Michigan Law Review

Volume 58 | Issue 2

1959

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# MICHIGAN LAW REVIEW

Vol. 58 DECEMBER 1959 No. 2

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THE Supreme Court, reads a famous passage by Bryce, "feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken."[1]

The history of the highest Court bears constant witness to the truth of Bryce's statement. Supreme Court action which has moved too far in one direction has always ultimately provoked an equivalent reaction in the opposite direction. Even an institution as august as the high tribunal cannot escape the law of the pendulum.

The decisions of the Court during the October 1958 term seem to fit directly into the pattern observed by Bryce. In recent years, the Court itself has come under increasing criticism because of decisions which have been seen unduly to limit both congressional and state powers. During 1959, on the other hand, important decisions were handed down which reaffirmed both congressional investigatory authority and state power in important areas. As has so often happened, the Court itself appears to have remolded its jurisprudence so as to render moot much of the criticism against it.

Members of a society dominated by what has been well termed "government by lawsuit"[2] tend all too often to forget the inherently weak position of the judicial department. The basic strength of the high Court is not its constitutional position, but the acceptance by public opinion of its role as guardian of the Constitution. Justice Miller has said:

> "Dependent as its Courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely

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1 1 BRYCE, THE AMERICAN COMMONWEALTH, 3d ed., 273 (1908).

2 JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 286 (1941).

upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives."[3]

From this point of view, action by the Court which brings its decisions into line with the dominant sense of the community can only be commended. In a representative, democratic government, as Chief Justice Vanderbilt well pointed out,[4] the power of the judiciary depends largely on its reputation for independence, integrity, and wisdom. The Supreme Court can maintain its role only so long as it continues to maintain its reputation in these respects in the public eye.

## I. LEGISLATIVE INVESTIGATORY POWER

Few aspects of legislative authority have received more public attention in recent years than the power of investigation. At times, in truth, it has seemed as if the chief role of our Congress has become that of what William Pitt the Elder once called the "Grand Inquest of the Nation."[5] Certainly, since the last war at least, the congressman *qua* inquisitor has seemed almost to place the congressman *qua* legislator in the shade.

"Scarcely any political question arises in the United States," acutely observed de Tocqueville over a century ago, "that is not resolved, sooner or later, into a judicial question."[6] And so it was to be expected that the exercise of congressional investigatory authority, too, would give rise to controversies for adjudication by the highest Court. Until the present Court, however, the dominant judicial theme in this field was that of abnegation. "Courts," said the Vinson Court in 1951, with regard to legislative investigative abuses, "are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."[7]

All this appeared to be changed when, two years ago, the Court handed down its decision in *Watkins v. United States*.[8] In *Wat-*

3 United States v. Lee, 106 U.S. 196 at 223 (1882).

4 VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 140 (1953).

5 TAYLOR, GRAND INQUEST 1 (1955).

6 Quoted in American Communications Association v. Douds, 339 U.S. 382 at 415 (1950).

7 Tenney v. Brandhove, 341 U.S. 367 at 378 (1951).

8 354 U.S. 178 (1957).

*kins,* for the first time in almost a century,[9] the high bench found that an exercise of congressional investigatory authority exceeded the permissible limits upon legislative power. With *Watkins,* it seemed, the Court had assumed a definite position of overseer vis-à-vis legislative exertions of investigatory power. According to some, indeed, *Watkins* itself was a serious barrier even to legitimate exercises by the Congress of its inquiring function.[10]

During the 1958 term, the Court indicated that the actual effect of *Watkins* was not nearly as extreme as many had feared. In this respect, it is important to distinguish between the actual holding in *Watkins* and the broad language of the Court's opinion there. The former constituted a needed check upon legislative investigations; the latter, if taken literally, could lead to emasculation of the informing function of the Congress.

The bare holding in *Watkins* was well stated in Justice Frankfurter's concurring opinion there: "The actual scope of the inquiry that the [congressional] 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."[11] The "contempt of Congress" conviction at issue in *Watkins* was reversed because it had not been shown to the witness that the questions he had refused to answer were clearly pertinent to an authorized inquiry of the investigating committee. As the Court put it, "knowledge of the subject to which the interrogation is deemed pertinent . . . must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[12]

The *Watkins* test of pertinency was the basis for the Court's decision in *Scull v. Virginia.*[13] Defendant there was convicted of contempt in a Virginia court for refusing to obey a court order to answer certain questions put to him by an investigating committee of the Virginia legislature. The committee in question had been set up after the Supreme Court's desegregation decision and appeared to be aimed at organizations and individuals attempting to secure integration in Virginia schools. The resolution setting up the committee specified that it could inquire into three general subjects: (1) the tax status of racial organizations and of contributions to

9 See Kilbourn v. Thompson, 103 U.S. 168 (1880).

10 See Schwartz, "The Supreme Court—October 1956 Term," 32 N.Y. UNIV. L. REV. 1202 at 1215 (1957).

11 354 U.S. 178 at 217 (1957).

12 Id. at 208-209.

13 359 U.S. 344 (1959).

them; (2) the effect of integration or its threat on the public schools of Virginia and on the general welfare of the state; and (3) the violation of the laws against champerty, barratry, and maintenance or the unauthorized practice of law.[14] Defendant was asked thirty-one specific questions, but it was not shown how any of them was pertinent to these subjects. In reversing defendant's conviction, the Court held that this violated the *Watkins* pertinency test.[15] Defendant, said the court, did not in these circumstances, "have an opportunity of understanding the basis for the questions or any justification on the part of the Committee for seeking the information he refused to give."[16]

One familiar with the workings of legislative committees and their all-too-common tendency to stray beyond the bounds of their authorizing resolutions cannot but agree with the *Watkins-Scull* approach. A reading of the questions asked in *Scull* is bound to make one wonder how most of them had any relationship at all to the subjects the committee was authorized to investigate.[17] Under *Watkins,* investigative power must at least be canalized within the bounds of pertinency — a limitation that imposes a needed check upon legislators who all too often interpret their investigative mandates as roving commissions to inquire into anything which appears suited to propel themselves into the headlines.

As already indicated, however, the test of pertinency was but a small part of the *Watkins* opinion. Instead of limiting himself to articulation of that test, the Chief Justice, who delivered the *Watkins* opinion, used the occasion to write a broad essay on congressional investigatory authority in which he went far beyond the bare holding of the case.

This is what makes the decision last term in *Barenblatt v. United States*[18] so significant. *Barenblatt* indicates that the Chief Justice's dicta in *Watkins* were just that—merely *obiter.* As such, they have only the effect enunciated by Chief Justice Marshall in

14 Id. at 347.

15 Watkins itself is binding on the states because it lays down a rule of "fundamental fairness." Id. at 353.

16 Ibid.

17 E.g., "Question 28 asked if the Communist Party used Box 218; Question 30 asked if Scull had ever been called as a witness before a Congressional Committee; Question 31 asked if his name had ever been cited by any Congressional Committee as being on any list of members of any organizations that are cited as subversive. Nothing in the language of the Act authorizing the Committee or in the statement of Chairman Thomson about the subjects under inquiry could lead Scull to think that it was the Committee's duty to investigate Communist or subversive activities." Id. at 350, n. 5.

18 360 U.S. 109 (1959).

his famous statement in *Cohens v. Virginia*[19]—i.e., general language which goes beyond the actual *ratio* ought not to control the judgment in a subsequent suit.

*Barenblatt,* like *Watkins,* involved a conviction for contempt of Congress arising from petitioner's refusal to answer certain questions put to him by a Subcommittee of the House Committee on Un-American Activities. In this case, however, the Court felt that the pertinency of the questions asked was clearly established.[20] This brought the Court directly to the broader issues of the scope of congressional investigatory power with which *Watkins* had gratuitously dealt.

The Chief Justice's language in *Watkins* had cast doubt upon the validity of authorizing resolutions containing broad investigatory mandates, such as that setting up the Un-American Activities Committee itself. Speaking of the charter of that committee,[21] the Chief Justice had declared, "It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American'?"[22] Implicit in this was the view that the enabling resolution of the House committee was too vague to be valid.

The difficulty with this view is that it loses sight of the practical realities of the legislative process. The exigencies of the congressional calendar make it impossible for the mandates of committees to be laid down in other than broad terms. There is certainly as much justification for broad standards here as there is in the delegation of powers to administrative agencies.[23] The *Watkins* approach might invalidate the charters of most congressional committees, since, as Justice Clark pointed out in his *Watkins* dissent, the common practice is for such committees to be given power "in exceedingly broad terms."[24] In addition, it is hard to see, under the Chief Justice's *Watkins* language, how a body like the Un-American Activities Committee could be given a valid charter. Its area of investigation must, of necessity, be de-

[19] 6 Wheat. (19 U.S.) 264 at 399 (1821).

[20] Even the dissenting members of the Court did not seem to question this.

[21] According to its enabling resolution, "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 360 U.S. 109 at 116, n. 6 (1959).

[22] Watkins v. United States, 354 U.S. 178 at 202 (1957).

[23] See SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 37 (1958).

[24] 354 U.S. 178 at 220 (1957).

fined through terms such as "un-American." If such a term cannot be defined with mathematical precision, it does nonetheless, in its broad contours, cover sufficiently a field which clearly comes within the legitimate concern of the Congress.

In *Barenblatt,* petitioner relied on *Watkins* as holding that the resolution authorizing the Un-American Activities Committee was invalid because of its vagueness in delineating the committee's jurisdiction. The majority of the Court rejected this argument. "We cannot agree with this contention," declared Justice Harlan, "which in its furthest reach would mean that the House-Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances."[25] The holding here is more consistent with legislative reality than the broad *Watkins* language. Whatever one may think of the manner in which the role of the Un-American Activities Committee has at times been exercised, that surely does not bear upon the congressional power to constitute such a committee.

The *Watkins* opinion did not limit itself to casting doubt upon the validity of the Un-American Activities Committee. Instead it placed much of recent congressional investigating activity under a constitutional shadow. "We have no doubt," reads the most frequently quoted passage of the *Watkins* opinion, "that there is no congressional power to expose for the sake of exposure."[26]

Petitioner in *Barenblatt* placed perhaps his principal reliance on this *Watkins* language, urging that the investigation at issue should not be deemed to have been in furtherance of a legislative purpose because the true objective of the committee was purely "exposure." The four dissenting justices[27] agreed with this contention. The majority, however, rejected it, in terms which indicate that the *Watkins* dictum on "exposure for exposure's sake" itself is hardly to be taken as a controlling rule of law.

In *Watkins,* the Chief Justice went out of his way to stress restrictions upon legislative investigatory authority. In *Barenblatt,* the focus has completely shifted. At the very start of his opinion, Justice Harlan sets the theme by emphasizing, not the limitations, but the extent of the congressional power. "The scope of the power of inquiry, in short," he affirms, "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[28]

25 360 U.S. 109 at 117 (1959).
26 354 U.S. 178 at 200 (1957).
27 Black, J., Warren, C.J., Douglas, J., and Brennan, J., dissented.
28 360 U.S. 109 at 111 (1959).

Under Justice Harlan's approach, the key question for the Court to answer is whether the particular investigation was related to a valid legislative purpose. In *Barenblatt,* such relationship was said to be clearly established: "That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable."[29]

That being the case, it is irrelevant that petitioner claims that the true objective of the committee was "exposure" rather than the furtherance of a legislative purpose. "So long," states the *Barenblatt* opinion, "as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[30] If a congressional investigation, in other words, is related to a valid legislative purpose, it cannot be invalidated because the Court feels that its real purpose is the exposure of those being investigated.

*Barenblatt* represents a needed corrective to the extreme implications of the *Watkins* opinion. Under it, the "power of inquiry [may be] employed by Congress . . . over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it [may] similarly [be] utilized in determining what to appropriate from the national purse, or whether to appropriate."[31]

Congressional investigatory authority is thus as broad as the legislative power itself. It encompasses both the sword and the purse and may be utilized in any area in which congressional power itself may be exerted. And, under *Barenblatt,* a court cannot go behind such valid legislative purpose to determine that the true motive of the congressmen was only "exposure."

It may be objected that such an approach will require the courts to uphold all but the most extravagant assertions of legislative investigatory authority. Particularly, it will be said, this will leave the citizen helpless before possible abuses of congressional investigatory power such as those that have occurred all too frequently in recent years.

The danger of misuse is not, all the same, a ground for denying the existence and scope of a power. Certainly investigatory authority may be abused; the same is also true of the law-making

[29] Id. at 127.
[30] Id. at 132.
[31] Id. at 111.

power of the Congress and, indeed, of all governmental power.[32] But the possibility of abuse does not justify the courts in setting themselves up as the censors of what is, after all, the internal functioning of a co-ordinate branch of government. The elected representatives of the people, more directly responsible to the citizenry than any other organ of government, should not be too closely restricted by the courts in their efforts to bring to light anything that they feel should be subjected to public scrutiny. It would, in the words of Justice Jackson in a 1949 case, "be an unwarranted act of judicial usurpation . . . to assume for the courts the function of supervising congressional committees. I should . . . leave the responsibility for the behavior of its committees squarely on the shoulders of Congress."[33]

## II. LOYALTY-SECURITY CASES

Among the most difficult problems presented to the Supreme Court during the past decade has been that of dealing with the government's response to the "cold war" that has become so prominent a feature of the post-war world. In terms of quantitative impact upon the individual, perhaps the most important governmental measures taken in this area have been the institution of various loyalty and security programs. In 1956, the federal loyalty-security program covered nearly six million civilian employees in both government and private industry.[34] And, even after the scope of the program was narrowed that year by the Court's decision in *Cole v. Young*,[35] several million persons continued to be covered by it.[36]

Although the Supreme Court has not expressly ruled on the matter, there can be little doubt about the substantive authority of the government to dismiss or refuse to hire employees who are disloyal or constitute security risks.[37] But, if the governmental power to bar the disloyal from its service has not really been open to question, the same has not been true of the means used to implement the government's conceded authority in this connection. And this has been particularly true of the procedural aspects of the federal loyalty-security program.

32 See McGrain v. Daugherty, 273 U.S. 135 at 175 (1927).
33 Dissenting, in Eisler v. United States, 338 U.S. 189 at 196 (1949).
34 See SCHWARTZ, THE SUPREME COURT 323 (1957).
35 351 U.S. 536 (1956).
36 See Greene v. McElroy, 360 U.S. 474 at 507, n. 31 (1959).
37 Garner v. Los Angeles Board, 341 U.S. 716 (1951), and Adler v. Board of Education, 342 U.S. 485 (1952), are clearly based upon such authority.

It can hardly be denied that loyalty-security proceedings have not been carried on in accordance with all of the procedural safeguards that are deemed necessary in other fields of our law. The right of cross-examination can serve to illustrate this point. Every party to an administrative proceeding, reads the relevant section of the Federal Administrative Procedure Act, "shall have the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts.[38] In loyalty-security cases, however, the government has felt that to allow those charged with disloyalty to confront and cross-examine those who have given the Federal Bureau of Investigation the information upon which the charge is based would impair the investigative network which the FBI has built up. From the FBI's point of view, it is hardly worthwhile to destroy the usefulness of its undercover operatives by disclosing their identity. That game, the Bureau would say, is plainly not worth the candle.[39]

At the same time, the failure to accord the rights of confrontation and cross-examination has tended all too often to make the hearings accorded in loyalty cases a matter of empty form. This can be seen clearly from a case like *Greene v. McElroy*.[40] Petitioner there had had his security clearance revoked after a hearing before the relevant board on charges of Communist associations. The essence of this "hearing" has been described by Chief Justice Warren:

> "The Government presented no witnesses. It was obvious, however, from the questions posed to petitioner and to his witnesses, that the Board relied on confidential reports which were never made available to petitioner. These reports apparently were compilations of statements taken from various persons contacted by an investigatory agency. Petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took their statements."[41]

In a case like this, the situation confronting petitioner was almost an impossible one. Where an individual does not know the identity of his accusers and cannot confront or cross-examine them, his task in refuting their charges becomes well-nigh insuperable. In such a case, in the Chief Justice's words, "not only is the testi-

[38] 60 Stat. 241 (1946), 5 U.S.C. (1958) §1006(c).
[39] Compare BARTH, THE LOYALTY OF FREE MEN 133 (1951).
[40] 360 U.S. 474 (1959).
[41] Id. at 479.

mony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally."[42]

How, it may be asked, can condemnation by "faceless informers"[43] of the type involved in the *Greene* case be reconciled with the requirements of due process?

It must be stated, in all frankness, that the Supreme Court has never given a satisfactory answer to this question. In fact, the Court has most carefully avoided having to give a reasoned reply to it. During the past term, too, the Court was able to reach decisions in this field without having to resolve the basic constitutional issues involved. In *Vitarelli v. Seaton*,[44] the Court invalidated the dismissal of a Department of Interior employee, on the ground that the procedure followed had violated the department's own regulations governing such cases. And, in the *Greene* case, the revocation of petitioner's security clearance (which had caused his discharge from employment with a government contractor) was declared void because the relevant agency had not been expressly authorized by either the President or the Congress to act in such cases without affording those affected the safeguards of confrontation and cross-examination. By so holding, the Court again avoided the constitutional issue.[45]

But the basic constitutional question still remains: can an individual be deprived of the fundamentals of fair play because the government finds that his case presents security problems? "Perhaps the most delicate, difficult and shifting of all balances which the Court is expected to maintain," wrote Justice Jackson just before his death five years ago, "is that between liberty and authority."[46] Keeping the balance is especially difficult in a time of tension, when legitimate demands of security must be heard.

42 Id. at 497-499.

43 The term used by Douglas, J., concurring, in Peters v. Hobby, 349 U.S. 331 at 350 (1955).

44 359 U.S. 535 (1959).

45 "Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." Greene v. McElroy, 360 U.S. 474 at 507 (1959).

46 JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 75 (1955).

At the same time, governmental action must be fitted into the mold of due process, even during a "cold war." Even then, the values inherent in the constitutional demand should make us hesitate before construing the law so as to deny adjective justice.

In the loyalty-security cases, fair resolution of the procedural problem has been clouded by the aphorism that no one has a "right" to be a civil servant. Public employment is thus only a "privilege;" its possessor is not protected by constitutional procedural requirements. "Due process of law," in the phrase of a federal court, "is not applicable unless one is being deprived of something to which he has a right."[47]

To deny the rudiments of adjective justice to the civil servant because public employment is only a privilege is to employ the kind of legal reasoning that has all the beauty of abstract logic and all the ugliness of injustice.[48] To describe public employment as a "privilege" is really only a convenient way of avoiding the problem of due process. It does not at all follow that, because the law does not guarantee to anyone a right to public employment, the government can resort to any scheme for depriving people of their positions in the civil service. "The fact that one may not have a legal right to get or keep a government post does not mean that he can be judged ineligible illegally."[49]

Denial of basic adjective requirements has an even less substantial legal foundation in a case like *Greene,* where public employment was not involved. The governmental issue at action there affected petitioner in a clear pre-existing "right" — namely, that of private employment: "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."[50]

If there is one principle that is established in our public law, it is that which prohibits a governmental agency from adversely affecting an individual in his personal or property rights without complying with the requirements of procedural due process, including the fundamental rights of confrontation and cross-examination. Perhaps the most important portion of the *Greene* opinion is the following passage, in which this basic principle is reaffirmed:

[47] Bailey v. Richardson, (D.C. Cir. 1950) 182 F. (2d) 46 at 58, affd. by equally divided Court 341 U.S. 918 (1951).

[48] Compare Mitchell, "The Anatomy and Pathology of the Constitution," 67 JURID. REV. 1 (1955).

[49] Jackson, J., concurring, in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 at 185 (1951).

[50] 360 U.S. 474 at 492 (1959).

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots."[51]

It is recognized that this language was not necessary to the *Greene* decision. Strictly speaking, therefore, it was delivered only by way of *obiter*. Yet it remains the only indication by the Court of its view on the constitutional issue involved in a case like *Greene*. And it points to ultimate resolution of that issue in favor of the procedural rights of the individual. In such a case, according to the *Greene* opinion, "We deal . . . with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures."[52] The plain implication here is that, at least where public employment is not involved, the individual cannot be deprived of his job by governmental action except after a hearing which comports with our traditional ideas of fair procedure[53] — including the safeguards of confrontation and cross-examination.[54]

## III. SUBVERSION AND THE STATES

The decisions rendered during the past term point up the role of the high Court as the ultimate arbiter of the federal system. Few, if any, functions of that tribunal are of greater practical importance. It is the supreme bench which ensures that national authority is not frustrated by a "crazy quilt"[55] of conflicting local laws. And, at the same time, it is that body which guarantees that the states will not ultimately be swallowed up by the government

51 Id. at 496.
52 Id. at 506-507.
53 Ibid.
54 Id. at 507.
55 The term used by Frankfurter, J., concurring, in Morgan v. Virginia, 328 U.S. 373 at 388 (1946).

in Washington. It is, in truth, difficult to conceive how a federal system like ours could work in practice without a judicial umpire. As Chief Justice Taney aptly stated a century ago, "So long . . . as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."[56]

Among the most sharply criticized decisions of the high Court in recent years have been those invalidating state laws on the ground of conflict (express or, more commonly, implied) between them and federal legislation. To critics, these have been seen as judicial attempts to reduce the states to governmental sterility. Indeed, its decisions restricting state authority have been more instrumental than any others (aside from those in the field of racial discrimination) in leading to serious congressional attempts to curb the Court.

But, as so often happens in our system, the justices themselves appear to have come to realize that they had gone too far in their jurisprudence in this field. In this writer's analysis of the 1957 term, it was noted that the Court was indicating a readiness to uphold state power in situations where a contrary result might previously have been reached.[57] The tendency in this direction continued during the 1958 term. In the fields of subversion and taxation of interstate commerce, state authority was recognized in a manner which (whether or not the Court consciously intended that result) is bound to remove much of the ammunition from critics of the high tribunal in this area.

In its 1956 decision in *Pennsylvania v. Nelson*,[58] the Court invalidated the Pennsylvania Sedition Act, on the ground that it was superseded by the Federal Smith Act, which proscribed the same conduct. The *Nelson* opinion declared that "Congress has intended to occupy the field of sedition."[59] Critics of the Court not unnaturally assumed that this meant just what it said and left the states without any authority to deal with sedition. Some went so far as to paint a picture of the states, helpless in the face of Communist conspiracy — shorn of all power to cope with subversion against themselves.

[56] Ableman v. Booth, 21 How. (62 U.S.) 506 at 521 (1859).

[57] Schwartz, "The Supreme Court—October 1957 Term," 57 MICH. L. REV. 315 at 332 (1959).

[58] 350 U.S. 497 (1956).

[59] Id. at 504.

Whether or not that picture was ever accurate,[60] it is plain that *Uphaus v. Wyman*[61] makes it a distortion of reality. *Uphaus* arose out of an investigation undertaken under a resolution of the state legislature directing an investigation of violations of the New Hampshire Subversive Activities Act. Appellant had been found guilty of contempt for refusal to produce certain documents before the legislative investigating committee.[62] He contended that the *Nelson* decision barred all state action in the field of subversion, including legislative investigations. According to the Court, however, "The appellant's argument sweeps too broad."[63]

As explained by Justice Clark in *Uphaus, Nelson* did not eliminate all state action in the field of subversion. *Nelson,* says the *Uphaus* opinion, "rejects the notion that it stripped the States of the right to protect themselves."[64] What then is left for the states under *Uphaus?* Justice Clark mentioned the following: prosecutions for sedition against the state itself; state activity in protection of itself either from actual or threatened sabotage or attempted violence of all kinds; and internal civil disturbances. "Thus registration statutes, *quo warranto* proceedings as to subversive corporations, the subversive instigation of riots and a host of other subjects directly affecting state security furnish grist for the State's legislative mill."[65]

The *Uphaus* gloss on *Nelson* appears to be based upon a distinction between subversion against the United States and subversion against a state. The Smith Act prohibits knowing advocacy of the overthrow of the Government of the United States by force and violence.[66] *Nelson,* says *Uphaus,* proscribed only state enforcement of laws aimed at such subversion. It did not affect state authority to enforce laws barring such advocacy against a state's own government. It should, however, be pointed out that, valid though the distinction made by the Court in this respect may be as a matter of abstract logic, it has little practical reality. One engaged in subversive advocacy does not normally act according to the niceties of theoretical federalism. His advocacy is aimed at *government,* without regard to the nuances between federal and state power. Under *Uphaus,* all such subversion can be reached

60 See id. at 500.

61 360 U.S. 72 (1959).

62 Under the relevant resolution, the state attorney general was constituted a one-man legislative investigating committee.

63 Uphaus v. Wyman, 360 U.S. 72 at 76 (1959).

64 Ibid.

65 Id. at 77.

66 Pennsylvania v. Nelson, 350 U.S. 497 at 499 (1956).

by the states — as it can be by the federal authorities under the Smith Act. Such result may be valid for a tribunal which is coming once again to scrutinize state authority with anything but a hostile eye. But it should be recognized that it is clearly inconsistent with the *Nelson* holding that Congress intended to occupy the field of sedition. Where Congress does occupy a field of regulation, it has spoken so as to silence the states — i.e., has acted so as to bar any state action at all in the particular field.

## IV. COMMERCE AND STATE POWER

Even more significant than *Uphaus* in upholding state power are last term's decisions involving state taxation of interstate and foreign commerce. Two of these decisions, in fact, bid fair to become landmark cases, for they make for notable departures in the law in this area.

The first of the decisions referred to is *Northwestern States Portland Cement Co. v. Minnesota.*[67] It involved the constitutionality of state net income tax laws levying taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing state when those activities are exclusively in furtherance of interstate commerce. The taxes in question were imposed under laws of Minnesota and Georgia. The Minnesota tax can serve as our illustration for purposes of discussing the case. It was levied under a statute which imposes an annual tax upon the taxable net income of residents and nonresidents alike. One of four classes taxed by the statute is that of "domestic and foreign corporations . . . whose business within this state during the taxable year consists exclusively of foreign commerce, inter-state commerce, or both." Minnesota utilized three ratios in determining the portion of net income taxable under its law. The first was that of the taxpayer's sales assignable to Minnesota during the year to its total sales during that period made everywhere; the second, that of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated. The third was the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business in the like period. In the

[67] 358 U.S. 450 (1958). Since this decision, Congress has enacted the Interstate Commerce Tax Act, P. L. 86-272, 86th Cong., 1st sess. (Sept. 14, 1959), barring the states from imposing net income taxes on income derived in the state from interstate commerce if the only business activities in the state are solicitation of orders to be approved and filled outside the state.

instant case appellant took no issue with the fairness of this formula nor of the accuracy of its application. Appellant itself was an Iowa corporation engaged in the manufacture and sale of cement, locally in Iowa and, in interstate commerce, to dealers in neighboring states including Minnesota.

The Court upheld the Minnesota tax upon the net income of appellant. According to its decision, "a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce."[68] Nor does it make any difference that the commerce engaged in by appellant in Minnesota is purely interstate and that, in consequence, the tax was on income derived exclusively from interstate commerce. The tax in question was part of a general scheme of state taxation, reaching all individual and corporate net income. The taxing statute was not, as Justice Harlan in his concurring opinion put it, sought to be applied to portions of the net income of appellant *because* of the source of that income—interstate commerce—but rather *despite* that source.[69] In the Court's view, it is not an improper interference with interstate commerce to permit a state within whose borders a foreign corporation engages in activities in aid of that commerce to tax the net income derived therefrom on a properly apportioned basis.

The opinion of the Court is based upon ostensible rigid adherence to stare decisis. It repeatedly asserts that it is only adhering to principles laid down in prior decisions and disclaims any intent to break new constitutional ground. But, in actuality, the Court's holding is novel doctrine.[70] According to Justice Whittaker, who dissented, "Neither the Court nor counsel have cited, and our research has not disclosed, a single opinion by this Court that has upheld a state tax laid on 'exclusively interstate commerce,' and we are confident none exists."[71] This statement appears to be borne out by analysis of the prior cases. Though many cases sustain state taxes imposed upon companies engaged in commerce, in none of them was the tax exacted from a business whose revenue derived solely from interstate commerce.

This is not to say that there is not much to commend the Court's recognition of such state power to tax even interstate commerce. The constitutional barrier against state taxation in

68 358 U.S. 450 at 458-459 (1958).
69 Id. at 469.
70 The characterization used in Justice Whittaker's dissenting opinion. Id. at 484.
71 Id. at 487. See also the dissenting opinion of Justice Frankfurter, id. at 470-471.

this field was primarily intended to prevent interstate commerce being placed at a disadvantage. The policy behind the commerce clause was aimed at what Justice Jackson aptly termed a collection of parasitic states preying upon each other's commerce.[72] But this hardly requires that interstate commerce be placed in a favored position. It, too, should share the burdens and costs of government and should not secure competitive advantage from tax immunity denied to local commerce. To put it another way, what the commerce clause requires is an equalization in the tax situation as between interstate and local commerce. The goal, in Professor Freund's phrase, is to prevent an interstate transaction from being saddled with an aggregate tax burden higher than it would bear if it had taken place in the same volume and over the same distance within a single one of the pertinent states.[73] At the same time, the commerce clause hardly requires that the tax burden be lower simply because state lines were crossed.

In the instant case, equality is the theme of the tax at issue.[74] "The thrust of these statutes is not hostile discrimination against interstate commerce, but rather a seeking of some compensation for facilities and benefits afforded by the taxing States to income-producing activities therein, whether those activities be altogether local or in furtherance of interstate commerce."[75] Income derived from sales in a state should not receive immunity from taxation simply because they are interstate, when such immunity is denied to similar local sales. Nor, according to the Court, is there any real danger of a multiple burden resulting from the exactions in question. "The apportioned tax is designed . . . 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce.' "[76]

The second important case on state taxing power decided last term is *Youngstown Sheet and Tube Co. v. Bowers*.[77] Appellant in that case operates an industrial plant in Ohio, where it manufactures iron and steel. In addition to the use of domestic ores, it imports iron ores from five countries. The imported ores arrive

72 JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 67 (1955).

73 FREUND, in SUPREME COURT AND SUPREME LAW, Cahn ed., 102 (1954).

74 See Cardozo, J., in Henneford v. Silas Mason Co., 300 U.S. 577 at 583 (1937).

75 Harlan, J., concurring at 358 U.S. 450 at 469 (1959).

76 Id. at 462. The Court concedes, however, that "In practical operation, . . . apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary States." Ibid.

77 358 U.S. 534 (1959).

in shiploads in bulk at a port of entry where they are unloaded from the ship into railroad cars and transported to appellant's plant. The plant is enclosed by a wire fence. Within the enclosure and adjacent to the manufacturing facilities are several ore yards for the storage of supplies of ore. When the imported ores arrive at this final destination, they are unloaded into one of the ore yards, but, because the ore from each country is different from the others and each is imported for a different use, the ores from each country are placed in separate piles in separate areas of the ore yard. The daily manufacturing needs for ore are taken from these piles. As ore from a particular "pile" in the ore yard is thus taken and consumed, other like ore is similarly imported from the same country and is brought to the plant and unloaded on top of the remainder of that particular pile. This course is continuously repeated.

The Tax Commissioner of Ohio assessed an ad valorem tax against appellant based on the value of the iron ores in its ore yards, including the imported ores remaining in its storage piles. Appellant contended that the imported ores had not lost their character as imports and were therefore immune from state taxation.

As stated by Justice Whittaker, who delivered the *Youngstown* opinion, the question presented on the above facts "is whether appellant[s] . . . have so acted upon the materials which they have imported for use in their manufacturing operations as to cause them to lose their distinctive character as 'imports,' within the meaning of that term as used in the Import-Export Clause, Art. I, §10, cl. 2, of the United States Constitution."[78] The state court held that appellant had done so. The majority of the Supreme Court agreed, basing their decision upon the view that imported goods lose their character as imports as soon as they are used for the purpose for which they were imported—in this case, use in manufacture.

As in the already-discussed *Northwestern States Cement* case, the Court's opinion disowns the notion that it is doing more than following precedent. The analysis in Justice Frankfurter's dissent, however, demonstrates convincingly that *Youngstown* does, in fact, make new law. In particular, the Court's decision appears directly contrary to *Hooven and Allison Co. v. Evatt*,[79] where the fact pattern precisely paralleled that presented here. Despite the

[78] Id. at 536.
[79] 324 U.S. 652 (1945).

Court's express disclaimer of acting other than in accordance with that case, the holding and approach of the *Youngstown* opinion are remarkably similar to those urged by Justice Black, dissenting, in *Hooven and Allison.*[80] The Court's approach is also contrary to the landmark opinion in *Brown v. Maryland.*[81] According to John Marshall's famous formula there, "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."[82] This formula seems clearly applicable to *Youngstown,* for the goods in question there remained in the hands of the importer in the form and shape in which they were brought into the country[83]—they clearly "had not been processed, changed from their original form or shape, acted upon, physically altered in the slightest, mingled with domestic goods, or 'used' in the sense that anything was done to them."[84]

But, if the reasoning in *Youngstown* is thus open to criticism, the same is not necessarily true of the decision there. There is much to be said for the extension of state power which the Court permits. What the Court really did in *Youngstown* was to draw a distinction for purposes of the import-export clause between goods imported for "sale" and goods imported for "use." Only the former are to be protected by the "original package" doctrine—i.e., they are exempt from state taxation while retained by the importer in their original "form or package"[85] prior to their sale. The latter are not to share the same immunity. When they are used by the importer for the purpose for which they were imported, their tax exemption is at an end, even though they are still in their original package or form.

The considerations which support the holding that net income derived from interstate commerce in a state is subject to its taxing power apply with equal force to the *Youngstown* decision. The constitutional ban against state taxation of imports was intended to prevent " '[t]he great importing States [from laying] a tax on the non-importing States,' to which the imported property is or might ultimately be destined, which would not only discriminate against them but also 'would necessarily produce countervailing

80 Id. at 686.
81 12 Wheat. (25 U.S.) 419 (1827).
82 Id. at 442.
83 See Taney, C.J., in The License Cases, 5 How. (46 U.S.) 504 at 575 (1847).
84 358 U.S. 534 at 569-570 (1959).
85 Brown v. Maryland, 12 Wheat. (25 U.S.) 419 at 442 (1827).

measures on the part of those States whose situation was less favourable to importation.' "[86] But it hardly requires discrimination in favor of goods imported from other countries. It is true that there are indications that the qualification against only *discriminatory* state taxes in commerce-clause jurisprudence cannot be read into the import-export clause.[87] There is much to be said, however, for an approach like that in *Youngstown* which assimilates the two clauses in this respect. Under it, the Constitution does not require that foreign products purchased for use of the importer be given what amounts to a tax subsidy at the expense of the particular state affected.[88] In such a case, the foreign products should be "subject to taxation just like domestic property that was kept at the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers."[89]

Closely related to the cases involving state taxation of commerce are those dealing with state regulation of commerce. *Bibb v. Navajo Freight Lines*[90] is such a case. The Court there was asked to hold that an Illinois statute requiring the use of a certain type of rear fender mudguard on trucks and trailers operated on the highways of that state conflicts with the commerce clause of the Constitution. The statute provides that the guard shall contour the rear wheel; it must be wide enough to cover the width of the protected tire, and must have a lip or flange on its outer edge of not less than two inches. Appellees, interstate motor carriers holding certificates from the Interstate Commerce Commission, challenged the constitutionality of the Illinois statute. A three-judge district court concluded that it unduly and unreasonably burdened and obstructed interstate commerce, because it made the conventional or straight mudflap, which is legal in at least forty-five states, illegal in Illinois, and because the statute, taken together with a rule of the Arkansas Commerce Commission requiring straight mudflaps, rendered the use of the same motor vehicle equipment in both states impossible. The Supreme Court affirmed, holding unanimously that the challenged statute violated the commerce clause.

86 358 U.S. 534 at 545 (1959) (quoting from Brown v. Maryland).
87 See Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 at 75-76 (1946).
88 Black, J., dissenting, in Hooven and Allison Co. v. Evatt, 324 U.S. 652 at 690 (1945).
89 358 U.S. 534 at 549-550 (1959).
90 359 U.S. 520 (1959).

The Court emphasized the findings below that installation of the contour mudguards imposed a substantial financial burden on truckers[91] and that such mudguard possessed no advantages in terms of safety over the conventional straight flap permitted in almost all states. But this was not the real basis of its decision. The vice of the challenged statute is to be found in the unconstitutional burden it imposes on the movement of interstate commerce. Such burden arises from the prescription by one state of standards for interstate commerce which conflict with the standards of another state, "making it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles once another state line was reached."[92] This was clearly true under the rule of the Arkansas commission already mentioned which requires straight mudflaps. To permit Illinois to enforce her law, while mudguards remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of interstate transportation, because truckers are subjected to regulation which is not uniform in its application. Hence the Court's holding that the statute in question results in a "rather massive . . . burden on interstate commerce."[93]

Looked at in this way, *Bibb* represents only a modern application of the fundamental principles laid down over a century ago in *Cooley v. Board of Port Wardens*.[94] Here, too, to paraphrase the oft-quoted language of Justice Curtis there, the subject of regulation requires a uniform system, or plan of regulation; it is not best provided for by as many systems of regulation as the legislative discretion of the several states should deem applicable.[95] The *Bibb* opinion relies in large part upon *Southern Pacific Co. v. Arizona*,[96] where a state statute prescribing a maximum length of seventy cars for freight trains moving through the state was invalidated on grounds exactly like those stated in *Bibb* itself.[97]

It certainly appears logical for the Court to apply the same rules to state regulation of interstate trucks as to state regulation of interstate railroads. As the *Bibb* opinion puts it, "The various

91 The district court found that the initial cost of controlling the mudguards on all the trucks owned by appellees ranged from $4,500 to $45,840. Id. at 525.

92 Id. at 526.

93 Id. at 528.

94 12 How. (53 U.S.) 299 (1851).

95 Id. at 319.

96 325 U.S. 761 (1945).

97 Morgan v. Virginia, 328 U.S. 373 (1946), which the Court says is even "more closely in point," 359 U.S. 520 at 526 (1959), does not seem as relevant, since it did not involve any safety regulation at all.

exercises by the States of their police power stand . . . on an equal footing."[98] The only difficulty arises from the fact that prior decisions seem to make a clear distinction between regulation of trucks and railroads in this respect. Thus, in the *Southern Pacific* case, the Court had felt compelled to distinguish *South Carolina Highway Department v. Barnwell Bros.*,[99] which had upheld a state statute prescribing maximum widths and weights for trucks on the state's roads. Although this law was basically similar to that declared invalid in *Southern Pacific* (and, it may be noted, to that in *Bibb*), the Court in *Southern Pacific* explained the seeming inconsistency by emphasizing the difference between motor and rail transportation: "Unlike the railroads local highways are built, owned and maintained by the state. . . . The state is responsible for their safe and economical administration."[100] In the field of motor vehicle regulation, in other words, an added element is present which tips the scales in favor of state regulatory power—namely, that motor vehicles use highways furnished and maintained by the state. Since the *South Carolina* case, the distinction thus drawn has been used to uphold many state laws regulating motor vehicles, even though their prescriptions applied to interstate as well as purely local traffic.[101]

The Court in *Bibb* all but ignores the *South Carolina* case, saying that the language in it contrary to its decision cannot be read in isolation from such later decisions as *Southern Pacific.*[102] But, as already pointed out, the *Southern Pacific* opinion expressly disclaimed any intent to overrule *South Carolina;* it rested upon the distinction between highways and railroads which justified more extensive control by the states over the former.

It should not, all the same, be assumed from this that the result reached in *Bibb* is necessarily undesirable. There is much less reason for upholding state power here than in the tax cases. Relying on *South Carolina,* the states have set up all-pervasive systems of highway regulation that appear to be contrary to the philosophy behind the commerce clause. It is paradoxical that, in a country dominated by the free-trade concept of the commerce clause, interstate commerce by motor must obtain separate permits, conform to conflicting rules, and pay toll every time it crosses a new state line. It is to be hoped that *Bibb* indicates that the

98 359 U.S. 520 at 529 (1959).
99 303 U.S. 177 (1938).
100 Southern Pacific Co. v. Arizona, 325 U.S. 761 at 783 (1945).
101 See cases cited in SCHWARTZ, THE SUPREME COURT 211-212 (1957).
102 359 U.S. 520 at 528 (1959).

Court will henceforth regard such state obstructions to motor commerce with the same jealous eye that it turns to state clogs upon railroad mobility.

One who examines the commerce decisions of the past term is bound to conclude that they illustrate a tendency—unfortunately not too infrequent in the present Court—to support even correct decisions with inadequate reasoning and analysis. In its *Northwest States Cement* opinion, the Court animadverted on the "need for clearing up the tangled underbrush of past cases" in this field, asserting that "the decisions have been 'not always clear . . . consistent or reconcilable.' "[103] Unfortunately, the decisions discussed on commerce and state power appear only to compound the confusion. Although, as pointed out, the results in each of these cases can be justified, the analysis in the Court's opinions can hardly serve to clarify. The desire to appear consistent with precedent may be understandable in a tribunal constantly censured with having relegated stare decisis to constitutional limbo. Still, it hardly justifies the twisting of clear prior decisions to make them appear to mean something other than what they have always meant to the profession. To treat stare decisis as an exercise in extreme procrusteanism is scarcely the way to meet men's reasonable expectations for certainty in the law. Where new ground is clearly broken by decisions such as those discussed, it hardly helps for the Court to act as though it were only treading on old ground.[104]

## V. CRIMINAL CASES

Among the most important aspects of the high Court's role as the arbiter of federalism is its function in reviewing state criminal convictions. This function has come to be exercised with increasing frequency in recent years. Indeed, so common has judicial intervention from Washington in the criminal sphere become that it has led some to assert that the Supreme Court has assumed the position of a virtual court of criminal appeal from the state courts.

But this misconceives the actual function of the high bench in this area. The Court may be the hierarchical head of the federal judicial system. The same is clearly not true of its relationship to the state courts. The framers never intended to compound the American legal system into one common judicial mass.[105] The

[103] 358 U.S. 450 at 457-458 (1959).

[104] Compare Frankfurter, J., in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 at 473 (1959).

[105] Compare McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 at 403 (1819).

Court stated early in 1959: "Some recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification but fly in the face of history. It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power."[106] In the judicial sphere, the organic instrument was not intended to reduce the state courts to subordinates of one central tribunal, with the latter exercising full appellate authority over all state decisions. On the contrary, the power of the highest Court to undo convictions in the state courts is limited to enforcement of those rights secured by the Constitution.

What this means as a practical matter in specific cases is a more difficult question. The Fourteenth Amendment, without any doubt, imposed upon the Court some responsibility over the caliber of criminal justice dispensed in the states. But how much responsibility was the Court supposed to assume? Or, to put it in the more specific context in which it has arisen, did the due process clause of the Fourteenth Amendment impose upon the criminal law of the states all the restrictions contained in the Bill of Rights or did it require something less?

If any question has been answered consistently by the Supreme Court, it has been this one. "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."[107] It is true that a contrary view has been urged in the present Court by Justices Black and Douglas.[108] But even they have conceded that theirs has not been "the prevailing view of the Fourteenth Amendment."[109]

Though the law on the subject thus appears clearly settled, the Court during the past term found it necessary to reiterate in detail its holdings in the matter. According to its opinion in *Bartkus v. Illinois*,[110] it is established "conclusively that Congress and the members of the Legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-

106 Bartkus v. Illinois, 359 U.S. 121 at 137 (1959).
107 Id. at 124.
108 See cases cited, id. at 151, n. 1.
109 Dissenting, id. at 150.
110 359 U.S. 121 (1959).

hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."[111]

Nor did the Court satisfy itself in *Bartkus* with simple reiteration of established doctrine. Justice Frankfurter's opinion contains a detailed analysis and table of the specific provisions which correspond to the Fifth, Sixth, and Seventh Amendments in the constitutions of the states which ratified the Fourteenth Amendment, as well as of those states entering the Union after such ratification. These, Justice Frankfurter shows, indicate beyond any doubt the soundness of the Court's consistent decisions on the subject. "Surely this compels the conclusion that Congress and the States have always believed that the Due Process Clause brought into play a basis of restrictions upon the States other than the undisclosed incorporation of the original eight amendments."[112]

At first glance, the exhaustive Frankfurter effort—based as it was on intensive scholarly research into the constitutions of almost all the states—appears to have as its purpose only the superfluous hammering of additional nails into the coffin of dead constitutional doctrine. It should nevertheless be noted that the view rejected once again in *Bartkus* has displayed amazing persistence for doctrine that has never commanded the adherence of a majority of the Court. Even after it had been rejected for over half a century, it was still able to receive the concurrence of four justices in 1944.[113] More recently, it has been advocated only by Justices Black and Douglas. Since 1957, however, the Black-Douglas wing of the Court has come close to constituting a majority.[114] Justice Frankfurter may have deemed it necessary to reaffirm the established doctrine in order to anticipate a renewed effort by Justices Black and Douglas to win over a majority. From this point of view, his detailed analysis of state constitutions could strongly buttress the majority holding, thus making it less likely that the minority approach would be adhered to by other than the three justices who dissented in *Bartkus*.[115]

*Bartkus* itself involved a problem that is inherent in the very

111 Id. at 124.

112 Id. at 126.

113 Adamson v. California, 332 U.S. 46 at 68 (1944).

114 During the 1957 term, Justices Douglas and Black again asserted their view on the matter in dissent. Hoag v. New Jersey, 356 U.S. 464 at 477, 480 (1958). Chief Justice Warren also dissented there.

115 It should be noted particularly that Justice Brennan, who has often joined with the Black-Douglas-Warren wing of the Court, concurred in the Bartkus opinion. He had abstained in the Hoag case.

nature of our federalism. In our system, unlike that which prevails in many others, both the nation and the states are provided with the complete accoutrements of government; each is composed of fully developed legislative, executive, and judicial branches. In such a system, an individual may commit an act which constitutes a crime under the laws of both jurisdictions. If such a case arises, can he be tried, convicted, and sentenced in both a federal and state court? Or, if acquitted in one, can he be tried again in the other on the same facts?

Petitioner in *Bartkus* was tried in 1953 in a federal court for robbery of a federally insured savings and loan association located in Illinois. The case was tried to a jury and resulted in an acquittal. In 1954, an Illinois grand jury indicted petitioner. The facts recited in the Illinois indictment were substantially identical to those contained in the prior federal indictment. The Illinois indictment charged that these facts constituted a violation of the Illinois robbery statute. Petitioner was tried and convicted in the Illinois court and was sentenced to life imprisonment. Petitioner's plea of *autrefois acquit* was rejected by the Illinois courts. Before the Supreme Court, he contended that his state conviction after a federal acquittal violated the due process clause of the Fourteenth Amendment.

What is the test to determine whether due process has been violated in such a case? The *Bartkus* opinion restates that which had been developed in the cases rejecting the view that due process in the Fourteenth Amendment includes all of the specific rights guaranteed by the Bill of Rights. Quoting Justice Cardozo in a leading case,[116] Justice Frankfurter states, "About the meaning of due process, in broad perspective unrelated to the first eight amendments, he suggested that it prohibited to the States only those practices 'repugnant to the conscience of mankind.' "[117] In other words, it is not enough, under the Court's test, that there has been only a violation of a specific provision of the Bill of Rights; the state practice at issue must be one which the highest Court finds repulsive. Due process in the Fourteenth Amendment thus bars procedures which shock "the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."[118]

[116] Palko v. Connecticut, 302 U.S. 319 at 323 (1937). Like Bartkus, it also involved a claim of double jeopardy.

[117] 359 U.S. 121 at 127 (1959).

[118] Id. at 128.

The present writer's analysis last year of *Hoag v. New Jersey*[119] would indicate that, to him at least, multiple prosecutions against one individual growing out of the same fact pattern shock one's sense of justice. The *Bartkus* Court would, however, assert that one's personal notions of justice should not be controlling here. "Time," says Justice Frankfurter, "has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy."[120]

To the Court, the fulcrum of decision in *Bartkus* is the caution which the Constitution imposes upon the high bench in reviewing the decisions of coordinate judicial tribunals, wholly independent in their own sphere. It must be remembered that the question of double jeopardy presented in the *Bartkus* type of case is one that has arisen before. "Constitutional challenge to successive state and federal prosecutions based upon the same transaction or conduct is not a new question before the Court. . . . The Fifth Amendment's proscription of double jeopardy has been invoked and rejected in over twenty cases of real or hypothetical successive state and federal prosecution cases before this Court."[121] The 1922 *Lanza* case[122] squarely held valid a federal prosecution arising out of the same facts which had been the basis of a prior state conviction.

In *Abbate v. United States*[123]—a companion case to *Bartkus*—the Court was asked to overrule *Lanza*. Petitioners there were convicted in an Illinois court of conspiracy to blow up certain property. After receiving prison sentences in Illinois, they were indicted and convicted of the same conspiracy in a federal district court and again sentenced to prison. The Court, however, refused to overrule the 1922 decision. "No considerations or persuasive reasons not presented to the Court in the prior cases are advanced why we should depart from its firmly established principle. On the contrary, undesirable consequences would follow if *Lanza* were overruled."[124]

If *Lanza* is still the rule and a subsequent federal prosecution

119 356 U.S. 464 (1958). See Schwartz, "The Supreme Court—October 1957 Term," 57 MICH. L. REV. 315 at 339 (1959).
120 359 U.S. 121 at 137-138 (1959).
121 Id. at 128-129.
122 United States v. Lanza, 260 U.S. 377 (1922).
123 359 U.S. 187 (1959).
124 Id. at 195.

is not barred by the double jeopardy clause of the Fifth Amendment, it would hardly make sense to hold that a subsequent state prosecution is so shocking as to contravene due process. This is the real basis for the *Bartkus* decision.

The limitations involved in the Court's review of state convictions on due process grounds also explain the decision in *Frank v. Maryland.*[125] Appellant there was convicted for violating a provision of the Baltimore City Code which made it an offense to refuse admission to a house to a health inspector who sought entry to investigate sanitary conditions. In the instant case, an inspector requested entry to appellant's house, stating that he had evidence of rodent infestation there. Appellant refused. His arrest and conviction followed, although it was not disputed that at no time did the inspector have a warrant authorizing him to enter.

The Supreme Court, by a bare majority, affirmed appellant's conviction. On the surface, the decision in this respect appears contrary to *District of Columbia v. Little,*[126] where the Court had held that a refusal to admit a health inspector without a warrant did not justify a conviction for violating a regulation prohibiting interfering with an inspector in the performance of his duties. It is true that the Court there expressly disclaimed decision on the question of whether municipalities could constitutionally provide for health inspections without warrants. Yet the *Little* case has generally been assumed to answer that question, at least by implication, in the negative.[127]

*Little,* nevertheless, involved a federal conviction. Under the Court's interpretation of due process, as already emphasized, control over state convictions does not proceed upon the same basis as does control over federal ones. Where a state conviction is at issue, it is not enough for reversal that a similar federal conviction would fall as contrary to a specific guaranty in the Bill of Rights. In such a case, more is required: only if the state conviction was secured by methods which are so extreme as to be shocking must it be reversed.

Under the leading case of *Wolf v. Colorado,*[128] the Fourteenth Amendment does not impose upon the states the federal rule requiring the reversal of federal convictions based upon evidence secured in violation of the Fourth Amendment. *Frank* follows

125 359 U.S. 360 (1959).

126 339 U.S. 1 (1950).

127 If Little's constitutional objection was clearly invalid, how could it be said he was not "interfering" within the meaning of the relevant regulation?

128 338 U.S. 25 (1949).

a similar approach. Though, under *Little,* entry by a federal inspector without a warrant may contravene the Fourth Amendment, that alone does not require reversal of the *Frank* conviction.

The Court in *Frank* was strongly influenced by the fact that the procedure of health inspection without a warrant is one that has existed for over a century and a half. "The power here challenged rests . . . on a long history of its exercise."[129] This has been true not only in Baltimore (the city where *Frank* arose); it has been the uniform practice of agencies of local government to provide for similar inspections in connection with sanitation, plumbing, building, and the like.[130] To be sure, due process issues are not to be decided alone by a Gallup poll of governmental practice. At the same time, the Fourteenth Amendment clearly did not "destroy history for the States."[131] Where what is at issue in a case is a "time-honored procedure"[132] which is generally followed in other states, that is bound to be of great weight in determining whether fundamental notions of justice are being violated. In Justice Frankfurter's words in *Frank,* "what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process. . . ."[133] This is particularly true when the conditions calling forth the state power at issue have, if anything, been constantly growing in intensity. "There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history. On the contrary, the problems which gave rise to these ordinances have multiplied manifold, as have the difficulties of enforcement."[134]

This is not to say, to be sure, that due process must necessarily imprison criminal procedure in an eighteenth-century strait jacket. It is, on the contrary, a plastic concept which, in appropriate cases, does enable "a free society to advance in its standards of what is deemed reasonable and right."[135] The type of case in which due process can expand to meet changing conceptions of the essentials of justice was strikingly illustrated in the Court's 1956 *Griffin*

129 359 U.S. 360 at 371 (1959).
130 See District of Columbia v. Little, 339 U.S. 1 at 3 (1950).
131 Holmes, J., in Jackman v. Rosenbaum, 260 U.S. 22 at 31 (1922).
132 359 U.S. 360 at 370 (1959).
133 Id. at 371.
134 Ibid. See Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959), in which probable jurisdiction was noted in a case presenting substantially the same facts and issues as Frank v. Maryland.
135 Wolf v. Colorado, 338 U.S. 25 at 27 (1949), quoted in 360 U.S. 360 at 371 (1959).

decision,[136] where it was held to violate the Fourteenth Amendment for a state to deny to defendants alleging poverty free transcripts of the trial proceedings, which would enable them adequately to appeal from their convictions. The right to such a free transcript may be a relatively recent one in our law. But a rule whose effect is to deny the poor an adequate appellate review is today an utter misfit in a country dedicated to equality of justice.

*Burns v. Ohio*[137] involved an application of the *Griffin* holding. The question presented there was whether a state may constitutionally require that an indigent defendant in a criminal case pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts. This question seems even easier to decide than that in *Griffin,* for "At least in *Griffin,* the defendant might have raised to the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio."[138] Ohio urged, however, that *Griffin* should not apply because appeal to its Supreme Court was a matter, not of right, but of discretion. In the Court's view, "this argument misses the crucial significance of *Griffin.*"[139] Under the *Griffin* approach to due process, indigents must be given the "same opportunities to invoke the discretion of the Supreme Court of Ohio"[140] which they would have if they had adequate financial resources. This they do not have, since, under the Ohio practice, without paying the filing fee, they cannot at all have the Ohio court consider on the merits their applications for leave to appeal. As the Chief Justice puts it, "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."[141]

Among the common cases which require the Court to apply its concept of criminal due process are those arising out of denials of counsel and the use of allegedly coerced confessions. The principles to govern decision of the due-process question in such cases are those laid down in the *Betts*[142] and *Ashcraft*[143] cases. In the

136 Griffin v. Illinois, 351 U.S. 12 (1956).
137 360 U.S. 252 (1959).
138 Id. at 258.
139 Id. at 257.
140 Id. at 258.
141 Ibid.
142 Betts v. Brady, 316 U.S. 455 (1942).
143 Ashcraft v. Tennessee, 322 U.S. 143 (1944).

present Court, however, it seems apparent that there is a willingness to apply such principles in a manner favorable to defendants.[144] Thus, in *Cash v. Culver*,[145] the denial of counsel was held improper "because of the complexity of the proceedings."[146] The conviction was based on accomplice evidence and, says the Court, a layman would hardly be familiar with his rights under the state's law to impeach such evidence. There were also questions with regard to the admissibility of evidence and impeachment of prosecution witnesses which raised problems "beyond the ken of a layman."[147] One wonders, nevertheless, whether the same type of thing cannot be said in almost any case where an accused is not accorded the assistance of counsel. Without the guiding hand of counsel, even the educated and intelligent layman is under disadvantages comparable to those emphasized by the Court in *Cash*. To look at a criminal trial the way the *Cash* opinion does is to go far toward holding that almost every denial of counsel violates the "fair trial" test laid down in the *Betts* decision.[148]

In the 1944 *Ashcraft* case,[149] the Court had held that, where the accused had been held incommunicado for thirty-six hours, during which time, without sleep or rest, he had been interrogated by relays of police officers, the situation was "so inherently coercive" as to vitiate any confession secured under such circumstances. In *Spano v. New York*,[150] defendant was questioned for eight straight hours, starting in early evening after defendant had surrendered himself to the authorities. Here, too, the Court held that the confession was invalid. "We conclude that petitioner's will was overborn by official pressure, fatigue and sympathy falsely aroused, after considering all the facts."[151] The facts here should be compared with those in the 1953 *Stein* case,[152] where confessions made during an illegal detention of thirty-two hours, during twelve hours of which defendants were closely questioned, were held not barred by due process.

To those who looked upon *Stein* as an unwarranted watering

144 But see Anonymous No. 6 v. Baker, 360 U.S. 287 (1959), where the holding of In re Groban, 352 U.S. 330 (1957), was applied.
145 358 U.S. 633 (1959).
146 Id. at 637.
147 Id. at 638.
148 Note 142 supra.
149 Note 143 supra.
150 360 U.S. 315 (1959).
151 Id. at 323.
152 Stein v. New York, 346 U.S. 156 (1953).

down of *Ashcraft*,[153] *Spano* will represent a welcome swing of the judicial pendulum. Indeed, *Spano* may indicate that the Court now is ready to go even farther than its bare holding would indicate. According to the opinion by the Chief Justice there, "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law."[154] But, whenever a confession is made during a period of illegal detention, it is based upon police disobedience of the law. Does this mean then that a state confession made during illegal detention is barred by due process? If it does, the basic distinction between federal and state convictions in this respect may be on the way to being erased by the present Court.[155]

## VI. JENCKS AND THE JENCKS STATUTE[156]

One of the most significant cases in recent years, from the point of view of the rights of criminal defendants, was *Jencks v. United States*.[157] In it, the high tribunal added a new dimension of evidentiary fair play to federal criminal procedure.[158] In *Jencks*, the Court laid down a broad rule on the right of a defendant to disclosure of documents in the government's possession. According to the Court last term, in pithily expressing the effect of the *Jencks* holding, it decided "that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses. These statements were therefore to be turned over to the defense at the time of cross-examination if their contents related to the subject matter of the witness' direct testimony, and if a demand had been made for specific statements which had been written by the witness or, if orally made, as recorded by agents of the Government. We also held that the trial judge was not to examine the statements to determine if they contained material inconsistent with the testimony of the witness before deciding whether he would turn them over to the defense. Once the statements had been shown to con-

153 See SCHWARTZ, THE SUPREME COURT 182 (1957).

154 360 U.S. 315 at 320 1959).

155 See SCHWARTZ, THE SUPREME COURT 180-181 (1957).

156 In assessing the present writer's remarks in this section, it should be borne in mind that he has been of counsel in a pending case involving the Jencks problem in an administrative agency.

157 353 U.S. 657 (1957).

158 See comment, 68 YALE L.J. 1409 (1959).

tain related material only the defense was adequately equipped to decide whether they had value for impeachment."[159]

*Jencks,* as is well known, was one of the most controversial of recent Supreme Court decisions. "The decision," the Court itself has conceded, "promptly gave rise to sharp controversy and concern."[160] *Jencks* was decided on June 3, 1957. The very next day a bill was introduced in the Congress to deal with what was said to be the "serious problem" posed by it. On September 2, 1957, the criminal code was amended by adding a new section to govern statements and reports of witnesses in criminal proceedings.[161]

What is the effect of this so-called *Jencks* statute on the rule enunciated by the Supreme Court? In the first place, there is the question of the constitutional power of the Congress to enact the statute. That question was answered in the affirmative in *Palermo v. United States.*[162] It holds that, since its enactment, it is the *Jencks* statute, not the Supreme Court decision, that governs the production of statements of government witnesses for a defendant's inspection at a criminal trial. *Jencks,* says the opinion in *Palermo,* was an exercise of the Court's "power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts."[163] But the judicial rule here must give way after "Congress had determined to exercise its power to define the rules that should govern in this particular area in the trial of criminal cases instead of leaving the matter to the lawmaking of the courts."[164] In view of the congressional power, exercised "from the earliest days," to prescribe rules of procedure in the federal courts, the *Jencks* statute, *Palermo* holds, "does not reach any constitutional barrier."[165]

The *Palermo* holding on the constitutional question appears sound. What is more debatable is the implication in the opinion of peremptory power in the Congress over the rule enunciated in *Jencks.* It is important to note that the *Jencks* statute enactment itself was by no means an assertion of such extreme legislative authority. On the contrary, as Justice Brennan (himself the author of the *Jencks* opinion) points out, "Congress had no thought to invade the traditional discretion of trial judges in evidentiary matters beyond checking extravagant interpretations of our decision in

159 Palermo v. United States, 360 U.S. 343 at 345-346 (1959).
160 Id. at 346.
161 18 U.S.C. (1958) §3500.
162 360 U.S. 343 (1959).
163 Id. at 345.
164 Id. at 347-348.
165 Id. at 353, n. 11.

*Jencks* . . ., which were said to have been made by some lower courts. Indeed Congress took particular pains to make it clear that the legislation 'reaffirms' that decision's holding."[166] What the *Jencks* statute does is to specify what documents a defendant is entitled to, as well as the procedural mechanics involved in securing their production. It, in other words, preserves the underlying rights, if not the identical procedures, dictated by *Jencks*.[167]

If the Congress had sought to abrogate the *Jencks* rule, an entirely different question would have been presented. In such a case, what Justice Brennan terms "an obvious constitutional problem"[168] would exist. It should be emphasized that, in *Jencks* itself, the Court spoke in the broadest terms. The opinion there redounds in the broad language of "justice." By its holding, the Court was articulating a fundamental requirement of fair procedure. While it is thus, to quote Justice Brennan again, "true that our holding in Jencks was not put on constitutional grounds, for it did not have to be; . . . it would be idle to say that the commands of the Constitution were not close to the surface of the decision."[169] The constitutional overtones in *Jencks* indicate that there would be grave doubt about the power of Congress itself to do violence to what the Court held to be a fundamental principle of "justice." "Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment."[170]

During last term, the Court dealt with several questions not specifically answered by *Jencks* and the *Jencks* statute. In *Pittsburgh Plate Glass Co. v. United States*,[171] the Court rejected a claim that *Jencks* required the government to permit defendants to inspect the grand jury minutes covering the testimony before that body of a key government witness at the trial. *Jencks*, said a bare majority of the Court, "is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes."[172] In the Court's view, the policy behind the historic secrecy of grand jury proceedings outweighs the interest of defendant in disclosure. Hence, the lifting of secrecy here is not essential to the fair administration of criminal justice within the sense of the *Jencks* holding.

166 Concurring, id. at 361.
167 See comment, 67 YALE L.J. 674 at 686 (1958).
168 Concurring, in Palermo v. United States, 360 U.S. 343 at 362 (1959).
169 Id. at 362-363.
170 Id. at 362.
171 360 U.S. 395 (1959).
172 Id. at 398.

In the already-referred-to *Palermo* case,[173] the Court dealt with the question of the types of document to which a defendant is entitled under the *Jencks* statute. According to *Palermo,* the statute now constitutes the exclusive vehicle whereby production of statements of government witnesses may be made to the defense in criminal cases. Consequently, only the documents included in its language need be produced. What are these documents?

In *Palermo* itself, the document whose disclosure was sought was a particular memorandum summarizing what a witness had said during a conference with government agents, executed by one of the agents present. The Court, five-to-four, held that, under the statute, such document did not have to be produced. The *Jencks* statute expressly includes written statements made by government witnesses. The document at issue was patently not such a statement. But the statute does not limit the right to production to statements signed by witnesses themselves. Under it the statements to which a defendant is entitled include, in addition: "A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."[174] According to *Palermo,* by this language, "the statute was meant to encompass more than mere automatic reproductions of oral statements."[175] The difficult question, of course, is to determine how much more was meant to be included.

In the Court's view, "the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital."[176] Hence, it is not necessary to produce "summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent."[177] The memorandum of interview at issue in *Palermo,* according to the Court, was just such a skeleton version of what had actually transpired.

It may well be that, on its facts, *Palermo* is correct in its holding on this point. At the same time, it would be most unfortunate if *Palermo* were to be used as the starting point for an unduly restric-

[173] Note 162 supra.
[174] 18 U.S.C. (1958) §3500 (e) (2).
[175] 360 U.S. 343 at 352 (1959).
[176] Ibid.
[177] Id. at 352-353.

tive interpretation of the rights of defendants. In the eloquent words of Justice Brennan's opinion, "it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it exalting and exaggerating its restrictions, in disregard of the congressional aim of reaffirming the basic *Jencks* principle of assuring the defendant a fair opportunity to make his defense."[178]

If the future cases lose sight of this, they will open the door to constant efforts by law enforcement officers to defeat the spirit of *Jencks*. "There inheres in an overrigid interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production."[179] Under some of the language in *Palermo,* such insulation is all too easy from the government's point of view.

An obvious question that arises to one familiar with the high Court's role in the criminal field is that of the effect of *Jencks* and the *Jencks* statute on state convictions. *Jencks* itself, we have seen, has clear constitutional implications. Violation of its rule, in Justice Brennan's phrase in *Palermo,* raises "a serious question of potential invasion of Sixth Amendment rights."[180] Yet, as emphasized in the prior section of this article, a state conviction will not be reversed only because such federal right would be violated, if the conviction were a federal one. The test, where the criminal case is a state one, is whether due process is violated and such violation occurs only if the right violated is so fundamental that it is "implicit in the concept of ordered liberty."[181] Is the right of defendant under *Jencks* such a right? The broad basis upon which the holding in *Jencks* was based would seem to point to an affirmative answer. The *Jencks* opinion itself, after enunciating its rule, asserts, "Justice requires no less."[182] If that is true, *Jencks* is more than a rule governing only federal trials. By articulating *Jencks* in terms of a fundamental of justice,[183] the Court foreshadowed its inclusion in the due process upon which its control of state criminal proceedings is based.

178 Id. at 365.
179 Id. at 365-366.
180 Id. at 363.
181 Palko v. Connecticut, 302 U.S. 319 at 325 (1937).
182 353 U.S. 657 at 669 (1957).
183 Compare comment, 68 YALE L.J. 1409 at 1415 (1959).

## VII. FIRST AMENDMENT CASES

In protesting against the decision of the Court in one case last term, Justice Black asserted, "the Court once again retreats from what I conceive to be its highest duty, that of maintaining unimpaired the rights and liberties guaranteed by the Fourteenth Amendment and the Bill of Rights."[184] To Justice Black, there is little doubt that the primary function of the high bench is to vindicate the personal rights of the individual as against the State. Such rights, in his view, were intended to have a preferred position in our constitutional scheme.

The "preferred position" theory in this respect has been urged with especial force with regard to those rights guaranteed by the First Amendment. That amendment, declared Justice Black, dissenting in the already-discussed *Barenblatt* case,[185] "says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition."[186] Proceeding from this absolute language, Justice Black goes on to take an absolutist position with regard to First Amendment rights. He concedes that, in other cases, congressional action is to be upheld if it is based upon a reasonable balancing of the interests involved. But, he affirms in his *Barenblatt* dissent, "I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process."[187]

In *Barenblatt* itself, as our previous discussion of it indicated, what was at issue was a congressional investigation into un-American activities. The particular hearing was one on Communist infiltration into the field of education. Petitioner, a college teacher, was asked about Communist activities and affiliations while he had been a graduate student. He urged that such inquiries transgressed the First Amendment. The Court, in rejecting his contention, was clearly acting contrary to the preferred-position theory. In its view, "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[188] In a case like this, "the close nexus between the Communist Party and violent overthrow

184 Dissenting in Anonymous No. 6 v. Baker, 360 U.S. 287 at 299-300 (1959).
185 Note 18 supra.
186 360 U.S. 109 at 140 (1959).
187 Id. at 141.
188 Id. at 126.

of government"[189] is found to justify this congressional inquiry into an area covered by the First Amendment.

Nor is the legislative authority in such a case defeated because its investigation was one into the field of education. There was language in the Court's 1957 *Sweezy* opinion[190] which appeared to immunize education from all legislative inquiry. In *Barenblatt,* the Court repudiates such broad implication: "We think that investigatory power in this domain is not to be denied Congress solely because the field of education is involved. Nothing in the prevailing opinions in *Sweezy* . . . stands for a contrary view."[191]

The *Barenblatt* clarification in this respect seems most salutary. The claims of academic freedom hardly justify the wholesale prohibition of inquiries into Communist activity in the field of education. *Barenblatt* holds specifically that the Constitution is no bar against action by the Congress "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow."[192]

It has been asserted that the preferred-position theory is really an "old theory."[193] At the same time, it is clear that its importance today dates from about two decades ago, starting with the famous footnote of Justice Stone in the *Carolene Products* case.[194] From about 1943 to 1948, the preferred-position philosophy was actually accepted by a majority of the Court.[195] From 1949 on, however, the Court receded from that position. Under the Vinson Court, in fact, only Justices Black and Douglas remained to adhere to the doctrine of firstness of the First Amendment.

*Barenblatt* is significant because it clearly demonstrates that, in the present Court also, a definite majority rejects the preferred-position theory. It is true that the Chief Justice joined Justice Douglas in the advocacy of that theory contained in Justice Black's dissent. Of even more significance, however, is the refusal of more than three members of the Court to adhere to the theory. Justice Brennan, often found with the Black-Douglas-Warren wing, was careful to dissent on separate grounds and thus to dissociate himself from concurrence in the Black advocacy of the preferred-position approach.

189 Id. at 128.
190 Sweezy v. New Hampshire, 354 U.S. 234 (1957). See especially p. 251.
191 360 U.S. 109 at 129 (1959).
192 Ibid.
193 See Cahn, in 1958 ANNUAL SURVEY OF AMERICAN LAW 699 (1959).
194 United States v. Carolene Products Co., 304 U.S. 144 at 152, n. 4 (1938).
195 See SCHWARTZ, THE SUPREME COURT 235 (1957).

An important question arising under the First Amendment is that of the types of speech safeguarded by the constitutional guaranty. In 1957 the Court expressly recognized that obscene speech stands outside the pale of First Amendment protection.[196] Is the same true of speech whose primary purpose is private profit?

In a 1942 case,[197] the Court held that the protection of the First Amendment did not extend to business advertisements. According to Justice Douglas last term, this ruling "has not survived reflection."[198] The First Amendment, he said, is not at all restricted to cultural ends. A protest against government action that affects business interests also comes within the amendment. In the Douglas view, "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."[199] And, if that is true, it is "difficult to draw a line between that group and those who in other lines of endeavor advertise their wares by different means."[200]

Perhaps the best cases to illustrate the soundness of the view that the existence of a First Amendment right does not depend upon the absence of a profit motive are those involving censorship of motion pictures. In 1915, the Court refused to hold movies within the constitutional guaranty, on the ground that they were "a business, pure and simple, originated and conducted for profit."[201] In the 1952 *Burstyn* case,[202] on the other hand, the Court declared that this was irrelevant to the First Amendment issue, and held that motion pictures *were* within the ambit of protection accorded by the amendment.

During the past term, the Court was once again required to consider the impact of a motion picture censorship law upon First Amendment rights. In *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*,[203] the statute at issue required a license for the distribution or exhibition of any motion picture. No license was to issue if a film was found by

196 Roth v. United States, 354 U.S. 476 (1957), Justices Douglas and Black, it should be noted, dissented even here, for their absolutist position does not permit such a holding.

197 Valentine v. Chrestensen, 316 U.S. 52 (1942).

198 Concurring in Cammarano v. United States, 358 U.S. 498 at 514 (1959).

199 Ibid.

200 Ibid.

201 Mutual Film Corp. v. Industrial Commission, 236 U.S. 230 at 244 (1915).

202 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

203 360 U.S. 684 (1959). See note, 58 MICH. L. REV. 134 (1959).

the licensing agency to be "immoral" or "of such a character that its exhibition would tend to corrupt morals." These terms were further defined as denoting a motion picture "the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

At issue in *Kingsley* was the denial of a license for the film "Lady Chatterley's Lover." Such denial was based on the broad ground that "the whole theme of this motion picture is immoral under said law, for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior."[204] The question for the Court was whether the state could deny a license to a motion picture because, in the words of the New York court, "its subject matter is adultery presented as being right and desirable for certain people under certain circumstances."[205] To put it in another way, could New York deny a license to any film which approvingly portrays an adulterous relationship, quite without reference to the manner of its portrayal?

The opinion of the Court, by Justice Stewart, answered this question in the negative: "What New York has done . . . is to prevent the exhibition of a motion picture because that picture advocates an idea — that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty."[206]

In view of the interpretation of the New York statute by the highest court of that state, it is hard to see how the high tribunal could have decided otherwise.[207] The New York court construed the law as giving to the term "sexual immorality" a concept entirely different from the concept embraced in words like "obscenity" or "pornography." The film at issue, in fact, was expressly found below not to be obscene or one which would operate itself as an incitement to illegal action. Yet that made no difference under the New York court's interpretation. The inflexible command which it attributed to the state legislature was to outlaw any approving

204 360 U.S. 684 at 685 (1959).

205 Id. at 687-688.

206 Id. at 688. Four justices concurred in the opinion of the Court.

207 But see the concurring opinion of Justice Harlan, id. at 702, joined by Justices Frankfurter and Whittaker, interpreting the statute as requiring obscene content or incitement to unlawful conduct. With this interpretation the statute was said to be constitutional on its face, but unconstitutionally applied to the film in question. The ramifications of this concurring opinion are discussed in note, 58 MICH. L. REV. 134 (1959).

portrayal of an adulterous relationship. This is, in effect, to bar mere advocacy of conduct contrary to most people's moral standards. But the Constitution clearly protects advocacy alone — i.e., where it falls short of incitement. "Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."[208]

The interpretation below enabled the Court to avoid the far more difficult question which has been inherent in all of the movie censorship cases presented to it — namely, that of whether any prior censorship of motion pictures is consistent with the Constitution. Justices Douglas and Black have adhered to the view that all such censorship is invalid. In their view, as again expressed in their concurring opinion in *Kingsley,* "censorship of movies is unconstitutional, since it is a form of 'previous restraint' that is as much at war with the First Amendment, made applicable to the States through the Fourteenth, as the censorship struck down in *Near* v. *State of Minnesota.* . . . I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."[209]

Although there is much to be said for this point of view in a system which has, since Blackstone, abhorred any prior restraint of organs of public opinion, it is probable that the majority of the Court would not go so far. To most of the justices, motion pictures would appear to be comparable to speech in a street or public place which is subject to regulation under properly drawn statutes. A Court which held only three years ago that "obscenity is not within the area of constitutionally protected speech or press"[210] would hardly be likely to prohibit to the states all authority to deal with obscenity in films.

## VIII. THE COURT AS AN INSTITUTION

Analysis of the highest tribunal's decisions during a given term may enable one to acquire a picture of the different aspects of our public law as they are unfolded. Even more important, however, is the fact that such analysis permits a broader view of the working

[208] 360 U.S. 684 at 689 (1959).

[209] Id. at 697. Near v. Minnesota, 283 U.S. 697 (1931), is the leading case on censorship of newspapers.

[210] Roth v. United States, 354 U.S. 476 at 485 (1957).

of the Supreme Court as a governmental institution. From an institutional point of view, what do last term's decisions tell us about the functioning of the high bench?

Perhaps the most significant thing to note about the Supreme Court during the past year is an accentuation in the polarization that has become its most striking characteristic. In the present writer's article on the decisions of the 1957 term, the sharp division in the Court as between the rival judicial philosophies of Justices Frankfurter and Black was noted.[211] During the 1958 term, the same split continued to dominate the work of the justices. In all of the cases of note where there was a sharp split in the Court,[212] the exponents of the Frankfurter approach were to be found on the one side, those of the Black view on the other. Even where the two schools were able to agree on the result in particular cases, they all too frequently articulated their differences in approach in separate concurrences.[213]

To be sure, internal fragmentation is nothing new in the history of our highest tribunal. A splintered Supreme Court is, indeed, but the juristic reflection of a pluralistic society, which has as its basis acceptance of the fact that there is no single, simple answer to the multifold problems which call for resolution by governmental action. If the Court is sharply divided, it is because the questions presented to it call for anything but clear, ineluctable responses.

From the point of view of its over-all functioning, the significant thing to note about our high tribunal is the fact that, even when it has presented a far from edifying spectacle of internal atomization, it *has* continued to function as an institutional entity. Even at such a time, the Court has continued to weave the basic pattern of its jurisprudence. This has been true because, at any given time, a particular approach to the judicial function receives the adherence of five or more of the justices.

211 See Schwartz, "The Supreme Court—October 1957 Term," 57 MICH. L. REV. 315 at 347 (1959).

212 Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); Frank v. Maryland, 359 U.S. 360 (1959); Palermo v. United States, 360 U.S. 343 (1959). Compare Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), and Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), where the split was not as clearly on the same doctrinal grounds.

213 See, e.g., Greene v. McElroy, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); Kingsley International Pictures v. Regents of the University of New York, 360 U.S. 684 (1959). It is not surprising, in view of this, that the number of dissents and concurrences during the term remained as high as ever.

During the past term, a clear majority of the Court[214] has indicated its acceptance of the Frankfurter, as opposed to the Black, approach to the resolution of constitutional issues. In all of the key decisions already discussed, a majority of the justices adhered to the more restrained view of the judicial function which Justice Frankfurter has advocated in his two decades on the bench. On the other hand, the other four members of the Court[215] do generally follow more or less what has come to be termed the "activist" position. Yet, even here, the past term has seen what may foreshadow a weakening in that position. Thus, only Justices Black, Douglas, and the Chief Justice adhered rigidly to the extreme activist approach. In two significant cases, *Barenblatt*[216] and *Bartkus*,[217] Justice Brennan was careful not to join the Black-Douglas position. On the key questions of whether First Amendment rights are to be treated as having a preferred position and whether the Bill of Rights guarantees are automatically included in the Fourteenth Amendment, Justice Brennan thus indicated a tendency to swing over to the Frankfurter position.

Aside from the school segregation issue (where the Court was bound to provoke the bitter reaction of an area whose very way of life was uprooted by application of the relevant constitutional provision), the current controversy over the high tribunal stems largely from its decisions rendered at the end of the 1956 term. *Watkins*,[218] *Sweezy*,[219] *Covert*,[220] *Jencks*,[221] *Mallory*,[222] — these 1957 decisions were seen by many to mark the end of a juristic era, comparable to the change inaugurated twenty years earlier with the landmark *Jones and Laughlin* decision.[223] Between 1937 and 1957, the dominant theme in the Supreme Court had been its deference toward the political branches. The 1957 decisions were taken by some commentators to signal the end of the subdued role that had come to characterize the Court in the post-1937 period.

Last term's decisions indicate that such an interpretation may have been over-hasty. The principal decisions rendered during 1959 have the Frankfurter self-restraint approach as their dominant

214 Justices Frankfurter, Clark, Harlan, Whittaker, and Stewart.
215 Chief Justice Warren and Justices Black, Douglas, and Brennan.
216 Note 18 supra.
217 Note 110 supra.
218 Watkins v. United States, 354 U.S. 178 (1957).
219 Sweezy v. New Hampshire, 354 U.S. 234 (1957).
220 Reid v. Covert, 354 U.S. 1 (1957).
221 Jencks v. United States, 353 U.S. 657 (1957).
222 Mallory v. United States, 354 U.S. 449 (1957).
223 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

theme. More than that, they go far to correct some of the excesses in several of the 1957 opinions which had disturbed many observers. Thus, *Barenblatt,*[224] as already discussed, supplies a needed corrective to the wholesale implications of *Watkins;*[225] *Uphaus*[226] does the same for *Sweezy,*[227] as well as for the 1956 *Nelson* decision;[228] and *Palermo*[229] approves a legislative rectification of the excesses implicit in *Jencks.*[230] All in all, the 1958 term must appear most satisfactory for those who have felt that the extreme activist position does violence to the demands which society imposes upon the judicial process.

There are, to be sure, those who deplore any decline in the activist approach. To them, a judicial attitude of deference toward the legislator leaves us unprotected against violations of constitutional right. This is, however, to ignore the basic limitations which must obtain upon judicial power in a system such as ours. Judicial review, no matter how we may gloss over it, is basically an undemocratic institution. If the democratic bases of our system are to be respected, the review power of the one non-democratic organ of our government must be exercised with rigorous self-restraint. Laws duly enacted by the people's representatives should not be aborted by judicial fiat unless the judges are presented with no other choice in the matter. The decisions of the 1958 term show clearly that a majority of the justices today agree that proper deference toward the representatives of the people still remains the judicial handmaiden of democracy.

224 360 U.S. 109 (1959).
225 354 U.S. 178 (1957).
226 360 U.S. 72 (1959).
227 354 U.S. 234 (1957).
228 Pennsylvania v. Nelson, 350 U.S. 497 (1956).
229 360 U.S. 343 (1959).
230 353 U.S. 657 (1957).