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RECENT TENDENCIES IN CIVIL LIBERTIES DECISIONS OF THE SUPREME COURT

DAVID FELLMAN

The Interests of the Court

The trend of Supreme Court decisions touching upon civil liberties may be discovered by noting what the Court did during its last term, 1947-48. In many ways the Court's behavior conformed with what may be regarded now as characteristic traits. Many decisions were 5 to 4 and 6 to 3 votes. Many opinions exceeded the five pages to which judges should be restricted on penalty of impeachment. Justice Frankfurter, the prophet of judicial self-restraint, had his say in a large number of cases, whether as author of the majority opinion, a concurring opinion, a dissenting opinion, or a concurrence with or dissent from a concurring opinion and/or a dissenting opinion. And the Court maintained during this term its special talent for sharp language. Here are a few samples. Justice Jackson: "To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops."¹ Chief Justice Vinson: "Criminals do not normally choose to engage in felonious enterprises before an audience of police officials."² Justice Murphy complained that an interpretation of the Fair Labor Standards Act was, among other things, "a pedantically literal reading," and "adherence to formalistic dogmas of interpretation," "in disregard of reality," and he also reminded the majority that the statutory provision under dispute was "not just an exercise in grammar."³ Justice Frankfurter's pithy aphorisms are scattered all through the opinions of the year: "A trial is not a game of blind man's buff;"⁴ "Federal judges are not referees at prizefights but functionaries of justice;"⁵ "We cannot as judges be ignorant of that which is common knowledge to all men;"⁶ "There is a difference be-

¹ Dissenting in *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 387, 68 Sup. Ct. 1, 5 (1947).

² Dissenting in *Trupiano v. United States*, 334 U. S. 699, 715, 68 Sup. Ct. 1229, 1237 (1948).

³ Dissenting in *Morris v. McComb*, 332 U. S. 422, 438, 439, 440, 68 Sup. Ct. 131, 139 (1947).

⁴ Dissenting in *Johnson v. United States*, 333 U. S. 46, 54, 68 Sup. Ct. 391, 395 (1948).

⁵ *Ibid.*

⁶ Dissenting in *Sherrer v. Sherrer*, 334 U. S. 343, 366, 68 Sup. Ct. 1087, 1102 (1948).

tween reading what is and rewriting it;"⁷ "If it takes nine pages to determine the scope of a statute, its meaning can hardly be so clear that he who runs may read, or that even he who reads may read."⁸ Indeed, it is submitted that his dissenting opinion in *Shapiro v. United States*,⁹ a self-incrimination case, reached a new high in judicial invective. To pursue only one line of thought, he used, *inter alia*, the following words and phrases to describe the various parts of the majority opinion: "almost cursory," "literary freewheeling," "finespun exegesis," "singular interpretation," "sophisticated reading," "extraordinary reading," "Pickwickian," "esoteric," "facile treatment," "ready-made catch-phrases," "subtle question-begging," "startling," and "temerarious pronouncement." Life seems to be going on as usual in the marble Grecian temple on the Potomac.

A characteristic of the present Court is the restraint with which it exercises judicial review in dealing with acts of Congress. Since the judicial revolution of 1937 got under way, only one act of Congress has been declared unconstitutional, and it is significant that the case involved a civil liberty.¹⁰ During the past term no federal statute was held invalid. In case after case the Court affirmed the amplitude of federal power. Above all, in a series of notable opinions, the Court gave added breadth and depth to the thrust of the anti-trust laws, and hence to the scope of the commerce power. These cases were concerned with the Cement Institute's multiple basing point delivered price system,¹¹ a price-agreement policy of California sugar refiners,¹² the power and sales practices of motion-picture distributors,¹³ and the impact of patents upon the reach of the anti-trust laws.¹⁴ Orders of the Interstate Commerce Commission¹⁵ and the Federal Trade Commission¹⁶ were also sustained, as well as an extreme application of the Federal Food, Drug and Cosmetic Act of

⁷ Dissenting in *Shapiro v. United States*, 335 U. S. 1, 43, 68 Sup. Ct. 1375, 1397 (1948).

⁸ Dissenting in *United States v. Sullivan*, 332 U. S. 689, 705, 68 Sup. Ct. 331, 340 (1948).

⁹ 335 U. S. 1, 36-70, 68 Sup. Ct. 1375, 1393-1410 (1948).

¹⁰ *United States v. Lovett*, 328 U. S. 303, 66 Sup. Ct. 1073 (1946).

¹¹ *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 68 Sup. Ct. 793 (1948).

¹² *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 68 Sup. Ct. 996 (1948).

¹³ *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 68 Sup. Ct. 915 (1948); *United States v. Griffith*, 334 U. S. 100, 68 Sup. Ct. 941 (1948); *Schine Chain Theatres v. United States*, 334 U. S. 110, 68 Sup. Ct. 947 (1948).

¹⁴ *International Salt Co. v. United States*, 332 U. S. 392, 68 Sup. Ct. 12 (1947); *United States v. Line Material Co.*, 333 U. S. 287, 68 Sup. Ct. 550 (1948); *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 Sup. Ct. 525 (1948).

¹⁵ *Seaboard Air Line R.R. v. Daniel*, 333 U. S. 118, 68 Sup. Ct. 426 (1948); *United States v. B. & O. R.R.*, 333 U. S. 169, 68 Sup. Ct. 494 (1948); *Morris v. McComb*, 332 U. S. 422, 68 Sup. Ct. 131 (1947).

¹⁶ *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 68 Sup. Ct. 822 (1948).

1938,¹⁷ in a variety of situations which further illustrate the broad view which this Court takes of federal power. However, the Government could not¹⁸ induce the Court to overrule the interpretation of the commodities clause of the Interstate Commerce Act advanced in 1936 in the disputed *Elgin* case.¹⁹ Nor would the Court enjoin the United States Steel Corporation and its subsidiaries from purchasing the assets of the largest independent steel fabricator on the West Coast.²⁰ In both cases the vote was 5 to 4.

The Housing and Rent Act of 1947 was sustained as a valid exercise of the war power, a power which "does not necessarily end with the cessation of hostilities."²¹ The power of the government to confiscate the property of enemy aliens in wartime was also reaffirmed.²² However, the Court avoided deciding the constitutionality of the political contributions and expenditures section of the Taft-Hartley law. It gave the legislation such an attenuated interpretation that four concurring justices complained it amounted to an abdication of its function of passing on the validity of legislation.²³

At the same time the Court sustained, during its last term, a wide variety of state laws touching upon foreign and interstate commerce, whether adopted as police²⁴ or tax²⁵ measures. In our constitutional system, the capacity to govern depends, in last analysis, upon what the judges will permit. Since 1937, following a sociological jurisprudence and indulging in habits of self-restraint, the Court has gone out of the business of pitting its judgment against that of Congress and state legislatures as to the wisdom of social and economic legislation. In consequence, there has been "a vast strengthening of the power to govern, on the part of both the nation and the states."²⁶

There was the usual run of cases on various other constitutional questions. In two full faith and credit cases the Court managed to muddy

¹⁷ *United States v. Sullivan*, 332 U. S. 689, 68 Sup. Ct. 331 (1948).

¹⁸ *United States v. South Buffalo Ry.*, 333 U. S. 771, 68 Sup. Ct. 868 (1948).

¹⁹ *United States v. Elgin, J. & E. Ry.*, 298 U. S. 492, 58 Sup. Ct. 841 (1936).

²⁰ *United States v. Columbia Steel Co.*, 334 U. S. 495, 68 Sup. Ct. 1107 (1948).

²¹ *Woods v. Cloyd W. Miller Co.*, 333 U. S. 138, 141, 68 Sup. Ct. 421, 423 (1948).

²² *Silesian American Corp. v. Clark*, 332 U. S. 469, 68 Sup. Ct. 179 (1947).

²³ *United States v. C.I.O.*, 335 U. S. 106, 68 Sup. Ct. 1349 (1948).

²⁴ *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 68 Sup. Ct. 190 (1947); *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 Sup. Ct. 358 (1948).

²⁵ *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U. S. 495, 68 Sup. Ct. 167 (1947); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 Sup. Ct. 1475 (1948); *Toomer v. Witsell*, 334 U. S. 385, 68 Sup. Ct. 1156 (1948); *Central Greyhounds Line v. Mealey*, 334 U. S. 653, 68 Sup. Ct. 1260 (1948).

²⁶ Barnett, *The Supreme Court and the Capacity to Govern*, 63 POL. SCI. Q. 342 (1948).

still further the murky waters of the law dealing with divorces.²⁷ The "brooding omnipresence" of the *Tompkins* rule²⁸ appeared in two interesting decisions.²⁹ In a case touching upon the liability of a federal governmental corporation, the Court added to the citizen's obligation of knowing what is in the United States Statutes at Large the additional responsibility of keeping up with the rules and regulations appearing in the Federal Register.³⁰ In two cases the Court struggled with the question as to what constitutes an advisory opinion.³¹ The War Contracts Renegotiation Act was sustained against the objection that it unconstitutionally delegated legislative power.³² And a claim to exemption from a state inheritance tax of property held in trust by the United States for the benefit of a restricted Osage Indian was rejected.³³

How, then, did the Court spend its time during the past term? The answer is that much of its energy was devoted to the broad field of civil liberties. This is a civil-liberties minded court, and many of its important decisions reflect this interest. This is well illustrated in the *Bob-Lo* case.³⁴ The Court held that the Michigan Civil Rights Act, which requires full and equal accommodations on all public conveyances, applies to the transportation of passengers by boat from Detroit to the city's Coney Island, Bois Blanc Island (commonly referred to as Bob-Lo), which is located in Canadian waters. Here the amusement company refused altogether to carry Negro passengers, and was convicted of violating the state law. A majority of the Court agreed that this transportation is undoubtedly foreign commerce, but that it is also of "highly local concern," since economically and socially the island is an amusement adjunct of Detroit. The case comes within the *Cooley* rule³⁵ therefore, which applies to both interstate and foreign commerce. The main problem before the Court was to explain away *Hall v. De Cuir*,³⁶ decided in 1878, which held that a state may not require equal accommodations in public carriers engaged in inter-

²⁷ *Estin v. Estin*, 334 U. S. 541, 68 Sup. Ct. 1213 (1948); *Sherrer v. Sherrer*, 334 U. S. 343, 68 Sup. 1087 (1948); Note, 34 CORNELL L. Q. 263 (1948).

²⁸ The phrase is that of Judge Charles E. Clark, *State Law in the Federal Courts; The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267 (1946).

²⁹ *King v. Order of United Commercial Travelers*, 333 U. S. 153, 68 Sup. Ct. 488 (1948); *Francis v. Southern Pacific Co.*, 333 U. S. 445, 68 Sup. Ct. 611 (1948).

³⁰ *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 68 Sup. Ct. 1 (1947).

³¹ *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103, 68 Sup. Ct. 431 (1948); *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426, 68 Sup. Ct. 641 (1948).

³² *Lichter v. United States*, 334 U. S. 742, 68 Sup. Ct. 1294 (1948).

³³ *West v. Oklahoma Tax Commission*, 334 U. S. 717, 68 Sup. Ct. 1223 (1948).

³⁴ *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 Sup. Ct. 358 (1948).

³⁵ *Cooley v. Board of Port Wardens*, 12 How. 299 (U. S. 1851).

³⁶ 95 U. S. 485 (1877).

state commerce, and *Morgan v. Virginia*,³⁷ decided in 1946, which held that a state may not constitutionally segregate white and colored passengers on busses moving interstate, this being an undue burden on interstate commerce. Justice Rutledge, speaking for the Court, distinguished these precedents, mainly by emphasizing the degree of localization of this commerce in the *Bob-Lo* case and the fact that it dealt with a complete exclusion from passage. Justice Jackson, with whom the Chief Justice agreed, dissented on the ground that the *De Cuir* and *Morgan* cases have committed the court to the rule that it will not permit local policies to burden national and foreign commerce. Justice Jackson complained that the Court conceded that this commerce is foreign commerce, but upheld the state policy "on the ground that it is not very foreign," and did not lay down any standard by which to judge "when foreign commerce is foreign enough to become free of local regulation." In the absence of criteria, all is left "to case-by-case conjecture," and he tartly remarked: "The commerce clause was intended to promote commerce rather than litigation."

What does all this add up to? It seems to come to this: that a state Jim Crow law is bad, and a state equal rights law is good. Therefore the former is an undue burden on interstate commerce, while the latter is not.

Right to Equal Protection of the Laws

Some of the weightiest decisions of the last term of Court dealt with one of the most fundamental of all civil rights, the right to the equal protection of the laws. Pre-eminent among them are the cases dealing with that species of incorporeal hereditaments known as restrictive covenants. In the *Shelley* case,³⁸ a unanimous Court of six judges held that it is a denial of the equal protection guarantee of the Fourteenth Amendment for a state court to enforce such covenants. This case was a joinder of two actions, one from St. Louis and the other from Detroit, both dealing with covenants barring the sale of real estate to Negroes. It cannot be doubted, the Court declared, that among the civil rights which are protected against discriminatory state action by the Fourteenth Amendment is the right to acquire, enjoy, own and dispose of property. While this Amendment does not inhibit merely private conduct, but only state action, action of state courts is state action. There is state action here in the full and complete sense of the word, and not merely a failure

³⁷ 328 U. S. 373, 66 Sup. Ct. 1050 (1945).

³⁸ *Shelley v. Kraemer*, 334 U. S. 1, 68 Sup. Ct. 836 (1948). The brief of the government, which appeared as *amicus*, has been published: CLARKE AND PERLMAN, *PREJUDICE AND PROPERTY* (Public Affairs Press, Washington, D. C., 1948).

to act, for the state makes available, in the enforcement of these restrictive covenants, "the full coercive power of government." In a companion case,³⁹ the Court held that the federal courts of the District of Columbia may not enforce such covenants running with land in the city of Washington. The Court did not decide the case, however, on the basis of the due process clause of the Fifth Amendment, but preferred to rule that such covenants were forbidden by the first clause of the Civil Rights Act of 1866. But even in the absence of this statute, the Court believed that it would not be "consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts. . . ." A concurring opinion by Justice Frankfurter emphasized this last point, that "equity is rooted in conscience," and that an injunction is always an extraordinary remedy granted, not as a matter of right, but in the exercise of a sound judicial discretion.

Another important decision involving the equal protection of the laws was the *Oklahoma* case⁴⁰ in which a unanimous Court ruled that a Negro is entitled to secure legal education afforded by a state institution, and that the state must provide it as soon as it does so for any other group.

Finally, two very significant decisions involving Japanese aliens and Japanese-Americans in California came up for disposition. In the *Oyama* case,⁴¹ the Court held that the California Alien Land Law, insofar as it prevented an ineligible alien from buying land in behalf of his native-born son, denies that son the equal protection of the laws and one of his privileges as an American citizen. A conveyance to the son, under the statute, is under the handicap of a presumption in favor of escheat to the state which is not true for conveyances to other minor donees in California. The Court refused to say, however, that it is unconstitutional for a state to forbid the ownership of land by ineligible aliens, and thus declined to reexamine the alien land law cases of 1923.⁴² Chief Justice Vinson, speaking for the Court, declared that discrimination between citizens on the basis of their racial descent is not justifiable, and the *Hirabayashi* case⁴³ was explained away as a war measure. Justices Black and Douglas, concurring, preferred the broader ground that the California

³⁹ *Hurd v. Hodge*, 334 U. S. 24, 68 Sup. Ct. 847 (1948); Note, 33 CORNELL L. Q. 293 (1947).

⁴⁰ *Sipuel v. Board of Regents of University of Oklahoma*, 332 U. S. 631, 68 Sup. Ct. 299 (1948).

⁴¹ *Oyama v. California*, 332 U. S. 633, 68 Sup. Ct. 269 (1948).

⁴² *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15 (1923); *Porterfield v. Webb*, 263 U. S. 225, 44 Sup. Ct. 21 (1923); *Webb v. O'Brien*, 263 U. S. 313, 44 Sup. Ct. 112 (1923); *Frick v. Webb*, 263 U. S. 326, 44 Sup. Ct. 115 (1923).

⁴³ *Hirabayashi v. United States*, 320 U. S. 81, 63 Sup. Ct. 1375 (1943).

Alien Land Law violates the equal protection clause of the Fourteenth Amendment and conflicts with federal laws and treaties governing the immigration of aliens and their rights in this country. They drew special attention to our obligations under the United Nations Charter. Justices Murphy and Rutledge also concurred separately, arguing that on its face this statute is unconstitutional, that a state may not legally deny an ineligible alien the right to own agricultural land, and that the Constitution is uncompromisingly opposed to racism in any form. In a masterful analysis of the various arguments commonly resorted to for justification of this sort of legislation, Justice Murphy demonstrated that a rational basis for this discrimination was completely lacking. Justices Reed, Burton and Jackson dissented, all calling attention to the fact that the real issue is whether a state may deny land-ownership to ineligible aliens. It follows that only Vinson and Frankfurter insisted on ducking the real issue, but at least one of their votes was necessary to arrive at any decision in favor of Oyama.

The *Takahashi* case⁴⁴ held unconstitutional a California law prohibiting the issuance of licenses for commercial fishing to ineligible aliens. At last a majority of the Court (seven judges) finally got around to declaring that it does not follow from the fact that in regulating immigration and naturalization Congress makes classifications on the basis of race and color, that a state can adopt one or more of the same classifications to prevent lawfully-admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living. The Court held that the Fourteenth Amendment and a section of the Enforcement Act of 1870, protect "all persons" against this sort of discrimination. The alien land law cases of 1923, "assuming the continued validity of those cases" (an invitation to litigation), are not controlling here, since they rested on reasons "peculiar to real property." Reed and Jackson dissented on the old theory that natural resources are in some special sense the property of the sovereign state, which it may preserve from exploitation by aliens.

Free Speech and Press Cases

There were several free speech and press cases during the past term of Court. By a 5 to 4 vote, the Court ruled, in *Saia v. New York*,⁴⁵ that a city ordinance forbidding the use of sound amplification devices except in the undefined discretion of the Chief of Police, is unconstitutional on

⁴⁴ *Takahashi v. Fish & Game Commission*, 334 U. S. 410, 68 Sup. Ct. 1138 (1948).

⁴⁵ 334 U. S. 558, 68 Sup. Ct. 1148 (1948).

its face, for it establishes a previous restraint on the right of free speech. The plaintiff was a Jehovah Witness. Justice Douglas declared:

"Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning? Must he prove to the satisfaction of that official that his noise will not be annoying to people?"

The state, however, may regulate the noise by regulating decibels, and may control the hours and places of public discussion.

"Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."

Four judges dissented. Justice Frankfurter argued with considerable heat for protection against "aural aggression," and in favor of the right to privacy. In Justice Jackson's view this is not a free speech issue at all; he warned against endangering the great right of free speech "by making it ridiculous and obnoxious."

In *Winters v. New York*⁴⁶ a majority of six held unconstitutional a New York law forbidding the printing or selling of any book, pamphlet, magazine or newspaper which is "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of bloodshed, lust or crime." A New York City bookseller was found guilty of a misdemeanor for selling a magazine called "Headquarters Detective." The Court noted that "the principle of a free press covers distribution as well as publication," and then ruled that even as interpreted by the New York Court of Appeals, the statute was so vague and indefinite as to be contrary to the Fourteenth Amendment. While the Court ordinarily goes far to uphold state statutes that deal with offenses which are difficult to define, this is not true when they involve limitations on free expression. The Court refused to accept the argument that the constitutional protection of a free press applies only to the exposition of ideas, for "the line between the informing and the entertaining is too elusive." Justice Frankfurter wrote a characteristically vigorous dissenting opinion, arguing that the standard of "indefiniteness" is itself indefinite, and complaining that the Court discussed this case only in the abstract, without considering the actual magazine involved. This, he said, is like playing Hamlet without Hamlet.

⁴⁶ 333 U. S. 507, 68 Sup. Ct. 665 (1948).

In *United States v. C.I.O.*,⁴⁷ the Court construed § 304 of the Taft-Hartley Act in such fashion as to hold for the defendant without ruling on its constitutionality. The majority did say, however, that if this statute forbade a union from advising its members, in the regular course of affairs, as to public measures and elections, there would be "the gravest doubt" as to its constitutionality. Four concurring judges said the Court had abdicated its function of passing on the validity of the Act. In their judgment, the Act unconstitutionally limited "the expression of bloc sentiment." In another case, the Court reaffirmed the doctrine first announced in 1904 in *Public Clearing House v. Coyne*,⁴⁸ that Congress may use its postal power to bar the use of the mails for fraudulent purposes, and rejected the argument that recent decisions have undermined the philosophy of that historic precedent.⁴⁹ There is not "the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetuation of swindling schemes." The Court sustained a decree against the big distributors of motion pictures, but made it clear that "we have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."⁵⁰ In a case from Utah, a conviction for the offense of conspiring to counsel and practice polygamy was set aside because, in the Court's judgment, the statute lacked reasonable standards of guilt, and the case was remanded to give the state court a chance to define its scope.⁵¹ Justices Rutledge, Murphy, Douglas thought that since the statute punished mere advocacy, it presented a free speech issue; in a democracy, they thought, people should be free to discuss and advocate polygamy.

In Justice Rutledge's concurring opinion in the *C.I.O.* case there is a good statement of the present Court's basic philosophy concerning freedoms guaranteed by the First Amendment:

"As the Court has declared repeatedly, that [the legislative] judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative

⁴⁷ 335 U. S. 106, 68 Sup. Ct. 1349 (1948).

⁴⁸ 194 U. S. 497, 24 Sup. Ct. 789 (1904).

⁴⁹ *Donaldson v. Read Magazine*, 333 U. S. 178, 68 Sup. Ct. 591 (1948).

⁵⁰ *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166, 68 Sup. Ct. 915, 933 (1948).

⁵¹ *Musser v. Utah*, 333 U. S. 95, 68 Sup. Ct. 397 (1948).

intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly. Hence doubtful intrusions cannot be allowed to stand consistently with the Amendment's command and purpose, nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion in other matters more largely within the legislative province and special competence, obtain."⁵²

And there are, Justice Rutledge added, "corollary principles" which are equally well-settled with regard to First Amendment freedoms:

"These are that statutes restrictive of or purporting to place limits to those freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb, . . . and that the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred signposts to criminality will not suffice to create it."

Religious Freedom

There was one case during the term which squarely raised a major issue of religious freedom. It involved Vashti McCollum's objections to the Champaign, Illinois, school board's program of religious instruction in the public schools on a "released time" basis.⁵³ Under this plan, religious teachers employed by private religious groups were permitted to give religious instruction during the last thirty minutes of the school day in the school buildings to those pupils whose parents had consented in writing, at no public expense. Eight justices agreed to a decree reversing the judgment of the Supreme Court of Illinois, which had sustained the program, but it was almost buried under a welter of opinions. Jackson preferred Frankfurter's to Black's, Frankfurter preferred Frankfurter's to Black's, and Black Black's to Frankfurter's; for good measure, Jackson concurred separately, in the expression of views that no one else seemed to share at the moment. All eight judges agreed, however, that the "released time" plan of religious instruction was a violation of the principle of the separation of church and state embedded in the First Amendment, and made applicable to the states by the Fourteenth. Justice Black

⁵² 335 U. S. 106, 140-42, 68 Sup. Ct. 1349, 1366-67 (1948).

⁵³ *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 68 Sup. Ct. 461 (1948).

denied that the Court's opinion was evidence of hostility to religion. In words which Roger Williams could have written, he declared: ". . . the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Here the state not only allows sectarian groups to use tax-supported public school buildings, but also helps to provide pupils for their religious classes. "This is not separation of Church and State." Returning to a theme which he elaborated in the flag salute cases,⁵⁴ Justice Frankfurter developed a line of thought which is well-summarized in the following sentence: "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects." Justice Jackson doubted whether the Court should have taken jurisdiction at all, expressing the fear that this decision would start a flood of litigations against local school boards. Justice Reed dissented, emphasizing mainly the fact that there are many governmental aids to religion, such as tax exemption, free textbooks, free lunches, and bible-reading. He did not believe that the Constitution forbids "every friendly gesture between church and state." It is difficult to reconcile this case with the New Jersey school-bus case,⁵⁵ though it is interesting to note that the *Everson* case was decided 5 to 4, whereas the vote here was 8 to 1.⁵⁶

There was another case involving Jehovah's Witnesses, in which three of them were denied classification by their draft boards as ministers of religion.⁵⁷ Five judges held that the scope of judicial review to which these men were entitled is extremely limited, and that it was not error for the trial court to refuse to submit the issue of the appropriateness of the classification to the jury. The constitutional right to jury trial does not include the right to have the jury pass on the validity of an administrative order, or to introduce new evidence at the trial. Douglas and Black dissented on the ground that the local boards had no adequate basis for denying these men the classification of minister; Murphy

⁵⁴ *Minersville School District v. Gobitis*, 310 U. S. 586, 60 Sup. Ct. 1010 (1940); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178 (1943).

⁵⁵ *Everson v. Board of Education of Ewing Township*, 330 U. S. 1, 67 Sup. Ct. 504 (1947), Note, 33 CORNELL L. Q. 122.

⁵⁶ The *McCollum* decision was bitterly denounced by the Administrative Board of the National Catholic Welfare Conference in a statement published on November 20, 1948, over the signatures of the four American cardinals and ten archbishops and bishops. They declared that it represented a victory for "doctrinaire secularism," and that it set forth "an entirely novel and ominously extensive interpretation" of the "establishment of religion" clause of the First Amendment. The majority opinions, they asserted, "pay scant attention to logic, history, or accepted norms of legal interpretation."

⁵⁷ *Cox v. United States*, 332 U. S. 442, 68 Sup. Ct. 115 (1947).

and Rutledge dissented on the theory that where a claim to freedom of conscience and religion is involved, there should be allowed a greater measure of judicial review.

Rights of Defendants in Criminal Cases

There were several cases during the term touching upon the right to jury trial. In *Moore v. New York*⁵⁸ a majority of five upheld the conviction of two Negroes for first degree murder by a special or "blue ribbon" jury. It was admitted that in the special jury panel of 150 names, from which this jury was drawn, there were no Negroes. The Court refused to disturb the very recent holding in the *Fay* case,⁵⁹ and held that the fact that there were no Negroes in this panel is not conclusive evidence of unconstitutionality without proof that Negroes were intentionally and systematically excluded. Four justices, speaking through Justice Murphy, protested that the "blue ribbon" jury is tainted by the very fact that it is not chosen from a fair cross-section of the community. This "contradicts the most elementary notions of equal protection." Whether Negroes are systematically and intentionally excluded is, therefore, quite beside the point, since the vice lies in the very concept of "blue ribbon" panels.

A unanimous court set aside the conviction of a Negro in the Circuit Court of Lauderdale County, Mississippi, by an all-white jury, following an indictment by an all-white grand jury.⁶⁰ The evidence showed that, in a county in which over one-third of the population is colored, no Negro had served on any jury for over 30 years. This, the Court thought, was proof enough of systematic exclusion, and in any event, in the face of such a showing, it becomes the duty of the state to show that such exclusion was due to some reason other than racial discrimination.

In a case coming from the District Court of Hawaii, the Court ruled that wherever the Sixth and Seventh Amendments apply, the requirement of unanimity extends to all issues, the nature of the punishment as well as the question of guilt; left to the jury.⁶¹

Michigan's unique "one-man grand jury system," under which the judge may order summary commitment for contempt if, in the course of secret hearings, he believes a witness has given false, evasive or deliber-

⁵⁸ 333 U. S. 565, 68 Sup. Ct. 705 (1948).

⁵⁹ *Fay v. New York*, 332 U. S. 261, 67 Sup. Ct. 1613 (1947), Note, 33 CORNELL L. Q. 272.

⁶⁰ *Patton v. Mississippi*, 332 U. S. 463, 68 Sup. Ct. 184 (1947).

⁶¹ *Andres v. United States*, 333 U. S. 740, 68 Sup. Ct. 880 (1948).

ately contradictory evidence, was held lacking in due process because of the secrecy of the proceedings and the denial of a reasonable opportunity to be heard.⁶² The accused is always entitled to a public trial. Similarly, where one has been convicted of violating § 2 of a criminal statute, and the state supreme court, on appeal, affirms on the ground that the evidence warranted a conviction under § 1, the defendant has been denied due process.⁶³ Clearly, procedural due process means that one has a right to notice of a specific charge, and a chance to be heard in a trial of the issues raised by that charge. But in a New York case, the Court held that where one was indicted for larceny, and pleaded guilty to a reduced charge of attempted larceny, "it would be exaltation of technical precision to an unwarranted degree" to say that the defendant was not given sufficient notice of the charge against him.⁶⁴

There are three civil liberties issues concerning the rights of persons accused of crime which have in recent years been the subject of an immense amount of opinion-writing: self-incrimination, searches and seizures, and the right to counsel. The last term of Court had its full share of cases dealing with these problems.

There were five important right-to-counsel cases. One may be forgiven for hesitating to plunge into this legal thicket, however briefly. The long, complicated series of cases since the *Scottsboro* case in 1932⁶⁵ does not lend itself to a simple and straightforward analysis. One suspects that on this subject the wavering of the Court arises from the fact that on the one hand it believes as a matter of principle that a defendant in a criminal case should ordinarily have a lawyer, while on the other hand it is often appalled at the Pandora's box it has opened in so declaring, for the jails are filled with residents itching to take one more shot at a writ of habeas corpus. In the hard cases of the last term on the right to counsel, three were decided by 5 to 4 votes and two by 6 to 3 votes. Considering the large number of cases the Court has had on this subject since 1932, it is a bit surprising that so much room is still left for basic disagreement.

One of these, *Bute v. Illinois*,⁶⁶ is worth some special attention as to one of its aspects. The main point made in Justice Burton's opinion, for a majority of five, was that due process under the Fourteenth Amendment does not necessarily require in the state courts exactly what the

⁶² *In re Oliver*, 333 U. S. 257, 68 Sup. Ct. 499 (1948).

⁶³ *Cole v. Arkansas*, 333 U. S. 196, 68 Sup. Ct. 514 (1948).

⁶⁴ *Paterno v. Lyons*, 334 U. S. 314, 321, 68 Sup. Ct. 1044, 1047 (1948).

⁶⁵ *Powell v. Alabama*, 287 U. S. 45, 53 Sup. Ct. 55 (1932).

⁶⁶ 333 U. S. 640, 68 Sup. Ct. 763 (1948).

Sixth Amendment requires in the federal courts. On the other hand, Justice Douglas argued that all the provisions of the federal Bill of Rights are applicable in all American courts, state and national, at all times. Whether the Fourteenth Amendment should be regarded as having absorbed all of the provisions of the Bill of Rights is one of the most absorbing subjects of dispute in the present court.⁶⁷ The point was fully debated in 1947 by Justices Frankfurter and Black in the *Adamson* case.⁶⁸ The division in the *Adamson* and *Bute* cases was identical. Justices Black, Douglas, Murphy and Rutledge are committed to the proposition that all of the provisions of the Bill of Rights are included in the Fourteenth Amendment's requirement of due process of law; they need one more vote.

Here are some of the propositions established on the subject of the right to counsel during the last term of Court:

(1) In a noncapital felony case in a state court, due process does not demand that the defendant be given the assistance of counsel unless there are special circumstances showing that without counsel the defendant would not have a fair trial.⁶⁹ It is difficult to discover any rule of reason in Justice Burton's distinction between capital and noncapital cases.

(2) On the other hand: "There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment."⁷⁰

(3) Due process has not been denied if a state judge fails to offer counsel, in a noncapital case, to a defendant who had been a defendant on eight previous occasions, and for whom counsel had twice conducted defenses. It may be presumed that he was aware of his right to counsel and waived it by failing to ask for an appointment.⁷¹

(4) A federal court should not accept a waiver of counsel without being satisfied that the defendant fully comprehends what he is doing.

⁶⁷ Justice Rutledge made a similar argument, at considerable length, in a concurring opinion in *In re Oliver*, 333 U. S. 257, 279-83, 68 Sup. Ct. 499, 510-12 (1948), the case dealing with Michigan's "one-man grand jury."

⁶⁸ *Adamson v. California*, 332 U. S. 46, 67 Sup. Ct. 1672 (1947).

⁶⁹ *Bute v. Illinois*, 333 U. S. 640, 68 Sup. Ct. 763 (1948). Special circumstances requiring counsel in a noncapital case were found in *Townsend v. Burke*, 334 U. S. 736, 68 Sup. Ct. 1252 (1948).

⁷⁰ *Wade v. Mayo*, 334 U. S. 672, 684, 68 Sup. Ct. 1270, 1276 (1948).

⁷¹ *Gryger v. Burke*, 334 U. S. 728, 68 Sup. Ct. 1256 (1948).

The duty of a federal judge to make a thorough inquiry into the matter and to see that this right is given the fullest protection at every stage of the proceedings is a "solemn duty" and not "a mere procedural formality."⁷² Waiver must be intelligent and competent, and there is a "strong presumption against waiver of the constitutional right to counsel," which is not overcome by the fact that in a mere routine inquiry the judge asked a few standard questions.

There were three search and seizure cases during the term, and the defendant won in each. Chief Justice Vinson and Justice Black dissented in all three cases, in two of which Justices Burton and Reed joined them. Justice Jackson wrote two of the three majority opinions. The Court dispelled the notion that an automobile is more vulnerable than other property to search without a warrant.⁷³ That belief is rooted in a misunderstanding of the *Carroll* case.⁷⁴ But even if there is a right of car search without a warrant, that does not include the person of occupants, any more than the right to search a residence confers the right to search all persons found in it. Of course, lawful arrest makes an ensuing search permissible, but the lawfulness of the arrest cannot be made to depend upon what turns up in the search. Nor is an arrest lawful because the defendant did not protest or resist it, for "courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law."

In the absence of exceptional circumstances a search warrant may not be dispensed with. Mere inconvenience to the officers and some slight delay, to prepare papers and present evidence to a magistrate, "are never very convincing reasons," especially when nothing would have been lost if the amenities had been observed.⁷⁵ It is best as a rule to insist that a judicial officer and not a policeman should decide when the right of privacy must reasonably yield to the right of search.

The Court underscored the proposition that "it is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable."⁷⁶ The right to search or seize without a warrant is a strictly limited right, and the mere fact, therefore, of a lawful arrest does not *ipso facto* legalize a search without a warrant.

There were four self-incrimination cases under review. In a case involving an alleged sex offense in Mississippi, a unanimous Court ruled

⁷² *Von Moltke v. Gillies*, 332 U. S. 708, 722, 68 Sup. Ct. 316, 322 (1948).

⁷³ *United States v. Di Re*, 332 U. S. 581, 68 Sup. Ct. 222 (1948).

⁷⁴ *Carroll v. United States*, 267 U. S. 132, 45 Sup. Ct. 280 (1925).

⁷⁵ *Johnson v. United States*, 333 U. S. 10, 68 Sup. Ct. 367 (1948).

⁷⁶ *Trupiano v. United States*, 334 U. S. 699, 705, 68 Sup. Ct. 1229, 1232 (1948).

that in a state criminal proceeding a defendant does not lose the right to contend that a confession was coerced because at some point he testified that a confession had never in fact been made.⁷⁷ As for the other cases, a conviction was set aside in one by a 5 to 4 vote,⁷⁸ and the defendant lost in the other two by votes of 5 to 4 and 5 to 3.⁷⁹ The majority ruled:

(1) Where a Negro boy of 15 makes a confession after questioning from midnight to 5 A.M., without counsel or any other kind of assistance, a court will scrutinize the record with special care. In this case, though he concurred in the judgment, Justice Frankfurter found it necessary to append an essay on judicial humility, because due process is such a "gossamer concept." He finally lifted the burden on his conscience by concluding that what happened in this case was in conflict "with deeply rooted feelings of the community." It followed therefore, in his judgment, that he was making no subjective judgment; he was applying an objective standard.⁸⁰

(2) The United States Supreme Court should go slow in reversing a deliberate judgment of the state courts on a question of the validity of a confession, for such a judgment is presumptively valid and should not be set aside on review unless patently arbitrary.⁸¹

(3) A statutory immunity from prosecution written into the Emergency Price Control Act was very strictly construed by a narrow majority to go no farther than the constitutional immunity itself. The Court went on to make the very questionable ruling that all records and documents required by any valid regulatory law are public documents, as to which no constitutional privilege against self-incrimination attaches.⁸²

Habeas Corpus Procedure

The Supreme Court ruled that a Circuit Court of Appeals has the power to command that a federal prisoner be brought before it so that he may argue his own appeal in a habeas corpus proceeding, though its power to do so is discretionary, since oral argument on appeal is not an essential ingredient of due process. The Court also held that it was improper for the District Court to dismiss a fourth petition for habeas corpus, which for the first time alleged that the prosecution had know-

⁷⁷ Lee v. Mississippi, 332 U. S. 742, 68 Sup. Ct. 300 (1948).

⁷⁸ Haley v. Ohio, 332 U. S. 596, 68 Sup. Ct. 302 (1948).

⁷⁹ Shapiro v. United States, 335 U. S. 1, 68 Sup. Ct. 1375 (1948); Taylor v. Alabama, 335 U. S. 252, 68 Sup. Ct. 1415 (1948).

⁸⁰ Haley v. Ohio, 332 U. S. 596, 68 Sup. Ct. 302 (1948).

⁸¹ Taylor v. Alabama, 335 U. S. 252, 68 Sup. Ct. 1415 (1948).

⁸² Shapiro v. United States, 335 U. S. 1, 68 Sup. Ct. 1375 (1948).

ingly used false testimony to obtain a conviction, without at least giving him an opportunity to explain why he had not raised the issue previously. Four judges dissented.⁸³

There were also several cases dealing with the difficult procedural issues which are raised in our courts because of our complicated federal system. In one of them the Court ruled that if two courses of action for appeal are available to a defendant who has been convicted in a state trial court, and he has exhausted one of the routes, he has done all he can to secure a determination of his claim by the state courts, and may then apply for habeas corpus in a federal district court.⁸⁴ Furthermore, failure to seek a review in the United States Supreme Court of the state court's denial of habeas corpus does not make it improper for the federal district court to entertain his petition; there is no hard and fast rule that one must go directly to the United States Supreme Court, in view especially of the volume of this Court's business and the fact that writs of certiorari are matters of grace. Generally speaking, habeas corpus procedure must be kept as flexible as possible. The Court brushed aside, as a "discredited fear," the notion that this would give rise to many cases in which a single federal judge will upset the judgments of the highest state courts. For the fiscal years 1943, 1944 and 1945, statistics compiled by the Administrative Office of the United States Courts show that an average of 451 habeas corpus petitions were filed each year in federal district courts by prisoners serving state court sentences, and of these, an average of only six per year resulted in a release of the prisoner. Four judges dissented on the theory that respect for our federal system requires that federal courts interfere with state cases "only in exceptional circumstances."

In connection with these decisions, mention should be made here of the recent revision by Congress of Title 28 of the United States Code,⁸⁵ dealing with the judiciary and judicial procedure, with its new and revised rules of statute law on the subject of habeas corpus. These rules are the product of a great deal of experience in the courts, and should help to prevent the abuse of the writ that some of the judges seem to fear.

Finally, it is worth noting that the Supreme Court interpreted two sections of the federal deportation statutes in favor of the alien parties. Neither case involved a constitutional issue, however, and both decisions were unanimous.⁸⁶

⁸³ Price v. Johnston, 334 U. S. 266, 68 Sup. Ct. 1049 (1948).

⁸⁴ Wade v. Mayo, 334 U. S. 672, 68 Sup. Ct. 1270 (1948).

⁸⁵ Pub. L. No. 773, 80th Cong., 2d Sess. (June 25, 1948). The habeas corpus sections are §§ 2241-55.

⁸⁶ Delgado v. Carmichael, 332 U. S. 388, 68 Sup. Ct. 10 (1947); Tan v. Phelan, 333 U. S. 6, 68 Sup. Ct. 374 (1948).

Conclusions

What conclusions may be drawn from this brief review of the cases decided in the last term of court?

(1) The Supreme Court has been extremely reluctant to use either the Commerce Clause or the Due Process clauses of the Constitution to invalidate state or national regulation of the economy. Here it practises self-restraint. But it makes use of its powers of judicial review freely when civil liberties are at stake. Thus the Court used the Commerce Clause to invalidate the California anti-Okie law in the *Edwards* case,⁸⁷ and the Virginia Jim Crow law in the *Morgan* case;⁸⁸ on the other hand, and still consistently with its civil liberties bent, it sustained the application of Michigan's equal rights law to a phase of foreign commerce in the *Bob-Lo* case.⁸⁹

(2) The debate as to whether the Fourteenth Amendment was designed to embrace all rights guaranteed by the Bill of Rights goes on, and the justices are still divided on this basic question 5 to 4. Five justices still cling to the rule of the *Hurtado*⁹⁰ and *Twining*⁹¹ cases, that only the most fundamental sections of the Bill of Rights, those which, in the words of Justice Cardozo, are "implicit in the concept of ordered liberty,"⁹² should be absorbed into the due process concept. The fact that the minority view would invalidate indictment by information in the states, and revive the grand jury, an almost obsolete institution, may very well be the decisive reason for not overruling the position the Court has always maintained on this important point.

3. The present Court is firmly committed to the proposition that the First Amendment liberties have a preferred place in our constitutional law. It holds that the normal presumption in favor of the constitutionality of legislation does not exist for statutes which on their face invade one of these freedoms, and the "clear and present danger" standard for testing the validity of limitations on these freedoms has been underscored.⁹³ Perhaps the chief feature of the decisions of the last term was the Court's emphasis upon the doctrine that crimes must be defined with

⁸⁷ *Edwards v. California*, 314 U. S. 160, 62 Sup. Ct. 164 (1941).

⁸⁸ *Morgan v. Virginia*, 328 U. S. 373, 66 Sup. Ct. 1050 (1946).

⁸⁹ *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 Sup. Ct. 358 (1948).

⁹⁰ *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111 (1884).

⁹¹ *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 (1908). The point at issue was reargued and the rule reaffirmed in *Adamson v. California*, 332 U. S. 46, 67 Sup. Ct. 1672 (1947).

⁹² *Palko v. Connecticut*, 302 U. S. 319, 325, 58 Sup. Ct. 149, 152 (1937).

⁹³ For a recent criticism of the "clear and present danger" standard by a notable champion of freedom of expression see MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

specificity. It took the view that criminal statutes touching upon First Amendment freedoms must be drawn narrowly, with special care and precision and that legislatures in this area will be held to higher standards of bill-draftsmanship than are normally demanded of them.

(4) The Court has had an usually large number of cases since 1938 dealing with freedom of religion. Most of these cases were brought to the Court by Jehovah's Witnesses. In fact, during the past decade the Court has had to rethink the whole question of freedom of religion. The Witnesses brought only two cases to the Supreme Court during the last term, and neither involved religious freedom as the central issue.⁹⁴ The principal case on this subject was the *McColum* case⁹⁵ which has stirred up an immense amount of public discussion.

(5) The Court has had a very notable series of decisions during the past ten years or so touching upon the equal protection of the laws, and especially various aspects of the problem of racial discrimination. In this area the Court wrote some distinguished opinions last year: in the restricted covenants cases, the California alien land law and commercial fishing cases, the Oklahoma law school case, and the *Bob-Lo* case.⁹⁶

(6) The Court has progressively enlarged the number of subjects falling within the scope of freedom of speech and press. For example, the right to criticize courts has been expanded, and the power of courts to punish through contempt proceedings has been constricted.⁹⁷ Freedom of speech and press include the distribution of pamphlets and leaflets⁹⁸ and peaceful picketing.⁹⁹ Freedom from postal censorship has been underscored.¹⁰⁰ Deportation and denaturalization statutes have been interpreted strictly in favor of the widest possible margins of free discussion and belief.¹⁰¹ Cases on some of these subjects came up in the

⁹⁴ One dealt with loudspeakers, *Saia v. New York*, 334 U. S. 558, 68 Sup. Ct. 1148 (1948), and the other with the scope of judicial review, *Cox v. United States*, 332 U. S. 442, 68 Sup. Ct. 115 (1947).

⁹⁵ *Illinois ex rel. McColum v. Board of Education*, 333 U. S. 203, 68 Sup. Ct. 461 (1948).

⁹⁶ *Shelley v. Kraemer*, 334 U. S. 1, 68 Sup. Ct. 836 (1948); *Hurd v. Hodge*, 334 U. S. 24, 68 Sup. Ct. 847 (1948); *Oyama v. California*, 332 U. S. 633, 68 Sup. Ct. 269 (1948); *Takahashi v. Fish & Game Commission*, 334 U. S. 410, 68 Sup. Ct. 1138 (1948); *Sipuel v. Board of Regents of University of Oklahoma*, 332 U. S. 631, 68 Sup. Ct. 299 (1948); *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 Sup. Ct. 358 (1948).

⁹⁷ *Bridges v. California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941); *Pennekamp v. Florida*, 328 U. S. 331, 66 Sup. Ct. 1029 (1946); *Craig v. Harney*, 331 U. S. 367, 67 Sup. Ct. 1249 (1947).

⁹⁸ *Lovell v. Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1938); *Schneider v. Irvington*, 308 U. S. 147, 60 Sup. Ct. 146 (1939).

⁹⁹ *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1940).

¹⁰⁰ *Hannegan v. Esquire*, 327 U. S. 146, 66 Sup. Ct. 456 (1946).

¹⁰¹ *Bridges v. Wixon*, 326 U. S. 135, 65 Sup. Ct. 1443 (1945); *Schneiderman v. United States*, 320 U. S. 118, 63 Sup. Ct. 1333 (1943); *Baumgartner v. United States*, 322 U. S. 665, 64 Sup. Ct. 1240 (1944).

last term—the New York detective-story magazine case, for example¹⁰²—and to the list as a whole must now be added loudspeakers.¹⁰³

(7) The least satisfactory state of affairs exists in the tangled area of rules dealing with the rights of persons accused of crime. The re-affirmation of the validity of the “blue ribbon” jury system represents a decision which many students of American institutions will deplore.¹⁰⁴ On the other hand, the Court applied once more its now familiar rule that it is unconstitutional for a state intentionally and systematically to exclude Negroes from grand or petit juries.¹⁰⁵ The Michigan “one-man” grand jury system was properly disposed of.¹⁰⁶ Much of the old confusion on such subjects as the right to counsel and freedom from self-incrimination goes on, and the law dealing with searches and seizures, now as always, is a mystery.¹⁰⁷

In the perspective of the decisions of the past decade, three types of cases were missing from last year's output:

(1) There were no cases dealing with direct federal protection of civil rights, as in the *Classic* and *Screws* cases.¹⁰⁸ No new ground was broken by the Supreme Court on this important subject in the last term.

(2) There were no cases growing out of war or the exercises of power by the military authorities, such as those dealing with the Japanese-Americans.¹⁰⁹ Cases testing wartime authority seem to have run out.

(3) There were no cases dealing with the right to vote and with elections. Here the white primary cases have made a notable contribution to American constitutional law.¹¹⁰ It is noteworthy, however, that on April 19, 1948, the Supreme Court denied certiorari in *Rice v. Elmore*,¹¹¹ thus making final the decision of the Fourth Circuit Court of Appeals,¹¹² which held that the Democratic Party of South Carolina is not “a mere private aggregation of individuals, like a country club”

¹⁰² *Winters v. New York*, 333 U. S. 507, 66 Sup. Ct. 665 (1948).

¹⁰³ *Saia v. New York*, 334 U. S. 558, 68 Sup. Ct. 1148 (1948).

¹⁰⁴ *Moore v. New York*, 333 U. S. 565, 68 Sup. Ct. 705 (1948).

¹⁰⁵ *Patton v. Mississippi*, 332 U. S. 463, 68 Sup. Ct. 184 (1947).

¹⁰⁶ *In re Oliver*, 333 U. S. 257, 68 Sup. Ct. 499 (1948).

¹⁰⁷ See PRITCHETT, *THE ROOSEVELT COURT*, c. 6 (1948).

¹⁰⁸ *United States v. Classic*, 313 U. S. 299, 61 Sup. Ct. 1031 (1941); *Screws v. United States*, 325 U. S. 91, 65 Sup. Ct. 1031 (1945). See CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* (1947).

¹⁰⁹ *Hirabayashi v. United States*, 320 U. S. 81, 63 Sup. Ct. 1375 (1943); *Korematsu v. United States*, 323 U. S. 214, 65 Sup. Ct. 193 (1944). See CORWIN, *TOTAL WAR AND THE CONSTITUTION* 91-105 (1947).

¹¹⁰ *United States v. Classic*, 313 U. S. 299, 61 Sup. Ct. 1031 (1941); *Smith v. Allwright*, 321 U. S. 649, 64 Sup. Ct. 757 (1944); *Rice v. Elmore*, 72 F. Supp. 516 (E. D. S. C. 1947), *aff'd*, 165 F. 2d 387 (C. C. A. 4th 1947), *cert. denied*, 333 U. S. 875, 68 Sup. Ct. 905 (1948).

¹¹¹ 333 U. S. 875, 68 Sup. Ct. 905 (1948).

¹¹² 165 F. 2d 387 (C. C. A. 4th 1947).

which may exclude Negroes by club rules, even though the legislature had repealed all statutes dealing with primary elections.¹¹³

It is worth recalling once more than whenever the role of the courts in protecting civil liberties is discussed—and however significant that role may be—it should never be forgotten that the litigation process is a severely limited one, and that there are a great many things in the field of civil liberties that courts will not or cannot do. They cannot, for example, protect academic freedom. Today, as our nation becomes more and more a garrison state, in a world dominated by two superpowers separated by iron and silken curtains, the imperious demands of security exert pressure on many of our most cherished concepts and traditions. And at some critical points, the courts are helpless to intervene. What can the courts do, for example, about the notion of the House Un-American Activities Committee that advocacy of a world state is a subversive activity? Ten years of probing, hearings, frenzied publicity, besmirched reputations, suicides and buffoonery, in connection with this Committee, have not yet ripened into a single Supreme Court opinion. Again: public access to public information is severely circumscribed by the fact that the service departments of the federal government have unlimited powers of labelling information or documents “classified,” the publication of which is a crime under the Espionage Act. The Atomic Energy Commission has similar powers, and the divulgence of its “restricted data” may be punished by life imprisonment or death. The judicial writs do not run in this territory. It is believed that university courses in nuclear physics are getting badly out-of-date: what can the courts do about that? There is a tremendous loyalty purge going on in the public service. Here too the judicial power may not enter. In the arsenal of democracy, recourse to the courts is important and valuable, but it is only one of several major weapons. Concern with what judges do and say should never be permitted to obscure the whole, complicated mosaic of government by the people for freedom.

¹¹³ Early in the current term, however, on October 21, 1948, in *MacDougall v. Green*, 69 Sup. Ct. 1 (1948), the Court refused to hold unconstitutional an Illinois law which decrees that a petition to form a new political party must be signed by at least 25,000 qualified voters, provided that this includes 200 signatures from each of at least 50 counties. It is interesting to recall that the plaintiff, MacDougall, the Progressive Party candidate for Senator, and the defendant Green, the Republican governor, agreed that the statute was unconstitutional, but fortunately for President Truman, the Supreme Court did not feel tied to the views expressed by counsel.