1985

Book Reviews

Jeffrey Glekel

Michael E. Tigar

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/ylj/vol94/iss4/7

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Money in the Public Realm


Jeffrey Glekel†

In recent years, there has been considerable discussion concerning corruption in national politics and the inducement to corrupt conduct provided by the present system of campaign financing. Much effort has been devoted to attempts to reconcile the speaker's judicially recognized First Amendment right to spend money to augment his voice with the public interest in preventing corrupt conduct.1 To the extent that its subject is the political corruption resulting from our system of campaign financing, Capital Corruption2 travels a familiar path. But Amitai Etzioni's focus is a far broader and more original one. His thesis is that political corruption is not simply a product of American democracy that has always been with us, but rather a problem that can be properly understood and effectively addressed only as part of the most aggressive effort since the Gilded Age by those who command wealth to dominate American government.

I.

Much of Capital Corruption attempts to demonstrate that the present system of campaign financing has resulted in well-financed special interests' buying legislative action in Congress. From this foundation, Etzioni

---

* Director, Center for Policy Research, Washington, D.C.; University Professor, George Washington University.
† Partner, Skadden, Arps, Slate, Meagher & Flom. J.D., Yale Law School, 1972.
2. A. ETZIONI, CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY (1984) [hereinafter cited by page number only].
moves to the heart and most interesting part of his argument: He contends that the growing influence of money on the conduct of government is the latest chapter in one of the dominant themes of American history—the conflict between the principle of equality and the prerogatives of wealth. American democracy, according to this analysis, is best understood as an "inter-class deal" which permits, with only moderate restrictions, the accumulation of private power or wealth that results from the operation of the economy. In exchange, this bargain insists upon a public realm protected from domination by the wealthy, a realm in which every voter has an equal political voice.³

The basic distinction between democracy and plutocracy is that democracy, although consistent with the unequal accumulation of wealth in the private realm, does not permit such wealth to control decisions made in the public realm, the realm of government. According to Etzioni, even the wealthy have, for prudential reasons, accepted this principle, at least through most of this century.⁴ The separation of political from socioeconomic power was a significant theme of colonial and post-revolutionary America.⁵ Gradually, expansion of the right to vote and to run for office and the increased number of offices filled by election rather than appointment reduced the domination of the public realm by those in possession of private power. Those controlling private wealth have been willing to tolerate substantial equality in the public realm, Etzioni argues, in exchange for a tacit understanding that this equal allocation of political power will not result in significant redistribution of private economic power.⁶

The historical instability of the equilibrium between the private and public realms is critical to Etzioni's approach. By the late nineteenth century, those who had amassed vast new wealth from steel, coal, electricity, oil, and the railroads were increasingly using large concentrations of economic power to ensure that government at all levels reflected their interests. The weak, disorganized, and relatively small governmental bodies existing at the national as well as at the state and local levels were unable to resist the concentrated power wielded by private interests.⁷ Inevitably, in

---

³ Pp. 162-68.
⁴ Pp. 164-68.
⁶ Pp. 167-68.
Etzioni's view, this sharp swing of the pendulum provoked a strong reaction from those who believed they were being disenfranchised by a political system increasingly controlled by business. This reaction led to the Progressive movement, a determined and to some extent successful effort to emancipate government from control by well-financed and concentrated private interests.8

The implicit deal between those desirous of using their economic power to control the public realm and those seeking greater socio-economic equality through the exercise of political power, Etzioni elaborates, has also been threatened from time to time by those seeking greater equality. In recent years, groups such as blacks, Hispanics, and women began using the political arena with some success as a means of achieving greater economic and social power. Some critics complained that these efforts resulted in excessive public interference with the private realm in the form of business regulation, public expenditures designed to redress economic inequality, affirmative action, and other programs. Established private interests reacted with vigor by deploying their resources in the public arena to defend their interests. Etzioni views the increasing dominance of money over our electoral and political system as the powerful response of those who possess economic power to the social and economic reforms of the 1960's and 1970's.9 He argues that the strength of this response has far exceeded an effort to restore the pendulum to a reasonable conception of its traditional equilibrium and constitutes instead an attempt by dominant private interests to control government to a degree not seen since the late nineteenth century.10

This resurgence of private power over public affairs has, according to Etzioni, responded to and been facilitated by two other contemporary developments. First, the general decline in the cohesiveness of American institutions and ethical standards since the early 1960's has created a social climate that encourages the pursuit of self-interest by individuals and groups without regard to the public interest. He cites the decline of the mediating influence of political parties as merely one indication that we live in an era where interest groups feel free to promote narrow ends unrestrained by any concern for the welfare of the general public.11 The tendency of groups to pursue their own interests is, of course, not new, but Etzioni insists that the concept of a public interest—loyalties and obligations shared by disparate interest groups which are more than the sum

---

10. P. 139.
of private interests—has been broadly accepted throughout most of our history.\[^{12}\]

Second, Etzioni emphasizes the significance of the 1974 amendments to the election financing laws.\[^{12}\] Under these provisions, corporations may establish, administer, and solicit contributions for Political Action Committees (PACs). This permits circumvention of the prohibition, enacted during the Progressive Era, against corporate contributions,\[^{14}\] and has opened the floodgates to the domination of the political process by well-financed special interests.\[^{15}\]

The result, *Capital Corruption* contends, is widespread legal corruption of elected representatives. This corruption is distinguishable from the illegal buying of votes or bribery only by the absence of explicit agreements tying contributions to specific votes\[^{18}\] but, unlike bribery, is protected in large part by recent First Amendment case law. Etzioni effectively documents not only the massive infusion during the last decade of PAC money into the electoral process—particularly from PACs representing business groups\[^{17}\]—but also, through persuasive circumstantial evidence, demonstrates that these expenditures have purchased legislative action and inaction.\[^{18}\] The legislative veto of the Federal Trade Commission rule requiring used car dealers to disclose known defects,\[^{19}\] the defeat of meaningful hospital cost containment legislation,\[^{20}\] the limitation of the windfall profits tax,\[^{21}\] and the continuation of subsidies to the dairy industry\[^{22}\] are convincing examples of business money’s ability to work its will.

---

\[^{13}\] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 (codified in scattered sections of 2, 5, 18, 26 and 47 U.S.C. (1982)). This provision repealed a prohibition upon entities that had contracted with the government from forming PACs, thus effectively banning corporate PACs. Pub. L. No. 76-753, § 5(a), 54 Stat. 772 (1940).
\[^{14}\] See 2 U.S.C. § 441(b) (1982).
\[^{15}\] Pp. 9-16.
\[^{16}\] Pp. 20-22, 56-80.
\[^{17}\] Pp. 24-41.
\[^{18}\] Pp. 42-55.
\[^{20}\] Pp. 44-47. In 1982 the House of Representatives voted to remove FTC authority to prosecute antitrust and consumer fraud cases against physicians, dentists, and lawyers. PACs representing the American Medical Association and the American Dental Association had, in the preceding two elections, contributed an average of $10,875 to the 208 members of Congress who supported this legislation. The PAC-supported measure died in the Senate. See Pertschuk, *The Case for Consumerism*, N.Y. Times, May 29, 1983, § 6 (Magazine), at 26.
\[^{21}\] P. 48.
\[^{22}\] P. 49. In fiscal 1982 the cost of farm price supports reached $11.9 billion, a figure three times higher than the total of the previous year; price supports escalated further during the following year. These expenditures did little to ease the worst farm recession in 50 years. N.Y. Times, Jan. 23, 1983, at 1, col. 6.
Capital Corruption

In many areas, such as gun control, this infusion of money simply frustrates the will of the majority. When it buys special subsidies and tax preferences that make no economic sense, however, it also perverts economic policy.\textsuperscript{23}

In addition, Etzioni argues, the use of contributions to influence decisionmaking in the national security area has frustrated pursuit of a defense policy based upon a vision of national needs. The influence exercised by defense-related interests, major defense contractors, and other groups that benefit from military expenditures results in a consistent bias in favor of the procurement of weapons over the training of individuals, the purchase of expensive and complex weapons over simpler, less costly ones, and the inflation of the total defense budget at the expense of competing social needs and a more productive economy.\textsuperscript{24}

Etzioni recognizes that there is no simple cure for the condition he has diagnosed. To the extent that the domination of the legislative process by money reflects only the most recent swing of the pendulum between the private and public realms, the problem lies deeper than the mistake Congress made in 1974 by unleashing special interest money. Nevertheless, he proposes a package of reforms to diminish the influence of money in the public realm. His principal recommendations include the public financing of congressional elections, the prohibition of private contributions—particularly through PACs—as far as the Supreme Court permits, reductions in the costs of running for office, and vigorous enforcement of the election laws. Etzioni also advocates measures such as stricter registration and reporting requirements that would expose the lobbying efforts of private interests to greater public scrutiny.\textsuperscript{25}

He offers these suggestions not as a complete program of reform but as illustrations of the kinds of measures that are required. Most important, he believes, is a change in public attitude away from an excessive emphasis on self-interest in favor of a renewed recognition of a broader public interest: a greater concern for others and the shared needs of the community.\textsuperscript{26}

II.

Etzioni’s exposition is vulnerable to both empirical and conceptual attack. What exactly are the special interests against which he inveighs? Do

\begin{footnotesize}
\end{footnotesize}
they include Common Cause, which in 1983 spent the second highest amount of all registered lobbyists, as well as PACs sponsored by the oil industry? Etzioni distinguishes among three types of organizations: special interest groups, public interest organizations, and constituency-representing organizations. He argues vigorously that the term “special interest groups” should be restricted to organizations “whose social base is relatively narrow, whose political representation is limited in scope—often to pecuniary interests—and whose beneficiaries are almost exclusively the groups’ members.”

Electoral expenditures and lobbying efforts by such groups, Etzioni believes, pose a threat to democratic processes not presented by the efforts of public interest organizations such as Common Cause whose “political positions concern the community at large, or primarily nonmembers, and whose focus is as a rule on nonpecuniary interests.” Both types of groups differ from constituency-representing organizations such as the AFL-CIO, the Urban League, and the Business Roundtable, which have a relatively broad scope of political representation and concern themselves with the welfare of the entire community, as well as the furthering of particular interests of their members.

Etzioni insists that only special interest groups, lacking this base, threaten to subvert American democracy through their economic power. Conversely, he argues, the positive role interest groups purportedly play—mediating between the state and individuals and contributing to political socialization—turns out to be largely unperformed by special interest groups.

It is unclear from this discussion, however, why Etzioni disapproves of the efforts of groups such as the Fund for a Conservative Majority, the nation’s third largest PAC, which contributed over $2 million to Ronald Reagan’s 1980 presidential race, and the National Conservative Political Action Committee (NCPAC), which spent over $1 million in 1980 for advertising campaigns opposing the reelection of six liberal democratic senators. At least some ideological PACs seem to possess the concern with the welfare of the general public that characterizes public interest groups, rather than promotion of private pecuniary interests. Moreover, one can argue persuasively that organized efforts by citizens to further a

---

29. P. 203. See also Houck, With Charity for All, 93 YALE L.J. 1415 (1984) (special interest groups sometimes present themselves as organizations devoted to the public interest).
32. P. 208.
Capital Corruption

shared vision of the public welfare is at the heart of our democratic tradition, and part of the speech protected by the First Amendment. It might be difficult to portray the Fund for a Conservative Majority, with over 200,000 members whose average contribution is less than twenty-five dollars, as a vehicle of the rich to enhance their own wealth.

Nevertheless, as Etzioni seems to recognize elsewhere, the expenditures of ideological PACs may well have a subversive impact upon democracy. There can be little doubt that such PACs are contributing to the decline of political parties and, consequently, to the role political parties have played in diluting the influence of special interests. In addition, to the extent that ideological PACs pour money raised nationally into local or state electoral contests, the support they provide is unrepresentative of the local constituency and promotes the election of candidates responsive to and financially dependent upon ideological interests that do not reflect those of the electorate. A contribution made to a PAC without any knowledge of the candidates whom it will support may not constitute the self-expression that is important to participatory democracy. Furthermore, even conservative PACs that rely upon small contributors have a significant advantage over PACs sympathetic to the social and economic interests of the poor, if one assumes that supporters of the former are wealthier than supporters of the latter.

Ultimately, of course, one must consider whether, even if the amount of money raised by ideological PACs reflects only the popularity of their causes among contributors rather than the relative wealth of those who share their ideology, they should be permitted to use this support to influence the electoral and legislative process through campaign expenditures. With some reason, Etzioni clearly feels uncomfortable with the contemporary role of ideological groups in American politics. Yet he never articulates a theory that would reconcile this discomfort with his views concerning the generally positive role played by public interest groups and the values of participatory democracy which the efforts of ideological groups arguably reflect.

Larger questions must be raised concerning Etzioni’s conception of a private realm, in which wealth is permitted to exercise considerable influence, balanced against a public realm, where every individual counts equally. Are these “realms” really so distinct? It seems at least questionable that a society tolerant of substantial concentrations of wealth will or can significantly restrict the ability of well-financed interests to influence

---

35. *Hearings, supra* note 33, at 260.
the course of public affairs. Etzioni does at times acknowledge this problem. He views the trust-busting efforts of Theodore Roosevelt at the turn of the century as a necessary part of the effort to free the public realm from plutocratic control. Democracy, Etzioni concedes, ultimately requires the reduction of large concentrations of economic power; otherwise they will dominate public affairs.\textsuperscript{37}

Etzioni nevertheless skirts the more controversial possibility that to achieve a democracy free from plutocratic tendencies will require a substantial reduction in economic and social disparities. The reforms of the Progressive era, a recurrent source of Etzioni's discussion, scarcely support his notion that efforts to avoid the excessive intrusion of private power into public policy can be strictly separated from the promotion of socio-economic equality. The Progressives regarded limits upon the length of the work day, a minimum wage law for railroad workers, and child labor restrictions—all of which constituted at least tentative efforts toward limiting inequalities of wealth—as essential parts of their agenda.\textsuperscript{38}

Etzioni asserts that democracy cannot coexist with the extensive use of governmental power to reduce economic inequality by restricting the accumulation and retention of private wealth,\textsuperscript{39} but he offers no support whatsoever for his position. Exercise of such power is precisely what Western democracies have been doing during this century. If Etzioni's position is that these efforts cannot go too much further without jeopardizing democracy, his views need further development. The question of the relation of economic to political democracy in America is obviously a difficult one,\textsuperscript{40} and a book addressed principally to campaign financing perhaps cannot be fairly criticized for not resolving it. But Etzioni's very perspicacity in recognizing the linkage between the two subjects makes the absence of further development disappointing.

Finally, there is something a little vague about Etzioni's construction of an "inter-class deal" in which the wealthy have generally agreed not to use their economic resources to dominate public affairs in exchange for the agreement of the poor not to use government to take too much money from the rich. If such an implicit understanding exists, why are reforms required? His answer appears to be that the contract has been breached, that well-financed special interests are rejecting their part of the bargain and must be restrained forcefully. Yet if he is right about the existence of a basic consensus, then there is reason to hope that special interests may

\begin{flushleft}
\textsuperscript{37} Pp. 149-51.
\textsuperscript{38} P. 160. See also R. Hofstadter, supra note 7, at 231 (middle class reluctantly preferred Progressives' expansion of federal regulation over uncontrolled corporate power).
\textsuperscript{39} Pp. 167, 233. Etzioni apparently believes, however, that the wealthy would be well advised to accept some "necessary socioeconomic reallocations and other accommodations." P. 168.
\textsuperscript{40} See B. Moore, Social Origins of Dictatorship and Democracy 111-55 (1966).
\end{flushleft}
demonstrate some restraint in the exercise of the political, legal, and economic advantages they seem currently to possess. Etzioni fails to establish, however, that the "deal" which he posits is anything more than a temporary equilibrium resulting from competing socio-economic forces.

Nevertheless, Etzioni's approach has considerable explanatory appeal when applied to the causes and consequences of the existing system of campaign financing and, indeed, to other significant developments in American society over the last two decades. The constitutional jurisprudence of the Warren Court, for example, fits nicely into Etzioni's scheme. During the 1960's the Court repeatedly applied the Constitution to invalidate obstacles to the full participation of the poor and minorities in the political system. Many believed that the Court would also intervene to ensure that the poor received a larger share of the economic pie. When presented the opportunity, however, the Court retreated and refused to equate the claim to full participation in the nation's political life with one of access to a minimum standard of living. One could perhaps argue that the Court was unwilling to breach the "inter-class deal.”

III.

Where can we take the realization that seemingly unrelated doctrinal developments may be manifestations of a common theme: the increasing influence of economic power over our political and judicial processes? *Capital Corruption* suggests a path well worth pursuing: the reexamination of the application of the First Amendment to campaign financing and related areas. Even Etzioni's cursory treatment of the subject strongly suggests that the resurgence of the influence of well-financed interests has been promoted by recent First Amendment holdings that were far from inevitable. It also suggests that at least some positions supported by advocates of civil liberties are serving very different interests than their advocates ever imagined. These developments are illustrated by one of the primary objects of Etzioni's hostility, *Buckley v. Valeo.*

The holding in *Buckley v. Valeo*, invalidating limitations on campaign expenditures, was predicated on the view that such limitations constitute a substantial impairment of freedom of expression, justifiable only by a demonstration that they are essential to efforts to prevent the corruption of

---


Perhaps most significantly, the Court held that insofar as the legislation was designed to lessen the influence of money in politics by reducing the disparity between well-financed and poorly-financed candidates, it furthered an interest which the First Amendment rendered constitutionally impermissible.

The distinction between the contribution limitations that *Buckley* upheld and the expenditure limitations that *Buckley* invalidated is an amorphous one. There is, however, a more fundamental question: Can *Buckley*’s distinction between the constitutionally valid interest in preventing corruption and the constitutionally impermissible interest in preventing domination of the political process by well-financed interests withstand analysis? Conduct constituting bribery under our criminal laws and the equally effective but legally permissible expenditure of money to obtain desired action by elected officials are frequently indistinguishable, as Etzioni convincingly demonstrates; both threaten the integrity of the legislative process. Perhaps Congress’ enactment of restrictions upon expenditures is best understood not as an attempt to combat corruption as traditionally defined but as an effort to prohibit conduct which, while not satisfying all the traditional elements of the offense of bribery, inflicts equally deleterious evils upon the polity. *Buckley* did not explain why the compelling state interest in preventing corruption, which the Court recognized, is restricted to enforcement of the bribery laws.

It would probably be naive, however, to suppose that the Court’s interference with efforts to prevent the use of money to corrupt the political process resulted merely from its unwillingness to acknowledge that the compelling state interest in preventing political corruption extends beyond the prohibition of conduct traditionally punished by the criminal law. The

---

44. Id. at 39-48.
45. Id. at 48-49.
46. See id. at 261 (White, J., concurring in part and dissenting in part) (limiting “the amounts an individual may give to a candidate or spend with his approval but fail[ing] to limit the amount that could be spent on his behalf” makes little sense); see also Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 356-75 (1977) (questioning distinction).
47. Pp. 56-80. Even assuming that the Supreme Court correctly concluded that political contributions are substantially more likely to result in violations of the laws against corruption than are expenditures, this result is merely a function of the limit which Congress has traditionally placed upon the scope of the criminal prohibition against bribery. See 18 U.S.C. §§ 201-224 (1982).
48. *Buckley* has also been criticized for equating campaign expenditures with speech. See Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Judge Wright has also argued that restrictions upon campaign expenditures should be subject at most to no more stringent a standard of review than that applied to time, place, and manner restrictions and allocation schemes. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 638-42 (1982). This analogy, however, may undervalue the First Amendment interest which attaches to efforts by citizens to promote their political views. Even assuming the Supreme Court was correct in requiring proof of a compelling state interest, Etzioni demonstrates that such an interest surely exists.
Capital Corruption

Court’s holding that the interest in equalizing access to the political process was not a permissible end in itself and not sufficiently related to the prevention of corruption may well indicate its inclination to use the First Amendment to invalidate legislative reforms which curtail significantly the use of money to augment the voices of its owners. Such a resolve, however unsupported by traditional First Amendment doctrine, would not be surprising in light of a related and broader development in the Court’s First Amendment jurisprudence: the successful use of the First Amendment by powerful financial interests to further their ability to operate profitably and to dominate the debate on matters of public concern.

Freedom of speech, after some setbacks at the beginning of the McCarthy era, has generally triumphed during the last three decades. It is close to impossible today to prohibit speech because of dislike or fear of the effect of its message. But this triumph has been accompanied by a significant development which few advocates of an expansive construction of the First Amendment probably ever anticipated: Business entities have repeatedly persuaded the Supreme Court in recent years to invalidate, in the name of the First Amendment, legislative efforts designed to control their power. The invalidated restrictions have ranged from limits upon commercial advertising and prohibitions against utilities using their monopoly franchise to preach to a captive audience to bans on corporate contributions in connection with political referenda.

Although these decisions purport to protect the communication of ideas, their hostility to legislative measures deemed inconsistent with “a predominantly free enterprise economy” or designed to prevent corporations “permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process” is reminiscent of an earlier era when the Court regularly invalidated, in the name of substantive due process, legislation designed to reduce economic inequality or regulate economic enterprises. Etzioni, by implication, prompts the question whether the Supreme Court’s restrictions upon efforts to regulate the power of money in elections and other areas constitute a reasoned

55. See Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 VA. L. Rev. 1, 30–33 (1979) (Supreme Court has revived discredited doctrine of “economic due process” as part of First Amendment jurisprudence).
application of First Amendment doctrine or a step toward permitting those with money to wield the same influence in the public domain as in the private realm.

Although these expansive applications of the First Amendment have not met with unanimous judicial or scholarly approval, they have evoked little reaction from those who traditionally advocate broad constitutional protection for unpopular advocates of unpopular ideas. Indeed, with few exceptions, those Justices generally identified with “liberal” social and economic views have supported decisions extending First Amendment protections to campaign expenditures and corporate speech.56

Perhaps this is not surprising. Those who advocate extending constitutional protections to abhorrent ideas have traditionally urged that today’s majority’s best assurance that the First Amendment will be available to protect its future dissenting ideas is that the First Amendment protects even the most outrageous speech.57 Whatever validity this approach may possess, many have apparently decided sub silentio to accept a quite different version of this traditional rationale: The best assurance that the First Amendment’s protections will be available when we need them is that the most powerful interests in society perceive themselves as its beneficiaries. Under such a view we must tolerate, if not vociferously support, this novel invocation of the First Amendment in the name of expediency, even if it is dubious as a matter of First Amendment doctrine. After all, what is the harm, what is the cost of stretching the First Amendment to protect a few additional activities—especially if they seem related to the communication of information?

Etzioni’s elaboration of the growing power of well-financed special interests to work their will in the political arena compels us to consider carefully whether the costs of such doctrinal expediency may well be incalculable. Although Etzioni confines his argument to the financing of elections, the time may have come for an examination of whether that which business in recent years has persuaded the Supreme Court to do in the name of the First Amendment threatens to undermine vital social and economic goals for which many proponents of free speech have fought.

There is a further irony in the increasing use of the First Amendment to prohibit restrictions on the right of money to speak. This development


57. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (it is in society’s long range interest to protect even ideas that majority loathes).
Capital Corruption

may not only threaten other vital social interests but may also undermine
the very values it is designed to preserve, by cheapening the First Amend-
ment in the eyes of the public. A public that has repeatedly seen the First
Amendment invoked to reinforce the position of those most powerful in
our society may doubt that it is essential to the functioning of the good
society, and may become increasingly reluctant to support First Amend-
ment protections when they are sought in the name of those interests tra-
ditionally protected by the First Amendment. 58

CONCLUSION

Etzioni's subject is not a simple one. Reforming campaign financing
and restricting the influence of special interests require difficult estimates
of the political feasibility as well as, ultimately, the social and economic
consequences of possible changes. This is an area where individual mea-
ures often have unintended, indeed, unimagined systemic consequences. 59
Moreover, efforts to curtail the power of money and punish corrupt con-
duct impinge upon values that many—including the current Supreme
Court—have elevated to constitutional sanctity. Capital Corruption does
not cut a clear path through this web. The strength of Capital Corrup-
tion is rather that it demonstrates why it is essential that the effort be
made, and suggests that the past provides reason to believe that the task is
not hopeless.

58. The courts, of course, are the ultimate protectors of First Amendment freedoms; but they do
not operate in a social vacuum unaware of the views and expectations of an informed public.
59. Ironically, in 1974 labor unions actively supported repeal of provisions which effectively
banned most large corporate and union PACs by prohibiting entities that contract with the govern-
ment from engaging in political action. See supra note 13; pp. 11, 234. These restrictions affected
large unions because many held government contracts to train workers. As a result of these efforts by
labor unions, corporate PACs considerably increased their influence in support of policies opposed by
labor unions.
Whose Rights? What Danger?


Michael E. Tigar†

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

This book sounds the alarm. “Be disturbed,” it says, “to the extent of a tut and I will thank God for civilization.”

I cannot fault the motive spirit

† B.A. 1962, J.D. 1966, University of California (Berkeley); Raybourne Thompson Centennial Professor of Law, University of Texas. I am grateful for comments and suggestions from my colleagues Douglas Laycock and Lucas A. Powe, Jr., and from my old friend John Mage.


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


Our Endangered Rights

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

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

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

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

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

11. Shattuck, Congress and the Legislative Process, in Our Endangered Rights, supra note 9, at 46.
When reading these essays, I am forcefully reminded of a remark reprinted in one of Professor Dorsen's earlier works, *Frontiers of Civil Liberties*, which I reviewed in this journal sixteen years ago. Caleb Foote said: "The great stoic philosopher Epictetus in one of his writings imagined himself facing a wrestler. The strong man boasted to him 'See my dumbbells,' to which the philosopher impatiently retorted, 'Your dumbbells are your own affair. I desire to see their effect.'" Professor Foote was talking about the practical effects of sweeping Supreme Court declarations of rights. His words could as well apply to the effects of strategies lawyers use in defense of civil liberties.

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

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

---

16. Id. at xi. This language also appears in the introduction to OUR ENDANGERED RIGHTS, supra note 9, at ix.
predictive and analytical utterances in 1971 have proven to be true. After all, the surest test of a theory—of natural science or of history—is its power to predict consequences.

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

I. THE LEGACY OF THE CIVIL RIGHTS AND ANTIWAR MOVEMENTS

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

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

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

22. These raids were much in the mold of the general search condemned in Stanford v. Texas, 379 U.S. 476 (1965). The ransack search of Stanford's home was done under a warrant obtained from
sued to restrain this sort of conduct, to get back their papers and books, and to inhibit the state authorities from prosecuting them under the Louisiana version of the Smith Act and Communist Control Act. SCEF and its officers also sued to prevent the Louisiana authorities from transferring the seized records to Senator James Eastland of Mississippi, who had subpoenaed them for use by the Senate Internal Security Subcommittee. After much skirmishing, the three-judge district court convened to hear the constitutional challenge to the Louisiana sedition laws, upheld the laws on their face, and refused to hear evidence on the laws' illegal application.

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

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

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

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

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

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

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

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

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

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

26. See C. Wright, supra note 25, § 52A, at 322.
28. There is a rich and extensive scholarly debate over the meaning of _Dombrowski_. Everybody’s favorite is or ought to be Fiss, _Dombrowski_, 86 Yale L.J. 1103 (1977). Douglas Laycock has contributed an important work in Laycock, _Federal Interference with State Prosecutions: The Cases Dombrowski Forgot_, 46 U. Chi. L. Rev. 636 (1979). Other commentaries are cited in C. Wright, supra note 25, at 320 n.1.
29. See generally Tigar, supra note 25 (arguing against an evanescent “political question” barrier to decision).
30. There is some discussion of this point in C. Wright, supra note 25, at 322; see also A. Kinoy, supra note 24, at 209–55.
31. Close attention to the constraints of legal ideology is the hallmark of careful judging and an indicium of conscious effort to legitimacy a decision by placing it in the context of precedent. Progressive judges and lawyers add to this technical skill a firm appreciation of where the law “must go” if it is to redeem the dominant ideology’s promises of freedom and fairness. See M. Tigar, _Law and the Rise of Capitalism_ 20–23 (1977).
ground. Seventeen other buildings used by civil rights groups were damaged by arson fires or bombs. Ten automobiles were damaged or destroyed, and there were an additional seven bombings that resulted in no property damage or injury.\textsuperscript{2}

The murders, and the struggles at the 1964 Democratic convention, dramatized the events of that summer in Mississippi. But these events were neither unprecedented nor localized. Leafing through the pages of the \textit{Race Relations Law Reporter} and the Civil Liberties Docket for 1963 through 1965\textsuperscript{3} freshens one's recollection. In Danville, Virginia, the summer of 1963 had seen more than 1000 arrests of demonstrators seeking desegregation and equal job opportunities.\textsuperscript{4} From 1961 to the summer of 1963, the civil rights movement in Southwest Georgia, centered in Albany, withstood a like number of arrests.\textsuperscript{5} As the Fifth Circuit found in \textit{Bush v. Orleans Parish School Board},\textsuperscript{6} and as Judge Wisdom repeated in dissent from the district court's decision in \textit{Dombrowski}, the State "marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club."\textsuperscript{7}

In sum, the officers of government of the former Confederacy—in the police, municipalities, courts, legislatures, and executive offices—were illegitimate in every juridical sense save only that concerned with their parents' marital status. Despite the unanimous decision in \textit{Brown v. Board of Education},\textsuperscript{8} and the dozens of decrees applying its teaching to particular school systems,\textsuperscript{9} segregation of public education was still the rule. Black voters were systematically disenfranchised, and when the overtly racist registration statutes fell before the first wave of civil rights suits, new and ostensibly neutral barriers were erected.\textsuperscript{10} These barriers in turn were attacked, with consequent delay in admitting blacks to the political process. Judge Wisdom, this time writing for a majority of a three-judge court, arraigned the voter registration system of Louisiana in an eloquent opinion richly detailed in its understanding of Louisiana history. Of the

\begin{itemize}
\item \textsuperscript{2} N.Y. Times, Aug. 20, 1964, at A1, col. 2. For much of the factual information that follows, I have referred to the Civil Liberties Docket, the Race Relations Law Reporter, and the scripts of my weekly radio program, Mississippi Report, aired over Pacifica Radio stations in the summer of 1964.
\item \textsuperscript{3} Race Relations Law Reporter was published by Vanderbilt Law School during this period.
\item \textsuperscript{4} \textit{Id.} at 125.
\item \textsuperscript{6} 194 F. Supp. at 581 (Wisdom, J., dissenting) (quoting Bush v. Orleans Parish School Board, 194 F. Supp. 182, 186 (1961)).
\item \textsuperscript{7} 227 F. Supp. at 581 (Wisdom, J., dissenting) (quoting Bush v. Orleans Parish School Board, 194 F. Supp. 182, 186 (1961)).
\item \textsuperscript{8} 347 U.S. 483 (1954); 349 U.S. 294 (1955).
\item \textsuperscript{9} These cases are collected in the issues of the Civil Liberties Docket and Race Relations Law Reporter for this period.
\end{itemize}
Louisiana registration statute, he wrote: "A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. . . . We hold: this wall, built to bar Negroes from access to the franchise, must come down." Thus begins forty-three pages in the Federal Supplement surveying the history of Louisiana voter law and demolishing barriers to the exercise of federal equity power. The opinion was written in November 1963, and the Supreme Court affirmed in the same term as Dombrowski. Of course, even had many blacks then registered, the promise of fair representation contained in Baker v. Carr and its progeny would not soon be redeemed.

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

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

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

---

43. 369 U.S. 186 (1962).
44. I have already set out some of these; others included holdings about the scope and meaning of Federal Rule of Civil Procedure 65. For a sweeping example of federal injunctive proceeding, see United States v. Original Knights of the Ku Klux Klan, 10 Race Rel. L. Rep. 1449 (E.D. La. 1965); see also 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2956, at 566 & nn.99, 1 (appealability of denials of injunctive relief by federal district judges); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964) (degree of deference due state rules).
46. V. NAVASKY, KENNEDY JUSTICE 96-155 (1970). I reviewed this book shortly after it appeared, and looking back I think I was too critical of Navasky's work. I apologize to him for that;
three civil rights workers disappeared on a trip within Mississippi to investigate the burning of a Black church, Attorney General Kennedy was reported in the press as having said the federal government lacks power to take “preventive police action” in Mississippi (or, presumably, elsewhere in the South) to aid Black citizens seeking to exercise the rights of citizenship. His words brought forth a letter, signed by five members of the Harvard law faculty (Bator, Countryman, Fried, Howe, and Mansfield) terming Kennedy’s remark a “facile pronouncement” and pointing to statutes dating nearly to the dawn of the Republic that gave the executive branch precisely such power. The second telling episode was the Democratic party’s unedifying compromise with the racist and segregationist Democrats of Mississippi at the 1964 convention in Atlantic City.

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

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

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

47. A copy of the professors’ letter is in my Mississippi Report file.
49. Fiss, supra note 28, at 1164.
50. A copy of text, furnished by Judge Wright, is on file with author.
51. See generally Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967) (discussing failure to define substantive rights created by the wartime amendments, and national duty to do so).
52. The first sit-in was February 1, 1960. See National Advisory Commission on Civil Disorders, Report 226–28 (Bantam ed. 1968) [hereinafter cited as Kerner Report].
Our Endangered Rights

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

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

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

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

The Adderley majority’s deference to the state’s statute, judicial process, and law enforcement officers, and Justice Black’s 1971 majority opinion in Younger v. Harris65 each rest on premises that undercut the language, if not the central meaning, of Dombrowski. Looking from Adderley to Younger, the events that spawned this new-found deference to the state police, courts and legislatures in First Amendment cases are easy to identify. Racial unrest had led to disorder in the cities and on the campuses of the North.66 Justice Fortas had penned a pamphlet, Concerning Dissent and Civil Disobedience,67 whose thesis could only with difficulty be reconciled with his own opinion for a narrow majority in Brown v. Louisiana,68 reversing trespass convictions arising from a library sit-in, or with his dissent in Adderley. So, despite the findings of a distinguished commission in 1968 that American society—North and South—was pervaded with white racism69 fifteen years after Brown v. Board of Education, the Court’s majority began to recede from the territory it had staked out before 1966. This limited retreat, marked by deep concern with the tactics of some civil rights activists, took place at a time when the civil rights movement itself was riven with controversy over issues of violence, disobedience to law, and the prospect of continued black-white cooperation. The antiwar movement rose, and in its turn faced like disputes.

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

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

Some in the center did not abandon their posts: Brennan, Marshall,
Douglas, and Skelly Wright spring to mind. But the profound alteration in perceptions of protest and protesters strengthened the hand of the right, and counseled its adherents to regard Dombrowski not as the redemption of a constitutional promise about federalism, but as an extraordinary response to an exceptional and concluded episode. It was not a case of judicial exhaustion, that “too long a sacrifice can make a stone of the heart.” Those who turned away from liberty had been at best its summer soldiers.

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

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

71. W. Yeats, Easter 1916, in id. at 179.
72. These suits sought every kind of result from receiverships over public institutions to injunctions against prosecutions under laws enforced by states whose policies had not been sullied by the consistent course of conduct that marked the Southern authorities. See C. Wright, supra note 25, § 52A, at 322–23. I recall the debates at the time over the use of what some perceived as the wonder-working power of Dombrowski. Nothing I say here is intended to cast aspersions on Arthur Kinoy, who argued Dombrowski in the Court. Arthur and I have disagreed at times over the years, but I remain an unstinting admirer.
74. The low-water mark, bringing all the McCarthyite clichés together, is Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (upholding registration order).
recognition of significant political forces. These forces need not be majorities, but they must at least command support among those with important roles in defining the dominant legal ideology of a particular time.

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

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

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

---

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

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

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

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

Thus, the entire line of authority of which Professor Laycock speaks was not exactly forgotten, for some of it was in the lower court opinion. After all, to have rested upon the pre-*Douglas* cases would
should have troubled to discover the provenance of the hostility that has undercut some—though by no means all—of Dombrowski's power. I have suggested the beginnings of an analysis. Dombrowski champions the First Amendment and reacts to the specific historical conditions to which I have referred. It reminds us of an era that "was" and "can be" because its promise will likely be redeemed only when a movement for change again confronts consistent and implacably lawless hostility, and when judges are willing to perceive what is happening and to act.

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

Recent judicial enforcement of the registration requirement does not call this analysis into question: Judicial review of conscription decisions has been limited in ways that the late 1960's and early 1970's cases did have validated a judicial role for the Court inconsistent with a presumption of noninterference in state social legislation. This perhaps Justice Brennan himself was unwilling to do, given his own view of federalism. Moreover, it is not surprising to see deference to the criminal process, whether of a state or the federal government. The restrictions on interlocutory review and on the use of extraordinary writs testify to that. See Will v. United States, 389 U.S. 90 (1967) (extraordinary writs); DiBella v. United States, 369 U.S. 121 (1962) (interlocutory review).

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

80. See, e.g., Mora v. McNamara, 389 U.S. 934, 935 (1967) (Stewart & Douglas, JJ., separately dissenting from denial of cert.).
not undermine, and that make the recent decisions unsurprising, if disappoint-
ing. More importantly, there has not yet been the great public outcry over registration that arose during the Vietnam War. If this analysis is correct, then a study of judicial power in the abstract, or as a matter of the structure of the constitution, does not tell us about the tasks ahead for those who wish to protect and extend democratic rights. We ought to be asking, among other questions, from whence may come the next great movement that will underscore the need for democratic rights and vivify the claims that they be enforced.

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

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

II. WHAT HAPPENED ON THE WAY TO THE FORUM?

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

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

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

84. Judicial review of Selective Service decisions must usually await the completion of the registrant's processing, his call to service, and his refusal to take the symbolic step forward signifying entry into the armed forces. See Practice Manual, SEL. SERV. L. REP. (PUB. L. EDUC. INST.) §§ 2454, 2501-2502 (1972).
86. Halperin, National Security, in OUR ENDANGERED RIGHTS, supra note 9, at 281.
87. Emerson, Academic Freedom, in OUR ENDANGERED RIGHTS, supra note 9, at 179.
Our Endangered Rights

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

"We'll see if it is," said Rivera.88

Beginning in the late 1930's, the Court, at the urging of labor organizers and religious colporteurs,89 began to take seriously the need for public communication even of unpopular views. The history is familiar. Jersey City's Mayor Hague had said to the CIO, "After all, it's my street." We'll see if it is, said the CIO, and Justice Roberts wrote for the Court that title did not give the municipality the right to restrict the historic use of public places for free expression.90 The company town of Chickasaw, Alabama, was declared in Marsh v. Alabama91 to look enough like a normal city to require First Amendment protection for Jehovah's Witnesses seeking to enter and proselytize. In another case, the expressive component of picketing was held to be a First Amendment activity.92

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

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

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

89. A "colporteur" is as different from a "Cole Porter" as "Amazing Grace" is from "Boola Boola."
94. Powe, Mass Speech and the Newer First Amendment, 1982 Sup. Ct. Rev. 243, 251. I have learned a lot from reading this article, although Professor Powe would add, "Not nearly enough."
business corporations from spending money to influence voters on any issue except one materially affecting the business or property of the corporation. The statute interfered with the "free flow of . . . information," wrote Justice Powell for six members of the Court. Justice White dissented, for himself and Justices Brennan and Marshall, noting the "deleterious influences . . . resulting from the use of money by those who exercise control over large aggregations of capital." The dissent also pointed out that management could not even say it was their money; the corporation's assets belong, in some sense, to the shareholders—all of whom were subsidizing this corporate message despite their individual views on the subject.

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

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

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

96. Id. at 783 (citations omitted).
97. Id. at 812 (citations omitted).
98. Interestingly, when the captive contributors were those who pay union dues under a union shop arrangement, the Court held the captivity issue forbade similar expenditures. These differences between these two types of cases, including the presence of federal legislation and an arguable additional element of compulsion in the union shop dues payment setting, do not obviously justify the Court's different approaches toward them. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).
101. 391 U.S. at 324-25.
Court has since that time limited access on a variety of grounds to various expressive activities in places to which even public agencies hold title.\textsuperscript{105} *Hudgens* reflected an attitude that swept more broadly than its First Amendment impact: an increased deference to nominal privateness for purposes of "state action" or "federal action."\textsuperscript{106} One major element of the civil rights litigation of the 1960's had been to look behind the form in which property was held in order to determine whether an entity was bound to comply with the Fourteenth Amendment.\textsuperscript{107} *Hudgens* affirms the same principles of insulation from constitutional obligation as the Court began to apply in cases involving racial discrimination and due process of law.

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

The constitutionalization of any rule tends to set that rule beyond substantial and immediate tinkering. The constitutional jurisprudence of the past decade evokes images of *Lochner v. New York*.\textsuperscript{110} The Court is erecting, by invoking the First Amendment and curtailing the reach of earlier state action cases, a constitutionally defined zone of immunity for wealth and the privileges of wealth. This trend is reversible: Indeed, identifying and commenting upon it is the first step towards doing something about it. For example, the Court has firmly said that the states are free to interpret their own constitutions as requiring access to places such as shopping centers for the exercise of First Amendment rights.\textsuperscript{111} The federalist vision of...
those—such as Justice Brennan—who now see the states as having a special responsibility to defend the rights that federal courts are unwilling to recognize, may have something powerful to teach us. These essays contain no discussion on this score. It may be, of course, that the promise of free speech the Constitution indisputably makes will yield to the market dominance of monopolists. That risk—and it is substantial—makes it all the more urgent to discuss the tactics of forestalling such an event.

It is surprising that these concerns are not raised in this book because they were at least acknowledged in an ACLU publication shortly after *Buckley v. Valeo* was decided. Joel Gora, then ACLU Associate Legal Director, analyzed the campaign finance legislation and took account of “the equality issue—trying to facilitate the whole spectrum of political viewpoints.”¹¹¹² There is no hint of concern with this issue anywhere among these essays. Yet the ACLU regarded *Buckley* as important when it was decided, and proclaimed pride that the petitioners included a broad cross section of political views.¹¹³

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

### III. The Security of Whom, and From What?

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

Morton Halperin’s essay on national security¹¹⁴ is not nearly as incisive as his past discussions. He refers to claims of presidential power, warning us to be suspicious when the President seeks to arrogate to himself the

¹¹⁴. Halperin, supra note 9, at 281.
right to decide important questions of individual liberty. Yet his discussion—which focuses principally on warrantless wiretaps and prior restraint of speech—is all too brief, all too cursory.

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

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

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

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

115. Id. at 286.
The current Administration wants government employees with access to certain kinds of classified information to sign an adhesion contract of non-publication as a condition of employment. These contracts, in one proposed form, declare that information acquired by the employee in the course of her or his service is the "property" of the United States.\(^{118}\)

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

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

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

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

---

118. See supra note 4.
119. Z. Chaffee Jr., Free Speech in the United States (2d ed. 1948).
Our Endangered Rights

known what it piped or harped? For if the trumpet give an uncertain sound, who shall prepare himself to the battle?\textsuperscript{121}

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

IV. SOME OTHER THOUGHTS

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

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

\textsuperscript{121} 1 Corinthians 14:7-8.
\textsuperscript{122} These are hard choices. When the ACLU has confronted them in past times, its record has been less than creditable. I have in mind the McCarthy era cooperation with the FBI and the purging of Elizabeth Gurley Flynn from the organization. See Baldwin & Westin, "They Never Stopped Watching Us," 4 CIV. LIB. REV., Nov.-Dec. 1977, at 18; Neier, Adhering to Principle: Lessons from the 1950s, 4 CIV. LIB. REV., Nov.-Dec. 1977, at 26, 30-31; see also B. Wright, The ACLU: Between Politics and Principle. A Study of a Pressure Group During Wartime (unpub. Ph.D. thesis) (Princeton Univ. 1975) (available on microfilm at Princeton University library).
\textsuperscript{123} Shapiro & Henderson, Justice for Aliens, in OUR ENDANGERED RIGHTS, supra note 9, at 160.
\textsuperscript{124} Rudovsky, Criminal Justice: The Accused, in OUR ENDANGERED RIGHTS, supra note 9, at 203.
\textsuperscript{125} Bronstein, Criminal Justice: Prison and Penology, in OUR ENDANGERED RIGHTS, supra note 9, at 221.
\textsuperscript{126} Bender, Privacy, in OUR ENDANGERED RIGHTS, supra note 9, at 237.
\textsuperscript{127} Neier, International Human Rights, in OUR ENDANGERED RIGHTS, supra note 9, at 296.
take it Professor Neier and I agree that it is—then there are some formidable jurisprudential and historical hurdles to overcome. Would that essays in this book had begun to map the course of that effort.

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

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

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

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

\(\text{129.}\) Estrich & Kerr, *supra* note 9, at 115-16.
Our Endangered Rights

the Court is reconsidering the criminal justice jurisprudence of the Warren era; it is showing, as Justice Marshall recently remarked in a death case, a Kafkaesque haste to judgment in doing so.\footnote{131}

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

V. \textsc{The Watchman We Have Set as Sentinel and Guard}

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

The watchman said, The morning cometh, and also the night: if ye will enquire, enquire ye: return, come.\footnote{133}

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

\begin{itemize}
\item [132.] \textsc{J. Thurber, The Thirteen Clocks} (1977).
\item [133.] \textit{Isaiah} 21:33–39.
\item [134.] Katz, \textit{An Historical Perspective on Crises in Civil Liberties}, in \textsc{Our Endangered Rights, supra} note 9, at 311, 323.
\end{itemize}
and dispute resolution, as against those of wealth who wanted to cut off that access?

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

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

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

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

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

\textsuperscript{136} See supra note 122.

\textsuperscript{137} B. BRECHT, To Posterity, in SELECTED POEMS 173, 177 (H. Hays trans. 1947).

Our Endangered Rights

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