Kentucky Law Journal

Volume 48 | Issue 1 Article 3

1959

The Supreme Court and Individual Liberties Since 1952

Paul A. Porter

The Supreme Court and Individual Liberties Since 1952

By PAUL A. PORTER*

The quiet hall of the Supreme Court of the United States has witnessed many decisive battles in each period of our history. Marshall established the supremacy of the national government. Slavery and Reconstruction were the passionate issues of the Taney and Chase courts. The Hughes era dealt with problems of economic regulation and social welfare. In the last decade, as central government has necessarily added to its responsibilities and mission, the civil and political rights of individuals became dominant. These issues have international significance at a time when conflicting ideologies compete for the uncommitted peoples of the world. A ruthless lust for power and conquest by the communist complex has created an environment of fear, suspicion and insecurity in our land.

Civil liberties, therefore, are now the focus of the Supreme Court's burden in recent years. Deciding these basic constitutional concepts in a period of tension understandably produces emotional reactions of anguish or dismay.

Recently the Chief Justices of the several States criticized the Court for allegedly usurping state authority. The American Bar Association called upon Congress to "remedy" decisions which involve communists (and, incidentally, civil liberties), claiming that these decisions displayed a solicitude toward subversives and thus endanger national security. Bills have been introduced in Congress to repeal particular decisions—almost all in the field of civil rights. Southerners are angry at the Court. They contend that the Court is rewriting the Constitution to accommodate individual members' social views. By contrast, others are critical of the Court for failing consistently to protect individual rights.

* LL.B., University of Kentucky. Attorney, Washington, D.C. Formerly chairman, FCC; Special Ambassador in the Near East.

Too often, many of these critics do not look at facts. I propose that we do just that—examine the Court's recent record on the vital issue of individual rights, and see which criticisms seem justified. The 1952 Term offers a good starting point for the Court's personnel has changed since then.

In 1952, the Court consisted of five members who were Roosevelt appointees and 4 named by Truman. Today, only 4 of these 9 remain. Chief Justice Warren, ex-Governor of California, was appointed to succeed our fellow Kentuckian Fred Vinson. John Marshall Harlan, a longtime member of a New York law firm and a Circuit Judge, replaced Robert H. Jackson, closely identified with the New Deal. William Brennan, member of the Supreme Court of New Jersey, replaced Sherman Minton, former New Deal Senator from Indiana. Charles Evans Whittaker, a lawyer and Judge from Kansas City, took the place of another eminent Kentuckian, Stanley Reed. And Potter Stewart, a youthful member of a distinguished Ohio family, replaced Harold Burton, a former Mayor of Cleveland and Senator from Ohio. After these changes, the Court had a majority appointed by Eisenhower. The dominant figures on the Court, however, remained unchanged since 1952 in the persons of Black, Frankfurter and Douglas, each of whom now looks down from over twenty years of service on the bench. Black and Douglas on the one hand, and Frankfurter on the other, represent the principal philosophical and conceptual differences which have existed on the Court for many years. Frankfurter has stood for an approach to liberty based upon a case to case effort to balance competing interests, while Black and Douglas have most consistently supported, in absolute terms, a preference for the Bill of Rights.

The work of the Court since 1952 occupies sixteen bound volumes. A large percentage of the pages in these volumes deal with individual liberties and we could hardly hope to cover all of this ground in a semester, much less in an hour. I propose to talk here about certain aspects of individual liberties which have been the center of controversy in recent years. Even in these areas it is not possible to survey the cases, but I shall cite some for illustration, without attempting to mention others which are equally important.

While criticism of the Court has been directed at diverse

areas, the two principal targets have been its treatment of racial segregation and internal subversion. I propose to first discuss what the Court has done in the field of segregation. Then we shall consider aspects of the subversive problem—particularly the procedural rights of government employees and the First Amendment rights of accused persons. These areas, where the Court is currently under intense fire, provide a testing ground for assessment of the Court's work in adjudicating citizens' individual liberties.

Segregation

Of all the areas of individual liberties, equal protection of the laws is certainly the most clamorously debated. It is the subject of bitter controversy although in every important case dealing with segregation the Court has been unanimous, a phenomenon in recent years. Indeed, in this year's Little Rock[1] opinion, the *Brown*[2] decision of 1954 was expressly reaffirmed with the concurrence of all of the new members who had not sat in 1954 except for Justice Stewart, not yet sitting.[3]

The Fourteenth Amendment laid down the rule that the States must treat all citizens equally. Subject to this rule, each state could set up any political, educational or social system its people desired. The Southern states chose separation. But the rule of separation was always open to challenge whenever and wherever it produced inequality. Inequality can be of two kinds: tangible—which is measured in physical terms, and intangible, which is as vital as tangible, but must be gauged in terms of psychological and other subjective factors. These cannot be precisely measured. In *Plessy v. Ferguson*,[4] decided in 1896, the question before the Court was whether separate seating in railroad trains was "equal". The Court found there was physical equality. But it was claimed that there was inequality from a social or psychological point of view, because segregation placed Negroes in an inferior status. The Court then rejected this claim with the following comment:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced

[1] Cooper v. Aaron, 358 U. S. 1 (1958).
[2] 347 U. S. 483 (1954).
[3] 358 U.S. 1 (1958).
[4] 163 U.S. 537 (1896).

> separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it...[5]

For many decades after *Plessy*, the Court condoned this ruling without further consideration. In the meantime, the Court gradually began giving a new meaning to "equality" in decisions holding that Negroes were being discriminated against. Discrimination, of course, is unconstitutional even under *Plessy*. In the field of public education, the Court in a series of decisions found that Negroes were not in fact being treated equally, and it therefore held the educational programs to be unconstitutional violations of the "separate but equal" rule of *Plessy*.[6]

In 1954, in the *Brown* case and its companion cases, the Court finally reconsidered the validity of the "separate but equal" rule of *Plessy* as applied, not to railroad seats, but to public schools. There was no discrimination in the sense of the earlier school cases because of findings of fact by the lower courts that the schools' tangible facilities were equal. Only the question of intangible equality was at issue.

In 1895 psychological knowledge was rudimentary. Much has been learned since about the importance of intangible factors affecting motivation, ability to learn and work, financial success, and other important aspects of life. These new facts were crucial to the Court's decision. On this point, I quote what the Court found:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro

[5] Id. at 551.

[6] E.g., McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

> children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[7]

Thus the Court's long series of decisions outlawing discrimination against Negroes culminated in a finding that, at least in education, separation itself has proven to be discrimination, even though the states have attempted to make physical facilities equal.

Is the Court's decision in 1954 hopelessly inconsistent with the principles expressed in *Plessy*? In the narrow sense, the answer must be "yes". The Court in *Brown* rejected all "inconsistent" language in *Plessy*, and there is a marked difference in approach in the two decisions. But *Plessy* did recognize that "separate but equal" was valid only if it actually preserved equality. There was no convincing showing of inequality—tangible or intangible—with respect to railroad seating. But the door was at least theoretically open to such a showing. Moreover, transportation and schools are very different things. Psychological factors play a far larger part in learning than they do in transportation. The Court in *Brown* needed to do no more than decide that, on the basis of different facts and findings, a showing of psychological inequality had been made out which had not been established a half century ago. In short, *Brown* does not really represent a new constitutional principle; it is a case where the plaintiffs proved that, although their schools were apparently equal, the nature of the education received was not, and therefore they had been denied the equal protection of the law.

In my judgment, the segregation cases, however revolutionary in social effect, are not really revolutionary in a constitutional sense. The Court has not rewritten the Constitution; it has merely held, as it has in many other situations, that new facts may give new effect to an old constitutional command. Critics may denounce the social consequences of the holdings, but constitutional scholars have no basis, in my view, for claiming any radical departure from the application of orthodox principles of judicial interpretation.

Subversion: Procedural Rights of Government Employees

The problem of Communism and subversion is almost as emotionally charged as that of segregation. Cases dealing with sub-

[7] Brown v. Board of Education, 347 U.S. 483, 494-95 (1954).

version range over many categories of law. They include labor law, deportation, taxation, free speech and due process. We cannot hope to discuss them all. I shall, therefore, speak of two of the most vital problems which have occasioned substantial litigation before the Court in the field of individual liberties. The first is the procedural rights of alleged subversives as those rights have been challenged in the field of government employment. The second is the First Amendment rights of alleged subversive persons.

In the fall-out of the Second World War, the federal government and some of the state governments undertook programs seeking to insure the "loyalty" of their employees. These programs were aimed at keeping out of government employment those persons who might be deemed disloyal, risky, or otherwise unsuitable from the point of view of security. These programs raised unprecedented problems for the Court. In 1952, I argued the first test of the procedural aspects of the loyalty program to reached the Supreme Court—the case of *Bailey v. Richardson.*[8] I urged the Court to determine the constitutionality of the government's action in discharging an employee named Dorothy Bailey—a discharge which in effect branded her as disloyal to her country —upon hearsay "evidence" from nameless and faceless informers whom she had no opportunity to confront or to answer and despite her testimony under oath that the allegations were false. With one Justice not participating, the Court split four-to-four and the constitutional issue remained unresolved while similar discharges continued unabated.

What has been the course of the Court since the *Bailey* case? Has the passage of seven years brought an authoritative pronouncement as to any aspect of the loyalty program and has the Court afforded any significant procedural rights to persons involved in loyalty programs, state or federal?

With respect to state loyalty programs, the Court has placed two very narrow limitations upon the power to discharge. In *Wieman v. Updegraff,*[9] the Court had before it a loyalty oath which required employees to disaffirm membership in disloyal organizations even if they had no knowledge of the purpose or nature of the organization. The Court held this oath to be arbitr-

[8] 341 U.S. 918 (1952).
[9] 344 U.S. 183 (1952).

ary and a deprivation of due process of law because it indiscriminately classified the innocent along with the "guilty". In a later case, *Slochower v. Board of Higher Education*,[10] a college teacher employed by New York City was discharged on the sole ground that, having been asked by a committee of Congress to state whether or not he was a member of the Communist Party, he refused, upon the Fifth Amendment. Without notice or hearing, he was *automatically* discharged because of his invocation of a federal constitutional right, without more. The Court pointed out that since Slochower's action in relying on the Fifth Amendment could not be taken as a confession of guilt, there was nothing whatever to support the discharge. In other words, the Court held the discharge an arbitrary denial of due process because it lacked any rational basis at all.

But against these narrow decisions on the side of the employee, we find others permitting the states to condemn and discharge employees.

In *Belan v. Board of Education*[11] and *Lerner v. Casey*,[12] the Court upheld in broad terms the power of states to dismiss for refusal to answer questions by state agencies. In *Beilan*, a teacher was discharged for "incompetency" for refusal to answer the school superintendent's questions as to Communist party membership. In *Lerner*, a subway conductor was discharged for "doubtful loyalty" after he refused, on the basis of the Fifth Amendment, to answer a question propounded by a state agency as to whether he was a member of the party. The Court distinguished the *Slochower* case on the ground that it referred only to a discharge based *solely* upon exercise of a federal right in an investigation having nothing to do with the teacher's fitness—an action which could not be taken to evidence anything. The Court left the states free to require answers to questions as to party membership under their own authority, and to draw adverse conclusions from silence, even silence on constitutional grounds.

So much for the state loyalty programs. With respect to the federal loyalty program, the Court since *Bailey* has placed limitations on the applicability of the program by its construction of the governing statutes and internal regulations. In *Peters v.*

[10] 350 U.S. 551 (1956).
[11] 357 U.S. 399 (1958).
[12] 357 U.S. 568 (1958).

Hobby[13] and *Service v. Dulles*,[14] the Court rejected so-called post-audit discharges where the original finding of loyalty was reversed by unauthorized procedure. And in *Cole* v. *Young*,[15] the Court held that the Congress did not intend to apply the loyalty program to non-sensitive government positions. But although persistent efforts continued, the Court could not be induced to decide the more fundamental issue of whether discharges could be based upon secret and undisclosed information and anonymous informers.[16]

On June 1 of this year, the Court decided *Vitarelli v. Seaton*,[17] involving the discharge of an Interior Department employee assigned to teach handicrafts to natives on remote Pacific Islands. Vitarelli was discharged on security grounds because of his alleged association with communists and communist causes. He received a "hearing" at which no witnesses or evidence supported the charges but at which he himself was questioned extensively on his social, political and religious views. He was then fired.

By departmental order, the Secretary of the Interior had previously established certain procedures for use in security cases. Among these were (a) a specific statement of charges; (b) a hearing with reasonable restrictions as to the relevancy, competency and materiality of matters considered; (c) the right to cross-examine any witness offered in support of the charges. Although no statute required these procedures, the Court held that the Secretary was bound by his own regulations, and the Court held further that the wide-ranging examination into Vitarelli's social, political and religious beliefs denied him rights granted by the order, in that neither the regulation concerning the statement of charges nor the requirements for an orderly hearing were observed. The Court said further that while the right of the accused to cross-examination did not give an employee the opportunity to examine confidential informants, not all those who furnished the Department with evidence against Vitarelli were in that status, and therefore this regulation had also been violated. Vitarelli was ordered reinstated.

It will be observed that none of the grounds for the decision

[13] 349 U.S. 331 (1955).
[14] 354 U.S. 363 (1957).
[15] 351 U.S. 536 (1956).
[16] Peters v. Hobby, 349 U.S. 331 (1955).
[17] 79 Sup. Ct. 968 (1959).

touched on the constitutional validity of discharges based upon anonymous informers and other conventional requirements of due process. But in holding that the security hearing board departed from the requirements of a meaningful hearing, when it asked questions as to views on religious and social matters, the Court hinted that there were some substantive limits on inquiries into associations and beliefs. In what is probably the opinion's most significant passage, a footnote, the Court quotes a series of questions on political and social views, and comments:

> It is not apparent how any of the above matters could be material to a consideration of the question whether petitioner's retention in government service would be consistent with national security.

Aside from this footnote dictum, the Court has not yet placed any significant curbs on the loyalty-security program as we have known it. The constitutional issues presented the Court in 1952 still remain undecided.

Free Speech and Subversion

The field of individual rights covers many different matters. Some are of profound importance while others may be less essential in a democracy. A supremely important individual right is the right of political expression guaranteed by the First Amendment. Without this right, our democracy is not a democracy.

The fear of subversion that has gripped our country in the past decade has put great pressure upon the fundamental right of free speech. It is, therefore, to be expected that in the area of free speech, we shall meet the most significant test of the Court's treatment of individual liberties.

Shortly after World War II, when the frustrations of the cold war produced a series of congressional acts in the field, the Supreme Court in a series of decisions placed several restrictions upon the First Amendment rights of alleged subversives and greatly expanded the power of the government to suppress free speech. These decisions, which I shall not discuss because they occurred before 1952, are headed by the *Dennis*[18] case, permitting punishment of advocacy of overthrow of the government by force and violence, and the *Douds*[19] case, in which it was held that

[18] Dennis v. United States, 341 U.S. 494 (1951).
[19] American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

communists could be excluded from posts in labor organizations. For a period after 1952, First Amendment issues remained relatively quiet in the Court. But in 1957 and 1958, a group of cases was decided which appeared to represent a new trend toward increased protection of individual rights.

In *NAACP v. Alabama,*[20] the Court gave broad affirmance to the right of association for political or other purposes. Alabama sought to put the National Association for the Advancement of Colored People out of business by forcing it to reveal the names and addresses of its Alabama agents. The Court found this law to be an invalid interference with the freedom of speech, assembly and association guaranteed by the First Amendment as incorporated in the Fourteenth Amendment. It held that Alabama had demonstrated no sufficient state interest to justify this repression.

That enforced exposure or disclosure may violate First Amendment rights was also recognized in dictum in the Supreme Court's 1957 decisions on legislative investigations, *Watkins v. United States,*[21] *and Sweezy v. New Hampshire.*[22] In *Watkins,* it was held that a labor leader could not be convicted of contempt for refusing to answer questions by the House Committee on Un-American Activities as to persons he knew as members of the Communist Party. The Court held that legislative investigations are subject to the Bill of Rights, but it did not reach the issue whether the Committee could constitutionally ask questions about party membership. It held instead that the questions had not been shown to be pertinent to the subject the Committee was authorized to investigate. In *Sweezy,* New Hampshire attempted to require a teacher to answer questions touching on his teaching in order to determine if he were "subversive". The Court held the questions infringed free speech and were not justified by any legitimate state interest.

Another important free speech case the following year was *Speiser v. Randall.*[23] California gave its World War II veterans a property tax exemption. But as a condition of obtaining this exemption, the state required them to take an oath that they did not advocate the overthrow of the government by violence.

[20] 357 U.S. 449 (1958).
[21] 354 U.S. 178 (1957).
[22] 354 U.S. 234 (1957).
[23] 357 U.S. 513 (1958).

Appellants refused to take the oath, arguing that the requirement was unconstitutional under the First and Fourteenth Amendments.

The Court began by recognizing that a discriminatory tax exemption was necessarily an inhibition on free speech. The California courts had held that the oath referred only to such speech or advocacy as might constitutionally be punished by either the state or the federal government,[24] and the Supreme Court assumed that California might constitutionally deny a tax exemption for conduct which it could punish. But the Court held that the *method* by which tax exemption was denied was unconstitutional. The oath was invalid because it placed an affirmative burden on the taxpayer to show he was not engaging in unlawful speech or advocacy. The Court thought it unfair to require claimants for exemptions in effect to show they do not engage in unlawful activities. The Court concluded as follows:

> [W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.[25]

I have cited the Court's reasoning in the *Speiser* case because that reasoning is of greater significance than what was actually decided. Instead of giving a definite meaning to the First Amendment, a majority of the Court has given it relative one. Whether or not a law restricting freedom of speech is valid depends, under this interpretation, upon a process of balancing the interest in free speech against the interests of the State in suppressing free speech. A similar pattern is found in other free speech cases of the period which do not involve subversion.

Two cases decided some few weeks ago have applied this balancing test in the field of political expression. The result in each case has been to hold that restraints may be imposed upon individual political rights, despite the First Amendment, because the state has an expressed interest in suppression.

In *Barenblatt v. United States*,[26] the Supreme Court was called upon to review the contempt conviction of an instructor at Vassar

[24] 341 U.S. 494 (1951).
[25] Speiser v. Randall, 357 U.S. 513, 528-29 (1958).
[26] 79 Sup. Ct. 1081 (1959).

College who was called before the House Committee on Un-American Activities. Barenblatt was asked whether he was or had ever been a member of the Communist Party. He refused to respond, justifying his refusal by reference to the First Amendment. By a vote of five to four, the Supreme Court held that his refusal could be punished as a crime. While other issues loom important in the case, the First Amendment question was paramount. The Court recognized at the outset that the investigative power of Congress is subject to the First Amendment and that questioning about political activities, such as Communist Party membership, is an infringement of the right of political expression different only in degree from a law punishing such membership. Hence, the Court considered the issue in the case to be whether the invasion of Barenblatt's First Amendment rights was justified. As a guide to decision, the Court laid down this formula:

> Where First Amendment rights are asserted to bar governmental interrigation, resolution of the issue always involves a balancing by the courts of the competing private and public issues at stake in the particular circumstance shown.[27]

In proceeding to balance the interest at stake in Barenblatt's case, the Court declared that Congress has wide power to legislate in the field of Communist activity—a power deriving from the national right of self-preservation. The Communist Party, the Court said, is not an ordinary political party but an organization devoted to the forcible overthrow of the government. Although Barenblatt was employed in the field of education, the Court said that the questions he was asked were not an attempt to control what was being taught at a college but to determine the extent of danger from the Communist Party in this country. And, proceeding to its self-appointed balancing task, the Court majority held that the interest of the United States in self-preservation was greater than Barenblatt's interest in avoiding exposure and consequently restriction of his political activities.

In the case of *Uphaus v. Wyman*,[28] decided the same day, the Court employed a similar approach with reference to the First Amendment and state investigatory power. The Attorney General of New Hampshire, acting as a one-man investigating

[27] Id. at 1093.
[28] 79 Sup. Ct. 1040 (1959).

committee, was probing alleged subversive activities in the state. Uphaus was an official of an organization called World Fellowship which maintained a summer camp in New Hampshire at which visitors gave political talks. He was asked for, and refused to provide, the names of all persons who attended the camp. It was this refusal which New Hampshire punished and which the Supreme Court undertook to consider.

By a five to four vote, the Court held that although the New Hampshire investigation was directly concerned with political activity, i.e., political speeches to a private group, this investigation was justified by the predominant interest of the State. The State, the Court held, could validly inquire whether there were gatherings of suspected subversives within its borders. The majority held that the governmental interest in self-preservation was sufficiently compelling to subordinate free speech and its associated privacy of persons who were guests at the camp.

The *Uphaus* and *Barenblatt* cases put the earlier and very similar *Watkins* and *Sweezy* cases into the shade. Watkins turns out to have been only a decision barring punishment for refusal to answer questions not clearly pertinent to the subject under inquiry. *Sweezy* turns out to have held no more than that an investigation into the field of education may not be conducted where the State has failed to demonstrate or clearly express any legitimate interest justifying the investigation. As soon as the questions are pertinent and the interest of the State is asserted to be that of self-preservation, the *Watkins* and *Sweezy* cases appear to be inapplicable.

It is true that the Court was dealing, not with laws prohibiting speech, but only with exposure of views and associations. But the Court itself has recognized that exposure as such is a direct infringement of First Amendment rights. This was its unanimous holding in the *NAACP* case. We must consider, therefore, that the rule laid down by these cases would be applied to laws against speech as well.

Conclusion

With these conflicting decisions before us, what can we say to the Court's work in the field of individual liberties? In segregation, the Court steadfastly has moved toward granting the Negro equality but it has done so within the established constitutional

framework. With respect to subversives, up to the present time, it has granted virtually no constitutional procedural rights. Some decisions, as we have seen, have properly redressed a miscarriage of justice on technical grounds (which Congress could reverse) but the Court has invoked no significant constitutional restrictions on the procedures employed by the federal government or the states in the so-called loyalty field.

When we turn to the First Amendment rights of political minorities, including suspected communists, we find that the Court has clearly and unmistakably subordinated these rights to the claimed interests of the state whenever the two seem to clash.

If the Court has thus been cautious in evoking constitutional principles in these areas, what is the basis of so much criticism? In the case of segregation, we have a profound disagreement based not primarily on constitutional principles but on social concepts. I do not share the views of such critics but I certainly can understand and sympathize with their concern for the vast social readjustments required to comply with the Court's mandate.

But criticism of the Court's relatively few decisions relating to the rights of subversives is a different matter. These criticisms stem largely from those who feel that persons or groups whom they dislike or suspect, such as alleged subversives, have no rights under our Constitution.

No one complains when a court insists upon a fair trial for the ordinary citizen. But if the court reverses the conviction of an unpopular individual, either because he is thought guilty of political heresy or has committed some loathsome crime, then efforts are made to restrict the court's power or limit its jurisdiction. Some critics apparently feel that rapists or communists should not be tried according to due process principles applicable to other citizens.

Then there are others who contend that the Court has fallen short of enforcing the Bill of Rights in the generous and glorious spirit which is needed for constant revitalization of our liberties. The fact of the matter is that the Court does seem to have limited these liberties, including the most prized one—freedom of speech. These values should be protected unless the government can show in each case a clear and immediate interest in their cur-

tailment. Black and Douglas would maintain that these rights are absolute and that the greater the danger, the more important the Constitution's protection.

In some ways, the Court's treatment of the First Amendment manifests a retreat from the doctrines established by earlier courts. Under the Holmes-Brandeis clear and present danger doctrine, infringements of the First Amendment were not permitted unless the danger to the state from *action* resulting from the exercise of First Amendment rights was so immediate that time for adequate discussion before such action would not be possible.

The Court has now ignored this classic action test. The majority in *Barenblatt* and in *Uphaus* does not even mention this concept. It thus seems to have rejected the Holmes-Brandeis thesis that so long as there is time for discussion, the best democratic weapon against bad ideas is more free speech, out of which the ultimate truth may emerge. And the Court seems to have thus far denied the First Amendment any preferred place in our constitutional scheme. Instead it has now declared that, despite the First Amendment's admonition about "no law", government may restrict political expression whenever the majority believe it desirable, even though there is no showing that any danger of action from the political expression is immediate or even exists. The Court has left the First Amendment to be enforced on an *ad hoc* basis when and if a majority believes that a particular exercise of speech ought to be repressed. In times of tension, this may have the effect of suppressing unpopular or even new ideas.

Criticism of the Supreme Court is of course to be expected. In a democratic society, it should even be encouraged. The Court is after all a human institution. But it is the responsibility, particularly of lawyers, to predicate their comments upon informed analyses and reasoned conclusions. It is morever the duty of all citizens to recognize that the institution of the Court, despite any disagreement with its actions, demands our respect and support. For true liberty reposes in the hearts and minds of our people and the Supreme Court of the United States is freedom's ultimate custodian.