THE VIABILITY AND RELIABILITY OF THE U.S. SUPREME COURT AS AN INSTITUTION FOR SOCIAL CHANGE AND PROGRESS BENEFICIAL TO BLACKS

By KENNETH S. TOLLETT
Distinguished Professor of Higher Education
Howard University, Washington, D.C.

The research assistance of Ms. Marta W. Berkley, a third year law student at Howard University, is gratefully acknowledged.

I. *Introduction*

IT MAY BE TOO EARLY to project the direction in which the Nixon-Burger Court is moving. President Nixon has appointed four of the presently sitting nine justices.[1] Chief Justice Burger is just beginning the fourth term of his helmsmanship of the floating Court. The Court appears somewhat adrift, sometimes charting a course back toward the nineteenth century and at other times, maintaining the liberal-progressive course of the Warren Court. In appraising the Nixon-Burger Court, a sensitive Black lawyer must guard against the paranoiac proclivity of indicting it by association, that is, critically associating it with the Nixon Administration's complicity in an apparent movement toward a second post-Reconstruction[1a] and its corruption of lan-

1. Warren Burger was nominated to the United States Supreme Court by President Richard Nixon on May 21, 1969. He was confirmed by the United States Senate on June 9, 1969. He was commissioned, took oath, and assumed the Chief Justiceship on June 23, 1969, the same date Chief Justice Earl Warren retired.

Shortly after nominating Chief Justice Burger, President Nixon nominated Clement Haynsworth to replace Justice Fortas who had resigned because while serving on the Court he had accepted a fee from Louis Wolfson's foundation. The Senate rejected Haynsworth, in part because of his anti-Black and anti-labor judicial record. President Nixon then nominated A. Harold Carswell who was also rejected, in part because of his mediocre judicial record and the signing of a racially restrictive covenant when he purchased some property in Florida. President Nixon then nominated Judge Harry A. Blackmun who like Chief Justice Burger was from Minnesota. Associate Justice Blackmun took office on June 9, 1970.

After Justices Black and Harlan resigned from the Court in September 1971, the Nixon Administration, among several people, seriously considered four about who Elizabeth Drew reported the following:

"Congressman Richard Poff, Republican of Virginia, a conservative, who had practiced law for only four years; Senator Robert Byrd, Democrat of West Virginia, a former member of the Ku Klux Klan, who hadn't practiced law at all; Mildred Lillie, a controversial California State Judge; and Herschel Friday, a bond lawyer who had represented the Little Rock, Arkansas, school board in its efforts to resist school desegregation. But all four were shot down by the American Bar Association and others in the legal profession. The Administration announced that the ABA would not be consulted in the future . . . Nina Totenberg of the *National Observer*, who has a fine eye for such things, reported during the uproar over the President's putative nominations: 'The Supreme Court Justices reacted too. Justice Harlan, often described as the Court's conservative conscious, was so outraged that he seriously considered writing the President a letter of protest from his hospital bed. The seven active Justices were extremely perturbed. Even the more conservative Justices began wondering aloud whether the President was trying to 'denigrate the Court'." "Washington: The Nixon Court," *The Atlantic Monthly*, November, 1972 at 10.

On October 21, 1971 President Nixon went on TV and announced that he was nominating to the Supreme Court Lewis F. Powell, Jr., of Virginia, a former president of the American Bar Association, and William H. Rehnquist of Arizona, an extremely conservative lawyer who served the Nixon Administration ever since it came to power as assistant attorney general in charge of the Office of Legal Counsel. After protracted Senate hearings and controversy, especially over Rehnquist, both were confirmed by the Senate and thereafter on January 7, 1972 took office.

1.A The Nixon Administration's opposition to busing which the Supreme Court has said may be necessary to implement the *School Desegregation* decision, *infra* note 4, and its fraudulent attack upon quotas for hiring women and minorities in the federal government for which there are no quotas, reinforce the Southern Strategy, undermining the egalitarian values of the *Desegregation* decision and signaling a watering down of "affirmative action" programs to hire minorities. The affirmative action program is administered by the Civil Service over government jobs, by Health, Education and Welfare over colleges that accept federal grants, and by the Labor Department over federal contractors. Employers set "goals" or "targets," not quotas and the above agencies are supposed to see that the goals are met. The program emphasizes results.

Arthur Fletcher, former Assistant Secretary of Labor and delegate to the United Nations in the Nixon Administration, has answered the question whether President Nixon, if he is re-elected, will "support, or even consider, any aspect of the so-called 'Black agenda'" as follows:

"My answer . . . is generally in the negative. The civil rights movement is now a human rights movement, with white women, ethnic groups such as Chicanos, and other minorities in control. It is now even *politically and socially acceptable to oppose so called 'Black aspirations,'* if it is done tactfully. Thus, promoting the remedy for the black plight to the exclusion of other minorities is out." (Emphasis added.) "The Black Dilemma if Nixon Wins," The Wall Street Journal, September 25, 1972 at 12.

guage,[2] its perversion of law and order, and its stench of scandal.[2a] However, intellectual integrity requires this writer to acknowledge that he is gradually sensing Chief Justice Burger and his Nixon-appointed associates as weather vanes who will point the Court in whatever direction Nixon winds blow and blacklash countercurrents flow.

The subject matter of this article is the viability and reliability of the Supreme Court as an institution for social change and progress beneficial to Blacks, not the alleged corruption, perversion, and stink in the Nixon Administration. Nevertheless, the latter appears to be vaguely related to an hypothesis this writer will set forth for explaining the current popularity of the Nixon Administration, an hypothesis whose meaning may directly or indirectly influence the Nixon-Burger Court. The hypothesis is that a malignant symbiosis exists between the regal pretensions and feeling of the Nixon Administration,[2b] which make it act and think it is above the law and Executive custom, and the yearning, compulsive desire and need of the general populace to have respect for, faith and trust in some major institutional structure in the United States, particularly the Presidency. Acceptance or rejection of this hypothesis must depend primarily upon its descriptive authenticity, analytical utility and self-evident plausibility rather than upon elaborate evidence and detailed data, lest this work stray at length from the major subject under discussion. Its analytical utility will be shown as the article is developed. However, some brief observations and comments must be made to suggest its descriptive authenticity and self-evident plausibility.

The post-World War II period has experienced unprecedented growth or change in cultural, social, economic, technological and other affairs.[3] The urban-industrialization process has greatly accelerated, resulting in a "cultural shock" to individuals and families who have migrated from rural and small town communities to the metropolitan centers of the nation. Families have been disori-

2. Henry Steele Commager has written the following about the Nixon Administration's corruption of language:
"Corruption of language is a special form of deception which the Administration, through its Madison Avenue mercenaries, has brought to a high point of perfection. Bombing is 'protective reaction,' precision bombing is 'surgical strikes,' concentration camps are 'pacification centers' or 'refugee camps,' just like our 'relocation camps' for the Nisei in World War II. Bombs dropped outside the target area are 'incontitent ordnance,' and those dropped on one of our own villages are excused as 'friendly fire'; a bombed house becomes automatically a 'military structure' and a lowly sampan sunk on the waterfront a 'waterborne logistic craft.' How sobering that fifteen years before 1984 our own government should invent a doublethink as dishonest as that imagined by Orwell. Book Review of Richard J. Barnet's *Roots of War* entitled, "The Defeat of America," in *The New York Review of Books*, October 5, 1972, at 11.

2A. A *Washington Post* editorial says the following on this subject:
"There is something to be said for corruption. It stinks. No matter how many lids you try to put on it, the stench will out. And that is what is happening with respect to the financial manipulations and related espionage activities involved in the effort to re-elect Richard Nixon, despite the best efforts of the administration and the Nixon campaign committee to stuff more lids onto the mess.

"Without being dreary about it, we know there was burglary at the Democratic Party's headquarters in the Watergate—breaking and entering for the purpose of committing a crime. We know there was bugging equipment on the premises for electronic eavesdropping. We know there was tapping of telephone lines. We know there was $700,000 stuffed into a suitcase and rushed to the Nixon campaign headquarters just before the deadline for reporting on campaign donations—and we know there was a shift in the position on milk supports favoring dairy farmers just after receipt of some hefty contributions from associations of dairy farmers. We know there was a slush fund in Mr. Stans' safe. We know that some of the money intended for the President's campaign ended up in the bank account of one of the men arrested at the Democrats' headquarters. We know that some of the President's money was 'laundered' by having checks from contributors deposited in a bank in Mexico from which nice, clean cash could then be withdrawn. We know there was a $10 million secret campaign fund and we know that one $25,000 donor got a federal bank charter a good deal faster than most people do. And we know, finally, that all this was done on behalf of the effort to re-elect the President of the United States." "Burglary, Bugging, Tapping—and Concealment," *The Washington Post*, September 25, 1972 at A20.

2B. The White House staff, "the Palace Guard," has grown tremendously during the Nixon administration. His administration has greatly expanded the use of executive privilege to keep information away from Congress. Although "the trend toward the King-President didn't start with this administration," TRB from Washington writes in *The New Republic*, May 6, 1972, at 6, "it is bothersome — and this doesn't apply to Nixon alone —. . . the reverential attitude that is growing up within the executive branch, and Congress too, toward the presidency." In addition to referring to the "Hessian guard uniforms that were tried out on the White House policemen" and to "the way the military honor guard has been turned into something out of medieval pageantry," TRB observes:
"There is almost a standard format now for any administration testimony. Start off with several words of praise for the President and his accomplishments. Then on to the specific proposal. Whether it's a broad foreign policy or some insignificant grant for free buses in a New England town, it is something 'the President proposes' with the accent always on the word 'the.' "
See also editorial in *The Wall Street Journal*, May 3, 1971, at 8, entitled, "Accountability and Arrogance," criticizing Attorney General Mitchell and C.I.A. Director Helms about their nonchalance regarding snooping and intelligence gathering concerning American citizens. Because they knew the democratic traditions, understood the history of the United States and were "honorable men" they claimed there need not be judicial supervision of electronic surveillance and eavesdropping in domestic security matters.

3. A. Toffler, *Future Shock* (1970). *See also* W. L. O'Neill, *Coming Apart: An Informal History of America in the 1960's* (1971).

ented. Marriages have become as transient as mobile employees who move from one branch office of industry or government to another.

Mass media have exposed individuals in the most isolated communities to the exotic behavior of both foreigners and fellow citizens. Value systems and patterns of conduct have been unsettled not only by this exposure but also by death-of-God talk, atheistic preachers, activist nuns and priests and church reforms. Neighborhood schools are perceived as threatened by busing and the streets are regarded as unsafe because of rampant crime.

The Viet Nam War has caused many to challenge uncritical patriotism and the Supreme Court, beginning with *Brown v. Board of Education*,[4] has reinterpreted and some would say changed the Constitution, to say nothing about its assault against complacent racism.[5] Civil rights, anti-war, ecological, feminist and student activists have engaged in protest marches, sit-ins, teach-ins, lie-ins and other attention-getting activities which have disrupted the repose of institutions, communities and minds. All of these changes and many more have created a crisis in the legitimacy of practically everything including authority, government, the family and the church. The Supreme Court's activism has made it a victim of this crisis. Science-created technology with its impending eco-catastrophes and other negative fallouts has even made knowledge and educational institutions themselves victims of this crisis.

Congress, by virtue of its passiveness and abdication of power, and the Presidency by virtue of its aggressiveness and abrogation of power, have reciprocally projected the Presidency to preeminent importance and commanding attention.[5a] Although not completely unscathed by the aforementioned changes and activities, the Presidency is one of the remaining major institutions which commands and inspires respect, faith and trust. If the image of the Presidency is significantly sullied, then no guiding light is left in the firmament which the general populace can respect, have faith in and trust. Thus the yearning compulsive desire and need to think or believe the best and the refusal to acknowledge much bad about the Presidency, including its incumbent, are the state of the public's mind. Of course, the above reinforces the President's regal pretensions and feeling and those associated with him. Inevitably, the beneficiaries of such uncritical respect and trust will feel they are above the law. Minority groups and members of the underclasses are unlikely to benefit much from government when people in high places think, feel, or act as if they are above the law.

Compelling evidence indicates top people in or associated with the Nixon Administration think, feel and act this way.[5b] However, in projecting the course the Nixon-Burger Court will follow, the important question becomes whether there is any evidence that this phenomenon or syndrome has found its way into the Supreme Court. A definitive answer cannot be given now, although the evidence thus far is not too encouraging. To the extent the evidence is discouraging, one may surmise that the Supreme Court is not a viable and reliable institution for social change and progress beneficial to Blacks. Before reviewing the evidence on the Nixon-Burger Court, this article will set forth a synoptic view of the status of constitutional law at the end

4. 347 U.S. 483 [also cited as *School Desegregation*].

5. "First. the [Warren] Court has rejected fiction as a substitute for fact in its dealings with racism." C. Black, *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 17 (1970).
See Tollett, *Blacks, Higher Education and Integration*, 48 Notre Dame Lawyer (October 1972).

5A. "The biggest change in Washington in 50 years, I think, is the growth of the presidency. . . . But one thing you can say [about Harding, Coolidge, or Hoover], power wasn't concentrated in one man as now, in an *aloof*, monarchical, puissant President in the White House. . . . The real power is centered in the Executive office of the President, Petter Flanigan, Erlichman, Haldeman; faceless figures, they are the center of government; they decide who sees the President . . .
. . . The story of the past half century has been the gradual decline of Congress and the rise of the White House.
. . . Congress permits the President to take funds appropriated for one program and transfer them to another. In 1971, for example, the Office of Management and Budget impounded almost a third of the money approved for housing and increased the Pentagon's own estimates. The power of the purse is all but gone. TRB, "Unchecked, Unbalanced," *The New Republic*, October 21, 1972, at 8.

5B. *See Wall Street Journal* editorial, *supra* note 2B.

of the Warren era, focusing primarily upon the cases most relevant to Blacks and the under-privileged. A similar view will be given of the Nixon-Burger Court through its third Term. Finally, the viability and reliability of the Supreme Court as an institution beneficial to Blacks will be assessed. Throughout the discussion, especially that concerning the Nixon-Burger Court, the hypothesis set forth above will be brought into the analysis to see what light it sheds upon the subject.

II. *Status of Constitutional Law at the End of the Warren Era*

Earl Warren assumed the Chief Justiceship of the United States Supreme Court in the Fall of 1953, nine months after President Eisenhower was inaugurated, shortly after the Korean Armistice was announced, while Senator Joseph McCarthy was still on the rampage, and four years before Russia's Sputnik I orbited the world. Before he completed the first term he wrote for a unanimous Court the far-reaching *School Desegregation* opinion[6] which inaugurated the "egalitarian revolution" in judicial doctrine.[7] Prior to Chief Justice Warren's ascension to the Court, its development could be divided into three historical periods characterized by its special concerns or preoccupations. The first period was from 1789-1860 in which the Court primarily was concerned with nation building and nation-state relationships. Chief Justice Marshall established a solid foundation for national supremacy;[8] Chief Justice Taney modified and cracked that foundation.[9] The next period was from 1865-1937 in which the Court was primarily concerned with business-government relations, protecting business and property interests by generously applying the Fourteenth Amendment to them[10] and neglecting and frustrating Black interests by niggardly and sophistically applying it and the other Reconstruction Amendments and legislation to them.[11] The Court recouped its lost stature by enforcing a pro-business *laissez-faire* interpretation of the Constitution while questionably challenging the motives of Federal and state tax legislation, using the Commerce Clause as a negative-implication curb on the powers of states to regulate business and property or to exercise their police power, and construing the Dues Process Clauses of the Fifth and Fourteenth Amendments as substantive limitations upon the power of Federal and State governments. The third period was from 1937-1953 in which the Court reversed its pro-business stance vis-à-vis Federal and State governments and began haltingly to champion some civil rights and unevenly to protect civil liberties.

The Warren Court may be characterized not only as inaugurating an "egalitarian revolution" but also as instituting "a jurisprudence of indivdual integrity"[12] and the "affirmation . . . of the positive content and worth of American citizenship."[13] Professor Swindler has put the matter this way:

> The many decisions of the Warren Court may be categorized as a jurisprudence of individual integrity within the increasing constrictions of a corporate society: the constitutional guarantee of equaltiy of opportunity between races, between voters, and between criminal defendants.[14]

The Warren Court's concern and preoccupation with individual integrity caused it to protect freedom of speech, press, association and religion as well as to guarantee the equal constitutional rights of races, voters and criminal defendants.

Obviously space will not permit a comprehensive canvassing of the cases affecting race, voter, criminal and First Amendment rights. Only a few major cases in each area can be touched upon

6. *Supra* note 4.
7. Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 Harv. L. Rev. 143 (1964).
8. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) I (1824).
9. Dred Scott v. Sandford, 60 U.S. (919 How.) 393 (1857).
10. e.g., Lochner v. New York, 198 U.S. 45 (1905); Nebbia v. New York, 291 U.S. 502 (1937).
11. *e.g.*, see notes 37, 80, 101 and accompanying text *infra*.
12. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 Vand. L. Rev. 205, 206 (1970).
13. Black, *supra* note 5 at (8).
14. Swindler, *supra* note 12.

for comparison with the Nixon-Burger Court. However, emphasis will be given to egalitarian decisions, particularly as they and other decisions have special impact upon or relevancy to Blacks.

A. *The Operation of Judicial Review*

Something must be written about judicial review in operation before canvassing some of the major Warren Court decisions regarding race, voters, persons accused of crimes and civil liberties. Substantive constitutional rights are practically meaningless unless the law affords those injured by the denial of such rights a remedy. Whether a remedy will be afforded largely turns upon a court taking cognizance of or jurisdiction over the case or controversy in which the rights are asserted. Constitutional, Congressional, and judicial rules limit and define what matters courts may hear.[14a] The Court has held that the judicial power of the United States extend only to "cases or controversies" where there exist two or more parties, involved in a genuine disagreement over property or a right with jurisdiction in a particular court to make a final and binding determination.[15] This means the Court will not give what are called advisory opinions. Furthermore, the Court has broad discretion whether it will hear or review a case. It has formulated various doctrines and rules governing the exercise of that discretion.

The major doctrines governing judicial review in operation are standing and ripeness, abstention and political questions. The doctrines to a certain extent are interrelated and on a continuum. They all concern whether a case or controversy is *amenable* to and *appropriate* for judicial resolution.[16] *Standing* is concerned with *who* may assert a right; *ripeness* is concerned with *when* the right may be asserted. *Abstention* is concerned with *deference* and *comity* toward state and administrative processes. Political questions are concerned with, in addition to the issue of *suitability* and *capability* of judicial resolution (aspects of the concept of "justiciability"), whether the issue has been committed to a coordinate or other branch of government or some other forum for resolution.

Some racial and underprivileged minorities peculiarly need judicial protection of their constitutional rights. Their rights are more likely to be violated than those of the majority or of powerful special interests.[17] Thus, a court especially sympathetic to egalitarian values, "individual integrity," and the positive content and worth of American citizenship should be expected to interpret and apply the aforementioned doctrines liberally.[17a] On the whole, that was the practice of the Warren Court.

1. *Standing*

Until the Court decided *Flast v. Cohen*[18] in 1968, it in effect would not permit taxpayers to challenge the spending power of the federal government.[19] However, *Flast* held that a taxpayer had standing to challenge the allegedly unconstitutional expenditure of funds for financing instruction in and purchasing textbooks for parochial schools under the Elementary and Secondary Education Act of 1965.[20] The Court distinguished the issue whether plaintiff was a proper party to adjudicate a matter from the issue whether the matter itself was justiciable. Chief Justice Warren wrote the resolution of this distinction depended upon "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[21] Since the legislation being attacked was a spending program and plaintiff was a taxpayer, there was a "logical link" between his status and the legislative enactment attacked. Further-

14a. U.S. Const. Art. III, 2; 28 U.S.C.A. 1251-57 *et al.*; Supreme Court of the United States Revised Rules—Rules 9-32 S. Ct. 2281-2299 (1970).
15. Muskrat v. United States, 219 U.S. 341 (1911); *but see* South Carolina v. Katzenbach, 383 U.S. 301 (1966); and Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933).
16. This is frequently put in terms of *capability* and of *suitability* for judicial determination or resolution.
17. J. S. Wright, *Poverty, Minorities, and Respect for Law*, 1970 Duke Law Journal 425.
17A. Contrariwise, an unsympathetic court would interpret and apply the doctrines illiberally.
18. 392 U.S. 83 (1968).
19. Massachusetts v. Mellon, 262 U.S. 447 (1923).
20. 20 U.S.C.A. 241a et seq., 821 et seq.
21. 392 U.S. at 101 (1968).

more, since the Establishment Clause of the First Amendment was interpreted as a specific prohibition against spending federal monies for parochial schools, the taxpayer had established a nexus between his status and "the precise nature of the constitutional infringement alleged."[22]

More importantly, the Court extended some of the logic of *Barrows v. Jackson*,[23] which held that a white defendant could assert as a defense — the constitutional right of a Black land purchaser not to have a racially restrictive covenant enforced — in an action for damages for his breach of such covenant, to an action by the NAACP[24] attacking an Alabama statute compelling it to disclose its membership list. The Court held that the principle of standing that parties may rely only on constitutional rights which are personal to themselves did not preclude the association from asserting the First Amendment rights of its members not to have compelled the disclosure of their affiliation with the association. Such a disclosure would have impaired their freedom of association right.[25]

Additional cases[26] especially concerned with individual integrity, but not permitting the standing doctrine to block the vindication of important substantive constitutional rights could be discussed, however attention must now be given to abstention and other procedural problems.

2. *Abstention*[27]

Deference and comity toward state sovereignty make delicate the discretionary intervention of federal courts into the enforcement of state policies, whether civil, criminal or regulatory. Needless friction is avoided by federal courts abstaining from interfering with state judicial and administrative processes until they are completed. Thus states may authoritatively interpret and enforce their own peculiar policies so as to penultimately avoid serious constitutional questions which might otherwise arise in the absence of such interpretation and enforcement. This policy of deference, comity and, it should be added, equity gives rise to the notion that the Court will intervene in state proceedings only after they are final or the moving party has exhausted all possible procedures within the state system — exhaustion of state remedies.

Congress in conformity with the above policy requires that three-judge district courts — of which at least one judge must be a member of the Court of Appeals for some circuit — hear applications for either preliminary or permanent injunctions against state and other enumerated proceedings.[28] Moreover, it has provided in Section 2283 of the 1948 Judicial Code:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[29]

However, the Warren Court in a significant effort to shield unpopular individuals from officious and harassing prosecutions decided in *Dombrowski v. Pfister*[30] that this statute did not preclude obtaining injunctions against state officials who

22. 392 U.S. at 102 (1968).
23. 346 U.S. 249 (1953).
24. NAACP v. Alabama, 357 U.S. 449 (1958).
25. *See also* Bates v. Little Rock, 361 U.S. 516 (1960) (holding that there was substantially relevant correlation between the governmental interest asserted —whether local branch of NAACP was subject to a license tax on any trade, business, profession, vocation or calling—and the Arkansas efforts to compel disclosure of the membership involved, therefore, Bates, custodian of records, need not disclose membership list, lest the association's members' right of freedom of association be significantly interfered with).

    But see New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) (sustaining against Fourteenth Amendment due process attack, a statute requiring the disclosure of the officers and members of certain organizations making an oath a condition of membership).

    The Statute in the *Bryant* case primarily was aimed at the Ku Klux Klan, whereas the Alabama and Arkansas statutes were aimed at the NAACP. Related cases decided favorably to the NAACP are: Shelton v. Tucker, 364 U.S. 479 (1960) and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Although the significance of these cases transcends the standing question, it should further be observed that unlike *NAACP v. Alabama* and *Bates*, the state's claim that it was seeking relevant information in *Shelton* was strong, nevertheless, the Court blocked the questioning of teachers about all organizational inquiry.
26. *e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1969).
27. Professor Wright maintains there are several abstention doctrines. He writes,
    "Thus abstention is variously recognized: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; (4) to ease the congestion of the federal court docket." C. Wright, *Law of Federal Courts* 196 (2nd ed. 1970).
28. 28 U.S.C.A. 2281.
29. 28 U.S.C.A. 2283.
30. 380 U.S. 479 (1965).

are about to initiate proceedings to enforce an unconstitutional statute. The complainants, an organization and individuals active in fostering civil rights for Blacks in Louisiana and other Southern States, invoked Section 1983 of the Civil Rights Act[31] as a basis for declaratory relief and injunction restraining State officials from prosecuting or threatening to prosecute complainants for alleged violations of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. Complainants attacked the good faith of the officials in enforcing the statutes and challenged the statutes as overly broad and vague regulations of expression. In October 1963 the complainants had been arrested, their office raided, and their files and records seized. "Later in October a state judge quashed the arrest warrants as not based on probable cause, and discharged the [complainants]."[32] State officials continued to threaten prosecution of complainants and a grand jury returned indictments against them under the challenged statutes after they instituted this proceeding for which a three-judge District Court was convened.

The Supreme Court held than the Anti-Injunction Act was inapplicable since the state proceedings were initiated after complainants brought their action. Since irreparable injury was threatened because "the chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospect of its success or failure,"[33] the Supreme Court held "that the District erred in holding that the complaint fails to allege sufficient irreparable injury to justify equitable relief." The Court also held that the lower court erred in abstaining to await authoritative interpretation by the state court of the state statutes. The abstention doctrine is inappropriate in cases where, because of a statutes' overbreadth and vagueness and the bad faith of officials in enforcing them,[34] "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."[35]

3. *Removal*

Another procedural problem which gives rise to some of the policy considerations in abstention is the removal jurisdiction and procedure of federal courts. This matter is purely statutory.[36] The Supreme Court has narrowly and, even, sophistically interpreted a removal statute particularly designed to vindicate the rights of Blacks. Indeed, in 1871 the Court handed down its first restrictive decision involving Reconstruction legislation in a case involving removal.[37] The third Section of the Civil Rights Act of 1886 provided for removal to federal courts "all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals in the states, or locality, where they may be, any of the rights secured to them by the first section of the act."[38] The first section of the act extended to Blacks the right to make contracts, to hold and enjoy property, to serve as witnesses and to enjoy the equal benefits of all laws.

A Black family in Kentucky had been savagely mutilated and killed by two

31. 42 U.S.C.A. 1983.
32. 380 U.S. at 487 (1965). "Subsequently the Court granted a motion to suppress the seized evidence on the ground that the raid was illegal." *Id.*
33. *Id.*
34. 380 U.S. at 489-490.
35. In Cameron v. Johnson, 390 U.S. 611 (1968) the majority of the Court in an opinion by Justice Brennan held that the District Court properly abstained from interfering with enforcement of Mississippi Anti-Picketing Law against civil rights demonstrations because the record did not establish the bad faith charged. Demonstrations began on January 22, 1964. Anti-Picketing Law enacted on April 8, 1964. Demonstrators arrested on April 10 and 11 under Anti-Picketing Law.

    Action for declaratory relief and injunction filed on April 13. Picketing continued everyday until May 18 when nine demonstrators were arrested and charged. "Special circumstances" recognized in *Dombrowski* to justify injunction do not exist merely because of the possibility of erroneous application of statute. Mr. Justice Fortas, joined by Mr. Justice Douglas, dissented. He thought that the Mississippi legislature enacted the law directed at Hattiesburg civil rights demonstrators and that there was hardly any evidence of obstruction or unreasonable interference with ingress and egress to and from public buildings and with traffic on streets and sidewalks adjacent to such buildings.
36. "The right to remove a case from state to federal court is purely statutory, being dependent on the will of Congress." C. Wright, *Law of Federal Courts* 130 (2nd ed. 1970).
37. Bylew v. U.S., 80 (13 Wall.) 581 (1871). *See also* Virginia v. Rives, 100 U.S. 313 (1879) (holding where state law did not require exclusion of Blacks there was no right of removal because of this exclusion from jury).
38. 14 Stat. 27 (1886).

whites. Kentucky law at that time would not permit Blacks to testify against whites. Since Blacks were witnesses to the murder the case was removed to a Circuit Court of the United States in Kentucky. The Supreme Court reversed the conviction of the murderers holding the removal was improper because the "affecting person" part of the act did not apply to mere witnesses or a person not in existence.[39] The modified remnants of this section may now be found in Section 1443 (1) of 1948 Judicial Code.[40] The Warren Court continued the judicially restrictive policy concerning removal by holding such removal is allowable only "in the *rare situations* where it can be clearly predicted by reason of the operation of a pervasive and explicit state of federal law those rights [guaranteed by the Constitution of the United States] will inevitably be denied by the very act of bringing the defendant to trial in the state court."[41] However, the Court did find the exacting standard of such a "rare situation" met in *Georgia v. Rachel*.[42]

4. *Habeas Corpus*

Problems of comity or federalism, exhaustion of state remedies, and the adequacy or independence of state law grounds in barring direct review in the Supreme Court are involved in the issuance of the "Great Writ," which the writ of habeas corpus has been called. The writ challenges the legal authority under which a person is detained. Article I, Section 9 of the United States Constitution provides, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." Congress has authorized its use in legislation dating back to the Judiciary Act of 1789, extending its use in 1833 and 1842, and greatly expanding its use in 1867. Sections 2241 to 2255 of the 1948 Judicial Code contain the present statutory provisions on habeas corpus. The most important provision of the statute, first adopted in the Reconstruction Congress in 1867, authorizes issuance of the writ where persons are detained in violation of the federal Constitution or laws and permits a federal court to order discharge of any person detained by a state on contravention of the supreme law of the land. The Warren Court displayed great solicitude for individual integrity in two cases involving the writ.

In *Fay v. Noia*[43] the Supreme Court overruled a case[44] which construed the exhaustion of remedy requirement of a statute as compelling application for review of state proceedings in Supreme Court, holding that such application was not always necessary for the exhaustion of state remedies. Petitioner must exhaust only those state remedies still available to him, the Court also held. Noia had been convicted of murder in 1942, sentenced to life imprisonment, and failed to appeal his conviction in the courts on the ground that his confession had been coerced because of fear on retrial he may have been given the death penalty. Two other defendants appealed unsuccessfully. Some fourteen years later these two defendants were discharged when it was established that their confessions were coerced. Noia, whose confession had likewise been coerced, sought relief from the state court but was turned down because his failure to appeal conviction barred him from subsequently challenging the conviction. He later brought habeas corpus action in federal court. The Supreme Court ruled not only that failure to appeal did not automaticaly bar relief but also that a state court's finding of waiver did not preclude independent determination by federal courts on habeas corpus of whether there was waiver.

Professor Wright has written, "Federal habeas corpus for state prisoners is, and always has been, a controversial and

39. For a fuller discussion of Bylew see, Tollett, *Black Lawyers, Their Education, and the Black Community*, 17 How. L. J. 326, 344-45 (1972).
40. 28 U.S.C.A. 1443 (I).
41. City of Greenwood, Mississippi v. Peacock, 384 U.S. 808, 828 (1966) (Italics added)
42. 384 U.S. 780 (1966). For a sympathetic view of removal, see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793 (1965).
43. 372 U.S. 391 (1963).
44. Darr v. Burford, 339 U.S. 200 (1950).

emotion-ridden subject."[45] State emotions were escalated by *Townsend v. Sain*[46] There the Court held that federal courts in habeas corpus proceedings have power to receive evidence and retry facts necessary to dispose of federal claims.[47] This procedure may affront state sensibilities but it certainly additionally protects prisoners' constitutional rights. Many other procedural considerations involving the operation of judicial review deserve attention, however, this section of this article will be ended with discussion of political questions.

5. *Political Questions*[48]

The Warren Court broke important ground when it held in *Baker v. Carr*[49] that the claimed malapportionment of the Tennessee legislature as being in violation of the Equal Protection Clause presented a justiciable issue which did not run afoul of the political question doctrine.[50] This case opened up judicial scrutiny and review of the apportionment of seats in Congress,[51] state legislatures,[52] and local governing boards.[53] It also led to favorable review of the refusal by the U.S. House of Representatives[54] and the Georgia House of Representatives[55] to seat Blacks elected to those bodies. *Baker v. Carr* and its progeny may be almost as far-reaching as the *School Desegregation* decision in affirming the positive content and worth of American citizenship. Chief Justice Warren thought it was the most far-reaching decision.

B. *Equality, Individual Integrity and Affirmation of Positive Content and Worth of American Citizenship*

The Warren Court promoted egalitarianism, individual integrity, and the positive content and worth of American citizenship by taking seriously the notion of equality under the law, expanding the concept of state action, liberating Congress from improper restrictions upon its enforcement of civil rights, making good the Bill of Rights against the states, reinforcing civil liberties and freedom of religion, and interpreting safeguards of the Constitution so as to protect individual integrity, security and freedom.

1. *Equality under the law*

The Warren Court took seriously the notion of equality under the law by assaulting discrimination based upon racial segregation, racial and other invidious classifications, poverty and geography. The assault in purpose and effect elevated and affirmed the human dignity and individual integrity of Blacks, voters and the despised. The assault seared the conscience of the country and its beneficiaries comprised the rich as well as the poor, whites as well as Blacks, the favored as well as the unfavored.

a. *Discrimination based upon racial segregation*

The egalitarian revolution was initiated May 17, 1954 in the *School Desegregation* decision. [56] The infamous separate-but-equal doctrine of *Plessy v. Ferguson*[57] which relegated Blacks to second-class citizenship was struck down. A year later in its decree enforcing its decision, the Court required defendants to make a prompt and reasonable start toward complying with its ruling, however, under-

45. Wright, *supra* note 36 at 217.
46. 72 U.S. 293 (1963).
47. "Where the facts are in dispute, the federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at time of the trial or in a collateral proceedings . . . . A federal evidentiary hearing is required unless the statecourt trier of facts has after a full hearing reliably found the relevant facts." 372 U.S. at 312-313.
48. For a fuller treatment of this subject by the author see Tollett, *Political Questions and the Law*, 42 U. Det. L. J. 439 (1965).
49. 369 U.S. 186 (1962).
50. The Court wrote:
"*Prominent on the surface of any case held to involve* a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of a court's undertaking independent resolutions without expressing lack of the respect due coordinate branches of government, or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from maltifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case I I I, there should be no dismissal for non-justiciability on the ground of a political question's presence." 369 U.S. at 217.
51. Wesberry v. Sanders, 376 U.S. 1 (1964).
52. Reynolds v. Sims, 377 U.S. 533 (1964).
53. Avery v. Midland County, Texas, 390 U.S. 474 (1968).
54. Powell v. McCormack, 395 U.S. 486 (1969).
55. Bond v. Floyd, 385 U.S. 11 (1966).
56. Brown v. Board of Education, *supra*, note 4.
57. 163 U.S. 537 (1896).

mining this requirement some by only ordering that Blacks be admitted "to public schools on a racially nondiscriminatory basis with all deliberate speed . . ."[58] the Court held state governmental power could not be used to delay or bar Black children from attending school on a nondiscriminatory basis even in the chaotic, tense, and violent conditions of Little Rock, Arkansas. The violence and disorder were traceable to the actions of Governor Faubus and the State Legislature. In *Griffin v. County School Board*[59] the Court held Prince Edward County of Virginia could not avoid school desegregation by closing its public schools. A "freedom-of-choice" plan in Virginia and a "free-transfer" plan in Tennessee were held invalid because they perpetuated the dual system and did not effectuate a transition to a unitary system by "disestablishing state-imposed segregation."[60] Therefore, at least in principle, the Warren Court moved the nation into the direction of desegregating public schools.

By per curiam decisions the Court extended its *School Desegregation* ruling to public transportation, parks, golf courses, bath houses and beaches.[61]

b. *Discrimination Based Upon Racial and Other Invidious Classifications*

The Warren Court did not flinch from moving into the most sensitive and emotion-ridden area of race relations. In 1964, it invalidated a Florida statute making interracial cohabitation a special and separate offense.[62] However, in 1967 it made a more frontal assault on the doctrine of White Supremacy. Virginia had claimed that its antimiscegenation statute preserved the racial integrity of its citizens and prevented the corruption of blood, the mongrelization of its citizens and the obliteration of racial pride. The Court held, in overturning a conviction under this statute, that legislation containing racial classifications carried a very heavy burden of justification and could not withstand the "most rigid scrutiny" called for in such cases unless it was necessary to accomplish "some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[63] In holding the act unconstitutional Chief Justice Warren in his opinion for the Court rejected Virginia's contention that the statute should be upheld if there was any possible basis for concluding that it served a rational purpose.

Anderson v. Martin,[64] which has implications for data collecting efforts of state governments, held a state law in violation of the Equal Protection Clause which required that the race of every candidate for elective offices be placed on the ballot. The Court also struck down a city charter amendment which required voter approval by referendum of "any ordinance dealing with racial, religious, or ancestral discrimination in housing" before its implementation. The charter amendment had been enacted after the city council of Akron, Ohio had enacted a fair housing ordinance.[64a]

The Court moved beyond the racial basis of invidious classifications in *Levy v. Louisiana*[65] where it held a Louisiana statute which denied illegitimate children the right to recover damages for the wrongful death of their mother violated the Equal Protection Clause. The egalitarian revolution started in *Brown*, thus, extended its mantle of protection to the most despised. The poor also were covered by this mantle as the next subsection will show.

c. *Discrimination Based Upon Poverty*

Egalitarian humanism more than anything else characterized Warren Court

58. *Brown v. Board of Education*, 349 U.S. 294 (1965).
59. 377 U.S. 218 (1964).
60. Green v. County School Board, 391 U.S. 430 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968).
61. New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54, *affirming per curiam* 252 F. 2d 122 (5th Cir. 1958); Gayle v. Browder, 352 U.S. 903, *affirming per curiam* 142 F. Supp. 707 (M.D. Ala. 1956); Holmes 350 U.S. 879, *reversing per curiam* 223 F. 2d 93 (5th Cir. 1955); Mayor & City Council v. Dawson, 350 U.S. 877, *affirming per curiam* 220 F. 2d 386 (4th Cir. 1955); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *reversing per curiam* 202 F. 2d 275 (6th Cir. 1953).
62. McLaughlin v. Florida, 379 U.S. 184 (1964).
63. Loving v. Virginia, 388 U.S. 1 (1967).
64. 375 U.S. 399 (1964).
64a. Hunter v. Erickson, 393 U.S. 385 (1969).
65. 391 U.S. 68 (1968).

decisions. Many, if not, most, of its controversial decisions in criminal justice administration manifested this characteristic.[66] This characteristic manifested itself in opinions which protected the rights of the poor. Indeed, the Court likened classifications based upon wealth or property to classifications based upon race.

In *Harper v. Virginia Board of Elections*[67] the Court held payment of a poll tax as a qualification for voting a violation of the Fourteenth Amendment Equal Protection Clause. In addition to making classifications based upon wealth or property suspect, the Court held the right to vote a fundamental political right which is preservative of all rights and thus classifications "which might invade or restrain [it] must be closely scrutinized and carefully confined."[68] Following this enunciation of principle, the Court during the last Term while Chief Justice Warren served held freeholder or parent-voter requirement for participation in a school board election and property-taxpayer requirement for participation in a municipal bond election unconstitutional denials of equal protection.[69]

The Court continued its solicitude for the poor, more explicitly added interstate movement to the list of fundamental rights, and elaborated a compelling governmental interest test for legislation which is based upon suspect classifications or affect fundamental rights in *Shapiro v. Thompson*.[70] This case involved a one-year residency requirement before applying for welfare assistance in Connecticut, Pennsylvania, and the District of Columbia. The Court held the enforcement of the requirement in the states violated the Equal Protection Clause and in the District of Columbia violated the Due Process Clause of the Fifth Amendment. The Court reasoned that the interests served by the one-year residency requirement either could not constitutionally be promoted by government or were not compelling governmental interests. In the impermissible category was the state interest in deterring indigents from migrating to it and in limiting welfare benefits to residents regarded as contributing to the state. In the non-compelling state interest category was the claim that the waiting period (1) facilitated budget predictability, (2) effectuated a rule of thumb for determining residency, (3) protected the state against fraud, and (4) encouraged new residents to join the labor force immediately. The Court thought that there were other or less drastic means for accomplishing the last three permissible administrative objectives. As for the first administrative objective, the Court found no evidence to support the claim that the waiting period facilitated budget predictability. Since the legislation touched the fundamental right of interstate movement, it was judged by the stricter standard of whether it promoted a compelling state interest. The above analysis led the Court to the conclusion that it did not.

Although Chief Justice Warren joined in Justice Black's dissenting opinion in *Shapiro v. Thompson*, the *Harper-Shapiro* cases placed the Warren Court in the position of requiring legislation with suspect classifications — such as race or wealth — or which touched fundamental rights — such as the franchise or interstate travel — to promote a compelling state interest. The constitutionality of any such legislation is judged by a stricter standard than other legislation.

d. *Discrimination Based Upon Geography: The Franchise and Apportionment*

Apportionment, and to a lesser extent, franchise, problems were insulated from substantive constitutional law review by the political question doctrine until the

66. *See* discussion of "Rights of the Accused" *infra* at p. 215.
67. 383 U.S. 663 (1966).
68. 383 U.S. at 670.
69. Kramer v. Union Free School District, 395 U.S. 621, (1969); Cipriano v. Houma, 395 U.S. 701 (1969); *but see* McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) (holding unsentenced inmates awaiting trial in Cook County jail were not entitled to coverage by absentee ballot voting provisions of Illinois law. The court regarded that what was at stake was a claimed right to receive absentee ballot, not the right to vote.)
70. 394 U.S. 618 (1969).

Warren Court decided *Baker v. Carr.*[71] *Baker v. Carr* held voters in geographical districts for the selection of legislative representatives were enttiled to the equal protection of the law. *Gray v. Sanders,*[72] soon decided after *Baker,* struck down Georgia's "county unit system" enunciating the "conception of political equality" that for "one person, one vote." The next year in *Wesberry v. Sanders*[73] the Court engrafted its "one man, one vote" rule upon Section 2 of Article I by holding its command that Representatives be chosen "by the People of the several States" meant that as nearly as is feasible one man's vote in one congressional election in a state should be worth as much as another's in the same state. In *Reynolds v. Sims*[74] the Court extended the equal protection logic of *Wesberry* to both the Senate and House of Representatives of the Alabama legislature. The Court argued that in testing the constitutionality of state apportionment schemes, "predominant consideration" should be given to individual and personal rights. Since the franchise touched a basic civil and political right, an allegation of its infringement "must be carefully and meticulously scrutinized." Legislators represent people, not trees or acres." Population is the starting point and controlling criterion for appraising legislative apportionment. Therefore "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

The *Reynolds* principle of substantial equality of population in electoral units was applied to local governments in *Avery v. Midland County.*[75] The *Avery* case involved the selection of County Commissioners Court members from single member districts which had populations of 67,906; 852; 828; and 414. Although the Texas Supreme Court had found that the Commissioners Court's legislative functions were "negligible," Mr. Justice White, who delivered this Warren Court opinion, thought such courts were assigned a mixture of tasks, some of which would normally be thought as legislative, others as executive or administrative, and still others as judicial. He put the Court's decision in these terms:

> Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.[76]

However, a year earlier in *Sailors v. Board of Education*[77] the Court took a less egalitarian and democratic view when it upheld a procedure for choosing an area wide school board which placed the selection of its members in component district boards which had equal votes but served unequal populations. Still earlier in *Fortson v. Dorsey*[78] the Court had approved Georgia's senatorial apportionment which provided for the election of 21 of the state's 54 senators from the state's most populous counties in multimember districts. *Fortson* and *Sailors*[79] are not too encouraging for those who feel some problems of the ghetto may be solved by community control. Multimember districts and at-large voting are schemes which may undermine the potential electoral and political power of expanding concentrations of Blacks in inner cities. Nevertheless, the Warren Court, when the opportunity permitted, rendered decisions generally supportive of egalitarian values which are beneficial to Blacks.

---

71. See discussion of "Political Questions" in text *supra* at p. 204.
72. 372 U.S. 368 (1963).
73. 376 U.S. 1, (1964).
74. 377 U.S. 533 (1964).
75. 390 U.S. 474 (1968).
76. 390 U.S. at 485.
77. 387 U.S. 105 (1967).
78. 379 U.S. 433 (1965).
79. *See also* Dusch v. Davis, 387 U.S. 112 (1967) which permitted local legislative body (city-county consolidation) to include at-large voting for candidates, although the residence districts varied widely in population. Some of the candidates, however, had to be residents of particular districts. In *Fortson,* the districts in which the legislators had to reside were substantially equal.

2. *The Concept of State Action*

The articulation, expansion, and application of the egalitarian principles in all of the cases in the preceding section required the resolution of a threshold question. That question is whether state action was involved in the activities or practices about which complained. The Supreme Court, fifteen years after the adoption of the Fourteenth Amendment, held in the *Civil Rights Cases*[80] that the rights established, secured, and protected by the Fourteenth Amendment were good only against state action. This decision not only undermined Congress' capacity to enforce that amendment and the Fifteenth Amendment, a subject which will be dealt with in the next section,[81] but also narrowed the scope of activities and actions in which the Court would enforce Fourteenth Amendment rights itself. Thus the promotion of egalitarian humanism depended upon the expansion of the concept of state action.

Before Warren assumed the Chief Justiceship of the Supreme Court, the Court in a series of primary election cases[82] expanded the concept of state action through the notion of state function. The notion of state function was carried over to other areas when the Court held citizens in a company-owned town were entitled to the First and Fourteenth Amendment rights which were good against ordinary municipalities.[83] The Warren Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*[84] equated a privately owned shopping center plaza to the business district of a company-owned town, thus entitling peaceful union picketers to exercise First Amendment rights which are primary good against state interference.[85] The Court said through Justice Marshall:

> All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama,* the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[86]

Justice Marshall's argument de-immunizes suburban shopping centers which could create a *cordon sanitaire* of parking lots around their stores from peaceful public picketing. Of course, businesses downtown are subject to such picketing on the public sidewalks outside them. His recognition of the state or public source of private property rights, thus collapsing the distinction between public and private law,[87] has far-reaching implications for the concept of state action and constitutional law in general.

The collapse of the private/public law distinction would permit Congressional and Federal judicial regulation and enforcement of "civil rights"[89] in a manner which would greatly subordinate the reserved powers of the states and undermine the traditional notions of federalism which the majority of the Court sought to avoid in the *Civil Rights Cases.* This would mean all state-created individual,

80. 109 U.S. 3 (1883).
81. *See* "Court Treatment of Congressional Enforcement of Civil Rights" *infra* at p. 211.
82. Terry v. Adams, 345 U.S. 461 (1953) (holding pre-primary election of Jaybird Democratic Association, although tenuously connected with Texas election laws, which excluded Blacks from participating violated Fifteenth Amendment prohibition against states denying or abridging right of citizens to vote on account of race, color, or previous condition of servitude.) Smith v. Allwright, 321 U.S. 649 (1944) (holding exclusion of Blacks from primary elections pursuant to Texas Democratic Party resolution was prohibited by the Fifteenth Amendment because state delegation of power to party to fix qualifications in primary elections was a delegation of a *"state function"* which made action of party the action of the state. *Smith* overruled Grovey v. Townsend, 295 U.S. 45 (1939) which held party's action was proviate action and, thus, was not subject to the prohibitions of the Fourteenth and Fifteenth Amendments). See Nixon v. Condon, 286 U.S. 73 (1932) (holding action of Democratic Party's executive committee excluding Blacks was state action in violation of the Fourteenth Amendment) and Nixon v. Herndon, 273 U.S. 536 (1927) (holding Texas legislation barring Blacks from democratic primaries violated Equal Protection Clause of Fourteenth Amendment.
83. Marsh v. Alabama, 326 U.S. 501 (1946).
84. 391 U.S. 308 (1968).
85. See discussion of Civil Liberties and Freedom of Religion" *infra* at p. 218.
86. 391 U.S. at 319.
87. For an argument against the private-public law distinction in contract law, see Kenneth Tollett, *Contracts to Influence Legislation: A Limited Case Study of Bold Judicial Action,* 3 Washburn L. J. 55 (1963).
88. Section 1 of the Fourteenth Amendment prohibits states from abridging the privileges and immunities of citizens, depriving life, liberty, or property of any person without due process of the law, and denying the equal protection of the laws to any person within their jurisdiction. Section 5 empowers Congress to enforce these provisions by appropriate legislation.
89. "Civil rights" is used here in the political theory sense as opposed to the technical legal sense. Thus it means all those rights created and secured by government as opposed to the "natural rights" of humankind in a "state of nature."

contractual and property rights would be subject to a large measure of Congressional regulation and Federal judicial review. In other words much, if not all, so-called private law would be transformed into public law. Therefore, activities and arrangements of private persons or organizations would have to comply with equal protection requirements (whatever the Court determined them to be) without ascribing to the activities or arrangements of state functions.

The Court, in effect, came very close to adopting such a position in *Shelley v. Kramer*[90] when it held judicial enforcement in equity of racial restrictive covenants against a Black purchaser would deny the equal protection of the laws because it would constitute state action. The Warren Court did hold in *Pennsylvania v. Board of Trusts*[91] that public officials performing the private function of a trustee could not constitutionally carry out the racial discrimination requirements of a private will because their activities constituted state action. These two cases together seem to say whatever state officials sanction or do, amounts to state action.

However, the Court in *Evans v. Newton*[92] adopted what appears to have been a governmental *entwinement* and *public domain* theory of state action. This case arose out of Senator A. O. Bacon devising land to Macon, Georgia to be used as a park by white people only. After *Pennsylvania v. Board of Trust* Macon permitted Blacks to use the park. Bacon's heirs sued to remove the city as trustee and Blacks intervened in opposition. The city resigned and the Georgia courts accepted the city's resignation and appointed private individuals as trustees so that the purpose of the trust would not fail. After granting certiorari, the Supreme Court reversed the Georgia court decision in an opinion by Justice Douglas. He argued that formally private conduct may be so entwined with governmental policies and control or so impregnated with a governmental character that it will be subject to limitations placed upon state action. Furthermore, he stated:

> Mass recreation through the use of parks is plainly in the public domain and state courts that aid private parties to perform that public function on a segregated basis implicate the state in conduct proscribed by the Fourteenth Amendment.[93]

Mr. Justice White concurred in the result but did not think the record supported the entwinement theory. He based his concurrence upon the fact that a 1905 Georgia statute specifically permitted racial restrictions in charitable wills and thus affirmatively encouraged private discrimination which converted "the infected private discrimination into state action."[94] Justices Black, Harlan and Stewart dissented. They thought the replacement of the city with a private trustee transformed the matter into a case of private discrimination unprohibited by the Equal Protection Clause. They apparently did not see close legal regulation of the park or the approval of the discriminatory practice by the city of Macon.

In *Burton v. Wilmington Parking Authority*[95] the Warren Court held a State could not lease public property in which a private leaseholder discriminated against Blacks in his restaurant. Public ownership of a building dedicated to public use (parking) manifested *state involvement* such that operation of the restaurant constituted state action. Mr. Justice Stewart concurred on the ground that state law classifying the coffee shop as a restaurant rather than an inn (inns under state law are required to serve any and all persons) authorized discriminatory classification based exclusively on color. A statement by city officials that they would not permit orderly and possibly inoffensive sit-in demonstrations at lunch coun-

90. 334 U.S. 1 (1948).
91. 353 U.S. 230 (1957).
92. 382 U.S. at 302.
93. 382 U.S. at 302, 86 S. Ct. at 490.
By way of apparent qualification Justice Douglas also wrote:
"If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that constitutional difficulty would be encountered." 382 U.S. at 300.
94. U.S. at 306.
95. 365 U.S. 715 (1961).

ters was construed by the Supreme Court as though it was the official command of an ordinance compelling racial discrimination, therefore, requiring reversal of trespass convictions of Black and white college students who refused to leave the lunch counter when they were refused service.[96]

Finally, in one of the last state action cases decided by the Warren Court, *Reitman v. Mulkey*[97] held that a state constitutional amendment, which invalidated fair housing laws, in purpose and intent, authorized and encouraged private racial discrimination and significantly involved the State of California in the same such that the amendment violated the Equal Protection Clause of the Fourteenth Amendment. Of course, this is a very far-reaching decision because it examines the purpose, intent and context of a constitutional amendment in passing upon its validity, although the amendment by its specific terms did not explicitly encourage racial discrimination. Obviously, the Warren Court's egalitarian humanism caused it to take seriously and to enforce strictly the spirit, purpose and meaning of the Equal Protection Clause.

However, precisely what constitutes state action is not altogether clear from the decisions. It may result from a private activity or operation performing a state function or taking place in the public domain. It may result from discriminatory behavior which is governmentally or officially sanctioned or encouraged or where the state is entwined or involved. Whatever officials do may be state action. Finally, action may be state tainted because it results from an unconstitutional law whose purpose, intent and context indicate discrimination is encouraged and authorized.

3. *Court Treatment of Congressional Enforcement of Civil Rights*

No phase of the history of the United States Supreme Court undermined the rights and interests of Blacks more than a series of decisions invalidating or frustrating Congressional attempts to enforce the Thirteenth, Fourteenth and Fifteenth Amendments, culminating in the *Civil Rights Cases of 1883*.[98] The Warren Court resuscitated the Thirteenth Amendment as a basis of the enforcement of the Civil Rights Act of April 9, *1866*[99] so as to reach private discrimination. It's expanded interpretation of state action enabled it to extend criminal sanctions to private individuals who acted in concert with public officials to deprive persons of their rights "under color of law" — which is interpreted to mean state action. The Court's recognition of the fundamental right to interstate travel and the broad power of Congress to regulate commerce enabled it to uphold and enforce Congressional legislation supportive of egalitarian values. The Court came very close to saying that Congress could reach and punish private action — with or without state action — designed to interfere wtih Fourteenth Amendment rights. Also, the Court revitalized the Fifteenth Amendment as a basis for Congressional protection and enforcement of voting rights.[100]

a. *Thirteenth Amendment*

In the course of striking down the equal public accommodation provisions of the Civil Rights Act of 1875, the Court in dicta rejected the notion that the Thirteenth Amendment empowered Congress to prohibit private discrimination. However, the Warren Court in *Jones v. Alfred H. Mayer Co.*[101] held that the

96. Lombard v. Louisiana, 373 U.S. 267 (1963).
97. 387 U.S. 369 (1967).
98. See discussion of *Civil Rights Cases* under "Concept of Ferguson, *163 U.S. 537 (1896)*, announcing the separate-but-equal doctrine, was probably the single most damaging decision to Blacks handed down by the Supreme Court.
99. 14 Stat 27 (1866), the surviving parts of which are now 42 U.S.C.A. 1981-2, respectively, providing civilly for equal rights under the law and property rights of citizens, and 18 U.S.C.A. 242, providing criminal sanctions for deprivation of rights under color of law.
100. In United States v. Reese, 92 U.S. 214 (1876) the Court held unconstitutional two sections of the Civil Rights Act of May 31, 1870 (16 Stat. 140) which were designed to enforce the Fifteenth Amendment. The court held that the offenses against voting created by Congress were not limited to the denial of the *right to vote on the basis of race*. A vote provision of that act which still survives (but only declares the right to vote "without distinction of race, color . . .") with no provision for a remedy may be found in 42 U.S.C.A. 1971 (a). Also surviving from that act is 18 U.S.C.A. 241 which provides criminal sanctions for conspiracies against the rights of citizens.
101. *392 U.S. 409 (1968).*

Thirteenth Amendment empowered Congress to assure Blacks the right "to inherit, purchase, lease, sell, hold and convey real and personal property"[102] free from racial discrimination. Joseph L. Jones, a Black, filed a complaint alleging that defendant had refused to sell him a home in the Paddock Woods community of St. Louis County for the sole reason that Jones was Black. Jones invoked the jurisdiction of the District Court to award damages and other equitable relief under 28 U.S.C.A. § 1343 (4) which conferred jurisdiction for such relief where civil rights protected by any Act of Congress had been violated. The Court stated clearly that Congress could reach private discrimination through the Thirteenth Amendment. Congress can enact any legislation appropriate for "abolishing all badges and incidents of slavery." The Court further said:

> Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.[103]

It concluded this paragraph, saying:

> And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[104]

Alfred H. Mayer was the most important case the Warren Court decided concerning Congressional power to enforce civil rights in terms of potential to wipe out all forms and acts of discrimination against Blacks. Most, if not all, forms and acts of discrimination are relics of slavery. Slavery was nourished and sustained by racism and violence.[105] Racism and violence have been institutionalized against Blacks especially in the administration of justice.[106] The Thirteenth Amendment is an instrument to work against this institutionalization. Indeed, many racist practices which have been attacked through judicial enforcement of the Fourteenth Amendment could be attacked on the basis of 42 U.S.C.A. § 1981.[107] Very few forms or acts of racism and violence, relics of slavery, would be invulnerable to assault following the analogy of *Alfred H. Mayer.* Moreover, following and basing its decision in part on *Alfred H. Mayer,* the Court recognized the right of a white person to receive damages because he was punished by a corporation "for trying to vindicate the rights of minorities protected by § 1982."[108] Furthermore, why should not the Thirteenth Amendment be treated as self-executing, as the Fourteenth Amendment has frequently been interpreted, thus permitting the Court to rule against relics and badges of slavery even in the absence of enforcing legislation such as 42 U.S.C.A. §§ 1981-2 and 18 U.S.C.A. § 242?

b. *Fourteenth Amendment*

Even before the 1883 *Civil Rights Cases* the Court said that the first section of the Fourteenth Amendment empowered Congress exclusively to see that states did not deny their citizens the benefits of equality of rights.[109] Of course privileges, immunities and rights derived from an individual's relationship to the Federal Government could be protected by Congress against individual as well

---

102. 42 U.S.C.A. 1982 provides:
"*Property rights of citizens.* All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell and convey real and personal property."
103. 392 U.S. at 440.
104. 392 U.S. at 442.
105. *See* Tollett, *supra* note 39 at (342-43).
106. *See e.g.,* K. Tollett, "Southern Justice for Blacks," *Ebony,* October, 1971 at (58).
107. 42 U.S.C.A. 1981 provides:
"*Equal rights under law.* All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."
108. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, (1969).
109. United States v. Cruikshank, 2 Otto (92 U.S.) 542 (1876). A mob of one hundred white persons broke up a political gathering of Louisiana Blacks. The Enforcement Act of 1870 in one section made it a crime if "two or more persons shall band or conspire together . . . to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution [or] laws of the United States . . ." Quoted in L. Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro.* p. 109 (1966). Following the duality of citizenship holding of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) Federal Government could not protect against private the Court held that privileges and immunities and right of peaceful assembly were state rights which invasion. *See also Virginia v. Rives,* 100 U.S. 313 (1879) which also said that the Fourteenth Amendment had reference to State action exclusively.

as State interference.[110] However, the *Slaughter-House Cases,* which emasculated the Privileges and Immunities Clause of the Fourteenth Amendment, greatly limited the number of such privileges, immunities and rights. The Warren Court's serious concern for egalitarian values and expanded interpretation of state action enabled it to find the requisite state action or involvement which would awaken the dormant Reconstruction legislation designed to protect Blacks.

In *United States v. Price*[111] the Warren Court reversed the dismissal in part of two indictments against three Philadelphia, Mississippi police officials and fifteen non-official or private persons for wilfully killing three civil rights workers. The Court held that the under-color-of-law or state-action requirement of 18 U.S.C.A. § 242 was met by the allegation that the private persons jointly engaged in the murderous activity with state officials. The Court also held that the rights or privileges spoken of in 18 U.S.C.A. § 241 were protected by the Fourteenth Amendment.

In *United States v. Guest*[112] a majority of the Justices of the Warren Court thought Congress could punish private action in enforcing the Fourteenth Amendment. This case arose out of the United States appealing a Middle District Court of Georgia dismissal of an indictment against six defendants for criminally conspiring to deprive Black citizens of the free exercise and enjoyment of rights secured by Section 241 of Title 18 of the U.S.C. and the Constitution. The alleged right violated was equal utilization of public facilities without discrimination based upon race. The District Court in dismissing the indictment held that it was based upon the Equal Protection Clause and that Section 241 does not comprise any Fourteenth Amendment rights. Furthermore, "any broader construction of Section 241 would render it void for indefiniteness." The Supreme Court maintained that since *United States v. Price* involved the Due Process Clause of the Fourteenth Amendment, there was no reason Equal Protection rights could not be secured by Section 241.

Since *Screws v. United States*[113] requires proof of specific intent to interfere with federal rights, the statute is not rendered unconstitutionally vague.

On the state action problem the Court said it need not be direct or exclusive. The Court reasoned that sufficient state action involvement was contained in the allegation that one of the means of accomplishing the conspiracy was "...causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."[113a]

Justice Stewart, who wrote the opinion of the Court, also maintained that the constitutional right to travel from one state to another was also secured by Section 241 in some state-involvement situations.

Justice Clark in a concurring opinion, in which Justices Black and Fortas joined, forthrightly maintained "that there now can be no doubt that the specific language of § 5 [of the Fourteenth Amendment] empowers Congress to enact laws punishing all conspiracies — with or without state action — that interfere with Fourteenth Amendment rights."[113b]

Justice Harlan concurred in part and dissented in part with Justice Stewart's opinion. He dissented from the contention that Section 241 encompassed the

110. *e.g.* right to vote in a feedral election. *Ex parte Yarbrough* 110 U.S. 651 (1883).
111. 383 U.S. 787 (1966). This grew out of the activities connected with the Mississippi Summer Project. This Summer was called Freedom Summer because the most far-reaching Civil Rights Act since the Civil Rights Act of 1875 was enacted. This was the summer of 1964. An historian of the sixties has this to say about it:
"Fifteen people were murdered during the Freedom Summer. Most of the killings attracted little notice until August 4, when the bodies of James Chaney, Andrew Goodman and Michael Scherner, missing since June, were discovered in an earthen dam near Philadelphia, Mississippi. In December the FBI arrested twenty-one persons for slaying them, including Sheriff Lawson Rainey of Neshoba County. The country was appalled, but that did not help the dead, protect the living, nor materially advance the cause.
"Of all the Negroes killed during Freedom Summer, only James Chaney received national attention, and he because two white youths were murdered with him." W. L. O'Neill, *Coming Apart: An Informal History of America in the 1960's* (1971).
See Tollett, *supra* note 106.
112. 383 U.S. 745 (1966).
113. 325 U.S. 91 (1945).
113a. 383 U.S. at 756.
113b. 383 U.S. at 762.

constitutional right of citizens freely to engage in interstate travel.

Justice Douglas, with whom Chief Justice Warren and Justice Black agreed, concurred in part and dissented in part with Justice Stewart's opinion. He disagreed with Justice Stewart's opinion to the extent it required state involvement in the conspiracy to interfere with the exercise of the right to equal utilization of state facilities. He argued:

> The Court tacitly construes the term "secured" so as to restrict the coverage of § 241 to those rights that are "fully protected" by the Constitution or another federal law . . . The Court then premises that neither the Fourteenth Amendment nor any other federal law prohibits private interferences with the exercise of the right to equal utilization of state facilities.
>
> In my view, however, a right can be deemed "secured . . . by the Constitution or laws of the United States," within the meaning of § 241, even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself (or another federal law). The term "secured" means "created by, arising under, or dependent upon rather than "fully protected." A right is secured . . . by the Constitution" within the meaning of § 241 if it emanates from the Constitution, *if it finds its source the Constitution.*
>
> . . . I think we are dealing with a statute that seeks to implement the Constitution, not with the "bare terms" of the Constitution.[114]

The above passage has been quoted at length because it is both simple and subtle, and pregnant with implications. On the one hand, Justice Douglas simply seems to be saying that there are some dormant substantive constitutional rights, because they are not self-executing, and are only secured or awakened by implementing or remedial legislation. Following this line of analysis leads him to conclude that Section 5 of the Fourteenth Amendment authorizes "Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."[115]

On the other hand, he also seems to derive the substantive constitutional right from the obligation of the states to provide equal access to public facilities, which is contested by none. Thus, Congress can enforce by appropriate legislation this state obligation through legislation directed at private individuals and their conduct as well as at the state or public officials. In other words, the Fourteenth Amendment imposes an affirmative obligation to promote racial equality upon the states and if in the view of Congress they are inadequately meeting that obligation, then Congress may enact appropriate legislation to correct the inadequacy.[116] This would place the primary responsibility for implementing the Fourteenth Amendment upon Congress where it seems to belong.[117]

This analysis is a double-edged sword, for although it may be swung to cut down obstacles obstructing Black progress, it also can be swung at Blacks in the guise of dealing with state inadequacies or in the exercise of "its discretion" to fashion "remedies to achieve civil and political equality for all citizens."

Does the above mean that Congress has plenary power to regulate equal access to public schools — including the matter of busing? Furthermore, Justice Douglas said in the *Harper* case:

> . . . the Equal Protection Clause is not shackled to the political theory of a particular era . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.[118]

An answer to the above question will be deferred until the Nixon-Burger Court's decision on busing is discussed.[119]

One other decision of the Warren Court related to the enforcement of the

114. 83 U.S. at 778.
115. 383 U.S. at 784.
116. *See* Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966). "Today, political theory which acknowledges the duty of government to provide jobs, social security medical care and housing extends to the field of human rights and imposes an obligation to promote liberty, equality, and dignity." *Id.* at 93.
117. This is not an argument against judicial activism in the area of Fourteenth or Thirteenth and Fifteenth Amendment rights, the latter are subject to a similar analysis and interpretation. Indeed, this writer has argued that the Court has a special responsibility to interject itself into areas primarily charted for Congressional activity, if Congress neglects to do so. Such neglect creates a decision-making deficiency which should be corrected by the Court. Tollett, *Political Questions and the Law*, 42. U. Det. L. J. 439 (1965).
118. 383 U.S. at 669. *See* text *supra* at 207.
119. See part 2 of this article appearing in 3 BLACK L. J. (Spring, 1973).

Fourteenth Amendment should be briefly noted before turning to the Fifteenth Amendment and the Commerce Clause. In 1961 the Court held in *Monroe v. Pape*[120] that the plaintiff could recover damages in a civil action under 42 U.S.C.A. § 1983[121] where police officers had unlawfully invaded his home and illegally carried out a search, seizure and detention. The Due Process Clause of the Fourteenth Amendment had secured to the plaintiff the Fourth Amendment guarantee against unreasonable searches and seizures.

c. *Fifteenth Amendment*[122]

The principles concerning state action requirements in enforcing the Fourteenth Amendment are also applicable to the Congressional enforcement of the Fifteenth, therefore, the Fifteenth Amendment can be disposed of quickly. In *South Carolina v. Katzenbach*[123] the Court upheld the constitutionality of the Voting Rights Act of 1965 (which was designed by Congress to banish the blight of racial discrimination in voting). In upholding the elaborate Act which provided for voting examiners to register qualified applicants in some situations, a limitation on state powers to enact new voting tests and the temporary suspension of literacy tests and other voting qualifications, Chief Justice Warren said for the Court, ". . . Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[124] In *Katzenbach v. Morgan*[125] the Court upheld the section of the act which permitted voting based upon the Spanish literacy of Puerto Ricans desiring to vote in New York where there was an English literacy requirement. However, the Court interpreted this section as enforcing the Equal Protection Clause of the Fourteenth Amendment. Thus the Warren Court took a latitudian view of Congress' power to enact laws concerning voting rights which are "preservative of all rights."

d. *Commerce Clause*

A discussion of the Court's treatment of Congressional enforcement of civil rights through the Commerce Clause also can be disposed of briefly since the Court has in effect collapsed the questionable distinction between interstate and intrastate commerce[126] in passing upon Congress' power to regulate commerce. The Court held in *Heart of Atlanta Motel, Inc. v. United States*[127] that Congress could prohibit racial discrimination in public accommodations, thus upholding Title II of the Civil Rights Act of 1964. The court stated the issue as follows:

> The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.[128]

The Court answered both questions in the affirmative. It likewise upheld the Act's application to restaurants which served food, a substantial portion of which had moved in commerce.[129]

4. *Rights of the Accused*

President Nixon waged his campaign for election in 1968 upon a platform of "law and order." He claimed lawlessness and disorder in large part resulted from the leniency of the Attorney General and the Supreme Court in dealing with the rights of the accused. He promised to appoint to the Court "strict constructionists." Thus in comparing the Warren Court with the Nixon-Burger Court con-

120. 365 U.S. 167 (1961).
121. This provision evolved from part of the Ku Klux Klan Act of 1871 (17 Stat. 13). It is the civil counterpart to 18 U.S.C.A. 242. A part of the original Act of 1871, making criminal private conspiracies to deprive persons of the equal protection of the laws, was held unconstitutional in United States v. Harris, 106 U.S. 629 (1882). Section 1983 provides civil relief for deprivation of rights under color of law, "custom, or usage of any State or Territory . . ."
122. *See* note 100, *supra.*
123. 383 U.S. 301 (1966).
124. 383 U.S. at 324.
125. 384 U.S. 641 (1966).
126. *See e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, (1937).
127. 379 U.S. 241 (1964).
128. 379 U.S. at 258.
129. Katzenbach v. McClung, 379 U.S. 294 (1964).

siderable attention appropriately could be given to the Warren Court's decisions affecting the rights of the accused. However, the decisions in this area are so wide ranging and numerous that only a few can be touched upon in order to demonstrate the Warren Court's egalitarian humanism and jurisprudence of individual integrity. A somewhat more detailed treatment of criminal cases will be given when the Nixon-Burger Court is discussed.

Three categories of cases decided by the Warren Court will be touched upon. They are those making the Bill of Rights good against the states, extending the federal exclusionary rules to the states, and affirming egalitarianism and individual integrity in the criminal process.

a. *Bill of Rights Made Good Against the States*

Before Chief Justice Warren took over the helm of the Court, it held only those provisions of the Bill of Rights which expressed concepts implicit in "a scheme of ordered liberty were good against the states." Thus only the First and, to a limited extent, the Fourth Amendments had been applied to the states.[130]

Fifth Amendment. — In *Malloy v. Hogan* and its companion case, *Murphy v. Waterfront Commission,* the Court held that the privilege against self-incrimination in the Fifth Amendment had been made applicable to the states by the Fourteenth Amendment Due Process Clause.[131] *Griffin v. California*[132] applied the no-comment rule (that is, prosecutor may not comment upon the failure of defendant to take witness stand) to the states. *Benton v. Maryland*[133] applied the double jeopardy prohibition of the Fifth Amendment to the states as fundamental to the American scheme of justice, thus overruling *Palkov v. Connecticut.*[134]

Sixth Amendment. — The Court ruled in *Klopfer v. North Carolina*[135] that the accused has the right to a speedy trial; in *Witherspoon v. Illinois,*[136] in effect, that the accused has the right to be tried by an *impartial jury,*[137] in *Duncan v. Louisiana*[138] that misdeameanant was entitled to trial by jury; in *Pointer v. Texas* [139] that the accused has the right to confront opposing witnesses; in *Washington v. Texas*[140] that the accused has the right to compulsory process for obtaining witnesses; and in *Gideon v. Wainwright*[141] that the accused has the right to the assistance of counsel.

Eighth Amendment. — In *Robinson v. California*[142] the Court ruled that it was cruel and unusual punishment to convict for mere status and without determination of any act.

The only guarantees of the Bill of Rights relating to the rights of the accused which the Warren Court did not apply to the states were the Eighth Amendment prohibition against excessive bail and the Fifth Amendment requirement of prosecution by grand jury indictment or presentment in capital or infamous crimes.

b. *Exclusionary Rules*

In order to deter violation of the above enumerated guarantees and to demand that law enforcing activities and agencies comply with the law, the Court has developed rules for the exclusion of evi-

130. Gitlow v. New York, 268 U.S. 652. (1925) (the Court assumed the First Amendment freedoms of expression "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States," in upholding the conviction under a New York criminal anarchy law): Wolf v. Colorado, 338 U.S. 25 (1949) (applying the Fourth Amendment to state criminal proceedings but not the federal exclusionary rule designed to make the Amendment effective. The Bill of Rights was first held inapplicable to the states Barron v. Mayor and City Council, 32 U.S. (7 Pet.) 243 (1883). *See also* Hurtado v. California, 110 U.S. 516 (1884) holding the Fourteenth Amendment did not encompass the Fifth Amendment guarantee that capitol or other infamous crimes be prosecuted on a presentment or indictment of a grand jury).
131. 378 U.S. 1 (1964); 378 U.S. 52 (1964).
132. 380 U.S. 609 (1965).
133. 395 U.S. 784 (1969).
134. 302 U.S. 319 (1937).
135. 386 U.S. 213 (1967).
136. 391 U.S. 510 (1968).
137. *See also* Sheppart v. Maxwell, 384 U.S. 333 (1966) (massive, highly prejudicial publicity, and carnival atmosphere of trial).
138. 391 U.S. 145 (1968) (jury trial not granted to misdemeanant).
139. 380 U.S. 400 (1965) (prior statements of witnesses who were "unavailable" for trial admitted).
140. 388 U.S. 14 (1967) (state statute prohibited a co-participant in an alleged offense from testifying on behalf of the other participant).
141. 372 U.S. 335 (1963) (request for assistance of counsel in misdeameanor case refused).
142. 370 U.S. 660 (1962) (statute made it a misdemeanor, subject to mandatory jail sentence not less than 90 days, for a person to be addicted to drugs).

dence obtained in violation of those guarantees. Other means of remedying the violation of constitutional rights, for example, tort actions, criminal prosecutions, and injunctions, were touched upon above.[143] However, the remedy which has engendered the greatest controversy because it is probably the most effective means of safeguarding the rights of the accused has been the exclusion of illegally obtained evidence including further evidence acquired by the initial illegal procedure.[144]

The leading case applying the exclusionary rule to the states was *Mapp v. Ohio.*[145] Before Chief Justice Warren ascended to the Supreme Court it had held in 1949 that although the Fourth Amendment applied to the states, the federal exclusionary rule of *Weeks v. United States*[146] did not apply. The defendant in *Mapp* had been convicted of knowingly possessing certain lewd and lascivious books, pictures, and photographs. The Supreme Court of Ohio acknowledged that the incriminating evidence "was based primarily upon . . . unlawfully seized" evidence "during an unlawful search of defendant's home." Pursuant to information that a suspected bomber wanted for questioning was hiding out in defendant's home, police went to her home and demanded entrance. Because they did not have a warrant, upon advice of counsel, she refused their entry. They returned three hours later, still apparently without warrant, and forced their entry. They ransacked her entire premises, finally seizing the evidence in question. No search warrant was produced at her trial. The Court reversed the conviction holding that the Fourth Amendment barred evidence secured through an illegal search and seizure, citing *Weeks, Silverthorne,* and other Fourth Amendment federal cases.

The exclusionary rule is not only applied to illegal searches and seizures without warrant or probable cause but also to the evidentiary fruits of unconstitutional arrests,[147] lineup identification procedures without presence of counsel, wiretaps not judicially authorized,[148] and involuntary confessions.[149] The latter three situations deserve fuller discussion, however, only the *Miranda* situation will be touched on further.[150]

c. *Egalitarianism and Individual Integrity in the Criminal Process*

Egalitarian humanism and a jurisprudence of individual integrity can be demonstrated as a characteristic and preoccupation of the Warren Court by briefly looking at four major decisions of that Court.

Illinois required appellant to furnish a bill of exceptions or report of trial proceedings, certified by the trial judge, in order to perfect full direct review of a criminal conviction. Sometimes a stenographic transcript of the proceedings would be necessary to comply with this requirement. Such transcripts were furnished free only to indigent defendants sentenced to death. *Griffin v. Illinois*[151] held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment required that all indigent defendants be furnished a transcript, particularly where allegations were made that errors occurred at the trial and they are not denied. Justice Black wrote in a four-man opinion for the Court:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no rational relationship to a defend-

143. *See e.g.*, "Abstention", "Removal," "Court Treatment of Congressional Enforcement of Civil Rights," *supra* at p. 202, 203, 211.
144. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (genesis of taint or fruit of the poisonous tree doctrine case—holding government cannot use information acquired during an illegal search to subpoena the very documents illegally viewed).
145. 367 U.S. 643 (1961).
146. 232 U.S. 383 (1914).
147. Wong Sun v. U.S. 371 U.S. 471 (1963).
148. Katz v. United States, 389 U.S. 347 (1967).
149. Miranda v. Arizona, 384 U.S. 436 (1966).
150. For a fuller consideration of *Katz, supra* note 148, see Tollett, *Bugs in the Driving Dream: The Technocratic War Against Privacy.* Paper prepared for Howard University Center for Clinical Legal Studies Law Symposium on *Crime and Punishment in Minority Communities* (April 20, 1972) to be published in forthcoming issue of the *Howard Law Journal.* The paper concludes, "Technological feasibility, executive exuberance, and national security paranoia to the contrary notwithstanding, a minimal commitment to the Bill of Rights compels the government to make a clean sweep of the 'dirty business' [of electronic surveillance]."
151. 351 U.S. 12 (1956).

ant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.[152]

Douglas v. California[153] held that a defendant was entitled to the assistance of assigned counsel in the appeal of a criminal conviction.

Miranda[154] seemed to have merged the guarantee against self-incrimination and the right to counsel into one holding. The Court said:

> Prior to any question, the person [accused] must be warned that he has a *right to remain silent,* that any statement he does make may be used as evidence against him, and that he has a *right to the presence of an attorney,* either retained or *appointed.*[155] (Emphasis added)

Moreover, Chief Justice Warren in his opinion for the Court in speaking about the policies of the privileges against self-incrimination said that they pointed "to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must acord to the *dignity* and *integrity* of its citizens."[156]

5. *Civil Liberties and Freedom of Religion*

Obviously, a discussion of the civil liberties and the freedom of religion aspects of the status of constitutional law at the end of the Warren era cannot even begin to be complete. It deserves fuller consideration than can be given within the space confines of this article. Civil liberties like the right to vote are preservative of other rights. Indeed, this writer is of the opinion that they are more fundamental than civil rights, for as long as they are preserved there is a chance and means of remedying the denial of civil rights. All rights are trampled over in a tyranny; the rights of minorities are practically extinguished. Yet only cases associated with what has been called "Negro Evangelism" principally will be touched upon.[157]

a. *Civil Liberties*

The Warren Court generally was solicitous and supportive of most claims based upon First Amendment privileges, immunities and rights whether they involved the press,[158] symbolic speech,[159] political membership or advocacy,[160] movies,[161] or literature.[162] However, in dealing with protests, picketing and the like, its guiding principle was to initially determine whether the element of "expression" or "action" was predominant in the conduct under consideration. If conduct or action was incidental to speech, then full First Amendment consideration was given it. If speech or expression was incidental to conduct then full First Amendment protection was not accorded it.

In dealing with First Amendment speech, press, and association cases, the Court emphasized the problem of overbreadth and a compelling state interest in appraising the governmental regulation. This approach involved the Court in an inquiry of whether the means employed to limit civil liberties bore a relationship to the interest sought to be protected, whether the interest sought to be protected could be obtained by a less drastic alternative means, and whether the state interest served by non-drastic means was deemed sufficient to justify restrictions imposed upon First Amendment privileges, immunities and rights.

The Court in *Edwards v. South Carolina*[163] reversed the conviction of civil rights demonstrators at State House grounds which merely "stirred people to anger, invited public dispute, or brought about a condition of unrest." In *Cox v. Louisiana*[164] because unfettered discretion was given to officials in arresting and apparently convicting southern col-

152. 351 U.S. at 17. The vote of the Court was 5-4.
153. 372 U.S. 353 (1963).
154. Cited, *supra* note (149).
155. 351 U.S. at 479.
156. 351 U.S. at 460. (Emphasis added)
157. For discussion of or reference to civil liberties cases especially relevant to Blacks *see e.g.* supra notes 24, 25, 30-35, 83-87, 96, 112 and accompanying text.
158. New York Times Co. v. Sullivan, 376 U.S. 255 (1964).
159. Street v. New York, 394 U.S. 576 (1969) Tinker v. Des Moines School District, 393 U.S. 503, 89 S. Ct. 733 (1969); *but see* United States v. Obrien, 391 U.S. 367 (1969).
160. Yates v. United States, 354 U.S. 298 (1957).
161. Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959); Jacobellis v. Ohio, 378 U.S. 184 (1964).
162. Fanny Hill Case, 383 U.S. 413 (1966).
163. 372 U.S. 229 (1963).
164. 379 U.S. 536 (1965).

lege students for disturbing the peace, obstructing public passages, and picketing before a courthouse the Court overturned the convictions.[165] In another Louisiana case, *Brown v. Louisiana*[166] the Court reversed a breach of the peace conviction based simply upon the failure of Blacks to leave a public library during its regular hours. However, the escalation of sit-ins and other types of protest demonstrations resulted in the Court taking a less solicitous and supportive position regarding civil rights activists in *Adderly v. Florida*.[167] There, trespass convictions of Black students for demonstrating at a county jail were upheld on the general policy ground that people could not propogandize protests or views whenever, however, and wherever they pleased. The Court said in effect that protesters have less leeway at and around jails than, say, state houses. The Court emphasized that there was a finding of obstruction to ingress and egress of a driveway to the jail.

b. *Freedom of Religion*[168]

The Warren Court generally took a hostile view of governmental activities supportive of religious establishments and a solicitous view of claims that religious freedom was being impaired by governmental regulations or activities.

Establishment Clause — In *Engel v. Vitale*[169] the Court disallowed a "nondenominational" prayer composed by the New York Board of Regents. A local school board had instructed its institutions to have it said out loud in class daily. The Court held this an improper establishment of religion by the state. Likewise, the daily reading of the Holy Bible was disapproved in *School District v. Schempp*.[170]

Free Exercise Clause — The Court's decisions in this area are more uneven than they are in the establishment cases. Two cases will illustrate the point. In *Braunfield v. Brown*[171] the Court upheld the enforcement of a Pennsylvania criminal statute which proscribed the Sunday retail sale of certain enumerated commodities. However, in *Sherbert v. Verner* [172] the Court reversed the refusal by the South Carolina Employment Security Commission to grant unemployment compensation to a Seventh-day Adventist who refused to accept employment that required work on Saturday.

165. *See also* companion case: Cox v. Louisiana, 379 U.S. 559 (1965) (officials erroneously concluded defendant threatened a breach of the peace).
166. 383 U.S. 131 (1966).
167. 385 U.S. 39 (1966).
168. *See* note and accompanying text *supra* N. 18.
169. 370 U.S. 421 (1962).
170. 374 U.S. 203 (1963).
171. 366 U.S. 599 (1961).
172. 374 U.S. 398 (1963).

The above completes the review of the status of constitutional law at the end of the Warren era. In the next installment the Nixon-Burger Court's performance in these areas will be reviewed. Some loose ends of the review of Warren Court decisions will be tied together. In any case, it can be seen that the Warren Court has been generally an instrument of social change and progress beneficial to Blacks. When the Nixon-Burger Court's performance is compared with the Warren Court's performance it will be seen that there are already substantial grounds for Blacks to become concerned about the direction in which the Nixon-Burger Court is moving.