphasized that those who have no access to the mass media must increasingly rely on inexpensive means of communication, and must be allowed access to those places where "most of their fellow citizens can be found". Additionally, as the Lloyd Corporation had allowed mainstream groups to hold public functions at the centre, but had barred the anti-war protestors, Tanner contradicts the principle of ideological neutrality in the public forum, as enunciated in Mosley, among other cases. As Justice Marshall argued, the centre had been opened to First Amendment activities; the protestors, therefore, could not be excluded since their activities were consonant with the use to which the property was actually put.[191] For Marshall the interests in free speech outweigh those in private property, and should be upheld even against private parties which have undertaken extensive public functions. He accused the majority of overruling Logan Valley without admitting it, and in a rare display of anger attributed this change of heart to the "radical change of the Court composition" by the Nixon appointments to the bench.

Four years after Tanner the conflict between private property and expressive rights in the public forum, which was first encountered in the early Jehovah's Witnesses cases and then in the sit-in cases of the 60s, received a seemingly final resolution. In Hugdens v. N.L.R.B.[192] the Supreme Court followed the road opened in Tanner and held that no-one, including those trade unionists engaged in an industrial dispute with a

privately owned shopping centre, has the right to enter, picket or otherwise communicate to the public within the centre against the wishes of the owner of the property.

The picketing in Hugdens was carried out by a trade union, outside the retail shop of a company which was involved in a labour dispute with its warehouse employees. The shop was located in a shopping centre and agents of the management of the centre ordered the pickets to leave and threatened them with criminal trespass prosecutions. The pickets left and their union initiated an action with the National Labor Relations Board claiming that trade union rights had been unconstitutionally interfered with by the centre's management. The N.L.R.B. upheld the union and the Court of Appeals enforced the Board's order to cease and desist relying on the Logan Valley Plaza and Tanner decisions of the Supreme Court. The Supreme Court vacated the judgment of the Court of Appeals, however, and directed the latter to remand the case to the N.L.R.B. The Board should reconsider the case on statutory grounds (the National Labor Relations Act) and should overrule all constitutional arguments. ". [T]he constitutional guarantee of free expression has no part to play in a case such as this".[193]

The Court declared that its decision in Tanner had overruled Logan Valley Plaza and derided the efforts of the Tanner majority to present the two decisions as reconcilable. "Our institutional duty is to follow the law as it now is... [and] we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive" the Tanner decision. The process of reasoning through which the Court reached its conclusion is quite interesting. It relied on the principle of equality in the field of ideas or ideological neutrality. This principle, which had been first used in the cases of the 60s, postulates that once a public forum has been opened to some group or category of speech it cannot be denied

to other "undesirable" people or ideas. In Hudgens, the Court used the principle in an original way: Tanner had ruled that anti-war protestors have no constitutional right to communicate their ideas in a privately owned shopping centre. The principle of equality demanded that trade unionists should have no such right either and should be excluded from the centre, if the owners so wished. The fact that the picketing in Hudgens was related to a labour dispute involving a shopping centre store was declared irrelevant.[194] Justice Marshall, dissenting, argued as in Logan Valley and Tanner, for a function theory of private property for First Amendment purposes. He thought that the majority's resolution of the conflict between property and free speech was formalistic and ignored the importance of massive shopping centres for local communities. The autonomy of the owners should be reconciled with the interests of the public, since "the shopping center owner has assumed the traditional role of the state in its control of historical First Amendment forums".[195] Such a radical doctrinal change was not forthcoming, however. Tanner brought to an end the line of development which was envisaged in Logan Valley's identification of shopping centres with company towns.

In 1976, too, the Court addressed the question of the permissibility of political activities in military installations open to the public, (Greer v. Spock).[196] In an earlier unanimous per curiam opinion (Flowers v. U.S.)[197] the Court had held that a peaceful leafleteer could not be excluded from the main street of a military reservation which was open to the public. The base commandant could "no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street". In the case of Spock, the anti-war leader Dr. B. Spock, who was running for the 1972 presidential elections, and three other candidates, informed the commanding officer of another military reservation that they intended to hold a meeting and distribute campaign literature in it. The officer

denied permission invoking a post regulation which prohibited all political activities. The Court of Appeals granted an injunction against the military authorities based on the Flowers decision, but the Supreme Court reversed.

Justice Stewart distinguished the two cases arguing that the military authorities of the second reservation had not "abandoned any claim of special interests in who walks, talks or distributes leaflets on the avenue", while the authorities of the Flowers camp had. The District Court and dissenting Justice Brennan found, on the contrary, after a detailed examination of the facts that the second reservation was clearly a more "open post" than the first. On the general issues involved in the case, the Court held that the purpose of the army is to be prepared for the "common defense" and that the military must be "insulated from both the reality and the appearance" of politics. Furthermore, the commanding officer is entitled to "avert what he perceives to be a clear danger to the loyalty, discipline or morale of troops on the base".[198]

The dissenters Brennan and Marshall thought that the decision went a long way toward the complete eradication of the constitutional rights of both civilians and servicemen "whenever the military thinks its functioning would be enhanced by so doing". Military preparedness does not require such drastic curtailment of political activities "unless, of course, the battlefields are the streets and the parking lots, or the war is one of ideologies and not men".[199]

Beyond the public protest cases, the Supreme Court dealt extensively with two other areas of First Amendment adjudication. The first was a continuation of the loyal/subversive ideas story of the fifties. The second was more of a new beginning: it led to the constitutionalisation and nationalisation of the law of libel and to a redefinition of the constitutional guarantee of a free press.

C. The Loyalty-Security Cases of the Sixties and Seventies

The main threat to the established order was perceived as coming from the protest movements in the 60s and 70s, but the loyalty-security measures of the 50s remained in the statute books and were invoked, albeit more sparingly, against communists and subversives of the old type. As the communist danger, real or imaginary, had receded in the late 60s, the Supreme Court started to address more boldly the theoretical and legal problems created by the persisting loyalty-security complex.

In U.S. v. Robel[200] the Court dealt with the constitutionality of section 5(a)(1)(D) of the Internal Security Act, under which once a group was under final order to register as a communist-action organisation its members were barred from "any employment in any defense facility". Robel, a communist, was employed as a machinist in a privately owned shipyard which had been designated as a defence facility. When he continued to work there, after the Supreme Court had upheld the S.A.C.B. order against the Communist Party to register as a communist-action organisation, Robel was indicted for violation of the section. The Supreme Court in a 6-2 decision dismissed the indictment.

Chief Justice Warren found that the statute "sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership [and thus] runs afoul of the First Amendment".[201] The section did not distinguish, as it stood, between active and knowing members of the Communist Party and others who could not be prosecuted for C.P. membership, according to the criteria established in Scales. Furthermore the section did not distinguish between sensitive and non-sensitive positions in defence facilities, thus excluding communists from all employment irrespective

of the security problems involved. These two characteristics made the statute an unconstitutional violation of the rights of expression and association.

> "The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. The inhibiting effect on the exercise of First Amendment rights is clear... That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of 5(a)(1)(D) may occupy a nonsensitive position in a defense facility. Thus, 5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights."202

The Court recognised that there existed a valid state interest in preventing espionage and sabotage in defence facilities. It stressed, however, that when First Amendment freedoms are involved the legislature should achieve its valid goal by devising means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.

In Robel the Supreme Court indicated that the state interest in national security could be validly served through general loyalty screening programmes of defence facilities employees. Such a programme came up for review in Schneider v. Smith.[203] The Magnusson Act required that all applicants for seagoing employment obtain a certificate stating that their employment "would not be inimical to the security of the United States". The power to issue the certificates had been delegated by the President to the Coast Guard. Schneider applied for a job as a second assistant engineer and was asked to answer a questionnaire relating to his political beliefs and association. He stated that he

did not advocate the forcible overthrow of the government but that he had been a member of some organisations on the Attorney-General's list. When he was requested to answer a number of more detailed questions, he refused and sought a declaratory judgment on the cnnstitutionality of the Coast Guard's power to deny him employment. A district court dismissed the suit but the Supreme Court reversed unanimously.

Justice Douglas construed the Act narrowly and avoided the question of its constitutionality. Despite the obvious legislative purpose of the Act, he stated that "we are loath to conclude that Congress in its grant of authority to the President to safeguard vessels and waterfront facilities from sabotage or other subversive acts, undertook to reach into the First Amendment area" and that "we hesitate to conclude that Congress told the Executive to ferret out the ideological strays in the maritime industry".[204] Since Schneider was not charged with any acts inimical to the security of the United States his beliefs and associations could not become the ground for refusal of employment.

In three cases decided on the same day in 1971 the Court returned to the loyalty investigations for admission to the Bar. In Baird v. State Bar of Arizona[205] petitioner had been denied admission because she refused to answer whether she had ever been a member of the Communist Party or any other subversive organisation. She had answered nevertheless another question listing all organisations she had associated with since the age of sixteen.

Justice Black wrote the plurality opinion and reversed the Arizona Supreme Court which had upheld the Bar Committee's refusal. He referred to the cases of Anastaplo, Konigsberg and Schware, which had dealt with the issue in the 50s and concluded that they "contain thousands of pages of confusing formulas, refined reasonings and puzzling holdings that touch on the same suspicions and fears about citizenship and loyalty". The

issue was a "divisive and bitter" one and should be resolved in a simple way: "narrate its simple facts and then relate them to the 45 words that make up the First Amendment".[206] Thus Justice Black returned to his "absolute" theory of freedom of expression and quoted from the cases of the 40s which had developed the "preferred freedom" position. Having made clear his theoretical basis he went on to resolve the case accordingly overruling in the process the earlier Bar admission decisions.

> "[A] state may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes... Without detailed reference to all prior cases, it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law."207

Furthermore, Black held that the practice of law is not "a matter of grace, but of right for one who is qualified by his learning or his moral character". Justice Stewart concurred in a separate opinion while four Justices dissented.

In Re Stolar[208] the issue was resolved in a similar way to Baird and produced the same divisions among the Justices. In that case the applicant, a member of the New York Bar seeking admission to the Ohio Bar, had refused to answer one question about his membership of subversive organisations and two more requesting a list of all organisations of which he had been a member "since registering as a law student".

Justice Black again rejected the various reasons advanced by the state for putting the questions. Citing Shelton v. Tucker[209], he held that "law students who know they must survive this screening process before practising their profession are encouraged to protect their future by shunning unpopular or controversial organisations" and concluded that not one overt act existed in the record that could cast

doubt on Stolar's moral character or professional fitness. For the dissenters the "crux" of the matter was that "to forestall inquiry at the threshold stultifies Ohio's appropriate concern as to faithful adherence to a lawyer's trust when the state is about to rest great professional and fiduciary power in those who seek entrance to the Bar".[210]

In the third case (Law Students Civil Rights Research Council v. Wadmond)[211] a number of organisations and individuals representing a class of law students and graduates attacked on constitutional grounds the screening procedures of the New York Bar for determining the character and fitness of applicants. Justice Stewart, who had given a decisive fifth vote in the first two cases, changed camps and wrote the 5-4 opinion which upheld the constitutionality of the practice.

He first sustained the "character and fitness" requirement of the screening procedure in general and then went on to examine the constitutionality of certain specific questions. Questions about past membership of subversive organisations were found constitutional since they were put in terms which followed the "knowing and intentional" membership requirements of Scales. Returning to the ruling of Konigsberg, the Court held that "/i/t is also well settled that Bar examiners may ask about Communist affiliations as preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer... Surely a state is constitutionally entitled to make such an inquiry of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men and between a man and his government".[212] Finally on the general challenge that the screening system had a serious "chilling effect" on the exercise of the rights to speech and association the Court held that this was an argument based solely on policy and therefore outside its power and jurisdiction.

The four Justices, who held the majority position in Baird and Stolar, dissented. Black repeated the same accusations that had been levelled against him in those cases: "I do not see how today's decision can be reconciled with other decisions of the Court". He was particularly incensed by one question which asked the applicants to affirm that they are "without any mental reservation, loyal to and ready to support the Constitution of the U.S.". He found the "mental reservation" requirement overbroad and the whole question an unconstitutional exercise reserving the law profession to those who hold certain unspecified loyal beliefs.

> "Perhaps almost anyone would be stunned if a State sought to take away a man's house because he failed to prove his loyalty or refused to answer questions about his political beliefs. But it seems to me that New York is attempting to deprive people of the right to practice law for precisely these reasons, and the Court is approving its actions."213

In Connell v. Higginbotham[214] the Court dealt with the loyalty oaths required from school teachers in Florida. In a per curium decision it upheld the part of the oath stating "that I will support the Constitution of the United States and the State of Florida" but invalidated another provision according to which the oathtaker should disclaim the belief in the violent overthrow of the government. The provision was struck because it led to "summary dismissal from public employment without hearing or inquiry". Refusal to take the oath was made a "conclusive, irrebutable proof of the proscribed belief", thus violating due process requirements.

In Cole v. Richardson,[215] however, the Supreme Court sustained the Massachussetts loyalty oath "to uphold and defend the Constitution... [and to] oppose the overthrow of the government... by force, violence or any illegal or unconstitutional means" required from all state employees. The oath had been demanded by the Boston State Hospital in which Richardson had been employed as a research sociologist. When she

refused to take it she was dismissed but the District Court granted an injunction against the hospital finding the second part of the oath "fatally vague and unspecific". The Supreme Court reversed, per Chief Justice Burger.

Dismissing summarily the challenge against the first, the Chief Justice addressed himself to the second part of the oath. He stated that the District Court was wrongly troubled by the oath. By defining the word "oppose" in a too literalist way, it came to the unwarranted conclusion that the oathtaking imposed "nebulous, undefined responsibilities for action in some hypothetical situations". Such an approach of "dissection with a semantic scalpel could make any word vague and ambiguous" and was little more than "verbal calisthenics". According to the Court's "non-literal" analysis, the second part was a "repetition" of the first; the word "oppose", being "the negative implication" of "support" for the constitutional system as demanded by the first clause, was "redundant". This semantic redundancy was not of constitutional interest: "[we] are not charged with correcting grammar (sic) but with enforcing a constitution".[216] Furthermore the Court held that the oath was a mere "amenity", that no criminal prosecution was threatened for refusal to take it and that it was not a part of an "endless parade of horribles".[217] The fact that refusal to take the oath led to dismissal without any hearing, which was relied upon in Connell, was not one of the "horribles", since the oath was constitutional. Three Justices dissented. For Douglas the oath was a direct violation of First Amendment rights in addition to being vague and overbroad. Referring to his Brandenburg dictum that the line between permissible and prohibited state control is one "between ideas and overt acts", he stated that the oath requires from people to pledge that they "'oppose' that which [they have] an indisputable right to advocate".[218]

During the same year the Court endorsed the long standing practice of the Executive to refuse visas to foreign "subversives" wishing to visit the United States. In Kleindienst v. Mandel[219] the renowned Belgian Marxist economist was refused entry under a provision of the Immigration and Nationality Act which excludes aliens "who write or publish... the economic, international and governmental doctrines of world communism". The Attorney-General could grant a temporary waiver, which he refused. Mandel had been invited for a lecture tour at various colleges and a number of professors joined him in bringing a suit against the Attorney General. The District Court found that the exclusion violated the professors' rights to hear Mandel and engage in free academic debate but the Supreme Court reversed. Justice Blackmun stated that a "facially legitimate and bona fide reason" existed for Mandel's exclusion and that no serious First Amendment rights were involved in the case. Thus the Court assured the Executive for one more time, as the dissent put it, that it would not question "the discretion to pick and choose among the ideological offerings which alien lecturers tender from our platforms".[220]

Finally, two years later the loyalty oath requirement for access to the ballot was dealt with in Communist Party of Indiana v. Whitcomb.[221] Under Indiana law all candidates for elective offices should pledge by oath that they do not advocate the "overthrow of local, state or National Government by force or violence". The Communist Party refused to comply and its candidate for the Presidency was denied a place on the Indiana ballot for the 1972 elections. Its efforts to obtain injunctive relief against the Indiana Election Board failed. It subsequently submitted an affidavit qualifying the oath in accordance with the Supreme Court Yates decision, which was rejected by the Board. In 1974 the Supreme Court invalidated the oath as violative of the First and Fourteenth Amendments. Counsel for the state argued that the oath should

be sustained even though it did not distinguish between advocacy of abstract doctrine and advocacy of action as required by Yates for the criminal prosecution of communists and subversives. In addition he maintained that the Communist Party was a "fraudulent group" disguising itself as a political party. Justice Brennan rejected all these contentions. The differentiation between advocacy of abstract doctrine and action should be extended to the field of politics proper. The right to exercise the "franchise in a free and unimpaired manner is preservative of other basic civil and political rights" and the interest in free and effective political action should be treated at least as favourably as the ones in "public employment, tax exemption or the practice of law".[222]

Thus some 25 years after Dennis the Supreme Court admitted the Communist Party in the national political life as a legitimate political group. In itself the decision was an important one and has since been denounced by a constitutional author for putting the Communist Party on an equal footing with other legitimate parties.[223] On the other hand, as the Wadmond and Richardson decisions above show, past or present membership of the Communist Party and adherence to assorted subversive beliefs continued to be used as a ground for the refusal of various rights and benefits. While a politically annihilated party was finally recognised as legal, communists, ex-communists and "subversives" were still harassed and discriminated against. As it has been argued in the previous chapter the legal persecution of the Communist Party in the 50s was used more as a springboard for the setting up of a framework proscribing radical ideas and people rather than as a goal in itself. In this sense, even though a period of formal restrictions on the Communist Party was undisputedly brought to an end by the Indiana case, important components of the loyalty-security complex remained intact to be utilized in some new era of moral and political panic.

It is instructive at this point to compare the vaccilating decisions of the Court in the area of loyalty oaths with a recent decision in which a state-imposed obligation to publicly state a certain political message conflicted with the religious beliefs of followers of the Jehovah's Witnesses sect. A New Hampshire statute required all non-commercial motor vehicles to bear number plates with the state motto "Live Free or Die". Obscuring the motto was a misdemeanour. A couple of Witnesses found the motto repugnant to their "moral, religious and political beliefs", covered it and the husband was subsequently three times charged and twice convicted to small fines under the statute. The District Court granted an injunction against future arrests and prosecutions and the Supreme Court in Wooley v. Maynard[224] affirmed.

The opinion was written by Chief Justice Burger who treated the New Hampshire statute as imposing upon individuals the obligation to disseminate publicly non-held ideological beliefs. The statute, Burger held, "requires that appellees use their private property as a 'mobile billboard' for the state's ideological message - or suffer a penalty... [and] display "Live Free or Die" to hundreds of people each day". Burger, therefore, viewed the motto embossed on all cars as a compulsory public affirmation of belief to a particular ideology and in doing so he identified the case with the earlier Cole where he had sustained the loyalty oath on the ground that the public affirmation of non-subversive ideas was a valid requirement for state employment. Ironically, however, the only valid precedent that he utilised to resolve the conflict in Maynard was the 1943 Barnette case while none of the intervening loyalty oath cases was mentioned. Based on the early flag salute case, Burger found the statutory requirement an unconstitutional invasion in the sphere of "intellect and spirit". The right to speak and to refrain from speaking were declared the "complementary components of the broader concept of 'individual freedom

of mind!". The First Amendment "protects the individuals to hold a point of view different from the majority and to refuse to foster... an idea they find morally objectionable". Finally the state interest in promoting "appreciation of history, individualism and state pride" was not ideologically neutral and could not outweigh the individual right "to avoid becoming the courier for such message".[225]

These were sweeping and startling statements, if one compares the form and content of the expression and of the penalties involved in Maynard with those in the loyalty oaths cases, where remaining silent was construed not as a right but as the standard of criminal liability and the reason for severe penalties. A further irony of the case was that the three dissenting Justices, who were among the foremost supporters of the loyalty oaths, argued that the case was wrongly decided because no compulsory affirmation of beliefs was involved. Expressive rights are implicated according to Justice Rehnquist, probably the most conservative Justice of the period, only when the citizen is placed in the position of either apparently or actually "asserting as true" the messages.[226] But when such assertions were indisputably requested from citizens, Rehnquist had always sustained the demand.

Wooley falls in the category of cases in which the Court employed a wide theory of thought, conscience and speech protection. As such it may replace in constitutional treatises the earlier Barnette decision, as a standard indication of the liberal spirit of the Supreme Court. But when it is compared with the loyalty oath cases which raised substantially similar questions, Wooley may be put in its proper perspective. The liberal rhetoric was used in order to distinguish and protect the claims of a small and eccentric, religious minority. The "intellect and spirit" of radical, political dissenters have been consistently accorded a much lower degree of protection.

D. Freedom of the Press and the Constitutionalisation of the Law of Libel

The most important departure in First Amendment theory and legal doctrine in the period under consideration, was made in the area of libel law. Before the 1964 New York Times v. Sullivan[227] decision, the Supreme Court had made clear that both civil and criminal libel were outside the protection of the First Amendment and were ruled by the differing common law or statutory standards of the various states. In its famous Chaplinsky[228] decision the Supreme Court had distinguished between utterances protected by the free speech clause and others which are "no essential part of any exposition of ideas, and are of such slight value as a step to truth" and had included libellous statements in the second category. The Chaplinsky statement and other similar dicta[229] did not address the relation between libel law and freedom of speech. It included libel and other categories of speech (the lewd and obscene, the profane, the insulting or "fighting words") in the list of unprotected utterances, by a question begging process of definitional categorization without any further explanation. However, when the Court came to discuss in detail the relationship between defamation and freedom of speech, in the New York Times case, the result was an almost complete reversal of its earlier rulings.

The Times case arose out of the Southern efforts to harass and suppress the civil rights movement. In the Southern demonology of subversives, the Eastern liberal press, which had adopted a pro-civil rights editorial policy, ranked high. When the New York Times carried an advertisement by a Civil Rights Committee denouncing various civil rights violations in Montgomery, Alabama, the Commissioner of Public Affairs of that city brought a libel suit in Alabama and obtained an award of $500,000 in damages, which was affirmed by the Supreme Court of that state. The main basis of the excessively high award was a number

of factual errors that had appeared in the paid advertisement: M.L. King had not been arrested seven times, as the advertisement asserted, but only four; the police had been deployed in force near a college campus where students were protesting, but had not "ringed" it; the students had boycotted the classes but had not refused to re-register, and so on. The fact that the gist of the allegations had not been refuted by Sullivan; that only thirty-five copies of the paper had been sold in Montgomery;[230] and the level of the damages award made the case a clear example of Southern intimidation of the national liberal press through the use of state libel law.

When the case reached the Supreme Court, the political undertones of the libel award assured reversal which, indeed, was unanimous. But in the process of reversing the state courts' decision, Justice Brennan, who wrote the opinion for the Supreme Court, went out of his way and made several general statements both on the theory and justification of freedom of expression and on the "technical" aspects of libel law.

He started by stating that although the state courts had construed the Times advertisement as a libellous statement, constitutional scrutiny was not precluded. He thus cleared the way for the invocation of the First Amendment and went on to explain the import of the clause. The Amendment amounts to a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on governmental and public officials".[231] Under this rule, the advertisement qualified, on its face, for constitutional protection and the Court examined in this light the principles of Alabama's libel law. The falsity of the statements was rejected as the basis for denying constitutional protection: "factual error affords no warrant for repressing speech that would otherwise be free"; injury to official

reputation did not suffice, either: "the right of free public discussion of the stewardship of public officials is a fundamental principle of the American form of government"; finally, a combination of factual error and injury to official reputation was equally inadequate to "remove the shield from criticism of official conduct... This is the lesson to be drawn from the great controversy over the Sedition Act of 1798... which first crystallized a national awareness of the central meaning of the First Amendment".[232]

Brennan reviewed the "great controversy" and concluded that the "attack upon [the] validity [of the Sedition Act] has carried the day in the court of history". Thus, the Act was declared unconstitutional 166 years after its enactment. According to the Court, seditious libel had no place in the American legal system. The traditional law of libel created a sort of self-censorship by forcing people "to make only statements which steer far wider of the unlawful zone". Its standards should be, therefore, relaxed in accordance with the underlying philosophy of the First Amendment.

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not".[233]

Justice Brennan remanded the case because it was impossible to determine whether the Alabama courts had followed the "actual malice" rule. He indicated, however, after an "independent examination of the whole record" that the evidence could not support a new finding against the Times under the new rules. Justice Black, Douglas and Goldberg concurred in the result, but stated that "actual malice" is an "elusive, abstract concept hard to prove and hard to disprove". They proposed instead an "unconditional right to say what one pleases about public

affairs... [this] is the minimum guarantee of the First Amendment".[234]

The New York Times decision has been greeted as a landmark one and as "the best and most important (the Supreme Court) has ever produced in the freedom of speech".[235] "It is an occasion for dancing in the streets", Alex.Meiklejohn enthused and his disciple H. Kalven underlined the fact that the Court discarded in it all previous legal doctrines in favour of an almost absolute protection of political speech. Kalven predicted that "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems... to be overwhelming".[236] But in an article written in the aftermath of the New York Times decision its author Justice Brennan stated that the Supreme Court had not adopted nor did it intend to adopt the "absolutist" position advocated by Meiklejohn and Kalven.[237]

Thus, under the Times rule, libellous statements were declared a category of speech which was not, by definition, outside the protection of the First Amendment. But subsequent Supreme Court rulings that sprung from the principles enunciated in Times were cautious. The Times rule did not spill over, against Kalven's prediction, to other areas of public discourse and was invoked exclusively in cases involving alleged defamatory statements about the official conduct of public officials and public figures. In these cases, the "Times progeny" so to speak, the Supreme Court gradually removed the differences between the various state jurisdictions and imposed on the states the libel law principles enunciated in the Times case.

In Garrison v. Louisiana[238] the Times rule was applied to a prosecution for criminal libel. The Court reversed the conviction of the District Attorney of New Orleans who had accused the city judges for inefficiency, laziness and racketeer connections. The Court stated

that although some statements relating to the fitness of public officials could impinge upon their private reputation, this was not enough reason for the relaxation of the Times rule.

In Rosenblatt v. Baer[239] a first sign of tension in the evolving libel case law became evident. The question was whether the application of the Times rule was determined by the nature of the issues involved or by the character of the defamation plaintiffs as public officials. Justice Brennan for the majority adopted the second course. He did not offer a definition of the term "public official" but he stated that the "..designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs".[240] Justice Douglas found this rule inadequate and thought that the question should be "..whether a public issue, not a public official, is involved".[241]

In two 1967 cases[242] the Court added the category of "public figures" to that of public officials. An athletics director and a retired general were found to be "public figures" because "they commanded a substantial amount of independent public interest at the time of the (libellous) publications". Their libel suits against a newspaper and the Associated Press news agency, respectively, should be examined under the Times rule. Four Justices stated that in cases involving the defamation of public figures a less stringent rule should be followed for the award of damages. A "public figure" who is not a public official should be able to recover damages for a defamatory falsehood "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers".[243] But according to Chief Justice Warren and

the Court majority, the differentiation between public officials and figures has no basis in "law, logic or First Amendment policy" and cannot be used as the standard for the relaxation of the Times rule. Warren pointed at the blurring of the public/private line: "This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large".[244] Public figures, too, should prove "actual malice" in order to recover defamation damages.

The Times rule was next extended to all candidates for public office.[245] A candidate, the Court reasoned, puts all aspects of his life in front of the electorate, for public scrutiny. Thus when he "seeks to further his cause through the prominent display of his wife and children [he] can hardly argue that his qualities as a husband or father remain of 'purely private' concern". All statements about a candidate were found relevant to his fitness for office.

But in Goldwater v. Ginzburg,[246] the Court denied certiorari and affirmed the award of substantive damages against the publisher of a magazine which had printed an article arguing that B. Goldwater was psychologically unfit to become president.

In St. Amant v. Thompson,[247] the Court distinguished the "reckless disregard of truth" part of the actual malice rule from the similar concept of the law of negligence. For libel law purposes reckless disregard is not "measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication".[248]

In the case of Rosenbloom v. Metromeda[249] the Court moved toward the Black-Douglas position who had consistently argued throughout the series of libel cases that libel suits had no place within the system of freedom of press. In that case, a distributor of pornographic magazines had obtained $750,000 in damages for a series of allegedly defamatory broadcasts which had followed his arrest and trial for criminal obscenity in which he was found not guilty. The Supreme Court reversed the award of damages and extended the "actual malice" rule to statements about people outside the public domain proper.

Justice Brennan stated that the public had an interest in the event "the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety". A subject of public interest does not lose its importance because a private person was involved in it. The commitment to an uninhibited, robust debate on public issues should extend to all matters of "public or general concern".

The extension of the strict defamation rule to private persons undermined one of the reasons given in earlier cases for the creation of the rule. As Justice Goldberg had argued in the New York Times case, for example, "the public official certainly has equal if not greater access than most private citizens to media of communication" and could, therefore, reply to any misstatements and falsehoods that affected his reputation.[250] Public officials and figures were assumed to be able to upset the adverse effects on their reputation through their greater capacity of access to the media. But in Rosenbloom, the Court rejected a petitioner's objection to the extension of the "actual malice" rule based on the access assumption. Denials and retractions of news stories were not "hot" news even if they were made by public officials; their publications depended solely upon the continuing interest of the media in the story.[251]

Furthermore, as the American commitment to private property placed vast economic and social power in private hands "we are virtually all 'public' men to some degree". The distinction between public figures, whose entire life was open to public scrutiny, and private citizens concealed from all "public view" was an untenable "legal fiction". Thus, the Court rejected in Rosenbloom a differentiation in the rules of recovery of defamation damages, based on the different opportunities of public and private citizens; it added that the states could improve the capacity of private citizens to respond to adverse publicity and took notice of an article by Professor Barron which argues for the creation of a legal right of access to the media.[252]

Rosenbloom indicated that the Court was moving toward an extension of the applicability of the Times rule; it left the earlier distinction between public officials and figures and private citizens in some confusion. However, in Gertz v. Welch Inc.,[253] the Court drew back from this position. In that case, the libel plaintiff was a Chicago attorney who had been accused by a magazine that he was involved in a conspiracy to discredit the police and that he was a fellow traveller. The lower federal courts had applied the Times rule and had concluded that the petitioner failed to prove actual malice on the part of the publishers. The Supreme Court, however, reversed and remanded.

Justice Powell, for the Court, drew a distinction between false and pernicious ideas and false statements of facts. He accepted that although lies are not worthy of constitutional protection, they are inevitable in free debate, and their limited protection was one of the main results of the Times rule and its progeny. The change of the common law rules of defamation was motivated by the "need to avoid self-censorship by the news media". The interest in free public debate should be balanced, however, against the social interest underlying the law of libel, that in the protection of individual

reputation. This protection is a reflection of the "basic concept of the essential dignity of every human being - a concept at the root of any decent system of ordered liberty".[254] The interest in human dignity is more at stake when the libel plaintiffs are private individuals. Public officials have greater access to the mass media and have voluntarily accepted the risk of closer public scrutiny. Equally these public figures who "have assumed roles of especial prominence in the affairs of society... [or who] occupy positions of... persuasive power... have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved".[255] However, the Court sounded a cautionary note on this access based theory of the Times rule. Although public officials and figures have greater access to the media in order to rebuff unfair criticisms, even they need some protection from false factual statements, since "truth never catches up with the lie".[256] Thus, the Court rejected the Rosenbloom ruling, according to which the "general or public interest" of the issues involved determined the applicability of the Times rule, and returned to the earlier distinction based on the status of the plaintiffs. In a further attempt at a meaningful definition of the category of "public figures" the Court held that some individuals become public figures for a limited range of issues and that a case-by-case examination of the "nature and extent of an individual's participation" in a particular public controversy should decide his status.

When however the plaintiff is a private individual the balance should be struck in favour of the interest in reputation and the strict rules should not apply. The Court held that liability for the defamation of private citizens exists when the publisher is "at fault" (without explaining this term which however is less strict than "actual malice"); in cases where "actual malice" is not proven presumed or punitive damages should not be awarded and the compensation should be commensurate

Following Gertz, the Court continued to refine its definition of public figures. A research assistance who had gained access to the media in order to respond to the announcement of a derogatory "award" given to him by a Senator for wasting public money, had not become a public figure by that fact alone. (Hutchinson v. Proxmire). The media cannot create a "public figure" merely by quoting a person in a limited context, and then claim the protection of the Times rule. One of the "accoutrements of having become a public figure is the regular and continuing access to the media", the Court held.[258] In another 1979 case (Wolston v. Readers' Digest Assoc.), petitioner had been named as a KGB agent in a "spy-revealing" book. Wolston had been convicted in 1958 for contempt of court, because he had failed to respond to a subpoena of a grand jury investigating Soviet espionage, but no further action had been taken against him. The Court rejected the contention that "any person who engages in criminal conduct automatically becomes a public figure"; such a rule "would create an open season for all who sought to defame persons convicted of a crime".[259]

As we saw the evolution of the federal constitutional rules of libel law were connected with the question of access to the media. Indeed in Rosenbloom the Court indicated that the creation of a legal right of access could be seen as compensating the increasing difficulty of public and private persons in recovering defamation damages. In Miami Herald Publishing Co. v. Tornillo,[260] the Court addressed the problem of access to the press in reply to newspapers attacks. Tornillo, the leader of a teachers' union, was a candidate in the Democratic primaries for the Florida House of Representatives elections. The Miami Herald attacked editorially his candidature, on two occasions, and accused him for the role he had played in an earlier official union strike. Tornillo asked the newspaper to print a reply to the attacks. He based his request on

a little used Florida statute which obliged newspapers to publish, free of cost, the replies of candidates for public office whose personal character or official record had been assailed. The newspaper refused to publish and Tornillo brought a suit for declaratory and injunctive relief. The Florida Supreme Court upheld the constitutionality of the "right to reply" statute and granted the injunction, but the Supreme Court reversed unanimously.

Chief Justice Burger reviewed favourably the literature arguing for the creation of a legal right of access to the media (constitutionally or statutorily enforced) which was put before the Court by Professor J. Barron, the leading exponent in the field. He took notice of the communication revolution, of the trend toward media concentration and monopolization, and of the economic factors that "have made entry into the marketplace of ideas served by the print media almost impossible".[261] However, after the sympathetic review of the pro-access material, the Court invalidated the Florida statute as a violation of the freedom of the press. The implementation of a statutorily enforced right of access called for the creation of a mechanism which would be necessarily censorial, reasoned the Court. The obligation to provide space for replies free of cost would "dampen the vigor and limit the variety of public debate" by forcing editors to avoid controversial topics. As the right of access to the media could be neither constitutionally enforced nor statutorily created, the Court accepted that the power of a newspaper to advance its political, social and economic views is limited, solely, by considerations of financial success and editorial integrity.[262] "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated". Notwithstanding these passing remarks about editorial integrity and responsibility, the Court's opinion was categorical: "The

choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment".[263] Thus, for the first time in its history, the Supreme Court adopted a doctrine of almost absolute protection of speech - whether fair or unfair - but only for the publishers and editors of the mass print media. Even one of the leading opponents of the creation of a legal right of access to the media regrets the weak reasoning and absolute language of the decision. "From the perspective of First Amendment law generally, Miami Herald would be a stark and unexplained deviation if one were to read the decision as creating absolute prohibition on access obligations. One would expect some rationalization in support of such a course".[264]

In the New York Times case the First Amendment was declared to have as its central meaning "the uninhibited, robust and wide open public debate"; the Times progeny allegedly materialized this principle by gradually freeing the print industry from the barriers of traditional defamation law. The Miami Herald ruling, ten years after the Times case, may be seen as an extension of the same process. The free public debate rationale of Times was applied almost exclusively to cases related to the print media. Thus, at the end, it became subdued to an absolutely sounding principle of editorial autonomy. In the process, the original "free market of ideas" rationale was lost. As B. Schmidt approvingly concludes his review of Miami Herald: "The Court sees a core principle in the First Amendment from which it will not exact instrumental justification... the decision represents a judicial preference for the principle of publisher autonomy over the competing policies of diversity of expression".[265] This core principle of editorial autonomy resembles the "guarantees of religious liberty" while the "policies of diversity of

expression and equality may have to find their primary outlet in the guarantee of freedom of speech"[266] and they are, therefore, only of secondary importance.

E. The Supreme Court, Legal Doctrine and the Public Sphere

9. Facets of Protest

9.1. The early civil rights movement

The civil rights movement brought back to the Supreme Court the question of public activities in the public forum. The earlier Jehovah's Witnesses and trade union cases had addressed the problem, but the pre-occupation of both legislatures and the judiciary with dangerous ideas, during the fifties, had suspended the examination of public forum issues. "The problem receded and the story of the streets became a bit quaint. We were likely to regard the law that had been developed as one that concerned a luxury civil liberty".[267] When the problem re-appeared in the sixties, it could no more be considered as a luxury. Combining a massive character, a variety of protest methods and a deeply felt sense of injustice, the civil rights movement could not be construed as a temporary aberration or as the annoying but innocuous antics of an eccentric minority. Thus, while it attacked the systematic violations of civil rights, the movement posed at the same time serious questions relating to civil liberties. The protestors claim for equal treatment was inextricably linked with their claim to use public places as fora for airing their grievances.

The intimate connection between civil rights and civil liberties issues makes the black movement of the early sixties a special case, and the claims of expressive rights involved cannot be examined in isolation. The fact that many of the practices that were the object of protest had been declared unconstitutional obviously helped the Supreme Court to uphold the

protest activities themselves. Indeed, one category of protest which has been called "direct civil disobedience"[268] involved an open violation of local laws and practices deemed unconstitutional, with the declared purpose of invoking federal judicial intervention and invalidations of the offending laws (for example sit-ins in statutorily segregated places). In such cases the protest activities had the dual purpose of publicizing grievances and of setting in motion federal authorities against recalcitrant or feet-dragging local ones. The Court had little difficulty in protecting such protest activities. Local law-breaking was dealt with as a legitimate self-help tactic that appealed above the heads of local majorities and courts to the higher rationality and justice embodied in the Federal Constitution. To facilitate this process, the Court relaxed traditional rules of standing, inviting, thus, early appeals to the federal jurisdiction. To the extent that the protestors were prepared to accept punishment for their disobedience and place the fate of their cause at the hands of federal judges, accepting the ultimate morality of the legal system as a whole,[269] the protest tactics were sustained and local convictions were reversed.

Thus, the early sit-in cases were dealt with as an inseparable whole: if the content of the claim (equality of treatment, desegregation) was deemed valid, its form (the particular protest activity) was upheld, too. This identification of the form and content of the various claims was most easily effected when the particular discriminatory practice was ordered by state or local law. However, the concept of "state action", which was extensively used in those cases, could not serve equally well when the discrimination was a result of long established but not legally sanctioned community practices or of the uncoerced decisions of the owners of private establishments. Similarly, when the protestors were convicted under general statutes, unobjectionable on equal protection grounds

(criminal trespass, breach of peace, disorderly conduct), the "state action" rationale and the collapse of expressive claims to the underlying substantive ones could not be easily used. In the former category of cases and up to the passage of the Civil Rights Act of 1964, the doctrine of state action was utilised in order to uphold the sit-ins, but it was considerably strained. (See, for example, Lombard and Griffin).[270] When the 1964 Act put an end to segregation in publicly used facilities and the sit-in wave subsided, the Supreme Court was forced to deal in a more direct way with traditional protest activities in the public fora, like assemblies, marches, demonstrations and picketing.

What becomes immediately apparent from the examination of the relevant cases, is that the Court avoided the formulation of any coherent theoretical or doctrinal approach which could serve as the backbone for the decision of concrete cases. Indeed, the few general pronouncements that can be found are usually elliptic and contradictory. Thus, Justice Harlan stated in Garner that sit-ins are "as much part of the free trade in ideas as is verbal expression". In Edwards, the march and the picketing was declared an exercise of basic constitutional rights in their "most pristine and classic form". But in Cox, the Court reintroduced the concept of lower level expressive activities - "patrolling, marching and picketing on streets and highways" - that cannot be afforded "the same kind of freedom as pure speech". Justice Black took an even more extreme position and declared that patrolling and marching were pure conduct, as distinguished from speech, and their regulation or prohibition only incidentally affected expressive rights. In Brown the Court went back and stated that freedom of speech includes the right of "peaceable and orderly protest by silent and reproachful presence". But in Adderley the old theory according to which the Government, as the owner of public places, can exclude public protest from its property as any other private owner, repudiated in Hague v. C.I.O., was resurrected by Black.[271]

It can be argued, however, that with the appearance of black militancy and the anti-war movement, in the mid-sixties, the Court moved towards a more conservative approach. The conceptual and constitutional status of the protest activities remained obscure, but the decisions reflect a growing intolerance toward even the peaceful and good natured protest activities. H. Kalven concludes his exhaustive review of Cox, by stating that the Court chose to discard its "fine tradition" of public fora precedents and that it distorted the facts of the case.[272] T. Emerson, who has taken a more critical attitude toward the case law, concludes equally that the Supreme Court "came close to abandoning the doctrine that there is an "immemorial right" to use the streets, parks and other public places for purposes of assembly and petition".[273]

Thus, after the end of the sit-in cases, the Court failed to accord any particular importance to the continuing civil rights or to the growing anti-war protests. The earlier validation of the forms of protest on the ground of their legitimate content came to an end and the various protest activities were treated on a case to case basis. Any mention to the substance of the demands that appears in the later cases is usually dismissive, and these demands are weighed against the "paramount" interests in internal order, tranquility and the values of the rule of law. A clear distinction was, therefore, drawn between the earlier demands for equality and similar grievances and forms of protest which arrived in the courts after 1965. Justice Black's performance was characteristic of that change. His opinions gave the impression that the necessary reforms were well under way, spearheaded not least by judicial intervention, and that the continuation of dissent activities was clearly jeopardising the achieved reforms as well as the overall "majesty of the law".[274] Justice Douglas only continued to link the protest activities with the substance of the grievances. He insisted that since

the substantive demands of the protesting minorities had not been met, a constitutional niche for protest and disobedient activities should be found. Following this line, Douglas was forced to a continual and consistent minority position.

9.2. Equality of ideas in the public forum

While the Court did not work out any consistent theory on the constitutional nature of public protest, it utilised a number of approaches when dealing with the issues raised in each particular case. It accepted, in general, that protest activities differ from "pure speech" and set up certain standards according to which the contextual characteristics of protest could be regulated.

When the fora of protest were public streets, parks and similar places, the Court insisted that the granting of licences and the prosecution of protestors under general breach of peace statutes and the like should not discriminate against certain ideas or groups. The regulation of the time, place or manner of the particular protest should not be used as a pretext for the suppression of certain unpopular messages. The concept of equality in the field of ideas or content neutrality in the regulation of the circumstances of protest was the most repeated doctrine in the cases of the sixties and seventies (for example, Shuttlesworth, Bachellar, Coates and Mosley).[275] The doctrine has been greeted as a clear liberal victory and as the judicial endorsement of the "Meiklejohn thesis" according to which the content of ideas should be absolutely protected while their presentation should be regulated by clear and non-discriminatory "rules or order". The Meiklejohn thesis was, however, considerably qualified.

First, the equality principle was applied exclusively to public expressive activities in streets and parks. The concept of the intrinsic unworthiness and dangerousness of certain political ideas remained intact although the "subversive" ideas of the 60s and 70s were not fully identified

with communism, as in the 50s.

Secondly, even within its more limited field of application, the principle of equality does not exclude and indeed is quite reconcilable with an across the board non-discriminatory prohibition of all public protest (Cameron v. Johnson).[276]

Thirdly, the application of the equality principle does not create great difficulties when the discrimination is ordered by a statute or ordinance in clear terms (as in Mosley). When, however, the statute is unobjectionable on its face the application of the principle is much more difficult. The banning of a politically undesirable demonstration can be easily couched in terms of traffic or noise regulation or the need for public comfort or convenience. Judges and juries are customarily used in the decoding of such legal subterfuge, to be sure. Even so, the impetus and immediate impact of a public protest is necessarily lost, if the protestors have to resort to the costly and time-consuming judicial proceedings. The problem is highlighted by the facts of Walker. In that case convictions arising from protest activities that took place in 1963 were still sub judice in 1969 (Shuttlesworth).[277]

Finally, even a fairly administered equality principle necessarily underestimates the structural inequalities of those groups which customarily use public fora for protest activities. Minority and radical groups are almost totally barred from the established and effective mass media, and their lack of opportunities of communication through the media can never be fully compensated by public protest. As a media lawyer argued, the equality principle has been used in order to restrict a broad right of access to the public fora and the decisions applying it cannot be used as a precedent for the creation of a right of access to the mass media.[278] In this and similar analyses a limited and controlled right of protest is seen as a means through which minority groups "let off steam" and accept the overall legitimacy of the political and social order.

When the demonstrators move from the streets to other public places the picture becomes more complicated. Protest activities outside a State Parliament and in a library were upheld (Edwards, Brown). But those outside a law court, a prison and a school were condemned on various grounds (Cox, Adderly, Grayned).[279] In those cases, the Court has insisted that the specific purpose to which the public establishment is dedicated and the disruptive effects of the protest on its normal operations should be taken into account. On the other hand, the direct link of the protest with the public facility on which it takes place has not been given equal weight. Thus, the later protest cases establish a tendency of insulating from protest the premises and surroundings of certain public places. Finally, public expressive activities have been banned from privately owned establishments open to the public (unless the owner authorizes them) and from open military facilities. The three shopping centre cases (Logan Valley, Tanner and Hudgens)[280] make quite interesting reading. The demise of Logan Valley is indicative of the relative value of precedent - even the most recent one. In Tanner the shopping centre's refusal to admit anti-war protest was upheld, despite the equality principle, on the ground that the protest was not directly related to the operations of the centre. But in Hudgens, the equality principle was relied upon in order to exclude union picketing, too, related to an industrial dispute with a business located in the centre. The principle of equality was interpreted as conferring both equal rights and equality in the refusal of rights.

9.3. Vagueness, overbreadth and symbolic speech

The other doctrines consistently used in the protest cases of the 60s were the related ones of "vagueness" and "overbreadth". The vagueness doctrine, which derives from the due process requirements of criminal law, postulates that a criminal offence must be formulated in clear language which gives "fair notice" of the proscribed conduct to "men of common

intelligence". According to the overbreadth doctrine, on the other hand, statutes which regulate or punish activities, that are a proper subject of state regulation, must not achieve their purpose by broad means which unnecessarily invade the area of protected freedoms.[281] These doctrines are, therefore, concerned in the main with the statutory language and its interpretation and constitute an injunction to the legislatures and the trial courts to draft and construe criminal laws clearly and unambiguously. The federal courts used these doctrines to reverse convictions and invalidate statutes and ordinances the language of which was vague or/and overbroad either on its face or as construed and applied in the particular case.

The vagueness and overbreadth doctrines were extensively used for the first time, in the early civil rights cases. They may be seen along with the relaxation of the standing to sue requirements as part of the Supreme Court's effort to accelerate reform and resist Southern harassment of the early protest movement. Although they appear as technical, they produced the most consistently liberal case law in recent Supreme Court jurisprudence. The majority of the decisions in which the two doctrines were employed sustained the protest activities, but their reliance on the meaning of the statutory language led to some strange results.

Thus, in Cameron, "unreasonable interference with free ingress or egress from public premise" was found to constitute clearly understood language; but in Gooding, the punishment of "opprobrious and abusive words" was declared vague and overbroad; equally the "contemptuous treatment" of the flag provision in Street. In Parker, however, the "conduct unbecoming an officer or gentleman" clause gave fair notice of the proscribed behaviour which included criticism of the Vietnam War by a navy officer. An interesting aspect of those cases was the frequent shift of judicial analysis from the "natural" to the "technical" meaning of

the crucial statutory terms. In Gooding the terms involved were taken in their dictionary meaning and were declared vague; their technical construction by the courts was discarded. But in Parker and Shuttlesworth the broad statutory language was saved by the fact that lower courts had defined in narrowly; according to these cases the "reasonable man" should seek the "fair notice" of the proscribed conduct in judicial reports. In Cole v. Richardson again, a "not too literal" analysis was used in order to uphold a loyalty oath. To use the dictionary meaning of words was an exercise in "verbal callisthenics" the Court ruled.[282]

In the late 60s and 70s the vagueness and overbreadth doctrines were employed in cases involving prosecutions for fighting, offensive and foul language. These cases offer another example of the manner in which breach of peace, offensive language or disorderly conduct statutes may be used in order to intimidate protestors and make protest a hazardous enterprise. But when "pure" speech was involved, the Supreme Court used the vagueness of the statutory definitions or their indiscriminate invocation in order to protect the protest. (Cohen, Watts, Gooding).[283] These decisions made clear that the Supreme Court would not tolerate convictions for mere offensive language, and this aspect at least of public speech - or rather of the public vocabulary - was almost totally protected.

When, however, public protest activities had a predominantly non-verbal character the Court's attitude was again ambiguous. The absence of any coherent theory of protest, noted above, meant that cases involving elements of symbolic speech were decided in contradictory ways. The "silent speech" of the early sit-ins was protected and the Court came close to accepting this form of protest as a constitutional exercise of free speech rights (Justice Harlan in Garner and Brown).[284] But as new and diverse forms of protest claimed similar status, the Court refrained from creating a comprehensive definition of "symbolic speech".

The draft card burning case was particularly important, in relation to the symbolic speech issue. The Court dismissed summarily the claims that the activity was a kind of symbolic speech and sustained the statute involved, as a constitutionally innocent regulation of the administrative needs of the draft system. To reach this conclusion the Court ruled that it was not competent to guess what purposes the legislature had in mind when passing the statute; but went on to provide a whole series of valid purposes which the Act was allegedly pursuing. It further disarticulated the doctrines of vagueness and overbreadth which until O'Brien had been used as mutually supportive. The Act was not vague because it singled out a well defined conduct for criminal prosecution. As a narrowly drafted law, the Act did not violate expressive rights either. The undermining of the doctrines of vagueness and overbreadth went even further in the later cases of Broadrick and Levy and their status in constitutional free speech adjudication remains somehow ambiguous.[285]

While O'Brien's conduct was not "symbolic speech", the wearing of black armbands in school in protest against the Vietnam War was found to be such speech (Tinker). Equally the public burning of a flag and other protest activities involving unorthodox displays of the flag (Street, Goguen, Spence).[286] One author has argued that the draft card and flag cases may be reconciled.[287] The former involved the protection of an unobjectionable state interest (in the efficiency of the draft system), while the interest protected by the flag desecration laws was an ideological one (the feelings of patriotism conveyed by the flag); according to Professor Ely the free market of ideas rationale of the First Amendment prohibits the protection or promotion of a uniform ideology. This analysis seems attractive but it must be somewhat qualified. Draft card and flag burning conveyed a similar message and both sets of statutes intended to suppress the message as well as the bizarre forms of protest through which it was

expressed. It can be argued that the contradictory results of the symbolic speech cases were due to the absence of any strict definition of what "speech" is for legal and constitutional purposes. This absence permits the differential construction of the various protest activities, as constitutionally protected or not speech, on a case to case basis. Extra-legal considerations may thus enter and influence the disposition of cases, while the utilisation of open-ended and elastic doctrines endows the judicial discourse with the element of continuity and consistence. The difference in outcome between the O'Brien and Spence cases may be attributed as much to the timing of the decisions - the first was decided in 1968, the second in 1974 after the protest movement had subsided - as to some substantial difference in the facts or the doctrines employed in the two cases.

10. The "National Commitment to an Uninhibited, Robust, Wide, Open Debate"

10.1. The preference for the freedom of the media

The most important doctrinal development in First Amendment adjudication, during the period under consideration, was made in the area of libel law. The constitutionalisation of defamatory statements and the process of nationalisation of libel law introduced in the New York Times case were a dramatic departure from traditional tort law. Changes both in the standard (actual malice) and the burden of proof made the recovery of defamation damages much more difficult.

The mass media were, thus, considerably relieved from one of the legal burdens traditionally perceived as hindering free public criticism. The free market place of ideas rationale of Holmes and Brandeis was revitalised and an important legal immunity of publishers and editors was created. Times and its progeny fully matched the liberal rhetoric with a seemingly equally liberal outcome. Nevertheless, the identification of the free

market in ideas with a virtually complete editorial autonomy is not fully convincing. As we saw, this tendency was first introduced in the press cases of the 30s and 40s, when the trend toward monopolization in the ownership of the mass media had already set in but was far from complete. By the late 60s and 70s, the belief that a free market in ideas could be sustained through the competition of the mass media was unrealistic. "In 1967 out of 1547 cities with daily newspapers, there were competing dailies in only 64".[288] The bulk of national and international news is provided by two news agencies, the A.P. and the U.P.I. and the similar trends in television and radio control and ownership are well known. According to T. Emerson,"the economics of radio and television press inevitably in the direction of programs that appeal to the lowest common denominator of a mass audience" and "the expression emanating from the mass media tends to represent a single, generally bland point of view... based upon conventional wisdom".[289] Professor Barron argues that media owners have identified the constitutional guarantee of freedom of the press with themselves and that although the market place of ideas has expanded with the help of the various technological innovations the emphasis has been placed on the market rather than the ideas.[290]

Various theories have been advanced as a reaction to these trends. It has been argued that the government should undertake the affirmative promotion of diversity of opinion; that a constitutional or statutory right of access to the mass media should be created; and that the interest of listeners, viewers and readers to know should be balanced with the right of editors and media controllers to speak.[291] But the Supreme Court has insisted in defining freedom as the absence of governmental and legal controls on the print media. In the Miami Herald case it invalidated a "right to reply" statute as a violation of the First Amendment. The

origins of a new two-tiered approach toward free speech adjudication may be traced in that decision. A protective net has been cast around the freedom of the press, defined as editorial autonomy, more extensive than any encountered before in First Amendment adjudication.

Freedom of the press is, surely, an essential component of a functioning "universe of discourse". The Watergate revelations and their consequences have underlined the importance of a free press. But the continuing underestimation of the censorial powers of the semi-sovereign mass media and the identification of their editorial freedom with the "central meaning" of the First Amendment is a far cry from the diversity of expressions and the market theory of truth advocated by the early liberals. Such an application of free market theories to the oligopolistic market of the modern mass media can lead to the complete elimination of all dissenting voices from the established means of communication. It will be ironical if in the name of the free market, the market in ideas will be all but destroyed.

10.2. Dangerous ideas in the sixties and seventies

Expressive activities outside the established mass media, were treated to a lower level of protection. The Times ruling that the First Amendment guarantees an "unhibited, robust and wide open" public debate and the accompanying dicta on the Sedition Act were, of course, a radical reversal of the "dangerous ideas" rationale of the fifties. Combined with the principle of equality of ideas, which was developed in the public forum cases, they could have led to a dramatic change in free speech theory and practice and they were deservedly welcomed in constitutional theory. The hopes did not materialise, however. The innovative power of Times was restricted to the area of libel law.

The virtual elimination of the Communist Party and communist front organisations led to a relaxation of anti-communist legislation and the Supreme Court decisions in that field were considerably more liberal than

before. The concept of subversive ideas was retained, however, in constitutional law. Loyalty tests and oaths continued to come for judicial review and although a majority of them was invalidated on various grounds, the underlying rationale was not comprehensively challenged.[292]

The reactivation of the old criminal anarchy and syndicalism laws against black and anti-war militants indicates a change in the concept of "dangerous ideas" and political activities. The old laws with their broad definitions of seditious speech provided a better means of suppression of the decentralized and anti-authoritarian radical dissent of the 60s and 70s than the laws employed against the Communist Party. In Brandenburg the Supreme Court restricted the applicability of these laws by imposing strict incitement to action and danger-in-context requirements for valid convictions under them. But later anarchy and syndicalism cases (Younger v. Harris) and the decisions sustaining loyalty oaths (Cole v. Richardson) qualify the hopes expressed after Brandenburg for the creation of a consistent legal doctrine protecting radical political groups and ideologies.[293]

The conspiracy prosecutions, a major characteristic of the Nixon era, was another major means of harassment of anti-war dissent. Much of the prosecution evidence in those trials was based on public statements of the defendants, critical of the American foreign policy. Thus, the cases involved crucial questions about the permissibility and extent of sharp radical dissent. Most of the prosecutions failed, however, at the trial or appeal stage, and the Supreme Court did not rule on the method of using conspiracy prosecutions as a substitute for sedition ones.

The various seditious speech cases indicate that no new all-inclusive category of "dangerous ideas" - as Communism was in the 50s - was created in legal discourse during the sixties and seventies. Allegations of subversive infiltration were often made against the protest movements.

Both civil rights and New Left groups were repeatedly investigated and publicly condemned either as communist fronts or as having an ideological affinity with communism. But the clear ideological and organisational differentiation of the new movements from the Communist Party as well as the virtual elemination of the latter made the identification of the old bête noire with the New Left impracticable and unconvincing. Indeed, as the cases reviewed show, the common elements of the protest and dissent movements were their public and highly visible character and the variety of the forms of protest utilised rather than any common ideological denominator. Consequently, the reaction of the legal and political order was directed at the forms of the protest and only indirectly at its content. As these forms varied the reaction took a multiple and flexible character, too. The draft card burning, flag desecration, breach of peace, disorderly conduct, offensive and foul language laws and prosecutions reflected the ideological and organisational dispersal of the protest movement. This multiformity and immediacy of the protest movement was a sign of its strength, but at the same time one of the reasons that led to its ultimate failure to mount an effective challenge to the sociopolitical order as it set out to do.[294]

11. In Conclusion, The Supreme Court, Freedom of Expression and the Constitution of the Public Sphere

The civil rights cases of the early 60s constitute one of the more sustained periods of judicial activism in recent American legal history. The Warren Court undertook to integrate the blacks within the pluralistic process against Southern resistance and federal hesitation. Barriers to the formal participation of blacks and urban poor in the political process were removed in the voting rights cases;[295] in the civil rights

cases propre, segretation and racial discrimination were declared unconstitutional; and in the early protest cases the Court protected civil rights and black organisations which campaigned for the improvement of negro life.

This phase of judicial activism derives directly from the theories of legal change and social engineering of Roscoe Pound and the Legal Realists and may be seen as a continuation of the principles of the New Deal. According to one author, the Brown school desegregation decision "was no fortuitous legal aberration but was instead the fruit of the collective hopes and efforts of a distinguished group of progressive jurists... (like) R. Pound, L. Brandeis and B. Cardozo, who were largely responsible for the development of the sociological school of jurisprudence, which stood for a more enlightened understanding of the nature and role of the law in a rapidly changing democratic society".[296] Chief Justice Warren was "the closest thing the U.S. had had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately, he was a decent, humane, honourable, democratic Guardian",[297] wrote A. Lewis of the New York Times. Thus, the Court returned to its pre-New Deal role of a full-fledged political actor and attempted to start and later accelerate a process of admission of traditionally disadvantaged groups to the pluralist give-and-take. The fact that the main black organisations, and in particular the N.A.A.C.P. had articulated a non-radical list of demands and had consistently sought, through litigation, a legal-constitutional solution to racial discrimination helped considerably the judicial effort. The interests and needs of the blacks were declared a legitimate concern for legal action and reform but certain conditions were imposed.

The disadvantaged groups should be properly represented by central organisations internally purged from any suspicion of radical or subversive

influence. In a series of cases, in the early 60s, the Court accepted the N.A.A.C.P. as the legitimate representative of the black movement and protected it from Southern harassment.[298] The Court noted repeatedly that the N.A.A.C.P. had expelled communists and subversives from its membership and on that basis resisted Southern efforts to use the anti-communist arsenal against it. More radical black organisations, however, were consistently denied similar protection.[299]

Secondly, the Court suggested as acceptable methods of political action by the blacks, the participation in party politics within the traditional mould of bipartisanism and litigation. In one case, it fully endorsed the tactic of litigation adopted by the N.A.A.C.P. leadership and declared that the solicitation of litigants for the institution of civil rights suits and the litigation itself were First Amendment freedoms. "In the context of the N.A.A.C.P. objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is a form of political expression".[300] The relaxation of the rules of standing, noted above, and similar procedural changes were part of the Supreme Court tactic to use federal litigation for judicial social engineering. Thus, the admission of black groups and interests to the plateau of legitimate state concerns was predicated on the existence of internal disciplined and disciplining mechanisms built into the organisations charged with the articulation of the political needs and on the acceptance by those groups of the overall legitimacy of the legal and political orders and of their capacity to effect the sought after reforms through the established channels of action.[301] As one of the most perceptive observers of modern American politics put it, each entrant to the domain of pluralistic group

competition must pledge "to keep its house in order, to regulate itself according to certain agreed upon criteria".[302]

When during the late 60s the black movement rejected certain of the methods of action and solutions proposed by the Court and became more militant, and the anti-war protestors took to the streets, the problem of expressive activities in the public forum and of the permissible regulation of protest became the main concern in Supreme Court jurisprudence. The decisions and legal doctrines of the period have been examined above. In the brief concluding remarks their implications for the construction of the public sphere will be further examined.

1. Despite the precedents of the 30s and 40s, the Supreme Court did not work out a comprehensive theory of a right to protest. Instead, it treated the various incidents on a case-to-case basis and its decisions upholding protest activities were made on technical points. By that time the wealth of precedents and legal doctrines that existed in the case law was such that almost any concrete decision could be accounted for by some previous holding. Thus, the contradictory requirements of judicial deference to legal continuity (the law-as-given) and of judicial freedom (the law-as-construct) were both preserved and enhanced. To be sure, the eclectic reference to some precedents and doctrines and not other, equally relevant, ones has been the cause of continuous friction within the Court itself and of considerable criticism of its performance in constitutional commentaries. This method enabled the Court, however, to open up a considerable margin for the appreciation of extra-legal factors involved in each case, and to distinguish among forms and circumstances of protest, which seemed similar on their face, without any great loss of institutional credibility.

The lack of any clear standards set out in advance offered, in addition, a considerable leeway to local enforcement authorities faced with protest activities. This is the area of expressive conduct where there exists, probably, the greatest need for advance notification of the line between what is permitted and what prohibited. The judicial approach, with its particularistic character, delegated an extensive area of discretion to local police and prosecutors. Contrary to the trend toward nationalisation of defamation law, the endorsement of the right of protest became increasingly localised. In a large number of its protest decisions the Court found for the protestors. But the total number of protest cases decided by the Court was minimal. In the overwhelming majority of protest prosecutions, the right to publicly assemble and protest was defined and regulated locally. Correspondingly, the role of the Supreme Court and of constitutional discourse in this area was relatively decreased.

2. In its later public fora decisions the Court adopted an approach under which the nature of the public forum in question determines the permissibility of the protest itself. The Court hierarchised the contextual characteristics of the protest activities and the right to public expression became dependent upon the position of the forum of protest on a line stretching from relatively open to completely closed public fora. Public streets and parks are at the one end of the line, military installations at the other with the precincts of courts, prisons and schools in between.

Of particular interest was the judicial treatment of protest activities in privately-owned establishments open to the public. In those cases, the two concepts of freedom identified in constitutional discourse - freedom as the unhindered enjoyment of private property and personal and political freedom - were in direct conflict. In the sit-in

cases the doctrine of state action was employed - sometimes in extreme ways - in order to present private violations of civil and expressive rights as governmental violations of the Constitution. In the shopping centre cases where the doctrine of state action was unavailable, the conflict was resolved in favour of the rights of private property. To be sure, the Court was not unmindful of the importance of shopping centres as public fora and of the censorial power delegated to their owners by its Tanner and Hudgens decisions. The final resolution of the conflict indicates the difficulties that the contemporary state faces in pursuing its social and constitutional policies against the entrenched interests of private property.[303]

3. A similar situation occurred in the Miami Herald case which involved the right of access to the print media. There again the Court reviewed approvingly the arguments in favour of the creation of such a right. The concentration in the ownership of the mass media, the attendant power of their owners and editors, and the inability of people excluded from media coverage to communicate their views effectively were all referred to. But at the end, the rights of property held sway. To be sure, the Court presented its decision as protecting freedom of the press, defined as full editorial autonomy. Thus, the cnnflict was presented as one between two opposing policies, both emanating from the same constitutional source, the guarantee of free public speech: editorial or press freedom versus diversity of opinions. Under this interpretation the rhetorical free market of ideas was subordinated to editorial freedom. At the same time the role of constitutional discourse in the regulation of the print media was relatively diminished.

It should be noted here that in a 1976 decision the Supreme Court invalidated, on First Amendment grounds, the financial limits on electoral

campaign expenditures imposed by Congress in 1974.[304] The Court held that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression... This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money".[305] By identifying political speech with the expenditure of money, the Court rejected the attempt of Congress to equalise the opportunities of communication, which would have benefited the poorer candidates. The equalisation was presented as a violation of the "natural" right of speech. According to one commentator, Americans can boast of that decision because it upheld "the idea of free speech as an individual liberty - something that belongs to a person by inherent right".[306] One could add, an inherent right that is quite expensive.

The shopping centre, access to the press and campaign expenditures cases appear, on their face, unrelated. There is a common thread that runs through them, however. Private property has been accepted in all three as the constitutionally protected means for "buying" or restricting opportunities of expression. The implications of these decisions are not yet clear and predictions based solely on a few decisions are always risky. But it would be ironical if the increased opportunities of human communication offered by the various new technologies lead to an even greater uniformity and conformism in media output, under the endorsement of a new "natural" right to speak (if you have the money) theory.

4. It can be said, in conclusion, that by the end of the seventies an important differentiation has taken place in First Amendment jurisprudence. Radical dissent and public protest - "the poor man's media" - have been dealt with in a particularistic and not strictly

principled manner while the established mass media have been accorded a high degree of constitutional protection. The constitutional recognition of the press and electronic media as the standard bearers and regulators of the public sphere contrasts with their gradual abandonment of any extensive critical function. The early liberals and democrats supported freedom of speech and of the press as the institutional guarantee of a continuous process through which both officials and policies would be put under the scrutiny of public reason. But as Habermas put it the contemporary "process of making public simply serves the arcane policies of special interests; in the form of 'publicity' it wins public prestige for people or affairs, thus making them worthy of acclamation in a climate of non-public opinion."[307] The centrally imposed and administered process of ideological planning and depoliticisation initiated in the fifties came to an incomplete end, but similar functions have been undertaken by the mass media under constitutional endorsement. One could say that under the banner of freedom of the press, freedom of speech and the market place of ideas has been gradually abandoned to the instrumental calculations of the media barons.

The future role of the Supreme Court and of constitutional discourse as regards the protection and promotion of diversity of opinion remains in some doubt. As radical dissent and protest subsided in the late seventies, the area of constitutional adjudication in which the Supreme Court made its more recent liberal contribution disappeared. In a 1981 decision the Court ruled that live nude dancing is protected by the First Amendment[308] and in other recent decisions it extended constitutional protection to commercial advertisements and the showing of sexually explicit films.[309] However important these decisions may be they are only marginal to the contemporary problems of an "uninhibited, robust, wide open" public debate.

The Supreme Court efforts to implement these principles, throughout the 20th century, have been erratic and some parts of its case law were outright repressive. But at the same time the Court did maintain a separate institutional structure and mode of discourse by means of which it participated as an independent political actor in the constitution of the public sphere. The road covered, from the early decisions dealing with the rights of socialists and pacifists to preach their political doctrines to the nude dancing one, has been long and adventurous. But as new pressures build up and "moral majorities" call for a further strengthening of political and ideological conformism, a return to the principles of the market place in ideas is necessary. The new communications technologies permit their full and effective realisation, for the first time in human history.

We have learnt, however, that technology, a most powerful means for human emancipation, may, too easily, become a weapon of domination. "'The free society' can no longer be adequately defined in the traditional terms of economic, political and intellectual liberties, not because these liberties have become insignificant, but because they are <u>too significant</u> to be confined within the traditional forms. New modes of realization are needed corresponding to the new capabilities of society".[310] The Supreme Court could play an important role in the redefinition of these liberties. As America and the world enter a period of "clear and present danger" one can only hope that the freedoms of conscience, thought and speech will be restored to their original, critical function.

CONCLUSIONS

1. One of the characteristics that strikes the observer of 20th century American constitutional law is the continuous proliferation of legal material dealing with freedom of expression. An increasing amount of human conduct involving a communicative intent has come under legal overview during that period. Legal discourse with its internal determinations, procedures, conditions and evolution has undertaken to sanction the social universe of discourse.

But has this increasing legal intervention enhanced the possibilities od debate, criticism and dissent, as many constitutional authors have argued, or has it led on the contrary to the silencing and repression of unpopular, minority viewpoints, as some radical critics would have us believe? Is there a dividing line between freedom and repression which could be used as a yardstick to help determine and criticize the relationship between legal and social discourse?

The multiplication of legal material has been accompanied by an equally impressive increase of theoretical writings in the field which, explicitly or implicitly, have tried to answer these questions. Two analytically separate approaches have been used in the literature. The first, followed by political philosophers and philosophically-minded constitutional theorists, seeks to clarify the justification(s) for the protection of expressive activities. Freedom of thought, speech and discussion relate to the functioning of the political system and an understanding of their role would provide a normative principle according to which the relevant legal material could be classified and criticized. In this approach the value and function of free speech becomes the principle of the relationship between legal and social discourse.

The second approach, followed in the main by constitutional lawyers, is more empirical. Instead of asking the reason(s) for the protection of free speech, it examines the limits of that protection. Laws, administrative acts and judicial decisions related to expressive activities are selected and classified, the legal doctrine(s) emerging are clarified and explained. In this approach the relationship between legal and social discourse is dealt with at the level of positive law, and normative questions are not usually emphasized.

It may be argued that behind most of these contributions lies a shared problematic: what is the principle according to which the law intervenes or should intervene in order to sanction the social universe of discourse. If such a principle existed and could be extracted from the legal material or alternatively if it could be theoretically constructed, then an ordered description of the law and/or a normative blueprint for the developing legal intervention would be available. The case-study is, therefore, preceded by a review of the contributions which posed the question first at a theoretical then at a more empirical level.

2. J.S. Mill's seminal essay "On Liberty" asks the question why should expression be protected more than other human conduct even though it may lead to harmful consequences. Mill did not base his classical defence of free speech on the well-known distinction between self and other-regarding action but on the "assumption of infallibility": all silencing of opinions assumes that the censor knows the truth and is infallible. For Mill and the liberal tradition the only way of arriving at the truth lies in the process of debate and exchange of opinions, of argument and counterargument. Free debate leads to the development of human personality, to the enjoyment of life as an open process of experimentation and innovation and to social

progress. A tyrannical government threatens this precarious freedom greatly, but Mill believes that this danger has receded in England where the main threat comes from the imposition of a "tyranny of the majority" which will stifle individual excellence, innovation and dissent from the uncritically received opinions.

The modern democratic tradition, on the other hand, is more concerned with the exercise of political power. Freedom of expression and of debate is seen as a method for the integration of the general will of the sovereign, self-governing people into the supreme power of the state. Alexander Meiklejohn, the most famous exponent of the democratic theory of free speech in America, argues that there exists a common interest which may be clarified through open debate and thus enable the people to participate in the continuous process of self-governing and its formal completion, voting. There is no radical separation between rulers and ruled: the ultimate authority lies with the people, who take all consequential decision collectively and delegate to the removable government of the day the power to carry out the sovereign will. The role of legal institutions is, therefore, to remove all hindrances to free political debate and enable the citizens to exercise their right and duty of self-government intelligently.

Thus, for the classical liberals freedom of expression is mainly a means for the development of individuality and the discovery of truth, while for the democrats, a basic prerequisite for the successful functioning of the political/democratic process. The two schools moved close to each other in the 1930s, and by the end of the 40s the pluralist theory of politics dominated American political and constitutional thought. The pluralists, who reacted against the exaggerated claims of democratic theory, saw politics and democracy as a competition among interest groups, and maintained that the pluralistic

process had been perfected in the U.S. The role of legal institutions is to balance the competing interests and effect the necessary compromises and reforms which would keep the sociopolitical order in a state of equilibrium. But as a background value-consensus had been allegedly achieved, the balance between the demands of stability and change should be carefully protected. Free expression became one of the interests which had to be weighed in the scales of social priorities, in which the interest in national unity and security ranked high. Thus, the effective functioning of the democratic process became the main justification for free speech. But democracy had been identified with the actual process of group pluralism and the normative emphasis of the earlier liberal and democratic theories of free speech was lost. In the 60s and 70s however, when the protest movements challenged the most optimistic assumptions of pluralism, the need for structural reforms, particularly in relation to the blacks and poorer sections of the population, became evident. Freedom of speech and of protest were perceived as a means for the airing of deep-seated grievances, which politics proper had not fully appreciated. A number of "qualified pluralists" argued that a degree of legal protection of public - even unconventional - protest would legitimize political power in the eyes of those who felt underrepresented in the pluralistic process and restore confidence and consent to the legal and political system.

Thus, the theoretical justifications for freedom of speech developed considerably during the 20th century. The writings of those constitutional authors who tried to devise a practically applicable legal doctrine of protection of expression reflect the changes. Some of the differences among the doctrines proposed and used in constitutional

adjudication may be attributed to a differing understanding of the theoretical rationale of free speech and of the definition and import of the political/democratic process. Theoretical positions and normative principles have been incorporated in legal proposals and in adjudication, but there is not one central justification of protection of expression which may account for the wealth of legal material that came to be examined by the American courts under that heading. Indeed, as the understanding and study of politics moved gradually away from the normative basis of political philosophy, still strong in early liberalism and democratic theory, and towards a positivistic account, measurement and rationalization of the empirically observable reality, the theoretical grounding of the highly critical institution of free speech was neglected.

The second, analytically distinct, approach utilised in the literature in order to account for the evolution of the legal material draws attention to the institutional aspect of expression protection. The First Amendment to the Constitution raises freedom of speech into an individual constitutional right; the extensive involvement of the legal institutions is, therefore, mandated by the clear command of the constitutional text. However, this approach too creates a number of problems.

First, the "clear" words of the First Amendment are not self-interpreting. Historical research has not been particularly helpful in clarifying the intentions of the framers, and if it were their contemporary significance would be arguable. Secondly, the American courts and the Supreme Court have taken an active interest in First Amendment adjudication relatively recently. Indeed, the whole concept of freedom and of individual rights had been interpreted until the 1930s by the Supreme Court as relating more to economic freedom and

property rights than to political and personal freedoms. Finally, the institutional approach is inevitably linked with the controversial question about the role of the Supreme Court within the legal and political order and the opposing theories of judicial activism and restraint, which have always accompanied any judicial inroads in the powers of the legislature. These theories draw their basic arguments from a differing understanding of the political/democratic process and similar problems to those encountered in the attempt to draw a theoretical justification out of political theory are faced here.

The fact remains, however, that since the seminal Supreme Court judgments of the 20s, in which a theoretical justification of free speech and the mainsprings of a legal doctrine of protection of expression were offered for the first time and the applicability of the First Amendment was extended to the states, the judiciary under the guidance of the Supreme Court has accepted the institutional duty of protecting the constitutional right of free speech. The legal doctrines, which have evolved since Schenck, constitute the method through which the Supreme Court dealt with an expanding and varied field, often involving important political acontroversies. They have given a measure of consistency, continuity and predictability to judicial interventions. However, the relatively large number of the doctrines used, the small periods of their consistent use, the marked differences between some of them - for example between the bad tendency and danger tests or between the preferred position and balancing ones - and the use of opposing doctrines in similar cases indicate that the various doctrines, instead of being mutually exclusive and capable of dealing with all sorts of situations, have been utilised as a panoply of approaches which could be mobilized simultaneously or successively.

Their development and use has served both needs of presenting the law as a unified, self-consistent whole and of judicial flexibility to deal with novel and controversial cases.

Thus, the various justifications for the protection of free speech, the institutional duty created by the constitutional command and the legal doctrines that developed in constitutional adjudication have all contributed to the expansion of the relevant legal material. But one is justified in concluding that the field of legally sanctioned social discourse cannot be seen as realising some central principle. The attempt to draw, in theory, the line between protected and prohibited speech to be compared, in a second step, with the actual legal decisions has been neglected as empirical political science abandoned normative and practical questions. On the other hand, the lines of precedent and the legal doctrines which may be drawn from the legal material are many, varied and sometimes contradictory and none among them may be considered as the principle that animates or organises the evolving legal intervention. The realisation of the situation has led recently a number of constitutional authors - most notably T. Emerson - to acknowledge that First Amendment theory and practice find themselves in an unsatisfactory state. It has been argued that this approach is related to an essentialist concept of law often encountered in American legal thoery. The law - and its part dealing with freedom of expression - is considered as constituting a closed corpus of hierarchized rules unified through their emanation from a central rule and/or permeated by a small number of principles and values. However, the increasing intervention of the state in society and the economy, carried out in the main by means of legal rules and procedures, has changed the role and function of the legal system and has led to its direct politicization. The use of the law for the management of socio-

economic crises and the pursuit of contingent policy objectives and its reflection of intense political conflicts make the effort to present the legal system as a closed ensemble of rules extremely difficult. A different approach is, therefore, suggested for the examination of the case-study. The procedural and substantive elements that give this part of the law its specifically legal and relatively consistent character are fully acknowledged and considered; but, at the same time, legal discourse is examined in relation to the outcome of its intervention on the social universe of discourse.

3. The majority of the cases involving First Amendment rights are politically contentious. Individuals and social and political groups claim the right to participate in public debate and influence public opinion in pursuit of their interests and of what they perceive as the common good. Other groups and interests resist these claims and when such conflicts are taken to the courts the legal institutions undertake to endorse some against others. In this perspective the constitutional right to free expression was defined as those claims related to expressive activities which have been effectively upheld by the competent legal authorities and granted legal status. The courts translate the claims in the technical language of the law with its own substantive and procedural guarantees and by resolving - temporarily or permanently - the dispute participate in the process of forming public opinion. Public opinion is neither the embodiment of an organically evolving volonté générale which by being transmitted to the political authorities becomes the sovereign opinion nor is it the object of manipulation by the powers-that-be. It is rather in a continuous process of constitution and reproduction, as its parameters and substance are in each historical period contested and differentially

demarcated. To be sure, political and social inequalities put some groups and interests in an advantageous position, and as the case-study indicates legal institutions often take the side of political power in situations of acute political conflict. However, the importance of legal involvement lies in the fact that independent institutions using their own formalities and doctrines are asked to participate in a process that has serious political repercussions. Law thus becomes a privileged social discourse: its descriptions and norms help shape social and political reality and its endorsement of certain values as those of the community mobilizes popular assent toward them and the established order. But, at the same time, law's procedural and substantive guarantees impose significant constraints on power and its intrusions. The cases of Dennis (p. 291) and of the Chicago conspiracy trial (p. 434) among others, which were fiercely and somewhat theatrically contested by both prosecution and defence, indicate that the established political power as well as its enemies and critics actively seek the legitimizing force that legal endorsement produces for their respective claims.

The legal material in the second part of the thesis is, therefore, examined in two ways. The first addresses its internal determinations and development. Theoretical justifications and legal doctrines are the means through which legal discourse evolves internally in an orderly manner and give this part of the law its coherence and continuity. On the other hand, the political nature of the expressive claims dealt with by the courts makes the outcome of their intervention open and historically specific. The relationship between these two aspects of the legal material is examined under the methodological hypothesis of the public sphere.

The public sphere is the realm of social life, in which opinions on matters of public interest are formed, reproduced, criticized and changed, the site in which the process of public opinion formation and debate takes place. Individuals and groups, issues and affairs strive continuously in each society and historical era to pass the threshold of the public sphere and legitimize their claim to influence public opinion. It was argued above that many of these claims are politically contentious and are often taken to the courts for resolution. In those cases, the courts extend or restrict formal political rights, sanction issues and alternatives as legally permissible and open to debate, endorse individuals and groups as legitimate subjects of public discourse and distribute control and access to the fora and media of communication necessary for effective public debate. When the courts decide cases involving free speech claims, they determine who can speak about what, what may be publicly uttered and what not, when and where public discussion may take place. The legal answers to these questions involve distinctions and differentiations among ideas, social and political groups and contexts of discourse as well as similarities and analogies. The process of drawing lines in practice between legal/legitimate and proscribed/illegitimate subjects, objects and contexts of discourse has been called the "process of the constitution of the public sphere". Thus, while the legal intervention cannot be easily placed within the bipolar freedom/repression paradigm it has become an increasingly important factor in that process. Legal discourse with its own dynamic and ability to reproduce itself according to its internal procedures participates in the task of definition, demarcation and endorsement of the universe of social discourse.

4. The second part of the thesis examines the process of the legal, and particularly judicial, constitution of the public sphere in the 20th century. The case-law is classified in chronological order and four periods are distinguished which display a broad thematic unity.

(a) During the first quarter of the 20th century, the legal institutions dealt with radicals, socialists and trade-unionists who challenged the American involvement in WWI and the corporatist capitalist development which preceded and followed the Great War. It was the first occasion in which the courts were asked to work out a theoretical justification snd a legal doctrine for the protection of public political speech. The early cases, which came under the Espionage Act, 1917, involved public dissent and criticisms of the Administration's war policy. As the Act had not prohibited such dissent explicitly but rather the intentional obstruction or attempted obstruction of the war effort, the legal question was posed in the following terms: when does political dissent become the means of violation of the Act, in other words when do expressive activities come close to being criminal conduct.

The majority of the lower federal courts construed the act under a doctrine that came to be known in the literature as the "bad tendency" test. If the intention to obstruct the war was proven - and in many cases that was not denied by the defendants - the possibility of success of their efforts was of no great importance. The expression of opposition to the war tended to sow dissension among the population and would set in motion a chain of causation which could result in someone being persuaded in the future to carry out the prohibited conduct. Against this approach Justice Holmes for the Supreme Court enunciated the "clear and present danger" test which is taken as the starting point of the modern American theory and practice on freedom of expression.

Justice Holmes clarified his position in the famous dissenting opinions in Abrams and Gitlow. He was joined in dissent by Justice Brandeis, whose Whitney dissenting opinion is usually taken as the definite statement of the evolving position of the two great Justices. They based their approach on an examination of the import of the First Amendment. Justice Holmes' theory was closer to the reformed liberalism of the social utilitarians, Brandeis' position was closer to the democratic justification of free speech. They both argued that the importance of freedom of expression in a democratic society and the command of the First Amendment created an institutional duty for the courts to put greater emphasis on the protection of expressive rights. Words could become criminal triggers to action, but a clear causal and a present chronological link between the utterances and the apprehended evils should be established for conviction. If there was no reasonable possibility that the prohibited consequences would come about, then the expression should be protected. This link should be examined in the light of all the circumstances of the case in a manner similar to that used in prosecutions for criminal attempts.

The two approaches, initially used for the construction of the same act, are radically different. The bad tendency test addresses the propositional content of the expression and tends to ban certain political ideologies from the public sphere as inherently dangerous. The danger test, on the other hand, emphasizes the fact that all expression is contextually situated. The "message" must not be judged in vacuo, but in its specific capacity to create present and serious threats by influencing its audience. Solicitation of law-violation cannot be condoned but political dissent that stops

short of that and has no possible chance of leading to criminal action must be protected. The first approach prohibits and punishes ideas deemed as inherently dangerous or undesirable. The second makes their prohibition dependent upon the circumstances surrounding their communication. Prohibition of content, regulation of context: these were the two major ways in which the courts dealt with political speech in the first period of First Amendment adjudication.

(b) The thirties and early forties were a period of expansion in free speech theory and practice. An increasing number of First Amendment cases were dealt with by the courts and the Supreme Court became more willing to review such cases. As a result the legal doctrines used multiplied.

All parts of the First were delcared as limiting state as well as federal power, through the due process clause of the Fourteenth Amendment. For the first time some state legislative and administrative acts were struck down by the Supreme Court as inconsistent with the constitutional guarantee of free speech. The bad tendency test disappeared and the danger test was adopted by a majority of Justices. In the previous period, the test had been used as a rule of evidence calling for the examination of the specific threat created by the utterances in question. While it still kept this evidentiary flavour and led to the first reversals of convictions for expressive activities, it acquired an additional function. When the constitutional validity of a state or local act was challenged the danger test became a constitutional standard, which demanded that there should exist a high degree of necessity linking the expression-restricting law with a valid and serious apprehended evil. If the social interest served by the law was considered as not serious enough or if the Court thought that it could be protected by less drastic means than the prohibition

of expressive activities, then the measure was invalidated. The Supreme Court showed a particular dislike for prior restraints on free speech and voided a number of licensing systems related to public meetings, for giving a vague and broad discretionary power to local authorities. The gist of these decisions was that activities in the public forum could not be prohibited because of their content. Their time, place and manner - their context - could be regulated to protect public peace, order, privacy and repose, but the regulation should not amount to outright bans or discriminate against unpopular issues and minorities.

Behind all these developments lay the theory of the "preferred position" of personal and political freedoms. It gave notice at the least of an increased judicial vigilance in cases involving First Amendment claims and at the most of a prima facie assumption of invalidity of measures violating freedom of expression. The adoption of this position coincided roughly with the Supreme Court's dramatic endorsement of the New Deal measures of economic regulation. Until the mid-1930s, freedom of contract and the rights of private property had been declared as the primary forms of freedom and a number of social welfare, economic regulation and union protective measures had been invalidated for violating the 14th and 5th Amendments. But now freedom was redefined as personal and political. When the Court examined expression-restricting laws for their constitutionality, it embarked on a balancing of the social interest in free speech against the interests served by the challenged measure. The Court, thus, undertook to draw a hierarchy of social and political values and check it against that of the legislature. The preferred position of freedom meant that expressive claims were favourably handicapped in this balance.

The activist stance of the Court had important repercussions. The words of the First Amendment are not as clear as they sound and as Justice Black insisted. Thus, the Court embarked on a process of construction of the constitutional terms in which the Constitution became "what the Supreme Court says it is". "Speech", and the "press" were defined as including the use of symbolic objects and gestures, all sorts of activities in the public forum (parades, demonstrations, canvassing), the publication as well as the circulation of printed matter. The "laws" which should not abridge free speech were defined as referring to federal and state legislative enactments, administrative acts and judicial decisions. Through this process of definition some activities were construed as protected expression, others as non-protected action. The "definitional balancing" of the period indicates one of the major ways in which the constitutional discourse intervenes and sanctions social discourse: the constitutional definitions, sometimes theoretically defended, sometimes question-begging, acquire immediate normative consequences and are backed by sanctions and thus help shape social reality.

Thus, the Supreme Court increased substantially its involvement in the process of the constitution of the public sphere. The majority of its decisions were preceded by eloquent essays on the liberal-democratic justification of free speech. However, the endorsement of the claims of groups and interests to commandeer the public forum was somewhat differentiated. Almost all proselytizing activities of religious sects, and in particular of the Jehovah's Witnesses, were accorded the status of protected expression. But picketing and other public activities of the trade-unions were defined as "speech plus" and were gradually excluded from a "definitional" protection. Religious dissent was treated more favourably than political dissent.

Civil servants were denied the right to participate actively in political activities, and during a brief period in WWII the Japanese-Americans of the West Coast were temporarily excluded from almost all political rights and procedural guarantees.

The democratic tenor and liberal effect of the bulk of the case law remains undeniable, however. Through its redefinition of the concept of freedom and its new activism the Court retained its position as the guarantor of the spirit of the Constitution, of individualism and limited government. At the same time it endorsed the democratic-reformist ideology of the New Deal and participated in the effort to mobilize popular assent toward the new socio-economic structures. Thus, the Court undertook a much more extensive role in the constitution of the public sphere and through it in the direct legitimation of the social order.

(c) When the Cold War started gripping America in the late 40s the legal system was put under strain. National confidence crumbled and external and internal enemies seemed to threaten the very foundations of the republic. In the previous period the Supreme Court had opened up public fora to expressive activites; but in the 50s public protest fainted. Seditious ideas and people became the main issue in First Amendment adjudication. The Court had already occupied the role of the national protector of free speech and soon became embroiled in litigation over the formidable anti-subversive legal arsenal built by both federal and state authorities.

There were three main components of this arsenal. First, federal and state criminal laws which punished severely the teaching and advocacy of seditious doctrines and membership in subversive organisations. The centrepiece was the Smith Act, 1940 which many states copied. Secondly, loyalty programmes and tests were introduced, linking the acquisition or retention of positions, rights,

benefits or privileges by individuals or groups with a loyalty qualification, confirmed through oath-taking by the persons concerned or through investigations by official bodies. The most common programmes related to public employment but they were gradually extended to areas of public life and positions and benefits not related to the Civil Service. Finally, a number of federal and state legislative investigating committees were set up, modelled on the House Committee on Un-American Activities, charged to investigate and expose the activities of subversive groups and individuals.

The major criminal case of the period, Dennis v. U.S. involved the prosecution under the Smith Act of the top leaders of the Communist Party for conspiracy to teach and advocate the violent overthrow of the government. The case was decided in all three instances under some version of the danger test. However, the requirement of a close chronological link between the utterances and the apprehended evil was dropped. The external and internal threat from communism was perceived as total and global, and although there was no likelihood of a communist insurrection the gravity of the danger outweighed its improbability. No evidence of illegal activities carried out by the communists was produced, but the advocacy of the communist ideology was construed as creating a danger of revolution "as speedily as circumstances would permit". Thus, in Dennis under the amended test, which came to be known as the "clear and probable danger" test, the Communist Party was declared a criminal conspiracy, Marxism-Leninism was construed as the doctrine of the violent overthrow of the government, the communist leaders were convicted and awarded maximum sentences and the rationale of the loyalty-security complex was given the legitimacy of constitutional validity. But in the later cases of Yates and Scales, the Supreme

Court, without challenging the constitutionality of the Smith Act, reinterpreted some of its key terms and imposed stringent conditions on the prosecutions of communists for seditious utterances. There should be evidence that the defendants advocated specifically the taking of future violent action rather than the abstract doctrine of revolution and that the tenor of the advocacy was to urge people to act. Convictions under the membership clause of the Act could be obtained only if the defendants were "active" members of the Party, knowing that it was involved in illegal advocacy and intending specifically to accomplish its illegal aims. Thus, by the late 50s, the Court returned to the particularistic approach of the original danger test. It asked for specific evidence of illegal activities and expressions and, as such evidence was difficult to obtain, brought to an end the Smith Act prosecutions.

In cases involving challenges to loyalty programmes and investigating committees the test most consistently used was that of the balancing of interests. In the previous period free speech was placed in a preferred position when balanced against social interests endangered by its exercise. Even during that period, the preferred position doctrine had been attacked by a minority of Justices, who thought that it amounted to an unjustifiable and undemocratic violation of legislative powers by the judiciary. During the 50s the implicit balancing of the previous period continued, but the preference for First Amendment claims was dropped. Thus, the paramount interest in national security was balanced against the right of radical trade-unionists and professionals to keep their jobs, or of investigated persons and witnesses before loyalty committees to avoid the public confession and disclosure of their past and present beliefs and associations. But this balancing between an overwhelming social interest and the personal interests of

a few individuals contained its outcome in the way in which the respective claims were formulated, as Justice Black repeatedly complained. Indeed, such a balancing act should take into account trends in national social and political life and in international relations, not a task suited to the judiciary, a point made by Justice Frankfurter. Thus, the balancing technique meant in effect that the rationale and excesses of the loyalty-security watchdogs went unchallenged, against the elegant protest of Justices Black and Douglas who continued placing expressive rights in a preferred position.

But when the Court dealt with First Amendment rights using procedural and technical points - the exact mandate of a particular committee, the pertinency of a question to the matter under investigation, the verbal formulation of a loyalty oath, the pre-emption of a state measure by a similar federal measure etc. - the worst excesses of the loyalty machinery were restricted. In those cases, substantive claims were upheld through the requirement of procedural correctness, and the protective role of the liberal system of justice was underlined.

The importance of these developments cannot be overestimated. In Dennis the gravity of the danger, that communists and communism posed for the security of the state, was emphasized in grave terms and became the main point of the reformulated danger test. However, the relative weakness of the Communist Party and the lack of any evidence of preparations for an eventual insurrection indicate that the apprehended evil was not that of a pending revolution. Chief Justice Vinson specifically stated that the success or probability of success of revolution was not the criterion for criminal liability under the Smith Act, and accepted that the Communist Party did not have the ability to bring about a popular rising. Indeed, throughout the period, the Communist Party, heavily infiltrated by police agents and torn apart

by internal schisms, was not outlawed, a measure which would seem reasonable if the danger of revolution was perceived as real and present. Reports of some clandestine activities by Party members and the defence of the Soviet foreign policy in an era of international tensions justified a degree of apprehension about the character of the Communist Party. But the nature and reach of the anti-subversive measures indicate that the apprehended danger was not, solely or even mainly, that of a communist uprising. Chafee had remarked in the 40s that an "American party-line" had started taking shape and was aggressively propagated. It may be argued, therefore, that a fear that motivated the drastic reaction of the 50s was the more extensive but less conspicuous threat of the "infection" of the body politic by subversive, radical or un-American - an elusive term never fully defined - people, organisations and ideas.

This danger remained in the background of the criminal prosecutions of communists. But it was more evident in the activities of the loyalty-security machinery. In those cases the existence of loyalty/disloyalty was disarticulated from the commission of specified criminal offences and was perceived as a character trait which called for an extensive scrutiny of all aspects of a person's life; it was sought out in past and present beliefs, opinions, expressions, acts and associations. The determination of loyalty was undertaken by administrative and legislative agencies acting as semi-judicial bodies, but freed from cumbersome procedural guarantees or any extensive judicial supervision. Finally, as since the New Deal an increasing part of the individual's life had become dependent upon public provision, a finding of disloyalty put under severe strain all relations of the person concerned with the public authorities. Furthermore, the publicity of the activities of the loyalty watchdogs was explicitly

intended to act in a symbolic manner for the rest of the society and to mobilize the public in the effort to uncover and isolate socially those suspected or found guilty of disloyalty.

Thus, a range of political ideas, starting from the hard-core of communism and extending to other radical and socialist doctrines and political objectives, was declared subversive and banned from the public sphere. Organisations and groups were admitted in the pluralistic process only if they acquitted themselves of any accusation of disloyalty. Social welfare measures and civil rights reforms were mostly abandoned as communistic and un-American. Individuals with past or present, real or alleged subversive connections were excommunicated from all areas of public life. The regulation of the economy by the state, which had started in the 30s, was complemented by an extensive intervention in the public sphere and by the further displacement of the great liberal dividing line between public and private.

(d) The sixties and the seventies were the years of public protest. The civil rights movement initially and later the Vietnam War movement took to the streets to air deeply felt grievances and militant politican dissent. The Supreme Court, since its seminal Brown decision, had taken an active interest in the promotion of civil rights and became increasingly involved in an effort to remove the most offensive discriminatory laws and practices of the southern states, through constitutional adjudication. Thus, when the civil rights movement started a campaign of protest against southern segregation in the late 50s and early 60s, the Court was prepared to extend full protection to the sit-ins and demonstrations. Many of the practices complained of had been declared unconstitutional, and direct action and civil disobedience were treated as the means through which the protesters could invoke the higher rationality and justice of the

federal constitution above the heads of recalcitrant local authorities. The content of the grievances - racial discrimination and segregation - justified the means of their publicity, and the doctrine of "state action" was extensively used to uphold the protests, if the offending practices had some - even remote - relation to state or local authorities.

The validation of the forms of public protest because of their legitimate content came to an end in the mid-60s, after the passage of the Civil Rights Act, 1964 which outlawed segregation in public facilities. As black militancy increased and the first anti-war demonstrations started, the Supreme Court was forced to deal with the protest activities as such. The forms of protest utilised in those turbulent years were many and varied: marches, demonstrations, sit-ins and picketings which often led to breaches of local licensing systems and to prosecutions for public order offences; commitment of illegal but newsowrthy symbolic acts like draft-card and flag burnings; use of foul and offensive language particularly against law-enforcement officers. The authorities for this sort of situation dated back to the public forum decisions of the 30s and the 40s. But the massive scale of the protests and their overtly political character differentiated this period from the earlier one.

The Court's answer to the challenge of the protest movements was particularistic. It accepted, in general, that public protest was more than "pure speech" and utilised a number of doctrines to deal with each situation on a case-to-case basis. When the fora of protest were public streets and parks, the Court took a relaxed position. It insisted that the regulation of the context of protest - its time, place and manner - should not discriminate against unpopular ideas. Equality in the field of ideas required that public fora which had been opened to

some expressive activities should not be denied to others. But when public protest took place in fora other than streets or parks, the nature of the forum determined the permissibility of protest. Thus, political activities were excluded from military installations otherwise open to the public, from privately owned shopping centres and from the precincts of courts, schools and prisons. In those cases great emphasis was placed on the procedural and statutory grounds of the prosecutions involved, and the line between open and closed public fora was not very clear or strictly adhered to.

In the examination of the statutory background of the prosecutions for protest, the Supreme Court used the two related doctrines of "vagueness" and "overbreadth" deriving from the due process requirements of criminal law. These doctrines require that the law should give clear and fair notice of the proscribed conduct and should not infringe unnecessarily upon protected freedoms. In the early 60s, they were used to protect the civil rights movement against southern harassment. But in the later cases, their status became uncertain. In some, the statutory language was examined according to its "natural", in others according to its "technical" meaning. When the prosecuted activity was foul or offensive language, the Court extended full constitutional protection. But the constitutional status of "symbolic speech" remained obscure. Draft-card destruction was not a protected expressive activity, but the earlier sit-ins, the wearing of black armbands and the burning and desecration of the flag were.

We may conclude, therefore, that no comprehensive theory or legal doctrine of public protest for constitutional purposes was worked out by the Supreme Court. The forms of protest were distinguished, the fora of protest were differentially demarcated; foul speech was declared fully protected, some symbolic conduct was found to be fully

protected expression, some other proscribed conduct. The differences in the outcome of the "symbolic speech" case indicate the conceptual problems facing any theory of free speech that relies on a strict expression/action distinction. The wealth of precedents and legal doctrines, that existed by that time, allowed the Court to refer back most of its decisions to some authority, while retaining at the same time a considerable margin for the appreciation of the form, circumstances and extra-legal factors pertaining to each particular situation. In this way, a degree of protest protection was worked out in practice, and the courts resisted effectively, in the conspiracy and criminal anarchy trials, the attempt of some legislative and prosecuting authorities to create a new all-inclusive category of "subversive radicalism" as a substitute for the communist danger of the 50s. Thus, as the common element of the protest movements was their multiformity and immediacy rather than any common ideological denominator, the reaction of the legal system became equally varied and flexible.

During the same period a major doctrinal change took place in the area of libel law. Defamatory statements became the object of a cautious constitutional protection and changes in the standard and burden of proof made the recovery of defamation damages extremely difficult. Thus, a trend in constitutional adjudication favouring freedom of the press, which had started in the 30s, was further developed and an extensive degree of constitutional protection was given to the editorial autonomy of the mass media. However, during the same period, economic and commercial factors had led to extensive concentration in the ownership and control of the mass media. The almost absolute protection of editorial autonomy, if not accompanied by a right of access for minority and dissenting views, may lead to

the stifling of diversity in the market place of ideas and to a silencing of effective free speech in the name of freedom of the press.

These are still open questions and constitutional discourse will have an important role in their development. As we enter a new era of expanding opportunities for cheap and effective communication, one hopes that the institutions of free speech and press will be fully restored to their original, critical function, best encapsulated in the writings of the early liberals and democrats. The universe of social discourse came under increasing public scrutiny during the 20th century and the constitution of the public sphere has been examined as an antagonistic process in which subjects, objects and contexts of discourse are continuously contested and differentially demarcated. But the normative principle of the public sphere, that political power will follow the discursively arrived at will of an informed and sovereign public, even though never fully realized, remains perhaps the greatest contribution of the Western civilisation to the theory and practice of politics.

NOTES

Full reference to all books cited in the notes is given in the bibliography. Periodical articles which are cited only once get their full reference in the notes. Articles of major significance for my argument or which are cited more than once are fully referred to in the bibliography.

INTRODUCTION

1. L. Levy in the Legacy of Suppression (1960), ch.6, argues that the Sedition Act led American libertarians to "formulate a broad definition of the meaning and scope of liberty of expression". He suggests that most of the ideas were taken from English liberals and not until 1798 did any American rival the libertarianism of the English. ibid., p.258.

2. Quoted from Emerson, Haber, Dorsen, Political and Civil Rights in the United States (1967), Vol.I, p.7.

3. Barron v. Baltimore, 7 Peters 243, 8 L.Ed. 672 (1833).

4. L. Whipple, The Story of Civil Liberties in the U.S., (1927), p.51.

5. R. Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy, (1972), p.177.

6. See the interesting history of the anti-vice societies in P. Boyer, Purity in Print, (1968).

7. A. de Tocqueville, Democracy in America, (1864), Vol.II, p.400.

8. K. Marx, "Debates on the Freedom of the Press and Publication of the Proceedings of the Assembly of the Estates". Newspaper article dated May 5, 1842 in K. Marx and F. Engels, Collected Works, Vol.1, p.132 at p.167, 162. (Lawrence and Wishart, London, 1975).

9. The two classical treatises in the field are Z. Chafee, Free Speech in the United States, (1941) and T. Emerson, The System of Freedom of Expression (1970). The best collection of legal material is found in Emerson, Haber and Dorsen (1967).

10. The first authority in the field is Roth v. U.S., 354 U.S. 476 (1957). The reformulation of the Roth obscenity test is found in Miller v. California, 413 U.S. 15 (1973); the "pandering" rule is found in Ginzburg v. U.S., 383 U.S. 463 (1966) and the ideological obscenity one in Kingsley v. Regents, 360 U.S. 684 (1959); in Ginsberg v. N.Y., 390 U.S. 629 (1968), a law against the sale of obscenity to minors was upheld as a "rational regulation". For the difference between obscenity and ideas see J. Finnis, 'Reason and Passion': The Constitutional Dialectic between Free Speech and Obscenity, 116 Univ. of Pennsylvania L.R., p.222 (1967).

11. "The Supreme Court as a Political Institution", in A. Westin (ed.), The Supreme Court: Views from Inside, (1965), p.170.

12. J. Griffith, The Political Constitution, (1979), p.20.

CHAPTER I

1. Recent articles on Mill's theory of freedom of expression include H. McCloskey and D. Monro, "Liberty of Expression: Its grounds and Limits" (I and II) (1970) and T. Scanlon, "A Theory of Freedom of Expression" in R. Dworkin (ed.), The Philosophy of Law, (1977). Two recent books on Mill discuss his free speech theory, too: G. Himmelfarb, On Liberty and Liberalism: The Case of John Stuart Mill, (1974); C. Ten, Mill on Liberty, (1980). See also H. McClosley, John Stuart Mill: A Critical Study, (1971); J. Barron, Freedom of the Press for Whom?, (1973), ch.8; I. Berlin, Four Essays on Liberty, (1979), ch.IV. A radical critique of Millian liberalism is found in R. Wolff, The Poverty of Liberalism, (1968) and R. Wolff, B. Moore and H. Marcuse, A Critique of Pure Tolerance (1965).

2. J. Milton, "True Religion, Heresie, Schism and Toleration", in Works, Vol.IV, 172-3.

3. J. Milton, "Areopagitica", in Works, Vol.IV, 4:353.

4. J. Locke, "The Fundamental Constitution of Carolina", quoted in Levy (1960), p.103.

5. L. Levy, Legacy of Suppression, (1960), p.104.

6. J.S. Mill, On Liberty (1972 ed.), p.79.

7. Popper's classical statement is found in The Logic of Scientific Discovery (1959). In Open Society and its Enemies, (1966), Popper applies his epistemological position of "critical rationalism" to society at large. However both the epistemological and political theory have been criticized. "Popper's philosophy, which some people would like to lay on us as the one and only humanitarian rationalism in existence today, is but a pale reflection of Mill", P. Feyerabend, Against Method, (1978), p.48, n.2. Feyerabend argues forcefully that "Popper's version of Mill's pluralism is not in agreement with scientific practice and would destroy science as we know it". ibid., ch.6-13 and p.171.

8. T. Kuhn, The Structure of Scientific Revolutions, (1970). For a comparison of the respective epistemological theories of Popper and Kuhn see A. Giddens, Studies in Social and Political Theory, (1977), pp.57-64 and A. Giddens, New Rules of Sociological Method, (1976), ch.4.

9. A. Dicey, Law and Public Opinion in England, (1962), pp.438-9.

10. I. Berlin, Four Essays on Liberty, (1979), p.128.

11. R. Wolff, (1968), ch.1, particularly pp.3-12.

12. Berlin (1979), p.190; Wolff (1968), pp.10-11.

13. But see H. Marcuse (1976), p.304.

14. J.S. Mill (1972), p.73.

15. ibid.

16. C.B. Macpherson, The Life and Times of Liberal Democracy, (1977), p.34.

17. C.B. Macpherson, The Political Theory of Possessive Individualism. Hobbes to Locke, (1966), ch.V generally and p.236.

18. ibid., p.224 quoting from Locke's Works.

19. J.S. Mill, (1972), p.277.

20. ibid., p.284.

21. ibid., pp.284-286.

22. See J. Habermas, Theory and Practice, (1974), ch. 1 and 2 passim.

23. See infra, Ch.VI,4,5.

24. Justice Holmes dissenting in Abrams v. U.S., 250 U.S. 616 (1919).

25. 268 U.S.652 (1925) at 673.

26. A. Kelly and W. Harbison, The American Constitution, (1970), p.678.

27. C.H. Pritchett, American Constitutional Issues, (1962), p.412.

28. F. Frankfurter, Justice Holmes and the Supreme Court, (1937), pp.54-5.

29. T. Emerson, The System of Freedom of Expression, (1970), p.48.

30. M. Lerner, The Mind and Faith of Justice Holmes, (1943), p.306.

31. A. Meiklejohn, Political Freedom, (1960), p.73.

32. W. Berns, The First Amendment and the Future of American Democracy, (1976), pp.153-54.

33. O.W. Holmes, Speeches, (1934), p.58.

34. M. Lerner (1943), p.59.

35. Holmes to Laski, March 4, 1920 in Holmes-Laski Letters, Vol.I, p.249.

36. Holmes to Pollock, June 18, 1925 in Holmes-Pollock Letters, Vol.II, p.11, 163.

37. Holmes to Pollock, April 5, 1919 in Holmes-Pollock Letters, Vol.II, p.7.

38. R. Dworkin in Taking Rights Seriously argues that Holmes and his disciple Learned Hand based their preference for judicial restraint on a "pervasive moral scepticism" according to which "even to speak of an act being morally right or wrong makes no sense", pp.138-40.

38a. A. Hunt, The Sociological Movement in Law, (1978), pp.40-44.

39. O.W. Holmes, "Ideals and Doubts", 10 Illinois Law Rev. p.3 (1915).

40. A. Meiklejohn (1960).

41. ibid., p.81.

42. p.26.

43. p.77.

44. p.37.

45. J. Dewey, The Public and its Problems, (1946) and Freedom and Culture, (1934); R. McIver, The Modern State, (1926) and The Web of Government, (1947). An informative review of the impact of pragmaticism in America is found in H.S. Commager, The American Mind, (1950), ch.V which includes an extensive bibliography.

46. Meiklejohn, ibid., p.74.

47. Mcpherson (1977), p.76.

48. Meiklejohn, p.75.

49. Barron (1973).

50. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). See infra, Ch.VIII,3.

51. This idea was adopted in some Supreme Court decisions of the 30s and 40s: "[The Framers] chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance", Justice Black at 319 U.S. 143 (1943). See also the opinion of Justice Murphy in Jones v. Opelika, 316 U.S. 584 (1942) at 611.

52. Z. Chafee Book Review of Meiklejohn's Free Speech, 62 Harvard Law R. p.891 (1949); W. Brennan (1965); Karst, "The First Amendment and Harry Kalven", 13 U.C.L.A. Law R. p.1; Kalven, Uninhibited Robust and Wide-Open, (1968) and The New York Times Case (1964).

53. L. Levy (1960).

54. Mieklejohn (1948 ed.), p.21.

55. Meiklejohn (1960), p.21. This is the only difference between the two editions.

56. Chafee (1949).

57. Al. Meiklejohn, The First Amendment is an Absolute (1961), p.257. Meiklejohn attempts to refute in this article the criticisms of constitutional authors that his interpretation of the First Amendment cannot stand "the test of lawyer-like application"; ibid., n.4. See also A. Meiklejohn, "What Does the First Amendment Mean?", 20 Univ. of Chicago Law Rev. 461 (1953).

58. A. Bickel, The Morality of Consent (1975), p.62.

59. R. Bork, Neutral Principles and Some First Amendment Problems, (1971), pp.25-26.

60. For example, T. Emerson, Towards a Theory of the First Amendment (1966), p.9; J. Ely, Democracy and Distrust, (1980), in particular ch.4.

61. H. Kalven (1964, 1965, 1965); Emerson (1966, 1971).

62. Berns (1957); Bork (1971); Bickel (1975), p.70ff.

63. Bickel (1975), pp.73-76.

64. Bork (1971), p.25; Bickel (1975), p.62ff.

65. J. Schumpeter, Capitalism, Socialism and Democracy, (1976), p.250. Schumpeter defines democracy as a "political method, that is to say, a certain type of institutional arrangement for arriving at political-legal and administrative - decisions and hence incapable of being an end in itself", ibid., p.242.

66. Voting (1954), ch.14.

67. A. Bentley, The Process of Government, (1967).

68. R. Dahl, A Preface to Democratic Theory, (1956), ch.5 and in particular, pp.131-135.

69. ibid., ch.3. The interest in social control methods is shared by all social sciences during that period in America. T. Parsons' The Structure of Social Action, (1949) is the best sociological statement of the pluralist position.

70. Macpherson (1977), p.85. A concise presentation of the pluralist theories of democracy is found in M. Margolis, Viable Democracy, (1979), ch.5.

71. R. Pound, Social Control Through Law, (1942), p.66.

72. A. Hunt (1978), p.21.

73. ibid., pp.22-25.

74. ibid., p.47.

75. K. Llewellyn, The Bramble Bush, (1960), p.22.

76. J. Stone, The Province and Function of Law, (1950), p.494. Stone applies the interests theory on the social situation of the Schenck case in which Holmes enunciated the danger test.

77. Among others see Barenblatt v. U.S., 360 U.S. 109 (1959).

78. See above, 2.

79. H. Marcuse (1972) describes the process through which the universe of discourse has been closed and a "functional" language of total administration has been imposed in Western societies. This Orwellian language "imposes images and militates against the development and expression of concepts". "The image may be 'freedom' or 'peace' or the 'nice guy' or the 'communist' or 'Miss Reingold'. The reader or listener is expected to associate (and does associate) with them a fixated structure of institutions, attitudes, aspirations, and he is expected to react in a fixated, specific manner", ch.4, p.86, 83. One of the greatest American comic novelists, John Toole, expresses the same point in a dialogue between two typical New Orleans characters:

"What you think about somebody wants peace, Claude?"
"That sounds like a comuniss to me".
(A Confederacy of Dunces, p.225).

80. H. Wellington, On Freedom of Expression, (1979), p.1131.

81. R. Horn, Groups and the Constitution, (1956), p.150.

82. Berns (1976), p.180.

83. Bickel (1975), ch.3.

84. ibid., pp.76-78.

85. See Wellington (1979), p.1132.

86. ibid., pp.1110-1121.

87. Bickel (1975), ch.1. A similar interest and approval of Burke's theories of representation as against those of Mill is found in a book criticising the Supreme Court voting rights decisions of the 60s: W. Elliott (1974), pp.193-204.

88. Bork (1971), passim.

89. M. Shapiro, Freedom of Speech (1966), pp.46-47.

90. Emerson (1966), pp.1-15.

91. M. Shapiro (1966) and Krislov, The Supreme Court and Political Freedom, (1968), passim. But see the criticism of the pluralist assumptions in Wolff (1968), ch.4.

92. The major case was Baker v. Carr, 369 U.S. 186 (1962). For criticisms and bibliography see Ely (1980), pp.116-125.

93. 304, U.S. 144, n.4 (1938).

94. See ch.X.

95. On positive discrimination see Ely (1980), ch.6; Dworkin (1977), ch.9 and bibliography cited there.

96. See ch.X, A, B.

97. Hague v. C.I.O., 307 U.S. 496 at 515 (1939).

98. Bickel expressed this thesis in his lecture "The Supreme Court and the Idea of Progress" (1970). For criticisms of the thesis based on "qualified pluralism" see Ely (1980), pp.69-70; and on the "rights thesis", Dworkin (1977), pp.144-147.

99. See R. Dahl, Democracy in the United States, (1976). Dahl, Galbraith and Schumacher concentrate their criticism on the tendency of government toward "bigness". Others are concerned with the popular participation in decision-making. A review of theories of "participatory democracy" is found in Macpherson (1977), ch.4; Margolis (1979), ch.7. A recent statement is J. Lucas, Democracy and Participation (1976).

100. Ely (1980), p.135.

101. ibid., p.242, n.4.

102. A. Cox, "Direct Action, Civil Disobedience and the Constitution", in A. Cox et al. (1967), p.20.

103. Bickel (1975), pp.62-65 and ch.4 passim.

104. Black, H., "The Bill of Rights", 35 New York Law R. p.866 (1960) and Black, H. and Cahn, Ed., "A Public Interview", 37 New York Law R. p.549 (1962).

105. Dennis v. U.S. 341 U.S. 494 (1951). Douglas dissenting, joined by Black, at 588.

106. Fieldman v. U.S., 322 U.S. 487 at 501 (1944).

107. See ch.VIII for cases protecting union rights. Justice Black found that the Sherman Act had been violated by business monopolies in all 19 cases that reached the Supreme Court between 1949-1959. He equally upheld the great majority of union and workers' complaints under the Fair Labor Standards Act and the Federal Employer's Liability Act. See W. Mendelson (1961), ch.2 and the same (1965), pp.33-36.

108. See ch.X, n.145 and text accompanying.

109. The phrase is taken from an anecdote about Black quoted in Snowiss (1973), p.241.

110. See S. Snowiss, "The Legacy of Justice Black", 1973 Supreme Court Rev. p.187. The article attempts to explain the inconsistency of the later opinions.

111. Elliott (1974), p.2.

112. ibid., p.VIII.

113. D. Truber, Toward a Social Theory of Law (1972).

114. ibid., p.20.

115. R.M. Unger argues that the purposive legal reasoning is one of the major characteristics of the Welfare State and leads to the decline of the formalistic modes of reasoning associated with the classical idea of the rule of law. R. Unger, Knowledge and Politics (1976), pp.94-100; Law in Modern Society (1977), pp.193-200.

116. Truber (1972), pp.37-39.

117. Ely (1980), p.71.

118. J. Rawls, A Theory of Justice, (1973). A radical critique of Rawls' theory is found in C.B. Macpherson, Democratic Theory, (1973), pp.87-95.

119. R. Dworkin (1977).

120. J. Ely (1980).

121. B. Ackerman, Private Property and the Constitution (1977). There is a wealth of legal books that use neoclassical economics. A classical text in that approach is R. Posner, Economic Analysis of Law (1973).

122. Recent economic and political developments have sparked off an interesting debate about the viability and future of the Welfare State. I have found particularly instructive: N. Poulantzas, State, Power, Socialism, (1978); S. Hall, "Popular-Democrativ vs. Authoritarian Populism: Two Ways of Taking Democracy Seriously", in A. Hunt (ed.), Marxism and Democracy, (1980); and the debates "Sur l'État" and "Democratie, Autogestion, Crise du Marxisme", in Dialectiques No.17 and 21.

123. Wellington (1979), p.1141.

124. ibid., 1140.

125. Ely (1980), p.135.

126. Wellington (1979), p.1137.

127. H. Arendt, "Civil Disobedience" in Crises of the Republic (1972).

128. The expression was coined by A. Bickel.

129. Arendt (1972), p.81.

130. Wellington (1979) passim.

131. See N. Puner (1968), p.714.

132. Dworkin (1977), ch.8.

133. See materials cited in ch.X, infra, note 267.

134. Emerson (1966), p.12.

135. Barron (1973) passim; The Georgetown Law Journal, "Media and the First Amendment" (1973), p.15.

136. A Free and Responsible Press (1947), p.113.

137. Emerson (1966), pp.12-13.

138. C.S. Pierce, "The Fixation of Belief", in The Philosophy of Pierce, (ed. by J. Buchler) (1940), p.20.

139. H. Marcuse, Repressive Tolerance, (1976), p.323.

140. ibid. Postscript.

141. T. Scanlon (1977).

142. Ely (1980), pp.105-116 and Ely (1975); Wellington (1979).

143. Scanlon (1977), p.161.

144. ibid., p.162.

145. See the analysis of meaning and communicative intent in A. Giddens, (1976), pp.86-92.

146. This is the basis of T. Emerson's impressive treatise The System of Freedom of Expression, (1971).

147. Meiklejohn's theory of two categories of speech is based on that distinction.

148. See J. Austin, How to do Things with Words, (1962) and J. Habermas (1979), pp.44-50 and 59-65 for the illocutionary force of speech acts.

149. Scanlon (1977), pp.159-60.

150. W. Friedmann, Law in a Changing Society (1972), p.161 and H. Hart, Punishment and Responsibility, (1978), ch.VII and VIII.

151. For a criticism of legal essentialism and its applications in Marxist theories of law see P. Hirst, On Law and Ideology, (1979), pp.106-126 and "Law, Socialism, Rights", in P. Carlen (ed.), Radical Issues in Criminology, (1980). I have found some particularly interesting critiques of legal philosophy in M. Miaille, Une Introduction Critique au Droit (1977), pp.343-379; M. Miaille, l'Etat du Droit, (1978), pp.159-198; and the collection, M. Bourjol et al., Pour une Critique du Droit, (1978), pp.114-146.

152. Wellington (1979), p.1122.

153. Scanlon (1977), p.163 and n.8.

154. Wellington (1979), p.1124.

155. For the theory of formal freedom that grew from the Kantian tradition see R. Unger (1976), p.85.

156. Special issue "On Civil Disobedience and the Law", 21 Rutgers Law Rev. (Fall 1966), p.6.

157. See A. Giddens, Central Problems in Social Theory, (1979) and in particular ch.1, 2 and 4; E.P. Thompson, The Poverty of Theory, (1978), pp.193-399 and P. Anderson, Arguments within English Marxism, (1980), ch.2; the classical liberal position on human agency and structure is found in I. Berlin (1979), ch.II.

158. H. Hart (1978), ch.VIII.

CHAPTER II

1. Shapiro (1966), pp.87-95.

2. See, for example, F. Neumann, "The Concept of Political Freedom" and "The Change in the Function of Law in Modern Society", in The Democratic and Authoritarian State (1964); O. Kirchheimer, "The Rechstaat as Magic Wall" in Wolff and Moore, The Critical Spirit, (1967); Unger (1976), pp.88-100; Unger (1977), pp.176-181, 192-220; Hart (1961), ch.VII; Hart, Positivism and the Separation of Law and Morals, (1958); C. Eisenmann, L'Esprit des Lois et la Séparation des Pouvoirs, (1933); L. Althusser, "Montesquieu", in Politics and History (1972), pp.87-95; M. Miaille (1978), pp.212-219 presents an informative criticism of the dominant understanding of Montesquieu's theory of separation of powers.

3. In J. Habermas (1974): The Classical Doctrine of Politics in Relation to Social Philosophy, particularly pp.41-76.

4. C.B. Macpherson (1961), pp.87-100, pp.221-232 passim.

5. In J. Habermas (1974): Natural Law and Revolution, pp.82-120.

6. C. Black, The People and the Court, (1960), p.17.

7. B. Ackerman (1977), p.11.

8. See Ely (1980), pp.48-54; Hart (1961), ch.IX; J. Griffith, The Political Constitution (1979).

9. H. Collins, Introduction to T. Paine, The Rights of Man (1969).

10. T. Paine (1969).

11. ibid., ch.4 passim.

12. ibid., p.188, 185.

13. ibid., p.187.

14. ibid., p.186.

15. ibid., p.187.

16. ibid., p.193.

17. ibid., p.206.

18. Farewell address quoted in Carroll, P. and Noble, D., The Free and the Unfree: A New History of the United States (1977), p.187.

19. ibid., p.132.

20. ibid., ch.8 passim. See also L. Levy (1960), ch.5.

21. Quoted in E. Corwin, The Twilight of the Supreme Court (1934), p.63.

22. A. de Tocqueville, Democracy in America (1864), Vol.II, p.314.

23. Tocqueville saw free press as a cure against the evil of equality: ibid., Vol.I, ch.XI and Vol.II, ch.VI.

24. See A. Giddens (1979), pp.89-96; Unger (1976), ch.2; H.F. Pitkin, Wittgenstein and Justice (1972), p.220f.

25. Hart (1961), ch.VI.

26. F. Frankfurter, "The Judicial Process and the Supreme Court" in Mendelson (1965), p.492; A. de Toqueville (1864), Vol.I, p.357.

27. C. Black (1960), p.118.

28. ibid., pp.6-23 and at 12; McIlwain, C., Constitutionalism and the Changing World (1939), ch.XIII and XIV.

29. McIlwain (1939), pp.278-9.

30. C. Black (1960), p.32.

31. A. Cox (1968), p.24.

32. Dworkin (1977) and J. Finnis, Natural Law and Natural Rights (1980) provide new interpretations of the relation between natural law and the constitution.

33. I was greatly helped by J. Habermas article on "Natural Law and Revolution" in Habermas (1974).

34. K. Marx, Early Writings (1975), p.88.

35. L. Colletti, Introduction to K. Marx (1975), p.42.

36. Colletti (1975), p.46; cf. A. Wolfe (1977), p.5.

37. Carroll and Noble (1977), p.199.

38. C.B. Macpherson, The Real World of Democracy (1966), p.1 and Macpherson (1973), I, VII, IX passim. Similarly E.H. Carr remarks that "in England... the word democracy long remained in bad odour with the English ruling classes". The Soviet Impact on the Western World (1946), pp.8-9.

39. See above, 2.1.2.

40. C. Black (1960), pp.106-107.

41. 1 Cranch 137, 2 L.Ed. 60 (1803).

42. ibid., at 176, 177, 178.

43. E. Corwin, Liberty and Government (1948), pp.72-85.

44. Corwin (1934), pp.54-62 at p.56.

45. Quoted in Corwin (1934), p.59.

46. "The Court's persistent resort to notions of substantive due process for almost a century attests the strength of our natural law inheritance in constitutional adjudication, and I think is unwise as well as hopeless to resist it". A. Cox, The Role of the Supreme Court in American Government (1976), p.113. The question of "substantive due process" has been one of the most vexed in American constitutional theory. For an informative review and bibliography see H. Abraham, Freedom and the Court (1977), ch.IV.

47. Corwin (1934), p.80.

48. Corwin (1948), p.137f. "The country was presented with a new, up-to-date version of natural law", p.138. Tocqueville stated that "If I were asked where I placed the American aristocracy, I should reply without hesitation... that it occupies the judicial bench and the bar", op. cit. Vol.I, p.355.

49. Pollock v. Farmers L. and T. Co., 158 U.S. 429 (1895). Advocate's argument is recorded ibid. at 544 and Field's reply at 607.

50. U.S. v. Knight Co., 156 U.S. 1 (1895).

51. In Re Debs, 158 U.S. 564 (1895).

52. Lochner v. New York, 198 U.S. 45 (1905) at 57.

53. A. Wolfe (1977), p.57.

54. 110 U.S. 535 at 536.

55. Lochner v. N.Y., 198 U.S. at 59.

56. The Slaughter House cases, 16 Wallace 36 (1873). Justice Field dissenting at 95.

57. R. McCloskey, American Conservatism in the Age of Enterprise (1951) pp.81, and 122-123.

58. See infra, ch.VI, 4.

59. Davis v. Massachusetts, 167 U.S. 43 (1897) at 47-48.

60. Children's Hospital v. Adkins, 284 Fed. 613 at 622 (D.C. Cir. 1922).

61. U.S. v. Carolene Products Co., 304 U.S. 144 (1938) at 152, n.4.

62. Dissenting in Drivers' Union v. Meadowmoor, 312 U.S. 287 (1941) at 301-2.

63. Palko v. Connecticut, 302 U.S. 319 (1937) at 326.

64. Jones v. Opelika, 316 U.S. 584 (1942) at 600.

65. M. Konvitz, replying to B. Russell's suggestion that freedom has been receding in the world, wrote "In the U.S., in the last twenty-five years, progress in civil liberties and civil rights has been made in an unprecedented way", Konvitz (1967), p.xiii.

66. Schwartz, B., A Commentary on the Constitution, Vol.I, p.264.

67. Kovacs v. Cooper, 336 U.S. 77 (1949) at 90.

68. "We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no first without thereby establishing seconds", Jackson dissenting in Brinegar v. U.S., 338 U.S. 160 (1949) at 180.

69. Learned Hand was equally opposed to the doctrine. He could not understand "why property itself was not a personal right", L. Hand (1946), p.698.

70. P. Freund (1950), ch.I; Mendelson (1961), pp.124-131.

71. P. Freund (1950), p.19.

72. Kovacs v. Cooper, Frankfurter dissenting, 336 U.S. 77 (1949) at 95. Learned Hand, too, in his famous lecture on the "Bill of Rights" came close to accepting the preferred position doctrine (1960), p.69.

73. A similar distinction between judicial activists and proponents of judicial restraint was drawn in the earlier cases that were decided on due process grounds. See Mendelson (1961, 1965); A. Bickel (1962, 1970); C. Black (1960); J. Deutch, "Neutrality, Legitimacy and the Supreme Court", 20 Stanford Law R. p.169 (1968); Learned Hand, The Bill of Rights (1958). In freedom of expression theory the activism/restraint distinction is usually presented as that between the "absolutists" and the "balancers". See Meiklejohn, "The Balancing of Self-Preservation Against Political Freedom", 49 California Law R. (1961); Frantz, "The First Amendment in the Balance", 71 Yale Law J., p.1424 (1962); Mendelson, "On the Meaning of the First Amendment: Absolutes in the Balance" 50 California Law R. p.821 (1962). The Frantz-Mendelson debate was continued in 51 Calif.L.R. p.729 (1963) and 17 Vanderbilt L.R. p.479 (1964). Krislov (1968) and Shapiro (1966) provide a pro-activist review of the debate.

74. The rules under which the Court avoids passing upon a large part of the constitutional challenges brought before it are gathered in a concurring opinion of Justice Brandeis in Ashwander v. T.V.A., 297 U.S. 288 (1936).

75. See Note, "The Chilling Effect in Constitutional Law", 69 Columbia Law Rev. p.808 (1969).

76. Hague v. C.I.O., 307 U.S. 496 (1939) at 515-516.

77. S. Krislov, The Supreme Court and Political Freedom (1968), p.77.

78. Quoted in R. Hodder-Williams, The Politics of the U.S. Supreme Court (1980), p.7.

79. Justice Roberts in U.S. v. Butler, 297 U.S. 1 (1936).

80. H. Black and E. Cahn (1962), pp.553-4.

81. An interesting convergence of such schools as Phenomenology, Ethnomethodology, Post-Wittgensteinian Philosophy, Critical Theory and of some schools within the Marxist tradition has taken place in an attempt to break from earlier positivistic concepts in the social sciences. See A. Giddens (1976), ch.I.

82. R. Unger (1977), p.196.

83. See R. Dworkin, "The Jurisprudence of President Nixon", 18 New York Review of Books, 27-38 (May 4, 1972) and B. Ackerman (1977), ch.7.

84. For an extensive review of the literature on the 14th Amendment see Ely (1980), pp.14-41 and accompanying references.

85. S. Krislov (1968), pp.65-66. G. Anastaplo, The Constitutionalist (1971) attempts an exhaustive examination of the legislative history of the First Amendment.

86. Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934) at 442-443.

87. Quoted in Hodder-Williams (1980), p.7.

88. Linde, Judges, Critics and the Realist Tradition (1972), p.254.

89. Abrams v. U.S., 250 U.S. 616 (1919) at 630.

90. "[T]he First Amendment repudiated seditious libel for this country", Black and Douglas dissenting in Beauharnais v. Illinois, 343 U.S. 250 (1951) at 272.

91. Schoffielf, Essays on Constitutional Law and Equity (1921), Vol.2, p.521-2.

92. Levy (1960), pp.247-8.

93. New York Times v. Sullivan, 376 U.S. 254 (1968) at 276.

94. Kalven (1964), p.209.

95. J. Roche, "American Liberty: An Examination of the Tradition of Freedom" in M, Konvitz and C. Rossiter, Aspects of Liberty (1958), pp.129-162.

96. See L. Althusser, Lenin and Philosophy (1971), pp.127-186, 195-219 and M. Foucault, L'Ordre du Discours (1971).

97. Krislov (1968), p.75.

98. J. Auerbach, Unequal Justice (1976), p.171.

99. See infra, ch.VIII.

100. Lochner v. New York, 198 U.S. 45 (1905), Holmes dissenting at 75.

101. A. Cox (1968), ch.1.

102. M. Shapiro (1966), p.16.

103. Note the contradiction of this argument with the claim of the pluralists that political apathy is a necessary characteristic of advanced democratic societies. See above, ch.I, 3.2. This was the favourite argument of Frankfurter and Learned Hand even though they had both fully adopted the pluralist assumptions.

104. Monaghan, "Constitutional Adjudication: The Who and When", 82 Yale Law Journal, 1363 (1973) at 1366.

105. "Law [is] the expression of the views and feelings that may fairly be deemed representative of the community as continuing society", F. Frankfurter, "Some Observations on the Nature of the Judicial Process of Supreme Court Litigation", 98 Proceedings of the American Philosophical Society, p.233 (1954).

106. A. Bickel (1975), ch.1; Elliott, W. (1974), pp.193-204.

107. H. Stone, "The Common Law in the United States", 50 Harvard Law Rev. (1936), pp.23-5. But see the criticisms of the position in Ely (1980), pp.63-69.

108. H. Wellington in "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication", 83 Yale Law Journal p.221 (1973), argues that the courts should implement in law the conventional or "common" morality. It is one more effort at defining the principle, or essence, or "spirit" of the law. See ch.III, infra.

109. This is the position of Ely (1980), ch.3.

110. M. Shapiro (1966), p.8 and Krislov (1968), ch.1; Corwin (1934), ch. III: "due process of law is no Frankenstein's monster that rides down legislation in defiance of its creator's will - it is the servant of the court's legislative judgment", ibid., p.101.

111. Shapiro (1966), pp.17-25.

112. ibid., pp.25-34.

113. This thesis has been advanced by R. Dahl in Decision Making in a Democracy (1957); cf. E. Latham, "The Supreme Court and the Supreme People", 16 Journal of Politics, p.207 (1954).

114. Bishin, "Judicial Review in Democratic Theory", 50 S. Cal. Law Rev. p.1099 (1977) at 1112.

115. T. Grey, "Do We Have an Unwritten Constitution?", 27 Stanford Law Rev., p.703 (1975) at 705.

116. H. Black and E. Cahn (1962), p.553.

CHAPTER III

1. T, Cooley, A Treatise in Constitutional Limitation (1890), ch.VII and IX.

2. See generally, F. Neumann (1964), Approaches to the Study of Political Power.

3. Habermas (1976) and (1979), ch.5; C. Black (1960), ch.II gives a classical liberal argument for the legitimatory role of constitutionalism and judicial review.

4. See J. Talmon, The Origins of Totalitarian Democracy (1966); on the link between liberalism and authoritarianism, N. Poulantzas, Political Power and Social Classes (1978), pp.219-221; on the ambiguous attitude of liberal political theory to state power F. Neumann (1964), The Concept of Political Freedom.

5. C.B. Macpherson (1962), passim.

6. An interesting review of the theories of civil society is found in N. Bobbio "Gramsci and the Conception of Civil Society", in C. Mouffe (ed.), Gramsci and Marxist Theory (1979).

7. G. Poggi, The Development of the Modern State (1978), ch.IV and V draws extensively from constitutional theory and is particularly informative.

8. The phrase is coined by Macpherson (1962).

9. R. Pound in The Spirit of Common Law (1925), p.46 describes the contradictory attitude of the Puritans toward legislation: they are both hostile to it and they prefer it against common law and equity.

10. M. Friedman, Capitalism and Freedom (1962), p.34.

11. See Macpherson (1962) passim and Habermas (1974), pp.92-96 and 105-109.

12. On the notion of law in J.J. Rousseau, F. Neumann, The Governance and the Rule of Law (1936), pp.240-265 and in particular 251-256.

13. Unger (1977), pp.58-86.

14. Habermas (1974), pp.56-67.

15. Arendt, H., Vita Activa, p.291, quoted in Habermas (1974), p.61.

16. The classical Marxist analysis of the form of law and of legal right is E. Pashukanis, Law and Marxism (1978).

17. Habermas (1974), p.85.

18. Marxist theories of law deriving from the analysis of Pashukanis suffer from formalism, too. See P. Hirst (1979), pp.153-176.

18a. Dr. J. Finnis argues that the inference of norms from facts often attributed to theories of classical natural law is not true. Finnis (1980), pp.33-42. I do not argue for any such inference but for the global character of traditional world-views which are "interpretations of the world, nature, and history as a whole". Habermas (1976), p.80.

19. "Technology and Science as 'Ideology'", in Habermas (1971), pp.81-122, and p.97.

20. Unger (1976), p.85 and B. Leoni, Freedom and the Law (1961), ch.3, 4 and 5.

21. E.g. A. Hunt, "Perspectives in the Sociology of Law", in P. Carlen (ed.), The Sociology of Law (1976); M. Cain, "Optimism, Law and the State: A Plea for the possibility of politics", 1977 European Yearbook in Law and Sociology; B. Edelman, Le Droit Saisie par la Photographie (1973); C. Sumner, Reading Ideologies (1979), ch.8.

22. E.P. Thompson, Whigs and Hunters (1977), p.263.

23. The expression is coined by Habermas (1971).

24. See A. Hunt (1978), ch.5. However, economic and social changes in Western democracies after the 1930s have increased the need for direct legitimation of the political order. See infra, ch.III.

25. D. Hay's "Property, Authority and the Criminal Law" is an excellent description of the ideological role of the law in 18th century England. In D. Hay et al., Albion's Fatal Tree (1977).

26. The concept of "negative freedom" is well known in continental legal philosophy and derives from the Kantian theory of law. The term was introduced in England by I. Berlin (1979).

27. See Neumann (1936), pp.405-424 and 462-491.

28. Corwin (1934), pp.89-90.

29. ibid.

30. ibid., at 91; cf. "The Court's power is a natural outcome of the necessity for maintaining capitalist dominance under democratic forms... judicial review has proved to be a very convenient channel through which the driving forces of American economic life have found expression and achieved victory". M. Lerner, "The Divine Right of Judges" in A. Christensen and E. Kirkpatrick (eds.), The People, Politics and the Politician (1941), p.578.

31. See above, p.58.

32. Unger (1977) 192-242; Poggi (1978), ch.VI.

33. Habermas (1971), ch.5 and 6.

34. M. Edelman (1964) passim.

35. See above, ch.II, 3.2.1.

36. Habermas (1971), p.75 and Habermas (1964) passim.

37. Ely (1980), p.79.

38. The debate on the "decline of law" started in Germany during the Weimar years by C. Schmidt and his school. The advent of the Welfare State after WWII in all major Western democracies made the theme one of the most discussed - and controversial - in legal philosophy. G. Ripert's Le declin du droit (1949) is a classical statement of the neoconservative position. In England F. Hayek's The Constitution of Liberty (1960) particularly ch.16 contains all the main arguments and a full bibliography. See also Hayek's later Law, Legislation and Liberty, Vol.I and III. For the United States see Mazon, "The Crisis of Liberal Legalism", 81 Yale Law J., p.1032 (1972) and references provided there. An interesting critique of the "decline of law" thesis is provided in M. Bourjol et al. (1978), pp.61-67.

39. H. Hart (1961).

40. R. Dworkin (1977).

41. Hart (1961), Cn.IV. There are similarities with T. Parsons' understanding of power in Western societies. For Parsons "authority" is not a form of power (legitimate power) but a basis of power. Power is, therefore, by definition legitimate. See A. Giddens (1979), ch.10, pp.340-41.

42. Dworkin (1977), p.198.

43. See ch.I, 5 and J. Griffith (1979).

44. Ch.II, 4.1.

45. Ch.II, 4.2.1 and 4.2.2.

46. Ch.I, 3.

47. A. Bickel (1970).

48. Elliott (1974), p.2, 11.

49. Ch.III, 2.

50. A clear statement to that effect is found in Prudential Insurance Co. v. Cheek, 259 U.S. 530 (1922) at 543.

51. For the centrality of law in legal philosophy and the sociology of law see A. Hunt in P. Carlen (ed.) (1976).

52. See ch.II, n.30 and accompanying text.

53. Bork (1971), p.1. According to classical political philosophy legitimacy is a characteristic of authority. The question is when power is legitimate, i.e. when power is authority. See Arendt (1972), On Violence, and A. Passerin d'Entreves, The Notion of the State (1967) on Power and Authority.

54. See the criticisms of A. Giddens (1979b), pp.101-103.

55. Marshall (1971), p.198.

56. S. Scheingold, The Politics of Rights (1974), p.3.

57. M. Foucault, La Volonté de Savoir (1976), pp.111-120 and p.116.

58. Chief Justice Hughes quoted in Hoddler-Williams (1980), p.11.

59. See H. Wechsler, "Toward Neutral Principles of Constitutional Law", 73 Harvard Law Rev. p.1 (1959) and Bork (1971) applying Weschler's theory on free speech issues.

60. Ackerman (1977) and Posner (1973).

61. M. Foucault (1971) p.23-38. See also G. Therborn, The Ideology of Power (1980), pp.81-84.

62. See F. Neumann (1964), Approaches to the Study of Political Power. R. Dahrendorf in his Society and Democracy in Germany (1969) remarks that "the exaggerated faith in the rule of law as an institution beyond all conflicts of interests betrays the same aversion to discord and thus the same evasion of the uncomfortable diversity of uncertainty that is inherent in the German idea of the state", p.197. The American theory of constitutionalism inheres similar faiths, aversions and evasions.

63. I was greatly helped in my analysis by the articles of B. Hindess, "Democracy and the Limitations of Parliamentary Democracy in Britain" in 1 Politics and Power (1980) and of P. Hirst, "Law, Socialism, Rights", in P. Carlen (1980).

64. Griffith (1979), p.16.

65. Giddens (1979b), ch.2, p.93; M. Foucault (1976), pp.121-135; Poulantzas (1978), Part Two, particularly pp.146-154.

65a. Offe in Connerton (1976), p.394.

66. "The creation of frames of meaning... [and their] reflexive elaboration is characteristically imbalanced in relation to the possession of power", A. Giddens (1976), p.113 and ch.3. See also J. Brigham, Constitutional Language (1978).

67. Poulantzas (1978), Part One.

68. B. Hindess in Hunt (ed.) (1980), p.44.

69. W. Connolly, The Terms of Political Discourse (1974), p.180.

70. Hunt in Carlen (ed.) (1976), pp.39-43.

71. E.P. Thompson (1977), p.265.

72. Poulantzas (1978), pp.76-93.

73. Therborn (1980), pp.100-115.

74. Talmon (1952).

75. See the critical review of functionalist social theory in A. Giddens (1979a), ch.2.

76. A. Giddens (1979b), p.103.

77. H. Hart (1961), pp.56 and 79-88.

78. ibid., at pp.113, 111.

79. ibid., at p.113 and pp.107-115 passing.

80. O. Kirchheimer (1967), part III.

81. See R. McCloskey, The American Supreme Court (1960), ch.VI and infra, ch.VIII, 1.

82. M. Foucault, Discipline and Punishment (1979), passim.

CHAPTER IV

1. Z. Chafee, Government and Mass Communications (1947), Vol.I, pp.21-2.
2. ibid., p.21.
3. p.28.
4. Associated Press v. U.S., 326 U.S. at 20 (1945).
5. A.V. Dicey, Law and Public Opinion in England (1962).
6. ibid., pp.21-27.
7. p.11.
8. pp.12-16.
9. p.16.
10. p.42.
11. p.43.
12. p.57.
13. J. Habermas, Stukturwandel der Öffentlichkeit, Neuwied: Luchterhand, 1962. The argument is summarized in Habermas,"The public sphere: an encyclopedia article", 3 New German Critique, 1974, p.49. Habermas develops this idea in his later work, where the public sphere is related to problems of legitimation in late capitalism. See Habermas (1974, 1976, 1979) passim.
14. S. Wolin, Politics and Vision (1960). His concept of the "political" resembles closely that of the public sphere.
15. H. Arendt, The Human Condition (1959) and Crises of the Republic (1972), passim.
16. Habermas (1974), p.49.
17. Other public spheres may be equally conceptualized, like an artistic, moral or scientific one. Popper's understanding of scientific practice as an "open society" is very close to the concept of a "scientific public sphere".
18. Karl Bücher, quoted by Habermas (1974), p.53.
19. op. cit., p.55.
20. op. cit., p.52.
21. op. cit., p.53; see also Habermas (1974), p.1 and Poggi (1978), pp. 104-7.
22. Ch.II, 2.1.2.
23. J.J. Rousseau, The Social Contract (M. Cranston transl.), London Penguin, 1968, Bk.II, Ch.II, p.96.
24. Habermas (1974), p.54.

25. ibid. The translation of this passage is taken from D. Held, Introduction to Critical Theory, London, Hutchinson, 1980, p.262.

26. Similar statements are found in Arendt (1959) p.220, 41 and Wolin (1960), p.287.

27. Habermas (1971), p.106.

28. J. Griffith (1979), p.12, 19.

29. op. cit., p.17.

30. H. Abraham (1977), p.170.

31. O. Kirchheimer (1967).

32. Learned Hand, The Spirit of Liberty (ed. I. Dilliard), New York, Knopf, 1953, pp.189-90.

33. Dennis v. U.S., Ch.IX, 3.1.2.

34. Griffith (1979), p.19. "Everything that happens is constitutional. And if nothing happened that would be constitutional also."

35. Giddens (1979b), Ch.2, 3, 5, particularly pp.97-100, 120-128, 190-193; see also Habermas analysis of "distorted communications" in (1971) Ch.5 and (1979), Ch.1.

36. See generally books cited in Ch.V, n.34 and in particular Roelofs (1979).

CHAPTER V

1. Berns (1957), p.50.

2. Z. Chafee, The Blessings of Liberty (1956), p.70.

3. Bork (1971), p.33; Freund (1950), p.24f; Justice Frankfurter dissenting in Bridges v. California, 314 U.S. 252 (1941) declared that the test was a mere "rule of reason", ibid. at 282.

4. Meiklejohn (1960), p.45.

5. M. Konvitz, Fundamental Liberties of a Free People (1957), p.288.

6. Frankfurter dissenting in Barnette, 319 U.S. 624 (1943) at 663; Emerson (1966), p.52.

7. Kalven (1964), pp.213-4; Kalven (1968), p.297.

8. Wellington (1979), p.1141.

9. Ely (1980), p.116.

10. Brandenburg v. Ohio, 395 U.S. 444 (1969).

11. Ely (1980), p.115.

12. H. Linde, "Clear and Present Danger Reexamined" (1970), p.1179; a more sympathetic view is found in F. Strong, "50 years of Clear and Present Danger" (1969).

13. R. Cushman, "Clear and present danger in Free Speech Cases: A Study in Judical Semantics" (1948) passim; cf. C. Antieau, "The Rule of Clear and Present Danger" (1950); W. Mendelson, "Clear and Present Danger" (1952).

14. For criticisms of all other main tests see Emerson (1966), pp.48-62.

15. Krislov (1968), p.108.

16. See W. Brennan (1965) and Krislov (1968), pp.97-107.

17. E. Hudon, Freedom of Speech and Press in America (1963), p.ix.

18. Emerson (1966), p.vii.

19. ibid., p.viii.

20. ibid. passim, and Emerson (1970). Emerson's theory is based on a conceptual distinction between speech and conduct.

21. Among others I have found most interesting the efforts of Chafee (1941); Meiklejohn (1960); Shapiro (1966); Krislov (1968); Kalven (1964); Wellington (1979); Ely (1980) and Emerson (1970).

22. Ch.II and III.

23. C. Campbell, Legal Thought and Juristic Values (1974).

24. ibid., pp.18-19 and n.24.

25. M. Cain, "Necessarily out of Touch", in P. Carlen (ed.) (1976), pp.229-234.

26. Quoted from Perelman, "The Idea of Justice and the Problem of Argument", p.19.

27. Campbell (1974), pp.27-8. This is done when jurisprudence limits its task in "seeking the validity of legal norms".

28. See ch.X, D.

29. Kalven (1964).

30. Brennan (1965).

31. ibid., pp.6-10.

32. See the criticisms of H. Hart (1961), pp.121-137 and Hunt (1978), pp.45-59.

33. E.P. Thompson (1977), p.266.

34. See, e.g., R. Lefcourt, Law Against the People (1971); Balbus (1973, 1977); Taylor, Walton and Young, Critical Criminology (1975); A. Skillen, Ruling Illusion (1977), ch.3; R. Quinney, Class, State, Crime (1977); V. Tumanov. Contemporary Bourgeois Legal Thought (1974); J. Roelofs, The Warren Court and Corporate Capitalism (1979).

CHAPTER VI

1. Ely (1980), p.107.
2. M. Davis, "Why the U.S. Working Class is Different" (1980a), p.30.
3. Wolfe (1977), ch.4, passim.
4. Nelson (1967), p.xxxii.
5. Carroll and Noble (1977), p.331.
6. Nelson (1967), p.xxxiv.
7. R. Murray, Red Scare (1964).
8. M. Davis (1980a), p.43.
9. Carroll and Noble (1977), p.331.
10. Chafee (1956), p.67.
11. ibid.
12. New York Penal Law, §160-166.
13. Chafee (1956), p.71.
14. See Wolfe (1977), ch.6 passim.
15. O. Kirchheimer, "Politics and Justice" in Politics, Law and Social Change.
16. J. Paul and M. Schwartz, Federal Censorship (1961), pp.17-24.
17. Nelson (1967), p.xxviii.
18. See ch.I, 2.
19. The process leading to the adoption of the Espionage Act is recorded in Chafee (1941), pp.35-41. For the Congressional debates see T. Carroll, "Freedom of Speech and of the Press in War-Time: the Espionage Act" (1919) and J. Hall, "Free Speech in War-Time", 21 Columbia Law R., p.526.
20. Act of June 15, 1917 C.30, Title I, §3, 40 Stat. 219, now 50 U.S.C.A., §33.
21. ibid., ch.30, Title XII, §2.
22. The judicial construction of the terms of the original Act makes the fears of the Attorney-General appear unjustified. See infra, 3.1, 3.2.

23. Act of May 16, 1918, C.75, §1, 40 Stat.553; repealed Act of March 3, 1921, C.136, 41 Stat. 1359. Numerals are mine.

24. The total number of persons convicted is stated in the Attorney-General's reports as 877 out of 1956 prosecutions commenced.

25. Learned Hand in Masses Publishing Co. v. Patten, 244 Fed. 535, 540 (S.D.N.Y. 1917).

26. U.S. v. Pierce et al., 245 Fed. 878 (N.D.N.Y. 1917); p.61. Most of the lower federal courts decisions which are quoted in this part (3.2) are taken from W. Nelles, Espionage Act Cases (1918). This book contains a compilation of extracts from federal decisions construing the Act. Some of these decisions are reported in the Federal Reporter; many in the "Interpretation of War Statutes" Bulletins published by the U.S. Department of Justice; finally some of the decisions are not elsewhere reported. Each quotation has two references; one to the relevant judicial reports or Bulletins and one to the Nelles' book where the case and quotation appears.

27. U.S. v. Ramp, Bul.66; p.15.

28. U.S. v. Max Eastman, S.D. of N.Y., May 1918; the case is reported only in Nelles (1919), pp.29-30.

29. Carroll (1919), p.642. Compare with Judge Rogers in Masses v. Patten 246 Fed. 24: "Indeed the Court does not hesitate to say that considering the natural and reasonable effect of the publication it was intended wilfully to obstruct recruiting."

30. U.S. v. Wolf, Bul. 81; p.16.

31. U.S. v. Krafft, Bul.84; pp.36-7.

32. U.S. v. Kirchner, Bul. 69; p.65.

33. Chafee (1941), pp.50, 63.

34. U.S. v. Rose Pastor Stokes, Bul.110; p.70.

35. U.S. v. Motion Picture Film "The Spirit of 76", Bul.33; p.34.

36. In a similar case Montana ordered public schools to cease using a textbook on ancient history that gave a "too favourable treatment of the Teutonic tribes prior to 812 A.D.". H. Schreiber, The Wilson Administration and Civil Liberties (1960), p.23. There is apparently an established"proximate causation" between moral and political hysteria and the ridiculous.

37. U.S. v. Capo, Bul.37.

38. W. Nelles, Espionage Act Cases (1919), p.v and 78. Carroll (1919) remarks that "Mr. Nelles' book was produced with the evident purpose of influencing opinion in favour of a milder interpretation of the law". p.642, n.47.

39. Judge Rogers in Masses v. Patten, 246 Fed. 24.

40. W. Nelles (1918), p.v. He supports his case from the opinions in U.S. v. Frerichs, Bul.85; p.8; U.S. v. Hall, 248 Fed. 156 and Learned Hand's opinion in Masses, 244 Fed. 535.

41. 245 Fed. 878 (N.D.N.Y. 1917); p.56.

42. A similar blurring of the distinction between statements of fact and opinion is found in U.S. v. Harper, Bul.76; p.66; U.S. v. Stokes, Bul.110; p.66.

43. Masses v. Patten (Civil Suit 244 Fed. 535).

44. Congress exercised such a power by passing the 1918 Amendment to the Act.

45. Masses v. Patten, 244 Fed. 540.

46. "There is no presumption that the minds of Americans in or out the military service, are to any extent imbecile", Nelles (1918), p.80. The dominant construction, however, went against Hand and Nelles.

47. From a letter of Learned Hand to Z. Chafee of Jan. 2, 1921 quoted in G. Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine" (1975), p.725. The article marks a new interest in Hand's early doctrine.

48. Masses v. Patten at 540. Hand was reversed at 246 Fed. 24.

49. 246 Fed. 24 (C.C.A. 2d 1917).

50. U.S. v. Goldman et al., Bul.41; p.39.

51. U.S. v. Philips et al., Bul.14; p.38.

52. U.S. v. Wallace, Bul.4; p.44.

53. From Judge Wade's charge to the jury in U.S. v. D.T. Blodgett reported in Nelles (1918), p.48.

54. U.S. v. Tanner, Bul.56; p.43.

55. Gunther (1975), p.729.

56. Chafee (1941), p.15.

57. ibid., pp.51-2.

58. 249 U.S. 47 (1919).

58a. ibid. at 50-51.

59. F. Giffin, "Six Who Protested" (1977), p.29.

60. 249 U.S. at 51-52.

61. Frohwerk v. U.S. 249 U.S. 204 (1919).

62. ibid. at 206.

63. ibid. at 208, 209.

64. Chafee (1941), p.83 argues that Frohwerk's conviction was the result of the inadequately prepared defence. "However, on the inadequately prepared record as it stood, the evidence might conceivably have been sufficient to sustain a conviction since the circumstances and the intention, though not the words per se, might satisfy the danger test."

65. 249 U.S. 211 (1919).

66. D. Karsner, Debs (1919), pp.23-4 records the whole Debs plea.

67. F. Giffin, Six Who Protested (1977), p.42. Justice Holmes remarked that "...the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct... and unless the defendant had the specific intent to do so in his mind", 249 U.S. at 216. Chafee (1941), p.84 found that the instructions had a "wide scope" and that Debs was "probably convicted for an exposition of socialism".

68. 249 U.S. at 213, 215.

69. D. Shannon, The Socialist Party of America: A History (1955), p.114.

69a. Chafee (1941), p.86

70. E. Freund, "The Debs Case and Freedom of Speech", New Republic, 3 May 1919.

71. A. Pinchot, "Debs Sent to Prison", Appeal to Reason, 26 April 1919.

72. Z. Chafee (1941), p.85.

73. R. Black, "Debs v. U.S. - A Judicial Milepost on the Road to Absolutism", 1932 Univ. of Pennsylvania Law Rev., pp.174-195.

74. H. Kalven, "Prof. E. Freund and the First Amendment American Tradition", 40 Univ. of Chicago Law Rev., p.235 (1973) at p.237; even one of the most conservative writers on free speech issues found the decision of Debs distasteful: Berns (1976), pp.167-8.

75. Chafee (1956), p.70; Kalven (1973), pp.237-8; Gunther (1975) passim.

76. Gunther (1975), p.739.

77. Holmes-Pollock Letters, Vol.II, p.7. Chafee (1941) concludes from that extract that Holmes made a successful tactical move by launching the test as the spokesman of a unanimous Court, even though he did not apply it to the facts of the case. "For subsequent decisions prove that he would then have been in a small minority and he would not have been able to announce with the backing of a unanimous Supreme Court the rule of clear and present danger", p.86. Holmes, however, did not use the rule, in the way Chafee understands it, in the two follow-up cases of which Debs was much more important than Schenck.

78. Abrams v. U.S. 250 U.S. 616 (1919).

79. ibid. at 621.

80. Holmes dissenting at 250 U.S. 627-8.

81. ibid. at 627.

82. Shaefer v. U.S., 251 U.S. 466 (1920); Pierce v. U.S., 252 U.S. 239 (1920).

83. See above 3.2(e).

84. 252 U.S. at 266, 267, 269.

85. Chafee (1941), p.95, n.99.

86. Carroll and Noble (1977), p.331.

87. 268 U.S. 652 (1925).

88. Chafee (1941), p.319.

88a. 268 U.S. at 665, 671-2.

89. 268 U.S. at 667.

89a. ibid. at 668.

90. ibid. at 668-9.

91. ibid. at 670, 671.

92. ibid. at 673.

93. See Ch.II, n.59 and 4.1.

94. 274 U.S. 357 (1927).

95. The clause provides that "any person who... organizes or assists in organizing, or is or knowingly becomes a member of any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism... is guilty of felony".

96. 274 U.S. 375 (1927).

97. Fiske v. Kansas, 274 U.S. 380 (1927).

98. ibid. at 387.

CHAPTER VII

1. O. Kirchheimer, Political Justice (1961), particularly Introduction and Conclusions.

2. Chafee (1941), p.64.

3. U.S. v. Mackley, Bul. 83; p.16.

4. For the use of conspiracy prosecutions in English law as a means of political repression see R. Spicer, "Conspiracy Law, Class and Society" in P. Carlen (ed.) (1976). For the use of conspiracy trials in the 50s and 60s in the U.S. see Ch.IX, 3.1 and Ch.X, 5.

5. Certain offences may be committed by a legally defined category of persons.

6. According to Holmes a danger is automatically present in two other social situations: (a) when a man falsely shouts fire in a crowded theatre and causes panic; and (b) when a man utters words that have all the effect of force.

7. E. Corwin, in "Bowing Out Clear and Present Danger", 27 Notre Dame Lawyer, p.332 (1951) argues that a strict intent requirement of liability is an alternative test to the danger one. But in his Abrams dissent Holmes included an intent requirement as an integral part of the danger test.

8. Abrams v. U.S. 250 U.S. 616 (1919) at 621.

9. Chafee (1941), p.135.

10. e.g. Commonwealth v. Peaslee, 59 N.E. 55 (1901); Swift and Co. v. U.S. 196 U.S. 375 (1905) at 396; Hyde v. U.S. 225 U.S. 347 (1912) at 388.

11. O.W. Holmes, The Common Law (1881). "Attempt and intent... are two distinct things. Intent to commit a crime is not in itself criminal... The law only deals with conduct; An attempt is an overt act... the importance of the intent is not to show that the act was wicked; but to show that it was likely to be followed with harmful consequences", p.65, 68.

12. Commonwealth v. Peaslee, 177 Mass. 267 at 272.

13. Commonwealth v. Kennedy, 170 Mass. 18; cf. "the considerations being (for a finding of criminal attempt) the nearness of the danger, the greatness of the harm and the degree of apprehension felt", Holmes (1881), p.68.

14. Sayre, "Criminal Attempts", 41 Harvard Law R. 821 (1928) was instrumental in the development of the American law of attempts.

15. Scott v. P., 141 Ill. 195, 30 N.E. Rep. 329. The problem of intent is tackled in J. Smith, "Two Problems in Criminal Attempts", 70 Harvard Law R. p.422 (1957); cf. Sayre, "Criminal Attempts" (1928).

16. Justice Brandeis referred to the relationship of the danger test and the theory of criminal attempts: "The test to be applied as in the case of criminal attempts and incitements, is not the remote or possible effect. There must be a clear and present danger", Schaeffer v. U.S. 251 U.S. 466 (1919).

17. Berns (1957), p.69 and Shapiro (1966), pp.122, 124 argue that the applicability of the test is limited to national security cases.

18. Most commentators agree on that point. Berns (1957), p.60; Cushman (1948), pp.315-6; Konvitz (1957), Part III; Emerson (1966), pp.51-3. But see Shapiro (1966), p.122. Chafee (1941), p.82 argues that the important question is the construction of the terms of the statute at issue and not its constitutionality. The test provides the means for a liberal judicial construction of statutes and accordingly "the concept of freedom of expression received for the first time an authoritative judicial interpretation in accord with the purposes of the framers of the Constitution".

19. Lochner v. U.S. 198 U.S. 45 (1905), Holmes dissenting at 75.

20. Thus, Justice Brandeis dissenting in Schaeffer v. U.S.:

> "The trial provided for is one by judge and jury, and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that... they would (not) bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error." 251 U.S. at 483.

Brandeis found from an examination of the record that Schaeffer's conviction was wrong. Thus, the test seems to be both a matter of law and of fact. In Dennis v. U.S., Justice Douglas argued that the test is one of fact to be submitted to the jury (see Ch.IX, 3.1 and 8.1).

21. Brandeis concurring in Whitney v. California, 274 U.S. 357 (1927) at 377, 378.

22. 274 U.S. at 377 (1927).

23. See the analysis in Ten (1980), p.132.

24. J.S. Mill (1972), p.78.

25. Quoted in Gunther (1975), pp.749-50.

26. The Sunday Times, June 21, 1981.

27. O. Kirchheimer, Politics and Justice in (1969).

28. A. Giddens (1976), pp.104-107.

CHAPTER VIII

1. 295 U.S. 495 (1936).
2. 298 U.S. 238 (1936).
3. 297 U.S. 1 (1936).
4. 298 U.S. 587 (1936).
5. Quoted in R. McCloskey, The American Supreme Court (1960), p.168.
6. See Mason, "Harlan F. Stone and F.D.R.'s Court Plan", 61 Yale Law J. p.791 (1952).
7. 300 U.S. 379 (1937).
8. 301 U.S. 548 (1937).
9. 283 U.S. 359 (1931).
10. ibid. at 369.
11. On the concept of statutory vagueness see Ch.X, 9.3.
12. De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry.
13. ibid., at 364, 365.
14. ibid. at 362, emphasis mine.
15. Brandenburg v. Ohio. See Ch.X, 6.
16. Herndon v. Lowry, 301 U.S. 242 (1937).
17. ibid. at 248-252.
18. The statute punished with death anybody who attempted, by speech or writing, to excite an insurrection of slaves or who brought in the State printed matter calculated to excite insurrection. (Ga. Code, 1861, §4214). After the Civil War the reference to slaves was dropped, but the statute was otherwise retained verbatim. See Chafee (1941), p.389.
19. 301 U.S. at 256.

19a. ibid. at 257.

20. ibid. at 258-9.
21. ibid. at 262, 263.
22. See R. Keeran, "Everything for Victory: Communist Influence in the Auto Industry During WWII", Science and Society (Spring 1979).
23. U.S. v. McWilliams, 54 F. Supp. 791 (D.D.C. 1944); 163 F. 2d. 695 (D.C. Cir. 1947).
24. Dunne v. U.S., 138 F. 2d 137 (8th Cir. 1943), cert. denied, 320 U.S. 790 (1943).

25. M. Davis (1980b), p.61.

26. 322 U.S. 680 (1944).

26a. ibid. at 686, 687.

27. 319 U.S. 583 (1943).

28. ibid. at 589-590.

29. For example, Chafee (1956), p.79.

30. See Ch.VIII, 2.

31. N.C.L.B. publications, March 1919, New York, p.113.

32. See D. Manwaring, "Render Unto Caesar" (1962).

33. 310 U.S. 586 (1940).

34. ibid. at 596, 598.

35. 316 U.S. 584 (1942).

36. 319 U.S. 624 (1943).

36a. ibid. at 641-2.

36b. ibid. at 639.

37. ibid. at 634.

37a. Frankfurter dissenting at 650, 667, 663.

38. at 662

39. For the historical background see R. Daniels, Concentration Camps U.S.A.: Japanese-Americans and WWII (1971). For legal comments see: Freeman, "Genesis, Exodus and Leviticus - Genealogy, Evacuation and the Law", 28 Cornell Law Qu., p.414 (1943); Rostow, "The Japanese-American Cases - A Disaster in the Soverei gn Prerogative" (1962); Dembitz, "Racial Discrimination and the Military Judgment", 45 Columbia Law Rev., p.175 (1945).

40. Kluger (1977), pp.661, 662.

41. 323 U.S. 214 (1944).

42. Kalven (1965), pp.11-12.

43. Emerson (1970), pp.285-292; Schmidt (1976), Ch.7.

44. See Ch.IV , 2.

45. Emerson (1970), p.291.

46. Chafee (1941), p.399.

47. Schmidt (1976), pp.90-91.

48. 303 U.S. 444 (1938); 308 U.S. 147 (1939).

49. 303 U.S. 444 (1938) at 451,452.

50. 308 U.S. 147 (1959) at 161.

51. ibid. at 164, 163.

52. 310 U.S. 296 (1940).

53. ibid. at 307.

54. ibid. at 308.

55. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) at 571, 2.

56. According to Meiklejohn (1960) this sort of regulation compares with the Roberts' rules of order.

57. 312 U.S. 569 (1941).

58. ibid. at 576.

59. Niemotko v. Maryland, 340 U.S. 268 (1951).

60. 319 U.S. 141 (1943).

61. ibid. at 146, 147.

62. 319 U.S. 105 (1943).

63. Valentine v. Chrestensen, 316 U.S. 52 (1942) at 54-5.

64. 319 U.S. 105 (1943) at 114.

65. Follett v. McCormick, 321 U.S. 573 (1944).

66. Breard v. City of Alexandria, 341 U.S. 622 (1951).

67. 326 U.S. 501 (1946).

68. M. Davis (1980b), p.47.

69. 326 U.S. at 506.

69a. ibid. at 509.

70. See S. Fine, Sitdown (1969) and Davis (1980b), pp.50-52.

71. J. Walsh, C.I.O. Industrial Unionism in Action (1937).

72. M. Davis (1980b), p.62.

73. 301 U.S. 1 (1937).

74. 312 U.S. 100 (1941).

75. 301 U.S. 548 (1937).

76. In Re Debs, 158 U.S. 564 (1895) and U.S. v. E.C. Knight Co., 156. U.S. 1 (1895).

77. Gompers v. Bucks Stove and Range Co. 211 U.S. 418 (1911) at 439.

78. C. McArthur Destler, American Radicalism 1865-1901 (1946), p.183.

79. Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937) at 476, per Justice Brandeis.

80. Emerson (197o), p.300.

81. M. Davis (1980b), p.54.

82. 307 U.S. 496 (1939).

83. ibid. at 515, 516; see above, p.72.

84. 310 U.S. 88 (1940); see also Carlson v. California, 310 U.S. 106 (1940) and A.F.L. v. Swing, 312 U.S. 321 (1941).

85. 310 U.S. 88 (1940) at 104, 105.

86. Milk Wagon Drivers' Local 753 v. Meadowmoor Dairies Inc., 312 U.S. 287 (1941).

87. ibid. at 293, 294.

87a. ibid. at 299.

88. 315 U.S. 769 (1942).

88a. ibid. at 775.

89. ibid. at 776, 777.

90. Thomas v. Collins, 323 U.S. 516 (1945).

91. ibid. at 530.

92. at 531-532, 529-530.

93. M. Davis (1980b), p.72.

94. 336 U.S. 490 (1949).

95. ibid. at 498.

96. See Cox, "Strikes, Picketing and the Constitution", 4 Vanderbilt Law R., p.547 (1951); Jones, "Free Speech 'Pickets on the Grass'", 29 Southern California Law R., p.137 (1956); Note, "Use of Economic Sanctions by Private Groups: Illegality under the Sherman Act", 30 Univ. of Chicago Law R., p.171 (1962).

97. 339 U.S. 460 (1950).

98. ibid. at 464, 6.

99. International Brotherhood of Teamsters Union v. Hanke, 330 U.S. 470 (1950); Building Service Empire International Union v. Gazzam, 339 U.S. 532 (1950).

99a. 330 U.S. at 474, 475, 476; Justice Minton dissenting at 483.

100. International Brotherhood of Teamsters Union v. Vogt Inc., 354 U.S. 284 (1957).

101. ibid at 289, 293.

101a. ibid. at 297.

102. 53 Stat. 1147 (1939).

103. Emerson (1970), p.584.

104. 330 U.S. 75 (1947).

105. ibid. at 115.

106. L. Loeb, Public Employees and Political Activity (1968), p.209.

107. 337 U.S. 1 (1949); 340 U.S. 315 (1951).

108. Note, "The Problem of the Hostile Audience", 49 Columbia Law R. p.1118 (1949); W. Gellhorn, American Rights (1960), pp.55-62.

109. 337 U.S. at 4-5 (1949).

110. ibid. at 37.

111. 340 U.S. 315 (1951) at 321.

112. ibid. at 325, 326, 327.

113. 340 U.S. 290 (1951).

114. See n.59 above and text accompanying.

115. See n.36 above and text accompanying.

116. 334 U.S. 558 (1948).

117. 336 U.S. 77 (1949).

118. See Chapter V.

119. 336 U.S. 77 (1949) at 87; Black dissenting at 98.

120. Black dissenting at 102, 103.

121. A Free and Responsible Press: A General Report on Mass Communications: Newspapers, Radio, Motion Pictures, Magazines and Books, Chicago, 1947.

122. Chafee (1947), p.585.

123. Nelson (1967), p.xlii.

124. 283 U.S. 697 (1931).

125. ibid. at 720.

126. 297 U.S. 233 (1936).

127. Chafee (1941), pp.381-4.

128. Carroll and Noble (1977), p.342.

129. Chafee (1947), p.318f.

130. 314 U.S. 252 (1941).

131. ibid. at 263.

132. ibid. at 271.

133. 328 U.S. 331 (1946).

134. 331 U.S. 367 (1947).

135. Wood v. Georgia, 370 U.S. 375 (1965).

135a. 370 U.S. at 388, 390, 389.

135b. Emerson (1970), p.456

136. Kovacs v. Cooper, 336 U.S. 77 (1949), Black dissenting at 102.

136a. Schmidt (1976), p.251.

137. Chafee (1947), pp.802-3.

138. Bickel (1975), p.81.

139. Schmidt (1976), p.251.

140. J. Habermas, Knowledge and Human Interests (1978), Part III; Habermas (1979), Ch.1.

141. Marcuse (1976), p.310.

142. P. Lazarsfeld and R. Merton, "Mass Communications, Popular Taste and Organized Social Action", in B. Rosenberg and D. White (eds.), Mass Culture (1957), p.457; see also R. Miliband's critique of the mass media in Miliband, The State in Capitalist Society (1973), Ch.8.

143. Nelson (1967), p.xxxvii.

144. Chafee (1956), pp.77-80.

145. Berns (1957), pp.56, 71.

146. The phrase is coined by McKay in "The Preference for Freedom", 34 New York Law R., p.1182 (1959).

147. Nelson (1967), p.1.

148. 319 U.S. at 639-640.

149. M. Arnold Foster in The Guardian, July 21, 1981.

150. See Ch.IX, 8.1.

151. Bickel (1975), Ch.2.

152. J. Bury, A History of Freedom of Thought (1952), p.134.

153. Chafee (1956), p.80f.

154. H. Gallagher, "American Liberalism at the Crossroads", 36 American Bar Association Journal, p.813 (1950), p.814.

155. Chafee (1956), p.98.

156. Kalven (1965), p.3, n.15.

157. See Ch.III.

158. Freund (1950), Ch.1.

159. Shapiro (1966), pp.61-2.

160. Marshall (1971), p.183.

161. See Ch.III, 3.3.

CHAPTER IX

1. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

2. E. Corwin (1934), p.91.

3. 54 Stat. 670 (1940), now incorporated in United States Code § 2385.

4. W. Goodman, The Committee (1969), pp.98-9. For the history of the Act see Z. Chafee, Free Speech in the United States (1941), pp. 439-490 and at 446. The best collection of relevant materials and references is found in T. Emerson, D. Haber and N. Dorsen, Political and Civil Rights in the United States (1967), Vol.I, pp. 105-6.

5. See F. Claudin, The Communist Movement (1975) and in particular pp.182-210.

6. I. Howe and L. Coser, The American Communist Party (1962), Ch.VIII.

7. Z. Chafee (1941), op. cit., p.461.

8. Emerson, Haber, Dorsen (1967), op. cit. See also: R. Goldstein, Political Repression in Modern America (1978), pp.246-7.

9. M. Davis, "The Legacy of the C.I.O.", New Left Review, 124, p.43 at p.67 and bibliography cited there.

10. Howe and Coser (1962), p.427.

11. Shneiderman v. U.S., 320 U.S. 118 (1943).

12. The history of the creation of the H.U.A.C. is best narrated in R. Carr, The House Committee on Un-American Activities, 1945-1950 (1952), and W. Goodman (1969), Ch.2,3,4.

13. Quoted in Goldstein (1978), p.288.

14. Howe and Coser (1962), pp.419-28.

15. Z. Chafee, The Blessings of Liberty (1956), p.126.

16. Goldstein (1978), p.323.

17. Some recent contributions by historians include: A. Theoharis, Seeds of Repression. Harry S. Truman and the Origins of McCarthyism (1971); R. Griffith and A. Theoharis (eds.), The Specter: Original Essays on the Cold War and the Origins of McCarthyism (1974); R. Freeland, The Truman Doctrine and the Origins of McCarthyism (1972). No conclusive history of the internal and international aspects of McCarthyism exists, however. It is reasonable to conclude that the lack of extensive critical bibliography on the subject, particularly in the 50s and 60s, was in itself an effect of McCarthyism.

18. Quoted in H. Zinn, A People's History of the United States (1980), p.430. For a similar analysis see A. Wolfe, The Limits of Legitimacy (1977), Ch.7 and P. Carroll and D. Noble, The Free and the Unfree: A New History of the United States (1977), pp.354-5.

19. Quoted in Goodman (1969), p.32.

20. Quoted in Goldstein (1978), p.242.

21. Goodman (1968), op. cit., p.122.

22. Quoted in E. Goldman, The Crucial Decade and After, 1945-1960 (1960), p.137.

23. Goldstein (1978), op. cit., p.334.

24. T. Emerson, The System of Freedom of Expression (1970), p.164.

25. Section 9(h) of the Taft-Hartley Act amending the National Labor Relations Act.

26. A. Link, American Epoch: A History of the U.S. since the 1890s, (1967), p.676.

27. 335 U.S. 106 (1948).

28. 352 U.S. 567 (1957).

29. For a comment on those and similar cases see T. Emerson (1970). pp.636-7.

30. The C.I.O. purge of radical unions is described in M. McAuliffe, Crisis on the Left, Cold War Politics and American Liberals, 1947-1954 (1978), ch.4.

31. ibid., p.59.

32. See infra, 4.1 and 5.

33. Goldstein (1978), op. cit., p.312.

34. McAuliffe (1978), op. cit., pp.104-5.

35. Z. Chafee (1956), op. cit. Chapter VI, and pp.157-8.

36. H.S. Commager, Freedom, Loyalty, Dissent (1954), p.20.

37. P. Murphy, The Constitution in Crisis Times, 1918-1969 (1972), p.175, n.15.

38. Z. Chafee (1956), op. cit. p.176. On the problems of the lawyer of the politically unpopular see M. Alexander, "The Right to Counsel for the Politically Unpopular", Law in Transition Quarterly 22 (1962), pp.19-45, and J. Casper, "Lawyers and Loyalty-Security Litigation", Law and Society Review 3 (1969).

39. The case became internationally known as the "Hollywood Ten". See Goodman (1968), op. cit., pp.202ff and at 218.

40. Goldstein (1978), p.361 and Goodman (1969), p.290.

41. Goodman (1969), p.304.

42. Goldstein (1978), p.363.

43. Quoted in Goodman (1969), p.327.

44. Goldstein (1978), ibid., and Goodman (1969), ibid.

45. Chafee (1956), op. cit., p.242.

46. Goldstein (1978), p.352.

47. G. Kahn, Hollywood on Trial (1948), p.139.

48. 65 Stat. 987 (1950); 50 U.S.C. §781-798, 811-826.

49. Emerson (1970), op. cit., p.131.

50. A detailed description of the effects of registration is found in Chafee (1956), Ch.V and Emerson (1970), pp.129ff.

51. Under a narrow construction, the Act was found constitutional in Schneider v. Smith, 390 U.S. 17 (1968), per Justice Douglas.

52. 68 Stat. 775 (1954); 50 U.S.C. §841-844.

53. The history of the passing of the Act is based on McAuliffe (1978), op. cit., Ch.9 and Note, "The Communist Control Act of 1954", Yale Law Journal, Vol.64 (1955), p.712.

54. Humphrey quoted in McAuliffe (1978), p.139 and 138.

55. Quoted in H. Chase, "Security and Liberty: The Problem of Native Communists, 1947-1955" (1955), p.7.

56. Chafee (1956), op. cit., p.82.

57. Goodman (1969) op. cit., p.196.

58. Emerson (1970), op. cit., p.150.

59. Goldstein (1978), p.350. An early account of state sedition laws is found in W. Gellhorn (ed.), The States and Subversion (1952). See also Emerson, Haber, Dorsen (1967), op. cit., pp.192-194.

60. R. Cushman, Civil Liberties in the United States (1956), p.201.

61. The ordinance is referred in Emerson, Haber, Dorsen (1967), p.194.

62. For the background of the communist trial see: M. Belknap, Cold War Political Justice (1977), Chapters 1 to 5; G. Marion, The Communist Trial: An American Crossroads (1950); N. Nathanson, "The Communist Trial and the Clear and Present Danger Test", Harvard Law Review 63 (1950), 1167-1175; Note, "The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants", Harvard Law Review 62 (1948), pp.276-286; E. Lathan, The Communist Controversy in Washington: From the New Deal to McCarthy (1966).

63. U.S. v. Dennis, 183 F. 2d. 201 (2d Cir. 1950).

64. Dennis v. U.S., 341, U.S. 494 (1951).

65. Belknap (1977), p.81; Marion (1950) op. cit., pp.76 ff.

66. O. Kirchheimer, Political Justice: The Use of Legal Procedure for Political Ends (1961), p.194, n.38.

67. Schneiderman v. U.S., 320 U.S. 118 (1943) at 157, 154.

68. Belknap (1977), p.82.

69. The story of the trial has been told by the irritable Judge himself, too: H. Medina, The Anatomy of Freedom (1959).

69a. U.S. v. Foster, 9 F.R.D. 367 (S.D.N.Y. 1949), at 391-392.

70. See above, Ch.VI, 3.2. For an approving description of Learned Hand's efforts to have his "masses" test adopted, see: G. Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History", Stanford Law Review, Vol.27 (1975), pp.719ff.

71. 183 F.2d, at 212.

72. Dennis v. U.S., 341 U.S. 494 (1951), at 510-511.

73. Z. Chafee, Government and Mass Communications (1947), Vol.I, p.54 and 59.

74. 341 U.S. at 550-551.

75. For example, see: C.H. Pritchett, Civil Liberties and the Vinson Court (1954), p.75; Emerson (1970), op. cit., p.175.

76. 341 U.S. at 570.

77. See above, Ch.VIII, 3.

78. For the use of conspiracy law against political dissenters in England see: R. Spicer, "Conspiracy Law, Class and Society", in The Sociology of Law (ed. P. Carlen), (1976), pp.45-63.

79. See O. Kirchheimer (1961), op. cit., pp.138ff.

80. 341 U.S. at 589.
80a. ibid. at 581.
81. Emerson, Haber, Dorsen, (1967), p.121.

82. Yates v. U.S., 354 U.S. 298 (1957).

83. 354 U.S., at 350.

84. 354 U.S., at 324-325.

85. A similar critique is made in G. Marshall, Constitutional Theory (1971), pp.180-1.

86. 354 U.S., at 330, 331, 332.

87. For press and academic reactions to Yates, see Belknap (1977), Ch.10, pp.252-258.

88. R. Mollan, "Smith Act Prosecutions: The Effect of the Dennis and Yates Decisions", University of Pittsburg Law Review 26, pp.732ff.

89. Among others, U.S. v. Silverman, 248 F.2d 671 (2d Cir. 1957).

90. 367 U.S. 203 (1961).

91. 367 U.S. 290 (1961).

92. 367 U.S at 229-230.

93. 368 U.S. 231 (1961).

94. 368 U.S., at 246, 247, 249. The Court approved the jury instructions to that effect, ibid. at 246, n.5.
95. ibid. at 254.

96. C.P. v. S.A.C.B., 367 U.S. 1 (1961).

97. ibid. at 104.

98. Among others: National Council of American Soviet Friendship v. Subversive Activities Control Board, 322 F. 2d 375 (D.C. Cir. 1963); American Committee for Protection of Foreign Born v. S.A.C.B., 331 F. 2d. 53 (D.C. Cir. 1963).

99. American Committee for Protection of Foreign Born v. S.A.C.B. 380 U.S. 503 (1965); Veterans of the Abraham Lincoln Brigade v. S.A.C.B. 380 U.S. 513 (1965).

100. Goldstein (1978), op. cit., p.408.

101. Quoted in Goodman (1969), op. cit., p.329.

102. ibid. at 400.

103. ibid. at 417.

104. Ch.IX, 2.5.

105. 350 U.S. 497 (1956).

106. ibid. at 504, 505.

107. The decision was found as too liberal and sparked off a series of attacks on the Supreme Court, by right-wing commentators and press. For such reaction see Hunt, "State Control of Sedition: The Smith Act as the Supreme Law of the Land", 41 Minn.L.Rev. 287 (1957).

108. 360 U.S. 72 (1959).

109. ibid. at 76, 77.

110. 366 U.S. 293 (1961).

111. 380 U.S. 479 (1965).

112. 379 U.S. 476 (1965).

113. Goldstein (1978), op. cit., p.424.

114. See generally: El. Bontecue, The Federal Loyalty-Security Program (1953). R.S. Brown, Loyalty and Security (1958) and T. Emerson and D. Herfeld, "Loyalty among Government Employees", Yale Law Journal 58 (December, 1948).

115. Chafee (1956), p.33.

116. Brown (1958), Ch.6 and Emerson (1970), p.206.

117. Bontecue (1953), p.105.

118. Brown (1958), p.34.

119. Goldstein (1978), p.303.

120. Chafee (1956), p.25.

121. For the list see Bontecue (1953), pp.157ff; Freeland (1974), pp.208-216.

122. Chafee (1956), p.28.

123. Pritchett (1954), op. cit., p.266, n.28; Emerson (1970), p.222.

124. Chafee (1956), p.169, 170, 28.

125. Bontecue (1953), p.204.

126. A. Barth, The Loyalty of Free Men (1952), p.110.

127. Ch.IX, 2.2.

128. See Goldstein (1978), pp.351-2; Chafee (1956), pp.29-30, 33, 34 and material cited there.

129. For this and other immigration provisions see: Emerson, Haber, Dorsen (1967), pp.320-328.

130. Chafee (1956), p.249.

131. See Goldstein (1978), p.337 and references cited there.

132. Pritchett (1954), pp.101-102. These cases are reviewed infra, 5.5.

133. Chafee (1956), p.23.

134. See Note: "Government Exclusion of Foreign Political Propaganda", 68 Harvard Law Review 1393 (1955), which contains a list of some of the books of the new Index.

135. See above 2.2. for the provision of the Act, and the terms of the oath.

136. 339 U.S. 382 (1950).

137. ibid. at 396.

138. ibid., at 401, 404.

139. ibid. at 420.

140. See the Dennis case above 3 and infra 8.1.

141. 353 U.S. 657 (1957).

142. Goldstein (1978), p.402.

143. 353 U.S. at 681-682.

144. See W, Murphy, Congress and the Court (1962), p.121; D. Fellman, "The Jencks Legislation: Problems in Prospect", Yale Law Journal LXVII (1958), pp.674ff.

145. at 3.3.

146. Section 9(h) was repealed by section 504 of the Labor-Management Reporting and Disclosure Act, 73 Stat. 525 (1959).

147. 381 U.S. 437 (1965).

148. ibid. at 455, 456.

149. W. Berns (1976), pp.183-4.

150. See above at 2.2; For a detailed description of these practices see: Chafee (1956), Ch.VI; Brown and Fasset, "Loyalty Tests for Admission to the Bar", 20 University of Chicago Law Rev. 480 (1953); Emerson, Haber, Dorsen (1967), pp.249-251.

151. 325 U.S. 561 (1945).

152. 353 U.S. 232 (1957).

153. Kalven and Steffen, "The Bar Admission Cases", 21 Law in Transition (1961), p.155, at 160.

154. Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

155. 366 U.S. 36 (1961).

156. ibid. at 50, 52, 53, 51.

157. ibid. at 72, 74, 73-74.

158. 366 U.S. 82 (1961).

159. ibid. at 90, 97

160. Anastaplo describes his attempts to enter the Bar in: G. Anastaplo, The Constitutionalist (1971); and "One Man's Brief Against the Bar", The National Law Journal, June 18, 1979, p.21.

161. See above 2.2. and 4.1.

162. 341 U.S. 918 (1951).

163. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), at 59.

164. 341 U.S. 716 (1951).

165. ibid. at 720.

166. ibid. at 735-736

167. 342 U.S. 485 (1952).

168. See above 2.5.

169. ibid. at 493.

170. ibid. at 509.

171. 341 U.S. 123 (1951).

172. Pritchett (1954), p.97.

173. 344 U.S. 183 (1952).

174. 349 U.S. 331 (1955).

175. Quoted in Chafee (1956), p.36.

176. Emerson (1971), pp.218-219.

177. Quoted in A. Wolfe, The Seamy Side of Democracy. Repression in America (1973), p.106.

178. The Eisenhower loyalty-security programme was partially restricted by the Supreme Court in Cole v. Young, 351 U.S. 536 (1956). The Court held that only holders of "sensitive" positions, in the federal government, could be dismissed on security grounds.

179. 357 U.S. 399 (1958).

180. 357 U.S. 468 (1958).

181. Nelson v. County of Los Angeles, 362 U.S. 1 (1960).

182. 360 U.S. 474 (1959).

183. 367 U.S. 886 (1961).

184. 364 U.S. 479 (1960), also Carr v. Young decided together.

185. Emerson (1971), p.233 and A. Bickel, The Most Dangerous Branch (1962), pp.52-54.

186. ibid. at 487-8, 490, 488.

187. ibid. at 499.

188. Bickel (1962), ibid.

189. 368 U.S. 278 (1961).

190. See above 3.3.

191. Bagget v. Bullitt, 377 U.S. 360 (1964).

192. 384 U.S. 11 (1966).

193. See above 3.3.

194. 385 U.S. 589 (1967).

195. ibid. at 603, 605, 609. The Adler case is reviewed supra 5.3.
195a. ibid. Justice Clarke dissenting at 622, 628.
196. 389 U.S. 54 (1967).

197. See 5.4. below.

198. 389 U.S. at 63.

199. 341 U.S. 56 (1951).

200. Murphy (1972), p.299; Pritchett (1954), p.91.

201. See above 2.5. and 4.2 and Emerson (1971), p.192.

202. 357 U.S. 513 (1958).

203. ibid. at 526.

204. 363 U.S. 603 (1960).

205. Kirchheimer (1961), p.158, n.69.

206. Borrow v. F.C.C., 285 F.2d 666 (D.C. Cir. 1960); certiorari denied 364 U.S. 892 (1960).

207. 388 U.S. 537 (1950).

208. 342 U.S. 580 (1952).

209. In a previous case (Bridges v. California, 314 U.S. 252 (1941)), the Supreme Court had ruled that legally resident aliens enjoyed such rights.

210. 342 U.S. 524 (1952).

211. Chafee (1956), p.33.

212. Quoted in Pritchett (1954), p.113.

213. 345 U.S. 206 (1953).

214. See above.

215. 347 U.S. 522 (1954).

216. ibid. at 533.

217. 355 U.S. 115 (1957).

218. Immigration Service v. Errico, 385 U.S. 214 (1966); Benenyi v. Immigration Director, 385 U.S. 630 (1967).

219. Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967).

220. See above 4.2.

221. 357 U.S. 116 (1958).

222. ibid. at 125.

223. 378 U.S. 500 (1964).

224. See above 3.3.

225. 378 U.S. at 507.

226. 381 U.S. 1 (1965).

227. For example, U.S. v. Laub, 385 U.S. 475 (1967).

228. 381 U.S. 301 (1965).

229. See above 4.2; Chafee (1956), p.23.

230. 381 U.S. at 307.

231. at 308.

232. The two best histories of the Committee are: R. Carr, The House Committee on Un-American Activities (1952) and Goodman (1969), op. cit.

233. Goodman (1969), Chapter 1.

234. ibid. at 43. No other effort was made after that for a federally subsidized theatre.

235. ibid. at 54.

236. ibid. at 132.

237. Goldstein (1978), p.243.

238. Goodman (1969), p.83 and 111.

239. See G. Kahn, Hollywood on Trial (1948).

240. Goodman, (1969), p.209.

241. See Kirchheimer (1961), pp.234-237.

242. Goldstein (1978), p.344.

243. Chafee (1956), p.221 and 219.

244. Goodman (1969), p.162.

245. Aiuppa v. U.S., 201 Fed. Rep. 2d Cir. 287 at 300.

246. Chafee (1956), p.223.

247. To Serve These Rights, Washington: Government Printing Office, 1947, p.52.

248. Goodman (1969), p.223.

249. Quoted in R. Carr (1952), p.280.

250. Quoted in Goldstein (1978), p.345.

251. ibid., p.377.

252. W. Gellhorn, Security, Loyalty and Science (1950), p.232.

253. See C. Beck, Contempt of Congress (1959).

254. Kilbourn v. Thompson, 103 U.S. 168 (1880).

255. 165 F.2d 82 (2d Cir. 1947).

256. 167 F. 2d 241 (D.C. Cir. 1948).

257. 176 F. 2d. 49 (1949).

258. Eisler v. U.S. 170 F 2d 273 (1948).

259. Goodman (1969), p.222.

260. On the Fifth Amendment and subversives, see the debate: E. Griswold, The Fifth Amendment Today (1955) and S. Hook, Common Sense and the Fifth Amendment (1957).

261. 340 U.S. 367 (1951).

261a. 340 U.S. at 378.

262. 341 U.S. 367 (1951).
262a. ibid. at 378.
263. U.S. v. Rumely, 345 U.S. 41 (1953).

264. 349 U.S. 155 (1955); Empsak v. U.S., ibid. at 190, and Bart v. U.S., ibid. at 219.

265. 349 U.S. at 161.

266. Pritchett (1954), p.265, n.12 and Hook (1957).

267. Goodman (1969), p.356.

268. 350 U.S. 551 (1956).

269. 354 U.S. 178 (1957).

270. ibid. at 197-198.

271. 354 U.S. 234 (1957).

272. ibid. at 261.

273. Goldstein (1978), p.405.

274. Goodman (1969), p.361.

275. See above 3.5.

276. Murphy (1972), pp.330-333.

277. 360 U.S. 109 (1959).

278. The Barenblatt decision created a strong reaction from liberal academics. Characteristically see: A. Meiklejohn, "The Barenblatt Opinion", 27 Univ. of Chicago Law Rev., 329 (1960); and "The Balancing of Self-Preservation against Political Freedom", 49 California Law Rev. 4 (1961); H. Kalven, "Mr. Alex. Meiklejohn and the Barneblatt Opinion", 27 Univ. of Chicago Law Rev. 329 (1960).

279. 360 U.S. at 127, 128, 134.

280. ibid. at 141, 142.

281. 360 U.S. 712 (1959).

282. 365 U.S. 399 (1961).

283. ibid. at 412.

284. 365 U.S. 431 (1961).

285. ibid. at 435.

286. 372 U.S. 539 (1963).

287. ibid. at 557, 558.

288. ibid. at 585.

289. 374 U.S. 109 (1963).

290. 383 U.S. 825 (1966).

291. 384 U.S. 702 (1966).

292. Davis (1980b), p.77.

293. Dennis v. U.S., 341 U.S. 494 (1951) at 510.

294. See above, 3.4.

295. See above, 2.4.

296. Above, p.326, 335, 331, 339.

297. Above, p.331, 334, 335, 329, 370.

298. Above, p.360, 365, 367, 369, 370,349, 350.

299. Above, p.326, 334, 333, 335, 331, 346, 347, 367, 339, 370.

300. Wolff (1968), Ch.2.

301. M. Foucault, Discipline and Punish (1979); M. Ignatieff, A Just Measure of Pain (1978).

302. See Ch.III, n.38 and W. Friedmann (1972), Ch.3, 5, 6, 10.

303. Poggi (1978), Ch.VI; Unger (1977), pp.192-216.

304. p.43 above.

305. Ch.III and V above..

306. Quoted in Goodman (1969), p.170.

307. H. Commager (1954), p.142.

308. See above, Ch.VII, 4.

CHAPTER X

1. Quoted in Murphy, P. (1972), pp.353-4.

2. 347 U.S. 483 (1954); The story of the desegregation adjudication is told in Kluger R, Simple Justice (1977).

3. Zinn (1980), p.444.

4. Zinn, H., S.N.C.C.: The New Abolitionists (1964).

5. The Constitutional commentary on the meaning of the 14th Amendment is prolific. The main positions are found in A. Bickel, "The Original Understanding the the Segretation Decision" (1959); Kurland, "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government" (1964); Karst, "Foreword: Equal Citizenship under the Fourteenth Amendment" (1973); H. Wechsler, "Equal Protection is a Double-Edged Sword"(1973); Ely, (1980), op. cit. Chapter 2.

6. S. Kutler (ed.), The Supreme Court and the Constitution (1969), p.515.

7. T. Lewis, "The Sit-in Cases: Great Expectations" (1963).

8. See Ch.VIII, 4.

9. Kalven (1965a), p.2.

10. H. Kalven, The Negro and the First Amendment (1965b), p.124.

11. 368 U.S. 157 (1961).

12. ibid. Harlan concurring at 201.

13. ibid. at 202.

14. 372 U.S. 229 (1963).

15. Kalven (1965a), p.143.

16. 372 U.S. at 235.

17. ibid. at 237.

18. 373 U.S. 244 (1963).

19. 373 U.S. 267 (1963).

20. ibid. at 273.

21. Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963).

22. Gober v. City of Birmingham, 373 U.S. 374 (1963).

23. 378 U.S. 153 (1964).

24. 378 U.S. 130 (1964).

25. 378 U.S. 146 (1964).

26. 378 U.S. 347 (1964).

27. 378 U.S. 226 (1964).

28. See Ch.VIII, 4.2. and 4.4.2 and Ch.IX, 3.1.3.

29. Fieldman v. U.S., 322 U.S. 487 (1944), at 501.

30. 378 U.S. 226 (1964), at 346.

31. Kalven (1965), p.172.

32. ibid. at 346.

33. 377 U.S. 218 (1964).

34. 78 Stat. 241 (1964).

35. A. Schlesinger, A Thousand Days: John F. Kennedy in the White House (1965), p.977.

36. Murphy (1972), p.364. For the background of the Act see A. Bickel, Politics and the Warren Court (1965), pp.92-108.

37. Hamm v. City of Rock Hill, 379 U.S. 306 (1964); Blow v. North Carolina, 379 U.S. 684 (1964).

38. 379 U.S. 306 at 318.

39. Report of the National Advisory Commission on Civil Disorders (1968), p.397.

40. 379 U.S. 536 and 379 U.S. 559 (1965).

41. ibid. at 552.

42. ibid. at 555.

43. ibid. at 578.

44. But compare with Kovacs v. Cooper, above p.249 where Black had condemned a similar rationale.

45. ibid. at 588-9.

46. 383 U.S. 131 (1965).

47. ibid. at 141-2.

48. ibid. at 162, 168.

49. 385 U.S. 39 (1966).

50. Emerson (1970), p.305.

51. ibid. at 47-48.

52. ibid. at 52.

53. ibid. at 56.

54. 388 U.S. 307 (1967).

55. See Shuttlesworth v. City of Birmingham, p.412.

56. ibid. at 320-1.

57. ibid. at 346, 330, 327, 336, 338.

58. N. Puner, Civil Disobedience (1968), p.692.

58a. 393 U.S. 175 (1968).

59. ibid. at 180-181.

60. 390 U.S. 611 (1968).

61. 380 U.S. 479 (1965); see also p.318 above,

62. ibid. at 485, 487.

63. 390 U.S. at 622, 627.

64. 394 U.S. 111 (1969).

65. 394 U.S. 147 (1969).

66. 391 U.S. 308 (1968).

67. ibid. at 315.

68. Marsh v. Alabama, 326 U.S. 501 (1946); see p. 228 above.

69. 391 U.S. at 318, 319.

70. ibid. at 332-333.

71. T. Emerson (1970), p.309, agreed with Justice White's prediction, that the decision opened the road for a major doctrinal development, but unlike the Justice he welcomed the prospect: "...[T]he logic of the decision would clearly seem to carry that far... the private owner is exercising control over property of a character that is customarily exercised by government, and the demands of the system of free expression put the owner in the same position as the government". The Court's reservation is found in 391 U.S. at 320, n.9.

72. See infra, Ch.X, 8.

73. Goodman (1969), p.431.

74. S. Lipset and S. Wolin (eds.), The Berkeley Student Revolt (1965).

75. K. Sale, S.D.S. (1974), pp.15-95.

76. The most interesting among a large selection of books on the protest movement is J. Skolnick, The Politics of Protest (1969), esp. Ch.2.

77. D. Alfange, "Free Speech and Symbolic Conduct" (1968), p.6.

78. Quoted in Note: "Symbolic Conduct", 68 Columbia Law Review (1968), p.1091; for a similar analysis, Barron (1967), pp.1644-7.

79. 372 F. 2d. 817 (2d Cir. 1967).

80. C. Schiesser and D. Benson, "The Legality of Reclassification of Selective Services Registrants" (1967).

81. Goldstein (1978), p.439.

82. Quoted in J. Mitford, Trials of Dr. Spock (1970), pp.55-6.

83. R. Harris, Justice (1970), p.62.

84. J. Ellif, Crime, Dissent and the Attorney General (1971), p.175.

84a. Oestereich v. S.S.B., 393 U.S. 233 (1968), at 237.

84b. Gutknecht v. U.S., 396 U.S. 295 (1970), at 306.

84c. U.S. v. Falk, 479 F. 2d 616 (1973), at 618.

85. Boorda v. Subversive Activities Control Board, 421 F. 2d. 1142 (D.C. Col. 1969).

86. Emerson (1970), p.145.

87. 18 U.S.C. § 2101-2102.

88. Eliff (1971), p.264, n.44 and text accompanying.

89. ibid. at p.110.

90. Quoted in Harris (1972), p.65.

91. Ellif (1971), p.177.

92. Civil Liberties, May 1971.

93. B. Wasserstein, "The Courts and the Campus", in B. Wasserstein and M. Green (eds.), With Justice for Some (1972).

94. Goldstein (1978), p.442.

95. Ellif (1971), p.190.

96. H. Commager, "Is Freedom Dying in America?", Look Magazine, July 14, 1970.

97. Quoted in N. Hentoff, "Subverting the First Amendment: Nixon and the Media" in A. Gartner et al. (eds.), What Nixon is Doing to Us (1973), p.217.

98. I. Glasser, "The Constitution and the Courts", in A. Gartner (1973), p.162.

99. Goldstein (1978), p.449.

100. On the use of the grand jury as a tool of political repression see Donner and Cerruti, "The Grand Jury Network" (1973), pp.432ff.

101. Glasser (1973), pp.176-7.

102. Goldstein (1978), p.464. Goldstein presents a concise and informative account of the intelligence network, ibid., pp.463-486.

103. ibid., p.469.

104. 19 N.Y. 2d. 496 (1967).

105. See above, Ch.IX, 3.2.

106. Epton v. New York, cert. denied, 390 U.S. 29 (1968).

107. ibid. at 33, 35.

108. R. Jackson, "The Federal Prosecutor", Journal of the American Judicature Society, 24, p.18 (June 1940).

109. Mitford (1970), p.191.

110. ibid. at Foreword.

111. Quoted in Harris (1970), p.63.

112. U.S. v. Spock, 416 F. 2d. 165 (1st Cir. 1969).

113. Quoted in Mitford (1970), p.59.

114. D. Walker, Rights in Conflict (1968), p.4 and 10-11.

115. Ellif (1971), pp.196-7.

116. J. Epstein, The Great Conspiracy Trial (1970), p.173.

117. ibid., pp.254-5.

118. ibid., p.414.

119. Goldstein (1978), p.488.

120. ibid., p.487.

121. See Goldstein (1978), pp.487-493 and material cited there. A detailed account of the Pentagon Papers case is found in S. Ungar, The Papers and the Papers (1975).

122. 395 U.S. 444 (1975).

123. ibid. at 447.

124. For criticisms of the two tests see Ch.VII, 2 and 3.

125. 447, n.2.

126. Douglas concurring, ibid. at 453.

127. For a typical reaction see Ely (1980), p.115.

128. The phrase is borrowed from H. Linde, "Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto", 22 Stanford L. Rev., p.1163 (1970).

129. See for example, O'Brien, p.442 and the continuing story of the loyalty-security cases, Ch.X, C.

130. 401 U.S. 37 (1971).

131. Before Dombrowski the Supreme Court had indicated that constitutional questions arising out of state criminal prosecutions could be tackled by federal courts only after a state conviction. In Dombrowski v. Pfister, 380 U.S. 479 (1965) the Court held that when criminal prosecutions were initiated without "any expectation of securing valid convictions, but rather as part of a plan... to harass and discourage [the defendants] and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens" then the "chilling effect on free expression of prosecutions initiated and threatened" created sufficient "irreparable injury" which called for federal equitable relief. ibid. at 482, 487. The substantive rulings of that case are reported above, n.61 and text accompanying.

132. 401 U.S. at 42.

133. ibid. at 46, 50, 53.

134. ibid. at 52.

135. ibid. at 51.

136. ibid. at 58.

137. 401 U.S. 66 (1971); The anarchy and syndicalism cases are discussed in P. Harris, "Black Power Advocacy: Criminal Anarchy or Free Speech" (1968), p.702.

138. 391 U.S. 367 (1968).

139. For comment on the case, see D. Alfange, "Free Speech and Symbolic Conduct: The Draft Card Burning Cases" (1968). Note, "Symbolic Conduct", 68 Columbia Law Review, p.1091 (1968); J. Ely, "Flag Desecration: A Case Study nn the Rules of Categorization and Balancing in First Amendment Analysis"(1975).

140. 367 F. 2d. 72 (2d Cir. 1966).

141. U.S. v. O'Brien, 376 F. 2d. 538 (1st Cir. 1967).

142. 391 U.S. at 376.

143. ibid. at 377.

144. L. Tribe, Constitutional Law (1978), p.688.

145. 393 U.S. 503 (1969).

146. ibid. at 518. Snowis (1973) provides an explanation for Black's change but see pp.35-37 above.

147. 394 U.S. 576 (1969).

148. Justice Fortas dissenting at 616.

149. 394 U.S. 705 (1969).

150. 394 U.S. at 708, quoting from N.Y.T. v. Sullivan [376 U.S. 254 at 270 (1964)].

151. 403 U.S. 15 (1971).

152. H. Abraham, Freedom and the Court (1977), p.176.

153. T. Walker, American Politics and the Constitution (1978), p.74.

154. 403 U.S. at 22 and Chaplinsky v. New Hampshire, above, p.225.

155. ibid. at 25.

156. ibid. at 24-25.

157. J. Ely (1980), pp.114-5; H. Linde (1970); L. Tribe (1978), pp.584-8, 670-4.

158. 405 U.S. 518 (1972).

159. ibid. at 525, 527.

160. ibid. at 537.

161. 413 U.S. 601 (1973).

162. ibid. at 615.

163. In U.S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1978), the Court overruled a similar challenge against the prohibition of political activities by civil servants.

164. 417 U.S. 733 (1974).

165. ibid. at 760.

166. Justice Stewart dissenting at 780 and quoting the majority opinion at 747.

167. 414 U.S. 105 (1973).

168. A similar result was reached in three cases involving foul language: Rosenfeld v. New Jersey, Lewis v. New Orleans and Brown v. Oklahoma, 408 U.S. at 901, 913 and 914 (1972) and again in Lewis v. New Orleans, 415 U.S. 130 (1974).

169. 410 U.S. 667 (1973).

170. In Healey v. James 408 U.S. 169 (1972), the Supreme Court reversed the decision of a University denying recognition to a campus group loosely affiliated with the S.D.S. The Court ruled that the campus was not exempt from the protection of the First Amendment. If a group does not disrupt the educational process and abides by the reasonable regulations of student life, it cannot be refused the privileges attendant upon official recognition. For comment on Healey and other cases related to the recognition of student groups by university authorities see, Note, "Beyond Tinker and Healey: Applying the First Amendment to Student Activities", 78 Columbia L. Rev. p.1700 (1978).

171. 415 U.S. 566 (1974).

172. ibid. at 574, 575.

173. ibid. at 589.

174. 418 U.S. 405 (1974).

175. ibid. at 423. For an interesting analysis of the case see Ely (1975).

176. Goldstein (1978), p.515.

177. 397 U.S. 564 (1970).

178. 402 U.S. 611 (1971).

179. 408 U.S. 92 (1972).

180. ibid. at 95.

181. ibid. at 101.

182 Professor Tribe remarks that in Young v. American Mini Theatres Inc., 427 U.S. 50 (1976) the Court departed from the equality principle enunciated in Mosley. He states that this case, involving the showing of sexually explicit films can be seen as an "aberration": Tribe (1978), pp.673-4. Cf. Ely (1980), p.233, n.27. However, the major premise of these analyses, namely that some sort of ideological neutrality has been established in Supreme Court jurisprudence, cannot be sustained. In the light of previous and subsequent decisions, not least Grayned which was decided on the same day as Mosley, the latter joins this select group of Supreme Court decisions whose liberal rhetoric and promise never fully materialized.

183. 408 U.S. 104 (1972).

184. Douglas dissenting at 122, 124.

185. ibid. at 116.

186. 407 U.S. 551 (1972).

187. Marsh v. Alabama, 326 U.S. 501 (1946), at 506; see p.228 above.

188. Amalgamated Union v. Logan Valley Plaza, 391 U.S. 308 (1968), at 318; p.413 above.

189. 407 U.S. at 561, 564.

190. ibid. at 576.

190a. ibid. at 567, 569.

191. Justice Marshall dissenting at 586, 581, 578.

192. 424 U.S. 507 (1976).

193. ibid. at 521.

194. ibid. at 519, 520, 521.

195. **Justice Marshall dissenting at 543.**

196. 424 U.S. 828 (1976).

197. 407 U.S. 197 (1972).

198. 424 U.S. at 839, 840.

199. Brennan dissenting at 843; Marshall dissenting at 852.

200. 389 U.S. 258 (1967).

201. ibid. at 262.

202. ibid. at 265-6.

203. 390 U.S. 17 (1968).

204. ibid. at 24.

205. 401 U.S. 1 (1971).

206. ibid. at 4.

207. ibid, at 7-8.

208. 401 U.S. 23 (1971).

209. See above, p.339.

210. 401 U.S. at 34.

211. 401 U.S. 154 (1971).

212. ibid. at 165, 166.

213. ibid. at 174.

214. 403 U.S. 207 (1971).

215. 405 U.S. 676 (1972).

216. ibid. at 683, 684.

217. at 685-686.

218. at 689.

219. 408 U.S. 753 (1972).

220. ibid. at 770; Douglas dissenting at 774.

221. 414 U.S. 441 (1974).

222. ibid. at 450.

223. N. Berns (1976), pp.178-181.

224. 430 U.S. 705 (1977).

225. ibid. at 714, 715, 717.

226. ibid. at 721.

227. 376 U.S. 254 (1964).

228. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

229. In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court upheld a "group libel" law.

230. 376 U.S. 260, n.3.

231. ibid. at 270.

232. at 272, 273.

233. at 279-280.

234. Justice Black concurring in the result at 293, 297.

235. H. Kalven, "The New York Times Case: A Note on the 'Central Meaning of the First Amendment'" (1964), p.194.

236. ibid. at p.221 and n.125.

237. W. Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment" (1965), see also above, p.137.

238. 379 U.S. 64 (1964).

239. 383 U.S. 75 (1966).

240. ibid. at 85.

241. at 91.

242. Curtis Publishing Co. v. Butts and Associated Press v. Walker 388 U.S. 130 (1967).

243. ibid. at 155.

244. at 163-4

245. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

246. Cert. denied at 396 U.S. 1049 (1970).

247. 390 U.S. 727 (1968).

248. ibid. at 731.

249. 403 U.S. 29 (1971).

250. 376 U.S. 254 at 305 (1964).

251. 403 U.S. at 46-47 (1971).

252. ibid. at 47, n.15.

253. 418 U.S. 323 (1974).

254. H. Kalven, "The Reasonable Man and the First Amendment: Hill, Butts and Walker" (1967), p.300.

255. 418 U.S. at 341.

256. This idea was argued by Kalven, The Reasonable Man and the First Amendment (1967), p.300. Justice Powell made a number of approving references to Kalven in Gertz.

257. at 349.

258. 443 U.S. 111 (1979) at 136.

259. 443 U.S. 157 (1979) at 168, 169.

260. 418 U.S. 241 (1974).

261. ibid. at 248, 254, 251.

262. at 255. The following passage is a quotation from Democratic National Committee v. Columbia Broadcasting System, 412 U.S. 94 (1973).

263. 418 U.S. at 258.

264. B. Schmidt, "Freedom of the Press v. Public Access" (1976), p.233.

265. ibid. at 237-8.

266. ibid. at 239.

267. H. Kalven, The Concept of the Public Forum: Cox v. Louisiana", (1965), p.2.

268. The potest movements led to an expansion of legal, political and philosophical writings on civil disobedience. I have found the following materials most interesting. On legal/constitutional aspects: A. Cox, Direct Action, Civil Disobedience and the Constitution; Wasserstrom, "The Obligation to Obey the Law" (1963); N. Puner, "Civil Disobedience: An Analysis and Rationale" (1968); G. Hughes, "Civil Disobedience and the Political Question Doctrine" (1968). Two Justices have contributed to the debate in A. Fortas, Concerning Dissent and Civil Disobedience (1968) and W. Douglas, Points of Rebellion (1970). On the moral aspects of civil disobedience see: Prosch, "Towards an Ethic of Civil Disobedience" (1967); J. Rawls, A Theory of Justice (1973), Ch.VI; R. Dworkin, Taking Rights Seriously (1977), Ch.8. More politically orientated analyses are found in H. Arendt, Crises of the Republic (1973); G. Marshall, Constitutional Theory (1971), Ch.IV; Campbell, "Law and Order Reconsidered (1969); I. Balbus, The Dialectics of Legal Repression (1973); R. Lefcourt, Law against the People (1971); L. Macfarlane, Political Disobedience (1971).

269. See for example, N. Puner (1968), p.718. "Civil disobedience is, in itself, a disavowal of lawlessness. 'Civil' can only mean within the law"; J. Rawls (1973), p.366. "[Civil disobedience] expresses disobedience to the law within the limits of fidelity to the law".

270. See above, p.398.

271. See above, p.396, 403, 406, 232

272. H. Kalven (1965), p.32. See also above, Ch.VIII, 4.1.

273. T. Emerson (1970), Ch.IX at p.387. Emerson's analysis is based on the distinction between expression and action which, as it has been argued, cannot be sustained theoretically. His review of the case-law remains, however, the most critical and complete in constitutional literature.

274. See above, pp.36-7.

275. See above, p.412, 453, 454. and Tribe (1978), pp.584-8 and 670-4.

276. p.411.

277. p.454, 408, 412.

278. B. Schmidt (1976), pp.99-100.

279. p.396, 406, 455.

280. p.413, 456, 459.

281. Clear statements of the two rules are found in N.A.A.C.P. v. Alabama ex rel. Flowers, 377 U.S. 288 at 307 and in U.S. v. Robel, above, p.429. I found Tribe (1978), pp.713-7, the most informative analysis of the application of the two doctrines in free speech cases. An interesting analysis of the two doctrines is found also in F. Strong, "50 years of Clear and Present Danger. From Schenck to Brandenburg" (1969).

282. p.411, 448, 445, 450, 412, 468.

283. p.445, 446, 448.

284. p.395, 406.

285. p.442, 449, 450.

286. p.444, 445,451-2. In Schacht v. U.S., 398 U.S. 58 (1970), the Supreme Court ruled that the wearing of military uniforms by actors performing in a play which intended to discredit the armed forces was protected symbolic speech.

287. J. Ely (1975).

288. T. Emerson (1970), p.627.

289. ibid., p.628.

290. J. Barron (1973), p.5 and Ch.11.

291. See, for example, T. Emerson (1970), Ch.XVII; J. Barron (1967, 1973); J. Pemberton, "The Right of Access to the Mass Media", in Dorsen, The Rights of the Americans (1971); Schmidt (1976) criticizes most of these theories and argues for an almost complete editorial freedom.

292. See Ch.IX, 3.

293. p.437, 439, 468.

294. Goldstein (1978) offers various reasons for the failure of the various repressive measures to halt the protest movement. He argues that Johnson failed to "sell" the Vietnam War to the American public and that overt repression during his Administration was half-hearted. When Nixon increased both the overt and covert repressive activities in the late 60s, the Vietnam policy was disapproved by a majority of Americans, and the repressive measures "took away further legitimacy from an already discredited government", ibid. p.533. This analysis seems correct, but it underestimates the relative failure of the protest movement to change the overall foreign policy of the American Government and to link the reorientation of foreign policy with radical changes at home.

295. The major cases were Baker v. Carr, 369 U.S. 186 (1962) and Reynold v. Sims, 377 U.S. 533 (1964). For (conservative) criticisms of the voting rights case see W. Elliott (1974); R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977) and A. de Grazia, Essay on Apportionment and Representative Government (1963).

296. P. Rosen, The Supreme Court and Social Science (1972), p.xi.

297. Quoted in R. Kluger (1977), p.667.

298. The most important of the pro-N.A.A.C.P. decisions were N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); and Gibson v. Florida L.I.C, above, p.342.

299. Compare the cases in n.298 with Wilkinson and Braden above, pp. 340-1 and the continuing harassment of the radical DuBois clubs throughout the sixties (T. Emerson (1970), pp.141-144). R. Wolff (1968), p.155 calls this brand of pluralism which distinguishes between legitimate and "beyond the pale" interests and groups "conservative liberalism".

300. N.A.A.C.P. V. Button, 371 U.S. 415 (1963) at 429.

301. See C. Offe in P. Connerton (ed.) (1976), pp.397-408. "The actual goal of association (of social groups whose economic-functional utility is minimal, e.g. ethnic minorities) is the disciplining of members and the creation of integrative symbols", p.402.

302. A. Wolfe (1977), p.154. Similar conditions were imposed on organisations representing the urban poor during Johnson's "American War on Property" campaign, ibid., pp.147-149.

303. The three major tasks of contemporary government, "shaping a business policy that ensures growth, influencing the structure of production in a manner oriented to collective needs, and correcting the pattern of social inequality", must be performed "without violating the functional conditions of a capitalist economy, and this means without violating the complementarity relations that

exclude the state from the economic system and, at the same time, also make it dependent on the dynamic of the economy": J. Habermas (1979), pp.194-195. Habermas and Claus Offe find that the dependence of the state on the capitilistically organised civil society and its inability, therefore, to perform efficiently its major tasks which require extensive intervention in the functional conditions of capitalist economy is one of the major causes of legitimation problems in late capitalism. J. Habermas (1973), in particular parts II and III. See also A. Wolfe (1977), Part II; M. Edelman (1964) and C. Offe, "Some Contradictions of the Modern Welfare State" (1981).

304. Buckley v. Valeo, 424, U.S. 1 (1976).

305. ibid. at 19.

306. D. Polsby, "Buckley v. Valeo: The Special Nature of Political Speech" (1976), p.43.

307. J. Habermas (1974), p.55.

308. Reported in The Guardian, 21 June 1981.

309. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) and Young v. American Mini Theatres 427 U.S. 50 (1976). See J. Ely (1980), p.233, n.27 and Tribe (1978), pp.673-4.

310. H. Marcuse, One Dimensional Man (1972), p.18.

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