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Attacks on the Constitution, Violence, and the Necessity of Disobedience

Cover Page Footnote

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ATTACKS ON THE CONSTITUTION, VIOLENCE, AND THE NECESSITY FOR DISOBEDIENCE

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I. INTRODUCTION

ATTACKS on the Constitution began even before it was ratified by the required nine States.¹ For example, Yates and Lansing of New York refused to sign the Constitution, with Hamilton alone so doing from that state, and ratification there was secured only after nine others had so done. "The Federalist" and the "Federal Farmer"² indicate the depth of the opposition, and the immediate adoption of the Bill of Rights discloses how widespread it was. One can therefore justly say that the Constitution was assailed before its birth, during its labor pains, and ever since its first amendments.

These assaults have been somewhat idealistic, base and ignoble, or in between; some have been motivated by fear, others by ignorance, and yet many by a felt concern for our way of life and government. The attacks have not been solely political, but economic, social, and religious bases (prejudices) also have been disclosed. And while these "external" assaults may be examined, there are also "internal" ones—*i.e.*, within the federal government, the three departments may so act as to assault the Constitution.

These modern-day charges have been levelled at, for example, the President (Lyndon B. Johnson and Franklin D. Roosevelt) and the Supreme Court (the "Warren" Court) because of their alleged flouting of the Constitution, and current opposition to our Vietnam participation is likewise indicative of these contentions. Assaults on the Constitution may therefore be examined from several points of view.³

II. PRELIMINARY ANALYSIS

While an attack on the Constitution may take many forms, we obviously do not refer to a direct physical one, as when a person seeks to mutilate, tear, or burn it. Nor is it suggested that we include an assault

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1. Such "attacks" are discussed at notes 34-41 *infra* and accompanying text.

2. This work was ascribed to Richard Henry Lee, "as a sort of textbook for the opposition." XI Dictionary of American Biography 120 (Malone ed. 1933).

3. (a) It may not be inappropriate to point out that this writer takes the position of a devil's advocate throughout this paper; (b) further, although not separately developed, the justification for the judiciary's role in our legislative process is not only reason, as opposed to power, but also invitation—*i.e.*, the Congress at times deliberately "requests" the Supreme Court to exercise this role; (c) the preponderance of judicial "assaults" is a reflection of the current outcries, but this is merely because, like one's nose, it is struck first in any assault or counter-assault.

such as the Civil War, although if decided otherwise there might be no Constitution. With respect to what is assaulted, we may exclude a restriction to the physical document maintained at Washington, for there is more to the Constitution than paper and ink.

The concept of our Constitution today goes beyond a written formulation of a form of government and its judicial interpretation. It may not be incorrect to say that for many Americans, perhaps the vast majority, the Constitution incorporates "fundamental principles as they have been understood by the traditions of our people and our law";⁴ that it means a way of government, of life, and of protection, of imbedded folkways and mores, of a whole congeries of historical accumulations into a religious, political, social, and economic *weltanschauung*. There may be disagreement with phraseology, but, it is suggested, not with approach. Even the Supreme Court has upheld a statute because it is in accordance with the "spirit of the Constitution"⁵ and it has deliberately created a penumbral region of First Amendment shadowland where "the Constitution is what the judges say it is."⁶ The Constitution has become so institutionalized that some even claim it to be "un-American" to suggest any degree of change or modification. From this overall point of view assaults may therefore be alleged to occur whenever constitutionally protected interests, vested or otherwise, are threatened.⁷

Threats, and interests, take many forms;⁸ the consequences may also be unpredictable. But these interests or threats, and their counters, do not then, necessarily stop; they may go further. To illustrate, we may first refer to the early Alien⁹ and Sedition Acts¹⁰ of 1798 which, while not

4. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

5. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), quoting from Chief Justice Marshall in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

6. Chief Justice Hughes, quoted in Hendel, Charles Evan Hughes and the Supreme Court 11 (1951). The penumbral aspect is found in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), which is especially interesting because of the respective reference to and discussion of the ninth amendment and its own rights of the people by Justices Douglas and Goldberg, who, with those concurring with them, total six of the current bench.

7. An example is found in the scathing dissent of Mr. Justice Campbell (joined by Daniel and Catron, JJ.) in *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 362 (1856), where he compared the legal situation in Turkey and Ohio, and, inter alia, concluded that "the corporate moneyed interest is dominant in Ohio, and in either country that interest claims exemption from the usual burdens and ordinary legislation of the State." *Id.* at 370.

8. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963). Justice Brennan said that "in the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment . . . for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." *Id.* at 429.

9. 1 Stat. 570 (1798).

10. 1 Stat. 596 (1798).

exactly in accord with our national principles, were (unconstitutional¹¹) reactions, albeit with built-in limitations,¹² and then refer to the notorious Espionage Act of 1917¹³ and the temporary Sedition Act of 1918.¹⁴ Even the enunciation of the doctrine of judicial review in 1803 was not accepted without much opposition,¹⁵ and this is still present as an alleged threat to modern interests.¹⁶ Or, to broaden the illustrations, we may refer to late nineteenth century America where, at the behest of business advocates, the Supreme Court adopted an interpretation of the due process clause of the fourteenth amendment which countered threats to established property rights.¹⁷ But this defense was not sufficient; new threats arose from and because of this successful judicial counter, and these, in turn, had to be once again judicially countered¹⁸ until resolution of these "interest-threat-counter" situations by legislation.¹⁹

11. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (dictum).

12. See Miller, *Crisis in Freedom* (1951).

13. 40 Stat. 217 (1917). Title I is thoroughly discussed in *Gorin v. United States*, 312 U.S. 19 (1941). Of special pertinence is Title XII, prohibiting from the mails "any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States . . ." 18 U.S.C. § 1717(a) (1964). Although the last clause is highly questionable on "free speech" grounds, early challenges to the section failed. *Masses Publishing Co. v. Patten*, 246 Fed. 24 (2d Cir. 1917); *Gitlow v. Kieley*, 44 F.2d 227 (S.D.N.Y. 1930), aff'd, 49 F.2d 1077 (2d Cir.), cert. denied, 284 U.S. 648 (1931). See notes 111-12 *infra*. See generally Chafee, *Free Speech in the United States* (1941).

14. 40 Stat. 553 (1918). This 1918 amendment to the 1917 Act was later repealed. 41 Stat. 1359 (1921). Cf. note 91 *infra* and accompanying text.

15. This doctrine was propounded in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a general discussion of the background of judicial review, see Burton, *The Cornerstone of Constitutional Law*, 36 A.B.A.J. 805 (1950). On the judicial appointments, see Turner, *The Midnight Judges*, 109 U. Pa. L. Rev. 494 (1961). For judicial opposition, see, e.g., *Eakin v. Raub*, 12 S. & R. 330 (Pa. 1825) (dissenting opinion). Presidential opposition is exemplified by Lincoln's First Inaugural Address, March 4, 1861, in Raymond, *History of the Administration of President Lincoln* 112-20 (1864).

With this doctrine there necessarily blends the national supremacy under article VI, i.e., the nation must follow these judicial views until reversed or amended. Thus, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), compelled the Virginia courts to bow, "and we deliver our judgment with entire confidence," concluded Mr. Justice Story, "that it is consistent with the constitution and laws of the land." *Id.* at 362. Judge Roane, however, characterized a subsequent holding as "a most monstrous and unexampled decision." 1 Warren, *The Supreme Court in United States History* 555 (1926). For the latest illustration of this negative attitude, see *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

16. For a sophisticated analysis, see Hyneman, *The Supreme Court on Trial* 84-89 (1963); cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965), where Mr. Justice Douglas stated: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of [state] laws that touch economic problems, business affairs, or social conditions." *Id.* at 482.

17. Twiss, *Lawyers and the Constitution* (1942).

18. E.g., labor's efforts against injunctions as countered from 1895 to 1932. See generally Forkosch, *Labor Law* §§ 205-16 (2d ed. 1965).

19. *Ibid.*

Throughout these attacks on interests, the battle cry was constitutionality—*i.e.*, that what actually was involved was an attack on the Constitution and its principles. Thus, in the 1930's, Roosevelt's efforts to galvanize Congressional action were frustrated by judicial precedents which, as just indicated, had been counters to threats to interests; but now, instead of a legislative resolution, judicial decisions undertook to resolve the new threats with most of the holdings not reversing, but distinguishing the old and expanding the scope of the constitutional clauses.²⁰ Judicial counters, however, must not be thought of as limited to the protection of property interests, with consequences as just disclosed. The present years also illustrate judicial counters to threats against personal interests, whether these involve color,²¹ legislative apportionment,²² or criminal law.²³

The cry of attack has also been raised when Presidential action occurred. For example, Jefferson allegedly violated the Constitution when he authorized the Louisiana Purchase in 1803;²⁴ the social and economic revolutions under Jackson and Roosevelt were branded as unconstitutional;²⁵ Lincoln's unilateral call for enlistments, without immediate congressional authority, his declaration of a blockade, and his suspension of habeas corpus²⁶ were likewise attacked; and today President Johnson's

20. See, e.g., Forkosch, *Constitutional Law* §§ 205-42 (1963) (discussion of commerce clause).

21. E.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

22. E.g., *Baker v. Carr*, 369 U.S. 186 (1962).

23. E.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

24. The contention was that the American-French Convention of April 30, 1803, could not agree to the purchase because the Constitution did not permit such incorporation of new territory (and this was Jeffersonism). Jefferson's proposal for a constitutional amendment was dropped when Livingston wrote that Napoleon might change his mind on selling. The purchase treaty was, therefore, ratified immediately. However, the constitutional assault was rejected in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828), which upheld the Spanish cession of Florida by treaty in 1819.

25. The National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (amended by 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-67 (1964)), was hotly contested, with preliminary injunctions and obstructions preventing its initial effectuation, until its constitutionality was upheld in 1937. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (5-to-4 decision).

26. See, e.g., *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861), where Taney's protests were voiced, albeit in vain. Congress thereafter granted Lincoln this power. Act of March 3, 1863, ch. 81, 12 Stat. 755. The validity of this grant was assumed in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Lincoln's views on Supreme Court decisions are exemplified by his comments on *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), in his famous debates with Douglas. He stated that "the sacredness which Judge Douglas throws around this decision is a degree of sacredness that has never

authority and conduct of affairs in Vietnam are also being castigated.²⁷

In other words, all three departments of the federal government have been accused of successfully defying the Constitution, and in effect this lends an imprimatur of rationality and respectability to the attacks by others today. However, two other questions intrude: Do these modern assaults have a root in our past history of national violence? Do they have a root, however slim, in anti-intellectualism?

For example, we were conceived in colonial wars with the Indians, and, as a nation, we were born in a revolution. Our frontiers were expanded and nurtured in violence. So also was the national destiny determined in a Civil War, and its social and economic reforms have seen open warfare erupting between the partisans, from the nineteenth century Pullman and Homestead strikes to the twentieth century Kohler strike, from the nineteenth century Reconstruction and Ku Klux Klan period to the twentieth century's era of equality and civil rights and reforms. This "national character,"²⁸ it is suggested, may also be the reason not only for the rising crime rate, but, for our purposes, for the erroneous national view that under the Constitution any governmental legislation or action may be challenged and, despite all else, meanwhile disobeyed with impunity. To the extent that law (and the Constitution as the fount of our fundamental laws) suffers, then the Constitution is assaulted.

On anti-intellectualism, the Founding Fathers, steeped in the political philosophy of the Greeks and their own contemporaries, were followed a

before [been] thrown around any other decision. . . . It is based upon falsehood in the main as to the facts." Quoted in Myers, *History of the Supreme Court of the United States* 477 (1925). Even before Lincoln, this executive antagonism to judicial decisions can be found. For example, President Jackson said "John Marshall has made his decision. Now let him enforce it." Morison, *Oxford History of the American People* 450 (1965). Franklin Roosevelt is reputed to have been ready to defy the Court if the Gold Clause Cases of 1935 had been otherwise decided—e.g., *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935).

27. See, e.g., *American Policy Vis-à-Vis Vietnam* (1965) (brief prepared by Lawyers Committee on American Policy Towards Vietnam).

28. The "national character" includes many aspects of life, such as the deep-rooted Puritan religious approach which so influenced the nation (and still does). One of these aspects is the predilection to violence which is also found in current Wild West literature, comics, movies, etc., the use of the bullet to assassinate not only Presidents but also others, the Prohibition Era when law-breaking was a way of life, and so forth. If such enumeration were continued it would appear as if the United States were a center of internal lawlessness. Yet the "national character" externally is epitomized by the Treaty with Other Powers providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 46 Stat. 2343, ratified 81-1 by the Senate in 1929. This treaty was used as a base for the Nuremberg war trials.

As opposed to this internal "national character," the non-violence today espoused by many groups may presage a new era, and the National Conference for New Politics, just created in the spring of 1966, may illustrate the substitution of the ballot for the bullet and violence.

generation later by the Know Nothing Party; the Wilson-Roosevelt-Kennedy stream found the materialism of the 1920's, the McCarthyism of the 1950's, and the Ku Klux Klan and extremists of the 1960's close behind. The early and late haters were and are anti-Catholic, anti-innovation, and anti-whatever would upset the past, so that minorities (religious or other) found themselves deprived of constitutional protections, all in the name of the Constitution, and therefore that document was attacked in reverse fashion. American history has many illustrations in this area, and the too-recent era of McCarthyism, as well as current extremism informs us that bigotry is still with us,²⁹ and, sadly, the Constitution suffers through such eroding infringements.³⁰ There is, however, another subtle, sophisticated and suave form of anti-intellectualism which may be mentioned. This new approach substitutes the Supreme Court as the devil to be exorcised, preaches upholding the Constitution, but simultaneously tears it down by destroying an indispensable part of it and decrying the changes in our social and political institutions without congressional participation.

The preceding may permit the conclusion that attacks on the Constitution take many forms, that interests of many kinds are involved, and that our history and background cannot be omitted. These assaults may come from federal and state governments, from the three federal departments, and from private persons. Further, the American temper still contains what can be described as a delight in a constitutional battle, with the blood surging as the bugle sounds the attack.

However, many of these assaults are, in fact and in law, merely "gripes," and as such may here be ignored.³¹ Others likewise may be omitted where the legislation teeters upon, but does not unquestionably plunge into, the

29. See, e.g., N.Y. Times, March 20, 1966, p. 41, col. 4; id., March 21, 1966, p. 24, col. 2. These articles detail the investigation being conducted by the New Jersey Young Republican Committee concerning charges that, at its state convention in May 1965 and at a national convention in June 1965, a "rat fink" group had sung anti-Negro, anti-Semitic, and anti-Catholic songs. See Hofstadter, *Anti-Intellectualism in American Life* (1963).

To the extent that administrators express personal views in their unwarranted interpretations of statutes, this is also within the current stream.

30. The House Committee on Un-American Activities, formed under the authority of 60 Stat. 812 (1946), 2 U.S.C. § 72a(nt) (1964), has been denounced by many organizations. These groups claim that this Committee violates the constitutional rights of all persons subpoenaed before it. There are, of course, two sides—e.g., the Congress has continuously legislated funds, but the point here made is that respectable opinion exists concerning the quoted assault on the Constitution by the Committee.

31. This is not intended to denigrate the political effectiveness of a gripe, as witness the public clamor over *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) which resulted in the adoption of the eleventh amendment. See 1 Warren, op. cit. supra note 15, at 91-102.

abyss of unconstitutionality,³² for otherwise much of government's work might never be done. It is only when legislation or conduct is clearly and unquestionably violative of fundamental law (*i.e.*, the *weltanschauung* above mentioned) that such an assault occurs as is here envisaged, or when the act creates, or conduces to, a climate which clearly flouts the Constitution's proscriptions and rights. As difficult of ascertainment as is the former, the latter may be more severely attacked as leading toward "a Serbonian Bog."³³ Nevertheless, there is no other and more specific preliminary enunciation possible. We may, however, further our tentative understanding of the source and nature of these many attacks on the Constitution if their conceptual bases are additionally highlighted through an examination of cases placed in some context and, finally, one current assault will be considered.

III. PARTICULAR ATTACKS

A four-fold division of these attacks may be made: (1) general; (2) federal (and this into judicial, executive, and legislative); (3) state; and (4) private. Briefly, these may be illustrated as follows.

A. *In General*

The Constitution was promulgated illegally. The 1787 invitation to the states to send delegates to a convention was "for the sole and express purpose of revising the Articles of Confederation,"³⁴ and the subsequent action of the convention was "in technical excess of its authority."³⁵ Further, even ratification by the ninth state had to be reported back to the old congress—*i.e.*, it was revision and not substitution which was originally desired, even though such congress thereupon resolved to commence proceedings under the new Constitution the following year.³⁶ The

32. For example, these were the arguments raised in Congress against the public accommodations section of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000a. Its application to restaurants in interstate commerce was upheld in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and to motels serving interstate travelers, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Similar arguments were employed against certain provisions of the Voting Rights Act of 1965, but this measure was upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), with Mr. Justice Black as the sole dissenter (and then only in part). *Id.* at 355 (separate opinion). In this dissent, § 5 of the Act, 79 Stat. 439 (1965), 42 U.S.C. § 1973c (Supp. I, 1965), was vigorously attacked. *Id.* at 356.

33. This term was used in *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting).

34. 3 Farrand, Records of the Federal Convention of 1787, at 14 (1911).

35. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 459 (1934) (Sutherland, J., dissenting).

36. *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820).

counter-argument, as phrased by James Madison, stems from "the absolute necessity of the case . . ."³⁷

The Constitution was adopted by a minority of the people, even though by a majority (ultimately all) of the states. This contention is two-pronged. If the states created and adopted the Constitution, then the federal government must look to these sovereigns for its powers, *e.g.*, the tenth amendment reserves all not so delegated. But this amendment "states but a truism,"³⁸ and it is actually the people who gave life and power to the new government.³⁹ If this be so, then a democratic head-counting discloses that the margin of ratification (by states, with majorities in each controlling) was so small that a popular referendum would have defeated the Constitution.⁴⁰ Also, since the convention sought a two-thirds vote of the states (9 of 13), then the same percentage definitely would have meant rejection by the people, and would never have resulted in even a proposal, *i.e.*, of 74 representatives chosen by the 12 states (Rhode Island excepted) only 55 gathered for the Constitutional Convention, and of these only 39 signed the document.⁴¹

Assuming the existence of the Constitution when its amending provisions were violated, the amendments so added were invalid, and, therefore, these new provisions need not be followed. This argument stems from the requirement in article V that the amending process requires state ratification whether by state legislatures or by state conventions, as Congress chooses. Assuming the former, then where the legislatures are not able freely so to determine, then the Constitution is not only assaulted, but the alleged amendment is also invalid.⁴²

Following close upon the preceding, and also subsumed within the next division, is the contention that the amending process is flouted when the judiciary "amends" through allegedly "interpreting" the Constitution.⁴³

37. The Federalist No. 43, at 292 (Ford ed. 1898).

38. *United States v. Darby*, 312 U.S. 100, 124 (1941) (Stone, J.); see *United States v. Sprague*, 282 U.S. 716, 733 (1930).

39. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (Marshall, C.J.).

40. There is nothing remarkable in this, as recent presidential elections have seen an electoral college majority based upon a minority of the voters. On the struggle for ratification, see Morison, *op. cit. supra* note 26, at 312-16 (1965).

41. A bare majority of the 74 signed, although these were two-thirds of those who gathered at Philadelphia.

42. This is the overall contention of the "conspiracy" advocates with respect to the ratification of the fourteenth amendment. See Forkosch, *Constitutional Law* § 360 (1963). There has also been a similar attack upon the eighteenth amendment, *i.e.*, that it should have been submitted for ratification to and by the people through state conventions and not state legislatures.

43. The constitutional theory and justification for judicial review is that the Supreme Court merely "finds" the law and applies it in particular cases, with interpretation of the

Even more reprehensible, it is claimed, is the situation which occurs when the Supreme Court interprets a constitutional amendment, and the Congress rejects a proposed amendment which would modify or overrule that decision. If legislation is then enacted in accordance with the Court's decision, and the Court then overrules its prior decision it has, in effect, enacted the rejected amendment and rendered the legislation unconstitutional.⁴⁴ The dissents give the arguments against this procedure,⁴⁵ but

Constitution and statutes being an essential corollary. Therefore, the Court does not "make" law, as this is a function of the legislature. When the "make" supersedes the "find," then, runs the argument, the judiciary has become the legislature and thereby flouts the constitutional "separation of powers" doctrine.

44. An analogous situation was *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Mr. Justice Black dissented, *id.* at 670, as did Mr. Justice Harlan with whom Mr. Justice Stewart joined. *Id.* at 680. The background discloses that eleven Southern states enacted poll taxes in the post-Reconstruction period, admittedly to deny Negroes the right to vote; seven were thereafter repealed (as was also done in Vermont). The constitutionality of these laws was upheld in *Breedlove v. Suttles*, 302 U.S. 277 (1937), despite "privileges and immunities" and "equal protection" contentions under the fourteenth amendment. The first federal bill to outlaw poll taxes was introduced in 1939. The twenty-fourth amendment was ratified in 1964 and invalidated the poll tax requirement for federal elections, thus overturning state laws to the contrary. *Harman v. Forssenius*, 380 U.S. 528 (1965). Congress, in § 10 of the Voting Rights Act of 1965, 79 Stat. 442, 42 U.S.C. § 1973h (Supp. I, 1965), denounced the remaining poll taxes for state voting and, by virtue of its power under § 5 of the fourteenth amendment, and § 2 of the fifteenth amendment, directed the Attorney General to bring a declaratory judgment or injunction action against these states for the requisite relief. Notwithstanding the references to the fourteenth amendment in *Breedlove v. Suttles*, *supra*, a suit by Virginia residents to denounce their state's requirement under the equal protection clause resulted in the Court's overturning these laws (and also, by inference, the "pauper" laws which deny the franchise to these citizens), without going into the preceding history and congressional failure to act. *Harman v. Forssenius*, 380 U.S. 528 (1965). Mr. Justice Douglas, writing for the Court, did not refer to *Butler v. Thompson*, 341 U.S. 937 (1951), in which the Virginia law had been upheld against his lone dissent.

45. Mr. Justice Black wrote, *inter alia*, that "since the *Breedlove* and *Butler* cases were decided the Federal Constitution has not been amended in the only way it could constitutionally have been, that is, as provided in Article V of the Constitution. I would adhere to the holding of those cases. The Court, however, overrules *Breedlove* in part, but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy. From this action I dissent." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 671-72 (1966) (dissenting opinion). Mr. Justice Harlan also dissented, stating that "the final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to Federal elections and abolished by the States themselves in all but four States with respect to state elections, is perhaps in itself not of great moment. But the fact that the coup de grace has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government." *Id.* at 680; see *Korematsu v. United States*, 323 U.S. 214, 245-246 (1944) (Jackson, J., dissenting). It was

the assault on the Constitution's amending provisions is here disclosed. The counter-argument to these dissenting views is that a constitutional right need not wait on legislative action, and that, if one clause does not work, then another may.⁴⁶

B. Federal Attacks

1. By the Judiciary

The doctrine of judicial review, or supremacy, was claimed to be in contravention of the Constitution. It may be counter-urged that necessity, and at least a degree of ambiguity, permitted this, and also that Congress opened the door by inviting such a judicial rejection of original additional jurisdiction.⁴⁷

This question of ambiguity raises another contention. When a constitutional provision is specific, without any question able to be raised as to meaning, then it must be followed regardless of consequences. For example, only the President himself can perform certain acts, and even a Wilsonian illness cannot permit change. For example under article I, section 7, clause 2, only the President can "sign" a bill. The eleventh amendment overcame a different, but likewise specific, judicial application and consequence.⁴⁸ But this amendment itself is "word-specific." Does an assault not occur when the Supreme Court amends the amendment further, and thereby eliminates the Constitution—at least for this new purpose?⁴⁹

The concept of a continuing judicial constitutional convention, or that the Constitution is what the judges say it is,⁵⁰ expresses another purported

further stated by Mr. Justice Harlan that "my disagreement with the present decision is that in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long-established standards governing the application of that clause." *Id.* at 681. "Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process." *Id.* at 686.

46. The Court rejected the first AAA because of its dependence upon the taxing and spending clause, *United States v. Butler*, 297 U.S. 1 (1936), but it upheld the second in *Mulford v. Smith*, 307 U.S. 38 (1939), where the commerce clause was the base.

47. See note 15 *supra*. It may, however, be argued that Marshall need not have come to this constitutional issue, but, nevertheless, seized it for its permitted assertion of his judicial power of reviewing legislative enactments.

48. This amendment reversed the consequences of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which permitted a citizen to sue his state on its defaulted bonds.

49. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

50. See text accompanying note 6 *supra*. However, this statement may involve a "novel

judicial assault. In one sense this cannot be countered, but, it may in the sense that this is the nature of judicial review. The people have never expressed dissatisfaction, and, by amending the Constitution to reverse judicial decisions, they have impliedly confirmed this assault.⁵¹ Nevertheless, some of the Justices disapprove of this almost unlimited power, feeling that it encroaches upon the legislative function, or in particular cases is used to deny a person his constitutional rights and thereby "we forsake a government of law and are left with government by Big Brother."⁵²

There is another and subsidiary aspect of this judicial instability which involves, besides the judicial interpretation of the clauses of the Constitution, statutes⁵³ and judicial principles. *Stare decisis* supposedly represents stability in the application of law and not, as one Justice objected, throwing judicial decisions "into the same class as a restricted railroad ticket, good for this day and train only."⁵⁴ As Mr. Justice Frankfurter expressed it, "ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors."⁵⁵ There is, nevertheless, an antinomy between stability and

construction of the facts," *Cox v. Louisiana*, 379 U.S. 536, 587 (1965) (Clark, J., dissenting), a "remarkable emasculation of a prohibitory statute," *id.* at 591 (White, J., dissenting), or a judicial reaching into the trial record for one sentence upon which to reverse, when this language had gone unnoticed and was not referred to "until this Court's independent research ferreted it out of a lengthy and somewhat confused record." *Terminiello v. Chicago*, 337 U.S. 1, 7 (1949) (Vinson, C. J., dissenting).

51. See notes 48-49 *supra*; text accompanying note 105 *infra*. The sixteenth amendment reversed *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

52. *Ginsburg v. United States*, 383 U.S. 463, 501 (1966) (Stewart, J., dissenting). See *Mishkin v. New York*, 383 U.S. 502, 515 (1966) (Black, J., dissenting). Mr. Justice Black stated that "distorting or stretching that Amendment by reading it as granting unreviewable power to this Court to perform the legislative function of fixing punishments for all state and national offenses offers a sadly inadequate solution to the multitudinous problems generated by what I consider to be the un-American policy of censoring the thoughts and opinions of people." *Id.* at 517. Similarly, Mr. Justice Stewart wrote: "For me, however, there is another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his 'sordid business.' That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam Sons. In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way." *Ginzburg v. United States*, *supra* at 501 (Stewart, J., dissenting).

53. See, e.g., note 50 *supra*.

54. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

55. *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (dissenting opinion). In regard

progress or, as Pound opened a volume, "law must be stable and yet it cannot stand still."⁵⁶ Further, there is a distinction in this area of the law which Lincoln early made: that constitutional decisions made in "ordinary litigation" are binding only upon the litigants but not upon "the policy of the government, upon vital questions affecting the whole people," for otherwise they "will have ceased to be their own rulers."⁵⁷

These, perhaps, may be the reasons why other Justices reject the notion of *stare decisis* in the field of constitutional law; that is, the doctrine has "never been a blind, inflexible rule," that it "has never been thought to extend so far as to prevent the courts from correcting their own errors," and that "erroneous precedents" should not be followed.⁵⁸ As another Justice has put it, the doctrine "carries different weight in Constitutional adjudication than it does in nonconstitutional decision,"⁵⁹ and he, therefore, applied it in private litigation when "the question thus raised is . . . of constitutional dimension."⁶⁰ Since the mass "constitu-

to the Court's composition and succession, there was the alleged court-packing so as to overrule *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870). See generally Ratner, *Was the Supreme Court Packed by President Grant?*, 50 Pol. Sci. Q. 343 (1935); Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 Harv. L. Rev. 977, 1128 (1941). The reversal, which was sought, occurred in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), after Grant had appointed two new Justices to bring the Court up to nine. The two appointees voted with the former minority of three so as to make a new majority. See generally Hughes, *The Supreme Court of the United States 51-53* (1928).

56. Pound, *Interpretations of Legal History* 1 (1923).

57. Lincoln, quoted in Randall, *Constitutional Problems Under Lincoln* xxii (rev. ed. 1951). For additional analyses and illustrations, see *Heyert v. Orange & Rockland Util., Inc.*, 17 N.Y.2d 352, 359-63, 218 N.E.2d 263, 267-70, 271 N.Y.S.2d 201, 207-10 (1966).

On July 26, 1966, the English House of Lords announced that in the future it will be free to depart from a previous decision when it appears right to do so. *N.Y. Times*, July 27, 1966, § 1, p. 1, col. 6. While continuing to "regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases," it was nevertheless recognized "that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the development of the law." *Id.* at p. 6, cols. 4-5.

58. *Green v. United States*, 356 U.S. 165, 195 (1958) (Black, J., dissenting). The Chief Justice and Mr. Justice Douglas joined in the dissent. One of the first major corrections of a "century of error" is seen in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), although this correction of error was itself corrected by the subsequent adoption of the sixteenth amendment.

59. *Mapp v. Ohio*, 367 U.S. 643, 674 (1961) (Harlan, J., dissenting). Mr. Justice Harlan perceived no justification for rejecting the doctrine in the *Mapp* decision. He felt judicial restraint should be exercised and concluded that judicial power, not reason, was being applied.

60. *Glidden Co. v. Zdanok*, 370 U.S. 530, 537 (1962) (Harlan, J.). In this instance, Mr. Justice Harlan wrote for a majority of three, with two others concurring, two dissenting, and two not participating. For the differing attitudes of the Justices, see the

tional" reversals of 1937,⁶¹ the doctrine has retained its vitality, but it is of greatly diminished importance. Its application may be said to depend upon the whims of the Justices.

The preceding two assaults are further documented by reference to the balancing concept—*i.e.*, there is an "interplay of competing social-economic interests and viewpoints,"⁶² and the Court's problem is "to strike a balance."⁶³ "It is a question of which of two powers or rights shall prevail . . ."⁶⁴ However, continues the argument, when such juggling or balancing is required, why should the elected policy-making body not decide, rather than a judiciary appointed for life? Mr. Justice Holmes superficially agreed with this, saying that

I do not conceive that [deciding] to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled [that states] . . . may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not.⁶⁵

A counter-argument may be that all government involves a continuing series of balancings and choices, whether internationally or domestically on the federal level, and locally on the state level; that individuals daily face these like problems on their own levels; and that the judiciary, confronted by similar conflicts, does not do otherwise.⁶⁶

opinions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Gray v. Sanders*, 372 U.S. 368, 383 (1963).

61. In *Smith v. Allwright*, 321 U.S. 649, 665 (1944), Justice Reed cited fourteen cases in the previous seven years where such reversals occurred. For a pre-1932 listing, see *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J., dissenting). The period between 1932 and 1943 is discussed in *Helvering v. Griffiths*, 318 U.S. 371, 401 (1943).

62. *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 475 (1950) (Frankfurter, J.).

63. *Id.* at 474.

64. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

65. *Id.* at 75. In the *Lochner* case the balancing involved the state's powers versus the person's rights under the Constitution as was the case in *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470 (1950). However, the conflicting interests may also involve the federal and state governments—*e.g.*, federalism. The great domestic balancing of interests today is, of course, in the area of civil, property and human rights, with individuals and organizations also finding that governments insert their own national or local interests into the conflict.

66. For example, the national use of zoning boards, created by legislative fiat, engages in this. "Zoning boards of appeals are made up not of theoreticians or doctrinaire specialists but of representative citizens doing their best to make accommodations between conflicting community pressures." *Von Kohorn v. Morrell*, 9 N.Y.2d 27, 34, 172 N.E.2d 287, 289, 210 N.Y.S.2d 525, 528 (1961).

The political federalism which the Constitution embodies and encourages is being negated by the decisions of the Supreme Court. While the Congress may initiate this breakdown, the contention here is that the judiciary permits and even expands this assault. The illustrations cover not only civil rights,⁶⁷ but also a state's control of liquor importation,⁶⁸ of labor relations,⁶⁹ of its local fight against crime,⁷⁰ and of the manner in which the federal commerce power controls the economic heart of a state.⁷¹ The most recent major counter-assault was that of the Conference of State Chief Justices in 1958, which inveighed against the judicial preemption of state power, and in particular of state sedition laws even though the Congress had not so intended.⁷² But, as Justice Jackson pointed out in 1954, "it is a mistake to lump all states' rights together as it is done so frequently in political discussions."⁷³

When the Court itself creates inequalities in the application of legal principles, then it flouts its own precept of equal justice under law. This is illustrated by the sit-down and sit-in methods. In the former, an employee does not physically leave his place of work to strike, but remains, takes over the plant, thereby prevents others from doing his work, and, in the language of Chief Justice Hughes, commits "a high-handed proceeding without shadow of legal right."⁷⁴ In the latter, a group of individuals occupies seats at a lunch counter and refuses to leave, claiming that the Civil Rights Act of 1964 forbids discrimination, grants federal statutory rights, and thereby prevents application of local laws of trespass. This sit-in method was upheld inasmuch as, although the

67. E.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964).

68. E.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

69. See, e.g., Forkosch, *Labor Law*, §§ 272-74 (2d ed. 1965).

70. See, e.g., notes 77-82 *infra* and accompanying text.

71. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964). See generally Forkosch, *Constitutional Law*, §§ 205-42 (1963). This problem is manifested in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

72. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (6-3 decision), which sparked this counter-assault. See Conference of Chief Justices, Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions 9 (1958).

73. Jackson, *The Supreme Court in the American System of Government* 66 (1955). He felt that "the maintenance of the constitutional equilibrium between the states and the Federal Government . . . has brought the most vexatious questions to the Supreme Court." *Id.* at 65. Interstate commerce, for example, and the federal powers thereunder, rightly belonged to the national government, *id.* at 67, although "considerations of a different nature arise from interferences with states' rights under the vague and ambiguous mandate of the Fourteenth Amendment." *Id.* at 68.

74. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939). In this case, the Court upheld the discharge of those employees who so illegally take and hold possession of their employer's property.

Court agreed "that the law generally condemns self-help [there was statutory immunization of] . . . nonforcible attempts to gain admittance to or remain in establishments covered by the Act . . ." ⁷⁵ The Court thus rejects a sit-down in labor-management relations as illegal, *i.e.*, a taking of property without due process of law, but permits a sit-in because a federal statute in effect permits it, even though the former approach might well void the latter act. ⁷⁶

The Court's decisions encourage crimes and criminals. The finger is pointed at the consequences of several recent decisions. The argument in some degree concedes, or at least does not denounce, the constitutional correctness of the holdings, but contends that pragmatic considerations have been overlooked and that experience now dictates a change. For example, while objection is not made to the general requirement of counsel in criminal cases, ⁷⁷ the exclusion of incriminating pre-trial

75. *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964). In effect, the Court decided in *Hamm* what they had earlier remanded to a state court because "an open and arguable" question of state law was involved. See *Bell v. Maryland*, 378 U.S. 226 (1964), where Mr. Justice Douglas stated that "a majority reach the merits of the issue. Why then should a minority prevent a resolution of the differing views?" *Id.* at 242 (separate opinion). The dissenters in the *Hamm* case advanced several reasons, but applicable here is the language of Justices Black and White. The former commented: "The idea that Congress has power to accomplish such a result [abate lawful state convictions prior to the act] has no precedent, so far as I know, in the nearly 200 years that Congress has been in existence. . . . I do not understand [the act to grant] . . . persons who are unlawfully refused service a 'right' to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay. I think one of the chief purposes of the 1964 Civil Rights Act was to take such disputes out of the streets and restaurants and into the courts, which Congress has granted power to provide an adequate and orderly judicial remedy." 379 U.S. at 318-19. (Footnote omitted.) The latter felt that "had Congress intended to ratify massive disobedience to the law, so often attended by violence, I feel sure it would have said so in unmistakable language. The truth is that it is only judicial rhetoric to blame this result upon Congress. . . . Whether persons or groups should engage in nonviolent disobedience to laws with which they disagree perhaps defies any categorical answer for the guidance of every individual in every circumstance. But whether a court should give it wholesale sanction is a wholly different question which calls for only one answer." *Id.* at 328.

For additional aspects of removal, see *Georgia v. Rachel*, 384 U.S. 780 (1966) and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). In the former the Court unanimously upheld the removal to a federal court of a state trespass prosecution, while in the latter, the court rejected removal of a prosecution for obstructing streets in violation of local law. The latter vote was five to four.

76. In a recent case, three parents were convicted of disorderly conduct in staging a sit-in at a junior high school to protest racial segregation. *Martin v. New York*, 382 U.S. 828, denying cert. in 15 N.Y.2d 933, 207 N.E.2d 197, 259 N.Y.S.2d 152 (1965).

77. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In this case, only two states joined Florida in opposing the prisoner's claim, while twenty-two states joined in an amicus brief supporting it. Of course, there are many questions based upon the rule in *Gideon*—*e.g.*, is there a right to counsel at a preliminary hearing where pleas are not accepted and the

statements at a police station—*i.e.*, custodial interrogation—because of a lack of counsel, police warning, or an invasion of rights⁷⁸ is denounced, and it is contended that such a rule “is most ill-conceived and . . . seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement.”⁷⁹ Various state law enforcement officials argue against this “judicial takeover” which has “tragically weakened”⁸⁰ law enforcement and is “destroying the nation,”⁸¹ although a counter to this is the view that crime and its rise have their basis in our social and economic conditions rather than in reduced police effectiveness.⁸²

The Court's decisions encourage violence. The contention here is that our legal heritage requires that parties eschew private methods of

judge decides only whether to hold the accused for the grand jury and to admit him to bail? See *Pointer v. Texas*, 380 U.S. 400 (1965), where this question is discussed but not decided.

78. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Miranda* and *Escobedo* are to be applied prospectively only. *Johnson v. New Jersey*, 384 U.S. 719 (1966).

79. *Id.* at 493 (Harlan, J., dissenting). Mr. Justice Stewart also dissented, stating that “the Court perverts those precious constitutional guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police investigation.” *Id.* at 494. A discordant voice was also raised by Mr. Justice White with whom Justices Clark and Stewart joined, saying “that [while] law enforcement will [not] be destroyed . . . it will be crippled and its task made a great deal more difficult . . . for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution.” *Id.* at 499. In the *Miranda* case, the dissent by Mr. Justice Harlan inveighed against “the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities.” 384 U.S. at 525-26. Dissenting once again, Mr. Justice White said that “equally relevant [to a criticism of the majority's decision] is an assessment of the [new] rule's consequences measured against community values.” 384 U.S. at 537.

80. William Parker, Police Chief, Los Angeles Police Dep't, quoted in Kamisar, *When the Cops Were Not “Handcuffed,”* N.Y. Times, Nov. 7, 1965, § 6 (Magazine), p. 34.

81. Garrett Byrne, Boston Dist. Att'y, *ibid.* Former Police Commissioner. Michael J. Murphy of New York City has commented that the police “are forced to fight by Marquis of Queensberry rules while the criminals are permitted to gouge and bite.” *Ibid.* Address by Lewis F. Powell, Jr., President of the ABA, at the Annual Meeting, in Miami Beach, Aug. 9, 1965.

82. See, e.g., Address by Chief Justice Earl Warren, 1965 ALI Annual Meeting, in 42 ALI Proceedings 21 (1965). “Thinking persons, and especially lawyers, know that this is not the fact. They know that crime is inseparably connected with factors, such as poverty, degradation, sordid social conditions, the weakening of home ties, low standards of law enforcement, and the lack of education.” *Id.* at 30. Lord Shawcross has stated that children go wrong “because they aren't brought up right”; that modern mobility and inventions indicate that “the criminal is living in a golden age”; that criminals are “becoming increasingly aware of the rules of the game” and the court procedures “have loaded the scales too heavily” in favor of the criminal and “we are paying too-high [a] price” for our concern that no innocent person be convicted. Interview, U.S. News and World Report, Nov. 1, 1965, pp. 80-81.

redress, and that, when such methods are sanctioned, these multiply into the present conditions. The FBI's figures disclose an increase in the physical crimes and also in the violence associated with them;⁸³ the cities disclose parks and sections often officially and unofficially declared off-limits; and urban populations daily spew up demonstrations which culminate in give-and-take melees, as witness the riots in the Watts area of Los Angeles in 1965 and 1966.⁸⁴ The governments are likewise so infected, and this recalls the television, newspaper, and other graphic reporting of the "marches" in the South during 1964 and 1965 with police clubbing, electric poles, and other forms of violence culminating in private burnings, killings, and armed conflicts. While these illustrations may also be ascribed to the executive branch, the judiciary, it is claimed, first gives a degree of substance by initiating⁸⁵ and continuing⁸⁶ imposed social changes which necessarily result in violence.⁸⁷ The counter, of course, is that the Court's duty is clear, that consequences such as these are not within its province to consider, and that the legislature can easily and speedily overcome its decisions and effects if and when so desired.⁸⁸

The Court's decisions encourage disrespect for the law.⁸⁹ It is almost

83. The argument here includes free speech aspects, such as the increase in the publication and depiction of pornography and sex—e.g., permitting the publication of *Fanny Hill* to be continued—despite the television and movie concentration upon crime and criminals, the increase in dope addiction and the necessity for money, all of which filter down even to children. See *N.Y. Times*, March 20, 1966, § 1, p. 73, col. 8, concerning charges of juvenile delinquency against three young boys (from six to eleven) who savagely beat a four year old girl with sticks and a hammer and set her clothing afire.

84. See, e.g., *N.Y. Times*, March 18, 1966, p. 24, col. 1. As a 1966 result, there were two deaths, twenty injuries and forty-nine arrests, whereas in August 1965, some thirty-five were killed and nearly one thousand injured. Another aspect of this use of violence is connected with the disrespect for the law and the reference is to assaults on the police and the use of clubs and rocks against them. See, e.g., *N.Y. Times*, January 12, 1966, p. 19, col. 5.

85. E.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

86. E.g., *Watson v. City of Memphis*, 373 U.S. 526 (1963), rejecting non-desegregation of public recreational facilities because of alleged fears of violence.

87. E.g., *Cooper v. Aaron*, 358 U.S. 1 (1958). Efforts to prevent educational desegregation in Little Rock, Arkansas, which included calling out the state militia by the governor to prevent Negroes from entering the schools, resulted in President Eisenhower's use of federal troops. Exec. Order No. 10730, 22 Fed. Reg. 7628 (1957).

88. The results can be reversed by statute, which method was upheld in *In re Rahrer*, 140 U.S. 545 (1891). This case approved the Wilson Act of 1890, 26 Stat. 313, 27 U.S.C. § 121 (1964), which was enacted to overcome *Leisy v. Hardin*, 135 U.S. 100 (1890). The twenty-first amendment, repealing the eighteenth, was proposed and ratified in ten months.

89. What has been said previously concerning violence, see notes 83-88 *supra* and accompanying text, can be repeated here. However, included here is the "minor" incidental violence which may or may not breach a law, or which is ordinarily ignored in the course

a truism that without public support⁹⁰ a law such as the Volstead Act (and its underlying eighteenth amendment) must fail. The wholesale and continued national flouting of this particular law engendered an aura of disrespect for all law which continues into the present.⁹¹ Instead of preventing this continuation, so runs the argument, the Court furthers it by decisions which hold as unconstitutional state laws proscribing the obstruction of, or congregating in, the streets⁹² and which also today permit the seizure of private property by a sit-in.⁹³ This disrespect⁹⁴ is also engendered in a people who believe in a pledge of allegiance which contains "under God,"⁹⁵ where religion is removed from the schools⁹⁰

of events. For example, the anti-war demonstrators who marched on Fifth Avenue in New York City on March 26, 1966, were heckled and verbally abused by numerous persons, who also threw eggs and, at times, engaged in physical violence. The reports indicated some arrests. *N.Y. Times*, March 27, 1966, § 1, p. 1, col. 6.

90. The lack of public support in all areas is illustrated by the great apathy disclosed in regard to murder and other crimes leading to a task force examination under the aegis of the President's Commission on Law Enforcement and Administration of Justice. In reverse, this is also illustrated by the example of a Bronx grocer in New York City who went to the aid of a policeman being attacked by an angry mob, was stabbed in the back, and was thereafter boycotted by his neighbors and lost his store. See *N.Y. Times*, January 17, 1966, p. 1, col. 3. He was later aided with jobs.

91. Congressman Bray has referred, during the debate in regard to the draft-card burning amendment of 1965, 79 Stat. 586, amending 50 U.S.C. App. § 462(b)(3) (1964), to the "growing disrespect for our law and institutions." 111 Cong. Rec. 19135 (daily ed. Aug. 10, 1965).

92. *Cox v. Louisiana*, 379 U.S. 536 (1965), and *Cox v. Louisiana*, 379 U.S. 559 (1965), were two cases in which the Reverend Cox, a field secretary of CORE, led 2,000 students protesting segregation, discrimination, and the arrest of fellow students, to a place near a courthouse where they listened to a speech by him, his conviction being reversed, even as to a charge of courthouse picketing. In *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), the Court denounced the application of a (valid) loitering statute because, after a refusal to move when requested by a police officer, there must also be "a showing of the accused's [continued] blocking free passage . . ." *Id.* at 91, quoting *Middlebrooks v. City of Birmingham*, 42 Ala. App. 525, 527, 170 So. 2d 424, 426 (1964), cert. denied, 277 Ala. 700, 170 So. 2d 427 (1964). See also *Dombrowski v. Pfister*, 380 U.S. 479, 491-92 (1965).

93. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). But cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

94. There are other illustrations available in fields other than those used here—e.g., the antitrust prosecutions against the electrical industry giants, resulting in comparatively light sentences and fines, with the costs then being deductible as business expenses, or permitting the cost of an unsuccessful defense against a criminal prosecution for fraud by a securities dealer likewise to be so deducted (since a constitutional right to employ a lawyer is involved). See *Commissioner of Internal Revenue v. Tellier*, 383 U.S. 687 (1966).

95. See *Lewis v. Allen*, 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, cert. denied, 379 U.S. 923 (1964). The *Lewis* case upheld the dismissal of a proceeding to require "under God" to be deleted from the pledge of allegiance to the flag, which action was recommended by the New York State Commissioner of Education for use in the state's public school system.

96. See *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421

although retained for Sunday closing of businesses.⁹⁷ The logic of a Godless state, runs the argument, sustains a decision that criminal indictments returned by grand juries whose members have been required to affirm a belief in God are defective.⁹⁸

The Court's decisions are re-molding our political, economic, and social life and form of government without sanction in the Constitution. This, of course, is the basis for many attacks on the Court for its alleged unconstitutional usurpation of power never before exercised.⁹⁹ The illustrations include the Desegregation Case¹⁰⁰ and others. For example, the recent "unequal voting" decisions¹⁰¹ have resulted in the imposition of a federal standard of "one man, one vote,"¹⁰² with constitutional amendments aimed at overturning these decisions being proposed. The economic guidance of the Court goes back a century and a quarter¹⁰³ to

(1962); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948). This latter case is quite different factually from the former one upon which the present argument is based. A constitutional amendment on school prayers has recently been proposed by Senator Dirksen.

97. E.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617 (1961). Mr. Justice Stewart has commented, in *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (concurring opinion), where a Seventh-day Adventist was upheld in her claim for unemployment compensation even though rendered unemployable by a refusal to work on a Saturday, "that the Court's approach to the Establishment Clause has on occasion . . . been not only insensitive, but positively wooden," *id.* at 414, and that "the result is that there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause." *Ibid.*

98. See *Maryland v. Madison*, 240 Md. 265, 213 A.2d 880 (1965); cf. note 95 *supra*.

99. See Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Supreme Court Review* 119 (Kurland ed. 1965). It has been said that "the Justices [in two early opinions] wrote history essentially for political reasons, that is, in an attempt to solve by judicial intervention some major contemporary socio-political problem upon which the case at hand could be made to bear." *Id.* at 126.

100. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

101. These cases began with *Baker v. Carr*, 369 U.S. 186 (1962), which upheld a federal suit challenging a state's apportionment of its legislative seats. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court rejected a county unit system applicable in statewide primary elections. The principles enunciated in these cases were applied to congressional districting plans enacted by state legislatures. See *Wesberry v. Sanders*, 376 U.S. 1 (1964).

102. *Reynolds v. Sims*, 377 U.S. 533 (1964); accord, *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). However, *Fortson v. Dorsey*, 379 U.S. 433 (1965), upheld Georgia's reapportionment plan.

103. In *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), the Court rejected an interpretation of a state charter to bridge owners as a monopoly and thereby opened up economic competition except where the exclusive grant was definite and unambiguous—e.g., public utilities.

its modern application, for example, in antitrust and patent litigation.¹⁰⁴ Justice Harlan's views in a dissent express this anti-Court approach:

What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. . . . I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be the product of state legislatures. Nevertheless, no thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. . . .

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.¹⁰⁵

2. By the Executive

The President cannot himself do the many things required of his office and must, therefore, depend upon departments, officials, and aides. Nevertheless, the responsibility is his—*e.g.*, when his Secretary of Commerce, acting upon an executive order, seizes private property in peacetime, there is an assault upon all of the constitutional provisions which safeguard private property.¹⁰⁶ Sometimes the President must himself act—*e.g.*, where the Executive utilizes his pardoning power to set free a criminal contemnor who has been imprisoned by the judiciary, he somewhat invades the constitutional separation of powers, renders the courts impotent to a degree, and thereby requires judicial condemna-

104. See, *e.g.*, *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945) (antitrust litigation). In regard to permitting the copying of a non-patented or copyrighted item, despite a state's rejection, see *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

105. *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964). (Emphasis in original.)

106. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

tion.¹⁰⁷ In other situations,¹⁰⁸ the actions of the President and his assistants may be impliedly denounced, but upheld for emergency reasons, in what otherwise might be termed an assault on the constitutional rights of citizens—*e.g.*, the Japanese relocation cases¹⁰⁹ or the suspension of the writ of habeas corpus.¹¹⁰ A few illustrations from executive departments may be sufficient to disclose some alleged assaults on the Constitution by subordinate officials.

a. Postmaster General

Communist political propoganda originating in a foreign country is statutorily required to be detained by the postal authorities. As interpreted and applied by the Postmaster General, delivery was permitted only if the addressee requested it. This has been held to be a deprivation of the first amendment rights of the addressee.¹¹¹ So, too, does such an appointed

107. In *Ex parte Grossman*, 267 U.S. 87 (1925), Mr. Chief Justice Taft, formerly a Chief Executive himself, conceded the President's technical and constitutional power so to do, but cautioned that its capricious use might bring impeachment.

108. Although not developed here, illustrations may be found in the Kennedy-Johnson methods in the steel industry. The late President Kennedy was successful in bringing to bear all of the federal government's powers to compel rescission of a price increase. The present Chief Executive has intervened in labor negotiations to compel a settlement and, in 1966, compelled an industry back-down on a proposed increase in prices.

109. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). In the *Korematsu* case, the Executive Order involved was based upon statutory authority. See 56 Stat. 173 (1942). However, in *Ex parte Endo*, 323 U.S. 283 (1944), the detention of a concededly loyal and law-abiding citizen was denounced.

Independent of these actual exertions of Presidential power there exists a question of threatened exercise of such power—*e.g.*, prior to the Gold Clause Cases of 1935, President Roosevelt was reputedly awaiting a negative decision so as to defy the Court's authority. The Court, however, upheld the devaluating power of Congress in those cases. *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

110. This, of course, refers to Lincoln's actions in 1863. The Supreme Court upheld such a suspension in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), which was decided while the war was still going on. However, the Court denounced it two years later in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), when the war was over. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the power of Congress to repeal the Supreme Court's appellate jurisdiction over such a writ was sustained even while the matter was before that Court. The emergency suspension of the writ has not been confined to the United States. The Republic of South Africa also suspended the writ under a 1963 law to keep a lawyer confined because of his representation of certain defendants who had been accused of sabotage. See *N.Y. Times*, July 10, 1964, p. 2, col. 2.

The President's conduct, even with an international emergency as its base, may be questionably unconstitutional—*e.g.*, the Vietnam involvement, challenged on constitutional grounds by a group of lawyers and professors, note 24 *supra*, although the counter to this was later expressed by the American Bar Association's upholding of the President's actions.

111. *Lamont v. Postmaster General*, 381 U.S. 301 (1965). In this case, the Court declared

official become a literary censor when he can bar the use of the mails to books and writings.¹¹²

b. Attorney General

Section 7 of the Subversive Activities Control Act of 1950 requires that Communist organizations register with the Attorney General and give certain information.¹¹³ Although barely upheld against vigorous dissents,¹¹⁴ it was thereafter rendered innocuous by the unavailability of an officer to sign.¹¹⁵ In effect this put the quietus upon the approximately twenty such efforts to obtain registrations. Nevertheless, in 1966 the Justice Department sought to compel the registration of the Du Bois Clubs, a picayune organization of about 2,500, mostly college undergraduates, and mostly opposing governmental policy and action in Vietnam. Insofar as, and if, this federal action to compel registration involved reprisal, it smacked of an unconstitutional effort to suppress dissent,

unconstitutional a section which Congress had added to the Postal Code entitled "Communist political propaganda." 39 U.S.C. § 4008 (1964). In effect all foreign unsealed material (excluding first class mail and exempted items) which was felt to be covered by the statute was held by the postal authorities. A notice would then be sent to the addressee asking if he desired delivery and requiring the latter to return a reply card. The Court found that this required return was an unreasonable limitation and an unconstitutional burden "on the unfettered exercise of the addressee's First Amendment rights." 381 U.S. at 305. A majority of five were joined by three concurring Justices (Mr. Justice White did not participate) who felt that "access to publications [and] . . . the right to receive publications is such a fundamental [first amendment] right." *Id.* at 308 (concurring opinion).

112. Such a situation has been denounced in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946). The same conclusion was reached by Mr. Justice Brennan in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962) (concurring opinion). For standards concerning obscenity, see *Ginzburg v. United States*, 383 U.S. 463 (1966); *Roth v. United States*, 354 U.S. 476 (1957). Censorship is also available to customs officials under § 305 of the Tariff Act of 1930, 46 Stat. 688, 19 U.S.C. § 1305(a) (1964). For a background analysis and application, see *United States v. One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911 (S.D.N.Y. 1966), in which summary judgment was granted in favor of the defendant because of governmental delay.

113. 64 Stat. 993, as amended, 50 U.S.C. § 786 (1964).

114. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

115. See *Communist Party of the United States v. United States*, 331 F.2d 807 (D.C. Cir. 1963), cert. denied, 377 U.S. 968 (1964), upholding the refusal of an officer to sign on the basis of the privilege against self-incrimination. In *Albertson v. SACB*, 382 U.S. 70 (1965), the Court upheld the refusal of an individual member to sign because of his privilege against self-incrimination. Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785 (1964), was held unconstitutional in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). This case was distinguished in *Zemel v. Rusk*, 381 U.S. 1 (1965), which upheld a refusal to validate a passport for travel to Cuba.

which is otherwise valid, and thereby attacked the constitutional rights of these persons.¹¹⁶

A question involving the constitutional prohibition against excessive bail in the eighth amendment has been raised by former Justice Goldberg. He writes that the abuses of our present bail system must be corrected "here and now," and he seemingly approves the illustration that civil rights groups are effectively prevented from demonstrating in many southern communities because of their inability to provide a suitable "bail warchest."¹¹⁷ In other words, the purpose of bail—*i.e.*, to insure a defendant's appearance at trial—is (unconstitutionally) subverted when it is used to prevent the exercise of one's rights or to impose such cruel punishment upon one simply because he is too poor to raise bail. Federally, the Attorney General may ease the situation, and through the fourteenth amendment's due process or equal protection clause, the Supreme Court may likewise ease the state action.

c. Department of State

The Passport Office of the State Department has been somewhat chided judicially because of its use of authority not given to it to withhold passports from citizens because of political affiliation or activity.¹¹⁸ Nevertheless, the clerks in that office, following routine policy and procedures, later rejected by their superiors, cabled American embassies "to keep an eye on an American professor when he goes to Europe this fall,"¹¹⁹ and to notify the State Department "if pertinent information were received concerning his activities."¹²⁰ Even where the State Depart-

116. The FBI, as part of the Attorney General's department, may also be mentioned. In a speech delivered on December 14, 1965, C. D. DeLoach, Associate Director of the FBI, "found a common denominator between criminals and extreme opponents of the Vietnam war and advocates of civil disobedience. It is that they believe they are above the law, he said." N.Y. Times, Dec. 15, 1965, p. 14, col. 1. It was further reported that "Mr. DeLoach said that he referred to 'the lawless demonstrators, the draft card burners, the raucous exalters of the four-letter word.' . . . 'I refer to the arrogant non-conformists, including some so-called educators, who have mounted the platform at public gatherings to urge 'civil disobedience' and defiance of authority,' he said." Ibid.

117. See Goldberg, Foreword to Goldfarb, Ransom at ix-x (1965).

118. *Dayton v. Dulles*, 357 U.S. 144 (1958); *Kent v. Dulles*, 357 U.S. 116 (1958). Where a statute was involved which controlled such passport issuance and use, the State Department's action of revocation was also rejected because of the statute's unconstitutionality. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). However, the delegation of authority in another statute to impose area restrictions on travel was upheld. *Zemel v. Rusk*, 381 U.S. 1 (1965).

119. N.Y. Times, March 23, 1966, p. 1, col. 5.

120. *Id.*, p. 17, col. 2. In the cables, the individual was said to have "strong pro-Communist convictions." Apparently departmental policy dictates allowing transmission of such information when requested by agencies charged by Congress with investigative responsibili-

ment has authority to act—*e.g.*, to discharge summarily an employee—it has been required to observe its own procedures established by its own regulations.¹²¹

d. Other executive departments

Dismissals of employees for a variety of reasons have been denounced—*e.g.*, that the individual was legislatively protected as to the reasons for such a dismissal,¹²² that the reviewing agency was not authorized to dismiss,¹²³ that the executive order was not followed,¹²⁴ that there was a failure to comply with the department's own regulations and procedures,¹²⁵ and, where an industrial security clearance of a government contractor's employees was involved, for failing to afford the traditional safeguards of confrontation and cross-examination.¹²⁶ The dismissal by the Secretary of the Army of an inductee by other than an honorable discharge was held unauthorized where pre-induction activities were taken into account, although Congress had not so intended.¹²⁷ The Internal

ties. Clearance, however, is first to be obtained from a departmental bureau, of which the Passport Office is a division. Since the FBI here requested this information, the only reason for the rebuke seems to be a failure first to obtain this clearance. The State Department spokesman was unable to say whether the original requests would be reinstated if such clearance were now sought. *N.Y. Times*, March 26, 1966, p. 11, col. 1. For the other side of the story, see Interview with Director of the Passport Division, in *The Washington Star*, March 25, 1966, p. 1, col. 6. Assuming clearance, it is suggested that this administrative snooping is undesirable and unconstitutional. If a passport is granted, then this should end such investigations; if the individual or the area is a risk, then congressional power may conceivably be invoked to authorize narrow rejection or restriction under appropriate and reasonable safeguards where an emergency situation is involved.

121. *Service v. Dulles*, 354 U.S. 363 (1957).

122. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which involved improper summary removal by President Roosevelt of an FTC member—*i.e.*, an administrative body created by Congress with quasi-legislative and judicial powers—where the statute itself prescribed the grounds therefor, thereby resulting in an executive flouting of constitutional and congressional safeguards. Where, however, an executive department official—*i.e.*, postmaster first class—is involved, then such a presidential power has been upheld. *Myers v. United States*, 272 U.S. 52 (1926). See also *Wiener v. United States*, 357 U.S. 349 (1958), which followed the *Humphrey* case as to a member of the War Claims Commission.

123. *Peters v. Hobby*, 349 U.S. 331 (1955).

124. In *Cole v. Young*, 351 U.S. 536 (1956), "national security" was set forth as the basis, but the dismissal was on loyalty grounds, and additionally no finding was made concerning a connection between the job and the national safety.

125. *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (a Department of Interior case).

126. *Greene v. McElroy*, 360 U.S. 474 (1959). But see *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

127. *Harmon v. Brucker*, 355 U.S. 579 (1958); see Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 *Harv. L. Rev.* 684 (1961); Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 *Colum. L. Rev.* 917 (1957).

Revenue Service used wiretaps, two-way mirrors, and "bugs" in seeking out tax evaders, but, when disclosure occurred in 1965, the Commissioner forswore its continued use, and the President prohibited it save in national security cases.¹²⁸ This also suggests reference to the use of the lie detector by numerous other agencies and departments as well as by the Army.¹²⁹

3. By the Legislature

It is unnecessary to cite instances of legislation held to be unconstitutional. The overall argument generally castigates the Congress for defying the Constitution. This defiance may take several forms, illustrated by the following.

a. Bill of attainder

Despite the specific prohibition of article I, section 9, clause 3, Congress has specified individuals for punishment.¹³⁰

b. Abdication

Abdication of power, rather than unconstitutional assertion as in the preceding illustrations, is also denounced. The point urged is that Congress, and not the President or the Supreme Court, makes the laws. When Congress voluntarily abdicates its power—*e.g.*, during Roosevelt's famous 100 days—or plays follow-the-leader,¹³¹ or by acquiescence does not reject indirect assertions of a type of law-making power—*e.g.*, by the Supreme Court¹³²—then our Constitution, through its system of the separation of powers, is attacked.¹³³

128. See *N.Y. Times*, Dec. 15, 1965, p. 25, col. 3.

129. Committee on Government Operations, *Use of Polygraphs as "Lie Detectors" By the Federal Government*, H.R. Rep. No. 198, 89th Cong., 1st Sess. 1 (1965). Hearings by a subcommittee continued into late 1965. This writer has disapproved use of the polygraph judicially. See *The Lie Detector and the Courts*, 16 *N.Y.U.L. Rev.* 202 (1939).

130. *E.g.*, *United States v. Lovett*, 328 U.S. 303 (1946), where a rider to an appropriations act stipulated no salaries were to be paid to certain named persons.

131. See, *e.g.*, *Leisy v. Hardin*, 135 U.S. 100 (1890), suggesting that a congressional statute be enacted to permit states to enter a proscribed area under the commerce clause. Such action was upheld in *In re Rahrer*, 140 U.S. 545 (1891). The most recent illustrations are found in *United States v. Price*, 383 U.S. 787 (1966), and *United States v. Guest*, 383 U.S. 745 (1966). In the *Guest* case, Mr. Justice Brennan concluded that 18 U.S.C. § 241 (1964), which makes it a crime to conspire against the constitutionally protected rights of any citizen, does not specifically cover action by private individuals and that "the remedy is for Congress to write a law without this defect." 383 U.S. at 786 (separate opinion). In other words, such an amendment would make it constitutional under the fourteenth amendment to punish private persons who interfere with such constitutional rights of others to enjoy state-owned public facilities.

132. See, *e.g.*, *Hans v. Louisiana*, 134 U.S. 1 (1890).

133. See, *e.g.*, *Myers v. United States*, 272 U.S. 52 (1926), where Mr. Justice Brandeis

c. Other instances

Although the Constitution gives the House the power to impeach, and the Senate the power to try a President, the exercise of these powers suggests a momentous occasion. When indulged in for petty politics, then the constitutional purposes are subverted. So it was in 1868 when President Johnson was barely acquitted, for the consensus of historians is that this was occasioned by personalities and politics, by emotions and vindictiveness, rather than by high principles.¹³⁴ When so used for partisan attacks, the Constitution and the government are attacked.

While Congress has constitutional authority to "be the Judge of the Elections, Returns and Qualifications of its own Members . . . punish its Members for disorderly Behavior, and . . . expel a Member,"¹³⁵ this power is exercised rarely. Nevertheless, in November 1918, Victor L. Berger, a leader of the Socialist Party, whose trial was pending for conspiracy under the Espionage Act, was elected to Congress as a Representative from Wisconsin. The House refused to seat him the following spring and, although again elected in a special election that fall, he was again refused a seat.¹³⁶ No comment is here required as to the power of Congress so to refuse a seat, nor concerning the judicial inability to enter this field because of the doctrine of separation of powers and the specific quoted clauses. But when such refusal is for a political ground which the electorate has the right to determine, it would appear as if Congress has violated some constitutional right or else has assaulted the Constitution.

Another argument is that federalism is compelled to be ignored or breached. The argument here is highlighted by Mr. Justice Black's recent dissent in *South Carolina v. Katzenbach*.¹³⁷ There the other Justices upheld the requirement that a violating state's proposed voting law must first be federally approved, which Mr. Justice Black felt "approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result."¹³⁸ The arguable stated that the doctrine was adopted "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 293 (dissenting opinion). See also note 105 *supra*.

134. See, e.g., Dunning, *Essays on the Civil War and Reconstruction* (1931). It has been stated that the evidence was "ludicrously insufficient" as to the conspiracy charges, and the trial has been otherwise decried. *Id.* at 275.

135. U.S. Const. art. I, § 5, clauses 1 and 2.

136. Berger was convicted in December, 1918, but on appeal the Supreme Court reversed because of trial prejudice. *Berger v. United States*, 255 U.S. 22 (1921).

137. 383 U.S. 301, 355 (1966). See note 32 *supra*.

138. 383 U.S. at 360.

distinction between the preceding and those situations in which the federal government induces state laws and action by grants-in-aid,¹³⁹ seems to be that in the latter a national, economic failure was ameliorated through accepted financial grants to all the states, even though on federal conditions, whereas in the former an unsatisfactory voting situation existed locally or regionally and was corrected by federally enforced requirements to which the states objected. Regardless, other federal powers and statutes, which have been upheld judicially, have inexorably turned the states into administrative subdivisions of a central government, as witness federal control in whole or in part over road building, housing, and education.¹⁴⁰

C. Attacks by the States

The doctrine of interposition, in effect, asserts the power of a state to interpose its sovereignty between the federal government and the state's citizens so as to prevent enforcement of a federal power even though its constitutionality has been upheld.¹⁴¹ "The conclusion is clear that interposition is not a *constitutional* doctrine. It taken seriously, it is an illegal defiance of constitutional authority."¹⁴²

As the result of various pressures and fears, the local communities and the states act in ways which discriminate against, deprive, and defeat persons who seek to exercise their constitutional rights. It is not necessary that reference be made to the efforts of southern governors and localities to defeat the school enrollment of Negroes or to render ineffective

139. See, e.g., Forkosch, *Labor Law* §§ 30-41 (2d ed. 1965), giving many such instances in the field of social security. Mr. Justice Cardozo once stated that one had to "draw the line intelligently between duress and inducement," that no coercion was exercised here upon the states and that they had made an unfettered choice to follow the federal views. *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-90 (1937).

140. For the judicial aspect of federalism, see notes 99-105 *supra* and accompanying text. On these other controls, see, e.g., the Civil Rights Act of 1964, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.), which is perhaps the most comprehensive federal legislation in this field. The Civil Rights Act of 1964 enables the Attorney General to obtain injunctive relief against a denial of equal protection in any public facility other than a public school or college. 78 Stat. 246, 42 U.S.C. § 2000b (1964). Title IV of that act deals with desegregation of public education. 78 Stat. 246, 42 U.S.C. § 2000c (1964). Title V of the Act deals with the rules of procedure of the Commission on Civil Rights, 78 Stat. 249, 42 U.S.C. § 1975a (1964); Title VI, with prevention of the denial of benefits because of race, color, or national origin under any federally assisted program and with the authorizing of each federal department and agency to effectuate this, 78 Stat. 252, 42 U.S.C. § 2000d (1964); and Title VII, 42 *id.* § 2000e, with prohibiting employers of 25 or more (affecting commerce) from discrimination. 78 Stat. 253, 42 U.S.C. § 2000e (1964). The other Titles are not here important. See also note 32 *supra*.

141. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

142. *Bush v. Orleans Parish School Board*, 364 U.S. 500, 501 (1960) (*per curiam*), quoting from the three-judge court below, 188 F. Supp. 916, 926 (E.D. La. 1960).

federal laws designed to remove unconstitutional barriers. Current demonstrations against national policy in Vietnam are entitled to constitutional protection even though a vast majority of the people agree with the present policy. State efforts to thwart protest are illustrated by refusals to grant permits for marches or demonstrations,¹⁴³ utilizing street ordinances improperly,¹⁴⁴ and otherwise seeking to intimidate persons in the exercise of these rights.

Under the analysis of assaults by the judiciary was its encouraging of disrespect for the law. States are no less offenders, as reference to the New York City subway strike in January 1966 discloses. That state's Condon-Wadlin Act¹⁴⁵ prohibits strikes by public employees on pain of, *inter alia*, automatic dismissal, but its strictures have seldom been invoked. The final settlement ignored this statute, thus provoking charges that "the contempt for all law engendered by this process of nonfeasance is heightened by the doctrine of general amnesty that has become ritual every time an illegal strike is settled."¹⁴⁶ A consequence was a successful *nisi prius* suit to hold the settlement illegal and void,¹⁴⁷ whereupon the state legislature enacted an exception to the Condon-Wadlin Act for this government agency.¹⁴⁸ This inequality was condemned, as inequalities have also been condemned when the Supreme Court has applied its legal and constitutional principles.

As heretofore seen, there is a history of federal legislative interference with executive and judicial officials¹⁴⁹—*e.g.*, by impeachment—and the Congress is also able to determine the qualifications of its own members and vote censure.¹⁵⁰ But these are based upon and stem from its constitutional powers. When a state acts so as to refuse to seat five duly elected assemblymen solely because they are Socialists,¹⁵¹ albeit within a context of emotional post-war fever, then constitutional rights are jeopardized, the electorate is being punished, and the Constitution's provisions concerning free speech and political association are assaulted. In today's

143. *E.g.*, *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Calif. 1965); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965). In *Williams*, injunctive relief was granted against the city and state so as to permit marches.

144. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. Louisiana*, 379 U.S. 559 (1965); cf. *People v. Turner*, 48 Misc. 2d 611, 265 N.Y.S.2d 841 (App. T. 1965).

145. N.Y. Civ. Serv. Law § 108 (Supp. 1965).

146. Editorial, *N.Y. Times*, Jan. 14, 1966, p. 38, col. 1.

147. *Weinstein v. N.Y.C. Transit Authority*, 49 Misc. 2d 170, 267 N.Y.S.2d 111 (Sup. Ct. 1966).

148. N.Y. Sess. Laws 1966, ch. 6.

149. See *Dunning*, *op. cit.* supra note 134, at 279.

150. Note 135 supra and accompanying text.

151. The New York Assembly so acted on January 7, 1920. Chamberlain, *Loyalty and Legislative Action* 48-51 (1951).

analogous emotional situation concerning opposition to our Asian policy, this assault is being repeated in the Georgia House of Representatives. That body voted to bar a duly elected person because he refused to withdraw his support of a statement criticizing United States action in Vietnam.¹⁵² Although the separation of powers doctrine may prevent federal judicial interference in a state election, the Supreme Court has already said that an individual's federally protected rights cannot be denied by a state's various departments or agencies, whether judicial or legislative.¹⁵³ There may be a federal right to free speech without consequences attaching such as these; or a right under the fifteenth amendment and the Voting Rights Act of 1965 even though these are related to voting and not to seating as the voters' right to vote includes the right to select and elect without impairment by the legislature;¹⁵⁴ or a claim that a bill of attainder is here involved. However, in any event, this legislative action appears to be violative of the Constitution.

D. *Private Attacks*

Not much analysis is required to illustrate private assaults on the Constitution. Such conduct of individuals is even more egregious than that of governments and agencies, for ordinarily a degree of choice is involved. For example, many of the situations discussed heretofore stem from initial private action; additionally, we may refer to individuals who excoriate as "young slob" those who demonstrate against our Vietnam policy, and in effect suggest a stifling of free speech solely

152. See N.Y. Times, Jan. 12, 1966, p. 18, col. 1, disclosing the vote to be 184 to 12 holding the representative-elect Horace Julian Bond to be guilty of "disorderly conduct" because he allegedly advocated violation of the draft law and gave "aid and comfort to the enemy." A three-judge federal court ruled against Bond because his statements "could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take." Bond v. Floyd, 251 F. Supp. 333, 345 (N.D. Ga.), motion to advance denied, 383 U.S. 956 (1966). Bond's subsequent re-election was again defeated by the Georgia legislature when a second refusal to seat him occurred. He is running for the seat a third time. N.Y. Times, Sept. 9, 1966, p. 30, col. 3.

By analogy to the situation in the apportionment case of Baker v. Carr, 369 U.S. 186 (1962), where the doctrine of political question was said to be applicable federally, but not for states where a constitutional right was involved, the constitutional inability of the judiciary to act where such a congressional refusal is found should not be applicable to like state refusals for now constitutional rights must be protected. This, of course, argues for procedural acceptance of jurisdiction; on the merits, the Bond decision seems to be somewhat far-fetched for, logically, Senators Fulbright, Robert Kennedy, and others should now be expelled.

153. E.g., Baker v. Carr, 369 U.S. 186 (1962); Shelley v. Kraemer, 334 U.S. 1 (1948).

154. An example is found in Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945), which validated the free, federally-protected selection of bargaining representatives in labor-management situations despite state laws.

because of political differences.¹⁵⁵ The counter-argument is that those who counsel others to reject or defy the law are likewise assaulting the Constitution.¹⁵⁶ Regardless of these contentions, there is probably universal agreement that organizations of the far left or far right actually do counsel and engage in such assaults—*e.g.*, the Ku Klux Klan—and that at times the disease spreads into governmental circles.¹⁵⁷ It must also be stated that at times individuals seeking worthy objectives do utilize methods which infringe on the rights of others¹⁵⁸—*e.g.*, labor-management disputes, with both sides engaging in conduct which is denounced by all branches of all governments, by the public, and even by other like groups.¹⁵⁹

IV. THE NECESSITY FOR CIVIL OR CRIMINAL DISOBEDIENCE

An attack on the Constitution here occurs when a person is compelled to violate a law, even though our government of laws requires obedience, and even though disrespect for our system and its judicial peculiarities is thereby engendered. This concept of civil (passive) disobedience, so prevalent today, may initially be ascribed to the violator, but, conceptually and necessarily, it may properly be laid at the feet of the one compelling it. One illustration is the federal Civil Rights Act of 1964 which makes certain conduct unlawful, and local statutes which require that same conduct to be engaged in. Torn between Scylla and Charybdis,

155. See Editorial, N.Y. Times, Oct. 23, 1965, p. 30, col. 1. This form of civil disobedience is not new—*e.g.*, Thoreau's refusal to pay a state poll tax as a protest against the Mexican War, his jailing, and his subsequent Essay on Civil Disobedience, which influenced Ghandi's methods which, full circle, today influence other types of American protests.

156. The contention here is that Martin Luther King's advocacy of nonviolent civil disobedience counsels a defiance of any law deemed unjust, and this in turn leads to lawlessness and mob rule and violence. So, too, is the condemning finger pointed at the comments from President Johnson down concerning the 1965 demonstrations. As Senator Robert Kennedy has said, "there is no point in telling Negroes to obey the law" when many of them have reasons to feel that "the law is the enemy." Quoted in U.S. News & World Report, Sept. 6, 1965, p. 100. In an address to the Tennessee Bar Association, Mr. Justice Whittaker stated that "it seems rather clear that a large part of the current rash and rapid spread of lawlessness in our land has been, at least, fostered and inflamed by the preachments of self-appointed leaders of minority groups to 'obey the good laws, but to violate the bad ones'—which, of course, simply advocates violation of the laws they do not like, or, in other words, the taking of the law into their own hands." U.S. News & World Report, July 5, 1965, pp. 60-63.

157. For example, the "McCarthyism" of the 1950's is continued and perpetrated today when committees, armed with the power of subpoena and contempt, either run far afield or use this power to harass and intimidate.

158. *E.g.*, *People v. Penn*, 48 Misc. 2d 634, 265 N.Y.S.2d 155 (App. T. 1964). *aff'd mem.*, 16 N.Y.2d 581, 208 N.E.2d 789, 260 N.Y.S.2d 847 (1965), cert. denied, 383 U.S. 969 (1966).

159. The violence and intimidation on both sides is universally condemned. See, *e.g.*, Forkosch, *op. cit. supra* note 139, § 269.

what is the "violator" to do? Or, a different type of assault occurs when a law is used to deprive a person of his rights—constitutional or statutory—with or without the availability of redress, and, even if available, then in certain cases made contingent upon a prior deliberate violation of the law itself. Here the same comment as has just been made may be reasserted concerning him who compels the assault. Attacks such as these, all compelled by administrative or judicial governmental conduct, are perhaps well intentioned and motivated, but nevertheless subtly create antagonism and result in counter-assaults and a continuing escalation of all forms of assaults.

A government under law requires obedience to its laws as long as they are not repealed or judicially repudiated¹⁶⁰—*i.e.*, "law is the expression of a principle of order to which men must conform in their conduct and relations as members of society . . ." ¹⁶¹ Of course, a law which goes against the grain of a vast majority and is universally condemned and ignored, cannot be effectively enforced and results in disastrous consequences, may be an exception—*e.g.*, the Volstead Act. But laws are ordinarily made to be obeyed, not broken, and national and local community pressures contribute to this concept. The injunctions to render unto Caesar, or to submit to authority, or to pay the Devil his due, indicate other such admonitions of obedience.¹⁶² Other illustrations, suggested by the judiciary, are that "one would not be justified in ignoring the familiar red light because this was thought to be a means of social protest,"¹⁶³ and the Holmesian shouting of fire in a crowded theatre.

160. See, *e.g.*, *Cox v. Louisiana*, 379 U.S. 559, 585 (1965) (Clark, J., dissenting). Ambassador Goldberg, who, as a Justice, wrote the opinion of the Court in the *Cox* cases, however, has stated (in his present position as Ambassador to the United Nations) that, "when the Assembly acts in derogation of the two-thirds-majority requirement, 'that action is a complete nullity . . . it is null and void.' The United States position was based, he said, on 'as old a principle of international law as exists,' that which holds that, if an action is unconstitutional, no person need comply with it." *N.Y. Times*, Dec. 23, 1965, p. 3, col. 1. Perhaps this international principle is not true, or accepted, domestically. *E.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). However, Ambassador Goldberg speaks of a principle of law which, practically, permits one to determine which laws are unconstitutional and which are not and therefore enables one to disobey the former. This, of course, is a rather extreme statement of the Ambassador's views and position, but it discloses how words may be interpreted.

161. Cardozo, *The Growth of the Law* 140 (1927). For analyses of civil disobedience, see Freeman, *Moral Preemption Part I: The Case for the Disobedient*, 17 *Hastings L.J.* 425 & n.1 (1966).

162. Former President Eisenhower has stated: "And you do not have the right to violate the law. In my opinion, the draft-card burners should be sent to jail—at least for the [Vietnam] war's duration." *Thoughts for Young Americans*, in *The Reader's Digest*, April 1966, p. 90.

163. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (Goldberg, J.). Mr. Justice Goldberg

There is, however, a required dichotomy when people speak of "the law" and assert that obedience to it is a requirement for any civilized society. The bifurcation here used is statute law not yet interpreted and finally upheld by the judiciary, and statute law finally upheld.¹⁶⁴ In other words, a "law" or statute not yet so determined may or may not be (for our present purposes) constitutional, whereas a statute upheld as constitutional is (for our present purposes) "the law."¹⁶⁵ When lumped together, error in concept and in reasoning may occur.¹⁶⁶

It is the present view that a judicially undetermined law is not automatically entitled to the same level of respect as is a judicially determined one insofar as one has a "right" to challenge the former if not the latter.¹⁶⁷ "Obedience" to the latter is a necessity under our concept of a civilized rule of law in a government where change is available through regular methods, whereas "obedience" to the former does not include a refusal to permit a challenge to the statute. However, even in this latter case obedience-with-challenge does not necessarily include breach of the statute; if methods for the resolution of the constitutional question are available which do not require a breach, then these are to be availed of. If these methods are not available and the only method for such a resolution is a breach, then this becomes a necessary disobedience.

also gave other illustrations. 379 U.S. at 563. It has been stated that "all discriminations that violate the Constitution and laws of the United States are redressable in our courts." Remarks of Mr. Justice Whittaker, in *The Dangers of Mass Disobedience*, *The Reader's Digest*, Dec. 1965, p. 123. See generally *id.*, pp. 121-24. This is not entirely acceptable, especially in light of our analyses and is definitely incorrect if the implication is that no disobedience can ever be countenanced.

164. Common law views are omitted which, decisionally, require no statutory support (or may have modifications). Even these, however, may be subsumed under the non-final aspect discussed.

165. Of course we reject the question of reversals judicially or by amendment. Examples are found in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and the overruling of *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), by the sixteenth amendment.

166. Cardinal Cushing of Boston has stated that "we are free to disagree with the law, but not to disobey it. . . . [No one] is entitled to defy a court of law. . . . The law which we obey includes the final rulings of the court as well as the enactments of our legislative bodies." *N.Y. Times*, March 28, 1966, p. 38, col. 6. See also note 115 *supra*.

167. Even here it is still possible to re-challenge a judicially-determined "good" statute and have it now judicially declared "bad." The Virginia poll-tax statute was upheld and then denounced. See note 44 *supra*. Another example is found in the *Flag Salute Cases*, where *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), was overruled in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Statutes have also been denounced and then upheld. An example of this is found in *Ribnik v. McBride*, 277 U.S. 350 (1928), which was overruled in *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236 (1941), as a result of the intervening decision in *Nebbia v. New York*, 291 U.S. 502 (1934).

Otherwise a possibly unconstitutional statute could never be challenged. In any event violence must be eschewed; it is seldom, if ever, that a statute requires violence for purposes of judicial challenge. In an opinion reversing a state conviction under a law preventing picketing "near a building housing a court," Mr. Justice Goldberg wrote:

We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.¹⁶⁸

In effect, therefore, it is not incorrect to write, in terms of vague generalities, that the mass of opinion is that no person may break the law while it is on the books; that adjudications concerning the interpretation, application, and constitutionality of the law must occur within the judicial procedures fixed by the legislature or evolved over the years by the judiciary; and that within this framework a transgressor has no place—*i.e.*, he should be punished. Whether or not such a transgressor has any other choice is ordinarily not discussed, much less acknowledged. That is what we do here.

However, obedience to the law becomes somewhat dangerous unless one knows what "the" law is. As referred to above, what is the conscientious citizen to do when confronted by a federal negative and a local positive commandment as to equality in civil rights? When local custom and local prejudice are then added to these scales, the federal negative becomes an insuperable burden to bear, and the individual thereupon infringes the constitutional and statutory rights of others through forced choice and fear rather than conviction.¹⁶⁹ This national-local antinomy is, of course, to be distinguished from the individual's personal views and whims, even though the preceding conflict has been resolved, so that, despite a knowledge and understanding of "the" law, he nevertheless flouts it. The main reason for the "massive resistance" technique of the South in regard to the Desegregation Case of 1954¹⁷⁰ and its progeny was apparently the effort to draw a parallel to the successful emasculation of the Volstead Act. But, the parallel was ill-drawn and the circumstances greatly different. This wholesale assault on the Constitution may have been doomed, but without the counter-assault from the White House down it might have succeeded.

168. *Cox v. Louisiana*, 379 U.S. 559, 574 (1965).

169. When "conviction" enters, of course, some persons have closed their businesses rather than "submit" to these laws.

170. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Unfortunately, one desiring to obtain some adjudication—*e.g.*, as to constitutionality—cannot always find a method, procedure, or remedy available.¹⁷¹ For example, a federal taxpayer cannot himself sue to contest the expenditure of public funds,¹⁷² although when “called upon to pay moneys as taxes, [he may] resist the exaction as” unconstitutional.¹⁷³ Neither can a competitor of the TVA itself sue for such constitutional relief on the ground of economic competition.¹⁷⁴ Or, even when a person has an otherwise valid right and remedy, the doctrine of “political question” may be judicially interposed so as to prevent the case from being decided.¹⁷⁵

Apart from a suit by a person himself injured, but otherwise unable to sue, the judicial questioning of a party’s “standing”¹⁷⁶ reveals inconsistencies in application which preclude effective generalization.¹⁷⁷ It has

171. While many other principles and illustrations thereof may be given, only three are here of moment. See text accompanying notes 172-75 *infra*.

172. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). However, a municipal taxpayer may so do, *Coleman v. Miller*, 307 U.S. 433 (1939), and eventually get the local question heard on constitutional principles, *Everson v. Board of Education*, 330 U.S. 1 (1947). Compare a refusal to permit a challenge against Bible reading in a local public school, where no financial injury was shown, *Doremus v. Board of Education*, 342 U.S. 429 (1952), with permission so to do, *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. v. Schempp*, 374 U.S. 203 (1963).

173. *United States v. Butler*, 297 U.S. 1, 58 (1936). In this case, the Court distinguished *Massachusetts v. Mellon*, *supra* note 172. 297 U.S. at 57-58.

174. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). The Court stated that there was no right to prevent competition otherwise lawful, so that the company had no standing. *Id.* at 138. This reasoning may appear a trifle strained, in the context of the case.

175. See, *e.g.*, *Forkosch*, *Constitutional Law* § 54, at 60-61 (1963), and the federal-state distinction in *Baker v. Carr*, 369 U.S. 186 (1962). On the international scene, see comment in *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) and the decision by the International Court of Justice in the South West Africa cases which were decided by an eight to seven vote. It was held that Ethiopia and Liberia lacked standing to protest South Africa’s racial practices. The dissent of Mr. Justice Jessup, however, felt that there was a juridical aspect to this “political question.”

176. Standing is not to be confused with the merits of the case, as the former may be lacking even though on the merits a party might be successful. *Chicago v. Atchison, Topeka & S.F. Ry.*, 357 U.S. 77, 83-84 (1958). In *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953), the majority opinion went into some discussion of the reasons behind this rule, saying it was partly constitutional in origin, and partly judicial, so that in “unique situations . . . broad constitutional policy has led the Court to proceed without regard to its usual rule.” *Id.* at 257.

177. Standing has been equated with justiciability. *Baker v. Carr*, 369 U.S. 186, 286-87 (1962) (Frankfurter, J., dissenting); *Coleman v. Miller*, 307 U.S. 433, 460, 470 (1939). The cases are overly numerous in this area. For an analysis, see *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150-60 (1951) and *Barrows v. Jackson*, 346 U.S. 249 (1953). Discussing those cases upholding and denying standing would merely list fact-situations and not provide any consistent thread.

been stated that "one may not claim standing in this Court to vindicate the constitutional rights of some third party. . . . The common thread underlying both [the constitutional jurisdiction and the judicial self-restraint] requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation."¹⁷⁸ For example, a Chicago license for a movie showing was sought, but when the film was requested the company refused. The lower courts felt this precluded a federal suit to require issuance and to restrain the city from interfering with the showing, but the Supreme Court upheld the bringing of the suit although denying the claimed relief.¹⁷⁹ The specific attack here was on the constitutional necessity to produce the film, and if complied with (even under protest), this contention might have become moot¹⁸⁰ even though other details of the licensing scheme could still have been attacked. Of course, a one-day showing, resulting in a fine of one hundred dollars, would have automatically provided injury and standing. Of even more interest is the litigation surrounding the Connecticut birth control law.

Under this 1879 Connecticut statute, persons were forbidden to use "any drug, medicinal article or instrument for the purpose of preventing conception," with violations resulting in fine or imprisonment or both.¹⁸¹ Under a separate provision accessories who violated or counselled others to violate a law might be likewise punished.¹⁸² Three related cases are of interest. In the first, Dr. Tileston claimed he was prevented by this law from giving birth control information to three patients whose lives would be in danger by a pregnancy. He sought a declaratory judgment that his patients would thus be deprived of their lives without due process of law, but not alleging any infringement of his own rights or any incon-

178. *Barrows v. Jackson*, 346 U.S. 249, 255-56 (1953). The Court stated that it was inapplicable there because respondent had been sued for \$11,600 damages which "would constitute a direct, pocketbook injury to her." *Id.* at 256.

179. *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), was decided five-to-four on the merits—i.e., upholding the licensing as a general requirement, but not the particulars as these were not attacked.

180. In *Stamler v. Willis*, — F.2d — (7th Cir. 1966), the appellants' brief on appeal contained this statement: "In the past, the Committee has used, and has threatened to use in the future, federal criminal statutes, in particular 2 U.S.C. § 192, to compel citizens to disclose publicly . . . [information]. Plaintiffs fear that if they decline to respond to the Committee's questions . . . they will be prosecuted for criminal contempt. Plaintiffs also fear that if they appear before the Committee, they will be unable to determine whether the Committee's inquiries are pertinent to the legislative purposes, if any, of the Committee." Brief for Appellants, p. 6, *Stamler v. Willis*, *supra*.

181. Conn. Gen. Stat. Rev. § 53-32 (1958).

182. Conn. Gen. Stat. Rev. § 54-196 (1958).

venience to himself. The Court rejected this attempt to attack the law on constitutional grounds.¹⁸³

A decade and a half later another declaratory judgment suit was instituted by a Dr. Buxton and two of his patients (a married couple), but attempting to close the earlier loophole. The former alleged the law prevented him from exercising his profession—*i.e.*, a due process infraction. The latter claimed the wife's health would be endangered unless the doctor was able to prescribe contraceptives for them—*i.e.*, also a due process infraction. The Court, however, rejected this second effort.¹⁸⁴ The lengthy dissent by Mr. Justice Harlan,¹⁸⁵ on both procedural grounds and on the constitutional merits, gives, as to the former, a clearer picture of the concept of standing, and, as for the latter (with Douglas and Stewart) unquestionably sparked the third, and finally successful, attack on the law. As to standing, Mr. Justice Harlan pointed to the earlier and successful prosecution against a birth control clinic¹⁸⁶ which the state conceded was a test case to uphold the statute's validity and to warn other violators of prosecution and punishment: "the very purpose of the *Nelson* prosecution was to change defiance into compliance [and] . . . this purpose may have been successful."¹⁸⁷ But even more devastating are the poignant words of Mr. Justice Douglas:

What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete [sic], orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. . . . They are entitled to an answer to their predicament here and now.¹⁸⁸

It is at this point in time that Dr. Buxton had to make a choice—*i.e.*, to accept the law and to be cowed, as Mr. Justice Harlan showed and Mr.

183. *Tileston v. Ullman*, 318 U.S. 44 (1943). See text accompanying note 178 *supra*.

184. *Poe v. Ullman*, 367 U.S. 497 (1961). It was conceded by the plaintiffs that no state enforcement of the statute had ever occurred against the use of contraceptives, and both sides also agreed these were sold openly in stores and also without any prosecution ever having been brought. Two vending-machine prosecutions for the sale of the items had been successful, but never appealed. In 1940 a birth control clinic had been closed for the violation of the statute. Plaintiffs had a letter-opinion from the State Commissioner of Food & Drugs that diaphragms had therapeutic and other uses, and so drug stores could fill a physician's prescription for them.

185. *Id.* at 522.

186. This occurred in *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940).

187. *Poe v. Ullman*, 367 U.S. 497, 534 (Harlan, J., dissenting).

188. *Id.* at 513 (Douglas, J., dissenting) (Footnote omitted.)

Justice Douglas cried against, or to violate the law and fight it, as the latter suggested. The language of Holmes is apropos here, that to the objection "that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men,"¹⁸⁹ the answer is that "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment [but] . . . he may incur the penalty of death."¹⁹⁰ Of course, the choice was somewhat easier because of the views already given as to the statute's unconstitutionality, but, nevertheless, a choice had to be made.¹⁹¹ The choice was to violate and be prosecuted. This time Dr. Griswold, who was the medical director of a Planned Parenthood League, and Dr. Buxton, its executive director, "gave information, instruction, and medical advice to *married persons* [sic] as to the means of preventing conception," were prosecuted, convicted, and fined one hundred dollars each under the accessory statute, and now found seven Justices of the Supreme Court concurring in denouncing the law, albeit for a variety of reasons.¹⁹² On the question of standing the first *Tileston* case was distinguished because there was now "a criminal conviction" under the accessory statute; and "Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime."¹⁹³ In other words, a direct or accessory violator has standing to attack such a law or action as unconstitutional, and without a violation the attack would have foundered at the outset.

In *Poe v. Ullman*,¹⁹⁴ the impossible situation confronting a "conscientious" citizen—*i.e.*, one who desired not to violate any law and yet was so compelled to do—was set forth by Mr. Justice Douglas. The

189. *Nash v. United States*, 229 U.S. 373, 376 (1913) (an antitrust violation under the Sherman Act).

190. *Id.* at 377.

191. If a first amendment violation had been urged, an injunction restraining a criminal prosecution might have been obtained, but, first, this was not then claimed, and, second, it was not until 1965 that the Supreme Court so held. *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965), apparently has been followed in a liberal manner by the lower courts. *E.g.*, *Reed Enterprises v. Corcoran*, 354 F.2d 519 (D.C. Cir. 1965). It might also be that, under such a first amendment claim, Dr. Buxton and the two others might have had standing to sue on behalf of others. See *Dombrowski v. Pfister*, *supra*.

192. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Mr. Justice Douglas wrote for himself and Mr. Justice Clark, although Mr. Justice Goldberg's concurring opinion, which was joined by the Chief Justice and Mr. Justice Brennan stated that "I join in its opinion and judgment" of Mr. Justice Douglas. *Id.* at 486. Thus Mr. Justice Douglas spoke for five justices. Mr. Justice Harlan concurred in the holding, but was "unable to join the Court's opinion." *Id.* at 499.

193. *Id.* at 481.

194. 367 U.S. 497, 513 (1961).

Supreme Court permits this citizen to escape between the horns of the dilemma where first amendment rights are claimed, in effect creating an exception. "If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation."¹⁹⁵

But this rule presupposes that all civil rights are within the protection of the first amendment; this is not so. For example, has one a right to ride in the front of a bus? On December 1, 1955, Mrs. Rosa Parks, a Negro seamstress, said she had such a right and refused to move to the rear in a Montgomery bus; the Freedom Movement began from this small incident. How else can these local assaults on one's constitutional rights be brought to the fore save by disobedience, individual or organized, local or national, but *sans* physical violence and like illegalities?¹⁹⁶ Or, to illustrate local requirements concerning, *inter alia*, personal identification and jaywalking, if a person desires to test each such law, how else can it be done save by refusing to identify one's self in the first situation and deliberately violating the ordinance in the second?¹⁹⁷ Again, to illustrate another local situation, a pacifist seeks to test an "alert" ordinance—*i.e.*, periodically sirens and civil defense methods are tested, and civilians must perform certain acts. How can a judicial determination as to the constitutionality of this law be obtained save by deliberately violating it and thereby coming within court-imposed requirements of "case" and "standing."

The 1965 amendment to the Universal Military Training and Service Act of 1951¹⁹⁸ makes it a crime if a person or a selective service registrant "knowingly destroys, [or] knowingly mutilates" another's or his own draft card.¹⁹⁹ The American Civil Liberties Union believes this amendment to be an infringement upon one's constitutional rights—*e.g.*, a tear-

195. *Dombrowski v. Pfister*, 380 U.S. 479, 487. See also the recommendation by the United States Civil Rights Commission, in its Report released November 13, 1965, when it suggested amendment of 42 U.S.C. § 1983 to permit injunctive relief against state prosecutions brought to prevent persons from exercising first amendment rights. See also note 187 *supra*.

196. Of course when a valid law in regard to traffic infractions or disorderly conduct is deliberately violated, or a sit-in results in a breach of a proper law, then the mere fact that a civil rights claim is involved is ordinarily no defense. See, *e.g.*, note 75 *supra*.

197. See, *e.g.*, *People v. Grant*, 16 N.Y.2d 722, 209 N.E.2d 723, 262 N.Y.S.2d 106 (1965), which upheld a jaywalking law providing for one's arrest unless proper identification was given, with the validity of the arrest being held immaterial where an information was filed and defendant appeared.

198. 79 Stat. 586, amending 65 Stat. 75, 50 U.S.C. App. § 462(b)(3) (Supp. I, 1965).

199. *Ibid.*

ing or burning of one's draft card equates with symbolic free speech,²⁰⁰ and some registrants agree. The question here is how to get this belief tested in the court and the problem of constitutionality finally resolved. Without detailing the possible methods—*e.g.*, an action for a declaratory judgment²⁰¹ and/or injunction—it suffices to state the conclusion, namely, that no practicable and judicially acceptable method exists save, as with the *Griswold* case, to deliberately violate the amendment's proscriptions.²⁰²

In the area of labor-management relations, the ordinary method used to obtain judicial review of a representation determination by the NLRB is the deliberate violation of an applicable provision of the law by the entrepreneur or the union. Judicial review of this unfair labor practice brings up for review the prior representation ruling.²⁰³

V. CONCLUSION

Attacks on the "Constitution" today, as yesterday, not only continue but also take many forms. The judiciary may bear the brunt of this criticism because of its alleged "activism," and the far-out charges levelled at the Justices of the Supreme Court may include treason and senility, but, withal, the very great majority of the people are content with the present system, if not with some of its results. The Presidency is not protected from like barbs of violating and assaulting the Constitution, nor is the Congress, and the shrill cries against administrative conduct sometimes hit the mark.

There is, however, a counter-assault, or even a counter-counter-assault, on the Constitution, which its proponents claim is for the purpose of protecting the Constitution from those assaulting it and, therefore, is claimed to be immune from charges of assaulting the Constitution. In other words, and solely to illustrate, the charge is that the Communist Party, its members and sympathizers seek to destroy our government, and do thereby assault the Constitution even though claiming protection under it. The Ku Klux Klan is now prepared to protect the Constitution

200. See *Stromberg v. California*, 283 U.S. 359 (1931).

201. This method for resolving civil disputes is not ordinarily used for criminal matters. Its use for our purposes is sharply circumscribed. It is also used administratively—*e.g.*, in NLRB matters, to obtain prior Board views concerning jurisdiction on specific matters. Some parallel method conceivably should be available in situations here discussed, but then a question of "advisory opinion" jurisdiction might enter. This brings the problem again into the area of necessary disobedience.

202. Lt. Gen. Lewis B. Hershey, head of the Selective Service System, has announced and upheld a policy of reclassifying from 2-S to 1-A students who stage sit-ins at local boards. As a matter of administrative power, this is highly questionable.

203. See cases and discussion in *Forkosch*, *Labor Law* § 341 (2d ed. 1965).

and our form of government by attacking the Communists, although in this process there may necessarily be involved methods which might otherwise be said to violate the constitutional protections of these persons. This counter-attack degenerates into a counter-assault on the Constitution through a denial of its protecting mantle regardless of who seeks it or why. These counter-assaulters have a long history of effort, success, and defeat—*e.g.*, the Alien and Sedition Acts of 1798, the McCarthy era of the 1950's, and the present-day efforts of such divergent groups as the American Legion and the White Knights (of the Ku Klux Klan). As to these last two, it seems incredible that they can be so linked, and yet, if one judges by methods or consequences in this area, the connection is plain.

There is no absolute in life, save this absolute itself, and there is no principle or rule of law or conduct which requires obedience under any and all circumstances. Nuremberg solved this problem on the international scene for one type of a dilemma; disobedience, under narrow conditions and circumstances, solves the instant problem on the domestic scene for this type of constitutional dilemma.²⁰⁴

204. The domestic scene offers instances of law-breakers asserting that the violation is necessitated by conscience—*i.e.*, to do otherwise and obey the law goes against their principles and conscience. This is found in many draft-card burning situations. However, the facts, circumstances, law, and principles, are not the same, and the analogy is too far-fetched to permit domestic application of Nuremberg principles and should not be held applicable. These Nuremberg claims were used by a draft protester who refused to report for induction and was sentenced to a five-year term. *N.Y. Times*, April 2, 1966, p. 2, col. 4.