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FOREGOVD: "EQUAL IN ORIGIN AND EQUAL IN TITLE TO THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE GOVERNMENT"†

Philip B. Kurland *

Hoc volo, sic ubeo, sit pro ratione voluntas.
—Juvenal, Satires, VI: 223.

Et c'est une folie à nulle autre seconde,
De vouloir se mêler de corriger le monde.
—Molière, Le Misanthrope, act I, scene I.

I. PREFACE TO A FOREWORD

These annual chronicles of the work of the Supreme Court of the United States, of which this is the sixteenth, have recorded a period during which the Justices have wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court had the unique opportunity to express itself on a tabula rasa. Indeed, the most critical period might be considered to cover only the decade between Brown v. Board of Educ.¹ and Reynolds v. Sims,² a period almost coincidental, whether by chance or for better reason, with the presence on the Court of Mr. Chief Justice Warren. To speak of such profound influences as the Court has recently exerted is, of course, neither to applaud nor to condemn the Court's behavior. Measuring the desirability of the results decreed, most students of the Court—even the "nonactivists"³—are inclined to approbation. Certainly it is hard to quarrel with the merits of commands that prescribe equal access to public education regardless of race,⁴ equal voting power for urban and rural citizens,⁵

¹ 347 U.S. 483 (1954). In retrospect, the importance of Brown inheres as much in the fact that it shook the equal protection clause completely loose from its moorings in history as in its substantive ruling. This is not to suggest that thereafter history had been a controlling factor in the application of the equal protection clause but only that it had not been, as it would now seem to be, totally irrelevant except in its more fictionalized versions.
equal opportunity to be represented by counsel in criminal litigation in state as well as federal courts, and equal rights of citizens, whether of American or foreign origin, not to lose their citizenship by establishment of domicile in the land of their birth.

A glance at the work of the Court during this fateful decade suggests three dominant movements, each of which continued to progress during the 1963 Term toward its climax. First and foremost, as suggested by the examples cited, has been the emerging primacy of equality as a guide to constitutional decision. Perhaps an offshoot of the Negro revolution that the Court sponsored in Brown, the egalitarian revolution in judicial doctrine has made dominant the principles to be read into the equal protection clause rather than those that have been read into the due process clause of the fourteenth amendment, just as Professors Tussman and tenBroek once predicted. Perhaps in order not to denigrate the status of "liberty," the Court, as Mr. Justice Goldberg reported, has chosen to "recognize the merging of the concepts of liberty and equality." The second major theme has been the effective subordination, if not destruction, of the federal system. The two are not disparate but related notions, for each is a drive toward uniformity and away from diversity. Equality demands uniformity of rules. Uniformity cannot exist if there are multiple rulemakers. Therefore, the objective of equality can be achieved only by the elimination of authorities not subordinate to the central power. The third theme discernible in the Court's work is the enhancement of judicial dominion at the expense of the power of other branches of government, national as well as state.

It is the first of these themes — the rise of egalitarianism — that contains the most novelty. As recently as Mr. Justice Holmes's heyday on the Court, he could accurately report that the equal protection clause was "the usual last resort of constitutional arguments." The last two are merely continuations of movements that have been evident throughout the Court's history, but with one important difference between them. The diminution of state power has been a constantly accelerating process since the Civil War. The aggrandizement of judicial power has been of a more undulating character. Like our recent economic prosperity, however, the most recent expansion of judicial authority has had a longer life than usual and shows no immediate likelihood of recession. At least there are no indications of self-restraint.

A fourth element that courses through the opinions of the Court during this era is, unlike the three already mentioned, likely to be considered important only by those addicted to "legal technicalities" rather than "legal statesmanship." It is a factor deemed important by the small group that aspires to membership in that strange cult, Holmes's Society of Jobbists, which "undertakes only those jobs which the members can do in proper workmanlike fashion. . . . It demands

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9 Goldberg, supra note 3, at 207.
right quality, better than the market will pass . . . ." 11 This cult is made up of those who find the slogan “extremism in the defense of liberty is no vice, moderation in pursuit of justice is no virtue” to be as inapt a standard for the judicial branch as it is for the executive. The fourth element, then, is the absence of workmanlike product, the absence of right quality. This phantom, invisible to those who so frequently speak in defense of the Court, 12 was described thus by Professors Bickel and Wellington some time ago: 13

The Court’s product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.

Because of a recent tendency to add disingenuousness and misrepresentation to this list, the problem has been exacerbated rather than cured in the years since Professors Bickel and Wellington spoke.

This Foreword is not the place to document these themes at length. Their validity may be tested by the contents of the “Supreme Court Note” that follows and the ones that have preceded it in this series. But a few comments on opinions of this Term in the context of these propositions are not inapposite.

II. The Egalitarian Revolution

There are two primary problems that arise under the equal protection clause. The first is the ambiguity inherent in the relevant term, whether it be “equality” or “equal protection of the laws.” The second major difficulty results from the possible conflict of the notion of equality with that of liberty or some other fundamental constitutional value. Neither the question of definition nor that of primacy is re-

11 See HAND, Mr. Justice Holmes, in THE SPIRIT OF LIBERTY 57, 62 (2d ed. Dilliard 1953). “The membership is not large, at least in America, for it is not regarded with favor, or even with confidence, by those who live in chronic moral exaltation, whom the ills of this world make ever restive, who must be always fretting for some cure . . . . Its members have no program of regeneration; they are averse to propaganda; they do not organize; they do not agitate; they decline to worship any Sacred Cows, American or Russian.” Id. at 62-63.


13 Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3 (1957). The importance of the charge is underlined by the fact that the authors are members of the Yale Law School faculty whose dean has noted the peculiar advantages that are theirs: the “view of law and of the judge’s task in law [that] might be called Sociological Jurisprudence, or American Legal Realism, with a strong orientation toward a jurisprudence of values . . . . has represented the prevailing approach to legal studies at the Yale Law School to a greater extent than has been the case in any other law faculty in the world.” Rosrow, op. cit. supra note 12, at xv. Dean Rostow also states that the Yale approach has as its “ancestors” those eminent Yale men Montesquieu, Ehrlich, Pound, Holmes, and Cardozo. Ibid. It is not quite clear why the pantheon recorded in Dean Rostow’s ana does not include Jerome N. Frank, Thurman Arnold, Karl N. Llewellyn, William O. Douglas, Felix Cohen, and Fred Rodell; each was a leader in “American Legal Realism,” each served on the Yale faculty, and each has had a more direct influence in formulating the orthodoxy of Yale jurisprudence than did those named.
soluble, however much the Court may try, by resort to constitutional history.\footnote{14} The Justices may rewrite history in support of their conclusions.\footnote{15} Such revision does not change the facts; it is only a disingenuous gesture that provides the Court’s critics — even its friendly critics \footnote{16} — with a large club with which to beat it. Nor does intellectual history provide answers,\footnote{17} for it only makes apparent that “equality” like “liberty”\footnote{18} is a multifaceted concept. And the decisions of the Supreme Court support this conclusion, although the decisions themselves are subject to conflicting analyses.\footnote{19}

A primitive analysis would suggest that with regard to the power of the state to act differently toward different people, the Court has used the equal protection clause in at least two ways. In its more general, less meaningful, and most used formulation, the Court has held that all persons within a class must be similarly treated by the state. That leaves unresolved the hard issues of how the class may be defined and how much leeway is left to the relevant government body in defining the class. Thus: “[W]hat the equal protection of the law requires is equality of burdens upon those in like situation or condition.”\footnote{20} Again: “[T]he equal protection clause does not forbid discrimination with respect to things that are different.”\footnote{21} Obviously criteria like these leave to the collective judgment of the Court the power to say whether the state action in question is valid or invalid, whether the inclusion or exclusion is arbitrary or reasoned. The cases do not make a comprehensible pattern.\footnote{22}

A second utilization of the clause in terms of the power of the state to classify is meaningful, definite, and usually ignored. Here the proposition is that there are certain factors that a state is precluded from

\footnote{15} See, e.g., Goldberg, supra note 3. 
\footnote{16} See, e.g., Levy, Legacy of Suppression (1960); Roche, The Expatriation Cases: “Breathes There the Man with Soul So Dead . . . ?,” in 1963 Supreme Court Review 325 (Kurland ed.). 
\footnote{17} On the issue of the meaning to be assigned the term equality see Wollheim, Equality, in 56 Proceedings of the Aristotelian Soc’y 281 (1955-56); Berlin, Equality, id. at 301. On the question of the appropriate resolution of conflict between “liberty and equality,” compare Tawney, Equality (4th ed. 1952), with Hayek, The Constitution of Liberty (1960). The comparison is not intended to suggest that “liberty” is the watchword of conservatism and “equality” the battle cry of revolution. 
\footnote{19} For one keen analytical study see Tussman & tenBroek, supra note 8. 
\footnote{22} See, e.g., Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goeaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm’rs, 330 U.S. 552 (1947); Skinner v. Oklahoma, 316 U.S. 535 (1942). There are the alternative possibilities that: (1) in cases involving economic matters, untainted by questions of race, political or religious creed, or color, the equal protection clause has no bite; (2) in such cases there is a heavy — nearly impossible — burden on the party attacking the state action, while in matters involving “civil liberties” the heavy — nearly impossible — burden is on the party defending the state action. See note 29 infra.
taking into consideration in establishing classes. Mr. Justice Jackson called these "neutral facts" and thereby, unknowingly, damned the standard to purgatory or worse. Concurring in Edwards v. California,23 he said: "The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." Mr. Justice Harlan I, in his dissent in Plessy v. Ferguson,24 thought that color was a neutral fact and could not form the basis for imposing a burden or failing to grant a benefit. "Our Constitution," he said, "is color-blind . . . ." 25 It has been suggested that religion is a neutral fact on the basis of which the state may not classify either to grant or deny benefits or to impose or relieve from burdens.26 To date, however, the "neutral facts" notion has been utilized by the Court only to prevent unfavorable discrimination by the state. Certainly poverty is not a neutral fact, that is, an improper basis for classification, when it forms the basis for governmental benevolence. It remains unclear whether neutrality will be invoked to prevent a state from conferring a benefit or from relieving a burden when the fact is color.27 In similar circumstances, the neutral aspect of religion disappears.28 And race, meaning national origin or derivation rather than color, has not yet been neutralized.29

It would have been possible, if the origins of the equal protection clause alone had been taken into consideration, to restrict that clause to a limitation on state behavior that involves classification by race.30 But once the Court expanded the role of the clause, the "neutral facts" notion could answer only a very small number of cases. In all others, what is like and what is different must depend on the values assigned by the Court. It should be recognized, however, that if the equal protection clause had been limited to the protection of the Negro, the question of proper classification in other cases might still be considered to arise under the due process clause, that is, is there a reasoned connection between the objective sought and the classification established? It is here that the overlap between due process and equal protection has occurred. If it is not an overlap but an incorporation of all equal pro-

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25 163 U.S. at 559.
29 "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." Korematsu v. United States, 323 U.S. 214, 216 (1944) (Black, J.).
30 "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).
tection standards within the due process clause, the equal protection clause is a redundancy.

There is, in addition to the problem of classification already mentioned, another difficulty inherent in the equal protection clause. It is one on which comparatively little evidence is yet forthcoming but which is likely to be at the center of issues in the near future. The question is whether the command implicit in equal protection constitutes merely a ban on the creation of inequalities by the state or a command, as well, to eliminate inequalities existing without any direct contribution there-to by state action. "Equality" like "liberty" has both a positive and negative aspect. Perhaps, if a skeleton key to constitutional law's Finnegan's Wake, Shelley v. Kraemer, is ever discovered, it will unlock the secret contained in the famous sentence: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Until then, the question remains, how is equal protection achieved?

The issue was presented to the Court this Term in Bell v. School City of Gary, which raised the question whether the state was not only required to abstain from commanding segregation but was under the affirmative duty to integrate the school system. The issue was avoided by the denial of certiorari. It may confidently be predicted that the issue will sooner or later be meet for decision by the Court. Meanwhile, with occasional aberrations, the Court has tended to speak as it did in Shelley, in terms of "restrictions . . . upon exertions of power by the States. . . ." But the other face was shown in Griffin v. Illinois, where the Court held it incumbent on the state to provide transcripts or their equivalents to criminal defendants who could not afford to purchase them: "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Griffin, of course, may fall into a category separate from other equal protection cases, either because of special concern for the proprieties of the administration of criminal justice or because the case, properly analyzed, presented an issue of due process rather than equal protection.

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31 See BERLIN, TWO CONCEPTS OF LIBERTY (1958).
32 334 U.S. 1 (1948).
33 Id. at 22.
37 Id. at 19.
38 Id. at 23 (Frankfurter, J., concurring). Justice Frankfurter states: Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.
39 But see id. at 36–39 (Harlan, J., dissenting).
These underlying questions remained unanswered in the equal protection cases of the 1963 Term that fell in the mainstream of the Court's egalitarianism: school desegregation, legislative reapportionment, desegregation of private property. But the reach and grasp of the clause were considerably extended.

A. The Reform Club, 1964; "Or What's A Heaven For?"
   — Browning, Andrea del Sarto.

The reapportionment cases are the most interesting, both theoretically and practically: theoretically, because their disposition purports to be based on a classic concept of egalitarianism — one man, one vote; \(^{40}\) practically, because they are as revolutionary in the political area as the desegregation cases have been in the social area. Moreover, all four of the points made at the outset of this article are revealed in the reapportionment cases: the movement to equality, the limitation of state power, the enhancement of the power of the Court, and a lack of workmanlike performance in reaching the results.

Any discussion of this area must begin with Baker v. Carr,\(^ {41}\) decided in the 1961 Term. Analysis of that case is not required here; it has been more than adequately accomplished elsewhere.\(^ {42}\) There are some aspects of the various opinions, however, that are noteworthy for the purposes of this paper. The first, perhaps, is the representation in the opinion that the decision is in no way inconsistent with any of the judgments that the Court had previously rendered when similar problems were presented to it.\(^ {43}\) It is impossible to believe that the Court was as artless as it represented itself to be; it is difficult to believe that the Court thought it could find an audience ingenuous enough to accept the assertion. Second is the limited judgment that purported to be rendered.\(^ {44}\) Third is a statement in Mr. Justice Douglas's concurring opinion: \(^ {45}\) "Universal equality is not the test; there is room for weighting." This, indeed, proved evanescent. Fourth is another statement in Mr. Justice Douglas's opinion: \(^ {46}\) "The recent ruling by the Iowa

\(^{40}\) "Every man to count for one and no one to count for more than one.' This formula, much used by utilitarian philosophers, seems to me to form the heart of the doctrine of equality or of equal rights, and has coloured much liberal and democratic thought." Berlin, supra note 17, at 301.

\(^{41}\) 369 U.S. 186 (1962).

\(^{42}\) See, e.g., McCloskey, Foreword: The Reapportionment Case, 76 Harv. L. Rev. 54 (1962) ; Neal, Baker v. Carr: Politics in Search of Law, In 1962 Supreme Court Review 252 (Kurland ed.).

\(^{43}\) "An unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature." 369 U.S. at 201. "We hold that the appellants do have standing to maintain this suit. Our decisions plainly support this conclusion." Id. at 206. "We hold that this challenge to an apportionment presents no nonjusticiable 'political question.' The cited cases do not hold the contrary." Id. at 209.

\(^{44}\) "In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justicable cause of action is stated upon which appellants would be entitled to appropriate relief; (c) because appellants raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes." Id. at 197-98.

\(^{45}\) Id. at 244-45.

\(^{46}\) Id. at 250 n.5.
Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act . . . is plainly correct." This proposition remains to be tested, but it is a clear invitation to flout the Court's later judgments, which no legislature has yet accepted. From Mr. Justice Clark's concurring opinion several propositions should be recalled: 47

No one—except the dissenters advocating the HARLAN "adjusted 'total representation'" formula—contends that mathematical equality among voters is required by the Equal Protection Clause. . . . Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum.

Finally, from Mr. Justice Stewart's concurring opinion: 48 "Contrary to the suggestion of my Brother HARLAN, the Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter.'"

The 1962 Term brought to the Court, in Gray v. Sanders, 49 the problem of the Georgia county-unit system. Mr. Justice Douglas avoided suggesting that the conclusion he reached was consistent with earlier decisions of the Court. Instead, he ignored the three adverse precedents involving not only the same legal issue but exactly the same factual issue as well. 50 Nor did the opinion rest exclusively on the equal protection clause, the sole ground of decision in Baker v. Carr. Along with recourse to the equal protection clause, the conclusion in Gray rested on the first three words of the preamble to the Constitution, the Declaration of Independence, Lincoln's Gettysburg Address, and the fifteenth, seventeenth, and nineteenth amendments. Once again the scope of the judgment was specifically limited by the Court. Among other things that were not decided was the question "whether a State may have one house chosen without regard to population." 51 "Nor does the question here have anything to do with the composition of the state or federal legislature." 52 The opinion did discard the analogy of the federal electoral college, stating: "[T]he Constitution, as the result of the specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election." 53

The essence of the opinion was briskly declared: 54 "Once the geographical unit for which a representative is to be chosen is designated,

47 Id. at 258-59.
48 Id. at 265.
51 372 U.S. at 376.
52 Id. at 378. (Emphasis added.)
53 Id. at 378.
54 Id. at 379. (Emphasis added.)
all who participate in the election are to have an equal vote . . . .”
Certainly, here if anywhere, the utilitarian principle of equality—one man, one vote—was applicable. The principle was derived, as already indicated, from higher, if more amorphous, authority. “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”

Mr. Justice Stewart, concurring, was joined by Mr. Justice Clark: “This case does not involve the validity of a State’s apportionment of geographic constituencies from which representatives to the State’s legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present . . . Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote.”

The innocence of these two Justices was matched by that of more sophisticated professors of law. Professor Paul A. Freund, after justifying the role of the judiciary in Baker v. Carr on the ground chosen by Mr. Justice Clark, hopefully anticipated the abandonment of the “one man, one vote” slogan:

The future will test the Court’s resourcefulness in defining the rational bounds of patterns of representation without resorting to a simplistic criterion of one man, one vote—a criterion meaningful in an election for a single state-wide office or for a particular representative but question-begging in the case of a collegial body to be chosen with a view to balanced representation . . . The problem for the courts in reapportionment . . . is . . . to maintain direction while avoiding the confounding of the rational with the doctrinaire.

Further proof that cynicism finds no place in the thinking of Harvard Law School professors was revealed in Professor Lon L. Fuller’s Storrs Lectures:

The architectural design of legal institutions and procedures obviously cannot be drawn by adjudicative decision. It is for this reason that the Supreme Court has wisely regarded as beyond its competence the enforcement of the constitutional provision guaranteeing to the states a republican form of government. A court acting as such can neither write a constitution nor undertake a general managerial supervision of its administration.

The decision in Baker v. Carr represents a gamble that extracurial processes of political adjustment and compromise will produce an issue digestible, as it were, by the Court. In carrying out the commitment it undertook in Baker v. Carr the Court will find itself, I believe, compelled to tread a difficult middle course. If, on the one hand, it lays down standards that are too exacting and comprehensive, it will stifle the indispensable preliminary processes of adjustment and compromise. If its standards are too loose, these processes are not likely to produce a solution acceptable to the Court.

55 Id. at 38x.
56 Id. at 38x-82.
57 See p. 150 supra.
Both scholars spoke before the 1963 reapportionment cases were decided. It would be interesting to learn whether they have yet felt disillusionment. Professor Freund was still able to support a petition to dissuade Congress from taking retaliatory action. The basis of Professor Fuller's error is apparent. He seems to have thought that the Supreme Court was "a court acting as such" and that there were enough in its membership who would heed counsels of moderation.

In the 1963 Term, the opening notes on reapportionment were sounded in *Wesberry v. Sanders*, which presented a new issue, whether the Court could command the reapportionment, not of state legislative districts, but of congressional legislative districts. *Baker v. Carr* would seem to have been not quite so narrow a decision as had been represented, for the Court stated: "[W]e made it clear in *Baker* that nothing in the language of that article [article I] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote. . . ." Moreover, in determining the merits, the answer was to be found in the slogan adopted in *Gray v. Sanders*: "[T]he command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." History was Mr. Justice Black's main support — a history that stopped with 1789, a history that reads Madison's *Federalist No. 57* as meaning "one person, one vote." All know how soon after 1789 the country enjoyed universal suffrage and equal representation in the legislature.

Mr. Justice Black's revision of American history was not persuasive to Mr. Justice Clark, who concurred in part and dissented in part: "[I]n my view, Brother HARLAN has clearly demonstrated that both the historical background and language preclude a finding that Art. I, § 2, lays down the *ipse dixit* 'one person, one vote' in congressional elections." He would rely on the equal protection clause. Mr. Justice Stewart joined Mr. Justice Harlan's dissent, except that he thought the issue was justiciable. More startling news was to come that would overshadow the importance of *Wesberry*, but first the Court took an excursion to sustain the gerrymandering of New York congressional districts in *Wright v. Rockefeller*. There, most of the Justices thought that the issue was similar to the one presented in *Gomillion v. Lightfoot* and the Court carefully pointed out that unequal state apportion-

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62 Id. at 6.
63 Id. at 7–8.
64 The portion of Madison's essay quoted in the opinion is as follows: "Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States . . . ." Id. at 18.
65 Ibid.
ment of congressional districts was not involved. It is not clear from the facts of the case whether the gerrymander — there can be little doubt that it was a gerrymander — assured the election of a Negro representative in Congress (Adam Clayton Powell) or inhibited the possibility of more than one Negro representative. For Justices Douglas and Goldberg, once again in tandem, it made no difference. Race was a "neutral fact" that could not be used to draw lines for congressional districts.

June 15, 1964 was the big day for judicial reapportionment of state legislatures. The principal opinion was written by the Chief Justice in Reynolds v. Sims. The issues concerned not only the reapportionment of the lower house of the Alabama Legislature but of the upper house as well. The lesson begins with the proposition: "No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available." Why it commences in this fashion is a little hard to see, for attached to the statement is a footnote: "See the discussion in Lucas . . . with respect to the lack of federal constitutional significance of the presence or absence of an available political remedy." Be that as it may, the opinion marches quickly to its inescapable conclusion. Its immediate premise is that legislatures are elected by and represent voters. The second premise is that, as a matter of "logic," a representative body should be subject to control of a majority of the voters. "To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result." The Court's answer to allegations that politics and redistricting of legislatures is a complicated business is sufficiently simple so that anyone should be able to see it: "[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." Therefore: "[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Q.E.D.

Those who point to the composition of the national legislature as an analogy to which the states might resort are obviously misled. First, such an argument is only a rationalization to justify apportionment that is not dependent upon population. Second, "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representa-
tion in the Federal Congress was adopted." 78 Third, "Political subdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities." 79 Therefore, again both houses of a state legislature must be apportioned by population. There are some who do not readily see the connection between premise and conclusion. But there are none so blind as those who think political factors are relevant to legislative districting.

The Court assures the states that they still have a great deal of leeway in establishing their legislative organizations. For example, they may continue to have a bicameral legislature and there may be differences in district lines, there may be differences in terms of office, there may be differences in size, and, although the Court did not mention it, it is likely that there may be differences in salaries and titles as well. Nor should the Court be considered unreasonable in its demands for equality of districts: 80 "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

As a matter of fact, the states may take many factors into consideration, so long as the determinative one is population: 81 "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation." For, it must never be forgotten: 82 "Citizens, not history or economic interests, cast votes." Similarly, considerations of area cannot be used to throw askew population-based representation. "Again, people, not land or trees or pastures, vote." 83 Local political units might be considered, but only so long as such consideration does not interfere with the "one man, one vote" formula. In any event, the details will be worked out by the Supreme Court: 84 "Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment."

The Court also spoke to the question of enforcement. The trial court had picked and chosen aspects of the various suggestions made to it for the temporary redistricting of the two branches of the Alabama Legislature, and the Supreme Court approved the choice. But a footnote of the Court is pertinent: 85 "Although the District Court indicated that the apportionment of the Alabama House under the 67-Senator Amendment was valid and acceptable, we of course reject that determination, which we regard as merely precatory and advisory . . . ."

78 Id. at 573.
79 Id. at 575. This vital distinction is important to our foreign relations, lest some citizen seek to enjoin our participation in the United Nations because: (1) countries representing only 10% of the population of the nations have about two-thirds of the voting power in the Assembly; (2) the Security Council is totally unrepresentative.
80 Id. at 577.
81 Id. at 579–80.
82 Id. at 586.
83 Ibid.
84 Id. at 578.
85 Id. at 586 n.68.
The Court took special pains to avoid the failure that followed the authorization of delay in the School Segregation Cases. "It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 86

The Court did assure the states that once a valid plan was entered upon, they probably need not redistrict any more often than once every ten years.

Mr. Justice Clark managed to stay on the bandwagon in Reynolds, but found it tricky since he thought that only one of two houses need be districted in accordance with population requirements. Mr. Justice Stewart was also able to concur in the conclusion of the Court. Only Mr. Justice Harlan dissented from the incursions of the Court into state politics. The reapportionment cases had almost, but not quite, reached their climax in Reynolds. New heights—or depths—were attained in Lucas v. Forty-Fourth Gen. Assembly, 87 and here the lonely dissenter was joined by Justices Clark and Stewart.

The new element in Lucas was the fact that the proposed redistricting of the legislature was the result of a state initiative procedure in which the people of the state made the choice in favor of an upper house that was not districted strictly according to population, although population received greater weight than under the prior system. A majority of voters in every county favored the new procedure. This did not satisfy the Court. Again the opinion was written by the Chief Justice and his reasoning was equally cogent, if not necessarily consistent, with his opinion in Reynolds. Judicial intervention, which had been justified by the failure to provide alternative political remedies, 88 now needed no such excuse: 89 "[W]e find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature." A doctrine that was justified by the Chief Justice himself in Reynolds, as a requirement to protect the rights of the majority, 90 was now extended to prevent the majority from expressing its will. It was not for the simple reason that "people and not majorities vote," but for the simpler reason that "a citizen's constitutional rights can hardly be infringed simply be-

86 Id. at 585. As of this writing, the outcome of the Tuck Bill to remove federal court jurisdiction over reapportionment and the Dirksen amendment to permit time for redistricting (and for a constitutional amendment) is still uncertain. See N.Y. Times, Aug. 20, 1964, p. 1, col. 8.


88 See Freund, supra note 58, at 639. Professor Freund states:
It is sometimes said that when legislatures and executives cannot be moved to advance the cause of liberalism, the opportunity and responsibility devolve on the courts. Stated thus baldly, the counsel is surely a dangerous invitation, dangerous to the standing of the Court and false to the liberalism in whose name it is propounded. But in the context of the Tennessee apportionment case the default of the lawmaking machinery had special relevance, for the very structure and processes that are presupposed in representative government had become distorted.

89 377 U.S. at 736.

90 See p. 153 supra.
cause a majority of the people choose to do so." This went too far even for the complaisant Justices Clark and Stewart.

In an opinion referring also to WMCA, Inc. v. Lomenzo, in which a radio station was permitted successfully to challenge the New York legislative apportionment, Mr. Justice Stewart dissented for himself and Mr. Justice Clark. The light that belatedly dawned showed them that the case had "nothing to do with the denial or impairment of any person's right to vote." Moreover, it had "nothing to do with the 'weighting' or 'diluting' of votes cast within any electoral unit." Nor did Lucas concern congressional elections, and so article I was irrelevant. "To put the matter plainly, there is nothing in all the history of this Court's decisions which supports this constitutional rule. The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union." The dissent of Mr. Justice Stewart found no authority for the proposition "that the demands of the Constitution were to be measured not by what it says, but by their [the Justices'] own notions of wise political theory." It behooved Mr. Justice Clark to assert in his own dissent to Lucas that the Court was "invading the valid functioning of the procedures of the States and thereby is committing a grievous error which will do irreparable damage to our federal-state relationship." It makes one wonder what happened in the conference room when Baker v. Carr was decided and Justices Frankfurter and Harlan challenged the majority without persuading Mr. Justice Stewart of the path on which the Court had started.

There were other cases decided this Term that presented the same or similar issues. But between them, Reynolds and Lucas had taken the Court as far as it could go. The additional cases added words but not new ideas. There is little further comment that is required. The opinions speak so well for themselves. The unbending simplicity — Professor Freund has called the governing principle "simplistic" — is not untypical of the Court's work. To a Court determined to make population the sole standard on the theory of majority rule, all other factors become irrelevant, despite the fact that any districting that provides for more than two districts makes it impossible to assure that a majority of the voters will be able to control a majority of the legislature. One wonders, as the Court moves along the path of "American Legal Realism, with a strong orientation toward a jurisprudence of values," whether it would have given the Justices any pause to have

81 377 U.S. at 736-37.
83 Id. at 744.
84 Ibid.
85 Id. at 746.
86 Id. at 747-48.
87 Id. at 743-44.
89 See note 13 supra.
read Judge Learned Hand's essay "Democracy: Its Presumptions and Realities," especially where he says: "My vote is one of the most unimportant acts of my life. . . ." 100

B. "Confound Their Politics, Frustrate Their Knavish Tricks."
— God Save the Queen.

The school segregation problem that reached decision in the Court this Term was a direct descendant of Brown v. Board of Educ. Unlike the reapportionment cases, which received — prior to this Term's decisions — rapid acquiescence by the states, school segregation has changed little in ten years since Brown. Fewer than two of every hundred Negro children in the South are attending public schools with white children. Prince Edward County, Virginia, a party to the Brown case, was back in Court this Term,101 its schools still segregated. Its device for evasion of the Court's decree was the closing of its public schools, tuition grants to children attending private schools, and tax rebates to contributors to private schools. The result was education for white school children and none for Negro school children. The high court of Virginia sustained the right to close public schools as within the local option of the county and held that the plan did not violate the Brown decree.102 Prince Edward was, however, the only county that did not operate public schools. The Supreme Court, in an opinion by Mr. Justice Black, held that the action violated the equal protection clause, but what the violation consisted of is not made clear.

First, it appeared that the violation resulted from permitting one county to depart from the rule in other counties. "Whatever non-racial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." 103 So far so good. The result was clearly foreshadowed by St. Helena Parish School Bd. v. Hall,104 although that was a memorandum order — a form of judgment that the Court did not consider binding in the reapportionment cases. The difficulties with the opinion come with the form of decree that it sanctioned.

The district court had enjoined the county from making and processing its tuition grants and tax exemptions for white students attending private schools. This the Supreme Court approved. But this suggests that the denial of equal protection occurred within the county in the discrimination between white and Negro pupils there. The authorization by the Court to the district court requiring the county officials to levy taxes for the purpose of operating public schools was ambiguous. The Court also approved the district court's order that the local schools be opened so long as the other public schools in the Commonwealth remained open. This brought the case back to the state-

103 377 U.S. at 231.
104 368 U.S. 515 (1962).
wide discrimination where it started. Justices Clark and Harlan agreed with the judgment except insofar as it authorized the lower court to order the reopening of the public schools.

The case represents one of the many factual situations that compels the Court to resort to unbecoming and unfortunate methods for assuring that its will is done. Certainly, if the discrimination were deemed to result from the fact that schools in Prince Edward County were closed while others in the state were open, the usual mandate that would follow from a finding of denial of equal protection would offer the alternatives of closing all public schools or opening public schools in Prince Edward County. Such a decree could have assured that public schools did not become private schools in name only. Indeed, one of the great advantages that the equal protection clause has had over the due process clause is the possibility of more limited interference with the prerogatives of the states. The choice under the equal protection clause normally leaves to the state the decision whether to broaden the class or eliminate the regulation entirely.105 It is certainly unfortunate that the behavior of the state in the Prince Edward County case compelled the Court to undertake to make the choice for it.

Unlike the redistricting cases, the school segregation cases have still not approached their climax. But the patience of the Court is about exhausted. The principle of “deliberate speed” is now about as viable as that of “separate but equal” facilities.106

C. “Their Strength Is To Sit Still.”

— Isaiah 30:7 (King James).

The sit-in cases have not even reached the stage of constitutional adjudication on the merits of the primary issue: How far beyond the realm of direct government action is the equal protection clause effective to compel equal treatment of whites and Negroes? 107 The Court's methods of avoiding the question have demonstrated an imagination that certainly taxes the credulity of the average student of the Court's work. The cases this Term proved no exception. But there were indications as to how a large majority of the Justices were prepared to rule.

Clearly the most important of the 1963 Term's decisions in this area was Bell v. Maryland,108 where six of the nine Justices revealed their positions on the essential issue. There, twelve Negro students had been convicted under the state's criminal trespass laws for engaging in a restaurant sit-in. They unsuccessfully challenged their convictions on both due process and equal protection grounds through the courts of Maryland. Mr. Justice Brennan, writing the opinion for the Court,

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107 See Lewis, The Sit-in Cases: Great Expectations, in 1963 SUPREME COURT REVIEW 109 (Kurland ed.). Professor Lewis framed the essential issue in this manner: “[W]hether the Fourteenth Amendment provides the Negro with a self-executing federal right to equal treatment by the proprietors of private establishments catering to all the public except Negroes . . . .” Ibid.
did not "reach the questions that have been argued under the Equal Protection and Due Process Clauses of the Fourteenth Amendment." Avoidance was based on the fact that subsequent to the time the convictions were affirmed by the highest state court, the legislature had passed a statute compelling nondiscrimination in public accommodations within the state. It took some fancy construction to read Maryland law as providing that a conviction affirmed by the Maryland Court of Appeals was subject to attack on the ground that it was inconsistent with a subsequently enacted public accommodation law. The Court did not undertake itself to rewrite the Maryland law. It sent the case back to the Maryland Court of Appeals. The majority in support of this mandate included, in addition to Mr. Justice Brennan, the Chief Justice and Justices Clark, Stewart, Douglas, and Goldberg. But six of the Justices, nevertheless, faced up to the constitutional question presented under the equal protection clause.

Mr. Justice Douglas wrote a slambang opinion that called for the dismissal of the indictment because the arrests violated the fourteenth amendment. The escape hatch used by the majority was not for him. Indeed the peroration of that part of his opinion calling for the Court to meet the issues is reminiscent of the inscription written by Emma Lazarus for the base of the Statue of Liberty:

We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the courts. When we default, as we do today, the prestige of law in the life of the Nation is weakened.

The demands of justice were equally plain to him. He would utilize the equal protection clause to put "all restaurants . . . on an equal footing," by making the state compel them all to serve Negroes. There was no conflict between the right of the Negro to service and the personal preference of the restaurant owner not to serve him. Many, if not most, restaurants are owned by corporations. "Here, as in most of the sit-in cases before us, the refusal of service did not reflect 'personal prejudices' but business reasons. . . . The truth is, I think, that the corporate interest is in making money, not in protecting 'personal prejudices.'" But even if the choice were between the personal prejudices of the storekeeper and the right of the Negro to service, the answer is the same. President Johnson's State of the Union Message on January 8, 1964, put the "constitutional right": "Surely they [Negroes and whites] can work and eat and travel side by side in their own country." These are federally created rights of citizenship.

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109 Id. at 228.
110 Id. at 244-45.
111 Id. at 246.
112 Ibid.
113 Id. at 247.
that must be enforced. "Seldom have modern cases . . . so exalted property in suppression of individual rights." 114 "Apartheid" is barred by the common law and must not "be given constitutional sanction in the restaurant field." 115 There can be no question of the existence of state action. Convictions for sitting in clearly fall within the ban of Shelley v. Kraemer: 116 "Why should we refuse to let state courts enforce apartheid in residential areas of our cities but let state courts enforce apartheid in restaurants? If a court decree is state action in one case, it is in the other. Property rights, so heavily underscored, are equally involved in each case." To reject this theory is to enhance the power of corporate management to a greater degree than ever before: 117 "Affirmance would make corporate management the arbiter of one of the deepest conflicts in our society . . .." Most corporations concerned here are already suffering the results of absentee management. Where "the corporation is little more than a veil for man and wife or brother and brother . . . disregarding the corporate entity often is the instrument for achieving a just result. But the relegation of a Negro customer to second-class citizenship is not just. Nor is fastening apartheid on America a worthy occasion for tearing aside the corporate veil." 118

Mr. Justice Goldberg joined the opinion of Mr. Justice Douglas but also wrote one of his own in which he was joined by the Chief Justice and Mr. Justice Douglas. In his sophomore year on the Court he gave ample evidence that he would run second to none in effectuating reforms in our body politic. Here, in an opinion that utilized some of the same language contained in his James Madison Lecture, 119 he found the answer in the aura of the Constitution no less than in its words and its history. The opinion also included a novel argument. In the Civil Rights Cases, 120 Mr. Justice Harlan I was right and the majority wrong. But now even a majority of that Court would support Mr. Justice Goldberg's approach. For Mr. Justice Bradley had premised the Court's position on the assumption that "innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them." 121 Since this premise has proved untrue in the years since the Civil Rights Cases, it is obvious that the conclusion must be reversed.

There can be no recognized conflict between the rights of Negroes to enjoy public accommodations and the rights of the owners to exclude them. There are no rights of the owners to exclude them. The Constitution commands that the state compel the owner to serve the Negro; it certainly cannot aid the owner in his refusal, by permitting

114 Id. at 253.
115 Id. at 254. (Emphasis in original.)
116 Id. at 259. (Emphasis in original.)
117 Id. at 264. (Emphasis in original.)
118 Id. at 271. (Emphasis in original.)
120 109 U.S. 3 (1883).
121 Id. at 25.
conviction under the trespass laws. Indeed, it is implied, that if the owner resorts to self-help to remove the unwanted guests from his premises, it is he and not the patron who should be subjected to the sanction of the laws. The issue is not trespass *quare clausum fregit*; it is trespass against the person *vi et armis*. The notion that there might be constitutional rights to privacy involved is, for Mr. Justice Goldberg, little more than nonsense: 122

[Certainly there are] . . . rights pertaining to privacy and private association . . . themselves constitutionally protected liberties.

We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use. A judicial ruling on this claim inevitably involves the liberties and freedoms both of the restaurant proprietor and of the Negro citizen. . . . The history and purposes of the Fourteenth Amendment indicate, however, that the Amendment resolves this apparent conflict of liberties in favor of the Negro's right to equal public accommodations. . . . The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight.

For Mr. Justice Douglas the shibboleth was "apartheid"; for Mr. Justice Goldberg it was "public accommodations." Both assert that a state has an affirmative duty to eliminate inequalities not necessarily imposed by the state.

To some, the surprising feature of *Bell* was the fact that the dissent was written by Mr. Justice Black. He was joined by Justices Harlan and White. For Mr. Justice Black, there was no state action here. *Shelley v. Kraemer* is inapposite. There the Court properly held that "state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy, and use their property without regard to race or color. . . . When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866 . . . prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties." 123 Perhaps that is what *Shelley* was intended to say; perhaps it did not say that. It is at least as reasonable a construction of that enigmatic decision as those offered by the concurring opinions. So too, Mr. Justice Black's history is more persuasive than that offered by Mr. Justice Goldberg. For the three Justices aligned in dissent, the word "property" is still contained in the fourteenth amendment. The fact that segregation of restaurants is unpalatable to them as individuals does not supply the answer. The dissent stated: 124

This Court has done much in carrying out its solemn duty to protect people from unlawful discrimination. And it will, of course, continue to carry out this duty in the future as it has in the past. But the Fourteenth Amendment of itself does not compel either a black man or a white man

122 378 U.S. at 313-14.
123 Id. at 330-31.
124 Id. at 342-43.
running his own private business to trade with anyone else against his will. We do not believe that Section 1 of the Fourteenth Amendment was written or designed to interfere with a storekeeper's right to choose his customers or with a property owner's right to choose his social or business associates, so long as he does not run counter to valid state or federal regulation. The case before us does not involve the power of the Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race and to trade with all if they trade with any. We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end.

By comparison, the other sit-in cases of the Term pale into insignificance. In *Robinson v. Florida,* the Court found state action by reason of a regulation of the board of health requiring segregated toilet facilities for men and women, whites and Negroes. In *Bouie v. City of Columbia,* the Court distorted a statute with plain meaning into ambiguity in order to decide the case on the due process clause rather than the equal protection clause. In *Barr v. City of Columbia,* the Court found an absence of factual basis for saying that the petitioners had "breached the peace." In *Griffin v. Maryland,* state action was found because the private police officer who caused the arrest was deputized as a deputy sheriff. It would be helpful if these and other similar cases could be labeled "good for use in sit-in cases only."

The significance of *Bell,* however, is not to be gainsaid. Students were taught by Professor Powell, his contemporaries, and his successors to read the future by feeling the bumps on the heads of the Justices or those on their opinions. These prognosticators can confidently predict that the public accommodation provisions of the Civil Rights Act of 1964 will be sustained. Cases arising directly under the Constitution, if any come, will be disposed of without reaching the issue that Mr. Justice Black debated with his brethren Justices Douglas and Goldberg. If the issue cannot be avoided, it will be necessary to assign Justices Clark, Brennan, and Stewart, to one side or the other. Past performance suggests that Mr. Justice Clark will go with the Black view, Mr. Justice Brennan with the Douglas view, and Mr. Justice Stewart will find a way of not joining either side.

So much for the principal cases of the Term concerned with the "new liberty"—equality. Perhaps the only appropriate comment is that of Holmes: "I used to say that equality between individuals, as a moral formula, was too rudimentary."

III. E Pluribus Unum

The reapportionment cases, the desegregation cases, and the sit-in cases are illustrative not only of the Court's drive for equality, but also

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129 1 Holmes-Laski Letters 653 (Howe ed. 1953).
of its limitation of state power, its expansion of its own power, and its lack of "good quality" product. There is little need to dwell with equal wordiness on the decline of federalism, both because of the examples already cited and because there is no novelty in the Court's behavior on this front. Indeed, the amazing fact about the Court's infringement on state authority is that, having taken away so much, it continues to find more to take away.

Governor Rockefeller in his 1962 Godkin Lectures said: 130 "The reports of the death of federalism, so authoritatively asserted in the nineteen-thirties, were, as we have seen, highly exaggerated." It is possible that the Governor and those who have reported the death are both right, for each may have a different concept in mind when he speaks of federalism. Certainly, as the Governor pointed out, state governments are bigger than ever, both in the amount of money they secure and disperse and in the number of tasks they perform. But the nature of federalism is not necessarily reflected in such data. Certainly local governments in England are also engaged in more tasks today and are spending more money than at any earlier period. That is not enough to turn Great Britain into a federal nation, certainly not into that kind of federal nation that, my colleague Professor Crosskey to the contrary notwithstanding, 131 was established by the United States Constitution. As Rector K. C. Wheare has pointed out: 132 "What is necessary for the federal principle is not merely that the general government, like the regional governments, should operate directly upon the people, but, further, that each government should be limited to its own sphere and, within that sphere, should be independent of the other." There are today, few, if any, governmental functions performed by the states that are not subject either to the direct control of the national government or to the possibility of preemption by the national government. The concept of separate sovereignties within this country is largely a matter of history. Its vestigial remains are most likely to be found in the fields of education and administration of criminal justice. This is not meant to suggest that the Court brought about this fundamental revision of governmental structure by itself. Advances in transportation, communication, and science, which reduced the size of the world, were the primary causes. The rise of the United States as a world power was certainly a most important factor. The essential default of the states cannot be ignored. But the Court, too, has made its contribution. Perhaps the report of a death is premature: 133 "Death must be distinguished from dying, with which it is often confused."

Once again, this Term, the major area in which the Court restricted state authority was that of administration of criminal law. The action by the Court here has involved not only the application of novel doctrine in limitation of the states but also the frequent overruling of prece-

131 See Crosskey, Politics and the Constitution (1953).
133 Rev. Sydney Smith, as recorded in Pearson, The Smith of Smiths 271 (1934).
dent to achieve this result. A few examples from the last few years should suffice. In 1961, in Map v. Ohio, the Court overruled Wolf v. Colorado, holding that in a criminal trial state courts must exclude any evidence that had been secured in violation of the fourth amendment. In 1963, in Gideon v. Wainwright, the Court overruled Betts v. Brady and held that counsel must be supplied where requested in state criminal proceedings and not merely where special circumstances warrant such appointment. On the same day that Gideon was decided, the Court, in Fay v. Noia overruled Darr v. Burford, so that a timely petition for certiorari from a state high court judgment is no longer a prerequisite to habeas corpus. "Adequate state grounds" for denying relief are no longer "adequate."

This Term, Adamson v. California and Twining v. New Jersey were overruled by Malloy v. Hogan, which held that the privilege against self-crimination must be applied in state proceedings in the same manner as in federal proceedings. In ruling that testimony compelled in a state proceeding under grant of immunity cannot be used in a federal proceeding, as it did in Murphy v. Waterfront Comm'n, the Court overruled Feldman v. United States. Stein v. New York bit the dust in Jackson v. Denno, and New York and other states can no longer leave the ultimate decision as to the voluntariness of a confession to be covered by a general jury verdict.

In light of the lust for conviction of police and prosecutors, no one can complain about giving a defendant in a criminal case all the protection to which he is entitled. At the same time, there is some appeal in Mr. Justice Black's suggestion in his dissent in Jackson v. Denno that it is not "within this Court's power to treat as unconstitutional every state law or procedure that the Court believes to be 'unfair.'" And one is forced to wonder whether there is merit in the proposition that the imposition of these "constitutional" standards on state administration of criminal law has resulted in improved police and prosecution practices or whether it has moved the enforcement of the law into other extralegal and nonjudicial procedures. At least some of the Justices are aware of the dangers of overzealous limitations even of overzealous criminal law enforcement.

134 367 U.S. 643 (1961); see Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, in 1961 Supreme Court Review 1 (Kurland ed.).
137 316 U.S. 455 (1942).
139 339 U.S. 300 (1950).
140 332 U.S. 46 (1947).
141 211 U.S. 78 (1908).
144 322 U.S. 487 (1944).
147 Id. at 401 n.1.
One of the difficulties with the imposition of these high standards in state proceedings is the Court's insistence that its rulings be carried to their dryly logical extremes. For one thing, it has insisted that the procedures in the state courts must adhere to the same standards that are imposed in the federal courts, even when the Justices of the Supreme Court are themselves divided four to four over what those standards require.\textsuperscript{148} If counsel must be supplied an accused under the \textit{Gideon} ruling, he must have access to such services from the time that the police begin to "focus" on him as a suspect.\textsuperscript{149} Certainly the right to counsel must cover appellate proceedings as well as trial proceedings, even where the appellate court rules that no help from counsel is required either by the defendant or the court.\textsuperscript{150}

Not only are the rules elaborated by the Court, while overruling its own decisions, prospectively imposed on state courts, but retroactive application comes as a matter of course — primarily by way of postconviction remedies — without any consideration or deliberation by the Court.\textsuperscript{151}

The Supreme Court's incursions on state power have not been limited to the area of criminal law. Again examples must suffice, but they are readily at hand. \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.},\textsuperscript{152} suggests that even a constitutional amendment that purports to restore state authority will be construed extremely narrowly. That case involved the propriety of regulation by New York of liquor sales by a New York dealer to persons in New York who were about to leave the country. The control of these sales was held to contravene the commerce clause. For purposes of this litigation it was as if the twenty-first amendment, designed to restore state authority, had never been promulgated.\textsuperscript{153}

The power of the state to limit the solicitation of business by its bar and the unauthorized practice of law was knocked down in \textit{Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar}.\textsuperscript{154} That case reveals several characteristics of the work of the Court. First, the desirability of the legislation, which should have been irrelevant, became predominant in the disposition of the case, further proof that the area of discretion left to the states is very limited indeed. Second, that the legislation was typical of regulation of the practice of law at least throughout the century and certainly throughout the country was no barrier to Supreme Court interference. The case also demonstrates that even cases in which the new egalitarian principles are not directly involved are affected by the trend. It is not unreasonable to believe that were it not for \textit{NAACP v. Button},\textsuperscript{155} this case might not have reached

\begin{itemize}
  \item \textsuperscript{148} See Ker v. California, 374 U.S. 23 (1963).
  \item \textsuperscript{150} Douglas v. California, 372 U.S. 353 (1963).
  \item \textsuperscript{151} See Dumond v. Wainwright, 375 U.S. 2, 3 (1963) (Harlan, J., dissenting).
  \item \textsuperscript{152} 377 U.S. 324 (1964).
  \item \textsuperscript{153} Cf. Duckworth v. Arkansas, 314 U.S. 390 (1941); id. at 397 (Jackson, J., concurring).
  \item \textsuperscript{154} 377 U.S. 1 (1964).
  \item \textsuperscript{155} 371 U.S. 415 (1963).
\end{itemize}
the Supreme Court for decision or, if it had, it might very well have been decided the other way. Finally, the case demonstrates how the states have tended to bring down on their own heads the limitations on their power that the Court has imposed. For if they had not attempted to utilize the ordinary powers over conduct of the bar to wage war on desegregation, the Button case would not have invoked the damnation of the Court.

Symptomatic also of these factors was the decision this Term in New York Times Co. v. Sullivan, which struck down a libel verdict for $500,000 rendered in favor of a commissioner of the city of Montgomery, Alabama, for the defamation allegedly contained in an advertisement that had appeared in the pages of The New York Times. Once again the Court established a constitutional standard, this time for the law of libel, which invalidated principles that had long governed the common law in almost every state of the Union. Again, the Negro revolution was a not-irrelevant factor in the case—the alleged libel consisted of remarks allegedly made about the conduct of the commissioner in suppression of student protests resulting from segregation as practiced in and about Montgomery. Again, the Alabama courts invited interference by sustaining an outlandish verdict for exemplary damages in a case in which there was no evidence on which to base compensatory damages. But it was not only the Negro revolution that supplied an egalitarian motif. The concurring opinions also suggest that, since public officials are exonerated from liability for defamatory statements published in the course of their duties, individuals should be equally free to defame public officials. It is less than surprising that the commercial nature of the activity by The New York Times did not appeal to Justices Douglas and Goldberg here—as it did in Bell v. Maryland—as a basis for protecting the individual against defamation contained in advertising space sold by a corporation.

Sears, Roebuck & Co. v. Stiffel Co. presented an unusual subject matter but not an unusual method for limiting state power. The device was the pronouncement that the area of regulation has been preempted by national authority. The case is cited here not to suggest the error of its conclusion that articles not protected by federal patent laws may not be protected against copying by state laws. The danger is that this case, which treats patent and copyrights as a single unit, sows the seeds for a later pronouncement that common law copyrights, long protected by state laws, will receive similar treatment.

At this point note should also be taken of the inhibitions that have been placed on the capacity of the states to control the dissemination of pornography. Perhaps the results here are not so bad as the inability of the Court to provide any guidance as to what regulations it thinks appropriate for the states to adopt. The Court is unwilling to

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161 Id. at 231 n.7.
say that pornography comes within the protection of the guarantees of freedom of speech and press. At the same time, it seems unable to say when it falls outside that protection. Thus, in this Term’s cases, *Jacobellis v. Ohio*,162 and *A Quantity of Copies of Books v. Kansas*163 there were judgments of the Court but no combination of Justices was able to form a majority in support of any opinion. The result is that censorship is permissible if the Court approves it and unconstitutional if the Court overrules it. But no one knows when it will do the one or the other.

IV. "THE ONLY INFALLIBLE CRITERION OF WISDOM TO VULGAR JUDGMENTS, — SUCCESS"

— Burke, A Letter to a Member of the National Assembly, 4 Works 7 (rev. ed. 1886).

Those who are not convinced that the Court exceeded its proper function in the reapportionment cases — and they are many — and those who do not believe that the strait jackets placed on the states have been excessive — and they are many — are not likely to turn squeamish at the utilization of the power of judicial review to strike down statutes of the United States. After all, the Court has engaged in this pastime since it was invented by Mr. Chief Justice Marshall in *Marbury v. Madison*.164 Even so, striking down two federal statutes in the course of a single term is a little better than par for the course. But Castor and Pollux did no more for Rome than the equally "princely pair,"165 Justices Douglas and Goldberg, can do for the cause of Justice. Mr. Justice Douglas wrote the opinion for the Court in *Schneider v. Rusk*;166 Mr. Justice Goldberg did the honors in *Aptheker v. Secretary of State*.167

Perhaps there is no irony in the fact that those prepared to enter the lists to assure representative government in its most pristine form are also those most anxious to curb the representatives. The Court, in

164 5 U.S. (1 Cranch) 137 (1803).
165 MACAULEY, The Battle of Lake Regillus, in The Poetical Works of Lord Macauley 84–85 (1st Am. ed. 1881):
So spake he; and was buckling
Tighter black Auster's band,
When he was aware of a princely pair
That rode at his right hand.
So like they were, no mortal
Might one from other know:
White as snow their armor was,
Their steeds were white as snow.

... "Rome to the charge!" cried Aulus;
"The foe begins to yield!
Charge for the hearth of Vesta!
Charge for the Golden Shield!
Let no man stop to plunder,
But slay, and slay, and slay;
The Gods who live for ever
Are on our side to-day."

Schneider, ruled that Congress cannot reasonably say that the benefits of citizenship conferred on a foreign-born citizen are dissipated when that citizen returns to his homeland for an indefinite period of time, perhaps never to return to the United States. This opinion is again in the classic mold — if so contemporary a form can be thus described. First, it overruled an earlier precedent and, as is Mr. Justice Douglas's wont, it did so sub silentio. Second, although it rests in part on the proposition that it is unreasonable for any legislature to assume that a person returned to his homeland for a long period of time shall be deemed to have made a choice between his country of adoption and his country of birth in favor of the latter, the opinion also rests largely on notions of equality. Third, these notions of equality provide both the premise and conclusion:

We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are co-extensive. The only difference drawn by the Constitution is that only the "natural born" citizen is eligible to be President. Art. II, § 1.

A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.

Of course, it is irrelevant that the statute does not infer surrender of citizenship simply from living abroad but only when the domicile undertaken in foreign parts is also the place of that person's original allegiance. Nor is it appropriate to suggest that there may be a difference between what is undesirable legislation and what is unconstitutional legislation. Obviously, the two are the same. It is part of the egalitarian notion that if what is unconstitutional is undesirable then it must be equally true that what is undesirable is unconstitutional.

Aptheker v. Secretary of State did not overrule any prior decision. It simply held — that no legitimate governmental purpose could be served by denying passports to all members of Communist organizations for travel outside the Western Hemisphere and, therefore, the statute could not be read to apply to the editor of Political Affairs, the "theoretical organ" of the Communist Party in the United States, or to the chairman of the party. The due process clause was the essential basis for decision, but notions of equal protection crept into the opinion, as in the quotation from Wieman v. Updegraff:

169 See p. 150 supra.
170 377 U.S. at 165, 168-69. (Footnote added.)
171 Certainly this distinction, too, is bound to fall when it comes to be realized that the fifth amendment superseded article II.
cation of innocent with knowing activity must fall as an assertion of arbitrary power.” The other member of the team, Mr. Justice Douglas, contributed a stirring peroration in his concurring opinion based on the Gladstonian theme that one cannot fight against the future:¹⁷³

America is of course sovereign; but her sovereignty is woven in an international web that makes her one of the family of nations. The ties with all the continents are close — commercially as well as culturally. Our concerns are planetary, beyond sunrises and sunsets. Citizenship implicates us in those problems and perplexities, as well as in domestic ones. We cannot exercise and enjoy citizenship in world perspective without the right to travel abroad; and I see no constitutional way to curb it unless, as I said, there is the power to detain.

These remarks are made pertinent by the proposition that no citizen, Communist or otherwise, can be precluded from traveling within this country. It follows that no citizen can be precluded from traveling out of the country.

No more need be said here on the passive vices. Professor Bickel has more than adequately dealt with that theme in an earlier Foreword ¹⁷⁴ in this series and even more completely in his recent book appropriately entitled The Least Dangerous Branch.¹⁷⁵

V. "WITH CONSISTENCY A GREAT SOUL HAS SIMPLY NOTHING TO DO."
— Emerson, The Writings of Ralph Waldo Emerson 152 (Atkinson ed. 1940).

If it is inappropriate to expect elegance from a Court dedicated to egalitarianism, it is not unreasonable to hope for workmanlike quality. It is, nevertheless, an unfulfilled wish. Since example must again suffice, only one of the Court's more egregious "stylistic" faults will be considered here: the failure of the Court to provide guidance for later litigation. In part this is due to the substitution of "hallowed catchword and formula" ¹⁷⁷ in place of reasons. "One man, one vote," "men

¹⁷³ 377 U.S. at 520.
¹⁷⁵ Bickel, The Least Dangerous Branch (1962).
¹⁷⁶ To consider this failing of the Court as more than merely "stylistic" is to fly in the face of "American Legal Realism." See Rostow, The Sovereign Prerogative 35–36 (1962).
¹⁷⁷ The phrase is Judge Learned Hand's and he suggested that their use was attributable to the egalitarianism becoming dominant in our society. Judge Hand stated:

As the social group grows too large for mutual contact and appraisal, life quickly begins to lose its flavor and its significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. Not only is there no compensation for our losses, but most of our positive ills have directly resulted from great size. With it has indeed come the magic of modern communication and quick transport; but out of these has come the sinister apparatus of mass suggestion and mass production. Such devices, always tending more and more to reduce us to a common model, subject us — our hard-won immunity now gone — to
vote, trees don’t,” “apartheid,” and “public accommodations” hardly provide guidance for the resolution of cases that are not quite so simple as simple-minded people would make them. Similarly, rhetoric may be helpful advocacy, emotionally appealing, even entertaining, but without more it does not solve problems; rather, it tends to cover the absence of a reasoned solution. Open avowal of an incapacity to formulate a standard is more commendable for its honesty but is equally unhelpful to judges and litigants in later cases. But probably the most serious contribution to confusion is the disdain with which the Court treats its own precedents. A Court that considers its pronouncements to be “the law of the land,” might be expected to pay more respect to its own opinions. And yet the fairly substantial number of cases mentioned in this paper in which the Court overruled its own precedents, either openly or covertly, are only samples. The increase in the rate of acceleration in recent years is noteworthy.

The series of denationalization cases that culminated this Term in Schneider provides adequate illustration of the difficulties that result from the lack of continuity in the Court’s opinions. For this purpose the story can begin with Perez v. Brownell, where the issue was the validity of a federal statute providing that an American citizen voting in a foreign election shall lose his American citizenship. A bare majority of the Court, speaking through Mr. Justice Frankfurter, sustained the statute as one within the foreign-affairs power of the national government. The proposition was that the United States could choose not to become thus embroiled in the internal politics of a foreign country. Mr. Justice Whittaker wrote a dissent for himself, choosing the narrow if reasonable ground that where the foreign country permits American citizens to vote in its elections there can be no embarrassment to our relations with that country. For him, therefore, the statute was too broadly drawn to meet the end for which it was assertedly designed. Mr. Chief Justice Warren’s opinion, for himself and Justices Black and Douglas, chose the high road and the broad one, but one not necessarily in conflict with the Court nor, indeed, justified in the context of the particular case. His proposition was simple: “The Government is without power to take citizenship away from a

epidemics of hallowed catchword and formula. The herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization—witness the history of law and morals.
native-born or lawfully naturalized American.” He did concede that an American citizen could properly surrender his citizenship voluntarily. His essential argument, reminiscent of Philip Nolan, is grandiloquent but not strong on fact: 188

Citizenship is man’s basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens, and like the alien he might even be subject to deportation and thereby deprived of the right to assert any rights. This government was not established with power to decree this fate.

Even if all that was alleged in this paragraph were true, it would have no application to the petitioner who, before he lost his American citizenship, had dual citizenship in this country and Mexico. 184 Moreover, the essential question debated by the majority and minority was not whether citizenship can be forcibly taken from an American citizen, but whether the United States may post warning that if a citizen chose to perform the act of voting in a foreign election he thereby opted in favor of resigning his American citizenship. The real quarrel was over the majority’s proposition that: 185

Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

... But it would be a mockery of this Court’s decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so.

Mr. Justice Douglas, joined by Mr. Justice Black, also wrote an opinion, and he met the majority squarely with a different conclusion on the essential issue: 186 “§ 401(e) does not require that his act have a sufficient relationship to the relinquishment of citizenship — nor a sufficient quality of adhering to a foreign power. Nor did his voting abroad have that quality.” There were, of course, a lot of other propositions in this opinion, including one suggesting that the status of citizenship is something like the status of marriage. 187 “One who is native-born may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or for worse, except and unless he voluntarily relinquishes that status.”

On the same day that four of the Justices expressed their views on denationalization in Perez, the Court held unconstitutional a federal statute that deprived a person of his citizenship when he was guilty of desertion in time of war and had been dishonorably discharged from the

183 Id. at 64–65. (Emphasis in original.)
185 356 U.S. at 60–61.
186 Id. at 83.
187 Id. at 84.
armed services as a result. But there was no opinion for the Court. The Chief Justice, in *Trop v. Dulles*, wrote an opinion for himself and Justices Black, Douglas, and Whittaker. He rested on two grounds. The first was the one he had stated in *Perez*. This time it was supported by a flourish of horribles:

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed.

Apparently for these four Justices there are no differences in degree, only differences in kind. But assuming the validity of the position, the question is why should a second ground for judgment be necessary, especially when it is such an extraordinary one: that deprivation of citizenship is a cruel and unusual punishment, even for a crime that may properly be punished by death. In *Trop*, it was Mr. Justice Black who wrote the separate concurring opinion in which Mr. Justice Douglas joined. Again, the concurrence offered a strong argument, that loss of citizenship could not be predicated on the judgment of a military court-martial on the issue whether a dishonorable discharge should be ordered.

Mr. Justice Brennan concurred separately on the ground that the war power, unlike the foreign-affairs power, did not justify a deprivation of citizenship. He could not “see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done.” He could not see that the deterrent effect of the punishment was related to the objective sought to be achieved. The reason he was prepared to support denationalization in *Perez* and not in *Trop* was that in the former the denationalization was automatic on voting in the election and, therefore, a deterrent, but in the latter it was dependent on conviction in a military tribunal and not possibly effective until after the harm was done. The suggestion is apparently that hanging without a trial is more desirable and effective

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189 Id. at 92–93.
190 Id. at 109–10.
than hanging after trial. Justices Frankfurter, Burton, Clark, and Harlan had no difficulty in seeing that denationalization for desertion in time of war, a sanction authorized since 1865, was within the legitimate bounds of congressional discretion in carrying on war.

In the 1962 Term, the Court again held unconstitutional a statute providing for denationalization. But in *Kennedy v. Mendoza-Martinez* 191 none of the grounds asserted in the earlier cases as bases for limiting the denationalization power of Congress was relied on, although each would have sufficed to sustain the judgment that was reached. This time the Court's opinion was written by Mr. Justice Goldberg. The issue was the validity of denationalization of persons who left the country in time of war or national emergency in order to evade the draft laws. The Court overruled *Perez*, insofar as that judgment implied that denationalization was not a punishment. It went on to hold that the statutes in *Mendoza-Martinez* were "invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment — for the offense of leaving or remaining outside the country to evade military service — without affording the procedural safeguards guaranteed by the fifth and sixth amendments." 192 Implicit in this proposition is the suggestion that if Congress had provided for appropriate trial the punishment could be imposed. This was certainly inconsistent with the dissents in *Perez* and the opinions in support of the judgment in *Trop*. And it is a minor matter that in fact one of the two petitioners in *Mendoza-Martinez* did have a trial comporting with the requirements of the fifth and sixth amendments. Justices Douglas and Black announced that although they joined in the opinion of the Court, they still adhered to the dissenting opinion by Mr. Justice Douglas in *Perez*. They did not say that they were adhering to the opinion of the Chief Justice which they had also joined, nor did the Chief Justice announce adherence either to his expression of views in *Trop* or those in *Perez*. This is a little surprising since Mr. Justice Brennan, who had not joined the plurality opinion in *Trop*, concluded: 193

> It is apparent . . . that today's cases are governed by *Trop* no matter which of the two controlling opinions is consulted. Expatriation is here employed as "punishment," cruel and unusual here if it was there. Nor has expatriation as employed in these cases any more rational or necessary a connection with the war power than it had in *Trop*.

Certainly Mr. Justice Brennan is right; if *Trop* was unimpaired by the majority opinion, it was sufficient to dispose of *Mendoza-Martinez*. It would appear that *Trop* is now *de trop*.

This was the state of confusion when the question of the validity of Mrs. Schneider's denaturalization came to the Court this Term. 194 Mrs. Schneider's loss of citizenship resulted from her return to Germany where she set up domicile with no present intention to return to the United States. A conclusion in favor of the statute could have been

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192 Id. at 165-66.
193 Id. at 193.
sustained by reliance on 

That case is probably now moribund. If it had not been disposed of by Trop and/or Mendoza-Martinez, it has certainly been done in by the Schneider case. The unconstitutionality of the statute might have been rested either on the dissent in Perez or on the opinions supporting the judgment in Trop or in Mendoza-Martinez. In fact, the Court relied on none of these precedents. Indeed, it treated them very peculiarly—it stated them and then ignored them. Mr. Justice Douglas spoke for a majority consisting of himself, the Chief Justice, and Justices Black, Stewart, and Goldberg. He announced with candor: 195

Views of the Justices have varied when it comes to the problem of expatriation.

There is one view that the power of Congress to take away citizenship for activities of the citizen is nonexistent absent expatriation by the voluntary renunciation of nationality and allegiance. See Perez . . . (dissenting opinion of Justices Black and Douglas); Trop . . . (opinion by Chief Justice Warren). That view has not yet commanded a majority of the entire Court. Hence we are faced with the issue presented and decided in Perez . . ., i.e., whether the present Act violates due process . . . .

Mr. Justice Douglas went on to state the ruling in Perez and state an opposite conclusion here. He also stated the holding in Mendoza-Martinez, but did not say why it was or was not applicable. He simply concluded that the statute in question denied Mrs. Schneider due process and equal protection of the laws,196 ignoring the holding of an earlier Court that the citizenship of a woman married to a foreigner was suspended during coverture.197

Mr. Justice Clark's dissent, in which he was joined by Justices Harlan and White, is marked by the strong facts in favor of his conclusion that this congressional judgment was reasonable: 198

Here appellant has been away from the country for 10 years, has married a foreign citizen, has continuously lived with him in her native land for eight years, has borne four sons who are German nationals, and admits that she has no intention to return to this country. She wishes to retain her citizenship on a standby basis for her own benefit in the event of trouble. There is no constitutional necessity for Congress to accede to her wish.

The coup de grâce had been delivered even earlier in Mr. Justice Clark's opinion: 199 "Even the Americans for Democratic Action suggested that it was a reasonable regulation. It is a little late for the Court to decide in the face of this mountain of evidence that the section has suddenly become so invidious that it must be stricken as arbitrary under the Due Process Clause."

For those who find nothing invidious in this series of cases, three of

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195 Id. at 166.
196 See pp. 167–68 supra.
197 Mackenzie v. Hare, 239 U.S. 299 (1915).
198 377 U.S. at 178.
199 Id. at 177.
which declared a statute of the United States unconstitutional, although no five Justices are prepared to stand behind any announced principle for more than a single case, it may be disconcerting to learn that on the same day that *Schneider* was decided, *Marks v. Esperdy* in which the petitioner was deprived of his citizenship for service in a foreign army — was affirmed by an equally divided Court.

It would be interesting to know what the "law of the land" is on the subject of expatriation. Admittedly Congress has contributed to the problem by dealing with citizenship as a unitary concept when the rights it implies are many and still undefined. The specific question confronting each of the petitioners might have proved more tractable: Perez and Mendoza-Martinez sought to prevent deportation; Trop wanted a passport to get out of the country; Cort wanted a passport to get into the country; Mrs. Schneider wanted an advisory opinion.

Certainly there is something to be said, under the circumstances of the Court’s behavior, for Lord Mansfield’s advice: 201 "[C]onsider what you think justice requires, and decide accordingly. But never give your reasons; — for your judgment will probably be right, but your reasons will certainly be wrong." To this view of the judicial process might be added the observation that in the absence of reasons it may not be possible to discover whether the judgment was right or wrong, especially if, in addition to refusing reasons, the Court does not reveal the facts of the case. The Court’s memorandum decisions demonstrate the absence of novelty in this suggestion.

VI. Envoi

The time has probably not yet come for an avowal that, in the field of public law, “judicial power” does not describe a different function but only a different forum and that the subject of constitutional law should be turned back to the political scientists. These students of political affairs realized, before lawyers did, that the true measure of the Court’s work is quantitative and not qualitative. The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court’s work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.

It would appear that those who have feared that the Court, by asserting its powers too frequently and too vehemently, would risk its own destruction have been wrong. So long as the third branch — “the least dangerous branch” — does not arouse effective opposition from both of the other branches of the national government at the same time, it is in no serious danger of being curbed. And the other branches are not both likely to be aroused at the same time, in part because the “passivists” who condemn the Court for its activist role are always in the vanguard of those who rush to the defense of the Court when it is attacked for its activism.202

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201 4 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 26 (3d ed. 1874).
202 See note 60 supra.
There is no threat from the states who are far too busy committing suicide with the weapons that the Court has proffered them. One of their last gasps issued in the 1958 report of the Conference of Chief Justices, an organization that appears to have learned its lesson and is now reduced to its appropriate state of vassalage. There is no danger from the "liberal" element in the community who are in sympathy with the results that the Court has reached. They do not care who makes the laws, or how, so long as the laws are to their liking. The time to attack the Court, for them, is when the Court is formulating the wrong rules. It is then an "undemocratic oligarchy" stifling the will of the people's representatives. There is no danger to the Court from the conservative elements in the community that have maintained respect for an institution that does not exist. They are confused by the fact that the wolf is now wearing Little Red Riding Hood's outfit rather than being adorned in Granny's bed jacket.

The Court has been most fortunate in the enemies that it has made, for it is difficult not to help to resist attack from racists, from the John Birch Society and its ilk, and from religious zealots who insist that the Court adhere to the truth as they know it. Responsible and respectable people are not comfortable on the same side of the barricades with these immoderates. In the immediate future, the only real threat to the Court's power is the possibility of a political victory for the forces who conscientiously affirm extremism in defense of liberty and oppose moderation in pursuit of justice. In that event, the Court may have no more function to perform than the Supreme Court of South Africa now has.

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This Foreword has not, by any means, considered all the work of the Court's 1963 Term, nor all the cases relevant to the themes it tries to develop, nor all the relevant data in the cases that it treats. This not only demonstrates the inadequacies of this Foreword, but hints at the enormity of the task that burdens the Court. Certainly it is easier to criticize the work of the Court than to perform it. Even Professor Wechsler did not offer an adequate replacement for the Brown opinion. It behooves any critic of the Court's performance to close on a note reminiscent of the wall plaque of frontier times: "Don't shoot the piano player. He's doing his best." It is still possible, however, to wish that he would stick to the piano and not try to be a one-man band. It is too much to ask that he take piano lessons.

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203 See Lewis, States' Justices Back High Court, N.Y. Times, Aug. 9, 1964,
§ 1, p. 66, col. 1.
204 See, e.g., Bothin, Government by Judiciary (1932).
205 See Black, The Occasions of Justice 80 (1963).