THE UNITED STATES SUPREME COURT AND THE RECENT CONSTITUTIONAL TEMPEST.*

I. ORIGINS AND SOURCES OF THE STORM.

In the tough yet subtly patterned fabric of American government the federal Supreme Court is charged with decision-making of a unique but essential quality.[1] Not only is it the final umpire in the ever-lasting match between the forces of centralization and particularism but it is also the ultimate guardian of individual freedom against the massive thrust of organized society. While it does not bear responsibility for bold initiative or large-scale activism, it must assume, if need be, the role of militant passivity and truculence. Since the detailed contours of what the Court itself likes to call the "scheme of ordered liberty"[2] rest so largely upon the combined wisdom and moral fortitude of the nine justices in Washington it is no wonder that in periods of tension and insecurity the judgment and personnel of the Court are castigated and attacked from various quarters and that, at times, the winds of criticism unite in strength and direction to the proportions of veritable storm.

Of course, the causes of such tempests have varied radically with the vicissitudes of historic settings. During the early Roosevelt era it was the Court's reluctance to accept economic interventionism, especially on the federal level, that precipitated popular resentment on a national scale and ended in a contrite capitulation by an unpacked though "reconstituted" bench.[3] More recently it has been the tribunal's uncompromising attitude in cases involving a clash between individual liberties and purported governmental exigencies, whether federal or State, which has subjected the justices to a cross-fire of censure, denunciation, and attempted muzzling.[4] Broadly speaking it is chiefly in three great areas where the Court's intensified solicitude for human freedom

* The substance of an address given by the author at the Law School of the University of Western Australia on 14th May 1959.

1 For a contemporary composite assessment of the position of the Supreme Court within the framework of American constitutionalism see the symposium on *Policy-Making in a Democracy: The Role of the United States Supreme Court,* in (1957) 6 J. PUB. L. 275.

2 Palko v. Connecticut, (1937) 302 U.S. 319, at 325, 82 L. Ed. 288, at 292 (language of Justice Cardozo).

3 For a recent reappraisal of this development see SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957).

4 See the references and discussions in Pollak, *The Supreme Court under Fire,* (1957) 6 J. PUB. L. 428, and Freund, *Storm over the American Supreme Court,* (1958) 21 MOD. L. REV. 345.

has come into sharp conflict with executive or legislative action and the policies dictating the same, *viz.*, (a) racial segregation, (b) protection against disloyalty and subversion, (c) suppression of criminality.

The displeasure with the new decisional trend manifested itself in a variety of ways and means, ranging from mere outcries of dismay and indignation to efforts toward effective counteraction. Thus while the chief law-enforcement officer of an eastern State was satisfied with publicly airing his grievances in a meeting of the National Association of Attorneys General,[5] the General Assembly of a southern State, by formal resolution, called for the impeachment and removal of six members of the United States Supreme Court,[6] and a Senator from one of the mid-western States introduced a Bill in Congress designed to deprive the Court of its appellate jurisdiction in those types of cases in which its recent course has proven to be irksome to the zealous fighters against un-Americanism and encroachment upon States' Rights.[7] Most startling of all, perhaps, was a declaration, signed by the Chief Justices of the Supreme Courts of thirty-six of the States at their annual conference in Los Angeles in 1958, which endorsed a committee report that expressed a not wholly temperate discontent with the constitutional views of the highest court in the nation.[8] Needless to say that these vociferous attacks on the integrity of the supreme bench caused articulated chagrin and preoccupation in many outstanding members of the legal profession. Illustrative of this reaction is the Morrison Lecture by Dean Griswold of the Harvard Law School before the State Bar of California with the title: *"Fools Rush In."*[9]

The purpose of the present paper is not a further rehearsal of the embarrassing episode. Rather it aims at an analysis of jurisdictional and constitutional bases of the clash; of the major judicial doctrines which engendered the controversial results; and of the apparent impact of the recent experience on the Court's present attitudes, in the perhaps presumptuous hope of contributing a sympathetic understanding abroad of the agonizing dilemmas facing an important instrument of constitutional democracy.

5 Speech by New Hampshire Attorney-General Louis C. Wyman, cited by Pollak in footnote 19 of *op. cit. supra* note 4.

6 (1957) 1 Georgia Laws 553.

7 Bill introduced by Senator Jenner of Indiana, discussed by Freund in *op. cit. supra* note 4.

8 For extracts from, and the conclusions of, the "Report of the Committee on federal-State relationships, as affected by judicial decisions," see (1958) 43 MASS. L.Q. 77.

9 Reprinted in *op. cit. supra* note 8.

II. THE COURT'S CONTROL OVER ITS BUSINESS.

Proper assessment of the course of constitutional adjudication in the United States Supreme Court calls, at the outset, for an adequate realization of the extent to which the tribunal itself controls the types of issues which are to be passed upon. For, unlike the situation in some other federal systems,[10] the exercise of jurisdiction by the United States Supreme Court is left in large measure to the sole discretion of the bench.

The Constitution of the United States has entrusted the regulation of the appellate jurisdiction of the Supreme Court, within the limits of the federal judicial power,[11] to national legislation.[12] Congress, in turn, has differentiated between enumerated cases in which the parties may *appeal* to the Supreme Court as a matter of right[13] and others where review by the Supreme Court may be secured only by petition for writ of *certiorari*.[14] Either form of review may be obtained as well of a judgment of a federal Court of Appeals as of a decision by the highest court of a State. Appeal from the judgment of a federal Court of Appeals lies in cases where either a federal statute was held to be unconstitutional or a State statute to be repugnant to the Constitution or federal laws or treaties.[15] Appeal from the decision of the highest court of a State is available if the controversy either involved the validity of a treaty or federal statute and the court held against validity, or involved the compatibility of a State statute with federal law and the court upheld the validity.[16]

In the instances where review of decisions by federal Courts of Appeals or highest State courts may be secured only by petition for writ of *certiorari,* the Supreme Court need not, and will not, grant such relief unless it considers the questions presented to be important

10 For a general survey of the judicial organization in various federal systems see Riesenfeld and Hazard, *Federal Courts in Foreign Systems,* (1948) 13 LAW & CONTEMP. PROB. 29.

11 Article III, section 2 (1) of the United States Constitution specifies the extent of the judicial power of the United States, including *inter alia* "all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

12 Article III, section 2 (2) of the United States Constitution vests the Supreme Court with appellate jurisdiction in the cases listed above "with such exceptions and under such regulations as the Congress shall make."

13 28 U.S.C., secs. 1252, 1254 (2), 1257 (1) and (2).

14 28 U.S.C., secs. 1254 (1), 1257 (3).

15 28 U.S.C., secs. 1252 and 1254 (2).

16 28 U.S.C., sec. 1257 (1) and (2). The Supreme Court may dismiss such an appeal *in limine* for the reason that no substantial federal question is presented: Revised Rules of the Supreme Court, Rule 16 (1) (b).

enough to warrant full hearing on the merits.[17] By established tradition this determination is reached upon the affirmative vote of four or more of the nine justices and, thereupon, requires determination of the case on the merits, unless unforeseen factors become evident which induce the Court to dismiss the writ subsequently as having been improvidently granted.[18]

Without going into tedious statistical details it may be worth noting that during the 1957 term the Court had to dispose of 1469 petitions for *certiorari* and that the writ was granted in 143 (*i.e.*, approximately ten per cent.) of the applications.[19] Of the total of 157 cases, decided during the same term by the Court on the merits following grant of *certiorari*, 37 or nearly one quarter involved the constitutional guarantees of civil rights.[20] In addition 41 out of 133 cases decided on appeal (*i.e.*, an even higher percentage) dealt with such issues.[21] As a result it is clear that the Court devotes a major portion of its time to the protection of constitutional liberties and that nearly half of these cases are determined by the Court by reason of its predilection. At least to that extent the temper behind the purple curtain is not inscrutable.[22]

III. THE ASYMMETRY OF THE CONSTITUTIONAL GUARANTEES OF CIVIL LIBERTIES.

Another factor to be appreciated at the outset, for a correct

17 Revised Rules of the Supreme Court: Rule 19(1) provides (among other matters): "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

(b) Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court . . . " (346 U.S. 967, 98 L. Ed. 16).

18 For a recent discussion of the certiorari process and the status of the "rule of four" see the dissent by Mr. Justice Frankfurter and the concurring opinion by Mr. Justice Harlan in Rogers v. Missouri P.R. Co., (1957) 352 U.S. 524, 559, 1 L. Ed. 2d 493, 517, noted in (1957) 105 U. OF PA. L. REV. 1084. See also Harper and Rosenthal, *An Appraisal of Certiorari*, (1950) 99 U. OF PA. L. REV. 293.

19 See *The Supreme Court, 1957 Term*, (1958) 72 HARV. L. REV. 77, at 96, 99.

20 *Ibid.*, at 104, 105.

21 *Ibid.*

22 See the comments on "the inner sanctum behind the purple curtain" by Harper and Rosenthal, *loc. cit. supra* note 18, at 297.

appraisal of the decisions of the United States Supreme Court in this area, is the asymmetrical structure of the Constitution itself in respect to its guarantees of civil liberties.

The United States Constitution, like the organic act in other federal unions, establishes a dual system of government, State and federal, for a single nation. By subsequent amendments, the Constitution has subjected each twin-set of governmental powers to formulated limitations for the purpose of assuring certain traditional civil rights and liberties to the individual. But the structure and wording of these guarantees *vis-à-vis* the Federal Government differ markedly from those *vis-à-vis* the State governments, thus creating perplexing apparent incongruities and dilemmas.

The Bill of Rights, enshrined in the first eight Amendments to the Constitution and ratified by the States upon proposal in 1789 by the First Congress, proclaims a number of civil liberties as guaranteed against abridgment. Among them are freedom of religion, freedom of speech, freedom of the press, and freedom of assembly (First Amendment); freedom from unreasonable searches and seizures (Fourth Amendment); the right to presentment or indictment of a grand jury in capital or otherwise infamous crimes; freedom from double jeopardy; privilege against self-incrimination; right to due process (Fifth Amendment); right to trial by jury; confrontation of witnesses, and assistance by counsel (Sixth Amendment). While only the First Amendment, in terms, refers to *congressional* encroachment, the Supreme Court for historical reasons until now has refused to apply any of the first eight Amendments *as such* against State action.[23]

Conversely the Fourteenth Amendment (which was adopted in 1868 in the wake of the Civil War) secures due process and equal protection of the laws expressly against curtailment by "any State."

Thus the so-called Bill of Rights as well as the Fourteenth Amendment include each a due process clause. But while the former adds a compendious catalogue of other civil rights without, however, ordaining equal protection, the latter expressly assures non-discrimination but fails to list the other liberties named in the Bill of Rights. As a result the contours of the boundaries of personal freedom drawn by the federal Constitution have a different appearance according to whether federal or State government is involved, and it rests with the Court to determine whether and to what extent this asymmetry in form entails an incongruity in scope.

23 See the catalogue in the recent opinion of Mr. Justice Frankfurter in Knapp v. Schweitzer, (1958) 357 U.S. 371, 2 L. Ed. 2d 1393.

In the course of time the Court not only has supplied substance and body to the tradition-laden programmatic formulae of the constitutional guarantees, but also, though haltingly, progressed toward an increased balance between the restraints on federal and State power by reading some of the detailed commands of the first eight Amendments (curbing the Federal Government) into the comprehensive mandate of the Fourteenth (operating on the States). Actually the extent of this "transfer" is one of the most delicate and controversial tasks of the Court in harmonizing national minimum standards of basic liberty with the essential tenets of federalism.[24] As a result the Court draws its lines not with clear and bold strokes but in a blotty, impressionistic manner. Thus the Court has taken the stand that "the great, the indispensable" and "cognate" democratic freedoms of belief, speech, press, and assembly (to use the language of the late Justice Rutledge) enjoy a "preferred place" in the American scheme,[25] and that their guarantees under the First Amendment are transferred part and parcel to, and enshrined in, the general notion of liberty, safeguarded against invasion by State action by the due process clause of the Fourteenth Amendment.[26] But the Court's approach has been much more hesitant with respect to restraint of State action under the Fourteenth Amend-

24 See the comments by Mr. Justice Frankfurter in his separate opinion in Staub v. Baxley, (1958) 355 U.S. 313, 326, 2 L. Ed. 2d 302, 313 (quoting a recent statement by the Chief Justice of the High Court of Australia in O'Sullivan v. Noarlunga Meat Ltd., (1956) 94 Commonwealth L.R. 367, 375), and in his (majority) opinion in Knapp v. Schweitzer, (1958) 357 U.S. 371, 2 L. Ed. 2d 1393, 1397.

25 Thomas v. Collins, (1945) 323 U.S. 516, 530, 89 L. Ed. 430, 440; but contrast Ullmann v. United States, (1956) 350 U.S. 422, 428, 100 L. Ed. 511, 519: "No constitutional guarantee enjoys preference."

26 Of the legion of cases announcing this principle we mention
Gitlow v. New York, (1925) 268 U.S. 652, 666; 69 L. Ed. 1138, 1145-1146.
Stromberg v. California, (1931) 283 U.S. 359, 368; 75 L. Ed. 1118, 1122.
Hamilton v. University of California, (1934) 293 U.S. 245, 262; 79 L. Ed. 343, 352.
Grosjean v. American Press Co., (1936) 297 U.S. 233, 244-245; 80 L. Ed. 660, 665-666.
De Jonge v. Oregon, (1937) 299 U.S. 353, 364; 81 L. Ed. 278, 283-284.
Herndon v. Lowry, (1937) 301 U.S. 242, 255, 259; 81 L. Ed. 1066, 1073-1074, 1075-1076.
Palko v. Connecticut, (1937) 302 U.S. 319, 324; 82 L. Ed. 288, 291.
Lovell v. Griffin, (1938) 303 U.S. 444, 450; 82 L. Ed. 949, 952-953.
Schneider v. Irvington, (1939) 308 U.S. 147, 160; 84 L. Ed. 155, 164.
Thornhill v. Alabama, (1940) 310 U.S. 88, 95; 84 L. Ed. 1093, 1098.
Cantwell v. Connecticut, (1940) 310 U.S. 296, 303; 84 L. Ed. 1213, 1217-1218.
Murdock v. Pennsylvania, (1943) 319 U.S. 105, 108; 87 L. Ed. 1292, 1295-1296.
West Virginia Board of Education v. Barnette, (1943) 319 U.S. 624, 639; 87 L. Ed. 1628, 1638 (the flag-saluting case).

ment in the cases of other civil liberties, such as the right to counsel in criminal prosecution,[27] protection from double jeopardy,[28] prohibition of unreasonable searches and seizures,[29] and the privilege against self-incrimination.[30] In the latter areas a majority of the Court so far has always refused to insist *vis-à-vis* the States on the full observation of identical standards of fairness and decency as must be met by the Federal Government, although in recent times a persistent minority on the bench has urged such a course.[31]

The Court never has conceived of the constitutional guarantees as boundless absolutes but has admitted that even the most preferred and cherished ones may be subject to restriction in the interest of protecting the nation from "a clear and imminent danger" of "destruction or serious injury, political, economic or moral."[32] But it has shown

Thomas v. Collins, (1945) 323 U.S. 516, 529-532; 89 L. Ed. 430, 440-441.
Everson v. Board of Education, (1947) 330 U.S. 1, 8; 91 L. Ed. 711, 719-720.
Staub v. Baxley, (1958) 355 U.S. 313, 321; 2 L. Ed. 2d 302, 310-311.

27 Betts v. Brady, (1942) 316 U.S. 455, 461-462; 86 L. Ed. 1595, 1601-1602, 1607.
Foster v. Illinois, (1947) 332 U.S. 134, 137; 91 L. Ed. 1955, 1958.
Bute v. Illinois, (1948) 333 U.S. 640, 656-657, 662-663; 92 L. Ed. 986, 995, 998-999.
Gallegos v. Nebraska, (1951) 342 U.S. 55, 64; 96 L. Ed. 86, 94.
Crooker v. California, (1958) 357 U.S. 433, 441; 2 L. Ed. 2d 1448, 1455.
Cicenia v. LaGay, (1958) 357 U.S. 504, 509-511; 2 L. Ed. 2d 1523, 1528-1529.
Nevertheless due process under the Fourteenth Amendment does require that the accused be either permitted to secure, or be furnished with, assistance of counsel under apposite conditions: Chandler v. Fretag, (1954) 348 U.S. 3, 99 L. Ed. 4; Moore v. Michigan, (1957) 355 U.S. 155, 2 L. Ed. 2d 167, and authorities cited.

28 Palko v. Connecticut, (1937) 302 U.S. 319; 82 L. Ed. 288.
Brock v. North Carolina, (1953) 344 U.S. 424, 426; 97 L. Ed. 456, 459.
Hoag v. New Jersey, (1958) 356 U.S. 464; 2 L. Ed. 2d 913.

29 Wolf v. Colorado, (1949) 338 U.S. 25; 93 L. Ed. 1782.
Stefanelli v. Minard, (1951) 342 U.S. 117; 96 L. Ed. 138.
Irvine v. California, (1954) 347 U.S. 128; 98 L. Ed. 561.
But see Rea v. United States, (1956) 350 U.S. 214; 100 L. Ed. 233.

30 Twining v. New Jersey, (1908) 211 U.S. 78, 99-114; 53 L. Ed. 97, 106-112.
Palko v. Connecticut, (1937) 302 U.S. 319, 323-324; 82 L. Ed. 288, 290-291.
Adamson v. California, (1947) 332 U.S. 46, 51-55, 62-68; 91 L. Ed. 1903, 1908-1910, 1914-1917.
Knapp v. Schweitzer, (1958) 357 U.S. 371, 374; 2 L. Ed. 2d 1393, 1397.
Lerner v. Casey, (1958) 357 U.S. 468, 478; 2 L. Ed. 2d 1423, 1432-1433.

31 See especially
Adamson v. California, (1947) 332 U.S. 46, 68; 91 L. Ed. 1903, 1917.
Foster v. Illinois, (1947) 332 U.S. 134, 141; 91 L. Ed. 1955, 1960.
Wolf v. Colorado, (1949) 338 U.S. 25, 40; 93 L. Ed. 1782, 1792.
Hoag v. New Jersey, (1958) 356 U.S. 464, 477; 2 L. Ed. 2d 913, 923.

32 See the formula used by Justices Brandeis and Holmes in their concurring opinion in Whitney v. California, (1927) 274 U.S. 357, 373; 71 L. Ed. 1095, 1104-1105.

increasing concern lest under the guise of misunderstood *raison d'état* or exaggerated doctrine of States' Rights fundamental personal rights are trampled upon by over-anxious law-makers or law-enforcers. Thus, blocking off the constitutional ramparts of individual freedom against encroachment by either federal or State authority, the Court has been compelled to settle issues of the gravest import and well-nigh imponderable character and thereby been forced into stands quite irksome to persons or groups of different outlook, conviction, and aspiration.

IV. THE IRKSOME STAND.

In analyzing the types of controversies in which the Court's stand for certain principles and ideas has been found especially irksome to spokesmen for particular groups or certain governmental agencies three main categories may be isolated:—

(A) cases involving segregation;
(B) cases involving protection against subversion; and
(C) cases involving enforcement of ordinary criminal law.

A. *The Segregation Cases.*

So much has been published already about the segregation cases that it should suffice to reduce the treatment of this class of adjudications to its narrowest compass. On 17th May 1954 the Court held in two long-awaited epoch-making decisions that racial discrimination in public education was unconstitutional and that all provisions of law requiring or permitting such discrimination must yield to this principle. This result was reached not only under the Equal Protection clause of the Fourteenth Amendment with respect to public schools maintained by the States or their subdivisions,[33] but also under the Due Process clause of the Fifth Amendment, with reference to public education furnished by the Federal Government.[34] For the first time, the Court thus read a specific clause of the Fourteenth Amendment into the general concept of liberty protected by the Fifth, thereby employing a technique heretofore utilized only in the opposite direction.

The Court couched its decision in absolute terms, declaring categorically that "separate educational facilities are inherently unequal" and therefore proscribed. On rejecting thus the appositeness in the field of education of the "separate but equal" test, which it had approved years ago for public transportation,[35] the Court buttressed

33 Brown v. Board of Education, (1954) 347 U.S. 483; 98 L. Ed. 873.
34 Bolling v. Sharpe, (1954) 347 U.S. 497; 98 L. Ed. 884.
35 Plessy v. Ferguson, (1896) 163 U.S. 537; 41 L. Ed. 256. Plessy v. Ferguson was overruled sub silentio in Gayle v. Browder, (1956) 352 U.S. 903, 1 L.

its holding with references to modern psychological knowledge. The implementation of the sweeping principle, in view of a variety of local problems, was left to further argument and the controlling standards were laid down finally on 31st May 1955.[36] The governing opinion required that "a prompt and reasonable start toward full compliance with the ruling be made" and that "the transition to a racially non-discriminatory school system" thereafter be effectuated "with all deliberate speed." The supervision of the proceedings was to be under the control of the federal courts.

The commencement of the desegregation thus ordained led to violent clashes in Little Rock (Arkansas) and precipitated actions and countermeasures which commanded world-wide attention. Initially the Little Rock School District evolved a step-by-step plan which called for desegregation on the senior high school level in the fall of 1957, to be followed by desegregation on the junior high and elementary levels, until complete integration by 1963. But interference by the State legislature and, above all, the Governor of Arkansas meanwhile created such an atmosphere of unrest, threat, and fear that when school opened in September of 1957 the negro students could not safely participate in the high school classes. Federal troops and afterwards federalized National Guardsmen had to be moved in and enabled eight of the negro students to remain in attendance at the school for the balance of the school year. In view of the conditions of "chaos, bedlam and turmoil" the School Board petitioned the United States District Court for a postponement of its desegregation programme. The Court granted the relief requested.[37] The negro respondents appealed and the Court of Appeals reversed the judgment.[38] The Supreme Court, upon application by the negro respondents, convened in Special Term on 28th August, and after oral argument fixed 8th September 1958 as the date on or before which the School Board's petition for *certiorari* might be filed, and 11th September 1958 for oral argument thereon.[39] On the latter date the Court granted the petition during its session and immediately heard further arguments upon the merits. The following day the Court announced its decision, affirming the judgment of the Court of Appeals and reinstating the original plan for desegregation.[40] In the opinion supporting the decision, the Chief Justice, speaking for the unanimous Court, made it clear that

Ed. 2d 114.

36 Brown v. Board of Education, (1954) 349 U.S. 294; 99 L. Ed. 1083.

37 Aaron v. Cooper, (1958) 163 F. Supp. 13.

38 Aaron v. Cooper, (1958) 257 F. 2d 33.

39 Aaron v. Cooper, (1958) 3 L. Ed. 2d 1.

40 Aaron v. Cooper, (1958) 3 L. Ed. 2d 3.

the tribunal could and would not tolerate that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color" be nullified by State legislators or State executive or judicial officers either "openly and directly" or "indirectly through evasive schemes for segregation, whether attempted ingeniously or ingenuously", and that "no State legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[41]

B. *Disloyalty, Non-conformity and the Right Not To Tell.*

In removing segregation on racial grounds from all places of public activity the Court adopted a clear-cut and uncompromising course and was bound to arouse the wrath of the implacable enemies of such policy. However, in fixing the bounds of legitimate governmental measures in the control of subversion the Court pursued a much more cautious and less determined approach and yet incurred acrimonious public censure for unrealistic meddling and political irresponsibility. The decisions which prompted this wave of dissatisfaction ranged over a wide variety of issues involving both the scope of civil liberty and the distribution of powers in the federal democracy of the United States.

The emotionally least perturbing issues, among the controversial decisions, were presented by the case of *Pennsylvania v. Nelson.*[42] There the Court was called upon to determine whether the re-entry by Congress in 1940 into the field of antisubversive legislation had deprived existing State Sedition Acts and similar statutes of their continued operativeness. In a 6 to 3 opinion the Court held that the Pennsylvania Sedition Act was superseded by the federal Smith Act. Passage of federal measures, such as the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954, sufficiently evidenced the congressional intent of occupying the field of criminal law on that subject to the exclusion of parallel State legislation.

Much deeper-reaching problems, however, had to be faced in the other litigation, which, in some way or the other, grew out of the refusal of individuals to take particular test-oaths or to divulge beliefs and associations either of their own or of other persons, when called to do so under loyalty programmes and investigations of various types.

41 Aaron v. Cooper, (1958) 3 L. Ed. 2d 5.
42 (1956) 350 U.S. 497; 100 L. Ed. 640.

Technically speaking the cases in this category brought into question the legality of two types of sanctions predicated upon such unco-operative or obstinate silence, *viz.*, either (a) that of fines or imprisonment imposed for the purpose of breaking or punishing the testimonial recalcitrancy, or (b) that of an exclusion or removal from public service or calling.

The first case in the second group was *Wieman v. Updegraff*.[43] It involved the constitutionality of the Oklahoma "loyalty oath", which by statute had been made a prerequisite for continuance in public office or employment. The oath, *inter alia,* required a statement to the effect that the employee or office-holder, within the five years preceding the taking of the oath, was not and had not been a member of . . . any group whatever which had been officially determined by the United States Attorney General . . . to be a communist front or subversive organization. The United States Supreme Court reversed a judgment by the Supreme Court of the State upholding the constitutionality of the oath. It reached the conclusion that the oath offended due process because of its failure to differentiate between "innocent" and "knowing" membership. While the taking of a loyalty oath could constitutionally be made a condition for continuance in public employment,[44] yet it was necessary that disloyalty and disqualification be predicated on a maintenance of organizational ties *after* learning of the true character and objectives of the group in question.

In *Slochower v. Board of Education*[45] the Court had to determine the constitutionality of the summary dismissal of a college professor of 27 years' experience, based on a section in the Charter of the City of New York providing that whenever an employee of the City of New York utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct his term or tenure of office or employment shall terminate and he shall not be eligible for election or appointment to any office or employment under the city. Professor Slochower had invoked the protection of the Fifth Amendment in a hearing concerning subversive influences in the

43 (1952) 344 U.S. 183; 97 L. Ed. 216.

44 Gerende v. Board of Supervisors, (1951) 341 U.S. 56, 95 L. Ed. 745; Garner v. Board of Public Works, (1951) 341 U.S. 716, 95 L. Ed. 1317; Adler v. Board of Education, (1952) 342 U.S. 485, 96 L. Ed. 517. Justice Black, in a concurring opinion joined by Justice Douglas, in Wieman v. Updegraff (*supra* note 43), declared emphatically that test oaths are notorious tools of tyranny and that all of them are incompatible with the free government established by the American Constitution.

45 (1956) 350 U.S. 551, 100 L. Ed. 692.

American educational system, held in 1952 by the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate. In that hearing he stated that he was not a member of the Communist Party and was willing to answer questions as to his political beliefs and associations after 1941, but declined to testify concerning his membership during 1940 and 1941 on the ground that his answers might tend to incriminate him. He testified, however, that some 10 years ago he had already appeared before a State investigatory committee and a Faculty Board and answered questions relative to his communist affiliations in the critical years. The Chairman of the Senate Subcommittee accepted Slochower's claim as a valid exercise of the constitutional privilege and the automatic dismissal followed. The Supreme Court held that such action violated due process of law. It found fault with the City Charter because, "as interpreted and applied by the State courts, it operates to discharge every city employee who invokes the Fifth Amendment." Hence "no consideration is given to such factors as the subject-matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege." This, the majority of the justices felt, was violative of the spirit of the privilege against incrimination which "would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." Especially as the Board of Higher Education had possessed all pertinent information for 12 years, belated dismissal based on a refusal to answer questions in an independent and unrelated federal investigation amounted to arbitrary action proscribed by the Constitution.

In *Schware v. Board of Bar Examiners (New Mexico)*[46] and *Konigsberg v. State Bar (California)*[47] the Supreme Court had to determine whether the exclusion of certain applicants from admission to the Bar contravened the guarantees of the Fourteenth Amendment. In both cases the result was reached that the responsible State agencies had violated the constitutional rights of the candidates in question. In the *Schware Case* the Supreme Court of New Mexico in 1954 had deemed a recent law school graduate with a creditable combat record as lacking the requisite "good moral character" because of admitted membership in the Communist Party between 1932 and 1940 (while at an age from 18 to 26). Justice Black, in the controlling opinion, stated categorically that past membership in the Communist Party at the particular period and so long ago did not justify an inference of present bad moral character.

46 (1957) 353 U.S. 232, 1 L. Ed. 2d 796.
47 (1957) 353 U.S. 252, 1 L. Ed. 2d 810.

In the *Konigsberg Case* the State Committee of Bar Examiners refused to certify petitioner to the Supreme Court of California for a licence to practise law on the ground that he had failed to prove, as required by the governing statute, that he was of good character and did not advocate overthrow of the government by unconstitutional means. Konigsberg had made "a forceful showing of good character" on the strength of his early life and war service, but during the hearing before the Committee he refused to answer questions concerning his political affiliations and beliefs and certain editorials written by him, based on his view that under the Constitution of the United States a State could not inquire into a person's political opinions and associations and that he had a duty not to answer. Justice Black, speaking again for the majority, specifically reserved decision on the issue as to whether a State could constitutionally make failure to answer questions an *independent* ground for exclusion from the Bar as not before the Court by reason of the existing statute, and held that petitioner's stand was not frivolous in view of prior decisions of the Court.[48] He concluded that on the record of the case the finding of the Board that petitioner had not carried the burden of proof of good moral character was unwarranted and in contravention of due process.

In *Service v. Dulles*[49] the Supreme Court voided a discharge by the (then) Secretary of State Dean Acheson of an officer in the Foreign Service of the United States which was based on a reasonable doubt as to the loyalty of the officer in question. Although the controlling statute empowered the Secretary of State to terminate the employment of any officer or employee of the Department of State, "in his absolute discretion", whenever he should deem such termination necessary or advisable, it was held that the Secretary by administrative regulation had validly imposed upon himself certain substantive and procedural limitations which were transgressed in the case under review.[50] Accordingly the official was aggrieved in his procedural rights[51] and, consequently, entitled to the appropriate relief against wrongful dismissal.

Undoubtedly the most agonizing and perplexing determinations were required where witnesses, in the course of sweeping legislative or grand jury investigations, had refused to answer questions propounded to them regarding political affiliations or beliefs of their own or of

48 (1957) 353 U.S. 252, 270; 1 L. Ed. 2d 810, 823.

49 (1957) 354 U.S. 363, 1 L. Ed. 2d 1403.

50 The Secretary of State had acted upon the advice of the Loyalty Review Board of the United States Civil Service Commission without reaching the decision "after consideration of the complete file, arguments, briefs, and testimony presented" as required by departmental regulation.

51 *Cf.* Accardi v. Shaughnessy, (1954) 347 U.S. 260, 98 L. Ed. 681.

other persons and thereupon had been punished for contempt. The crucial questions to be decided concerned the issues of whether and to what extent the First, the Fifth, and the Fourteenth Amendments entitled the witness to remain silent with impunity.

In so far as such right to remain silent rests solely upon the privilege against self-incrimination it was beyond question that the latter applied to federal investigations of all types, whether by grand juries[52] or by congressional committees and subcommittees.[53] But it was also established by cogent authority that the protection of the Fifth Amendment was not available in State proceedings[54] and that it did not bar testimonial compulsion in federal proceedings if and where Congress had provided for adequate immunity.[55] It remained, however, a somewhat debatable problem whether the governing rules would have to be qualified, if the subject-matter to be elicited spilled over into the domain of the freedom of conscience sanctified by the First Amendment. The pertinent issues occupied the Court in a series of five opinions, handed down between 1955 and 1957.

The first three of these cases[56] grew out of an investigation by the House Committee on Un-American Activities into communist infiltration of labour unions. Two of the witnesses involved declined to answer questions regarding their past or present membership in the Communist Party, membership in communist-front organizations, and associations with persons known to be, or charged with being, communists, basing their refusal on "the First Amendment to the Constitution, supplemented by the Fifth Amendment." The third invoked the Fifth Amendment with respect to questions as to his communist affiliations, but in addition objected to inquiries as to his family background because of lack of pertinency. Each witness thereupon was cited for contempt and convicted. The Supreme Court reversed all three convictions. It held that questions as to membership in the Communist Party or communist organizations and affiliations with communists

52 Hale v. Henkel, (1906) 201 U.S. 43, 50 L. Ed. 652; Brown v. Walker, (1896) 161 U.S. 591, 40 L. Ed. 819; see also Ullmann v. United States, (1956) 350 U.S. 422, 100 L. Ed. 511.

53 See the authorities collected in Watkins v. United States, (1957) 354 U.S. 178, 196 (footnote 29); 1 L. Ed. 2d 1273, 1289.

54 See authorities cited *supra* note 30.

55 Brown v. Walker, (1896) 161 U.S. 591, 40 L. Ed. 819; Hale v. Henkel, (1906) 201 U.S. 43, 50 L. Ed. 652; see also Shapiro v. United States, (1948) 335 U.S. 1, 92 L. Ed. 1787, and Adams v. Maryland, (1954) 347 U.S. 179, 98 L. Ed. 608.

56 Quinn v. United States, (1955) 349 U.S. 155, 99 L. Ed. 964; Emspak v. United States, (1955) 349 U.S. 190, 99 L. Ed. 997; and Bart v. United States, (1955) 349 U.S. 219, 99 L. Ed. 1016.

tend to be incriminatory and therefore were covered by the privilege. The claim thereof need not be couched in any ritualistic formula. Moreover punishment for contempt must be conditioned on a clear appraisal by the witness that the Committee overrules the objections or claim of the privilege, a requirement which had been overlooked in all cases before the Court. In view of this disposition the Court felt that it could by-pass the "novel constitutional issues" as to the effect of the First Amendment on the right to remain silent on political beliefs and activities.[57]

The latter problem faced the Court again in *Watkins v. United States.*[58] Like the previous cases, that litigation involved the legality of a punishment for contempt inflicted upon a witness who had declined to answer certain questions by a subcommittee of the House Un-American Activities Committee. The present investigation concerned communist activities in the Chicago area. The testimony sought to be elicited concerned *former* membership in the Communist Party by persons known to the witness. The witness rested his silence on the ground that he did "not believe that such questions are relevant to the work of this committee nor . . . that this committee has the right to undertake the public exposure of persons because of their past activities." Chief Justice Warren, speaking for the majority of the Court,[59] held that "clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly" and that "the First Amendment may be invoked against infringement of the protected freedoms by law or lawmaking."[60] He exposed the danger that "abuses of the investigative process may imperceptibly lead to the abridgment of protected freedoms"[61] and that this threat was heightened when it is past beliefs, expressions or associations that are inquired into. He stated squarely that "there is no congressional power to expose for the sake of exposure"[62] and emphasized that "protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need."[63] Accordingly, in the relation between a congressional investigating committee and a witness subject to compulsory process, pertinency of the disclosure sought to a defined legislative purpose

57 Quinn v. United States, (1955) 349 U.S. 155, 170; 99 L. Ed. 964, 976.
58 (1957) 354 U.S. 178, 1 L. Ed. 2d 1273.
59 Mr. Justice Clark dissented.
60 (1957) 354 U.S. 178, 197; 1 L. Ed. 2d 1273, 1289.
61 *Ibid.* at 197 and 1289 respectively.
62 *Ibid.* at 200 and 1291 respectively.
63 *Ibid.* at 205 and 1294 respectively.

possesses jurisdictional character, and a witness has a right to proper guidance in that respect either by means of the resolution establishing the committee or by instruction from the committee itself. Since in the circumstances of the case neither the "excessively broad charter" of the House Un-American Activities Committee nor the information given by the Subcommittee Chairman revealed the legislative purpose, the witness in question was not accorded fair opportunity to determine whether he was entitled to remain silent and thus his conviction for contempt violated due process.

Sweezy v. New Hampshire[64] again concerned the constitutional limits of legislative inquiry, but the investigation involved in that case was conducted under the aegis of a State legislature, rather than a house of Congress. The legislature of New Hampshire in 1953 had passed a resolution for the investigation of subversive activities and charged the Attorney-General of the State with the conduct thereof. In the course of this investigation the Attorney-General called the petitioner. He testified at length and denied that he had ever been a member of the Communist Party or participated in a programme to overthrow the government by force or violence. He refused, however, to answer questions relative to activities of his wife and other persons connected with the formation of the Progressive Party and to a lecture given by him in the humanities course at the State university. He took the position that these questions lacked pertinency and transgressed the limitations of the First Amendment as applicable to the State through the medium of the Fourteenth. Conviction for contempt followed. Chief Justice Warren, again speaking for the majority, held that in the circumstances of the case this amounted to a denial of due process. The State legislature was not free to give the Attorney-General a sweeping and uncertain mandate, such as was contained in the basic resolution, and to insulate itself from the witness where his standing in the community might be vitally affected by the information made a matter of public record. In "such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community",[65] control over the information needed could not be left to the unfettered discretion of others than the legislature itself.

As may be deduced from this discussion of the holdings of the Court, the latter as yet has not been inclined to determine unambiguously to what extent the First and the Fourteenth Amendments

64 (1957) 354 U.S. 234, 1 L. Ed. 2d 1311.
65 *Ibid.* at 245 and 1322 respectively.

supplement and enlarge the protection of the Fifth Amendment in entitling the individual to remain silent on matters of political beliefs and activities;[66] but at least it did take a step in this direction. As a result it met with violent censure from those who felt that its decisions exposed to abuse and destruction the very liberties which they were meant to protect.

C. *The "New Fairness" in Law Enforcement.*

The Supreme Court, in its role as guardian of the liberties guaranteed by the Constitution as well as in its task of "judicial supervision of the administration of criminal justice in the federal courts",[67] for a considerable time has shown a mounting preoccupation with the standards of fairness to be observed in the apprehension and conviction of criminals. In battling against lawless law-enforcement the tribunal has embarked upon a decisional course which in responsible quarters, including members of the highest bench itself, has been decried as unrealistic, impracticable, and amounting to an unwarranted boon for the guilty.

One source of this dissatisfaction has been the uncompromising adherence to the rule that evidence obtained by federal agents in disregard of the requisite standards is subject to suppression and that a conviction based thereon cannot stand. Thus any slip-up by federal police or other law-enforcement officers in tracking down a criminal will result, by necessity, in the latter's going scot-free. This applies especially to incriminating evidence secured neither in execution of a properly issued search warrant nor in conjunction with a completely impeccable arrest.[68]

Examples of the recent trend of insistence upon a rigid compliance with the governing formalities are *Miller v. United States*[69] and

66 In Ullmann v. United States, (1956) 350 U.S. 422, 100 L. Ed. 511, the Court had held that the privilege against self-incrimination of the Fifth Amendment did not entitle a witness in a federal grand jury investigation not to answer questions with respect to his or other persons' membership in the Communist Party, where under the Immunity Act of 1954 such witness could claim immunity from criminal prosecution based upon evidence so divulged. The rights given by the First Amendment were not discussed by the Court since the petitioner had not relied thereon in the contempt proceedings. Justices Douglas and Black emphatically dissented on the ground that the "privilege of silence" could not be replaced by a partial and vague immunity such as freedom from criminal prosecution.

67 McNabb v. United States, (1943) 318 U.S. 332, 340; 87 L. Ed. 819, 824.

68 The leading precedent is United States v. Rabinowitz, (1950) 339 U.S. 56, 94 L. Ed. 653.

69 (1958) 357 U.S. 301, 2 L. Ed. 2d 1332.

Giordenello v. United States,[70] both—according to the acid comments of the dissenting justices—entailing undeserved freedom for vicious dope-peddlers. In the first of these two cases federal narcotics agents in the District of Columbia had supplied a co-operative violator of the narcotics laws with marked money and then watched him contacting a middleman who, after taking the bills, proceeded to an apartment and within a short time emerged therefrom with a quantity of heroin. At that stage the agents went to the apartment door and, after knocking and identifying themselves merely as "police", forced their way into the apartment. A search for the incriminating currency uncovered the same in several hiding places and ended in the arrest of the culprit and the seizure of the money. The Court held that this evidence should have been suppressed. The arrest in question was illegal since the officers had executed it by breaking the door without first *adequately* stating their authority and demanding their admission.[71] Hence the search was unlawful, too, and incapable of producing evidence competent to sustain a conviction. The *Giordenello Case* produced a similar outcome upon a slight variation in circumstances. There the incriminating evidence, consisting of a bag of heroin, was held to be illegally obtained on the ground that the arrest-warrant under which the possessor was seized was defective because it was issued without detailed showing that there was probable cause to believe that a violation of the narcotics law had been committed. Three justices dissented, lamenting the excessive formalism.

Other decisions in this area which evoked loud echoes of dissatisfaction and anxiety were two in which the Court practically gave *carte blanche* to the accused to require the federal law-enforcement agencies to disclose the identity of their undercover employees[72] and to permit defendant to inspect the confidential reports in their possession.[73] The first of these cases again involved the conviction of a dope-peddler who had been caught by federal narcotics agents while supplying heroin to an undercover agent. The Court held that the government was not entitled to withhold the identity of an informer, where considerations of fairness, depending on the particular circumstances of each case, required compliance with a demand for disclosure. Since in the case before the Court testimony by the informer might

70 (1958) 357 U.S. 480, 2 L. Ed. 2d 1503.

71 The Court chiefly relied upon celebrated, traditional English precedents for the limitations upon law-enforcement officers in breaking into a dwelling for the purpose of an arrest.

72 Roviaro v. United States, (1957) 353 U.S. 53, 1 L. Ed. 2d 639.

73 Jencks v. United States, (1957) 353 U.S. 657, 1 L. Ed. 2d 1103.

have revealed an entrapment[74] the trial court committed prejudicial error in not honoring the accused's motion for a bill of particulars requesting the true name, address, and occupation of John Doe.

In *Jencks v. the United States*[75] a labour union official was convicted for falsely swearing in an affidavit, executed pursuant to the National Labor Relations Act, that he was not a member of the Communist Party. Government witnesses testified that they had been Communist Party members and officers while acting as undercover agents for the F.B.I. and that they had known defendant as a Party-member and engaged in Party-activities. Defendant requested to inspect the confidential reports by the witnesses for the purpose of a possible impeachment of their testimony. The trial court rejected this motion because no foundation was laid of inconsistency between the testimony at the trial and the contents of the reports. This the Supreme Court held to be error. It declared in unqualified and absolute terms that, short of a fishing expedition, the accused was entitled to inspect the reports to decide whether or not to use them in his defence and that a preliminary showing of conflict between them and the oral testimony was not needed. In criminal cases the government could invoke its evidentiary privilege only at the price of letting the defendant go free. "Justice requires no less."[76]

V. HOW NOW SACRED COW?

In the thoroughfares of American politics the Supreme Court plays very much the role of a sacred cow. It basks in frequently proclaimed public reverence. An atmosphere of calm and gentle pressures, deftly applied, will bring forth the milk of liberty. But there is always the danger that sudden commotion and upheaval will cause the precious liquid to dry up. How then did the tribunal weather the recent storm? Needless to say that the members of the bench outwardly remained aloof and undaunted. An effect, if any, can at best be inferred from their most recent decisions.

As has been discussed already, the Court did not yield one inch from its insistence on prompt progress in the racial desegregation of schools.[77] In other areas of civil liberties the Court likewise did not

74 For recent United States Supreme Court cases on entrapment as defence in narcotics laws violations see Sherman v. United States, (1958) 356 U.S. 369, 2 L. Ed. 2d 848, and Masciale v. United States, (1958) 356 U.S. 386, 2 L. Ed. 2d 859.

75 *Supra,* note 73.

76 Jencks v. United States, (1957) 353 U.S. 657, 669; 1 L. Ed. 2d 1103, 1112.

77 Aaron v. Cooper, *supra* notes 37-41.

retreat discernibly from its recent stands. Thus in *Speiser v. Randall*[78] and *First Unitarian Church v. Los Angeles*[79] the Court invalidated a section of the Revenue and Taxation Code of California which required the claimant, as qualification for any property-tax exemption, to sign a statement on his tax return declaring that he advocated neither the overthrow of the government of the United States or the State by force or violence or other unlawful means nor the support of a foreign government against the United States in the event of hostilities. This declaration was part of a statutory scheme by which California sought to determine whether or not a taxpayer was excluded from certain preferential treatment. It was held "that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition."[80] It followed that the whole statutory procedure, including the test-oath as its first step, had to fall under the constitutional prohibition. Similarly it was held in *Kent v. Dulles*[81] that the Secretary of State lacked power to curtail the constitutional right to travel abroad by the requirement of a non-communist affidavit for the issuance of a passport, at least in the absence of a specific congressional mandate.

On the other hand, however, the Court did show a marked disinclination against progressing further in the irksome direction. Thus its decision in *Lerner v. Casey*[82] sustained the dismissal of a subway conductor in the New York City Transit System, based on the Security Risk Law of New York of 1951, where such public employee, in an investigation of his reliability by the Commissioner of Investigation of the City of New York held in 1954, had refused to answer whether he was *then* a member of the Communist Party. Similarly in *Beilan v. Board of Education of Philadelphia*[83] the Court affirmed even the dismissal by the local authorities of a school teacher although such discharge flowed from his refusal in 1952 to answer questions by the Superintendent as to his activities in the Communist Political Association in 1944 or questions of similar type. Most of all, the Court continued to cling to its traditional position that the privilege against self-incrimination under the Fifth Amendment does not, through the medium of the Fourteenth Amendment, protect against testimonial

78 (1958) 357 U.S. 513, 2 L. Ed. 2d 1460.
79 (1958) 357 U.S. 545, 2 L. Ed. 2d 1484.
80 (1958) 357 U.S. 513, at 528, 529; 2 L. Ed. 2d 1460, at 1474.
81 (1958) 357 U.S. 116, 2 L. Ed. 2d 1204.
82 (1958) 357 U.S. 468, 2 L. Ed. 2d 1423.
83 (1958) 357 U.S. 399, 2 L. Ed. 2d 1414.

compulsion in State proceedings. Accordingly, in *Knapp v. Schweitzer*[84] it upheld the conviction for contempt of a witness who had refused to answer questions propounded to him in an investigation by a New York grand jury into bribery and corruption in labour unions, on the ground that such testimony might incriminate him under federal law. Mr. Justice Frankfurter, speaking for the majority in almost ecstatic language, re-emphasized the doctrine that the Fifth Amendment was intended only as a restraint on the newly organized Federal Government and not as a general declaration of policy against compelling testimony. Hence the adoption of the Fourteenth Amendment did not transfer it to a restraint on the States and "blur the great division of powers between the Federal Government and the individual States in the enforcement of criminal law." That a witness, compelled to testify by a State, may thereby facilitate his amenability to federal prosecution, was "a price to be paid for federalism." Four justices, writing separate opinions, professed reservations against this exegesis.

CONCLUSION.

The foregoing survey demonstrates the range of fundamental and agonizing determinations which the highest court in a federal democracy has been and is compelled to make in days of stress and tensions where with it rests the ultimate protection of individual liberties. Perhaps the most distressing feature is the fact that issues such as those discussed have to come at all before the Court. At any rate, since its work commands attention even abroad, a fair understanding of its recent problems should, at least, be essential in the interest of spiritual harmony among equally-minded nations.

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84 (1958) 357 U.S. 371, 2 L. Ed. 2d 1393.

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