

# Whose Rights? What Danger?

*Our Endangered Rights: The ACLU Report on Civil Liberties Today.*  
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“Years and years and years ago, when I was a boy, when there were wolves in Wales,”<sup>1</sup> when the federal courts were open to plaintiffs and prisoners for the resolution of constitutional issues,<sup>2</sup> before money was speech,<sup>3</sup> before closet socialists in the executive branch nationalized all the government’s information and declared it off limits to the citizenry,<sup>4</sup> before Gonzo legal journalism cleaned up its act and became Critical Legal Studies,<sup>5</sup> before it was decreed that pregnancy is gender-neutral,<sup>6</sup> before the Supreme Court cleared its docket by not hearing argument on why people should be released from unconstitutional confinement,<sup>7</sup> there were civil liberties and civil rights. Now, the liberties and rights are in danger. We must do something.

This book sounds the alarm. “Be disturbed,” it says, “to the extent of a tut and I will thank God for civilization.”<sup>8</sup> I cannot fault the motive spirit

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1. D. THOMAS, *A CHILD’S CHRISTMAS IN WALES* [no pagination] (1959).

2. Compare *Wainwright v. Sykes*, 433 U.S. 72 (1977) (denying federal habeas review of claim that conviction was based on coerced confession where constitutional claim was not raised in state court proceeding) with *Fay v. Noia*, 372 U.S. 391 (1963) (federal habeas appropriate for reviewing conviction based on coerced confession).

3. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), discussed *infra* Part II.

4. See Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1461-71 (1984); *Censorship and Polygraphs: Hearings on H.R. 4681 Before the Subcomm. on Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 26-34 (1984); Federal Polygraph Limitation and Anti-Censorship Act of 1984, H.R. 98-961, 98th Cong., 2d Sess., 130 CONG. REC. 238 (1984) (banning use and enforcement of prepublication review requirements and restricting use of polygraph examinations by federal agencies against their employees).

5. Compare H. THOMPSON, *FEAR AND LOATHING: ON THE CAMPAIGN TRAIL ’72* (1974) with Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) and Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

6. See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

7. See, e.g., *Florida v. Myers*, 104 S. Ct. 1852, 1854 (1984) (summary per curiam reversal of appellate court’s reversal of conviction based on warrantless search of impounded vehicle) (Stevens, J., dissenting), quoted with approval in Remarks of William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, Fifth Circuit Judicial Conference, New Orleans, Louisiana, June 1, 1984 (unpublished speech on file with author).

8. C. FRY, *THE LADY’S NOT FOR BURNING* 13 (1949).

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that produced these essays, for I share the concerns of their authors and respect them and their contributions to the protection of democratic rights.

How did we get to this situation of danger? One expects a report by the American Civil Liberties Union, an organization distinguished by its long history of battling for constitutional rights, to suggest an answer. It barely manages to address the question. Few of the contributors try to put the present danger into the perspective of the ACLU's sixty-plus years of experience, much less into the broader framework of constitutional development since the adoption of the Bill of Rights.

Whose rights are endangered? Here the authors do better. Some of the essays are brilliantly conceived, trenchant, and eloquent. The study of "Sexual Justice" by professors Estrich and Kerr, for example, merits all these appellations.<sup>9</sup> Most of the essays fail, however, to answer this question, preferring to cast about in the political currents of Reaganism and conservative rhetoric to pull out this or that expression of hostility to liberty. There is plenty to catch in those waters, but I shall argue that the bigger fish are elsewhere.

What is the nature of the danger? After all, the Supreme Court has, over the past decade, decided a series of cases upholding what the Court has identified as First Amendment rights against the claims of states and the federal government. Doesn't this consistent course of decision count for anything? Not much, when we look at the cases, but essays on "endangered rights" ought to have addressed a different issue: Why are we seeing a jurisprudence of free speech and press that falters in a double sense, speaking in First Amendment rhetoric while endorsing the rigging of the marketplace of ideas?

What should we do about the danger? ACLU executive director Ira Glasser offers some thoughts,<sup>10</sup> and John Shattuck--legislative director of the ACLU's Washington, D.C. office--reports on civil liberties battles in the Congress.<sup>11</sup> But Mr. Glasser's prescriptions are too general to serve as an agenda for action, and Mr. Shattuck ignores the serious criticism of the ACLU's legislative efforts as too temporizing. This latter criticism from within and without the organization ought to have been addressed head-on in this book.

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9. Estrich & Kerr, *Sexual Justice*, in *OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY* 98 (N. Dorsen ed. 1984) [hereinafter cited as *OUR ENDANGERED RIGHTS*].

10. Glasser, *Making Constitutional Rights Work*, in *OUR ENDANGERED RIGHTS*, *supra* note 9, at 3.

11. Shattuck, *Congress and the Legislative Process*, in *OUR ENDANGERED RIGHTS*, *supra* note 9, at 46.

When reading these essays, I am forcefully reminded of a remark reprinted in one of Professor Dorsen's earlier works, *Frontiers of Civil Liberties*,<sup>12</sup> which I reviewed in this journal sixteen years ago.<sup>13</sup> Caleb Foote said: "The great stoic philosopher Epictetus in one of his writings imagined himself facing a wrestler. The strong man boasted to him 'See my dumbbells,' to which the philosopher impatiently retorted, 'Your dumbbells are your own affair. I desire to see their effect.'"<sup>14</sup> Professor Foote was talking about the practical effects of sweeping Supreme Court declarations of rights. His words could as well apply to the effects of strategies lawyers use in defense of civil liberties.

One hesitates at first to review this book in an academic journal, for the book does not profess to be "academic." For one thing, it doesn't have enough footnotes to feed your average law review staff three solid cite-checking meals a day for even a week. That is no ground for criticism, but it may help in understanding the difficulty of the reviewer's task. When I point to places in these essays where doctrinal or historical analysis is thin, one might respond, "Well, this is not a book for law-trained people; it is designed to alert and instruct all citizens." Such a retort would not be responsive: Lawyers wrote this book, mostly about their own work over the past decade. They have a duty to address the hard questions, if only because doing so may illuminate some faults in their perception of their roles.

Some of my concerns arise from comparing this book to the previous ACLU-sponsored report on civil liberties. In 1971, with Norman Dorsen as editor, Pantheon published *The Rights of Americans*.<sup>15</sup> It was a paean to the Warren Court, an expression of foreboding about the Nixon administration's systematic assaults on freedom of expression, and a worried prediction that the Burger Court would not prove hospitable to claims of constitutional right. In thirty-one essays, authors—most of them lawyers—analyzed the progress of rights-protection in as many different areas. By contrast, this book contains fewer essays on fewer subjects. Professor Dorsen introduces the present volume by reminding us that in 1971, the "confident forward march" towards vindicating civil liberties seemed then "on the verge of disorderly retreat."<sup>16</sup> He had the earlier volume in hand and mind, so one may permissibly express regret that the contributors to this volume did not pay more attention to which of the

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12. N. DORSEN, *FRONTIERS OF CIVIL LIBERTIES* (1968).

13. Tigar, *New Frontiers* (Book Review), 78 *YALE L.J.* 892 (1969).

14. N. DORSEN, *supra* note 12, at 31, quoted in Tigar, *supra* note 13, at 894.

15. *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* (N. Dorsen ed. 1971) (hereinafter cited as *THE RIGHTS OF AMERICANS*).

16. *Id.* at xi. This language also appears in the introduction to *OUR ENDANGERED RIGHTS*, *supra* note 9, at ix.

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predictive and analytical utterances in 1971 have proven to be true. After all, the surest test of a theory—of natural science or of history—is its power to predict consequences.

My introductory thoughts lead me to adopt a certain format for this review. I am going to pretend that I had been asked to write the last essay in the volume, a sort of envoi, or if you prefer, antistrophe. I want to look back over these essays, to gain a perspective on what they fail to tell us.

### I. THE LEGACY OF THE CIVIL RIGHTS AND ANTIWAR MOVEMENTS

Several of the authors look back two decades and remind us of the civil rights and antiwar movements, and of the judicial decisions occasioned by these movements. Professor Neuborne tells us, in a couple of paragraphs, that the Supreme Court has cut back on dissenter access to federal courts.<sup>17</sup> None of these essays does justice to this theme. Yet in *The Rights of Americans*, many authors speculated on just how far the federal courts had really gone in remaking the rules about federal judicial power, and whether we were about to witness a major retrenchment.<sup>18</sup>

The retrenchment has come, and we had best understand it. The civil rights and free speech cases of the 1950's and 1960's were remarkable because they represented a new vision of federalism, of judicial power, and of the meaning of the Civil War amendments. Almost every expansive Supreme Court opinion on these topics broke new ground on all of these fronts, provided only that the party claiming a federal right was somehow involved in the historic struggle to vindicate the promise of *Brown v. Board of Education*.<sup>19</sup> At the same time, it must be noted, claimants without such an involvement did not uniformly fare well against the competing claims of coordinate branches of the federal government or of the states.

I consider the proper starting point of this analysis to be *Dombrowski v. Pfister*,<sup>20</sup> decided in 1965. *Dombrowski* was discussed in *The Rights of Americans*,<sup>21</sup> but not in this volume. The facts are worth recalling. Jim Dombrowski was executive director of the Southern Conference Educational Fund (SCEF). The Louisiana Un-American Activities Committee organized raids, carried out at gunpoint, on the SCEF offices and the homes and law offices of SCEF leaders.<sup>22</sup> Dombrowski, SCEF, and others

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17. Neuborne, *The Supreme Court and the Judicial Process*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 33-35.

18. E.g., Dorsen, *Introduction*, THE RIGHTS OF AMERICANS, *supra* note 15, at xi; Boudin, *The Right to Travel*, in *id.*, at 381, 395-96; Emerson, *The Right to Protest*, in *id.*, at 208, 212.

19. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

20. 380 U.S. 479 (1965), *rev'g* 227 F. Supp. 556 (E.D. La. 1964) (three-judge court).

21. THE RIGHTS OF AMERICANS, *supra* note 15, at 219-20.

22. These raids were much in the mold of the general search condemned in *Stanford v. Texas*, 379 U.S. 476 (1965). The ransack search of Stanford's home was done under a warrant obtained from

sued to restrain this sort of conduct, to get back their papers and books, and to inhibit the state authorities from prosecuting them under the Louisiana version of the Smith Act and Communist Control Act.<sup>23</sup> SCEF and its officers also sued to prevent the Louisiana authorities from transferring the seized records to Senator James Eastland of Mississippi, who had subpoenaed them for use by the Senate Internal Security Subcommittee.<sup>24</sup> After much skirmishing, the three-judge district court convened to hear the constitutional challenge to the Louisiana sedition laws, upheld the laws on their face, and refused to hear evidence on the laws' illegal application.

Justice Brennan, writing for five Justices (Harlan and Clark dissenting, Black and Stewart not sitting) held the challenged provisions of the Louisiana Subversive Activities and Communist Control Laws unconstitutional on their face as overbroad and vague, and remanded the case to the district court to fashion a decree.<sup>25</sup> As for abstention, the Court did not tarry long, for deference to a state court by waiting for it to construe a statute in the first instance is silly when the statute is unconstitutional on any reading.

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a state district judge who ordinarily heard only civil matters. The prosecutors told the judge that neither of the two regular criminal district judges was available to issue the warrant. This was false, as both of them were in their chambers all that afternoon. Neither of these two judges would have issued the warrant. I owe this bit of history to John F. Onion, Jr., one of the two criminal district judges involved, and now Presiding Judge of the Texas Court of Criminal Appeals.

23. While the lawsuit was pending, some of the plaintiffs were indicted under these sedition acts, although they would not have been if Judge Wisdom's restraining order had not been—wrongly, the Supreme Court later said—dissolved.

24. This aspect of the litigation was mooted by transfer of the records from Louisiana to Mississippi at Eastland's direction, apparently while the lawsuit was pending. My information about the chronology of events is taken largely from 9 CIV. LIBERTIES DOCKET 12-13 (1963); 9 *id.* at 88-89 (1964); 10 *id.* at 30-31 (1964); 10 *id.* at 104 (1965). The Docket is an invaluable resource in revisiting the times of which I am writing. See also A. KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER (1983) (autobiography of leading participant in these struggles).

25. *Dombrowski*, 380 U.S. at 497-98, 496 n.13. The decree was to uphold most of the rest of the appellants' claims while addressing, without abstention, the remaining issues in the case. The district judge having dismissed the complaint, the matter was heard in the Supreme Court on the appellants' allegations, as supplemented by facts otherwise appearing in the record and conceded by the State.

The Court overcame three objections to its decision: the Anti-Injunction Act, 28 U.S.C. § 2283 (1982); the restraint on a court of equity interfering with a criminal prosecution; and the abstention doctrine. The Anti-Injunction Act bars judicial interference with pending state proceedings, and there was no criminal case pending when appellants' complaint was filed.

The equitable principle of noninterference rests upon the theory that a criminal defendant has an adequate remedy at law, by raising the constitutional claim in the criminal case. See C. WRIGHT, FEDERAL COURTS § 52A, at 321 (4th ed. 1983). Ultimately, he will have a federal forum in which to air the claim, whether by discretionary review on certiorari or by federal habeas corpus. (I intend here to express, though not to defend at length, a view that federal habeas to review confinement in violation of a federal right is constitutionally mandated. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 348-60 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1173-78 (1970).) *Dombrowski* and his friends, however, were inhibited in their protected activity by the mere threat of a prosecution under these invalid statutes, and their claim that prospective members and supporters would be scared off was not difficult to credit.

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*Dombrowski*, as one of its wisest critics has put it, led “many litigants” to discern “a major change in federal-state relations.”<sup>26</sup> These litigants were doomed to disappointment when in 1971<sup>27</sup> the Court began a retreat from *Dombrowski* that continues to this day.<sup>28</sup> Professor Neuborne should not have forgotten *Dombrowski*, particularly as he was describing the Court’s increasingly restrictive philosophy of judicial review. In the great debates over the function and power of the Court, *Dombrowski* is a declaration that the Court can decide something important, and that overcoming purported barriers to deciding is not a matter of unprincipled discretion but of closely-argued principle arrayed in the informing light of social conditions.<sup>29</sup>

Many of the lawyers who in 1965 believed in progressive social change failed to understand why *Dombrowski* was decided as it was, and therefore went about filing lawsuits that exposed what was narrow and weak about the principles it announced.<sup>30</sup> I cannot think this was any fault of Justice Brennan, who was quite aware of the historical setting in which he wrote the majority opinion and could expect his auditors to understand both what he was saying and why he could get the votes to say it.

The historical setting of *Dombrowski* instructs us about the conditions that produce judicial willingness to assert power.<sup>31</sup> Between the filing of the *Dombrowski* appellants’ jurisdictional statement in early spring of 1964 and oral argument in January of 1965, the nation had witnessed Freedom Summer—a concentrated effort by civil rights organizations in Mississippi to reform educational opportunities for blacks, register black voters, and unseat the regular Mississippi Democrats at the Democratic Party convention in Atlantic City. During that summer in Mississippi, three civil rights workers were murdered by Klan agents, four were shot and wounded, fifty-two beaten severely enough to warrant reports to the authorities. Two hundred and fifty civil rights workers were arrested by Mississippi authorities. Thirteen Black churches were burned to the

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26. See C. WRIGHT, *supra* note 25, § 52A, at 322.

27. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

28. There is a rich and extensive scholarly debate over the meaning of *Dombrowski*. Everybody’s favorite is or ought to be Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977). Douglas Laycock has contributed an important work in Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979). Other commentaries are cited in C. WRIGHT, *supra* note 25, at 320 n.1.

29. See generally Tigar, *supra* note 25 (arguing against an evanescent “political question” barrier to decision).

30. There is some discussion of this point in C. WRIGHT, *supra* note 25, at 322; see also A. KINOV, *supra* note 24, at 209–55.

31. Close attention to the constraints of legal ideology is the hallmark of careful judging and an indicium of conscious effort to legitimate a decision by placing it in the context of precedent. Progressive judges and lawyers add to this technical skill a firm appreciation of where the law “must go” if it is to redeem the dominant ideology’s promises of freedom and fairness. See M. TIGER, *LAW AND THE RISE OF CAPITALISM* 20–23 (1977).

ground. Seventeen other buildings used by civil rights groups were damaged by arson fires or bombs. Ten automobiles were damaged or destroyed, and there were an additional seven bombings that resulted in no property damage or injury.<sup>32</sup>

The murders, and the struggles at the 1964 Democratic convention, dramatized the events of that summer in Mississippi. But these events were neither unprecedented nor localized. Leafing through the pages of the *Race Relations Law Reporter* and the *Civil Liberties Docket* for 1963 through 1965<sup>33</sup> freshens one's recollection. In Danville, Virginia, the summer of 1963 had seen more than 1000 arrests of demonstrators seeking desegregation and equal job opportunities.<sup>34</sup> From 1961 to the summer of 1963, the civil rights movement in Southwest Georgia, centered in Albany, withstood a like number of arrests.<sup>35</sup> As the Fifth Circuit found in *Bush v. Orleans Parish School Board*,<sup>36</sup> and as Judge Wisdom repeated in dissent from the district court's decision in *Dombrowski*, the State "marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club."<sup>37</sup>

In sum, the officers of government of the former Confederacy—in the police, municipalities, courts, legislatures, and executive offices—were illegitimate in every juridical sense save only that concerned with their parents' marital status. Despite the unanimous decision in *Brown v. Board of Education*,<sup>38</sup> and the dozens of decrees applying its teaching to particular school systems,<sup>39</sup> segregation of public education was still the rule. Black voters were systematically disenfranchised, and when the overtly racist registration statutes fell before the first wave of civil rights suits, new and ostensibly neutral barriers were erected.<sup>40</sup> These barriers in turn were attacked, with consequent delay in admitting blacks to the political process. Judge Wisdom, this time writing for a majority of a three-judge court, arraigned the voter registration system of Louisiana in an eloquent opinion richly detailed in its understanding of Louisiana history. Of the

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32. N.Y. Times, Aug. 20, 1964, at A1, col. 2. For much of the factual information that follows, I have referred to the *Civil Liberties Docket*, the *Race Relations Law Reporter*, and the scripts of my weekly radio program, *Mississippi Report*, aired over Pacifica Radio stations in the summer of 1964.

33. *Race Relations Law Reporter* was published by Vanderbilt Law School during this period.

34. 8 CIV. LIBERTIES DOCKET 124-25 (1963).

35. *Id.* at 125.

36. 194 F. Supp. 182 (E.D. La. 1961), *aff'd sub nom.* *Gremlion v. United States*, 368 U.S. 11 (1962).

37. 227 F. Supp. at 581 (Wisdom, J., dissenting) (quoting *Bush v. Orleans Parish School Board*, 194 F. Supp. 182, 186 (1961)).

38. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

39. These cases are collected in the issues of the *Civil Liberties Docket* and *Race Relations Law Reporter* for this period.

40. *See, e.g., United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965) (striking down ostensibly neutral voter registration provisions).

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Louisiana registration statute, he wrote: "A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. . . . We hold: this wall, built to bar Negroes from access to the franchise, must come down."<sup>41</sup> Thus begins forty-three pages in the Federal Supplement surveying the history of Louisiana voter law and demolishing barriers to the exercise of federal equity power. The opinion was written in November 1963, and the Supreme Court affirmed in the same term as *Dombrowski*.<sup>42</sup> Of course, even had many blacks then registered, the promise of fair representation contained in *Baker v. Carr*<sup>43</sup> and its progeny would not soon be redeemed.

The compelling force of these facts led the great judges of the South—Wisdom, Tuttle, Rives, Johnson, Wright, and others—to their often-repeated conclusion that federal equity power was virtually the only constitutionally-based authority in the former Confederacy. In the service of this conclusion, these judges sought majorities for broad propositions about judicial power.<sup>44</sup> As Judge Wisdom wrote:

"States' Rights" are mystical, emotion-laden words. For me, as for most Southerners, the words evoke visions of the hearth and defense of the homeland and carry the sound of bugles and the beat of drums. But the crowning glory of American federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against *all* wrongful governmental invasion of fundamental rights and freedoms.<sup>45</sup>

When I say that the federal equity power was *virtually* the only legitimate authority in the South, I have in mind the desultory performance of the executive branch, even as late as the 1964 Mississippi Freedom Summer. Attorney General Kennedy, as his most able biographer has shown, had no civil rights program and tended to respond to the growing crisis in the South as a series of isolated events, each of which could be "handled" by the Camelot team.<sup>46</sup> Two striking examples deserve mention. When

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41. *United States v. Louisiana*, 225 F. Supp. at 355–56.

42. 380 U.S. 145 (1965); *see also* *United States v. Mississippi*, 380 U.S. 128 (1965) (challenge to voting prerequisites embodied in new constitution with registrars and election commissioners named as defendants constituted proper cause of action), *rev'g* 229 F. Supp. 925 (S.D. Miss. 1964).

43. 369 U.S. 186 (1962).

44. I have already set out some of these; others included holdings about the scope and meaning of Federal Rule of Civil Procedure 65. For a sweeping example of federal injunctive proceeding, *see* *United States v. Original Knights of the Ku Klux Klan*, 10 Race Rel. L. Rep. 1449 (E.D. La. 1965); *see also* 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2956, at 566 & nn.99, 1 (appealability of denials of injunctive relief by federal district judges); *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964) (degree of deference due state rules).

45. *Dombrowski*, 227 F. Supp. at 570 (Wisdom, J., dissenting).

46. V. NAVASKY, *KENNEDY JUSTICE* 96–155 (1970). I reviewed this book shortly after it appeared, and looking back I think I was too critical of Navasky's work. I apologize to him for that;

three civil rights workers disappeared on a trip within Mississippi to investigate the burning of a Black church, Attorney General Kennedy was reported in the press as having said the federal government lacks power to take "preventive police action" in Mississippi (or, presumably, elsewhere in the South) to aid Black citizens seeking to exercise the rights of citizenship. His words brought forth a letter, signed by five members of the Harvard law faculty (Bator, Countryman, Fried, Howe, and Mansfield) terming Kennedy's remark a "facile pronouncement" and pointing to statutes dating nearly to the dawn of the Republic that gave the executive branch precisely such power.<sup>47</sup> The second telling episode was the Democratic party's unedifying compromise with the racist and segregationist Democrats of Mississippi at the 1964 convention in Atlantic City.<sup>48</sup>

Despite calls from members of Congress, however, the Administration intervened only gradually in the South, never becoming a full partner with the courageous and overburdened federal judges. The consequences of inaction included the burnings, bombings, beatings, and deaths. For the civil rights leaders and their lawyers, executive inaction heightened a perceived need for broad equitable relief.

Of the many observations about *Dombrowski* prompted by this history, I would single out one: Professor Owen Fiss ended his article on *Dombrowski* by saying, "It is an authoritative reminder of a judicial era that was and that could be."<sup>49</sup> Judge J. Skelly Wright quoted those words in introducing Justice Brennan at the Fifth Circuit Judicial Conference in May 1984.<sup>50</sup> They carry the key to *Dombrowski*'s central meaning. The "judicial era" of *Dombrowski* "was" because courageous judges perceived an imperative need for federal judicial intervention. *Dombrowski* was faithful to the course of decision from *Brown* in 1954 to 1966, a time when the Court began at last to redeem the promise of the Civil War amendments;<sup>51</sup> it also acknowledged that the movement contending for rights needed at least as much protection as the rights themselves. When, on February 1, 1960, the civil rights movement—in the hands of a new generation—burst out of the courthouses and entered a new phase of direct action,<sup>52</sup> the Court's decisions kept pace while the overworked judges

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since he is a Yale Law School graduate, this apology belongs in these pages.

47. A copy of the professors' letter is in my Mississippi Report file.

48. See, e.g., A. KINOY, *supra* note 24, at 257-96.

49. Fiss, *supra* note 28, at 1164.

50. A copy of text, furnished by Judge Wright, is on file with author.

51. See generally Kinoy, *The Constitutional Right of Negro Freedom*, 21 *RUTGERS L. REV.* 387 (1967) (discussing failure to define substantive rights created by the wartime amendments, and national duty to do so).

52. The first sit-in was February 1, 1960. See NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 226-28 (Bantam ed. 1968) [hereinafter cited as KERNER REPORT].

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of the Fifth Circuit filled up the interstices with decisions striking at every manner of state interference.

In a string of cases that included *Edwards*,<sup>53</sup> *Lombard*,<sup>54</sup> *Hamm*,<sup>55</sup> *Barr*,<sup>56</sup> *Gibson*,<sup>57</sup> *Bates*,<sup>58</sup> *Button*,<sup>59</sup> and *Bowie*,<sup>60</sup> the Court recognized that defense of the principles of *Brown* and its progeny required defense of Black self-organization. These cases not only announced results and rules, but implicitly conceded that in the long run the federal courts could not do this job alone. Seen in this context, *Dombrowski* announced a rule that was as exceptional as the situation it confronted. And one need not have been surprised that in other, less demanding, contexts, a majority of Justices could not be summoned to approve a like interference with state procedures for adjudicating claims, or a like skepticism towards the claims of red-baiters. For example, the Court in 1961 had affirmed by a narrow majority the contempt of Congress conviction of SCEF leader Carl Braden for refusing to answer questions concerning anti-House Committee on Un-American Activities organizing.<sup>61</sup> I say that the Court's constancy in defense of *Brown* endured from 1954 to 1966. Already by 1964, the majority had begun to waver. *Hamm v. City of Rock Hill*<sup>62</sup> set aside sit-in trespass convictions by a vote of 5 to 4. The basis for Justice Clark's opinion was that the Civil Rights Act of 1964 had abated the prosecutions. This opinion suggested that the occasion for taking to the street was now sharply reduced, given the availability of federal civil remedies for discrimination.

In 1966, it was 5 to 4 the other way, as the Court "stepped back" in *Adderley v. Florida*<sup>63</sup> and, through Justice Black, affirmed trespass convictions that arose from a sit-in at a jail to protest alleged unlawful arrests of civil rights activists. Justice Black rejected claims that the state trespass statute was unconstitutionally vague and overbroad. His opinion rests upon the premises that a jail, unlike a park, is not an appropriate or natural place for protest, and that these demonstrators had not shown that the state had in the past tolerated demonstrations at this jail. The opinion defers in great measure to the facts as impliedly found by the jury, and to

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53. *Edwards v. South Carolina*, 372 U.S. 229 (1963). I know my list is selective. For a broader, deeper view, see H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1966).

54. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

55. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

56. *Barr v. City of Columbia*, 378 U.S. 146 (1964).

57. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

58. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

59. *NAACP v. Button*, 371 U.S. 415 (1963).

60. *Bowie v. City of Columbia*, 378 U.S. 347 (1964).

61. *Braden v. United States*, 365 U.S. 431 (1961).

62. 379 U.S. 306 (1964).

63. 385 U.S. 39 (1966). The phrase is taken from the title of Kipperman, *Civil Rights at Armageddon—The Supreme Court Steps Back: Adderley v. Florida*, 3 *LAW IN TRANS. Q.* 219 (1966).

the evidence offered by the state's witnesses. This deference is in marked contrast to the independent factfinding characteristic of the court's earlier—and later—First Amendment cases. Justice Douglas, writing in dissent for himself, Chief Justice Warren, and Justices Brennan and Fortas, pointed out that jails have traditionally symbolized arbitrary power, and mentioned the Tower of London and the Bastille.<sup>64</sup>

The *Adderley* majority's deference to the state's statute, judicial process, and law enforcement officers, and Justice Black's 1971 majority opinion in *Younger v. Harris*<sup>65</sup> each rest on premises that undercut the language, if not the central meaning, of *Dombrowski*. Looking from *Adderley* to *Younger*, the events that spawned this new-found deference to the state police, courts and legislatures in First Amendment cases are easy to identify. Racial unrest had led to disorder in the cities and on the campuses of the North.<sup>66</sup> Justice Fortas had penned a pamphlet, *Concerning Dissent and Civil Disobedience*,<sup>67</sup> whose thesis could only with difficulty be reconciled with his own opinion for a narrow majority in *Brown v. Louisiana*,<sup>68</sup> reversing trespass convictions arising from a library sit-in, or with his dissent in *Adderley*. So, despite the findings of a distinguished commission in 1968 that American society—North and South—was pervaded with white racism<sup>69</sup> fifteen years after *Brown v. Board of Education*, the Court's majority began to recede from the territory it had staked out before 1966. This limited retreat, marked by deep concern with the tactics of some civil rights activists, took place at a time when the civil rights movement itself was riven with controversy over issues of violence, disobedience to law, and the prospect of continued black-white cooperation. The antiwar movement rose, and in its turn faced like disputes.

Both to those who saw the turmoil as a harbinger of necessary change, and to those who saw it as an inequity that could not possibly be justified, William Butler Yeats' words must have seemed apt:

Turning and turning in the widening gyre  
The falcon cannot hear the falconer;  
Things fall apart; the center cannot hold.<sup>70</sup>

Some in the center did not abandon their posts: Brennan, Marshall,

64. 385 U.S. at 49 (Douglas, J., dissenting).

65. 401 U.S. 37 (1971).

66. See Tigar, *supra* note 13, at 898-901; Symposium, *Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966).

67. A. FORTAS, *CONCERNING DISSSENT AND CIVIL DISOBEDIENCE* (1968). See also Tigar, *Book Review*, 67 MICH. L. REV. 612 (1969) (reviewing Fortas' book).

68. 383 U.S. 131 (1966). See Tigar, *supra* note 67, at 614.

69. KERNER REPORT, *supra* note 52, *passim*.

70. W. YEATS, *The Second Coming*, in *THE COLLECTED POEMS OF W.B. YEATS 184-85* (1977).

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Douglas, and Skelly Wright spring to mind. But the profound alteration in perceptions of protest and protesters strengthened the hand of the right, and counseled its adherents to regard *Dombrowski* not as the redemption of a constitutional promise about federalism, but as an extraordinary response to an exceptional and concluded episode. It was not a case of judicial exhaustion, that "too long a sacrifice can make a stone of the heart."<sup>71</sup> Those who turned away from liberty had been at best its summer soldiers.

The lawyers whose work had brought *Dombrowski* to the Court failed, in some measure, to see this change coming. Regarding *Dombrowski* as the herald of a newly-defined federal equitable jurisdiction, they brought affirmative suits in great numbers. These cases mostly foundered.<sup>72</sup> They were perhaps unwise in concept, for they sought to combine the attitude of the early affirmative cases brought in the wake of *Brown* with a confident certainty that *Dombrowski* would be read for all that it might mean. The lawyers minimized the important consideration that *Dombrowski* was brought to defend a vital, insistent movement under attack, and not to define and lead a movement. I do not argue that these lawyers were responsible for choking off the applicability of *Dombrowski* through systematic overuse: Rather, they were too confident that most federal judges could survive the shocks of the late 1960's and still pursue the goal of defending the protest and dissent that many began to perceive as imperiling established order.

The lesson of *Dombrowski* then was and now is that while movements for change will often find courts more congenial allies than police or legislatures or Presidents, this will by no means always be true. The Supreme Court's willingness to uphold protest when all other political institutions are seeking to put it down is exceptional in our constitutional history, as the World War I prosecutions<sup>73</sup> and most of the McCarthy-era cases<sup>74</sup> bear out. True, even a relatively conservative Court will respond to genuine constitutional crisis by upholding its own authority: Witness the unanimous decision that President Nixon had to surrender the tapes.<sup>75</sup> Most often, however, the Court has done its great constitutional work in tacit

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71. W. YEATS, *Easter 1916*, in *id.* at 179.

72. These suits sought every kind of result from receiverships over public institutions to injunctions against prosecutions under laws enforced by states whose policies had not been sullied by the consistent course of conduct that marked the Southern authorities. See C. WRIGHT, *supra* note 25, § 52A, at 322-23. I recall the debates at the time over the use of what some perceived as the wonder-working power of *Dombrowski*. Nothing I say here is intended to cast aspersions on Arthur Kinoy, who argued *Dombrowski* in the Court. Arthur and I have disagreed at times over the years, but I remain an unstinting admirer.

73. See T. EMERSON, D. HABER & N. DORSEN, 1 *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 50-54 (4th ed. 1976).

74. The low-water mark, bringing all the McCarthyite clichés together, is *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (upholding registration order).

75. *United States v. Nixon*, 418 U.S. 683 (1974).

recognition of significant political forces. These forces need not be majorities, but they must at least command support among those with important roles in defining the dominant legal ideology of a particular time.

For the *Dombrowski* majority, "federalism" and "separation of powers" were not simply words but articles of faith in the fundamental rightness of American institutions, and in the ability of these institutions to accommodate all legitimate demands for change. The wave of federal judicial intervention could not, even by the principles invoked in *Dombrowski*, carry forward for very long. And when it receded, it would be up to the other branches or an organized citizenry to occupy the terrain over which it had washed.

This analysis suggests that the authors of this collection of essays might profitably have joined the debate over judicial review, and asked where we can expect to see a developing consensus for support of democratic rights. The authors might have asked whether, given the prediction in *The Rights of Americans* of a shift in the Court's attitude toward federal judicial power, some civil libertarian resources were misdirected in the decade just past. Perhaps civil libertarians should have pressed more for favorable interpretations of state constitutions, which state courts are free to construe as conferring more protection than the federal Constitution.<sup>76</sup> In any case, these essays do not seek, as they ought to have done, to understand and interpret the Court's retreat from article III.

One might also ask, as some have, whether *Dombrowski* carried its own seeds of destruction, because it conceded too much or because it overlooked significant precedent that might have made its rationale more intelligible and enduring. Professors Fiss<sup>77</sup> and Laycock,<sup>78</sup> among others, have illuminated this difficult question, and surely some of the authors of these essays

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76. See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state may provide more expansive individual liberties in its constitution, not inconsistent with those conferred by federal Constitution); remarks of Justice Brennan *supra* note 7; remarks of Judge Wright, *supra* note 50.

77. Fiss, *supra* note 28, *passim*.

78. Laycock, *supra* note 28. Professor Laycock's brilliant article on the precedents that Justice Brennan failed to cite in *Dombrowski* provokes this additional observation. Laycock notes, quite rightly, that *Dombrowski*'s defense of federal equitable power could have rested firmly upon dozens of cases holding federal equitable relief "generally available without regard to the plaintiff's substantive constitutional theory." *Id.* at 659. Professor Fiss, he argues, was wrong in saying that *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), had closed the doors of the federal courts save in exceptional cases. See Fiss, *supra* note 28, at 1106-14.

This question was discussed in the majority opinion for the three-judge court in *Dombrowski*, 227 F. Supp. at 560. The court cited cases decided before and after *Douglas*, misconstrued several of them, and found them all unpersuasive. Most of the cases, Judge Ellis pointed out, involved injunctions against economic regulation statutes. "None of the cases," he noted, "involved so fundamental an element of state sovereignty as that of self-preservation." *Id.* at 560 n.1. Nevertheless, Judge Ellis' analysis stood the First Amendment on its head, since the "self-preservation" of which he spoke was to be guaranteed by an arguably overbroad statute being invoked on an allegedly improper basis.

Thus, the entire line of authority of which Professor Laycock speaks was not exactly forgotten, for some of it was in the lower court opinion. After all, to have rested upon the pre-*Douglas* cases would

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should have troubled to discover the provenance of the hostility that has undercut some—though by no means all—of *Dombrowski's* power. I have suggested the beginnings of an analysis. *Dombrowski* champions the First Amendment and reacts to the specific historical conditions to which I have referred. It reminds us of an era that “was” and “can be” because its promise will likely be redeemed only when a movement for change again confronts consistent and implacably lawless hostility, and when judges are willing to perceive what is happening and to act.

There is additional support for this view in the Court's treatment of the Selective Service cases during the Vietnam War, as well as in the eventual reaction of the lower federal courts to the evident unfairness of the conscription system and to the upsurge of deliberate defiance of that system's commands.<sup>79</sup> The Court, while refusing to confront the issue of the War's legality under international and domestic law,<sup>80</sup> and while refusing pre-induction judicial review in one important case,<sup>81</sup> upheld most registrant challenges in a series of significant decisions. These decisions, although addressing the draft, relied upon a principled theory of judicial review and commanded the votes even of those who were later to join the majority in *Younger* and its progeny.<sup>82</sup> In the lower federal courts, the hostility to Selective Service overreaching was even more apparent, as median sentences and conviction rates steadily declined and as judicial opinions insisted more and more sharply that the System obey its own rules and honor constitutional commands.

Recent judicial enforcement of the registration requirement<sup>83</sup> does not call this analysis into question: Judicial review of conscription decisions has been limited in ways that the late 1960's and early 1970's cases did

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have validated a judicial role for the Court inconsistent with a presumption of noninterference in state social legislation. This perhaps Justice Brennan himself was unwilling to do, given his own view of federalism. Moreover, it is not surprising to see deference to the criminal process, whether of a state or the federal government. The restrictions on interlocutory review and on the use of extraordinary writs testify to that. *See Will v. United States*, 389 U.S. 90 (1967) (extraordinary writs); *DiBella v. United States*, 369 U.S. 121 (1962) (interlocutory review).

79. For details about this period, including the statistics on the number of prosecutions and the declining rate of convictions and declining median sentence, see the issues of the *Selective Service Law Reporter*.

80. *See, e.g., Mora v. McNamara*, 389 U.S. 934, 935 (1967) (Stewart & Douglas, JJ., separately dissenting from denial of cert.).

81. *Clark v. Gabriel*, 393 U.S. 256 (1968).

82. I have in mind *Breen v. Selective Service Board*, 396 U.S. 460 (1970) (preventing delinquent induction of student protester who had obtained valid deferment); *Gutknecht v. United States*, 396 U.S. 295 (1970) (unanimous decision—though different justices had different rationales—striking down delinquency regulations); *McKart v. United States*, 395 U.S. 185, 192–201 (1969) (excusing failure to exhaust administrative remedies). *See generally* Symposium, *Selective Service 1970*, 17 UCLA L. REV. 893 (1970). *But see* Asimow, *Introduction*, 17 UCLA L. REV. 893, 898 (1970) (in protecting registrants court offered “muddy and confusing” rationale for judicial review).

83. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

not undermine, and that make the recent decisions unsurprising, if disappointing.<sup>84</sup> More importantly, there has not yet been the great public outcry over registration that arose during the Vietnam War. If this analysis is correct, then a study of judicial power in the abstract, or as a matter of the structure of the constitution, does not tell us about the tasks ahead for those who wish to protect and extend democratic rights. We ought to be asking, among other questions, from whence may come the next great movement that will underscore the need for democratic rights and vivify the claims that they be enforced.

Who built the seven gates of Thebes?  
The books are filled with the names of kings  
Was it kings who hauled the craggy blocks of stone?<sup>85</sup>

It may be that when such a time comes, the institutions of judicial power will have been so far corrupted and will have committed themselves so deeply to defending power and privilege that the era that "was" cannot then be. That is a question one might profitably raise, but raising it goes beyond a review of the book I am discussing.

## II. WHAT HAPPENED ON THE WAY TO THE FORUM?

I would have expected these essays to discuss in some detail the course of free speech doctrine this past decade. Morton Halperin's article<sup>86</sup> contains some enlightening comments on national security, and Professor Emerson's essay<sup>87</sup> contributes greatly to understanding the academic freedom precedents. But the Supreme Court has, during this decade, decided a torrent of free speech cases, and these are not addressed. The Court's decisions have markedly changed the dominant themes of First Amendment analysis in ways that should concern civil libertarians.

In the 1930's, the Mexican artist Diego Rivera was commissioned to do murals on the interior walls of Rockefeller Center. In one scene, he portrayed Lenin. John D.'s grandson Nelson was displeased. As E. B. White told the story, Nelson said:

"And though your art I dislike to hamper  
I owe a *little* to God and Gramper,

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84. Judicial review of Selective Service decisions must usually await the completion of the registrant's processing, his call to service, and his refusal to take the symbolic step forward signifying entry into the armed forces. See Practice Manual, SEL. SERV. L. REP. (PUB. L. EDUC. INST.) §§ 2454, 2501-2502 (1972).

85. B. BRECHT, *A Worker Reads History*, in SELECTED POEMS 109 (H. Hays trans. 1947).

86. Halperin, *National Security*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 281.

87. Emerson, *Academic Freedom*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 179.

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And after all,  
It's *my* wall . . .”

“We’ll see if it is,” said Rivera.<sup>88</sup>

Beginning in the late 1930’s, the Court, at the urging of labor organizers and religious colporteurs,<sup>89</sup> began to take seriously the need for public communication even of unpopular views. The history is familiar. Jersey City’s Mayor Hague had said to the CIO, “After all, it’s my street.” We’ll see if it is, said the CIO, and Justice Roberts wrote for the Court that title did not give the municipality the right to restrict the historic use of public places for free expression.<sup>90</sup> The company town of Chickasaw, Alabama, was declared in *Marsh v. Alabama*<sup>91</sup> to look enough like a normal city to require First Amendment protection for Jehovah’s Witnesses seeking to enter and proselytize. In another case, the expressive component of picketing was held to be a First Amendment activity.<sup>92</sup>

We need to recall these cases because the Burger Court has developed a free speech jurisprudence that rests upon different premises and tilts the balance away from the dissident speaker with limited resources and an unpopular message and in favor of those who are able to say: It’s my wall.

We can see this development begin in the campaign finance cases. Beginning with *Buckley v. Valeo*,<sup>93</sup> the Court invalidated restrictions on the amount of money individuals could spend in support of their own candidacies. The federal statute at issue, passed in the wake of Watergate, ostensibly regulated money and sought to limit the public impact of wealthy candidates engaging in speech through purchased access to the mass media. These limitations had been enacted with the Rockefellers—and the Kennedys—in mind.<sup>94</sup> The Court held that, after all, it is Nelson’s money, and that for these purposes anyway, money is speech.

In *First National Bank v. Bellotti*,<sup>95</sup> the Court struck down a Massachusetts statute that, like the laws of some thirty-one states, restricted

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88. White, *I Paint What I See*, in A NEW ANTHOLOGY OF MODERN POETRY 232, 233 (1946).

89. A “colporteur” is as different from a “Cole Porter” as “Amazing Grace” is from “Boola Boola.”

90. Hague v. CIO, 307 U.S. 496, 515 (1939).

91. Marsh v. Alabama, 326 U.S. 501, 508 (1946).

92. Thornhill v. Alabama, 310 U.S. 88, 102–05 (1940). See generally T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (wise and extensive treatment of First Amendment cases).

93. 424 U.S. 1 (1976) (per curiam).

94. Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 251. I have learned a lot from reading this article, although Professor Powe would add, “Not nearly enough.”

95. 435 U.S. 765 (1978).

business corporations from spending money to influence voters on any issue except one materially affecting the business or property of the corporation. The statute interfered with the "free flow of . . . information," wrote Justice Powell for six members of the Court.<sup>96</sup> Justice White dissented, for himself and Justices Brennan and Marshall, noting the "'deleterious influences . . . resulting from the use of money by those who exercise control over large aggregations of capital.'"<sup>97</sup> The dissent also pointed out that management could not even say it was their money; the corporation's assets belong, in some sense, to the shareholders—all of whom were subsidizing this corporate message despite their individual views on the subject.<sup>98</sup>

When the ACLU last reported to us in 1971, the Court had built upon *Marsh v. Alabama*<sup>99</sup> and held in *Logan Valley*<sup>100</sup> that a shopping center that looked like a downtown business district was, at least for picketing related to the center's business, a proper place for the exercise of First Amendment rights.

*Logan Valley* noted that the modern shopping center was absorbing an ever-greater percentage of retail trade, and was therefore appropriate to the exercise of First Amendment rights.<sup>101</sup> It recognized that direct control by property owners of what had been areas suited for public discourse required a new mode of analysis. By rejecting the owners' claim that "it's our wall," the decision protected those of limited means, whose communication efforts are limited to walking, handbilling, and talking to small groups of citizens. *Logan Valley* was a common-sense application of Justice Roberts' conclusion in *Hague*<sup>102</sup> that abstract ideas of title are not dispositive of First Amendment issues.

*Logan Valley* did not live long; it was limited to its facts in 1972 by *Lloyd Corporation v. Tanner*,<sup>103</sup> and then overruled in 1976 in *Hudgens v. NLRB*.<sup>104</sup> Denizens of the suburbs were now insulated from speech, save that sponsored by those who could afford to beam it into their living rooms and pay to have it put in their daily papers or their mailboxes. The

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96. *Id.* at 783 (citations omitted).

97. *Id.* at 812 (citations omitted).

98. Interestingly, when the captive contributors were those who pay union dues under a union shop arrangement, the Court held the captivity issue forbade similar expenditures. These differences between these two types of cases, including the presence of federal legislation and an arguable additional element of compulsion in the union shop dues payment setting, do not obviously justify the Court's different approaches toward them. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

99. 326 U.S. 501 (1946).

100. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

101. 391 U.S. at 324-25.

102. *Hague v. CIO*, 307 U.S. 496 (1939).

103. 407 U.S. 551 (1972).

104. 424 U.S. 507, 518 (1976).

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Court has since that time limited access on a variety of grounds to various expressive activities in places to which even public agencies hold title.<sup>105</sup> *Hudgens* reflected an attitude that swept more broadly than its First Amendment impact: an increased deference to nominal privateness for purposes of “state action” or “federal action.”<sup>106</sup> One major element of the civil rights litigation of the 1960’s had been to look behind the form in which property was held in order to determine whether an entity was bound to comply with the Fourteenth Amendment.<sup>107</sup> *Hudgens* affirms the same principles of insulation from constitutional obligation as the Court began to apply in cases involving racial discrimination and due process of law.

In a provocative article in *The Supreme Court Review*, Professor Powe has focused upon a somewhat different group of cases, but his able analysis confirms that the Court’s majority has decided that money is speech.<sup>108</sup> I would add that lack of money may permissibly mean no speech, or highly restricted opportunity to engage in speech. Not First Amendment ideology, but the myth of the free market, drives these cases. A volume devoted to telling us why and how our rights are endangered, and containing at least some recognition of the relationship between economic well-being and rights,<sup>109</sup> should have commented critically upon the powerful and increasing acceptance of monopoly forces in the marketplace of ideas.

The constitutionalization of any rule tends to set that rule beyond substantial and immediate tinkering. The constitutional jurisprudence of the past decade evokes images of *Lochner v. New York*.<sup>110</sup> The Court is erecting, by invoking the First Amendment and curtailing the reach of earlier state action cases, a constitutionally defined zone of immunity for wealth and the privileges of wealth. This trend is reversible: Indeed, identifying and commenting upon it is the first step towards doing something about it. For example, the Court has firmly said that the states are free to interpret their own constitutions as requiring access to places such as shopping centers for the exercise of First Amendment rights.<sup>111</sup> The federalist vision of

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105. See, e.g., *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984). The owners of shopping malls are a promising market for communicators, but mostly for those with commercial messages designed to attract shoppers. An airline magazine tells about a shopping mall promotional stunt involving an elephant who became excited and misbehaved. *The American Way*, Dec. 1984, at 42. Speech takes many forms.

106. See, e.g., *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

107. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965).

108. Powe, *supra* note 94, at 278-84.

109. Law, *Economic Justice*, in *OUR ENDANGERED RIGHTS*, *supra* note 9, at 134.

110. 198 U.S. 45 (1905). See Powe, *supra* note 94, at 278.

111. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-81 (1980).

those—such as Justice Brennan—who now see the states as having a special responsibility to defend the rights that federal courts are unwilling to recognize, may have something powerful to teach us. These essays contain no discussion on this score. It may be, of course, that the promise of free speech the Constitution indisputably makes will yield to the market dominance of monopolists. That risk—and it is substantial—makes it all the more urgent to discuss the tactics of forestalling such an event.

It is surprising that these concerns are not raised in this book because they were at least acknowledged in an ACLU publication shortly after *Buckley v. Valeo* was decided. Joel Gora, then ACLU Associate Legal Director, analyzed the campaign finance legislation and took account of “the equality issue—trying to facilitate the whole spectrum of political viewpoints.”<sup>112</sup> There is no hint of concern with this issue anywhere among these essays. Yet the ACLU regarded *Buckley* as important when it was decided, and proclaimed pride that the petitioners included a broad cross section of political views.<sup>113</sup>

On the whole, I suspect civil libertarians applaud the rhetoric of many of the Court’s recent First Amendment decisions. They must, however, pay serious attention to the closure of public forums to the dissentient voices of the less affluent. This is not simply a matter of First Amendment theory in a mass society, but relates vitally to broader support for democratic rights. The message of the wealthy few who dominate mass speech is not congenial to democratic rights, and the judicial record of rights-protection tends to be worst when well-financed and strident voices call for repression.

### III. THE SECURITY OF WHOM, AND FROM WHAT?

Certainly there is no more potent threat to First Amendment doctrine than the idea that “national security” is a kind of talismanic incantation, the invocation of which dissolves competing constitutional claims. Coupled with the idea that property is speech but that speech yields to property, there is abroad a powerful and potentially fatal danger to liberty of expression.

Morton Halperin’s essay on national security<sup>114</sup> is not nearly as incisive as his past discussions. He refers to claims of presidential power, warning us to be suspicious when the President seeks to arrogate to himself the

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112. *And What Must Be Done for 1980: A Conversation With Joel Gora*, in 4 CIV. LIB. REV., Sept.–Oct. 1977, at 20, 25.

113. *Inside the Great Campaign Finances Case of 1976*, in 4 CIV. LIB. REV., Sept.–Oct. 1977, at 8.

114. Halperin, *supra* note 9, at 281.

right to decide important questions of individual liberty. Yet his discussion—which focuses principally on warrantless wiretaps and prior restraint of speech—is all too brief, all too cursory.

I think back to 1967, when the indictment was returned against Dr. Spock and other antiwar activists. The American Civil Liberties Union had trouble seeing the prosecution as a civil liberties case. The ACLU attitude changed sharply over time, as it became clear that claims of executive prerogative to conduct an undeclared war were inseparable from the Administration's effort to punish those who dissented from that mistaken policy. Now we are in the midst of another effort to control the executive branch as it prepares and wages overt and covert aggression against other sovereign states, and spends unprecedented billions on ever more sophisticated nuclear armaments.

Morton Halperin knows this to be so, and his knowledge, gained from experience in and out of government, makes him an observer and commentator without peer. I wish he had spoken to us from his deep knowledge and conviction. He tells us instead that warrantless foreign national security wiretaps are no longer a great problem, because Congress in the Foreign Intelligence Surveillance Act requires some sort of a warrant for such taps. This statute, he says, is "a reasonable attempt to balance privacy and the protection of national security."<sup>115</sup> Would that it were so. The Foreign Intelligence Surveillance Act, with its secret court and secret files and restrictions on open litigation over compliance with its terms and with the Fourth Amendment, may have been the best one could get from the Congress, but it has proven to give scant protection to privacy rights.<sup>116</sup>

Dr. Halperin's analysis of the national security claims that are interposed to restrict public access to government information is more cogent, though not developed. In *Snepp v. United States*,<sup>117</sup> the Supreme Court upheld a contract between a CIA agent and the Agency that created a fiduciary relationship between the agent and the CIA with respect to information obtained in the course of employment, and required former agents to submit their writings to the agency. On this basis, the Court imposed a constructive trust on royalties from writings not submitted in accordance with the contract, and approved censorship of the agent's work.

Seeking to take *Snepp* to the limit of its logic and beyond, the executive branch has proposed to "Snepp" thousands, if not millions, of government employees to prevent leaks of information relating to government policy.

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115. *Id.* at 286.

116. See Kennedy, *Our Eroding Constitution*, LITIGATION, Winter 1983, at 3.

117. 444 U.S. 507 (1980).

The current Administration wants government employees with access to certain kinds of classified information to sign an adhesion contract of non-publication as a condition of employment. These contracts, in one proposed form, declare that information acquired by the employee in the course of her or his service is the "property" of the United States.<sup>118</sup>

Whatever else one may say of it, the Burger Court has generally upheld the consistent course of federal decisions forbidding most prior restraint of expression. In the balance is whether government may make these principles of the First Amendment irrelevant to a given decision by invoking ostensibly speech-neutral rules of contract and property law. The idea that the sovereign owns information concerning matters of public policy, and that it can assert this ownership right against an individual employee who holds the information, and against the public's interest in hearing it, has gained currency in some judicial utterances and executive proposals of late. Dr. Halperin's contribution—warnings, forebodings, and a short list of some recent cases—does not do justice to this development.

An analysis of national security and civil liberties ought to begin by noting the salutary purposes of public debate on the issues of war, peace, and human survival. Proposals to "nationalize" information in the name of national security are, after all, overtly designed to still debate on such questions. The ACLU's history is rich in recognition of the interaction between foreign and military policy disasters and the curtailment of speech, beginning with the First World War events so ably summarized in Professor Chaffee's famous work.<sup>119</sup>

While I would have looked for a richer and deeper analysis on this issue, I am disturbed for another reason by the tone of Dr. Halperin's comment on the Foreign Intelligence Surveillance Act. The ACLU has become wary of the federal courts, fearing that seeking judicial vindication may in fact produce rulings that cut into yesterday's victories. So it has turned, and rightly so, to the legislature. There is nothing wrong with participating in the legislative process, nor perhaps with getting every possible concession to democratic rights on a given issue and then accepting a compromise. It is neither necessary nor justifiable, however, to salute these reluctant concessions as victories for fundamental principle.<sup>120</sup>

And even when things without life giving sound, whether pipe or harp, except they give a distinction in the sounds, how shall it be

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118. See *supra* note 4.

119. Z. CHAFFEE JR., *FREE SPEECH IN THE UNITED STATES* (2d ed. 1948).

120. See Burnham, *The Increasing Dissent Within the ACLU*, N.Y. Times, Aug. 14, 1984, at A16, col. 3; Peck, *Strange Bedfellows: Spies and Secrets, and the ACLU*, *THE PROGRESSIVE*, Nov. 1984, at 28.

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known what it piped or harped? For if the trumpet give an uncertain sound, who shall prepare himself to the battle?<sup>121</sup>

Debate goes on within the ACLU about the proper allocation of civil libertarians' resources between courts and Congress, and between the federal government and the states. Perhaps the authors could have shared some thoughts on this debate, so that we could better evaluate the wisest way to battle for rights. I think it best for the ACLU to announce unwaveringly its commitment to an agenda, and to forebear from endorsing—as opposed to acquiescing in—compromises. By adopting such a policy, the ACLU would seek to keep the scope of debate over democratic rights broad, waiting and working for the return of a time that “was” and “can be.”<sup>122</sup>

### IV. SOME OTHER THOUGHTS

Time, space, and the patience of readers and editors permit only the briefest comment on some remaining essays. The pieces on aliens,<sup>123</sup> criminal justice,<sup>124</sup> prisons,<sup>125</sup> and privacy<sup>126</sup> are able and persuasive.

I do wish Aryeh Neier's essay on international human rights<sup>127</sup> and the Shapiro-Henderson piece on aliens were more closely tied together. The immigration of aliens fleeing repressive regimes propped up by United States intervention and the agenda of international human rights concerns would benefit from treatment as part of a larger problem: The origin, nature and function of international legal principles in the protection of individuals. Only recently has it been generally agreed that individuals, and not only sovereign states, are subjects and beneficiaries of international law. If it is important to develop a justification for recognizing international human rights principles under the supremacy clause—and I

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121. I *Corinthians* 14:7-8.

122. These are hard choices. When the ACLU has confronted them in past times, its record has been less than creditable. I have in mind the McCarthy era cooperation with the FBI and the purging of Elizabeth Gurley Flynn from the organization. See Baldwin & Westin, “*They Never Stopped Watching Us*,” 4 CIV. LIB. REV., Nov.-Dec. 1977, at 18; Neier, *Adhering to Principle: Lessons from the 1950s*, 4 CIV. LIB. REV., Nov.-Dec. 1977, at 26, 30-31; see also B. Wright, *The ACLU: Between Politics and Principle. A Study of a Pressure Group During Wartime* (unpub. Ph.D. thesis) (Princeton Univ. 1975) (available on microfilm at Princeton University library).

123. Shapiro & Henderson, *Justice for Aliens*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 160.

124. Rudovsky, *Criminal Justice: The Accused*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 203.

125. Bronstein, *Criminal Justice: Prison and Penology*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 221.

126. Bender, *Privacy*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 237.

127. Neier, *International Human Rights*, in OUR ENDANGERED RIGHTS, *supra* note 9, at 296.

take it Professor Neier and I agree that it is—then there are some formidable jurisprudential and historical hurdles to overcome. Would that essays in this book had begun to map the course of that effort.

A necessary beginning to any such effort would be frank recognition that the United States' consistent and deliberate departures from the restraints on military action contained in both municipal and international law are profoundly corrosive to the entire notion of a rule of international law. The Neier and Shapiro-Henderson essays touch upon the violations of individual rights in the context of recent events in Central America and the Caribbean, but fail to inquire into the course of lawless American military conduct that has produced these problems.

"Sexual Justice," by Professors Estrich and Kerr, is the best essay in this book: well-argued, and grounded in insights about the history and sociology of sexist oppression. Sexism raises fundamental issues of democratic rights and challenges fundamental assumptions of the system of capitalist social relations. Because it is also an issue upon which political support can provably be marshalled, I hope the authors will go beyond analysis and propose a program for action.

I would also welcome clarification of the authors' discussion of *Michael M. v. Superior Court*,<sup>128</sup> in which the Court upheld California's statutory rape law even though it punished only the male participant in underage sex. The authors say that "the reality" is that "statutory rape prosecutions are commonly brought in nonconsensual situations," and that therefore it was wrong for the dissenters in *Michael M.* to assume that Michael and the woman had engaged in the "same act."<sup>129</sup> For example, their discussion of *Michael M. v. Superior Court* suggests that there could be a presumption of male aggression in every prosecution of underage sexual encounters. Would the factual basis—if any—for such a presumption justify new legislation or a shift of the burden of going forward or of persuasion in a criminal prosecution?

With respect to criminal justice and prisoners' rights, I would not add much to the excellent articles by David Rudovsky and Alvin Bronstein. Justice Stevens was recently moved to an angry denunciation of the Court's majority for having summarily disposed of nineteen cases in the 1981 through 1983 Terms on the basis of petitions filed by wardens and prosecutors complaining of decisions below in favor of an accused or convicted inmate: "The Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor. The Framers surely feared the latter more than the former."<sup>130</sup> It is not simply that

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128. 450 U.S. 464 (1981).

129. Estrich & Kerr, *supra* note 9, at 115-16.

130. *Florida v. Meyers*, 104 S. Ct. 1852, 1856 (1984) (Stevens, J., dissenting).

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the Court is reconsidering the criminal justice jurisprudence of the Warren era; it is showing, as Justice Marshall recently remarked in a death case, a Kafkaesque haste to judgment in doing so.<sup>131</sup>

One quixotically disposed would compare the present majority to the Duke of Coffin Castle in James Thurber's *The Thirteen Clocks*.<sup>132</sup> The Duke feared the Todal, an agent of the devil sent to punish evildoers for not doing as much evil as they should. Thus, he rushed about doing ill toward his fellow creatures with greater vigor.

### V. THE WATCHMAN WE HAVE SET AS SENTINEL AND GUARD

He calleth to me out of Seir, Watchman what of the night?  
Watchman, what of the night?

The watchman said, The morning cometh, and also the night: if ye will enquire, enquire ye: return, come.<sup>133</sup>

Stanley N. Katz, in the essay that concludes this volume, writes that the task of the next generation of civil libertarians is to expand guaranties of freedom "within the practical realities of liberal politics."<sup>134</sup> "The practical realities" conjures images of two other periods of the ACLU's history that might have repaid study in this volume, seeking as it does to project an agenda for these times. During FDR's first term, the ACLU hotly debated whether to support federal labor legislation, including the Wagner Act of 1935. This debate focused upon whether the rights granted by the Act were illusory because labor organizations were required to submit to NLRB jurisdiction and otherwise risk governmental interference in their affairs. This was certainly a reasonable position, as demonstrated by the later history of labor relations legislation, including section 9(h) of Taft-Hartley. But the debate, as I see it, had less to do with the practical realities of politics than with a genuine concern to determine the true underlying interest of the American labor movement and take a position that supported the democratic rights of that movement.<sup>135</sup> The ACLU was looking beyond rights as an abstraction and into the more significant question of rights for what purpose, and on whose behalf: Would the Act strengthen the hand of those who needed access to the forums of speech

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131. *Dobbert v. Wainwright*, 105 S. Ct. 34, 41 n.† (1984) (Marshall, J., dissenting, joined by Brennan, J.).

132. J. THURBER, *THE THIRTEEN CLOCKS* (1977).

133. *Isaiah* 21:33-39.

134. Katz, *An Historical Perspective on Crises in Civil Liberties*, in *OUR ENDANGERED RIGHTS*, *supra* note 9, at 311, 323.

135. C. DANIEL, *THE ACLU AND THE WAGNER ACT: AN INQUIRY INTO THE DEPRESSION-ERA CRISIS OF AMERICAN LIBERALISM* (1980). I disagree with much of Daniel's thesis, but his book provides insight into some valuable primary source material.

and dispute resolution, as against those of wealth who wanted to cut off that access?

A second historical episode—the McCarthy era—also deserved comment. In June 1977, the Federal Bureau of Investigation released 10,000 pages of documents that revealed that five key officers of the ACLU transmitted information concerning ACLU members and activities to FBI officials. ACLU executive director Aryeh Neier promptly disclosed these contacts to ACLU members and engaged in public discussion concerning them. As Neier said, “Long before I saw the files maintained by the FBI on the ACLU, I knew the ACLU record during the 1950’s was poor.”<sup>136</sup>

A candid evaluation of the ACLU’s performance during the 1950’s might help us to plan an agenda and an attitude for the present danger. I do not advocate ritual repetition of *mea culpa*: Acceptance of the dominant liberal ideology concerning the consummate evil of Communism probably had as much to do with the poor record as anything. But at the least, I think the ACLU’s claim of willingness to lead the struggle to defend endangered liberty requires defending by telling us how they are going to do better than they did in the 1950’s.

If I understand what Professor Katz means by saying the next generation’s tasks will be found “within the practical realities,” I answer: That is not the task of the next generation, and has not been the task of any generation of liberty’s protectors if they were serious about their work. True, “[w]hen,” as Brecht wrote, “there was only injustice and no resistance,”<sup>137</sup> civil libertarians served as keepers of the flame.

But those were merely waiting times. Waiting for what “was” and “could be”: voices in unison arraigning things as they were and insisting on the right to be heard in advocacy of fundamental change. The truth of this assertion is within the historical memory of the ACLU, for it first raised its voice on behalf of those victimized by World War I and postwar political persecutions: socialists, union organizers, draft evaders, feminists. Its best hours, in sum, have been those when it dared to challenge “the practical realities.”

The dangers to democratic rights that now appear, many of which these authors recognize, have a common theme. The declaration that money is speech, the nationalization of government information, the insistence on gender-based role classifications, and the anti-labor decisions of recent days<sup>138</sup>—all of these look to the constitutionalization where possible, and the institutionalization where not, of the dominant power of large aggregations of capital in American life. The battle is for a space within which

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136. *See supra* note 122.

137. B. BRECHT, *To Posterity*, in *SELECTED POEMS* 173, 177 (H. Hays trans. 1947).

138. *E.g.*, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

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the opposition to this power can grow. It is well to sound the alarm of danger. It would have been better to analyze the roots of that danger and to ask whose interests are being served by its most prominent manifestations.