JUDICIAL HIGHLIGHTS OF CIVIL RIGHTS

"CIVIL RIGHTS" as the term is used in America today is of wide and ill-defined meaning. American courts define the term to include "all rights which the law gives a person which depend upon the community in which he lives"[1] and seldom place emphasis upon Locke's idea that they are categorical absolutes derived from the immutable law of nature.[2] While the expression is apparently indigenous to America, such concepts, of course, antedate American history and owe their origin to the Stoic philosophy and their growth to Christianity.[3] More recent antecedents include Magna Carta and the English Petition and Bill of Right.

Any survey of the judicial history of civil rights must for brevity be limited to focal points of interest. This paper treats constitutional background and provisions; then considers cases on religious matters, suffrage, rights of persons accused of crime, segregation in carriers, education, and residential ownership, aliens, and certain limits on free speech.

Constitutional Provisions and Nationalization of Civil Rights

The United States Constitution is more noted for its lack of provisions for civil rights than for its safeguards. Aside from guaranteeing the writ of habeas corpus,[4] outlawing bills of attainder[5] and *ex post facto* laws,[6] and setting minimum standards for punishment of treason,[7] no other civil rights are mentioned in the body of the Constitution. The Philadelphia Fathers did not forget about a bill of rights; they thought about and rejected it.[8] If the new government was to have only the powers specifically granted, and none of such powers

gave it authority over the areas which a federal Bill of Rights would protect, why declare the thing shall not be done which there is no delegated power to do? The founders, however, misjudged the temper of the country, and it was not until a bill of rights in the form of amendments had been promised that the constitution received ratification.[9] The Bill of Rights was set up to protect the civil liberties of the people against invasion by the new federal government. It was intended to restrict Congress, the president, and the federal courts, and did not apply to the states. The framers regarded state interference with civil liberty as outside the scope of their concern. Not until 1833, however, did the Supreme Court, speaking through John Marshall, in the case of *Barron vs Baltimore*,[10] confirm this view. There the City of Baltimore, in paving streets, diverted a natural water course leaving Barron's wharf inaccessible. Barron contended that he was protected under the Fifth Amendment, which forbids the taking of private property for public use without just compensation. But Marshall said that the language of the first eight amendments shows a complete demonstration that they apply solely to the United States government and not the states, and dismissed the appeal for want of jurisdiction. Quite clearly, then, until the Civil War, states could with impunity deprive citizens of many civil rights today regarded as basic.

The nationalization of our civil rights is primarily a history of the Civil War amendments, particularly the Fourteenth, which provides that "No *State* shall deprive any person of life, *liberty* or property without due process of law." In the renowned *Slaughterhouse Cases* (1873)[11] it was not the freedman or the white Unionist who first invoked the Fourteenth Amendment, but a group of ex-Confederates who

were aroused over a particularly odious Carpet Bag administration. The Republican legislature of Louisiana, ostensibly as a health measure, passed an act incorporating and monopolizing for 25 years a slaughterhouse in New Orleans. These former competitors claimed their *privileges and immunities* as citizens of the United States against the monopoly. Such privileges and immunities, they contended, guaranteed a system of economic laissez-faire. The Court paid little regard to the due process and equal protection clauses of the Fourteenth Amendment; then drew an unexpected construction of the privileges and immunities clause, which virtually cut the heart from the Reconstruction amendments. The Amendment, observed the Court, provides that no *State* shall make any law abridging privileges of *citizens of the United States.* The Court then distinguished state and national citizenship, pointing out that each carried with it certain incidents. Without defining the privileges incident to national citizenship, it was remarked that free access to seaports and protection of life on the high seas would be among them. But the Court held that a state could make or enforce a law that would abridge the privileges and immunities of citizens of the state.

Ten years later in the *Civil Rights Cases* (1883),[12] the court was called upon to consider the constitutionality of the Civil Rights Act of 1875, which had forbidden proprietors of public conveyances, hotels, restaurants, and places of amusement to refuse accommodations to any person because of race, color, or previous condition of servitude. The Court held the act void, saying that the Fourteenth Amendment forbids only undue racial discrimination when practiced by the state itself, and not by individuals.

Thus the enervated amendments remained until a remark-

able about-face a half-century later. In *Gitlow vs. New York* (1925),[13] the constitutionality of a New York statute making it a criminal offense to advocate overthrow of the government was challenged. Gitlow contended that the State of New York was depriving him of liberty without due process of law, contrary to the Fourteenth Amendment. While the Court proceeded to hold the statute as applicable to Gitlow valid, and affirmed his conviction, it did make the following unprecedented remark:

> "For present purposes we may and do assume that freedom of speech and of press which are protected by the First Amendment from abridgement by Congress are among the fundamental personal rights and liberties protected by the Due Process clause of the Fourteenth Amendment from impairment by the state."

A few years later the Court actually held that freedom of speech was within the compass of the Fourteenth Amendment.[14] In 1937 in *DeJonge vs. Oregon*,[15] it was further held that right to peaceable assembly was "liberty" within the meaning of the Fourteenth Amendment; then in 1940 in *Cantwell vs. Connecticut*,[16] it was held that freedom of religion fell within its orbit; and in 1941 in *Bridges vs. California*,[17] it was held that the right to petition for redress of grievances was also included.

Even so, the liberties protected against state encroachment by the Fourteenth Amendment do not parallel those protected from federal encroachment by the Bill of Rights. For in 1937 in *Palko vs. Connecticut*,[18] the provision that a state could appeal from an unfavorable decision and thus put a defendant twice in jeopardy was held not contrary to the United States Constitution. Surely if the criminal can appeal when he loses, the Court observed, the edifice of justice may stand in even greater symmetry by allowing the state to do so

where a mistake of law has been made in the lower court. There was weighty precedent for such a view, for in the leading case of *Twining vs. New Jersey* (1908),[19] the Court had held that a state might modify or completely abolish trial by jury. Even before, in *Hurtado vs. California* (1884),[20] the Supreme Court had held that California's conviction on methods other than grand jury indictment was sustainable.

Further inroads on state action have been made, however. In 1947 in *Adamson vs. California*,[21] the prosecuting counsel was allowed to comment on the failure of the defendant to deny or explain evidence in a criminal case. The majority stuck to the traditional view that the privilege against self-incrimination might even be withdrawn by the state and the accused put on the stand as the prosecution's witness. But Mr. Justice Black, with the concurrence of three other members of the Court, voiced his strong dissent: "My study of the historical events that culminated in the Fourteenth Amendment," commented Justice Black, "and the expressions of those who sponsored and favored it, as well as those who opposed its submission and passage, persuades me that one of the chief objects . . . [it was] intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced." Later that year, he was called upon to reiterate his dissent when, in *Foster vs. Illinois* (1947),[22] the Court held the Fourteenth Amendment had not been breached when a state denied counsel to defendants who entered pleas of guilty.

The Court stood firm, however, in its most recent expression in *Wolf vs. People of Colorado* (1949).[23] There a state conviction for a state offense was had by use of evidence ob-

tained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States (because there deemed an infraction of the Fourth Amendment forbidding unlawful searches and seizures). Mr. Justice Frankfurter concluded the issue for the majority as follows: "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected again and again after impressive consideration. . . . The issue is closed." Yet three judges dissented and another (Black), while concurring in the result, restate his stand in the *Adamson* case.

With this delicate balance, the minority view today could easily be tomorrow's rule. The untimely loss of Justices Rutledge and Murphy (who dissented in the *Wolf* case) would seem to insure that the majority stand is not yet weakened, however.

Religious Cases

Turning to religious cases and the First Amendment as it relates to freedom of religion, the Jehovah's Witnesses have done more than all other groups combined to formulate the law on its interpretation. Within eight years, they reached the Supreme Court on twenty major cases, and won fourteen. The Witnesses are an aggressive sect, preaching the second coming of Christ, insisting that each person is a minister of the gospel, and attacking organized religion in churches, especially the Roman Catholic Church.

In *Lovell vs. Griffin* (1938),[24] a unanimous Court held an ordinance of the Town of Griffin, Georgia, prohibiting distribution of pamphlets without censorship of the city manager,

to be invalid on its face. A Connecticut statute requiring prior approval of the Secretary of Public Welfare before solicitation for religious purposes met a similar fate in *Cantwell vs. Connecticut* (1940),[25] Later, a city ordinance was passed making it illegal to ring a doorbell to summon an occupant to the door to give him a hand bill. On challenge by the Witnesses, the Court held that freedom of speech and press had been violated.[26]

In 1942, opponents of the Witnesses must have felt some relief in having upheld a license tax imposed on peddlers.[27] The relief was short-lived, for the Court reversed itself the next year saying that the Witnesses were engaged in a religious activity, and not a commercial enterprise, and therefore the license tax as applied to them was invalid.[28] In *Marsh vs. Alabama* (1946)[29] the Court upheld the right of Witnesses to distribute literature in a company-owned town, and the same year in *Tucker vs. Texas,*[30] the Court upheld the right of religious solicitation in a United States-owned housing project. It has, however, been held valid for fees to be imposed upon them for the extra police service necessitated by their presence.

During the war years came the renowned flag saluting cases, perhaps more famous for the Court's direct reversal of itself than for the principles involved. The Witnesses refused to salute the flag on the basis of a passage from Exodus 20 which says, "Thou shall not make unto thee any graven image." In *Minersville School Dist. vs. Gobitis* (1940),[31] the Court held that legislation aimed at securing national unity was of paramount importance, and allowed enforcement of the policy. Three years later came *West Virginia Board of Education vs. Barnette* (1943)[32] after the composition of the Court had changed by one member. The five-to-four deci-

sion of the *Gobitis* case was reversed and the Court remarked that "a person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

The pillars of Jefferson's "wall of separation" between church and state have been shaken in two recent cases. In *Everson Board of Education of Ewing Township* (1947),[33] a New Jersey statute which authorized local school districts to make contracts for transportation of their children to and from schools was challenged. Part of the money was for the payment of transportation of some children in the community to Catholic parochial schools. The taxpayers filed a suit in the state court challenging the right of the Board to reimburse parents of parochial school students. The Due Process argument was used: that some were being taxed for the private benefits of others; but stronger emphasis was laid on the First Amendment, in that such practice constituted support of a religion by the state. Surely the decision will always be outstanding as a commentary on church-state division, if not for its holding. By a five-to-four decision in which four opinions were written, the tax was upheld. Justice Jackson, attacking the majority for their ultimate holding, after prefatory remarks on the wisdom of church-state division said that "the case which irresistibly comes to mind as the most fitting precedent [for their opinion] is that of Julia who, according to Byron's report, 'whispering I will ne'er consent, consented.'"

In *McCollum vs. Board of Education* (1948),[34] teaching religion in public schools was challenged. Active members in the community of the Jewish, Roman Catholic, and some Protestant faiths formed a council of religious education and obtained permission of the Board of Education to offer

classes for each. Students were excused from their secular study on condition they attend religious classes. The Court held the plan contrary to the first Amendment, saying that neither a state nor the federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

Justice Frankfurter observed that the students could be let out early to participate in religious activity, but state facilities must not be used. The loan of textbooks to parochial schools has been approved under some conditions,[35] however, and the National School Lunch Act[36] does not exclude religious schools. Despite compulsory educational laws, it has also been held that children may attend parochial schools which meet proper educational standards.[37]

Suffrage

There is little judicial expression on suffrage in the early history of our country, since all of the states imposed property qualifications, and since suffrage was regarded as a privilege and not a right. John Adams expressed the popular thought of the time in stating that allowing non-property-holders to vote "tends to confound and destroy all distinctions and prostrate all ranks to one common level." Chancellor Kent also observed that "no voting qualification would be unfavorable to the security of the property." Universal suffrage, even in England, was not to come until the next century. It is not uncommon even during this decade for a court to classify suffrage as a "political privilege" and not one of the civil or natural rights.[38] It is not surprising then, that the Constitution provides that the time, place, and manner of electing even federal officers shall be regulated by the states.[39]

The Fifteenth Amendment, which provides that no person

shall be denied the right to vote because of race, color, or previous condition of servitude, is said to confer the right to vote on no one;[40] it merely creates a right to freedom from discrimination. As a result, the states in the exercise of their power to prescribe voting qualifications have been able to discriminate against the characteristics which the Negro possesses. In *Williams vs. Mississippi* (1898)[41] it was required that all persons who were qualified to vote must be able to read and write and interpret the state constitution. In the hands of white officials, this last requirement could become onerous indeed. The results were those desired. The Court upheld them on attack under the Fifteenth Amendment.

Unfortunately for those policy-makers, not a few illiterate whites were also excluded by the above provisions, so that "grandfather clauses" were placed in the state constitutions, providing that such rigid standards were not required of those who were lineal descendants of persons who could vote on January 1, 1867. They temporarily served their purpose,[42] although the most recent grandfather clause in the Constitution of Oklahoma was held unconstitutional in 1915.[43]

Perhaps the most useful device for depriving the Negro of suffrage in the South, apart from the grandfather clause, has come with the white primary. In 1921 in the case of *Newberry vs. U.S.*[44] the defendant was accused of violating the Federal Corrupt Practices Act by excessive expenditures in a primary election. Ironically the outspent opponent was Henry Ford. Newberry challenged the constitutionality of the Act on the basis that Congress had no power to control primaries since they were not elections. Since the justices split four to four in their decision, Newberry was acquitted; but the question of the extent of the power of Congress over

primaries was left unsettled. The impression prevailed, however, that Congress could not regulate them.

Then came an interesting series of cases from Texas. In 1927 in the case of *Nixon vs. Herndon,*[45] an El Paso Negro physician challenged a Texas statute providing that political parties in Texas could provide qualifications for those who could vote in primaries. The Supreme Court held such provision was "state action" under the Fourteenth Amendment, and did not even consider the Fifteenth.

Texas then changed the statute, and to prevent state action, simply gave power to the State Executive Committee of every political party to determine its own membership. Of course, they limited it to white Democrats. Nixon again challenged this provision on the basis that the Executive Committee was simply an agency of the State and was bound by all the same provisions. Again in *Nixon vs. Condon* (1932)[46] he prevailed.

Texas then fell back to its old expedient of using the white primary and letting the convention *en masse* determine the policy and the membership. They, in turn, excluded Negroes. In *Grovey vs. Townsend* (1935)[47] the Supreme Court sustained such policy, saying that exclusion from a primary was tantamount to denying party membership, which was permissible. Wedged between this case and the Houston case of *Smith vs. Allright*[48] in 1944 came the case of *U.S. vs. Classic* (1941)[49] in which a Louisiana politician had flagrantly violated all election laws in a Louisiana primary by buying votes and having them illegally counted. He was convicted under the Enforcement Act of 1870, but appealed on the basis that Congress had no power to legislate with regard to primaries, as did Newberry. The Court rejected his view, however, and held

that where a party primary is an integral part of the procedure of election, Congress can control it under the Constitution.

In *Smith vs. Allright, supra,* a Houston Negro sued an election official for damages in being denied the right to cast his ballot. The federal court here dismissed the action, but on appeal the United States Supreme Court specifically overruled *Grovey vs. Townsend* and held that the primary was a state function, and that in Texas it was a vital part of the election machinery of the State.

After *Smith vs. Allright,* the State of South Carolina repealed everything in its Constitution and laws referring to a primary. The democratic party then attempted to determine through wholly internal action who could vote in the primary. This effort was frustrated by the decision in *Rice vs. Elmore* (1947).[50] The United States Supreme Court refused to review the decision. Obviously, if a state legislature could vitiate rights guaranteed by the Constitution by abandoning state functions to a private organization, it is arguable that no guarantee would stand.[51] The Court also followed a new test in determining application of the Fourteenth Amendment: "state function" seems to replace the "state action" test laid down in the *Civil Rights Cases.*

The Democratic Party then attempted to organize itself into a private club and determine the qualifications for membership, excluding those who did not meet its standards. By more than coincidence, the standards would have excluded Negroes. On attack, this effort also failed in *Brown vs. Baskin* (1949)[52] where the district judge gave the party leaders in South Carolina a scathing lecture.

The poll tax, once a vital weapon for controlling suffrage, now exists in only six states. Those who retain it recognize the social problem involved where, as in Birmingham, Alabama,

and throughout Mississippi, poorly qualified Negroes compose over fifty per cent of the population. The poll tax, at least once upheld in the Supreme Court, has not recently been challenged.[53]

Rights of Persons Accused of Crime

No government known has provided more safeguards to the accused than America. Unreasonable searches and seizures, appointment of counsel, jury trial, compulsory self-incrimination, and interpretation of the Due Process Clause have been focal points of Constitutional controversy particularly since the Civil War.

In the famous *Olmstead* case (1928)[54] where Seattle bootleggers were making over $176,000 per month in their illicit traffic, the Supreme Court was called upon to decide whether wire tapping constituted an unlawful search or seizure within the prohibition of the Fourth Amendment. Governmental agents had monitored telephone conversations over many weeks and had used the fruits of their wire tapping to obtain conviction. A divided Court held that wire tapping was not a search or seizure, although the use of evidence so obtained has been sharply curtailed by later legislation. In his usual succinct manner, Holmes drew the issues in his dissent: "There is no body of precedents by which we are bound and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose and

for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

In the *Nardone* case (1937)[55] the Court was again called upon to decide whether evidence procured by a federal officer's tapping telephone wires and intercepting messages is admissible in a criminal trial, after the Federal Communication Act of 1934 had provided that "no person not being authorized by the sender shall intercept any communication. . . ." Quite obviously, information gained from wire tapping could lead investigators to discover other independent evidence sufficient for conviction apart from the tapped conversation. The Court, however, held that not only is evidence obtained from the wire tapping inadmissible, but also the evidence procured through use of knowledge gained from tapping, it being "fruit of the poisonous tree." The burden, however, is on the defendant to show such information was thus obtained. But the Court in *Goldman vs. United States* (1940)[56] distinguishes the wire tapping cases from testimony overheard by another as it was spoken into the transmitter. It has also been held that taking original statements into the telephone by a concealed detectaphone is permissible, there being no "interception" within the meaning of the Federal Communications Act.[57]

Searches and seizures without warrant have caused convictions resting upon information thus obtained to be overturned. *Weeks vs. United States* (1914)[58] has stood as a leading case holding that the immunity from unreasonable searches and seizures afforded by the United States Constitution had been denied the accused in a federal district court where the court refused the defendant return of his letters and private documents seized in his home during his

absence, by a United States marshal having no warrant.

Before the *Weeks* decision, of twenty-seven states which had passed upon the admissibility of evidence obtained by unlawful search and seizure, twenty-six states had opposed the Weeks doctrine.[59] Recently, in *Wolf vs. People of Colorado* (1949),[60] the Court reaffirms the Weeks doctrine insofar as it applies to practice and convictions in federal courts, but held that, in a state conviction based upon evidence inadmissible under the federal rule, there was no denial of Due Process. Three justices dissented, and Justice Black, while concurring, felt that "a state officer's knock at the door . . . as a prelude to a search without authority of law may be . . . just as ominous to ordered liberty as though the knock were made by a federal officer."

In *Agnello vs. United States* (1925)[61] where a legal seizure was made, and through such seizure it was apparent that smuggled dope was confined in another's house, a second arrest without warrant and not incidental to the first was illegal, and evidence so obtained could not be introduced. It has also been held in *Lewis vs. United States* (1937)[62] that where a federal officer without warrant breaks into the home of one and discovers evidence fatal to another, the latter cannot complain, since his property has not been illegally broken.

One court gave sanction to a novel twist of the "unreasonable search" clause in recently holding that use of a stomach pump treatment which leads to the discovery of narcotics in the stomach of one charged with concealing them was unreasonable so as to render testimony concerning possession thereof inadmissible.[63]

Cases are now numerous in requiring that a fair and impartial trial be allowed the accused, and that evidence ob-

tained by coercive methods should not be admissible. In the now famous *McNabb* cases (1943),[64] three brothers who were Tennessee mountaineers were accused of second degree murder when they shot the "revenuers." Evidence showed that the brothers had never been more than twenty-one miles away from the farm during their lives, and after arrest, they were thrown in a cell without cot or chair and were questioned for hours without advice of counsel. The Supreme Court reversed a conviction in the trial court on the basis that defendants were compelled to give evidence against themselves and were deprived of liberty without due process of law.

Indeed, in their vigilance to outlaw easy but self-defeating ways of crime detection, the Court has virtually disallowed any confession made between arrest and arraignment.[65]

On one day in 1949, the Court overturned three widely-separated state court convictions[66] where the defendant had been held incommunicado for several days before commitment to a magistrate. While the trial courts and state supreme courts had found as a fact that the confessions were voluntarily given, the Court refused to be ignorant as judges of what they know as men. "Ours is the accusatorial as opposed to the inquisitorial system,"[67] observed Justice Frankfurter for the majority, and held that the prosecution must establish its case not by interrogation of the accused even under judicial safeguard, but by evidence independently secured through skillful investigation. Justice Jackson, mindful of the social implications of the majority view, wrote an appealing dissent to all three cases. "The seriousness of the Court's judgement is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to

close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble."[68] Mr. Jackson further observed that once a confession is obtained, its verity might be established by corroborating evidence, which existed in each of these cases. Three judges joined Jackson's dissent, and its strong social appeal may in time gain the following of the Court.

Right of counsel guaranteed by the Sixth Amendment has also been reviewed in numerous cases, often to the advantage of the accused. In *Powell vs. Alabama* (1932),[69] the Court found there was a duty to appoint counsel for the accused, but the doctrine was limited to capital cases of indigent defendants incapable of hiring counsel or conducting their trials. In *Betts vs. Brady* (1942),[70] the Court held that failure of a state in a non-capital case to appoint counsel was not denial of Due Process unless specific prejudice was shown. Convictions have been reversed where the defendant had no counsel and the issues were complex,[71] where the prosecution resorted to trickery,[72] or where the partiality of the trial judge was shown.[73]

Wade vs. Mayo (1948)[74] held that where an individual by reason of age, ignorance, or mental capacities is incapable of representing himself even in a prosecution of a relatively simple nature, refusal to appoint counsel denies Due Process under the Fourteenth Amendment. Another 1948 case seems to make it clear that in every capital case, whether prejudicial influence is shown or not, the defendant is entitled to counsel.[75] In 1949, the Court further held in *Gibbs vs. Burke*[76] that failure to request counsel does not constitute a waiver when defendant does not know of the right.

Louisiana ex rel Francis vs. Resweber (1947)[77] brought an

interesting interpretation of the "double jeopardy" and "unusual crimes and punishments" clauses. There a Negro boy who had been convicted in a Louisiana State court was given the death penalty and his warrant duly issued. While he was strapped in the electric chair, the switch failed because of a latent mechanical defect. On the second attempt, the defendant pleaded that he was placed twice in jeopardy and that his punishment was cruel and unusual in that he was enduring a double psychological strain in preparing twice for death. By a five-to-four decision, the Court refused both grounds, stating that there was no suggestion of malevolence, and likening the situation to a fire that might break out in one's cell. The dissent would have remanded the case for further investigation of the amount of electric current which passed through the defendant's body, in order to determine the question of jeopardy.

Cases involving fair and impartial juries and Courts have also resulted in state court reversals. In *Ex Parte Virginia* (1880),[78] a Negro who was convicted by a jury composed of all whites pleaded that he was denied his liberty without Due Process and showed that the county judge had systematically excluded Negroes from the jury panel. On the evidence, the Court sustained the defendant's position and stated that the Fourteenth Amendment had been violated, even though the judge had acted outside the scope of his duties as a state officer. But the Court showed that a Negro need not necessarily be on the jury for conviction of another Negro to stand; and in *Akins vs. Texas* (1945),[79] where the commissioner systematically placed only one Negro on each jury panel, it was held equal protection had not been denied since no person is entitled to proportionate representation.

In *Moore vs. Dempsey* (1923),[80] where five Negroes were

convicted for murdering a white man, the evidence on appeal showed that a mob had assembled around the court house awaiting conviction. The Court observed that no one on the jury would have dared vote other than for conviction, else he would not escape the mob. This amounted to no trial at all, said the Court, but was merely mob violence masquerading as such.

In the 1947 case of *Fay vs. New York*,[81] defendant challenged the "Blue Ribbon Jury" used by New York in its state courts. Among other complaints, the county clerk selected the jury from the general panel, and women had the option of serving or not as they chose. The juries in practice were far from being equally distributed between the sexes, but the Court held there was no denial of Due Process.

Segregation in Public Carriers

Enforced segregation in public carriers in the South was first challenged in the *Civil Rights Cases* mentioned above.[82] In *Plessy vs. Ferguson* (1896)[83] a Louisiana statute provided that all railroads should furnish separate and equal accommodations for white and colored races. In challenging the statute it was maintained that the enforced separation stamps the colored race with a badge of inferiority. The Court, however, upheld the statute saying that if so, it was not because of anything in the Act, but solely because the colored race chose to put that construction upon it. The majority felt that racial prejudice could not be overcome by legislation or forced commingling and held that segregation was not discriminatory or unreasonable; all this being done, however, over the protest of Justice Harlan, a Southerner, who stated that "our Constitution is color blind."

Previously, segregation on carriers had been challenged

under the commerce clause in *Hall vs. De Cuir* (1877).[84] The Court there invalidated the Louisiana statute which prescribed racial segregation on interstate carriers on the ground that uniformity of regulation was essential, that Congress had exclusive power to regulate, and that interstate commerce must remain "free and untrammeled."

In *Morgan vs. Virginia* (1946)[85] a Negro passenger on an interstate bus was arrested for refusing to change her seat in compliance with the driver's direction pursuant to a Virginia statute. The Court held, consistently with the early *De Cuir* case, that the statutory requirement that passengers change seats from time to time, as it might become necessary to increase the seats available to one race or the other, constituted an undue burden on interstate commerce.

However, in *Day vs. Atlantic Greyhound Corporation* (1948)[86] the Fourth Circuit Court held that an interstate carrier has a right to establish rules and regulations which require white and colored passengers to occupy separate accommodations provided there is no discrimination in the arrangement, distinguishing the *Morgan* case where a State statute required the segregation. In 1938, an I.C.C. decision held that it was not unreasonable, in view of the paucity of Negro demand, that no pullman accommodations be furnished for Negroes.[87] The day of air travel may require special doctrines on the law of segregation.

Segregation in Education

Much of the history on segregation in educational institutions undoubtedly lies ahead. The leading case on the equal protection of the laws as applied to public education is *Missouri ex rel Gaines vs. Canada* (1938).[88] There Gaines, a Negro graduate of Lincoln College, was refused admission to the University of Missouri Law School. Under Missouri

policy, the State made a practice of providing tuition for its colored citizens whereby they could obtain equal educational facilities in other states. But the Supreme Court held that such provision denied the applicant equal protection of the laws under the Fourteenth Amendment. The Court said that Gaines was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State. Thirty years prior the Court had recognized in *Berea College vs. Kentucky* (1908)[89] the constitutionality of a state statute prohibiting private schools from admitting whites and blacks to the same institution.

In 1948, on the application of an Oklahoma Negress to the law school of her State University, the Court seemed to go slightly further than in the *Gaines* case. Chief Justice Vinson rendered a unanimous decision[90] saying that "Ada Sipuel is entitled to secure legal education afforded by a state institution. Oklahoma must provide it for her and provide it as soon as it does for applicants of any other group." Arkansas first met the problem by putting a colored student in an adjacent room, then by moving him into the main classroom with a small fence around him, then finally by absorbing him into the group.

In *Sweatt vs. Painter* (1948)[91] a Texas Appellate Court upheld the state laws which require segregation of races in state-supported schools, where substantially equal facilities for education exist for Negro students. The State Supreme Court refused writ of error, and the United States Supreme Court has set the case for hearing in April, 1950.

Residential Segregation[92]

While a recent New York decision[93] has held that the right to acquire interests in real property cannot be classified as a

civil right, residential segregation and restrictive convenants have been viewed by minority groups in the same light as other discriminations. Restrictive convenants against certain use of real property (as occupancy by members of designated races) have for years rested upon common law principles, with a distinction being drawn between use and ownership.[94]

In *Buchanan vs. Warley* (1917),[95] the Court struck down an ordinance of Louisville, Kentucky, which forbade Negroes to move into any block wherein the greater number of houses were occupied by whites, and vice versa. The ordinance was challenged by a white owner who desired to convey a lot to a Negro. But this is a case of discrimination by city ordinance or governmental action. What if individual owners in a neighborhood agree to restrictive covenants whereby none shall sell to a Negro? In *Corrigan vs. Buckley* (1926)[96] the Supreme Court dismissed an appeal on the constitutionality of such provision, saying the question lacked "any substantial . . . color of merit." But this case concerned land in the District of Columbia, and could not possibly call into play the Fourteenth Amendment aimed at state action.

In *Shelley vs. Kraemer* (1948)[97] and several companion cases, the Supreme Court answered the question whether state governments were participating in racial discrimination by lending aid of their courts in enforcement of restrictive covenants. Deciding in the affirmative, the Court outlawed future enforcement of the covenants in state courts by saying: "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property." The impact of these decisions has not been fully realized; almost all property in

Southern urban areas is subject to such convenants, and the question is posed whether a landowner whose property value is threatened by a neighbor's sale to a Negro in breach of the covenant can maintain an action for damages against him.[97a]

Aliens

In any time of national crisis, the position of aliens in the country is extremely uncomfortable. The United States has not been without its problems in this regard. In the western part of the United States, where Oriental labor was competing with white, the states passed discriminatory measures against the former. Laws were passed forbidding aliens, except those who declared their intentions to become citizens, to own or require any interest in land within the state. The penalty was forfeiture of the land to the state and criminal punishment of those conveying title in violation of law. While the Supreme Court has held in *Traux vs. Raich* (1915)[98] that the alien had the right to earn a living by following ordinary occupations, it was held in *Terrace vs. Thompson* (1923)[99] that each state had power to deny to aliens the right to own land within its borders. A modification of the holding came in 1948, however, when in *Oyama vs. California*[100] it was held that a father alien could convey to his minor son, who was a citizen of the United States, lands within the State of California and insofar as the California Alien Land Law applied to the minor, it deprived him of equal protection of the law and of his privileges and immunities as an American citizen.

During the recent war, deportation of enemy aliens brought many civil rights issues to court attention. Pending deportation, persons of Japanese ancestry, even though American citizens, were ordered to observe an evening curfew, which was upheld in *Hirabayashi vs. U.S.* (1943).[101] In

two lower court decisions, the Courts took opposing views. One[102] reasoned that Congress might consider all the area as an actual military arsenal under martial control; the other[103] took the position that no constitutional power existed for making a distinction relating to citizens on the basis of their race or color. The Supreme Court took approximately the position of the first district judge, stating through Chief Justice Stone: "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be of a greater source of danger than those of a different ancestry. Nor can we deny that Congress and the military authorities acting with its authorization have constitutional powers to appraise the danger in the light of facts of public notoriety. We decide only the issue as we have defined it—we decide that the curfew order as applied and at the time it was applied was within the boundaries of the war power." Undoubtedly, treatment accorded Japanese-Americans during World War II constitutes the most discordant note in the recent expansion of civil liberties.

Free Speech and Picketing

A civil right that owes its origin and development to this century is the right to picket, which the new Court has held to be a form of free speech protected by the Fourteenth Amendment. While Texas and other states had upheld peaceful picketing long prior to 1937,[104] it was in that year that the Supreme Court in *Senn vs. Tile Layers Union* (1937)[105] upheld the constitutionality of a Wisconsin statute legalizing peaceful picketing. "Clearly," observed Justice Brandeis, "the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment.

Members of a union might without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." Thus was born the implication that picketing was a form of free speech with which the state could not legally interfere.

Carlson vs. California (1940)[106] and *Thornhill vs. Alabama* (1940)[107] each involved municipal ordinances to prohibit picketing on city streets. The Court held both ordinances unconstitutional in that "dissemination of information concerning . . . labor disputes must be regarded as within that area of free discussion guaranteed by the Constitution."

In *American Federation of Labor vs. Swing* (1941)[108] the defendant's employees were satisfied with their employment, but the union wanted a closed shop and commenced picketing. In the state court, Swing was granted an injunction, but the United States Supreme Court reversed, stating that a ban on free discussion was inconsistent with the guarantee of freedom of speech even though there was no employer-employee controversy.

In *Milkwagon Drivers' Union vs. Meadowmoor Dairies* (1941)[109] the court held, however, that a state court might lawfully enjoin "picketing enmeshed with violence." Trivial rough incidents, however, are insufficient, though past misconduct may lend sufficient inference of future violence to warrant an injunction.[110]

In *Carpenters' and Joiners' Union vs. Ritters' Cafe* (1942)[111] defendant owned a cafe in Houston and started constructing a building several miles away. His contractor used non-union labor, and the union started picketing his cafe. The state granted an injunction, and the Court upheld this action, restricting picketing to the area of dispute. The Court further

upheld in 1949 an injunction issued by a Missouri court restraining peaceful picketing when in violation of the state's restraint of trade statutes.[112]

Limits of Free Speech—Criticism of Court and Country

World War I caused unprecedented consideration of free speech. Even during the Civil War, the efficacy of the Bill of Rights in war time had been confirmed in *Ex Parte Milligan* (1866).[113] In 1917, Congress passed the Espionage Act forbidding the wilful making of false reports with intent to interfere with the operations of military forces and training. The Sedition Act of 1918 created new penalties for uttering language disloyal to the United States or its form of government. The former was tested in *Schenck vs. U. S.* (1919),[114] in which appellant contended the Espionage Act violated the First Amendment and was unconstitutional. Mr. Justice Holmes wrote a unanimous opinion stating that free speech had never been absolute at any time. "Free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" even in peace and, when a nation is at war, "many things that might be said in time of peace are such hindrance to its effort that their utterance will not be endured so long as men fight . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of promixity and degree." The latter statute was passed on in *Abrams vs. U. S.* (1919),[115] where the Court reviewed a conviction of defendants charged with publication of pamphlets denouncing the "capitalistic government of the United States." The majority opinion upheld the conviction and the statute, but Justice

Holmes, in one of his most famous opinions, dissented: ". . . but when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. . . ."

Gitlow vs. New York,[116] already mentioned, is of importance primarily for extending the protection of the Fourteenth Amendment to state action invading freedom of speech.

About two thousand cases involving the Espionage Act arose in the lower Federal Courts during World War I,[117] and hundreds more have been tried under Sedition and other Acts since that time. Undoubtedly the trial gaining widest attention in recent years has been that of the twelve communists convicted in the United States Court House in Foley Square, New York, by Judge Harold R. Medina for advocating overthrow of the United States government as early as circumstances would permit, contrary to Congressional legislation.[118] In his charge[119] to the jury, Judge Medina made it clear that belief in and advocacy of a system of government unlike our own was in every sense permissible, and it is through incitement to action that the evil lies. Undoubtedly more will be heard from this case in the appellate courts.

Also of interest to free speech is the right to criticize the Court's action in pending litigation. In *Bridges vs. California* (1941)[120] defendant sent a telegram to the Secretary of Labor stating that enforcement of a state court's current decision would tie up the entire Pacific Coast and that he did not

intend to abide by it. Held in contempt by the court, the defendant contended on appeal that he was within his rights thus to speak. In sustaining his view, the Court commented that it was not enough to abridge speech to show that a substantive evil would result—but that the evil must be itself serious, and that the likelihood of danger was a question of degree for which no formula could be captured.

In Pennekamp vs. Florida (1946)[121] the editor of the *Miami Herald* published a series of editorials after eight rape indictments had been dismissed. Accompanying cartoons showed a robed compliant judge handling a decree to a huge criminal figure with another marked "public interest" vainly protesting. Again emphasizing the necessity of criticism, the Supreme Court overruled the conviction with the candid remark that: "Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat—one which is close and direct, or one which disturbs the court's sense of fairness depends upon a choice of words."

In 1947 a Corpus Christi publisher made comment that a county judge had wrought a gross miscarriage of justice and a "raw deal" and that he would not know whether justice was done, not being a member of the bar. As defendant he insisted he intended no disrespect, but merely wished to quicken the conscience of the judge and make him careful in the discharge of his duties. Again the Supreme Court held there was no clear and present danger, and that the defendant's conviction for contempt would not stand.[122]

In 1942 in *U. S. vs. Pelley,*[123] we find a defendant much more facile in attacking American institutions than the above three. William Dudley Pelley published the *Galilean*

Magazine which not only criticized President Roosevelt and his New Deal, but also strongly attacked the British and made expressions of gloom about our war preparedness. Obviously one could not be punished for criticizing the President or New Deal, for that would include the most of us, and criticism of the British has been a sacred American prerogative since 1775. But Pelley interwove such statements with a seditious web of propaganda designed to depress military morale. The Circuit Court of Appeals held that there was a clear and present danger and the Supreme Court gave its tacit approval by refusing to review the case.

Conclusion

The treatment of civil rights in this paper has left many fields untouched, particularly domestic relations,[124] newly created tests for naturalization,[125] and many others.[126]

In appraising the cases, some[127] will feel with Justice Harlan that our Supreme Court has prolonged racial conflict by allowing the seeds of race hate to be planted under the sanction of law. The Southern realist[128] will more likely feel, however, that when legislation runs counter to emotions rising to a religious pitch, the Court has usually acted with prudence and wise restraint. In many respects it is remarkable that a system devised in the Eighteenth Century for a sparsely settled agricultural nation has so well coped with the needs and complexities of today's highly integrated technological society. In general, America can be proud that even while fighting for her very survival, she has preserved her basic civil liberties.

The new civil rights program of the President may someday be hailed as the beginning of true democracy;[129] it as likely could break down, like the Fifteenth Amendment, for

coming too soon; it may aggravate rather than heal. Today's society requires closer surveillance of those who would undermine our government, but excessive surveillance is the beginning of the police state. Even the most rabid regulationist would fear a government like that in George Orwell's recent satire, *Nineteen Eighty-four.*

Through the ages the crude and bestial instincts of the mob have succeeded in destroying the delicate achievements of human endeavor; no nation can consider itself immune. War and its aftermath create a social context poisonous to the sensitive plant of freedom.[130] We must renew our trust in the saving grace of wider sympathy and tolerance and greater understanding, and recognize that human progress is made in light and not in darkness, if the hard-won gains of the human spirit are to survive.

C. M. HUDSPETH

NOTES

1. *Bowles v. Habermann,* 95 NY 246; see also *Davis v. Wilson,* 35 SW (2d), 1020, *Haupt v. Schmidt,* 122 NE 343 and *People v. Barrett,* 67 NE 742.
2. John Locke, *Two Treatises of Government,* London, 1764 (Chapter II).
3. *Encyl. Brit.,* see "Civil Liberty," *passim.*
4. Art. I., Sec. 9.
5. Art. I., Sec. 9.
6. Art. I., Sec. 9.
7. Art. II., Sec. 3.
8. Kelly and Harbison, *The American Constitution* (1948), p. 152.
9. Beck, *The Constitution of the United States* (1924), p. 185; Warren, *The Making of the Constitution,* p. 768.
10. 7 Pet. 243, 250.
11. 16 Wall. 36.
12. 109 US 3.
13. 286 US 652.
14. See *Stromberg v. California,* 283 US 359 (1931) and *Near v. Minnesota,* 283 US 697 (1931).
15. 299 US 353.

16. 310 US 296.
17. 314 US 252.
18. 302 US 319.
19. 211 US 78.
20. 110 US 516.
21. 332 US 46.
22. 332 US 134.
23. 333 US 879.
24. 303 US 444.
25. See Note 16.
26. *Martin v. Struthers* (1943), 319 US 141.
27. *Jones v. Opelika* (1942), 316 US 584.
28. *Murdock v. Pennsylvania* (1943), 319 US 105.
29. 326 US 501.
30. 326 US 517.
31. 310 US 586.
32. 319 US 624.
33. 330 US 1.
34. 333 US 203.
35. *Cochran v. Board of Education* (1930), 281 US 370.
36. 60 Stat. 230 (1946), 42 U.S.C. 1751.
37. *Pierce v. Society of Sisters* (1925), 268 US 510.
38. *Wilson v. Gonzales,* 106 P (2d) 1093 (New Mexico); *contra, Ex Parte Bullen,* 101 So 498 (Alabama).
39. Art. I., Sec. 4.
40. *United States v. Reese* (1876), 92 US 214.
41. 170 US 213.
42. Shoup, *The Government of the American People* (1946), p. 156–157.
43. *Guinn v. United States* (1915), 238 US 347.
44. 256 US 232.
45. 273 US 536.
46. 286 US 73.
47. 295 US 45.
48. 321 US 649.
49. 313 US 299.
50. 72 Supp. 516, 165 F (2d) 387.
51. See 61 *Harvard Law Review* 1247.
52. 174 Supp. 933, 174 F (2d) 391.
53. *Breedlove v. Suttles* (1936), 302 US 277.
54. *Olmstead v. United States,* 277 US 438.
55. *Nardone v. United States,* 302 US 379.
56. 316 US 129.
57. See Note 56.
58. 232 US 383.

59. See statistics compiled in case cited Note 60.
60. 333 US 879.
61. 269 US 20.
62. 92 F (2d) 952.
63. *United States v. Willis* (1949), 85 F Supp. 745.
64. *McNabb v. United States,* 318 US 332.
65. See Justice Jackson's dissent in the three cases cited in Note 66.
66. *Watts v. Indiana,* 336 US 917, 69 S.Ct. 1347; *Turner v. Pennsylvania,* 334 US 858, 69 S.Ct. 1352; *Harris v. South Carolina,* 334 US 837, 69 S.Ct. 1354.
67. See *Watts v. Indiana, supra,* at page 1350.
68. — US —; 69 S.Ct. 1357.
69. 287 US 45.
70. 316 US 455.
71. *Rice v. Olson* (1945), 324 US 786.
72. *Smith v. O'Grady* (1941), 312 US 329.
73. *Townsend v. Burke* (1948), 334 US 736.
74. 334 US 672.
75. *Bute v. Illinois* (1948), 333 US 640; see also 48 *Col. Law Rev.* 1076.
76. 335 US 867, 69 S.Ct. 1247; see also *People v. Williams* (1948), 78 NE (2d) 512, 3 ALR (2d) 999.
77. 329 US 459.
78. 100 US 339.
79. 325 US 398.
80. 261 US 86.
81. 332 US 261.
82. See Note 12.
83. 163 US 537.
84. 95 US 485.
85. 328 US 373.
86. 171 F (2d) 59; see also 62 Harvard Law Review 1389.
87. *Mitchell v. Chicago Rr.,* 229 I.C.C. 703.
88. 305 US 337.
89. 211 US 45.
90. 332 US 631.
91. 210 SW (2d) 442.
92. See Clark, "Legality of Discriminatory Restrictions on the Possession and Ownership of Real Estate," Proceedings of the Real Property Section of American Bar Association, 1947–8, pp. 18 *et seq.*
93. *Dorsey v. Stuyvesant Town Corp.* (1949), 81 NE (2d) 541; the case further holds that exclusion of Negroes from a corporation-owned housing project was not "state action" so as to violate the Equal Protection clauses.

94. See *Los Angeles Investment Co. v. Gary* (1919), 186 Pac. 596; *Title Guarantee & Trust Co. v. Garrott* (1919), 183 Pac. 470.
95. 245 US 60.
96. 271 US 323.
97. 334 US 1.
97a. See *Weiss v. Leaon* (Mo., 1949), 225 SW (2d) 127.
98. 239 US 33.
99. 263 US 197.
100. 332 US 633.
101. 320 US 81.
102. *Ex Parte Venturax* (1942), 44 F. Supp. 520.
103. *U.S. v. Yasui* (1942), 48 F. Supp. 40.
104. *Cooks', Waiters' and Waitresses' Union* (1918), 205 SW 465; *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (1921), 230 SW 1086.
105. 301 US 468.
106. 310 US 106.
107. 310 US 88.
108. 312 US 321.
109. 312 US 287.
110. See Note 109; cf. *Ethyl Gasoline Corp. v. U.S.* (1940), 336 US 490.
111. 315 US 722.
112. *Giboney v. Empire Storage Co.* (1949), 336 US 490.
113. 4 Wall. 2.
114. 249 US 47.
115. 250 US 616.
116. See Note 13.
117. *The American Constitution,* Note 8, at P. 666.
118. See *Time,* Vol. LIV, No. 17 (Oct. 24, 1949), pp. 20 *et seq.*
119. See *Time,* Note 118 above where a portion of the court's charge is set forth.
120. 314 US 252.
121. 326 US 709.
122. 331 US 367.
123. 132 F (2d) 170.
124. As marriage is a civil right, it is somewhat surprising that more cases have not attacked the miscegenation laws of the states. In 1932 thirty states forbade miscegenation (*X Encyclopaedia of the Social Sciences* 531). Attacks on the constitutionality of such statutes have usually been of no avail. In 1948 in *Perez v. Lippold* (California) one state declared unconstitutional its statute which stated that all marriages of white persons with Negroes, Mongolians, Malayans or mulattoes are void.
125. Prior to 1946, "pacificists" had encountered fatal difficulties in

applying for citizenship. *U.S. v. Schwimmer* (1929), 279 US 644 (where Rosika Schwimmer answered negatively the question "If necessary, are you willing to take up arms in defense of this country?") In 1931 Marie Bland met the same ruling. *U.S. v. Bland,* 283 US 636. In 1936, however, a sharply divided Court in effect reversed its earlier position in admitting a noncombatant Seventh Day Adventist to citizenship. *Girouard v. U.S.*, 328 US 61.

In 1943 the government failed in its endeavor to revoke citizenship of one William Schneiderman on the sole ground that he was an active member of the Communist Party at the time of his naturalization. *Schneidermann v. U.S.*, 329 US 118.

126. Rights of labor to strike have not been touched upon, nor powers of Congressional investigation and related matters. The seldom-invoked bills of attainder clause was brought into action in 1946 in *U.S. v. Lovett,* 328 US 303, when Congress adopted a provision that no funds available under any act of Congress should be paid out as salary for government service to three men under political attack by the House Committee on Un-American Activities. The three prevailed.
127. See *Vindication of Mr. Justice Harlan,* Watt and Orlikoff, 44 *Ill. Law Rev.* 13 (1949).
128. See *Constitutional Aspects of the Truman Civil Rights Program,* Collins, 44 *Ill. Law Rev.* 1 (1949).
129. Compare Notes 127 and 128.
130. See *Safeguarding Civil Liberty Today* by Carl L. Becker and others, rev'd 58 *Harvard Law Review* 1093.