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The Warren Court: A Study of Selected Civil Liberties

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THE WARREN COURT: A STUDY OF SELECTED CIVIL LIBERTIES

Under Chief Justice Earl Warren, the Supreme Court of the United States has retooled much of the Nation's constitutional design. This note will discuss four aspects of civil liberty in the United States: equal protection of the law, the associated concept of state action, freedom of speech and expression, and the emerging unenumerated, fundamental liberties. Since the Chief Justice's ascension to the Bench in 1953, the Supreme Court has decided many important cases, but only cases dealing with civil rights will be treated here. Space does not permit a commentary on the many significant changes that have taken place with respect to rights of the accused, school prayer, or reapportionment.[1] Further, this note does not purport to offer an in-depth analysis of any particular case or to suggest profound insight into the complex issues with which the Supreme Court is confronted. Its thrust, rather, will be an overview of the four topics mentioned above with emphasis on the Supreme Court's methodology.

EQUAL PROTECTION AND RACIAL DISCRIMINATION

When the school desegregation cases[2] were decided on May 17, 1954, Earl Warren had served as Chief Justice of the United States Supreme Court slightly more than six months. For fifty-eight years the Court had said that "separate but equal" facilities for white and colored persons did not violate the fourteenth amendment — a proposition established by the case of *Plessy v. Ferguson*[3] in 1896.

The *Plessy* case involved a Louisiana statute that required railroads operating in that state to provide separate accommodations for white and colored people. Plessy, the petitioner, had one great-grandparent who was a Negro — a fact not discernible by his appearance. He challenged the statute's constitutionality after refusing to leave a "white" car and subsequently was held to answer for a criminal charge of violating an act of the Louisiana General Assembly. The Court held that the statute was a reasonable exercise of state power, not calculated to oppress a particular class in view of the fact that it provided for equal but separate accommodations. The fallacy of the petitioner's argument, according to the majority, was the assumption that segregated facilities stamp the colored race with a badge of inferiority: "If this be so, it is not by reason of anything found in the Act, but solely because the colored race chooses to put that construction upon it."[4]

The doctrine of "separate but equal" was unscathed constitutional law until 1938, at which time a Negro citizen of Missouri, Lloyd Gaines, attempted

1. For an excellent discussion of the reapportionment cases *see* Baldwin & Laughlin, *The Reapportionment Cases: A Study in the Constitutional Adjudication Process,* 17 U. F. L.REV. 301 (1964).

2. Brown v. Board of Educ., 347 U.S. 483 (1954). This case was combined for decision with the following: *Briggs v. Elliott* (S.C.), *Davis v. County School Bd.* (Va.), and *Gebhart v. Belton* (Del.).

3. 163 U.S. 537 (1896).

4. *Id.* at 551.

to enter the University of Missouri law school. A Missouri statute provided that Negro residents attend schools in adjacent states if they needed courses not available at Missouri's Negro institutions. Missouri paid reasonable tuition fees for out-of-state attendance. Dissatisfied with this statutory arrangement, Gaines brought a mandamus proceeding against the Registrar of the University of Missouri to compel his admittance.[5] Failing in this, the petitioner brought certiorari to the Supreme Court. In *Missouri ex rel. Gaines v. Canada*[6] the first crack appeared in the shell of separate but equal. The Court agreed that separation of the races was tolerable so long as there was real equality. White residents of Missouri were afforded a legal education in Missouri, but Negro residents possessing the same qualifications were compelled to go outside the state to obtain it. Reversing and remanding, the Supreme Court held that as an individual and personal right, Gaines was entitled to equal protection of the laws and that Missouri was bound "[t]o furnish him within its borders facilities for legal education *substantially equal* to those which the State there afforded for persons of the white race . . . ."[7] The Court did not reach the question whether separate schools actually could be equal.

In 1950, another petition to the Supreme Court alleged that Texas had not provided its Negro citizens with substantially equal law school opportunities. In *Sweatt v. Painter*,[8] National Association for the Advancement of Colored People (NAACP) counsel, Thurgood Marshall, argued for the relator that although Texas had provided Negroes with all the physical and tangible benefits of a new law school,[9] there were other intangible qualities that made a law school prominent: reputation of the faculty, experience of the administration, position and influence of the alumni, traditions and prestige. The Supreme Court acknowledged the validity of Marshall's argument and ruled that the Negro school was not substantially equal. As a result, the equal protection clause required Sweatt's admittance to the University of Texas Law School.[10]

Brown v. Board of Education.[11] *Brown v. Board of Education* involved Negro children who were denied admission to state public schools designated for use exclusively by white children. Appellants brought suit to enjoin enforcement of a Kansas statute[12] that permitted cities of more than 15,000 popu-

5. State *ex rel.* Gaines v. Canada, 113 S.W.2d (Mo. 1937).

6. 305 U.S. 337 (1938).

7. *Id.* at 351 (emphasis added).

8. 339 U.S. 629 (1950).

9. *Id.* at 633: "It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar."

10. On the same date *Sweatt* was announced, the Supreme Court decided McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) in essentially the same manner, holding that special treatment of a Negro graduate student deprived him of equal protection at the state supported University of Oklahoma. Both *Sweatt* and *McLaurin* were decided without the Court finding it necessary to reexamine the separate but equal doctrine.

11. 347 U.S. 483 (1954).

12. KAN. GEN. STAT. ANN. §72-1724 (1949).

lation to maintain separate educational facilities for Negro and white students. A three-judge district court found that, although segregation has a detrimental effect upon Negro children, they were not, under the *Plessy v. Ferguson* rationale, entitled to relief.[13]

Once again at the Supreme Court, NAACP counsel, Thurgood Marshall, argued the case for appellants. He developed the brief with alternative approaches: (a) *Segregated schools are not equal and cannot be made equal; therefore, the Negro children are being deprived of equal protection of the law.* Marshall, by frontal assault, was attempting to have the "separate but equal" doctrine completely overturned; (b) *Even if the Court finds that tangible facilities are substantially equal, certain existing intangible factors cause inequality.* Here, Marshall attempted to persuade the Court to extend the *Sweatt v. Painter* formula to public elementary schools.[14]

Marshall attempted to bolster both arguments by introducing in the lower courts, by expert witnesses, and in the Supreme Court by an appendix to the appellants' brief, the published opinions of social scientists based on empirical studies. These experts unanimously agreed — racially segregated schools were detrimental to the minds and motivation of Negro children.

In holding racial segregation in public schools unconstitutional, Chief Justice Warren spoke for a unanimous Court. He began by declining to unravel the intention of the framers of the equal protection clause.[15] Said Warren: "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[16]

The question the Chief Justice squarely presented was whether segregation of children in public schools solely on the basis of race, even if physical facilities and other tangible factors might be equal, deprived minority-group school children of equal educational opportunities. With this inquiry he struck at the heart of "separate but equal." The Court concluded that a segregated school system engenders a sense of inferiority in Negro children, thereby retarding their educational and mental development. "[T]his finding," said Warren, "is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[17]

Footnote eleven of the Court's opinion cited numerous publications of

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13. Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951).

14. Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 40 (1959).

15. Brown v. Board of Educ., 347 U.S. at 489, 492-93 (1959). It has been pointed out that if the Chief Justice had not foreclosed debate on the original intention of the fourteenth amendment's drafters, the Court either would have had to acknowledge that the amendment was not intended to apply to racial segregation or to formulate an explicit theory rationalizing its application to segregation in public schools. Saying that the history was "inconclusive," Warren effectively burned his bridges behind him. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64-65 (1955).

16. 347 U.S. at 492-93.

17. *Id.* at 494-95.

social scientists — the same publications Marshall had included in the appendix of his brief. To dispel any doubt as to the meaning of the Court's pronouncement, Warren unqualifiedly announced: "Separate educational facilities are inherently unequal."[18]

Aftermath

Brown v. Board of Education was not surprising to seasoned observers of the Supreme Court.[19] After all, it was a rather logical sequel to *Missouri ex rel. Gaines* and *Sweatt*. It was not, however, a decision easily digested by many Americans culturally accustomed to racial segregation.

The *Brown* decision has of course significantly affected American life. Since 1954, the Supreme Court has held racial classification unconstitutional in diverse contexts, using *Brown* as precedent.[20] But ten years after this landmark decision, the nation was still gripped in a smoldering civil rights revolution that was becoming increasingly more militant, and it was apparent by then that problems generated by years of racial isolation would not be remedied quickly or easily. Even the single goal of *Brown v. Board of Education* — equal educational opportunity for all children — has been illusive and intertwined with social problems of bewildering complexity. Most Negro children continue to attend public schools that, in the main, are racially segregated.[21] In retrospect, *Brown v. Board of Education* was almost blandly optimistic. The United States Commissioner on Civil Rights has reported on attempts at school integration: "Despite some initial success and a few stable solutions, the consequences, for the most part, have proved disappointing. Steady increases in urban Negro population, continuing shifts in the racial character of neighborhoods, actual or supposed decline in student achievement, unhappiness over cultural differences and unpleasant personal relations have combined to produce new problems faster than old ones could be solved."[22]

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18. *Id.* at 495.

19. *See* J. FRANK, THE WARREN COURT 27 (1964).

20. *See* Loving v. Virginia, 87 S. Ct. 1817 (1967) (state miscegenation statute); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (state poll tax); Rogers v. Paul, 382 U.S. 198 (1965) (state grade-a-year school desegregation plan); Anderson v. Martin, 375 U.S. 399 (1964) (state statute requiring designation of race on ballot); Swain v. Alabama, 380 U.S. 202 (1965) (deliberate denial of Negro participation as jurors); Schiro v. Bynum, 375 U.S. 395 (1964) (an ordinance requiring segregation in municipal auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); Turner v. Memphis, 369 U.S. 350 (1962) (a regulation requiring segregation in an airport restaurant); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (a statute forbidding integrated athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 43 (1958) (public parks); Gayle v. Browder, 352 U.S. 903 (1956) (a statute requiring segregation on buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses).

21. A recent United States survey discloses that 65% of all Negro children in the first grade attend schools that have an enrollment 90% or more Negro — about 80% of their white counterparts are enrolled in schools that are 90% or more white. UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 2 (1967).

22. UNITED STATES COMMISSION ON CIVIL RIGHTS, EDUCATION PARKS 2 (1967).

Despite the difficulty of societal readjustment, it is clear that racial segregation could not be perpetuated in a nation with a historical and moral commitment to the equality of its people in contemplation of the law. The Supreme Court's activity provided the catalyst and awakened the federal government from its lethargy. Congress slowly became aware that racial equality would not be fostered by action of the courts alone. It eventually would respond with legislative measures directed at the states; the Court's task would be to find means of upholding their constitutionality.

STATE ACTION

In order for the machinery of equal protection and due process to be set in motion, the orthodox principle since the *Civil Rights Cases*[23] has been that the state must have participated in the deprivation of an individual's rights. This reasoning emanated, naturally enough, from the language of the fourteenth amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The *Civil Rights Cases* interpreted this amendment's language and concluded:[24]

> [C]ivil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of [such] an individual . . . is simply a private wrong, or a crime of that individual . . . .

The problem, then, is to determine whether the wrongful act was a private or state act.[25] Some activities may be characterized as wholly private. Others — functions of state agencies, for instance — are strictly governmental and unquestionably within the purview of the fourteenth amendment. Difficulty arises when private persons or organizations begin to function like governments and when public officials step outside of their normal duties and act with personal motives. These are the difficult-to-resolve cases with which the Supreme Court has wrestled in an attempt to maintain a viable rule of law.

One category of problems arising under state action theory involves cases in which a state official, supposedly acting in his official capacity, commits an act against an individual, otherwise unconstitutional, for purely personal motives. The Supreme Court has held that the official's act is the state's act,[26] even if the official was proceeding in direct violation of state law.[27]

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23. 109 U.S. 3 (1883).

24. *Id.* at 17.

25. Courts supposedly confront the state action question as a preliminary matter. If some form of involvement by the state is not found, an inquiry into the merits of the allegedly unconstitutional act becomes unnecessary. *See Ex parte* Virginia, 100 U.S. 339 (1880).

26. *Id.*

27. *See* Screws v. United States, 325 U.S. 91 (1945); *accord,* Monroe v. Pape, 365 U.S. 167 (1961); Williams v. United States, 341 U.S. 97 (1951); United States v. Classic, 313 U.S. 299 (1941).

A second class of cases involves private parties functioning, at least in part, like governmental agencies. The Court has dealt with these by holding that when a state delegates or permits such private interests to exercise powers or functions essentially governmental in nature, they become agents or instrumentalities of the state and, consequently, are encumbered by its constitutional prohibitions.[28]

A third broad category — the most difficult to resolve — concerns those cases that have focused on private activities, contractual or otherwise, wherein one or both parties have attempted to invoke state administrative or judicial enforcement of their respective rights and obligations. This category has most troubled the Supreme Court since 1953.

Shelley v. Kraemer,[29] the foundation case which set the stage for the later Warren Court decisions, arose out of a contract for the sale of residential real property between a white owner and Negro purchasers. A racially restrictive covenant ran with the property, one of fifty-seven parcels of land covered by the encumbrance. Respondents, as owners of adjoining parcels subject to the terms of the covenant, brought suit to restrain Shelley, the Negro, from taking possession of the property. The trial court dismissed the suit, but the Missouri Supreme Court reversed and directed the trial court to grant relief. On certiorari, the United States Supreme Court held:

> (1) Private agreements standing alone do not violate any constitutional rights under the fourteenth amendment[30]
>
> (2) but, action of state courts and judicial officers in their official capacities is "state action" within the meaning of the fourteenth amendment[31]
>
> (3) therefore, in granting enforcement of a racial restrictive covenant, the court is acting to deny an excluded group the equal protection of the laws.[32]

Since this ruling, the Warren Court has confronted state action in several major decisions in an attempt to clarify the *Shelley* case. The conclusions of the respective Justices as to the meaning of state action have not been homogeneous.

Pennsylvania v. Board of Directors of City Trusts.[33] By a will probated in 1831, Stephen Girard left a trust fund for the establishment and maintenance of a college that was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate

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28. *See* Terry v. Adams, 345 U.S. 461 (1953) ("voluntary" private political party primary that excluded Negroes held in violation of fifteenth amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (company-owned town attempted to bar distribution of religious literature on sidewalks of Chickasaw, Ala.).

29. 334 U.S. 1 (1948).

30. *Id.* at 13.

31. *Id.* at 18.

32. *Id.* at 22.

33. 353 U.S. 230 (1957).

to maintain."[34] The will designated the City of Philadelphia as trustee of the fund, and, by an act of the Pennsylvania Legislature, the trust had been administered and the college operated by Philadelphia's Board of Directors of City Trusts. In 1954, two Negroes applied for admission to the college. Their applications were refused solely on the basis of race. Alleging that their exclusion violated the fourteenth amendment, they unsuccessfully petitioned through the Pennsylvania courts for an order of admittance. On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings. The Court held, in a per curiam opinion, that the Board operating the college was an agency of Pennsylvania. Citing *Brown v. Board of Education*,[35] the Court ruled that even though the board was acting as trustee under a private will, its refusal to admit petitioners because of their race was discrimination by the state and contrary to the fourteenth amendment.

Evans v. Newton.[36] *Evans v. Newton* involved a private will that devised to the mayor and council of Macon, Georgia, a trust of land to be used as a park for white people only. The city maintained the facility as a segregated park for a number of years but later announced that the park was a public facility, which constitutionally it could not manage and maintain on a segregated basis. The individual members of the park's board of managers brought suit in state court, asking that the city be removed as trustee and that the court appoint private trustees to whom title would be transferred. A number of Negro citizens of Macon intervened, requesting that the court refuse to appoint private trustees on the ground that this would constitute discriminatory state action in violation of the fourteenth amendment. The lower court accepted the trustees' resignation and appointed three new trustees. On appeal the Georgia Supreme Court affirmed, ruling that the settlor had the right to appoint the trust benefits to a limited class and that the court had power to appoint new trustees so that the purpose of the trust would not fail. On certiorari, the Supreme Court, with Justice White concurring and Justices Black, Harlan, and Stewart dissenting, held that state courts, by aiding private trustees in maintaining a park on a segregated basis, were implicating the state itself in racial discrimination as long as the state was involved in supervision, control, or management of the park.

Justice Douglas, speaking for the majority,[37] was careful to pay homage to the traditional rule of the *Civil Rights Cases*:

> 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 no constitutional difficulty would be encountered.

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34. *Id.* at 231.
35. 347 U.S. 483 (1954).
36. 382 U.S. 296 (1966).
37. *Id.* at 300.

The public park was an integral part of Macon's activities for years, having been cared for, policed, funded, and granted tax exemptions under Georgia law. Its "dominant character and purpose" was that of a public facility, and the Court had not been shown by the record that anything but formal title had passed to the private trustees. As long as control or management of the park rested in the hands of the municipality, the property would remain subject to the strictures of the fourteenth amendment. The Court refused to articulate a rule that would define state action. Instead, its decision could be reached "only by sifting facts and weighing circumstances." This approach had been used by the Court in an earlier state action case:[38] all direct or indirect connections between a private facility and government are aggregated in order to determine whether the private facility is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[39]

Justices Harlan and Stewart, dissenting from the majority opinion, expressed concern about the "other ground" for the decision, which they believe ultimately becomes the real holding — the "public function" theory of state action. This theory, in essence, stands for the idea that nongovernmental activities or facilities should be held to a state's constitutional responsibility if they function vis-à-vis private individuals in a manner basically similar to government. Formal connections, according to this theory, are a superficial means of reaching the same result.[40] Justices Harlan and Stewart fear the vagueness of the public function test, which they believe might ultimately encompass "privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other [private facilities functionally related to governmental activities] . . . ."[41]

Lombard v. Louisiana.[42] On May 20, 1963, the Supreme Court decided a series of important civil rights cases,[43] one of which was *Lombard v. Louisiana.* Three Negro students and one white student attempted to order at a lunch counter in New Orleans, Louisiana, a city that had no ordinance prohibiting integrated restaurant facilities. When the students were asked to leave by the store manager, they replied that they were going to remain seated until served. One week earlier a similar sit-in had occurred in the city, after which the superintendent of police and the Mayor of New Orleans had issued statements publicly condemning the sit-ins and declaring the city's intention to arrest and prosecute any person involved in a sit-in demonstration. For refusing to leave the lunch counter, the petitioners were convicted of violating Louisiana's criminal mischief statute. The issue was

38. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

39. Evans v. Newton, 382 U.S. 296, 299 (1966). *See also* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

40. *See* Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 46 (1961).

41. Evans v. Newton, 382 U.S. 296, 322 (1966) (dissenting opinion).

42. 373 U.S. 267 (1963).

43. Peterson v. Greenville, 373 U.S. 244 (1963); Shuttlesworth v. Birmingham, 373 U.S. 262 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Wright v. Georgia, 373 U.S. 284 (1963).

whether the city could be considered to have prohibited desegregated service in restaurants. The Supreme Court held that the state could not achieve segregated seating in restaurants by an official command that had as much coercive effect as an ordinance, and therefore the convictions violated the equal protection clause of the fourteenth amendment.[44]

Justice Douglas concurred with the result in *Lombard,* but rather than base state action on an official command, he preferred to consider the restaurant as a business so *affected with the public interest*[45] that its discriminatory acts could be imputed to the state if enforced by police or upheld by state courts.[46] Douglas declared: "We should not await legislative action before declaring that state courts cannot enforce this type of segregation."[47] It should be recognized that Justice Douglas delivered the Court's opinion three years later in *Evans v. Newton,*[48] discussed above. He apparently has persuaded Chief Justice Warren, Justices Brennan, Clark, and Fortas of the desirability of considering private action as state action if a sufficient nexus may be inferred from the relationship of the private party or business to state government.[49] How far the Court is willing to carry this reasoning in order to find state action is unclear.[50]

The Enforcement Clause

Under the aegis of the commerce clause, the Civil Rights Act of 1964[51] significantly broadened the legal obligations of private business to serve all persons regardless of race.[52] Further, the Voting Rights Act of 1965[53] has shifted the emphasis away from the prohibitory character of the fourteenth amendment to the positive utilization by Congress of section 5 of that amendment, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Although these developments have relieved the Warren Court of the urgency to compel the same result through a tenuous stretching of the state action concept,[54] it has forced

44. 373 U.S. at 273.

45. *See* Hamilton, *Affectation with Public Interest,* 39 YALE L.J. 1089, 1098, 1099 (1930).

46. *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Marsh v. Alabama 326 U.S. 501 (1946).

47. 373 U.S. at 276 (concurring opinion).

48. 382 U.S. 296 (1966).

49. *E.g.,* licenses, tax exemptions, government property, government loans.

50. In Reitman v. Mulkey, 87 S. Ct. 1627 (1967), the Supreme Court upheld a decision of the California Supreme Court holding an article of the California constitution violated the equal protection clause of the fourteenth amendment. The unconstitutional article purported to deny to the state any authority to obsruct an individual's right to decline to sell, lease, or rent his real property to any person he chose. The United States Supreme Court agreed with the California Supreme Court that the state had significantly involved itself with racial discrimination by having to permit such discrimination in the housing market.

51. 42 U.S.C. §2000a (1964).

52. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); *accord,* Katzenbach v. McClung, 379 U.S. 294 (1964).

53. 42 U.S.C. §1973 (1965).

54. *See* Bell v. Maryland, 378 U.S. 226 (1964).

the Court to reevaluate the extent of Congress's authority under the little-used section 5 to impose obligations on the states and to punish individuals who interfere with the constitutional rights of other individuals.

In 1966, the Supreme Court announced a number of decisions that seem to signal the dawn of a new constitutional era in federal-state-individual interrelationships.[55] Two of these cases are particularly relevant to the discussion of state action — *United States v. Price*[56] and *United States v. Guest*.[57] In *Price*, the defendants were charged under federal statute with conspiracy to deprive three civil rights workers of their fourteenth amendment rights without due process of law.[58] Of the eighteen defendants, one was a sheriff, one a deputy sheriff, and one a patrolman of the Philadelphia, Mississippi Police Department. The others were unconnected with state employment. The district court dismissed indictments against the nonofficial defendants because they were not considered to have taken any action under color of law. In reversing the district court's finding of no state action, Justice Fortas, for the Supreme Court, held that "to act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."[59] Fortas rejected the lower court's finding that the Reconstruction Congress had in mind only the protection of an individual's federal privileges and immunities,[60] not the general rights extended by the fourteenth amendment. Said Fortas, "We have no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.' "[61]

The facts of *United States v. Guest*[62] differ from *Price* in that the six defendants charged under section 241, volume 18, of the United States Code[63] were in no respect state officers. On a motion to dismiss, the district court ruled that the indictment failed to charge an offense against the laws of the United States. Taking the case on direct appeal, the Supreme Court, speaking through Mr. Justice Stewart, reversed the district court and held that although

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55. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Guest, 383 U.S. 745 (1966); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); United States v. Price, 383 U.S. 787 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

56. 383 U.S. 787 (1966).

57. 383 U.S. 745 (1966).

58. Conspiracy Against Rights of Citizens, 18 U.S.C. §§241-42 (1964).

59. 383 U.S. at 794.

60. These are the few rights that find their genesis in the seven articles of the Constitution; *e.g.*, United States v. Classic, 313 U.S. 299 (1941) (right to vote in federal elections); *In re* Quarles, 158 U.S. 532 (1895) (right to inform on violations of federal law); Logan v. United States, 144 U.S. 263 (1892) (right to be secure from unauthorized violence while in federal custody).

61. 383 U.S. at 789.

62. 383 U.S. 745 (1966).

63. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . . [t]hey shall be fined not more than $5,000 or imprisoned not more than ten years, or both." Conspiracy Against Rights of Citizens, 18 U.S.C. §241 (1964).

the extent of official involvement was unclear, the indictment stated that defendants had conspired to cause the arrest of Negroes "by means of false reports that such Negroes had committed criminal acts." Stewart reasoned that this *might* mean there was active connivance between agents of the state and the defendants — at least enough doubt to refuse a motion to dismiss. In this manner, he avoided the question whether Congress validly could enact legislation, under the enforcement clause of the fourteenth amendment, punishing individuals who are not state agents for conspiring to deprive citizens of their fourteenth amendment rights. Justice Stewart reiterated the familiar rule that the fourteenth amendment does not protect against wrongs done by individuals and declared that this was the present view of the Court. However, said Stewart, the state's involvement may be indirect, peripheral, or "only one of several co-operative forces leading to the constitutional violation."[64]

Mr. Justice Clark, joined by Justices Black and Fortas, wrote a concurring opinion expressing his conclusion that the enforcement section of the fourteenth amendment grants Congress the authority to enact laws "punishing all conspiracies — *with or without state action* — that interfere with Fourteenth Amendment rights."[65] Mr. Justice Brennan, joined by the Chief Justice and Justice Douglas, wrote an opinion in which he both concurred and dissented in part. He interpreted the Court's opinion as holding that Congress could not reach private action by legislation under the enforcement clause of the fourteenth amendment. To this supposition Mr. Justice Brennan directed his dissent. His reasoning proceeded:[66]

> Section 241 is an exercise of Congressional power under section five of the fourteenth amendment. Section 241 punishes *all* conspiracies to interfere with the exercise of a "right secured by the Constitution." Equal utilization of state facilities is a "right secured by the Constitution." Therefore, a private conspiracy to interfere with equal utilization of state facilities under section 241 is punishable.

However, this still did not indicate how to circumvent the language "No State shall . . . ." According to Justice Brennan the fourteenth amendment's equal protection clause created the right to equal utilization of state facilities. In his words:[67]

> Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, §5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and rising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.

64. 383 U.S. at 755-56.
65. *Id.* at 762 (concurring opinion) (emphasis added).
66. *Id.* at 780 (concurring in part, dissenting in part).
67. *Id.* at 782.

The *Civil Rights Cases*[68] had declared that the power of Congress under section 5 was restricted to correcting the effects of unconstitutional state laws and acts — in other words, a congressional neutralization power. Justice Brennan announced, in agreement with five other Justices,[69] that this interpretation of Congress's power under section 5 now is rejected. Section 5, according to Justice Brennan, is a positive grant of legislative power to Congress, which permits Congress to exercise its discretion in creating remedies for the attainment of political and civil equality for all citizens.[70]

Viewed from another perspective, it might be concluded that the fourteenth amendment, even without federal legislation, imposes a positive duty on the states to insure equal access to its available facilities. Therefore, Congress is authorized under the enforcement clause to punish any individual who attempts to interfere with the states' duty to provide equal access to such facilities.[71] It should be noted here that the Court in *Katzenbach v. Morgan*[72] held that Congress was authorized, under section 5 of the fourteenth amendment, to remove impediments obstructing equal enjoyment of state-provided services.[73] Congress can do this even if the condition or state law that is the target of its legislation does not, of itself, violate the Constitution. The holding is consistent with *South Carolina v. Katzenbach*[74] and *Guest,* both of which expressed the idea that the enforcement clauses of the fourteenth and fifteenth amendments were to be judged by the same standard as all other express powers of Congress in relation to the states' reserved powers.

To illustrate the importance of these cases, Professor Cox of Harvard points out that they may well provide the constitutional underpinnings of a congressional bill to prohibit racial discrimination in the private sale and rental of housing. This legislation might be viewed as removing an impediment to the states' duty not to discriminate in making available equal education and other facilities. The "impediment" is the urban "ghetto" that makes it practically impossible for Negroes to enjoy state-provided facilities on an equal basis, according to Cox.[75]

Much of what happens as a result of these enforcement clause decisions will depend on what action Congress feels motivated to take, if any, and how the Supreme Court will amplify the foregoing decisions. Whatever the outcome, it seems clear that the Warren Court, after a dozen years of struggling with equal protection and state action, has finally passed the torch of equality to Congress. It has cleared the way for measures to be enacted at the national

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68. 109 U.S. 3, 11 (1883).

69. Justices Clark, Black, Fortas, Douglas, and Warren.

70. United States v. Guest, 383 U.S. 745, 784 (1966).

71. *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

72. 384 U.S. 641 (1966).

73. In this case the "impediment" was an English literacy requirement in New York's election laws that conflicted with the Voting Rights Act of 1965. The Voting Rights Act, 42 U.S.C. §1973b (e) (Supp. I, 1964), contained far less stringent requirements with respect to English literacy. 384 U.S. at 643, 644.

74. 383 U.S. 301, 324 (1966).

75. *See* Cox, *supra* note 71, at 102, 120.

level directed at private interferences with fundamental rights. In so doing, it has redressed almost one hundred years of "established" state action theory and returned to John Marshall's classic rule of liberal interpretation: "Let the end be legitimate, let it be within the scope of the Constitution."[76]

SPEECH AND EXPRESSION

Congress shall make no law . . . abridging the freedom of speech or of the press. A discussion of free speech must begin with a realization that these words do not mean what they say. The Supreme Court often has repeated variations of the following statement: "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience."[77] The Court has concocted several verbal formulas in an effort to articulate the limits of legitimate governmental restrictions on free expression. A view that has never gained majority acceptance is Mr. Justice Black's literal reading of the first amendment; that is, because "Congress shall make *no* law." speech is an absolute right, not subject to governmental restrictions of any kind.

Three major areas of freedom of expression have been selected for treatment: speech as a medium for social protest and petition, speech as it relates to public officials, and speech and the obscenity standards. These three areas have undergone reexamination by the Warren Court and in some respects have been changed significantly.

Speech as Petition and Protest

Early free speech cases laid down the well-known doctrinal ideas with which the Supreme Court has since labored. In *Schenck v. United States,*[78] Justice Holmes spoke for a unanimous Court: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[79] This *clear and present danger* test has been used most often when public speakers have aroused their listeners to such passion as to threaten immediate violence to others or to the state.[80] Mr. Justice Murphy once categorized a form of nonconstitutionally protected speech as *fighting words* — "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[81]

76. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

77. Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

78. 249 U.S. 47, 52 (1919).

79. *Id.* at 52.

80. *See* Whitney v. California, 274 U.S. 357 (1927) (defendant convicted under state subversion statute — conviction sustained as a valid exercise of state police power to punish those who threaten public welfare, peace, or organized government); Gitlow v. New York, 268 U.S. 652 (1925) (pamphlets urging mass political strikes for the destruction of the parliamentary state); Abrams v. United States, 250 U.S. 616 (1919) (leaflets urging resistance to United States' war effort against Germany).

81. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also* Kunz v. New

The central idea of *clear and present danger* and *fighting words* is described familiarly by Professor Emerson as a test that balances the individual and social interest in freedom of expression against the social interest protected by the restricting regulation.[82] The Warren Court has continued to employ this balancing approach in cases dealing with petition and protest, as the following two cases demonstrate.

Cox v. Louisiana.[83] In Baton Rouge, Louisiana, 2,000 demonstrators, led by the appellant Cox, paraded and demonstrated in front of a courthouse, protesting what they considered to be an illegal arrest of twenty-three students the previous day. State judges, who were to try the students at a later date, were then in the building. Louisiana had worded its statute almost exactly like a 1950 federal statute. This measure made it a misdemeanor to parade or picket with intent to impede the administration of justice, "or with the intent of influencing any judge . . . in the discharge of his duty . . . in or near a building housing a court of the State of Louisiana . . . ."[84] Appellant was convicted under this statute and sentenced to one year in jail and a 5,000 dollar fine — the maximum penalty. Relying on the first and fourteenth amendments, appellant appealed to the Supreme Court after this conviction was affirmed by the Louisiana Supreme Court.[85] He claimed the statute invalid on its face as an unlawful restriction of free expression. Confronted with the dilemma of a challenged, federally inspired state statute, the Supreme Court held this statute was not unconstitutionally vague:[86]

> We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society [impartial administration of justice] and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.

Justice Goldberg, who spoke for the Court, rejected appellant's contention that an expression of opinion presents no clear and present danger to the administration of justice, saying that state legislators legitimately may conclude that such conduct as courthouse demonstrations *inherently* threatens the judicial process. But from the facts in the record, a majority of the Court reasoned that the sheriff of Baton Rouge had given an ad hoc interpretation of the statutory words "near a courthouse" by granting appellant permission to continue the demonstration as long as the protestors stayed on the opposite side of the street from the courthouse. By impliedly sanctioning the rally and then arresting appellant for his conduct, the sheriff's acts were

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York, 340 U.S. 290 (1951) (fighting words are categorized as lewd, profane, obscene, or libelous).

82. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912 (1963).

83. 379 U.S. 559 (1965).

84. LA. REV. STAT. §14:401 (Supp. 1962).

85. State v. Cox, 245 La. 303, 158 So. 2d 172 (1963).

86. 379 U.S. at 564.

considered equivalent to entrapment. The majority overturned the conviction and concluded with a reaffirmance of their faith in balancing interests: "freedom and viable government are indivisible concepts."[87]

Mr. Justice Black, dissenting in part from the majority opinion, could not conclude that the sheriff had given sufficient permission to Cox so as to justify a finding of entrapment. He clarified his absolute theory of first amendment rights in these words: "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.*"[88] Justice Black makes a distinction between "conduct," which may be validly regulated (that is, marching, parading, sitting-in), and "speech," which of itself may not be restricted. It could be said that Justice Black is an absolutist as far as speech is concerned but does not consider "expression" — a more generic term —inviolable since it may embrace conduct as well as speech.

Adderley v. State of Florida.[89] Petitioner Adderley and thirty-one others were demonstrating at a county jail in protest of the arrest of other Florida A & M students who had demonstrated on the previous day. The sheriff first attempted to persuade Adderley and his followers to leave the jail grounds, but after his pleas were ignored, he warned that he would be forced to arrest the demonstrators for trespassing and, if necessary, for resisting arrest. Petitioners who remained after this warning were arrested, tried, and convicted of malicious trespass on public property, and when their convictions were sustained,[90] applied to the Supreme Court for certiorari.

Mr. Justice Black delivered the opinion for a majority of the Court[91] — a rather terse statement that echoed his dissent in *Cox*. He distinguished an earlier case, *Edwards v. South Carolina,*[92] from the facts presented in *Adderley*. The public facility in *Edwards* was the capitol grounds; in *Adderley* it was a county jail built for "security purposes" and not "traditionally open to the public." In *Adderley*, contrary to *Edwards*, the protestors congregated in a service driveway without warning or permission from the sheriff. The statute in *Adderley* was narrowly drawn, while in *Edwards* the charge was a common law crime — breach of the peace. The Court concluded by affirming the judgments, holding that a state has as much power as a private owner to preserve the property under its control for the use to which it is lawfully dedicated.[93]

Mr. Justice Douglas, speaking for the dissenters, pointed out that the Court was dealing with "preferred rights," which should not be treated as an

87. *Id.* at 574-75 *citing* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963).
88. 379 U.S. at 578 (concurring in No. 24, dissenting in No. 49).
89. 385 U.S. 39 (1966).
90. Adderley v. State, 175 So. 2d 249 (1st D.C.A. Fla. 1965).
91. The Chief Justice, Justices Douglas, Brennan, and Fortas dissented.
92. 372 U.S. 229 (1963).
93. 385 U.S. at 47-48.

ordinary trespass. A jailhouse, said Douglas, is one of the seats of government — "an obvious center for protest." Finding vulnerability in Justice Black's analysis, Justice Douglas pointed out: "To say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government, not to private proprietors."[94]

With *Adderley*, the closely divided Warren Court ended 1966 with a warning to demonstrators that free expression does not mean that such expression may unnecessarily disrupt governmental functions or an orderly society. Mr. Justice Black's speech-conduct approach has conceptual appeal,[95] but distinguishing between the two often is not easy. A raised eyebrow, on occasion, is more expressive than words. All speakers accompany their words with some degree of expressive conduct.

Two critics of Justice Black's opinion in *Adderley* commented: "Under the first amendment, we see no constitutional difference between a peaceful speech and a peaceful march — the function of each is to convey one's ideas as to how society should operate."[96] Mr. Justice Douglas was more persuasive when he pointed out in *Adderley*[97] that some impoverished people cannot afford to voice their complaints in publications and electronic media. Lacking funds, influence, channels of access to government, and ability to articulate their needs, their last hope indeed may be public demonstration and protest.

Public Officials: The Right To Criticize

The position of those in public life is unique. They occupy the center stage, both as decision-makers and as objects of public commentary. With regard to defamatory statements against such public persons, the Supreme Court's decisions prior to 1959 were sketchy at best.[98] On occasion the Court had made statements to the effect that libelous publications were not constitutionally protected.[99] Among the states, the majority position had limited discussion of public officials to comment and opinion; there was no protection against a libel suit for those who made false and damaging statements of fact.[100] In 1959, the Supreme Court began to stir, holding in *Barr v. Matteo*[101] that all federal executive officers were protected by an absolute immunity from being sued for libel or slander. So long as the official issued the statement within the context of "matters committed by law to his control or supervision," he would be fully shielded.[102]

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94. *Id.* at 52 (dissenting opinion).

95. *Cf.* Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting opinion).

96. Sperber & Solomon, *Preserving the Peace: Vagueness, Overbreadth and Free Speech*, 3 LAW IN TRANSITION Q. 161, 163 (1966).

97. 385 U.S. 39, 50-51 (1966) (dissenting opinion).

98. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952); Pennekamp v. Florida, 328 U.S. 331 (1946).

99. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 268 n.6 (1964).

100. W. PROSSER, TORTS §110, at 814 (3d ed. 1964).

101. 360 U.S. 564 (1959).

102. 360 U.S. at 573 (quoted portion cited by the Court from Spalding v. Vilas, 161

New York Times Co. v. Sullivan.[103] The *Times* case arose from a newspaper advertisement imploring its readers to contribute their dollars to support Martin Luther King and civil rights workers "who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights."[104] The advertisement contained several false and damaging statements concerning Montgomery, Alabama policemen with regard to their tactics directed against protesting civil rights demonstrators. The Montgomery Police Commissioner brought suit in state court, alleging libel by the *New York Times.* The trial judge instructed the jury that the statements in the advertisements were libelous per se and were not privileged — the law implied legal injury from the bare fact of publication. Two key questions were submitted to the jury: (1) Did the *New York Times* publish the advertisement? (2) If "yes," then were the libelous statements made "of and concerning" the police commissioner?[105] The jury answered "Yes" to both questions, awarding 500,000 dollars in damages to the commissioner; the Alabama Supreme Court affirmed.[106]

On certiorari, the Supreme Court overruled the Alabama courts and held that a state cannot, under the first and fourteenth amendments, award damages to a *public official* for defamatory falsehood relating to his official conduct unless he proves *actual malice* (that is, making the statement with knowledge that it is false, or making it with reckless disregard whether it is true or false). The Court summarily dismissed respondent's state action argument that the fourteenth amendment was not directed at private parties in a civil dispute: "[T]he Alabama courts have applied a state rule of law which petitioners [*New York Times*] claim to impose invalid restrictions on their constitutional freedoms of speech and press. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[107] The Court outlined its policy in these now familiar words:[108]

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.
> . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive . . . ."

Mr. Justice Black, with whom Mr. Justice Douglas joined in a concurring opinion, stated his view that the *New York Times* and the defendants had

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U.S. 483, 498 (1896)).

103. 376 U.S. 254 (1964).

104. *Id.* at appendix.

105. *Id.* at 262.

106. New York Times Co. v. Sullivan, 144 So. 2d 25 (Ala. 1962).

107. 376 U.S. at 265.

108. *Id.* at 270-72. *See* NAACP v. Button, 371 U.S. 415, 433 (1963); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

"an absolute unconditional constitutional right" to publish their criticisms, with or without malice.[109] He viewed this as the necessary consequence of the Court's holding in *Barr v. Matteo*.[110]

In 1964 the Court extended the *Times* rule to the field of criminal libel.[111] The following year, in *Rosenblatt v. Baer*,[112] the Supreme Court once again reaffirmed the *Times* rule: No public official may recover damages for defamatory falsehood unless he can prove actual malice or that the statement did not relate to his official conduct. Justice Douglas expressed discontent with the "public official" label as being too restrictive.[113] To Douglas, the question was more properly whether a "public issue" was involved.[114] Mr. Justice Black reasserted his belief that the Constitution affords an individual the absolute right to say what he pleases about public affairs and public officials.[115] We shall see, in the following case, that the Court indeed highly regards free speech when it relates to matters of public concern.

Bond v. Floyd.[116] In 1965 Julian Bond was elected to the Georgia House of Representatives, winning over his opponent by a vote of 2,320 to 487 in a district composed of over ninety per cent Negro voters. Bond, also a Negro, was a leader in the Student Nonviolent Coordinating Committee, an organization that had issued a policy statement highly critical of United States policy in Vietnam. On the day the statement was released, Bond was interviewed by telephone at which time he endorsed the policy statement, claiming he was a pacifist. Asked if he would adhere to his position if war were declared on North Vietnam and his statements might then be considered treasonous, he replied that he did not know if he were strong enough to place himself in a position where he would be guilty of treason. The Georgia House of Representatives, by resolution, voted against permitting Bond to be seated. This action was based on Bond's statements, which the legislators felt could not honestly be reconciled with Bond's willingness to take the Georgia loyalty oath requiring a legislator to support the constitutions of the United States and Georgia. Bond then brought action for injunctive relief and for a declaratory judgment that his exclusion violated his first amendment rights forbidding abridgement of freedom of speech. When a three-judge federal court denied relief,[117] Bond appealed to the United States Supreme Court.

Chief Justice Warren delivered the opinion for a unanimous Court, holding that Bond's exclusion from the Georgia House violated his right of

109. 376 U.S. at 293 (concurring opinion).

110. 360 U.S. 564 (1959).

111. Garrison v. Louisiana, 379 U.S. 64 (1964).

112. 383 U.S. 75 (1966).

113. For an extensive analysis of the term "public official," see Note, *The Expanding Right To Criticize: A Post-Times Analysis*, 19 U. FLA. L. REV. 700 (1967). *See also* Curtis Publishing Co. v. Butts, 87 S. Ct. 1975, 1991 (1967); "[A] 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent . . . ."

114. Rosenblatt v. Baer, 383 U.S. at 91 (concurring opinion).

115. *Id.* at 94-95 (concurring and dissenting).

116. 385 U.S. 116 (1966).

117. Bond v. Floyd, 251 F. Supp. 333 (1966).

free expression under the first amendment. The Court rejected the state's contention that the Georgia Legislature had authority to determine whether an oath taker's motives were sincere. Said the Court: "Such a power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution."[118] The Court added that Bond could not have been convicted under any law for any statement that he had made. Because of the unusual nature of this case, the Court's main holding cited just one precedent—*New York Times Co. v. Sullivan*. Once again the Court stressed the importance of preserving and encouraging an atmosphere of free and full discussion concerning matters of public policy. The state has no power to restrict a legislator's capacity to discuss his views of state or national issues.[119] On the contrary, the Supreme Court considered that legislators have an *obligation* to take positions on controversial political questions as a matter of responsibility to their constituencies, "so that they may be represented in governmental debates by the person they have elected to represent them."[120] *Bond v. Floyd*, then, stands for the stringent protection the Court affords the first amendment's freedom of speech when matters of public policy are involved.

The *Bond* case is almost as interesting for what it declined to consider: namely, the "republican form of government" clause.[121] The sub silentio issue of *Bond v. Floyd* was whether a state legislature legitimately could exclude a duly elected representative from serving his constituency solely on the basis of a deviant—though not treasonous—political and social philosophy. The Court's opinion did not frame the issues in these terms, but beneath the discussion of loyalty oath and free speech lay a troublesome and sensitive question: whether an essentially Negro district was going to be deprived of a radical voice and vote, which apparently reflected its view of society.

The Supreme Court chose the path of least resistance. Rather than becoming bogged down in the quagmire of "political question" and assuming an activist role, the Court, citing *Gomillion v. Lightfoot*,[122] shifted its focus to the first amendment. Within this framework it was able to avoid a blunt political confrontation with the Georgia legislature. Having grounded its case on the speech issue, the Court found it unnecessary to decide the other six issues raised by Bond's counsel and the *amici*.[123] Thus it neatly sidestepped the "political question" and, at the same time, avoided having to expressly

118. 385 U.S. at 132.

119. *Id.* at 135.

120. *Id.* at 136.

121. U.S. CONST. art. IV, §4.

122. 364 U.S. 339, 347 (1960): "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

123. The other issues raised: the action of the Georgia House was not authorized by state law; the oath is unconstitutionally vague; the exclusion is a bill of attainder, and *ex post facto* law; the decision not to seat Bond was involved with race prejudice; and it violated the guarantee of a republican form of government. 385 U.S. at 137.

direct the Georgia legislature to seat Julian Bond. The Court pragmatically upheld Bond's right to be seated with solid precedent while ruffling as few feathers as possible. Georgia's compliance was vital; it is unlikely that the President would have enforced this decision with federal marshals.

Press: Censorship and Obscenity

The Supreme Court has encountered additional problems with free expression in the area of obscene and pornographic literature. The peculiar difficulty with attempts to suppress such expression is the matter of drawing a line between the obscene and the nonobscene. The more fundamental question is: What evil are courts and lawmakers attempting to prevent that would justify stifling free expression? The Warren Court has attempted to answer this perplexing question in several landmark cases.

Roth v. United States.[124] *Roth* involved a New York publisher of books, photographs, and magazines who had been convicted on four counts of mailing obscene advertising circulars and an obscene book in violation of a federal obscenity statute.[125] In considering for the first time a claim that allegedly obscene literature was protected by the first amendment, the Court upheld the constitutionality of the federal statute but laid down somewhat ambiguous guidelines. Justice Brennan delivered the opinion for a five-man majority holding that the Court had always assumed speech or literature that could be categorized as obscene was not protected by the first amendment.[126] Having established this, Brennan then cited *Beauharnais v. Illinois*[127] to point out that where speech is not constitutionally protected there is no necessity to determine whether it engenders a clear and present danger of antisocial conduct. Under such circumstances there is no requirement that a clear and present danger exists in order to punish the speaker or publisher.[128] But, said the Court, "All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless . . . they encroach upon the limited area of more important interests."[129]

After finding no constitutional protection for obscenity, Brennan then set forth a definition of obscenity:[130] "whether to the average person, applying contemporary community standards,[131] the dominant theme of the material taken as a whole appeals to prurient interest." Publications of prurient interests were defined as "material having a tendency to excite lustful

124. 354 U.S. 476 (1957).

125. 18 U.S.C. §1461 (1964).

126. Roth v. United States, 354 U.S. 476, 481 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); *see, e.g., Ex parte* Jackson, 96 U.S. 727, 736 (1877).

127. 343 U.S. 250, 266 (1952).

128. 354 U.S. at 486 (1957).

129. *Id.* at 484.

130. *Id.* at 489.

131. Regarding whether this standard should be local or national, see Jacobellis v. State, 378 U.S. 184 (1964).

thoughts."[132] Justice Douglas, joined by Justice Black, vigorously dissented, criticizing the majority for creating a vague rule that punished stimulation of thought rather than overt acts or antisocial conduct. The dissenters admitted that the first amendment does not protect conduct such as public nudity or adultery, but insisted that freedom of expression was "preferred" and could be suppressed only if it were "so closely brigaded with illegal action as to be an inseparable part of it."[133]

Despite the apprehension of Black and Douglas, the *Roth* test generally was regarded as a rule that would put an end to arbitrary censorship of literature dealing with sex.[134] But in 1966, in three major decisions, the Court again faced the issue of obscenity and attempted to refine the *Roth* test. These decisions followed the growing wake of alarm created by countless cheap paperback booklets, their jackets decorated with lurid sales pitches promising, in the words of one magazine, "all manner of sex, all imaginable deviations, combinations and permutations."[135]

Memoirs v. Massachusetts,[136] *Ginzburg v. United States*,[137] *Mishkin v. State of New York*.[138] On March 21, 1966, the Supreme Court simultaneously handed down these three cases. In *Memoirs* the Court ruled that state suppression of the classic *Fanny Hill* was unconstitutional. Publisher Ralph Ginzburg's five-year federal sentence and 28,000 dollar fine were affirmed by a vote of 5-4 in *Ginzburg v. United States*. The Court in *Mishkin* upheld a New York criminal obscenity statute[139] under which Edward Mishkin had been convicted of hiring others to prepare and publish obscene books and possessing such books with intent to sell them. Mishkin's booklets beamed their deviate-appeal titles from the newsstand: *Mistress of Leather, Cult of the Spankers,* and *Stud Broad*.[140]

As in *Roth*, Mr. Justice Brennan delivered the three opinions. In *Memoirs*, Brennan reiterated that literature cannot be banned unless it is found totally worthless in terms of social value. Then, adding a new wrinkle to the determination of obscenity, the opinion held that surrounding circumstances of production, sale, and publicity are relevant to such determination. "Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."[141] Stressing the

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132. 354 U.S. at 487.

133. *Id.* at 514 (dissenting opinion); *see, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477-78 (1941).

134. *See* Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue — What Is Obscene?*, 7 UTAH L. REV. 289 (1961).

135. *See* TIME, April 1, 1966, at 56.

136. 383 U.S. 413 (1966).

137. 383 U.S. 463 (1966).

138. 383 U.S. 502 (1966).

139. N.Y. PENAL LAW §1141 (McKinney 1944).

140. Mishkin v. New York, 383 U.S. 502, 514-15 (1966) (appendix).

141. Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966).

difference between content and marketing of books, Brennan pointed out: " 'A wholly different result might be reached in a different setting.' "[142]

The appellant, in *Mishkin*, ingeniously had seized upon the "average person" requirement in *Roth* and had argued that his books did not appeal to the average person's prurient taste but rather would disgust and sicken him. Therefore, concluded Mishkin, the books could not be classified as obscene. Undaunted, the Court accepted this logical sleight of hand and simply reworked the prurient appeal requirement to accommodate "social realities." A book now may be obscene if it panders to the sexual interest of its "intended and probable [that is, deviate] recipient group."[143]

Justice Black, dissenting, expressed his opinion that the drafters of the first amendment meant that the federal government should regulate only conduct, and when they said Congress shall pass no law, they meant *no* law.[144] Mr. Justice Stewart also was unable to agree with the Court's opinion: "Most of the material strikes me as both vulgar and unedifying. But if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's."[145]

Memoirs, Ginzburg, and *Mishkin* have left in their wake a thoroughly divided Supreme Court. Only the Chief Justice and Mr. Justice Fortas joined in the Court's opinion, thus making it difficult to say that the *Court* held anything. It is more understandable from a political perspective to comprehend why the Court tightened the standards in applying the *Roth* obscenity test. There was increasing pressure for the courts to put an end to the wide-open operations of smut peddlers. The 1966 decisions seem to be the Court's accommodation between a highly regarded constitutional right and a people culturally and mentally unprepared to accept the unknown consequences of unrestricted expression in print. The future will reveal that which at present can merely be speculation. From the Court's exculpation of *Fanny Hill,* however, it seems clear that erotic literature was not the target of Brennan's opinion. It appears, rather, that those who were commercially exploiting the sexual aberrations of disturbed minds were the objects of the new pandering rule.

The Warren Court was not concerned merely with the principle of free expression in literature. It was faced with a society unwilling to accept this principle, and it was, in its opinion, compelled to make an adjustment. As troublesome as the new obscenity test is likely to be, it does represent a pragmatic tool with which law enforcement may compel removal of the most demonstrably sordid reading matter.[146] Publishers have been admonished to

142. Ginzburg v. United States, 383 U.S. 463, 475 (1966), *quoting* Roth v. United States, 354 U.S. 476, 495 (Warren, C.J., concurring).

143. Mishkin v. New York, 383 U.S. 502, 509 (1959).

144. *Id.* at 518 (dissenting opinion).

145. Ginzburg v. United States, 383 U.S. 463, 498 (1966) (dissenting opinion).

146. For cases in which the obscenity test has been employed *see, e.g.,* United States v. 392 Copies of a Magazine Entitled "Exclusive," 373 F.2d 633 (4th Cir. 1967); United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," 373 F.2d 635 (4th Cir. 1967).

make their tainted wares less conspicuous, to tone down the "come-on" covers; in short, to remove not so much the sex, but to wipe away the leer from sex. Mr. Justice Douglas objected: "[T]he contents [of the books] remain the same."[147] Nevertheless, the Court was not interested in the contents of the books. It seemed more concerned with society's *attitude* about the contents of the books — for this was the factor that resulted in public emotional disequilibrium. In this view, then, the 1966 obscenity cases will affect advertising and packaging changes in certain material, but will not substantially alter the textual matter.

UNENUMERATED CONSTITUTIONAL RIGHTS OF THE PERSON

A discussion of unenumerated constitutional rights and especially *Griswold v. Connecticut*[148] must be preceded by an understanding of the controversy among the individual Justices as to (1) what rights are of constitutional dimension and (2) what rights are applicable against the states through the medium of the fourteenth amendment.

Shortly after the enactment of the Civil War amendments, the *Slaughter-House Cases*[149] restricted the fourteenth amendment's "privileges and immunities" clause to protection against state acts that interfered with rights growing out of the seven articles of the Constitution. This of course did not operate to make the Bill of Rights applicable against the states. In *Twining v. New Jersey*[150] the defendants had argued that the due process clause of the fourteenth amendment protected individuals against state-compelled self-incrimination. The Supreme Court considered the argument, not because the enumerated rights were what was meant by "due process," but because the concept of due process might include some of the enumerated rights. Liberties protected by due process, said the Court, were those that were inalienable, fundamental principles of justice — inherent to the idea of free government. After a lengthy "search" the Court could not conclude at that time that self-incrimination was one of those liberties.

Since *Palko v. Connecticut*[151] a majority of the Court has accepted this theory of "selective incorporation." That is, the fourteenth amendment's due process clause does not apply all of the provisions of the Bill of Rights against the states, but only those that are "implicit in the concept of ordered liberty."[152] Perhaps the controversy is most clearly revealed in *Adamson v. California*[153] — a case that held the due process clause did not prohibit a state prosecutor from commenting on the accused's failure to testify at trial.[154] The majority in *Adamson* decided on the basis that self-incrimination, protected by the fifth amendment from federal abuse, was not one of the rights to be

147. Memoirs v. Massachusetts, 383 U.S. 413, 427 (concurring opinion).
148. 381 U.S. 479 (1965).
149. 83 U.S. (16 Wall.) 36 (1872).
150. 211 U.S. 78 (1908).
151. 302 U.S. 319 (1937).
152. *Id.* at 325.
153. 332 U.S. 46 (1947).
154. *Adamson* was overruled by Griffin v. California, 380 U.S. 609 (1965).

selectively incorporated into the "liberty" of fourteenth amendment due process. The case also brings into sharp relief the contrast between the views of Justices Black and Frankfurter.

Mr. Justice Black wrote a dissenting opinion to which he attached a resumé of the fourteenth amendment's history.[155] His position, known as the "total incorporation" theory, is that the historical and original purpose of the fourteenth amendment's due process clause was to extend each clause of the Bill of Rights to every person in the United States, thus protecting them from state infringement.[156] In Justice Black's view, the doctrine of selective incorporation was an invalid usurpation of power by the Supreme Court: "Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course."[157] Black expressed his fear that the Court could use the ordered liberty approach "to roam at large," trampling on state and federal legislative domains "all too freely."[158] Justice Douglas joined in Black's dissent.

Justices Murphy and Rutledge agreed with Black that the first eight amendments were intended to be wholly incorporated into the fourteenth, but they were not prepared to say that the Court could not look beyond the enumerated rights of the first eight amendments to elucidate the meaning of fourteenth amendment liberty.[159]

Justice Frankfurter, on the other hand, could not agree with the total incorporation theory or the selective incorporation theory because, according to him, the first eight provisions of the Bill of Rights, as such, had nothing to do with "due process" as used in the fourteenth amendment. For Justice Frankfurter, the fourteenth amendment commanded the Court to exercise its judgment within the boundaries of "accepted notions of justice" as they have evolved through the history of the "English-speaking peoples." As explained by Frankfurter: "In the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth."[160]

This, basically, is how matters stood when Chief Justice Warren was nominated in 1953. Between 1953 and 1965 the specific amendments of the Bill of Rights were used to include other rights that were implied from, essential and peripheral to, these amendments,[161] but the Court did not venture far from the language of the specifically mentioned rights.

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155. *Id.* at 68, 92 (Black, J., dissenting).
156. *Id.* at 89.
157. *Id.* at 90.
158. *Id.*
159. *Id.* at 124 (Murphy, J., dissenting).
160. Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring).
161. *See* Carrington v. Rash, 380 U.S. 89 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); NAACP v. Button, 371 U.S. 415 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Kent v. Dulles, 357 U.S. 116 (1958); NAACP v. Alabama, 357 U.S. 449 (1958); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Bolling v. Sharpe, 347 U.S. 497 (1954).

Griswold v. Connecticut.[162] *Griswold*-type cases had come to the Supreme Court twice before the substantive issue was resolved.[163] The case involved a Connecticut statute that made the use of contraceptives a criminal offense. Appellants, directors of the Planned Parenthood League of Connecticut, were convicted in a New Haven circuit court for having violated the statute, as accessories, by advising and instructing married couples about effective methods of birth control. By reason of the convictions, the Supreme Court took the case on appeal and reversed, holding that the statute was an unconstitutional invasion of the right of privacy of married persons.

Professor Emerson of Yale aptly labeled *Griswold* "Nine Justices in Search of a Doctrine."[164] Not since *Adamson v. California* had there been such exhaustive Court analysis in an attempt to justify the result – a constitutional right of privacy within the marital relationship. Of the nine Justices, only Clark declined to add something in a separate opinion.

As if to answer Justice Black's warning in *Adamson*, Justice Douglas, writing for the Court, observed that the Supreme Court was not purporting to sit as a "superlegislature," but that the state's law had intruded upon an area of constitutional sensitivity. The thrust of Douglas's opinion was that the enumerated rights[165] create a "zone" of privacy, that the specific rights have "penumbras, formed by emanations from those guarantees that help give them life and substance," and that in absence of these "peripheral" rights, the enumerated rights would not be so secure.[166] Having found a constitutional right of privacy, Douglas declared the contraceptive statute too broad an infringement into the privacy of the marriage relationship. Justice Douglas wrote his opinion in *Griswold* in the same vein as his dissent in *Poe v. Ullman*,[167] at which time he signaled his split with Justice Black concerning Black's refusal to extend due process beyond the Bill of Rights. It is now clear that Douglas conceives of due process liberty as a total incorporation of the first eight amendments and, in addition, any associated "penumbral" rights that emanate from the first eight.

Justice Goldberg wrote a widely noticed concurring opinion in *Griswold*, joined by Chief Justice Warren and Justice Brennan. The gist of Goldberg's opinion was that, unlike Douglas and Black, he did not accept the view that all of the first eight amendments are wholly incorporated by the due process clause. Goldberg's position was that "liberty" embraces "those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[168] Goldberg's argument at this point became unique in the Court's history as he interjected the long-dormant ninth amendment[169] and

162. 381 U.S. 479 (1965).

163. Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

164. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965). Professor Emerson was one of appellants' counsel in *Griswold v. Connecticut*.

165. 381 U.S. at 484 (first, third, fourth, fifth, and ninth amendments).

166. *Id.* at 484.

167. 367 U.S. 497, 509 (1961).

168. 381 U.S. at 486 (concurring opinion).

169. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

used it to bolster the Court's authority to look beyond the enumerated rights for "additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[170] Goldberg carefully explained that he was not saying the ninth amendment constituted an independent *source* of rights; nor was he contending that the ninth amendment was to be applied against the states through the fourteenth. Instead, the ninth evinces the intention of the Constitution's drafters that unenumerated *fundamental* rights were to remain within the ambit of personal prerogative. The Supreme Court therefore has a duty to shield these unenumerated rights from unreasonable encroachment by either state or federal government.[171]

Mr. Justice Harlan wrote a separate concurring opinion in which he reiterated that "due process" does not concern itself per se with any of the enumerated rights. Citing *Palko v. Connecticut*,[172] Harlan explained: "[I]n my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.' "[173]

Justice White, concurring separately, also rejected the notion that the Bill of Rights must be the only peg from which to hang a due process decision. White's view is the standard, flexible due process formula: "[S]uch statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause."[174] But because of the sweeping scope of the Connecticut statute, Justice White could not vote to uphold its constitutionality.

Justice Black essentially restated his well-articulated dissent in *Adamson*, which may be summarized by his use[175] of a statement of the late Learned Hand. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them (which I assuredly do not." Justice Stewart seemingly agreed with Justice Black and rejected the idea of substantive due process as a substitution of the Court's social and economic beliefs in place of those of the legislative bodies.[176] Addressing himself to the ninth amendment argument, Stewart asserted that it was

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170. 381 U.S. at 488 (concurring opinion).

171. This position was basically advocated by Professor Redlich in his article: Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

172. 302 U.S. 319, 325 (1937).

173. 381 U.S. at 500 (concurring opinion).

174. *Id.* at 504 (concurring opinion).

175. *Id.* at 513 (dissenting opinion) *quoting* L. HAND, THE BILL OF RIGHTS 73 (1958).

176. Justice Stewart assigns protection of "private personalty," of "life itself," and of ones "own reputation from unjustified invasion" under the ninth and tenth amendments as rights entitled to recognition by the Supreme Court "as a basic of our constitutional system." Thus, some confusion results about Stewart's position regarding the ninth amendment's function in constitutional adjudication. *See* Rosenblatt v. Baer, 383 U.S. 75, 91 (concurring opinion).

simply a truism that everything retained is that which is not surrendered;[177] to bring in the ninth amendment for support would be "to turn somersaults with history."

An evaluation of *Griswold v. Connecticut* reveals two certainties: (1) statutes proscribing the *use* of contraceptives are invalid under the Constitution; (2) the concept of privacy as a constitutionally-protected entity is fully established. Beyond these precepts, one must move into the grayer realm of speculation.

	Total Incorporation	Selective Incorporation	"Ordered Liberty"	Penumbral Rights	Ninth Amendment "Fundamental Rights"
Warren		X		X	X
Black	X				
Douglas	X			X	
Harlan			X		
Brennan		X		X	X
Stewart		X			
White			X		
Fortas	---	---	---	---	---
Marshall	---	---	---	---	---
Clark		X		X	
Goldberg		X		X	X

The chart above represents the various theories that are embraced by recent Supreme Court Justices when dealing with the issue whether some activity should be given constitutional protection under the fourteenth amendment's word "liberty." The *penumbral rights* and both *incorporation* theories relate to the enumerated rights found in the Articles of the Bill of Rights. The *ninth amendment*: *fundamental rights* and *"ordered liberty"* approaches are used without reference necessarily to the enumerated rights.

177. The same language was used by the Court to describe the tenth amendment, United States v. Darby, 312 U.S. 100, 124 (1941).

It seems clear that, although the individual Justices arrive at their conclusions by divergent paths, a majority of the Supreme Court is willing to protect individual rights categorized as "fundamental."[178] The addition of Justice Fortas, who replaced Justice Goldberg, does not appear to invalidate this conclusion.[179] Justices Black, Harlan, Stewart, and White are most concerned with maintaining the balance of federalism by avoiding the imposition of constitutional limitations on state action through judicial review. The ninth amendment's emergence as a viable concept of constitutional reasoning is perhaps *Griswold's* most interesting facet. One commentator has dismissed the ninth amendment addition as an "interesting tour de force"[180] that adds substantially nothing to the fundamental rights approach. Although it is true that at this time the ninth amendment has added little, one should bear in mind that the ninth has barely passed the point of gestation. It has been introduced to a Court steeped in the tradition of due process being conceived of as either formally connected with the first eight amendments (strictly or by implied association) or solely as a natural law entity (rooted in the traditions and conscience of our people). Justice Black's total incorporation theory has not gained any new adherents. The "ordered liberty" formula has not been used to declare any rights not expressly or impliedly found in the first eight amendments as of constitutional stature. It seems to discourage support because it clashes too sharply with the notion of judicial self-restraint. The ninth amendment therefore is likely to win new followers among future Justices of the Supreme Court for two reasons: first, because these Justices will not have to abandon any prior written opinions on the matter; second, because it seems to extend to the Court a grant of authority to deal with unspecified rights in a forthright manner without resort to attenuated straining to "find" formal connections with the enumerated rights.

The ninth amendment does not offer a simple methodology that the Supreme Court can employ to objectively separate fundamental from nonfundamental liberties. But under the Constitution final authority to interpret it and its amendments rests with the Supreme Court alone. The ninth amendment has made it clear that certain unenumerated rights are vested with the people. These rights should not be ignored merely because the Framers did not provide the Court with a fixed formula for evaluating their relative importance to a free society.

SUMMARY

Assessing the Warren Court for sheer impact, one sees great change as a result of its decisions: a firm commitment to equal treatment of all citizens regardless of race; further expansion of the concept of state action and barely concealed encouragement for Congress to impose positive duties on the states

178. *See* Griswold v. Connecticut, 381 U.S. 479, 485, 486, 492, 493, 502 (1965).

179. *See* Robinson & Weisbrod, *The Civil Rights and Civil Liberties Decisions of the United States Supreme Court for the 1965-1966 Term*, 3 LAW IN TRANSITION Q. 236, 245, 248 (1966).

180. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 254 (1965).

to insure equal access to state-provided facilities and perhaps private facilities; increased protection of speech relating to matters of public interest, with a warning that some responsibility for public order must accompany free speech; and recognition that fundamental, personal rights are constitutionally protected, whether or not they are specifically mentioned in the Constitution. These are the results of just the few decisions that have been discussed in this note. Other profound changes, especially in the areas of political representation and criminal law, also have come about since Chief Justice Warren's appointment to the Court.

The most persistent theme of the Warren Court decisions we have examined is equality before the law. The fourteenth amendment's equal protection clause often has been used to strike at discriminatory treatment of citizens, especially Negroes. Further, in an attempt to insure that the quest for equality will not be abandoned, the Supreme Court has left the way open for Congress to assume command and enact more positive and specific remedial measures. In this regard the Court has deviated sharply from the traditional notion of equal protection — state nonparticipation — to the idea that government has a positive duty to insure that a minimum climate of fairness and tolerance exists in which all citizens must be accorded a measure of human dignity. This philosophy, of course, reflects the long-range attitudinal shift of Americans in regard to their relationship with government. Whereas once the best government was that which "governed least," today government is seen by most as the logical instrument through which societal problems can be resolved.[181] The Warren Court has shared this faith in representative government.

The second major value that consistently has been woven into the fabric of Warren Court decisions is the right of the individual to exercise personal prerogatives, free from government interference. This value is the other side of the coin. Governmental activism is tolerated only so long as it does not unnecessarily overlap into the ambit of personal liberties considered "fundamental." One might, with justification, ask: "Why is it that an individual cannot devise his property to a city and have the conditions he imposes on the gift enforced? Why isn't this as fundamental as the right of married persons to use contraceptives?" Justice Black's answer would be that neither are protected constitutionally because they are not expressly or impliedly mentioned in the Constitution.

The Justices who agree that "fundamental" rights are protected *are* sitting as a "superlegislature," perhaps necessarily. The Supreme Court, after all, is composed of nine men whose task it is to translate an extremely vague and compromised document written by other men almost two hundred years ago. In short, the answer to what liberties are fundamental is whatever the spirit of the Constitution and Bill of Rights demand in light of present-day needs. This unavoidably involves a value judgment on the part of each Justice (even Justice Black who makes his judgment by refusal to consider liberties in this light).

181. *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

Government has become a more intrusive force in the citizen's everyday life, both as a regulator and as a welfare mechanism — a state of affairs unknown to the drafters of the Constitution. Is it not proper for the Court to recognize the growing importance of the individual's right to privacy?[182] Although the right to be let alone as such has never, before *Griswold,* been protected, the necessities of the times require the Court to reexamine periodically what is hallowed and what is not. Fundamental rights, like good health, often are taken for granted. So it is with the Supreme Court; it seldom declares rights "fundamental" unless they are genuinely threatened. In a free society that stresses individualism, there must be rights retained by the people. Hopefully, the Warren Court will continue to declare them fundamental as they are attacked.

David Easton has broadly defined "politics" as "an authoritative allocation of values" among competing interests.[183] Using this nonpartisan definition of politics, one readily can see that the Supreme Court is as much engaged in politics as the executive or legislative branches. Its decisions interpreting the Constitution are binding on every court in the nation, federal and state. Moreover, its decisions often set the philosophical and moral tone of the people. Without becoming involved in the debate concerning how individual Justices reach their decisions, it may be helpful simply to list some of the influences that are said to affect their decisions:

> *The Law* — The language of the Constitution (as interpreted in the mind of each Justice), precedent, and the facts of the case. This, of course, is the bailiwick of the lawyer: it is the logic of the law and the structure around which the decision ultimately is written.
>
> *External Pressures* — The President, Congress, likelihood of enforcement, urgency of the situation, interest group participation (amicus curiae briefs, organizational financing and sponsorship of cases), and public opinion. These considerations are of special interest to the political scientist who sees the Court as a policymaking, political institution that must take into account in pragmatic fashion its ability to influence society's orientation.
>
> *Internal Pressures* — Each Justice's frame of reference (his psychological makeup, attitudes, and values), and his cultural and educational experiences. Behavioral scientists have suggested that personal orientation largely determines the result of each Justice's decision.[184]

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182. The Court shows continuing evidence of its concern with the right to be let alone from Government intervention. In See v. Seattle, 87 S. Ct. 1737 (1967) and Camara v. Municipal Court, 87 S. Ct. 1727 (1967), the Court ruled that administrative searches by municipal health and safety inspectors required a search warrant if owner or resident refused to permit a warrantless inspection, whether the structure was residential or commercial.

183. D. EASTON, THE POLITICAL SYSTEM (1953).

184. *See, e.g.,* G. SCHUBERT, THE JUDICIAL MIND (1965); Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court,* in COURTS, JUDGES, AND POLITICS 497 (Murphy & Pritchett ed. 1961); Nagel, *Political Party Affiliation and Judges Decisions,* 55 AM. POL. SCI. REV. 843 (1961); Schubert, *Jackson's Judicial Philosophy: An Exploration in Value Analysis,* 59 AM. POL. SCI. REV. 940 (1965); Spaeth, *Unidimensionality and Item Invariance in Judicial Scaling,* 10 BEHAVIORAL SCIENCE 290 (1965).

Compromise — After the individual Justices have reached their own conclusions as to how the case should be decided, they must synthesize their theory preferences into a majority opinion. Little is known about the personality interaction between Justices. No doubt it exists, but what role it plays in the decisional process is conjectural. A few facts are known about the weekly conference:[185] voting is by inverse order of seniority, the Chief Justice assigns the writing of the opinion if he is on the majority side, and drafts of the various opinions are circulated among the Justices for suggestions and compromise prior to the final printing. One probably can be assured that the printed decision is thoroughly compromised.

All of these factors play some part in the Court's decisional process. To what degree is a question that will be left with the jurisprudents. It should be a question, however, of great practical interest to the student as well as to the lawyer who habitually deals with brief writing and oral argument addressed to the Supreme Court.[186] The Warren Court's decisions are placed in perspective by considering these elements. The cases cannot be studied isolated from the sociopolitical forces with which the Court interacts.

Judicial Activism

The Supreme Court often is criticized for the activist role it assumes in exercising the power of judicial review. Much of this criticism is heard from those who recall the sensational decisions such as *Brown v. Board of Education*,[187] the school prayer cases,[188] or *Miranda v. Arizona*,[189] cases that run counter to their personal values. It is worthy of note that approximately ninety-four per cent of all cases filed with the clerk of the court on appeal and certiorari are denied review.[190] Thus, the status quo is maintained without comment in all but six per cent of the cases that reach the Court. Of the cases decided on the merits, roughly half are in favor of the government, half against.[191] A larger number of cases were decided against state government in 1965 criminal cases (16-6). Otherwise the percentages were about even. Even when the petitioner seems to have a solid case for reversal, the Court often refuses to hear the case on its merits. For instance, in the recent case of *Painter v. Bannister*[192] the Court denied certiorari to a father who petitioned seeking reversal of an Iowa Supreme Court ruling that he was not entitled to custody of his child, although he was held to be a fit parent who had never consented to giving up the child. The United States Supreme

185. Clark, *The Decisional Processes of the Supreme Court*, 50 CORNELL L.Q. 385, 390 (1965).

186. *See* Kemmers, *Professor Kurland, The Supreme Court and Political Science*, 15 J. PUB. L. 230 (1966).

187. 347 U.S. 483 (1954).

188. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engle v. Vitale, 370 U.S. 421 (1962).

189. 384 U.S. 436 (1966).

190. Clark, *supra* note 185, at 389.

191. *See The Supreme Court, 1965 Term*, 80 HARV. L. REV. 144 (table II) (1966).

192. Painter v. Bannister, 140 N.W.2d 152 (Iowa), *cert. denied*, 385 U.S. 949 (1966).

Court easily could have reversed this decision holding that the right of a parent to his child was an unenumerated "fundamental" liberty. But it declined. This leads one to suspect that more than case facts, precedent, and scholastic reasoning is involved. The cases are docketed for argument and decision when at least four of the Justices consider them important enough to merit the Court's time and when the legal status quo seems in need of fundamental restructuring.

Like any power-wielding political institution, the Supreme Court must conserve its influence and exercise it discriminately. It occasionally chooses to exert its influence where state or federal legislative and executive branches have not responded to the needs of particular interest groups. Typically, elected officials serve the needs of the middle class, the class which is in a position to help return them to public office. Consequently minority racial groups, the criminally accused, the poor, and such outsiders as atheists, often are left with only the courts for their protection. The independent federal judiciary, particularly the Supreme Court, is in a realistic position to insure that uninfluential, perhaps despised, persons are treated with a constitutional minimum of fairness. *Brown v. Board of Education* is the classic example. The segregated states assuredly were not going to desegregate voluntarily, and Congress was handcuffed by a conservative Democrat-Republican coalition. The President was powerless without Congress's support. The task of desegragation fell by default to the Supreme Court, which, although not the consummate treatment center, was at least unencumbered by the suicidal political realities that faced elected officials. This is perhaps one of the clearest functional advantages of pluralistic, tripartite government.

As was seen in the child custody case, *Painter v. Bannister*, it is not always enough to have a legitimate grievance. The case ordinarily must present a recurring social problem making it sufficiently important for the Court to invest its time and prestige in a consideration on appeal or certiorari. The child custody case was not a typical state court disposition. State court judges need considerable latitude when dealing with domestic relations problems, and for the Court to plunge into this sensitive arena on behalf of one person, engendering bitterness among the state judges, would seem politically improvident. The Supreme Court, then, can be expected to confine most of its unpopular decisions to cases in which the prize is worth the game.

The Supreme Court under Earl Warren seems to have appreciated the Court's role in governmental decision-making. It has intervened to protect human values of equality and dignity when these values have been threatened by overbearing social forces. On occasion it has been reluctant to extend its logic to the ultimate conclusion,[193] superimposing qualifiers to a prior holding, as in *Memoirs v. Massachusetts*.[194] It also has refused to meet the fundamental issue squarely as in *Bond v. Floyd*[195] and *United States v. Guest*.[196]

193. *See* Ginzburg v. United States, 383 U.S. 463 (1966).
194. 383 U.S. 413 (1966).
195. 87 S. Ct. 339 (1966).
196. 383 U.S. 745 (1966).

This has proved unsatisfactory to most lawyers, who appreciate logic, clarity, and reliable precedent. A legitimate argument can be made that the Warren Court has over simplified issues by use of such labels as *neutrality*,[197] *public official*,[198] *one-man one-vote*,[199] and *fundamental*.[200] One writer commented that with these labels, the Court "has arrogated to itself *the amending power* and is in practice rewriting the Constitution according to its philosophical preferences."[201] Although labels are simplistic and often unwieldy of application, the Court ultimately must articulate a relatively unqualified legal guideline. A terse verbal formula would never placate philosophers or semanticists, but then such people are not called upon to resolve authoritatively these intricate societal conflicts.

If any characteristic of the Warren Court's methodology stands out, it is its skill in reaching decisional objectives pragmatically. The labeling practice of the Supreme Court may well have its pragmatic function. When it is unclear how a social problem is to be resolved, there is merit in deciding cases vaguely. For as one commentator suggests, "Once a legal precedent reaches a point of being clearly controlling . . . in an appellate litigational context, it will inhibit a substantive value preference of the decision-maker who assumes the judicial role . . . ."[202] As long as the Court deals with vague labels, it has the necessary flexibility to modify its holding until the problem has crystalized enough to narrow the language to something more definite. Of course, the labeling device cuts both ways. Mr. Justice Black's speech-conduct dichotomy is more rigid than the realities of behavior.

There are sound reasons why the Court cannot simply declare "the law" and be done with it. The Supreme Court does not have an enforcement arm and must in many cases depend on the Justice Department and the President to uphold its decisions. Presidents have responded with coercive enforcement in Little Rock, Arkansas and Oxford, Mississippi, but it must be recognized that critical social problems were at stake. As was mentioned earlier, it is highly doubtful that Julian Bond would have been seated in the Georgia House by federal marshals. It would have been impolitic for the Executive to have attempted this because the issue was no longer one of simple racial discrimination. The Court, realizing this, avoided the appearance of being actively involved in Georgia's politics. In *Brown v. Board of Education*, the Court redocketed the cases for later consideration of enforcement, "[i]n order that we may have the full assistance of the parties in formulating decrees."[203] Not until 1958 did the Court start to get tough with evasive schemes to avoid the desegregation decisions.[204]

197. Abington School Dist. v. Schempp, 374 U.S. 203, 242 (1963); Engel v. Vitale, 370 U.S. 421, 428 (1962).

198. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

199. Baker v. Carr, 369 U.S. 186 (1962).

200. Griswold v. Connecticut, 381 U.S. 479 (1965).

201. Lowry, *The Case for the Traditional American Middle Way in Church and State*, 13 J. PUB. L. 447, 457 (1964).

202. T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE 100 (1964).

203. 347 U.S. at 495.

204. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

In the 1966 case of *United States v. Guest*,[205] six Justices went beyond the necessary holding to acknowledge Congress's right to enact private-party enforcement legislation under section 5 of the fourteenth amendment, thus demonstrating that the Warren Court understands its functional role in the governmental structure with its practical limitations. *Adderley v. Florida*[206] may well have represented a reaction to the increasingly boisterous nature of protest demonstrations. On the facts of the case the decision could have gone either way. There was not, however, the obvious one-sided external social pressure to reach a decision in favor of the Negroes. To the contrary, there was now countervailing social pressure to stem the rising tide of violent demonstrations.

The school prayer cases, which as a practical matter are unenforceable unless state officials voluntarily accept them, are a comforting reassurance that the Court is not omnipotent. Ultimately it has to have the support of the other elective governmental organs, both state and federal; it cannot venture too far from the consent of the people. If the Supreme Court is amending the Constitution with its own philosophy, it is doing so with tacit consent of the political branches. One writer puts it this way: "Over the nearly two centuries of American constitutional history one finds it difficult, even impossible, to locate any instance where the Supreme Court has been able to do more than postpone what a determined people or legislative majority wanted."[207] Unquestionably the Warren Court has recognized the validity of that statement.

Decline of Federalism

The roots of American federalism are found in the Constitutional Convention of 1787. The Constitution was considered a victory for the federalists. What emerged from that convention was a nation of vaguely delineated enumerated powers, a congressional grant of authority to do anything "necessary and proper" to effectuate those vague powers, and the supremacy clause. The anti-federalists had to content themselves with the Bill of Rights as a condition of ratification, including the tenth amendment, which declared that powers not delegated to the national government or forbidden to the states by the Constitution were reserved to each state respectively or to its people.

Under Chief Justice John Marshall, a nationalist, the new Constitution was interpreted as one of broadly delegated national powers that superseded any conflicting state constitutional provisions or statutes.[208] Professor Mason[209] has written that "[J]udicial interpretation of federal-state relations has precipitated three major crises. The first occurred near the end of Chief Justice

205. 383 U.S. 745 (1966).

206. 385 U.S. 39 (1966).

207. Miller, *Some Pervasive Myths About the United States Supreme Court*, 10 ST. LOUIS U.L.J. 153, 185 (1965).

208. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

209. McCormick Professor of Jurisprudence, Princeton University.

Taney's long regime, the second in the middle 1930's and the third confronts us today."[210] In the *Dred Scott Case*[211] Justice Taney had held that slavery was a matter of state concern only. The Court of the 1930's busied itself using the tenth amendment to strike down congressional legislation aimed at regulating economic matters that were national in scope. But in 1941, a unanimous Supreme Court returned to Chief Justice Marshall's view of the tenth amendment: "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[212] Professor Mason's third crisis is the Warren Court's attempt to incorporate the Bill of Rights into the fourteenth amendment's due process clause, thus protecting individual liberties from state abridgment. If it was clear that the Supreme Court of the New Deal was faced with the prospect of an economic revolution, it is doubly clear that the Warren Court has been confronted with a social revolution. This Court has had to turn to the fourteenth amendment and restore its full meaning. The task is not yet completed, and there is disagreement among members of the Court as to what the fourteenth's commands require.

Justice Brennan denies that the Court's effort takes anything away from the states in favor of the federal government:[213]

> [T]o deny the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. This, I think promotes rather than undermines the basic policy of avoiding excess concentration of power in government . . . .

Justice Brennan may be correct in saying that the federal government has gained nothing by the incorporation of the Bill of Rights into fourteenth amendment due process, but it is not so clear that the states have lost nothing. By the process of incorporation the states have lost the absolute discretionary power to regulate the activities of their citizens. They now must adhere to a national constitutional standard, and to this extent they have been inhibited by the Warren Court's decisions. Outside the area of constitutional standards, the states have been far more limited by Congress's statutory activity in imposing restrictions on permissible state action, particularly under the commerce clause. The executive branch of the federal government has attached many conditions to federal appropriations that are rechanneled through state government such as minimum wage standards, fair employment practices, aid to education, and highway funds. Thus, what the federal government has not attempted to do directly, it has accomplished indirectly. As has been seen, Congress has utilized the enforcement sections of the four-

210. Mason, *The Supreme Court and Federalism*, 44 TEXAS L. REV. 1187, 1197-98 (1966).
211. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
212. United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941).
213. Brennan, *Extension of the Bill of Rights to the States*, 44 J. URBAN L. 11, 23-24 (1966).

teenth and fifteenth amendments to further regulate social conditions of national concern. Perhaps learning its lesson from the court-packing debacle of the New Deal, the Warren Court has not tried to obstruct these congressional measures. The problems Congress and the President are confronted with are national problems, and the Supreme Court has matured to the point that it now realizes its role is a facilitative one when the other branches are willing to take the initiative. The states are not as autonomous as they once were; however, there no longer is the functional necessity for them to have this control. On the contrary, it is impractical for them to have it, for national problems should not be resolved piecemeal. It often has been said, but it is worth repeating, that the unique durability of the United States Constitution lies in its broad principles, its flexibility. It is not a hard and fast set of regulations, and moreover it is difficult to imagine that its framers intended it to be amended often; they made the amendment process too difficult. They instead must have envisioned the Constitution as a framework of almost philosophical generalities. Between 1789 and 1868, the policy-makers of the nation saw that the states were capable of imposing injustices upon their citizens so grave that there was no redress. It was not enough for the people to be protected from the national government's wrongs – there were *two* governments. As a consequence, the thirteenth, fourteenth, and fifteenth amendments were drafted to insure that all persons would be guaranteed a constitutional minimum of substantive and procedural freedom. Perhaps desirous of a *reapproachment* between North and South, the Supreme Court drained these amendments of their spirit and purpose. But they could not forever be ignored.

Two world wars and massive technological change operated to draw the states together into functional interdependence. The poorest, most provincial individuals in the United States had only to glance at television to discover that they were not sharing in the material wealth of a prosperous nation. Moreover, the focus of political interest, through the medium of network news, shifted from the state capitals to Congress. Whereas once people might have thought of themselves as citizens of a particular state, they now probably consider themselves Americans residing in a particular state. Even though incorrect, it is not unlikely that they see the Bill of Rights as complete protection as against all arbitrary governmental authority, state as well as federal. The Warren Court has assured the constitutional guarantees of human dignity to the citizens of every state and for this, if for nothing else, it will be remembered.

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