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Just the other day Mr. Justice Jackson offered a wry reminder that the experience of the Supreme Court in applying against local authorities the guarantees of free speech—and he might have added the other guarantees of the First Amendment—has been quite brief.

> "This Court's prior decisions, as well as its decisions today, will be searched in vain for clear standards by which it does, or lower courts should, distinguish legitimate speaking from that acknowledged to be outside of constitutional protection. One reason for this absence is that this Court has had little experience in deciding controversies over city control of street meetings. As late as 1922, this Court declared, '. . . neither the Fourteenth Amendment nor any other provision of the Constitution of the United Stated imposes upon the States any restrictions about "freedom of speech." . . .'"[1]

The evolution of the enforcement of First Amendment guarantees under the aegis of the Fourteenth is an interesting study in the throwing up of bridges before and the burning of them behind, characteristic of juridical advance. The protection of property and of liberty of contract had long since been assured under decisions applying the Fourteenth Amendment. The interests of a teacher and of a private school, challenging interference with their pursuits, were well calculated to furnish the span between proprietary and forensic rights.[2] When the span was crossed the newly taken ground provided a new base for advance. Freedom of speech, recognized as a guaranteed interest in the *Gitlow* case,[3] was not less to be preserved when it took the form of religious proselyting;[4] and so, in turn, the protection of forensic religious activity led to the inclusion of religious nonobservance in the flag-salute cases; first, as in *Gitlow,* a recognition of the general right but its rejection in the special case, and then an acceptance by decision itself.[5]

Looking back, it is hard to see how the Court could have done otherwise, how it could have persisted in accepting freedom of contract as a guaranteed liberty without giving equal status to freedom of press and speech,[6] assembly,[7] and religious observance.[8] What does not seem so inevitable is the inclusion

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1. Kunz v. People of State of New York, 340 U.S. 290, 299, 71 Sup. Ct. 312 (1951).
2. Meyer v. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070 (1925).
3. Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).
4. Schneider v. State (Town of Irvington), 308 U.S. 147, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939); Cantwell v. Connecticut, 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940).
5. Minersville School District v. Gobitis, 310 U.S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375 (1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).
6. *E.g.,* Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931); Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066 (1937).
7. De Jonge v. Oregon, 299 U.S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278 (1937); Hague v. C.I.O., 307 U.S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939).
8. See note 5, *supra.*

within the Fourteenth Amendment of the concept of nonestablishment of religion in the sense of forbidding nondiscriminatory aid to religion, where there is no interference with freedom of religious exercise. Whether the First Amendment guarantee against establishment of religion was a peculiarly antinational guarantee, whether none the less by 1868 the principle against public aid had so developed as to become part of a state taxpayer's property interest within the Fourteenth Amendment, or whether the true test is rather the crystallized sentiment of mid-twentieth century, are debatable and debated questions.[9] For purposes of this essay it is only necessary that these questions be asked, not that they be answered.

Whatever the Court may have lacked in temporal seasoning, to revert to Mr. Justice Jackson's reminder, it has supplied in the intensity of its efforts in recent years. It requires no pedantic use of a calculating machine to discover that in the past fifteen years the Fourteenth Amendment has had very little impact on the regulation of economic affairs and very great impact on issues of procedure and civil liberties. In undertaking to consider the subject of civil liberties one must acknowledge at the outset that the term covers a variety of interests. The "liberties of the subject," in the English phrase, are of many kinds. There are energetic liberties,—freedom to speak, to petition, to assemble and to proselyte. There are more passive liberties,—freedom from unwarranted official intrusion, from unreasonable searches and seizures and from official brutality.

Not only do civil liberties differ in their quality. In some cases it is far from clear with which side the interests of civil liberty are to be identified. When an individual is charged with contempt of court because of publicly uttered admonitions to the judge regarding the outcome of a pending case, is the important civil liberty to be found in the privilege of free expression or in the privilege of litigants to enjoy a hearing before triers whose minds are not tampered with by extrajudicial pressures?[10] When an individual is prosecuted for voting frauds under a statute which must be generously construed to cover the offense, is the interest of civil liberty to be found in the integrity of the suffrage or in the protection of an accused against vague definitions of crime?[11] Fidelity to the principle of civil liberties does not supply a ready answer in such cases. Moreover, even in cases where an issue of civil liberties is clearly identifiable, it must be remembered that the issue is likely to be entwined with others in the litigation. There may be questions

9. Everson v. Board of Education, 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947); *cf.* Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 210, 233, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948). See, generally, the symposium on *Religion and the State*, 14 LAW & CONTEMP. PROB. 1 (1949).

10. *Cf.* Bridges v. California, 314 U.S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941); Pennekamp v. Florida, 328 U.S. 331, 66 Sup. Ct. 1029, 90 L. Ed. 1295 (1946).

11. United States v. Classic, 313 U.S. 299, 61 Sup. Ct. 1031, 85 L. Ed. 1368 (1941); United States v. Saylor, 322 U.S. 385, 64 Sup. Ct. 1101, 88 L. Ed. 1341 (1944).

of standing to complain, or of procedural lapses in the presentation in the lower courts.[12] There may be doubts regarding the appropriateness of the subject for judicial review, doubts as to feasible judicial standards or judicial sanctions in what are called "political" controversies.[13] A court may not be serving the cause of liberty under law by overstepping its own bounds in order to keep other departments of government within theirs.

When allowance has been made, however, for these complexities[14] some general views can perhaps be ventured concerning the issues of civil liberties in the Supreme Court. In this essay I shall not undertake a catalogue of decisions but shall address myself to three inquiries suggested by the development which has occurred. First, does the Court apply a double standard in the review of civil liberties questions and the review of other questions? Second, is a double standard justified? Third, how effective can Supreme Court review be?

I

In *McCulloch v. Maryland* Chief Justice Marshall, discussing the weight to be given to a practice of government long acquiesced in, observed that in the case before him "the great principles of liberty are not concerned."[15] A little more than a hundred years later a judge of the Court of Appeals of the District of Columbia was able to say, "It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property."[16] Today the phrase of Chief Justice Marshall has a more contemporary ring than that of Mr. Justice Van Orsdel.

To what extent is it true to say that a double standard has of late been applied? It may be useful to examine, with this question in mind, the operation of certain principles of judicial review in constitutional cases.

Perhaps the most basic postulate of judicial review is that the legislature possesses a generous choice of means. In order to prevent littering of the streets the local authorities may elect to forbid the distribution there of all commercial handbills;[17] but though the end would be better served by the prohibition of noncommercial handbills as well, this further step cannot be

12. See Brandeis, J., concurring, in Whitney v. California, 274 U.S. 357, 379-80, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927).

13. Colegrove v. Green, 328 U.S. 549, 66 Sup. Ct. 1198, 90 L. Ed. 1432 (1946) (Congressional districts); South v. Peters, 339 U.S. 276, 70 Sup. Ct. 641, 94 L. Ed. 834 (1950) (county unit system); *cf.* McDougall v. Green, 335 U.S. 281, 69 Sup. Ct. 1, 93 L. Ed. 3 (1948) (distribution of signers of nominating petition).

14. Elsewhere I have tried to analyze these complexities and the divisions on the Court in resolving them. FREUND, ON UNDERSTANDING THE SUPREME COURT c.1 (1949).

15. 4 Wheat. 316, 401, 4 L. Ed. 579 (1819).

16. Children's Hospital v. Adkins, 284 Fed. 613, 622 (D.C. Cir. 1922), quoted in JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 74 (1941).

17. Valentine v. Chrestensen, 316 U.S. 52, 62 Sup. Ct. 920, 86 L. Ed. 1262 (1942).

taken.[18] A legislature may outlaw some edibles and potables which are innocuous in themselves, as a matter of administrative convenience in suppressing what is objectionable;[19] yet such marginal enforcement in the realm of publications will not be permitted.[20] On the principle that, in Mr. Justice Brandeis' words, sunlight is the most powerful of all disinfectants, a legislature may require registration, with its attendant publicity, as a means of protecting consumers or investors;[21] yet registration of solicitors for labor unions may not be required as a condition of making a general appeal on behalf of trade unionism.[22]

Nothing is better settled than that the courts will not inquire into the motives of the legislature, and that a rate of taxation graduated according to size or volume is legitimate;[23] yet the circumstances of a Louisiana graduated tax on newspapers make it suspect and impel the Court to strike it down.[24] The courts do not sit to retry facts found by administrative tribunals where rights of property are involved;[25] it is not difficult to discover less deference to the administrative findings in cases touching human freedom.[26] The canons of statutory construction are sufficiently accordion-like to permit an expansive or a contracting view of legislative coverage in the light of the interests affected; one view for dangerous drugs,[27] another for questionable literature.[28] The same fluidity permits the inference of legislative ratification of administrative action to be drawn or to be rejected in the name of a presumption of greater solicitude on the part of the legislature for basic human freedoms.[29] Administrative remedies must be exhausted before a deprivation of rights can be claimed, lest the complainant cry before he is hurt, and there is no presumption that the administrator will abuse his discretion;[30] but

18. Lovell v. City of Griffin, 303 U.S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938).
19. Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184 (1912) (near-beer).
20. Winters v. New York, 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948) (crime magazines).
21. *See* Electric Bond & Share Co. v. SEC, 303 U.S. 419, 437-38, 58 Sup. Ct. 678, 82 L. Ed. 936 (1938).
22. Thomas v. Collins, 323 U.S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945).
23. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 Sup. Ct. 772, 81 L. Ed. 1193 (1937).
24. Grosjean v. American Press Co., 297 U.S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660 (1936).
25. *E.g.*, Federal Trade Commission v. Standard Education Society, 302 U.S. 112, 58 Sup. Ct. 113, 82 L. Ed. 141 (1937); Gray v. Powell, 314 U.S. 402, 62 Sup. Ct. 326, 86 L Ed. 301 (1941); *cf.* Phillips v. Comm'r, 283 U.S. 589, 596-97, 51 Sup. Ct. 608, 75 L. Ed. 1289 (1931); Brandeis, J., concurring, in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 77, 56 Sup. Ct. 720, 80 L. Ed. 1033 (1936) ("The second distinction is between the right to liberty of person and other constitutional rights").
26. *E.g.*, Ng Fung Ho v. White, 259 U.S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938 (1922); Bridges v. Wixon, 326 U.S. 135, 65 Sup. Ct. 1443, 89 L. Ed. 2103 (1945).
27. United States v. Sullivan, 332 U.S. 689, 68 Sup. Ct. 331, 92 L. Ed. 297 (1948).
28. Hannegan v. Esquire, Inc., 327 U.S. 146, 66 Sup. Ct. 456, 90 L. Ed. 586 (1946).
29. *Compare* Brooks v. Dewar, 313 U.S. 354, 61 Sup. Ct. 979, 85 L. Ed. 1399 (1941), *with Ex parte* Endo, 323 U.S. 283, 65 Sup. Ct. 208, 89 L. Ed. 243 (1944).
30. Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 55 Sup. Ct. 7, 79 L. Ed. 259 (1934). *But cf.* Smith v. Cahoon, 283 U.S. 553, 51 Sup. Ct. 582, 75 L. Ed. 1264 (1931).

where large discretion is reposed in an official to grant or withhold a license to speak or assemble, it is unnecessary to try the temper of the administrator before raising a protest in court.[31]

Two items call for more elaborate scrutiny: the doctrines, not infrequently advanced, that in matters of civil liberty a prior restraint is more vulnerable than penalties after the act, and that a law abridging civil liberties is to be judged on its face. Each of these presents complexities beneath the surface.

In ordinary regulation a legislature may, and commonly does, include a variety of sanctions—civil penalties, criminal penalties and injunctions against violation. The antitrust laws and statutory price control are familiar examples. In regulating the liberties of the First Amendment, is the sanction of prior restraint inadmissible? A generation ago an able historian searching the classic legal authorities was able to assert flatly that prior restraints are illegitimate and subsequent punishment is freely available.[32] Chief Justice Hughes in the *Near* case[33] gave the *coup de grace* to the latter part of this proposition while maintaining that there are special objections to prior restraint. It is now clear that if subsequent penalties may constitute abridgments under the First Amendment, it is also true that some forms of prior restraint may be perfectly proper.[34] Both terms of the Blackstonian formula have been qualified.

Certain distinctions commonly drawn between prior restraint and subsequent punishment will not bear analysis. It is sometimes said that prior restraint is the greater deterrent. This generality depends on the psychological aspects of the case. An injunction running against a particular individual may, to be sure, deter him more sharply than the broad command of a criminal statute; but just as possibly the underlying statutory prohibition, whether enforceable by injunction or by criminal sanctions, may have a deterrent effect not varying with the particular sanction employed. It is said, moreover, that there is a difference in the time at which the offense is passed upon, that in the case of prior restraint the offense is judged prospectively while in the case of criminal sanctions it is judged after it has been committed. But the judicial sanction takes its bite after the fact in either case, whether the sanction be fine or imprisonment for criminal violation or fine or imprisonment

31. Schneider v. State (Town of Irvington), 308 U.S. 147, 158-59, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939). If it be suggested that the vice in licensing of speech is the conventional one of excessive delegation of legislative power, it should be remembered that ordinarily the Federal Constitution is deemed not to forbid delegation by a state legislature. Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 Sup. Ct. 549, 81 L. Ed. 835 (1937).

32. 1 MORISON, LIFE OF HARRISON GRAY OTIS 120-21 (1913).

33. Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931).

34. Cox v. New Hampshire, 312 U.S. 569, 61 Sup. Ct. 762, 85 L. Ed. 1049 (1941) (street procession).

for violation of an injunctive or administrative order. In either case the facts of the violation are spread before a judicial tribunal after the event.

Is there then no validity in the conventional contrast between prior restraint and subsequent penalty? Several possible differences do exist. In the first place, the identity of the trier of fact is important. There are two sets of facts to be judged: what may be called facts of coverage (including interpretation and application of the governing standards) and facts of violation. Under an outright criminal law the two coalesce into one stage, determined ordinarily by a jury and at all events according to criminal procedure. Under a licensing or injunctive scheme the one determination is made by an administrative official or by a judge, with review normally by a judge, and the other determination is made by a judge in contempt proceedings or by the processes of criminal law. To the extent that an advisory jury is used by a court at the injunctive stage, the difference between this procedure and the outright criminal sanction on the score of the trier of fact is minimized.

Second, there may be a difference in the clarity and definiteness of the prohibition. On this point, however, no generalization is possible. The injunctive order may in fact be just as clear and definite as a penal statute, particularly if the order is issued with respect to a designated publication. Indeed, an injunctive order in some circumstances may afford greater guidance than a penal statute. Consider, for example, the case of *Valentine v. Chrestensen*.[35] An ordinance forbade the distribution of "commercial" handbills on the streets. The problem facing the prospective distributor was whether a handbill containing commercial matter on one side and matter of general noncommercial interest on the other could be distributed with impunity. The question might be determined in three ways. There might be, in the first place, a criminal prosecution after the event, in which case the distributor would have taken the risk of an erroneous construction. There might be, in the second place, an injunction against distribution. In that case the order would clarify the law before its pinch is felt, and the question could be finally resolved without the risk of punishment for an erroneous prophecy. There might be, in the third place, an injunction by the distributor against criminal prosecution, if a court of equity were willing to assume this jurisdiction. In such a case if the distributor should win he would be protected as he would be under the second alternative. If he should lose, he would have the same authoritative notice with respect to future distribution but the question of interim violations would remain. If his constitutional challenge were a reasonable one, though finally rejected, might it not be possible to enjoin prosecutions for the interim violations in the interest of removing a clog on the process of constitutional adjudication? Something of the kind has been done

35. 316 U.S. 52, 62 Sup. Ct. 920, 86 L. Ed. 1262 (1942).

where a public utility has no means of challenging an order other than violation and exposure to multiple penalties.[36] Of course the utility is under a duty to serve and it may be required to give bond to restore the status quo as a condition of avoiding prosecution for the interim violations. The case of the distributor of leaflets is relegated to a lower level unless it is recognized that the device of a bond to restore the status quo is impractical and that the duty to serve may find an equivalent in the public interest in freedom of expression in marginal cases while the validity of a restraint is being tested. At all events, the double standard here seems to operate in favor of the economic interest unless some such parallel comes to be drawn.

A third difference between prior restraint and subsequent punishment is suggested by this problem of interim violations. Suppose that the individual offender, rather than ultimately losing, eventually prevails on a full hearing of the constitutional issues. In a criminal trial he would of course suffer no punishment. In an injunctive or administrative proceeding, where a restraining order or temporary injunction has been issued against him or a permit withheld, but where a final injunction is ultimately denied or a permit granted, there is the serious problem of penalties for interim violations. If disobedience of the interim order is *ipso facto* contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute. To the extent, however, that local procedure allows such a defense to be raised in a contempt proceeding,[37] the special objection to prior restraint growing out of the problem of interim activity is obviated.

In sum, it will hardly do to place "prior restraint" in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.

A comparable analysis needs to be made in assessing the proposition that a law regulating freedoms guaranteed by the First Amendment is to be judged "on its face." This proposition is on its own face at odds with the established rule that one who challenges a statute must show that it is unconstitutional as applied to him and the circumstances of his case. A departure in civil liberties cases may be thought to derive from the *Thornhill* decision,[38] where the new and special doctrine was announced by Mr. Justice Murphy. No separate opinions were delivered. Nevertheless the pronouncement that statutes interfering with freedom of speech are to be judged on their face

36. Oklahoma Operating Co. v. Love, 252 U.S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596 (1920), per Brandeis, J.

37. *Cf.* Thomas v. Collins, 323 U.S. 516, 524, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945). See Cox, *The Void Order and the Duty to Obey,* 16 U. OF CHI. L. REV. 86 (1948).

38. Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).

was unnecessary to the decision, since so far as appears the picketing in which the defendants were engaged was peaceful picketing of a kind that was itself entitled to constitutional protection. It was therefore unnecessary to consider whether, had the picketing been of another kind, the defendants might still have escaped conviction because the statute made no differentiation in the breadth of its ban.

The problem of an overbroad statute, whether in the field of civil liberties or elsewhere, is really a special case of the problem of vagueness. A statute which is vague and indefinite—which prohibits, for example, "unreasonable prices"—is of course insupportable unless what is indefinite is made definite in advance by authoritative construction.[39] Essentially the same vice inheres in a statute that is overbroad. The terms themselves are not vague; a ban on all picketing is superficially precise. Yet the clarity of its language is delusive, since it will have to be recast in order to separate the constitutional from the unconstitutional applications. If it is read as applicable only where constitutionally so, the reading uncovers the vagueness which is latent in its terms.

The problem, as has been said, is not peculiar to civil liberties cases. A federal statute making it an offense to commit any act that is constitutionally punishable by the national government would presumably be invalid. Indeed, there was substantial doubt about the validity of a civil rights law punishing the deprivation of rights secured by the Constitution, in so far as it was sought to be applied to the evolving rights under the Fourteenth Amendment, even though the conduct of the defendant was so immoral as to constitute homicide.[40] In applying the rule against vagueness or overbroadness something, however, should depend on the moral quality of the conduct. In order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of protection beyond the constitutional periphery, where the statute does not make the boundary clear. The public interest in freedom of expression may serve to invalidate an overbroad statute that casts a cloud on expression both within and without the constitutional boundary.[41]

Can an overbroad statute be saved by construction? If the limiting construction is a relatively simple and natural one it can probably be made to save the statute. A law requiring street parades to be licensed, but containing no standards to govern the grant of a license, appears to be invalid on its face, and yet when the highest court of the state interpreted it to condition the grant or refusal of a license only on the basis of safety and convenience of

39. United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516 (1921); *cf.* Mahler v. Eby, 264 U.S. 32, 44 Sup. Ct. 283, 68 L. Ed. 549 (1924).

40. Screws v. United States, 325 U.S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495 (1945).

41. See Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 HARV. L. REV. 1208 (1948).

traffic, the Supreme Court accepted the limitation and sustained a conviction.[42] If, however, the terms are more at large, and if the true vice in such a case is, as suggested, latent vagueness, it is difficult to see how it can be cured in a given case by a construction in that very case placing valid limits on the statute. The objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact.[43] The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. The latter objection—inadequate guidance to the triers of fact—might be cured by appropriate instructions at the trial stage or on remand under directions from the appellate court.

This analysis of the so-called *Thornhill* doctrine, it must be acknowledged, has not appeared to guide the Court in its treatment of the problem of statutes "void on their face." Despite the *Thornhill* opinion the Court on occasion has remanded a case to the state court for clarification of a statute involving a regulation of civil liberties, and has also considered such a statute in terms of its narrowed construction by the appellate court of the state in the very case.[44]

A spate of current cases is giving the Supreme Court an opportunity to survey further the implications of "prior restraint" and "voidness on its face" in civil liberties issues.

Three cases decided by the Court on January 15 of this year may serve, by a process of triangulation, to mark out more clearly the bounds of proper and improper prior restraint. One case, *Niemotko v. Maryland*,[45] presented prior restraint in its baldest form. The city council of Havre de Grace, Maryland, heard an application of Jehovah's Witnesses to use a public park at a stated time for the purpose of conducting a Bible talk. Without benefit of any ordinance laying down standards of discretion and apparently without any explicit basis for the determination, the city council denied the request. Upon commencement of the meeting without a permit the speaker was arrested and later convicted on a charge of disorderly conduct. The Supreme Court was unanimous in reversing the judgment of conviction. There is nothing surprising about the case except the fact that the Court of Appeals of Maryland had declined to review the conviction on the ground that the issues were not "matters of public interest."

42. Cox v. New Hampshire, 312 U.S. 569, 61 Sup. Ct. 762, 85 L. Ed. 1049 (1941).

43. See Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

44. Musser v. Utah, 333 U.S. 95, 68 Sup. Ct. 397, 92 L. Ed. 562 (1948) (remand); Winters v. New York, 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948) (construction by state court; held invalid nevertheless). In the *Winters* case the Court said: "The interpretation by the Court of Appeals [in this case] puts these words in the statute as definitely as if it had been so amended by the legislature." 333 U.S. at 514.

45. 340 U.S. 268, 71 Sup. Ct. 325 (1951).

At the opposite pole is the case of *Feiner v. New York*.[46] There was involved here no licensing or permit practice or injunctive procedure. The petitioner was convicted of disorderly conduct under the New York penal laws. He had spoken on a sidewalk in Syracuse to a crowd of 75 or 80 people made up of Negroes and white persons who overflowed the sidewalk into the street. His voice was carried through a loud speaker; he was urging his listeners to attend a meeting sponsored by the Young Progressives and in the course of the speech used derogatory but not profane language with reference to the city authorities, President Truman and the American Legion. He urged his listeners to rise up and fight for their rights. Whether he urged them to "rise up in arms" was a matter of some uncertainty in the record, but the lower courts so found. The crowd became restless, there was some movement and excitement in the crowd, a police officer was asked to take action, and after he had requested the petitioner to come down from the speaker's box several times over a space of four or five minutes he arrested the petitioner, who had been talking for half an hour. The conviction was affirmed by the Supreme Court, but not unanimously. Justices Black, Douglas and Minton dissented.

The third and intermediate case, *Kunz v. New York*,[47] is the most difficult of the three and presents some complexities in the problem of prior restraint. The appellant had been granted a permit in 1946 under an ordinance permitting a clergyman to conduct religious services in public places but making it unlawful for any person "to ridicule or denounce any form of religious belief." In November 1946 his permit was revoked after a hearing by the police commissioner; the revocation was based on evidence that he had ridiculed and denounced religious beliefs of others in his meetings. In 1947 and 1948 appellant was refused a permit, and upon his speaking without a permit at Columbus Circle in New York City he was arrested. He was charged with holding a meeting for public worship without a permit, he was convicted, and the conviction was affirmed by a four-to-three decision of the New York Court of Appeals. The Supreme Court reversed the conviction, Mr. Justice Jackson dissenting.

The precise scope of the decision is not entirely clear from the opinion of the Court delivered by Chief Justice Vinson. In particular, it is not clear whether a prior restraint, at least where it is not based on considerations of time and place, is *ipso facto* invalid. At one point the Chief Justice states: "We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly

46. 340 U.S. 315, 71 Sup. Ct. 303 (1951).
47. 340 U.S. 290, 71 Sup. Ct. 312 (1951).

invalid as a prior restraint on the exercise of First Amendment rights."[48] At the close of the opinion a somewhat narrower formulation is announced: "It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."[49] On the facts of the case, it will be observed, neither the revocation of the permit nor the refusal to grant a new one was based on any express standards in the ordinance. Apparently the ordinance was construed to authorize revocation where the permit holder did in fact denounce or ridicule a form of religious belief. If a further step in construction could be taken and the ordinance interpreted to authorize withholding of a permit where such conduct had previously or recently occurred on the part of the applicant, there would remain the serious question whether such a standard is adequate as a basis for suppressing speech in a public place. It appeared in fact that the appellant prior to the revocation had used inflammatory language of a kind calculated to arouse disorderly conduct on the part of admirers as well as of the objects of the abuse. It is in reliance on that evidence that Mr. Justice Jackson would have affirmed the conviction. He regards the opinion of the majority as holding that such speeches "are within [appellant's] constitutional freedom and therefore New York City has no power to require a permit."[50] And again: "This Court today initiates the doctrine that language such as this, in the environment of the street meeting, is immune from prior municipal control."[51] Quite possibly Mr. Justice Jackson gives too much breadth to the prevailing opinion. In any event, it is hard to follow his conclusion that the facts disclosed in 1946 sustain a denial of a permit in 1948 where the hearing on the application in the latter year was not focused by any provision of the ordinance, or by any settled construction, on the issue of the likelihood that the applicant would engage in insulting and abusive talk calculated to stir his hearers to breaches of the peace. Surely we can demand as much direction in an ordinance of this kind as in a statute providing for jurisdiction over nonresidents, where, it has been held, the fact that nonresidents actually received notice does not cure a statute that fails to provide an orderly procedure for giving the notice.[52]

The separate opinion of Mr. Justice Frankfurter, concurring in the result in all three cases, makes it clear that he will not follow any absolute dogma regarding the invalidity of prior restraint. In his judgment the vice in the conviction was that the relevance of the prior facts to the denial of a permit was not defined in advance. In his view the nub of the case was this:

48. *Id.* at 293.
49. *Id.* at 295.
50. *Id.* at 297.
51. *Id.* at 298.
52. Wuchter v. Pizzutti, 276 U.S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446 (1928).

"In the present case, Kunz was not arrested for what he said on the night of arrest, nor because at that time he was disturbing the peace or interfering with traffic. He was arrested because he spoke without a license, and the license was refused because the police commissioner thought it likely on the basis of past performance that Kunz would outrage the religious sensibilities of others. If such had been the supportable finding on the basis of fair standards in safeguarding peace in one of the most populous centers of New York City, this Court would not be justified in upsetting it. It would not be censorship in advance. . . . The situation here disclosed is not, to reiterate, beyond control on the basis of regulation appropriately directed to the evil."[53]

In order to suggest the artificiality of an absolute distinction between prior restraint and subsequent punishment, the following case may serve. Suppose that Kunz had been prosecuted and convicted for breach of the peace in 1946 under the statute and upon facts which were held to support Feiner's conviction. Suppose further that a sentence of thirty days in jail was imposed, but execution suspended on condition that the defendant not engage in street meetings during that period. Would such a condition be unconstitutional as a prior restraint? Perhaps this illustration, in its application to the more general problem of prior restraint, is an attempt to prove the unknown by means of the more unknown—what the logicians call *ignotum per ignotius*. In any event, the use of recent prior misconduct as a ground for enjoining street meetings for a limited future time raises issues comparable to those which have been encountered in the enjoining of picketing where there has been a record of recent violence on the part of the picketers.[54] It need hardly be added that the discussion is in terms of constitutional limits, not necessarily of the wisest method for the localities to adopt within their constitutional power.

It is to be hoped that future cases will not be solved by a facile application of the subsequent-punishment—prior-restraint dichotomy. An order not to circulate a specific publication is different from an order forbidding circulation of a publication not yet composed. An order indefinitely suppressing future issues is different from an order limited in time and coverage. An order forbidding the circulation of a periodical differs from an order forbidding a street meeting. An order forbidding a street meeting because of its sponsorship is different from one forbidding such a meeting because of recently punished or possibly even punishable conduct by the speaker on similar occasions. A law defining appropriate standards governing permits differs from a law which leaves the local authorities at large to find grounds for a denial. If the *Kunz* case is interpreted in this light, the three decisions taken

53. 340 U.S. at 285-86. The phrase "would outrage the religious sensibilities of others" suggests a criterion short of a provocation of breach of the peace by vile or inflammatory language such as was found in the *Feiner* case. Perhaps the passage should be read in the light of the evidence regarding Kunz's previous performances. If the case were that of a sober-minded, soberly-spoken appeal, though spoken outdoors and outraging certain sensibilities (perhaps because of its very "rationalism"), would there be adequate ground for suppression?

54. *Cf.* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 Sup. Ct. 552, 85 L. Ed. 836 (1941).

together will go far to bring greater clarity and order in a field where guidance is needed by speakers, local public officials and the courts.

The issue of "voidness on its face" or overbroadness will doubtless be faced by the Court in the *Dennis* case, which has not been decided at this writing.[55] Whether the Smith Act can be validly applied to officers of the Communist Party even if not to a more trifling organization formed to teach the violent overthrow of the government; if so, whether the clear-and-present-danger test is the limiting criterion and whether the test is for the Congress or the courts; if for the courts, whether that test was in fact applied by the lower courts or a new version formulated in the course of the litigation; if the record gives evidence of a conspiracy to train members in espionage and perjury, whether such evidence is relevant to the offense as defined in the statute and the indictment—these are basic questions in the application of the Smith Act.[56]

In all these cases the Court is called on to weigh the claims of public order and the exhortations of the nonconformist. The task unfortunately cannot be performed by any mechanical device for testing the centripetal and centrifugal forces in our community. For the Court the problem is the fearful one of so measuring the tensions, or so reviewing the measurements made by others, as not to appear absurd in the sight of history.[57]

II

At the threshold of the development which was to bring liberty of speech within the purview of the Fourteenth Amendment a commentator was moved to ask whether the philosophy of judicial tolerance to state social and economic legislation should not also embrace state restrictions on liberty of speech:

> "Courts are upholding such 'social' legislation with increasing sympathy, which is what we wish them to do. The majority opinion in *Lochner v. New York*, the New York bakers' case, seems a long way off. But will not the same kind of argument and

55. Dennis v. United States, No. 336, 1950 Term, *cert. granted*, 340 U.S. 863 (1950); see also *id.* at 887. For opinion below, see 183 F.2d 201 (2d Cir. 1950); and see Williamson v. United States, 184 F.2d 280 (2d Cir. 1950).

56. 62 STAT. 808 (1948), 18 U.S.C.A. § 2385 (1951). Today, as in the English sedition trials of a century and a half ago, one may wonder no more at what men are tried for than at what they are not tried for. *Cf.* Sutherland, *British Trials for Disloyal Association During the French Revolution*, 34 CORN. L.Q. 303, 309 n.14 (1949).

57. Lord Eldon's dire forebodings in 1830 may be recalled: "What is passing is a renewal of a more frightful kind than the prospects of 1791, 2, 3, 4, and 5. The occurrences of those days, involving the Crown as well as the Houses of Parliament, by express mention, in revolutionary projects—the language 'No King'—gave a treasonable character to the proceedings of that era which enabled government to deal with it by law. That is now carefully avoided, and the proceedings of this day are therefore the more difficult to be dealt with. They are, of course, more dangerous. The sacrifice, too, of the Test Act and the passing of the Roman Catholic Emancipation Bill have established a precedent so encouraging to the present attempts at revolution under name of Reform, that he must be a very bold fool who does not tremble at what seems to be fast approaching." Letter to Lord Stowell, quoted in TREVELYAN, LORD GREY OF THE REFORM BILL 206 (1920).

> the same line of thought which upholds a law which restricts a man in the contracts he may make, or limits him in the use to which he may lawfully put his real estate, uphold a law limiting the exercise of his tongue when the majority so wills it?"[58]

A quarter of a century later Judge Learned Hand found it appropriate to commend the late Chief Justice Stone for his resistance to a current of thought which would sweep away, through judicial review, controls on one kind of liberty while leaving almost unimpaired controls on other kinds:

> "Even before Justice Stone became Chief Justice it began to seem as though, when 'personal rights' were in issue, something strangely akin to the discredited attitude towards the Bill of Rights of the old apostles of the institution of property, was regaining recognition. Just why property itself was not a 'personal right' nobody took the time to explain; and perhaps the inquiry would have been regarded as captious and invidious anyway; but the fact remained that in the name of the Bill of Rights the courts were upsetting statutes which were plainly compromises between conflicting interests, each of which had more than a merely plausible support in reason. That looked a good deal as though more specific directions could be found in the lapidary counsels of the Amendments than the successful school had been able to discover, so long as the dispute turned on property. It needed little acquaintance with the robust and loyal character of the Chief Justice to foretell that he would not be content with what to him was an opportunistic reversion at the expense of his conviction as to the powers of a court. He could not understand how the principle which he had all along supported, could mean that, when concerned with interests other than property, the courts should have a wider latitude for enforcing their own predilections, than when they were concerned with property itself."[59]

Is there any ground in reason for treating differently experiments in social and economic legislation and experiements in the control of speech and assembly and religious observances? Judge Hand has done a service in reminding us that these problems as they come before a court do not present a clash of absolutes; legislation, whether it restrains freedom to hire or freedom to speak, is itself an effort at compromise between the claims of the social order and individual freedom, and when the legislative compromise is brought to the judicial test the court stands one step removed from the conflict and its resolution through law. The question of the preferred position of First Amendment freedoms cannot, however, be so easily disposed of. Surely Mr. Justice Frankfurter is right in cautioning against the epithet "preferred position" for those freedoms if the epithet threatens to become a substitute for analysis.[60] And yet there are issues here of political philosophy which call for scrutiny.

During the constitutional crisis of 1937 the acute and pervasive dissatisfaction with the record of the Court on review of experimental economic

58. Goodrich, *Does the Constitution Protect Free Speech?* 19 MICH. L. REV. 487, 500 (1921), reprinted in 2 SEL. ESS. ON CONST. LAW 1068, 1078-79 (1938).

59. L. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COL. L. REV. 696, 698 (1946).

60. Kovacs v. Cooper, 336 U.S. 77, 95, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949) (concurring).

legislation led to suggestions for a reformulation of the Fourteenth Amendment. Senator Borah introduced a resolution for a constitutional amendment which would have limited the due process clause of the Fourteenth Amendment to matters of procedure and added an enumeration of the First Amendment guarantees respecting religion, speech, press and assembly.[61] A notable effort to achieve substantially the same end through interpretation has been made by Mr. Justice Black in his celebrated dissent in the *Adamson* case.[62] Under that suggested view the due process clause would protect liberty and property only against procedural abuses; the guarantees of the first eight Amendments would be read into the privileges and immunities clause of the Fourteenth Amendment and into the Amendment as a whole. The result would be that by a process of textual and historial reasoning the First Amendment freedoms, together with the specified procedural guarantees, would be crystallized, while interests of property would be protected only against arbitrary procedures. This proposal, which has not commanded the support of the Court, is open to very serious historical question insofar as it regards each and every provision of the first eight Amendments as incorporated in the Fourteenth.[63] Moreover it is open to serious objection on other grounds. The concept of liberty in the Fourteenth Amendment is hardly adequate if it is limited to the specific substantive guarantees of the first eight Amendments and to procedural guarantees. How, for example, would the Court justify the safeguard which it has enforced against excessively vague statutes governing conduct? Moreover, the privileges and immunities clause protects only citizens, and the "liberty" guaranteed by the Fourteenth Amendment has been deemed to be the liberty of natural, not artificial, persons.[64] In that view how could associations and corporations be given the protection of freedom of the press, for example, unless some substantive protection is afforded to interests of property?[65] Finally, the position suggested by Mr. Justice

61. S.J. Res. 92, 75th Cong. 1st Sess. (1937): ". . . 'Due process of law' as herein used shall have reference only to the procedure of executive, administrative, or judicial bodies charged with the execution and enforcement of the law.

"SEC. 3. No State shall make or enforce any law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the State or the Government for a redress of grievances."

62. Adamson v. California, 332 U.S. 46, 68-123, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947) (dissenting). See also his earlier concurrence in the separate opinion of Roberts, J., in Hague v. C.I.O., 307 U.S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939), relying on the privileges and immunities clause of the Fourteenth Amendment rather than the due process clause.

63. See the massive study by Professor Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

64. See Stone, J., in Hague v. C.I.O., 307 U.S. 496, 527, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939), and cases there cited.

65. *Cf.* Times-Mirror Co. v. Superior Court, 314 U.S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941). A case like Grosjean v. American Press Co., 297 U.S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660 (1936), might be explained as an application of the equal protection clause to a corporation as a "person." Mr. Justice Black was evidently aware of the difficulty when he joined Mr. Justice Roberts in the *Hague* case, *supra* note 62, in

Black is open to the double objection that it would unduly enlarge the guarantees applicable to the states by including such less fundamental guarantees as the right to a jury in common law civil cases involving over twenty dollars, and at the same time would unduly restrict the development of fundamental rights by imprisoning them in the formulas of the late eighteenth century.[66]

Apart from textual and historical grounds, other reasons have been advanced in support of a preferred position for one set of liberties as compared with another. It has been suggested that legislation restricting liberty of contract is designed to enlarge the effective freedom of one group by limiting the freedom of another, while restrictions on freedom of expression have no such compensating effect.[67] It is true, of course, that some restraints are needed to achieve a larger measure of freedom—in the words of the Harvard commencement citation for degrees in Law, "those wise restraints that make men free." But if the Court is to judge the validity of a restraint by its effect in enlarging the freedom of a group, the way will unfortunately be open for a return to the era of the judicial veto on social legislation. It will hardly do to depend on the judgment of the Court regarding the liberating economic effects, for example, of legislation directed against chain stores or against the closed shop or the open shop. It would be but a short step from the *Social Statics* of Herbert Spencer to the social ecstatics of the judges.

Mr. Justice Cardozo regarded freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom."[68] The primacy of freedom of expression as a fundamental means is elsewhere matched by an insistence that it is the fundamental end, reflecting the nature of man. Mr. Charles Siepmann has put this view succinctly: Liberty of speech "is our passkey to self-expression and to self-discovery. Our claim to it is a manifestation of our claim on life, the claim to influence, and the claim to learn from others. In this sense it is the measure of our hold on life, our grasp of what human as opposed to animal existence can mean."[69]

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concluding that the decree could not run in favor of the incorporated and unincorporated plaintiff associations. These plaintiffs were excluded likewise by the opinion of Mr. Justice Stone, relying on the "liberty" clause; the "property" clause was unavailable in the special circumstance that Federal jurisdiction had to be based on the Civil Rights Act to obviate lack of jurisdictional amount.

66. On the latter ground Murphy and Rutledge, JJ., did not fully join in the dissenting opinion of Mr. Justice Black in the *Adamson* case. See 332 U.S. at 123.

67. Shulman, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech*, 41 YALE L.J. 262, 270-71 (1931), reprinted in 2 SEL. ESS. ON CONST. LAW 1098, 1106 (1938). The article presents an acute comparison of the presumption of constitutionality in liberty of contract and free speech cases, occasioned by two cases decided at the same term: O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 51 Sup. Ct. 130, 75 L. Ed. 324 (1931) and Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931). The cases were decided by the same five-to-four division, upholding the state law in the first and upsetting it in the second.

68. Palko v. Connecticut, 302 U.S. 319, 327, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).

69. SIEPMANN, RADIO, TELEVISION, AND SOCIETY 203 (1950).

A different philosophic grounding for freedom of expression is found in the skepticism of Mr. Justice Holmes. The witticism that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"[70] has brought down on Holmes the heavy thunder of the natural law critics. These critics perhaps make too little allowance for Holmes's jaunty irreverence of speech, his astringent washing-down of flabby moralizing, his delight in shocking the legal bourgeoisie. On occasion, however, he so far forgot his manners as to speak solemnly of freedom of speech and press as "very sacred rights."[71] The skepticism of Holmes furnishes a basis for distinguishing experimentation in the control of ideas from experimentation in the control of physical and economic activity. We can be surer of our aim and the propriety of the means when we deal with food and drugs or even their prices than when we deal with the "poison" of ideas. Official censorship draws a parallel between material and mental poison, between violence to the body and to the spirit. But it would be dangerous to forget that we are here dealing in metaphors.

The philosophic controversy stirred by Mr. Justice Holmes can be avoided. Characteristically, Mr. Justice Brandeis put the matter more narrowly and therefore more acceptably when he qualified the concept of truth for this purpose by the adjective "political." In Anita Whitney's case he said: "Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[72] In this view freedom of expression, whether it reflects skepticism or confidence about the ultimate validity of political ideas, rests on the imperative need for an unfettered process of rational exploration. Freedom of expression is thus a necessary corollary of representative government.[73]

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70. Dissenting in Abrams v. United States, 250 U.S. 616, 630, 40 Sup. Ct. 17, 63 L. Ed. 1173 (1919).

71. Dissenting in United States *ex rel.* Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 438, 41 Sup. Ct. 352, 65 L. Ed. 704 (1921).

72. Concurring in Whitney v. California, 274 U.S. 357, 375, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927).

73. See MEIKLEJOHN, FREE SPEECH 26-27 (1948): "When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." (Italics in original).

This is not to forget how large a part is taken by the irrational in our acts and decisions. But this reminder hardly justifies committing control to those whose irrationality may be more fatal. There is always the haunting question, *Quis custodes custodiet.* Moreover, even those who find irrationality most pervasive do not regard it as all-inclusive; the psychoanalyst relies on his own rationality and even on that of his patient.

Viewed in this light it is possible to place the First Amendment freedoms more confidently in the setting of judicial review. If, as has been suggested above, the court stands one step removed from the clash and compromise of contending interests, its function is basically to keep that process clear and clean. The procedural guarantees of the Bill of Rights define one aspect of this task. We need not torture freedom of expression into the technical category of procedure in order to assimilate it to the procedural guarantees. What is protected is not procedure in a narrow sense but process. Process includes those elements of conscience and expression that go to make up the political flux.

It is of interest, in this connection, to compare another task of the Court, that of maintaining the federal system. In essence this too is the safeguarding of structure and process. Interests are involved in these controversies beyond those of the groups immediately affected—interests of hearers as well as speakers, of a national market as well as the prosperity of a firm. "Ask not for whom the bell tolls; it tolls for thee."

If a double standard has been applied by the Court in judging state legislation affecting economic interests within a state and those transcending a state the explanation may lie here. A striking parallel exists between the treatment of state legislation under the commerce clause and under the Bill of Rights. Regulations affecting interstate commerce will be scrutinized closely for covert motives of hostility; taxes on solicitors, like taxes on newspapers, will be viewed with an eye to history and imputed purpose.[74] The choice of means, so generously granted to the states in matters of local economic control, will be severely limited when the flow of commerce or of ideas is impeded in the interest of health or order and there are available more moderate measures to protect these interests of the state.[75] So far as the role of the Court is concerned, there is more than a verbal likeness between the national market in goods and the free market in ideas. It is in precisely these areas that the Court may seem at times to be acting as a legislative drafting service. If the Court does require a local government to turn square corners when it deals with interstate commerce or trade in ideas it is vindicating its responsibility as the guardian of structure and process.

In a remarkably thoughtful passage, which is particularly relevant to the role of the Court, Paul H. Douglas has said:

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74. *E.g.*, Nippert v. City of Richmond, 327 U.S. 416, 66 Sup. Ct. 586, 90 L. Ed. 760 (1946); *cf.* Grosjean v. American Press Co., 297 U.S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660 (1936). In Murdock v. Pennsylvania, 319 U.S. 105, 63 Sup. Ct. 870, 87 L. Ed. 1292 (1943), invalidating a municipal license fee as applied to distributors of literature of Jehovah's Witnesses, the majority relied upon decisions invalidating license fees for the doing of interstate business. It must be added that the divisions in the Court have not been parallel in the two lines of cases.

75. *E.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 71 Sup. Ct. 295 (1951); *cf.* Saia v. New York, 334 U.S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574 (1948).

"Most young men tend to be impatient with what the lawyers term procedural matters and to be far more interested instead in substantive issues. Only the latter seem to the young to have vitality. But as time passes and a man grows older, it dawns upon him that a great part of our progress has been made through transforming substantive issues of conflict into accepted matters of procedure. For it is in this way the society peacefully disposes of issues which, if not so handled, would tear it apart. May there not be a moral guide for action in this fact?"[76]

III

How effective is Supreme Court review in civil liberties cases? Once again Judge Learned Hand has posed the issue:

"And so to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides.' You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say.

"What will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish."[77]

There is great strength in Judge Hand's position. Regeneration comes from within. Save in special circumstances the restraints which the Constitution forbids are those of public, not private, action.[78] And when the Court has spoken resoundingly, the occasion calling for the vindication of civil liberties has commonly receded into history and the Court has only caught up with a new tide of sentiment. Thus when the *Milligan* decision was announced President Johnson was already prepared to release the victims of martial law;[79] when the *Endo* decision was rendered in 1944 the Federal authorities had announced on the preceding day the termination of the program of detention of loyal citizens of Japanese ancestry.[80] Furthermore, decisions vindicating civil liberties may lose much of their apparent force through evasion on the level of actual practice. While a racial covenant is not enforceable by a court against a willing seller and willing buyer, there are signs that

76. Douglas, *A Possible Method of Dealing with the Closed Shop Issue,* 14 U. OF CHI. L. REV. 386, 398 (1947).

77. L. Hand, *The Contribution of an Independent Judiciary to Civilization,* in THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692-1942 59, 66 (Mass. Bar Ass'n, 1942). And see Curtis, *Due, and Democratic, Process of Law,* 1944 WIS. L. REV. 39.

78. *Cf.* Note, *Applicability of the Fourteenth Amendment to Private Organizations,* 61 HARV. L. REV. 344 (1948).

79. See KLAUS, THE MILLIGAN CASE 41, 43 (1929).

80. *Ex parte* Endo, 323 U.S. 283, 65 Sup. Ct. 208, 89 L. Ed. 243 (1944); see N.Y. TIMES, Dec. 18, 1944, p. 1, col. 2.

discriminatory practices of lending institutions may make extremely difficult the purchase of property on mortgage where such a covenant or equivalent practice is in operation. While Negroes may not systematically be excluded from jury panels, it appears that counsel may exercise their peremptory challenges to achieve the same result.[81] All of these considerations fortify Judge Hand's admonition against placing our trust in judicial enforcement of the Bill of Rights.

And yet there are heavy weights which must be placed on the other side of the scale. Judge Hand has put the dilemma of a people lost beyond redemption or healthy beyond the need of saving. In fact, of course, our situation falls between. The question is not whether the courts can do everything but whether they can do something. Moreover, the cleavage between growth from within and alteration imposed from without is not absolute. Education and the practice of self-improvement may be fostered by judicious judicial intervention. Decisions refusing enforcement of restrictive covenants and forbidding segregation in institutions of higher learning break down barriers that in the past have impeded the process of enlightenment through experience in living.

The Court, furthermore, does more than decide controversies and maintain a balance of governmental powers. It serves as a symbol, and particularly so in the area of civil liberties. When great classic utterances in this field are invoked, the English are apt to call upon Milton and Mill, while we are likely to summon up Holmes and Hughes and Brandeis. Jefferson apart, our preceptors in civil liberties have tended to be judges, whose opinions imponderably but surely influence our course of action far beyond the occasions which have called them forth. Of course the Court does not sit as a symbol or to compose for the anthologies. We accept the Court as a symbol in the measure that, while performing its appointed tasks, it manages at the same time to articulate and rationalize the aspirations reflected in the Constitution. We are able thus to achieve in some measure the legal guarantees of a Bill of Rights and the moral and intellectual qualities of a Declaration of Rights. Indeed, those qualities are vivified by the very necessity of concreteness and accommodation of principles in the test of specific controversy. It is rather idle to speculate whether it would have been better to leave the Bill of Rights virtually without judicial sanction. Conceivably we might have developed something like questions in the House of Commons as an effective substitute. But our history and habits have taken another course, and to conjecture on the responsibility and self-restraint of government had judicial

81. Hall v. United States, 168 F.2d 161 (D.C. Cir. 1948); People v. Roxborough, 307 Mich. 575, 12 N.W.2d 466 (1943), *cert. denied*, 323 U.S. 749 (1944); see 2 VAND. L. REV. 111 (1948); 48 COL. L. REV. 953 (1948); 61 HARV. L. REV. 1455 (1948); REPPY, CIVIL RIGHTS IN THE UNITED STATES 180 (1951).

review not been adopted is less hazardous than to estimate the consequence of a shift in practice after more than a century and a half of accommodation to the tradition of judicial sanctions.[82]

These considerations pro and con are relatively abstract and inconclusive. We need to know more than we do about the effect of judicial decisions on official conduct at the lowest operating level. We ought to encourage studies of the impact of decisions on the drafting of ordinances and regulations and on their administration. We do, however, have some evidence of a positive sort. Thus, after the decision in *Hague v. C.I.O.*,[83] Jersey City revised its ordinance on permits for meetings in public places, producing a fair and carefully drawn plan.[84] No one can read the Proceedings of the National Institute of Municipal Law Officers without being made aware of the preoccupation of those officials with Supreme Court decisions and the problems of draftsmanship and enforcement which they raise. One of the activties of the group is the preparation and distribution of drafts of model ordinances. Significantly, two of these in recent years have related to municipal control of sound trucks and municipal control of comic books, subjects familiar to students of the Supreme Court reports.[85]

This preoccupation with drafting and enforcement at the local level reflects the fact that Supreme Court decisions in this field deal not so much with absolute prohibitions as with questions of standards and methods. In this respect the decisions are quite different from those which in the past stood in the way of such social legislation as minimum-wage and price-fixing laws. The resemblance is rather to the invalidation of taxes or local regulations affecting interstate commerce. The infirmities are curable. Sound trucks may not be subjected to an unfettered licensing power, but may be controlled in respect of time and place and volume.[86] Jehovah's Witnesses may not be subjected to a license tax on the distribution and sale of their literature, but other forms of taxation such as a net income tax or a general property tax are presumably applicable.[87] Jehovah's Witnesses may not be forbidden by

82. See Powell, *Judicial Protection of Civil Rights,* 29 IOWA L. REV. 383, 389-90 (1944).

83. *Supra* note 64.

84. The ordinance, adopted July 6, 1939, designated certain public places, permits to speak at which could be applied for four days in advance and were to be granted unless a prior applicant had preempted the time and place, in which event another of the designated places would be offered. See also 36 CODE FED. REGS. §§ 3.19-3.21 (1949), giving priority to those applicants for permits to speak in public parks in the national capital who seek to answer other scheduled speakers.

85. See NATL. INST. MUN. L. OFFICERS, REP. No. 123 (1948) (municipal control of noise); *id.*, REP. No. 124 (1948) (comic books); *cf. id.*, REP. No. 118 (1947) (peddlers, solicitors and itinerant merchants).

86. *Compare* Kovacs v. Cooper, 336 U.S. 77, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949), *with* Saia v. New York, 334 U.S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574 (1948), 2 VAND. L. REV. 113.

87. *Compare* Watchtower Bible & Tract Soc. v. Los Angeles County, 181 F.2d 739 (9th Cir. 1950), *with* Murdock v. Pennsylvania, 319 U.S. 105, 63 Sup. Ct. 870, 87 L. Ed. 1292 (1943).

ordinance to knock on doors, but presumably an ordinance may make it criminal to do so where the householder has posted a notice.[88] In actuality, therefore, these momentous constitutional cases frequently come down to such details as whether the city fathers may place on receptive householders the burden of posting a welcome or must place on resistent householders the burden of posting a sign of inhospitality. The difference is by no means trivial, but it need not be inflated to the dimensions of irreconcilable principles. One may perhaps be forgiven for suggesting that if the cases were treated in this particularistic light some of the acerbity in the divisions of the Court might be avoided. Mediation might be promoted if there were closer focus on areas of actual agreement; to stress the minuteness rather than the largeness of the issues dividing the Court would not be to lose sight of their significance. Civil liberties, like substantive law itself, frequently inhere in the interstices of procedure and are none the worse for it.

88. *See* Martin v. City of Struthers, 319 U.S. 141, 148, 63 Sup. Ct. 862, 87 L. Ed. 1313 (1943) (making reference to a draft ordinance proposed by the National Institute of Municipal Law Officers).