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Civil rights litigation: An uncertain tradition.
(Volumes I and II)

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Rice University, 1991

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CIVIL RIGHTS LITIGATION: AN UNCERTAIN TRADITION

BY

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VOLUME I

SELF-EVIDENT TRUTHS:
THE HISTORICAL DEVELOPMENT OF AMERICAN CIVIL LIBERTIES,
1776-1968

by

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ABSTRACT

Volume I of this study examines civil rights doctrine as it developed in the United States Supreme Court. I conclude that most historians and law scholars have been incorrect in their assessment of the civil rights record of the Supreme Court; especially the Warren Court. My research indicates that great advances were made in civil rights doctrine long before the advent of the Warren Court.

Volume II of this study examines all civil rights cases filed in the United States District Court for the Southern District of Texas, Houston Division. This volume is intended to convey an impression of what a civil rights law suit actually looked like and how a trial court processed these cases from 1950 - 1974. I found that most of the federal judges were hostile towards the civil rights claims.
ACKNOWLEDGEMENTS

I want to thank Professor Harold Hyman for teaching me the historical method; the members of my committee, Professors Craig Joyce and Chandler Davidson; Mary Mapps at the Federal Court House in Houston who helped me find my way through the docket room; Bill Stephens and Allen Baquet for their patience and computer skills, which made possible the processing of the enormous amounts of data involved in this thesis; Clarence O. Bradford for his many hours of insight and discussion; and, finally, Theresa Rohr, whose patience, kindness, and editing assistance, as well as moral support, encouraged me to pursue my dream.
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We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Declaration Of Independence

INTRODUCTION

The problem every historian confronts in telling a story is where to begin. As historian Theodore H. White stated when he wrote about the 1980 presidential election, "it simply had to be seen as a climactic episode in a much longer period of time...."¹ This is also true of American civil liberties development: it has tentacles reaching far back in time.

The development of American civil liberties has been followed using various methods. The approach taken by many legal historians is to examine the origins of the Bill of Rights or the Fourteenth Amendment. This approach attempts to discern how civil rights came into being, and what the framers intended by their passage. This method, however, leaves the inquirer back in another century and fails to explain the modern era of civil liberties.

Most legal scholars equate the transformation of American civil liberties with the Warren Court. They believe the "defining event of modern American constitutional law" was the 1954 decision of *Brown v. Board of Education*. The Warren Court transformed American society through a new interpretation of the Bill of Rights and the Fourteenth Amendment, even though the basic constitutional structure had been in place for almost a century. If legal scholars are correct in beginning with the Warren Court, why did the transformation take so long to occur?

Was it, as some scholars have postulated, simply an activist Court at work setting out to remake American society? Although portrayed in a negative light, Judge Robert Bork's latest work is a good example of what most legal scholars believe happened. He explains the transformation of civil liberties as a result of the Warren Court embracing the "political role". He argues that the Supreme Court engaged in judicial activism to protect property and free enterprise following the Civil War, and

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3. Many conservative and liberal scholars have accepted this viewpoint. Of course the liberals praise the Warren Court for doing what was right and the conservatives condemn the Court for legislating from the bench.
gives the following analysis. In 1937, the Court lost a war with Franklin Roosevelt and abandoned economic due process. The Court, in 1938, discovered "Discrete and Insular Minorities" in a footnote authored by Justice Stone.\footnote{United States v. Carolene Products Co., 304 U.S. 144 (1938).} This famous footnote "adumbrated a constitutional revolution."\footnote{Id. at 61.} It became the "doctrinal foundation of the Warren Court."\footnote{316 U.S. 535 (1942).} In addition, Substantive Equal Protection was created by the Court in 1942, in \textit{Skinner v. Oklahoma},\footnote{R. Bork, \textit{supra} note 2, at 69. This paper is not a response to Bork or any other current writer. I did not even read Bork’s book until I had almost finished the paper. He was, however, current, controversial and well known at the time.} in an effort "to reach a result that existing doctrine did not permit." Up to this point, Bork is fairly representative of the current literature.

Judge Bork’s conclusion, however, is what separates him from more traditional approaches. He states that the new doctrine then "led to more judicial lawlessness..." during the Warren Court. The Warren Court, therefore, "occupies a unique place in American law. It stands first and alone as a legislator of policy..."\footnote{Id.} Most other approaches agree in some respect that the Warren Court legislated policy. The disagreement is over whether this was a good thing or simply "judicial lawlessness." Fortunately, the answer is not important to this inquiry. The central focus of this paper is how civil liberties developed.
This inquiry began by asking what happened during the Warren Court era to cause this sudden shift in American civil liberties development. I examined the period just before the Warren Court to discover what foundation had been laid for a judicial revolution during the fifties and sixties. My investigation continued to take me back further and further until I became confused. It appeared that an individual rights revolution had begun to occur long before the Warren Court era. However, a clear pattern was difficult to discern because of several apparently anomalous cases, primarily the Japanese Internment cases of World War II.

As my search broadened by examining the larger environment from which the Court was operating and lengthening the time horizon back into the past, an amazing story began to unfold.

**Organization of the Paper**

What happened in America was not simply a local or national event, but rather a part of a chain of international events. This paper will attempt to reflect the multitude of impulses that influenced civil liberties development. Because the real world does not develop in a linear fashion, this paper does not have a linear structure. The result, organizationally, is an unconventional structure that hopes to bring together the factors which shaped the development of what is now a historical phenomenon. If the
reader can resist the desire for a traditional approach to structure and accept this unconventional approach, the overall impact of the story should be enhanced.⁹

**Overview**

This paper will focus on the most important factors that influenced civil liberties development: race and world political events. The story with its ideological underpinning: the Declaration of Independence.

The American Revolution then traveled abroad where it set Europe ablaze, especially France. From Europe, a moral revolution returned to America and rekindled the old flame of the legitimacy of slavery.

Because of the centrality of slavery to American civil liberties development, a considerable amount of space is devoted to the subject. The Civil War and its aftermath proved to be a watershed in American Constitutional law. After the War, seeds were planted that would not bear fruit for almost a century. The advances made by Blacks during Reconstruction, and the time shortly thereafter, serve to highlight the tragedy of their subsequent fall into the abyss of racism's darkside.

The social caste system that developed in the South following reconstruction is chronicled in some detail. Most important during this period was the Supreme Court's role in

⁹. As one reader of this paper has commented, it reads like a Public Television Station documentary: it phases in and out subjects that eventually combine to communicate a sense of the time.
justifying, and then assisting the South in establishing, a horrifying system of apartheid. The Court traded human dignity for the protection of private property. In the process, the Court emasculated the North's Civil War victory as embodied in the Civil War Amendments.

Finally, the stench of repression becomes too great for the High Court to bear. The ascension of Charles Evans Hughes to the Court signaled a change in course. The Court's defeat at the hands of Franklin Roosevelt accelerated the shift towards an emphasis on human, as opposed to economic, rights.

World War II catapults the Nation into world power from which, unlike the First World War, it could not retreat. With the explosion of the atomic bomb, America entered into a fearful death struggle with Communism. As a result of this "Cold War," the Nation was forced to either rectify its illicit affair with apartheid or concede a great defeat: loss of the world.

Unable to commit to so great a loss, the Warren Court thus took center stage in the final acts of a tragedy worthy of the Greeks. Our heroes throughout this drama are the twins, freedom and equality. It is the light of this past that best illuminates the Court that has for so long been shrouded in legend, myth and, above all else, controversy.
PART I: SETTING THE STAGE

The American Declaration of Independence

A key concept in American law is that the government has limits or, conversely, that the people have rights. In 1215, English Barons forced King John to accept the Magna Carta.10 The Great Charter checked unlimited governmental power, which is best exemplified by the King's declaration that "[t]he Law is in my mouth."11

Drawing upon a historical right to rebel12 against unreasonable governmental power, the American colonists issued their Declaration of Independence on July 4, 1776. As evidence of the colonist Christian heritage, the Declaration proclaims that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Nevertheless, slavery and the trafficking in slaves was a significant part of the colonist existence. Reconciling these two ideas, brotherhood and class society, proved to be the major theme of the American future.

11. Id. at 170.
12. The Declaration begins, "When in the Course of Human events it becomes necessary for one people to dissolve the political bands which have connected them with another,..."
Ordering Affairs

If we view the contract between the government and the governed as a Constitution, then the first Constitution of the United States was ratified on March 1, 1781, commonly known as the Articles of Confederation. The Articles, however, were such a failure that they were soon replaced by the work of a Constitutional convention in 1787. Constitution II was ratified on March 4, 1789.\(^\text{13}\)

However, the second Constitution was soon replaced by a third Constitution. Winston Churchill, writing about the adoption of the American Constitution states that small farmers, backwoodsmen and others felt betrayed by the new Constitution. They had fought to eliminate an absolute monarch and in the process they had gained their freedom. Now, they were being "asked to create another instrument no less powerful and coercive. They had been told they were fighting for the Rights of Man and the equality of the individual." But in the document they saw "an engine for the defense of property against equality."\(^\text{14}\) To remedy this defect, the Bill of Rights was adopted in 1791, and together with the second Constitution, they framed American government until the Civil War (hereinafter "the Constitution").

\(^{13}\) 2 Encyclopedia Britannica 527 (1973). One noted constitutional scholar has argued that we ignore the fact that the 1787 Constitution is number two in order to give it more permanence and lessen the chance of there being a number three, a number four, etc.

The Constitution derived in great part from the Magna Carta.\textsuperscript{15} Incorporated in it was the notion of a very limited national government with explicitly defined powers. The United States Constitution went further than Magna Carta by including devices to check governmental power. In the design of a federal system, the framers vertically distributed power between the national government and the state governments.\textsuperscript{16} At the national level, the Constitution further divided power into three branches of government. In addition, enumerated within the document were specific prohibitions against the national government. All of these devices were incorporated into the Constitution to ensure that government remained within its boundaries: something Magna Carta had failed to do.

However, according to Supreme Court Justice Thurgood Marshall, the Constitution of 1787 did not yield a "more perfect Union." It was "defective from the start."\textsuperscript{17} According to Justice Marshall, the greatest defect was that the "moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths 'that all men are created equal',..."\textsuperscript{18} The Constitution had failed to incorporate the Declaration of Independence.

\textsuperscript{15} 3 Encyclopedia Britannica, Bill of Rights 618 (1973).
\textsuperscript{18} Id. at 1339.
"We the People" was an exclusive, not an inclusive, phrase. It excluded the majority of American citizens. William Lloyd Garrison called the Constitution a "covenant with death and an agreement with Hell." This defect, however, would not be addressed until the next century.

The American Experiment Goes Abroad

The American Revolution inaugurated an "era of world revolutions." Churchill stated that "across the Atlantic shone a noble example of freedom which in the end was to exercise a formidable influence upon the world." France was soon caught in the grip of a revolution. Among intellectuals of the period, there was a sense of human kinship. The poet William Wordsworth, along with others, believed that the French Revolution "was the dawn of universal freedom and viewed the French as the heroes of humanity."

The ideas enunciated by the French Declaration of the Rights of Man and the Citizen of 1789 were supranational in character. Richard Price, an English minister, published a sermon in 1789 in which he attempted to apply the logic of

19. Id.
24. Id. at 192.
25. Id. See Churchill, supra note 14, at 267. "The French Revolution was to spread out from Paris across the whole Continent." Id.
the Declaration of Independence and of the French National Assembly to Britain: "The light of liberty that had first appeared in the freeing of the United States was now 'reflected to France, and there kindled into a blaze that lays despotism in ashes, and warms and illuminates Europe! Tremble, all ye oppressors of the world! ... Restore to mankind their rights'...."\textsuperscript{26} The touch words of the French Revolution were liberty, equality and brotherhood. In this spirit, France abolished slavery in the French colonies in 1794.\textsuperscript{27} Thomas Paine wrote "The Rights of Man" in support of the French Revolution.\textsuperscript{28}

British statesman and political thinker, Edmund Burke, was alarmed by the initially favorable reaction the French Revolution received in England in 1789. He had previously opposed the oppression of the American colonies but he refused to see the French Revolution as an extension of the American Revolution. He believed that the eventual result of "whipping the slate clean would be to leave the individual defenseless against the power of the all-encompassing state..."\textsuperscript{29} The French Revolution had reverberations well into the future. Churchill stated that "[e]very great popular and national movement, until the Bolsheviks gave a fresh turn to events in 1917, was to invoke the principles set forth at Versailles in 1789." For

\textsuperscript{26} Id. at 193.
\textsuperscript{27} Garraty, \textit{supra} note 21, at 771.
\textsuperscript{28} 4 Encyclopedia Britannica 433 (1973).
\textsuperscript{29} Willcox, \textit{supra} note 23, at 194.
America, the reckoning with the universal principles of equality would come with the second World War.

The French Revolution, in placing primacy upon the principle of the equality of all men, sought to destroy all societal distinctions. In destroying these distinctions, they subordinated the rule of law. The end result was an orgy of violence known as the Reign of Terror.\textsuperscript{30} Napoleon, in 1799, stated, "Upon my return to Paris I found among authorities, an agreement upon only one point, namely that the Constitution was half destroyed and was unable to save liberty."\textsuperscript{31} This fear of equality gripped America and held it hostage for most of the next two centuries.

\textbf{The Beginning of the End of Slavery}

The English reacted with horror to the French Revolution's excesses. The English, however, could not completely contain the humanitarian notions set fire by the French Revolution. Christianity in England began to mean a personal involvement in men's daily lives. In 1833, England, under pressure from Christian organizations, passed a statute which freed 700,000 black slaves at a cost of 20 million pounds.\textsuperscript{32} According to one historian, "[t]he anti-slavery movement helped forge a new instrument in British domestic politics- the weapon of organized moral indignation."\textsuperscript{33} The anti-slavery movement combined with

\begin{itemize}
\item[30.] Garraty, \textit{supra} note 21, at 753.
\item[31.] \textit{Id.} at 773.
\item[32.] W. Arnstein, Britain Yesterday and Today 44 (1976).
\item[33.] \textit{Id.} at 45.
\end{itemize}
British naval power ended slavery in West Africa and brought world slave trafficking to a halt by 1850. This same spirit of moral reform led to other areas of social reform such as legislation to protect child workers. America soon contracted the desire to abolish slavery but with drastically different results.

If ever America undergoes great revolutions, they will be brought about by the presence of the black race on the soil of the United States; that is to say, they will owe their origin, not to the equality, but to the inequality, of condition.  

Alexis De Tocqueville (1805-1859)

**Before the Storm: American Legal Developments to 1860**

The next significant legal event in America was the United States Supreme Court’s decision in Marbury v. Madison in 1803. The Marshall Court decided the branch of the federal government that would have superiority in interpreting the Constitution. Naturally, the Court gave itself this power. More importantly, it embedded the idea of judicial review into the fabric of our Constitution. From 1803 forward, some have argued that the Supreme Court has acted as an ongoing constitutional convention, rewriting the Constitution to fit the needs of the time. In any event,

34. Id. at 164.
35. Quoted in Graham, at 86.
36. 1 Cranch 137 (1803).
it thrust the Court into the crucial role of deciding the issue of race.

In 1833, the same year in which the British slaves were freed, the United States Supreme Court decided *Barron v. Baltimore*. The Court held that the Bill of Rights only limited the Federal government; its provisions did not apply to the state governments. This holding was probably true to the intentions of those who had made the Bill of Rights a part of the Constitution.38

After *Marbury*, where the Court first declared an act of Congress unconstitutional, 54 years would pass before the Court would again strike down an act of Congress. Unfortunately, the Court exercised the power in the now infamous case of 1857, *Dred Scott v. Sanford* Abraham Lincoln called the decision "an astonisher in legal history." A future Chief Justice of the Court described the decision "as a self-inflicted wound."41

*Dred Scott*, a slave, was purchased in Missouri, a slave state, by Army doctor John Emerson. His owner had taken him to two free states: 1) Illinois, where the state constitution forbade slavery; and, later 2) Wisconsin, where congressional statute forbade slavery. After a number of years of residing in these free states, they returned to

37. 7 Pet. 243 (1833).
39. 19 How. 303, 15 L.Ed. 691 (1857).
41. Id. The statement was made by Chief Justice Hughes.
Missouri where Scott's owner died. Scott was then sold to John Sanford. Scott sued in federal court arguing that his residency in the free states entitled him to freedom. Sanford, however, argued that the Missouri Compromise, passed by Congress in 1820, was unconstitutional. The central issue was whether the Wisconsin territory was free, i.e., whether Congress had the power to prohibit slavery in federal territories? Politically, the territories were the battleground between the free peoples of the North and the "slave power" of the South.42 "Republicans believed that the presence of slavery in the territories of the West would make it impossible for Northerners to migrate there; the social systems of the North and South were not compatible... [Northerners] would be choked off by the presence of slavery. If the South had its way, the Republicans believed, the North and Midwest would become islands of freedom in a sea of slavery."43

Writing for the Court, Chief Justice Taney held that Scott had no right to sue because, as a Negro, he could never be a citizen of a state or of the United States whether he was a slave or free. The Court also held that the Missouri Compromise, operating for over 34 years, was unconstitutional under the Fifth Amendment due process clause because Congress could not interfere with the property rights of slaveowners by forbidding slavery in the territories. Even though Congress had been outlawing

42. Id. at 14.
43. Id.
slavery in federal territories since before the adoption of the Constitution itself, the Court ignored existing precedent and struck down the Congressional Act. Finally, Taney wrote:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution...was framed and adopted. ... They had for more than a century before been regarded as beings of an inferior order; altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which white man was bound to respect;... He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

Wrapped in a sense of duty, the Court declared negroes to be sub-human, mere property. The holding was on a collision course with the rest of Western thought and the decision "ignited a fire storm of new controversy over the slavery issue." Within three years, the nation was at war in an attempt to resolve the negro question. Out of the Civil War, a new Constitution was forged. As Lincoln prepared to occupy the White House in 1861, Southerners increasingly began to speak of secession. They correctly perceived that the Republicans would attempt to gain control over the Supreme Court through appointments and reverse the Dred Scott decision. Southerners felt that the Republican refusal to support the Supreme Court and the Dred Scott decision was an indication of their "reckless disregard of

44. Lasser, supra note 40, at 22.
45. 19 How. 303.
the Constitution and laws of the land..."47 Georgia Congressman John Underwood declared: "Obedience to the law of the land and the decision of our Supreme Court—justice and right. When this shall be heeded by the people of the North, I will then talk for the Union."48 Congressman William Simms of Kentucky stated that "there is nothing now left between the South and her assailants, except the Democratic party of the northern States and the Constitution of the Federal Union as expounded by the Supreme Court."49

**What Will It Cost And Who Will Pay?**

To gain a proper perspective on the problem, the following information is relevant. It has been estimated that a slave selling for an average price of $1000 in 1850 would have the same value today of $50,000 to $75,000. Anyone owning twenty or thirty slaves would be considered a millionaire today.50 In 1860, slaves represented the South’s major capital investment. The expected income from slave labor had been capitalized into the price of the slave. If slavery were compromised, the wealth that it represented would be reduced or destroyed. Southerners viewed Lincoln’s position as leading to a long-term erosion of their wealth.

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47. Lasser, *supra* note 40, at 50.
In the North, slavery was gradually abolished. At the time of the American Revolution, slaves existed in all northern colonies. By the time of the Civil War, slavery in the Northern states,51 as in most of the North Atlantic world, had been abolished.52 Northerners, however, were "trapped by a Constitution that legitimized slavery..." and were unable to rid the entire Union of this great evil. The moral issues began to torment them as they "struggled to reconcile their obligations as citizens with ...a labor system that crucified their consciences."53

Slavery could have been destroyed in several ways. The two most likely means during the nineteenth century were prohibition or purchase. As in the British example, buying the slaves and freeing them shifted the financial burden to the taxpayers. Prohibiting slavery placed the financial burden on the slave owner. The ultimate question of the Civil War, then, was who was to bear the cost of freeing the slaves. Because the South perceived that it would not be adequately compensated for its capital investment, it took measures to protect its wealth through secession.

The Supreme Court Makes A Bad Problem Worse

Although The Supreme Court correctly interpreted the Fifth Amendment’s protection of private property, the Court

51. C.V. Woodward, The Strange Career of Jim Crow 17 (1955) (Slavery had virtually disappeared by 1830. Only 3500 slaves were left in the free states).
52. Gunderson, supra note 50, at 263.
53. Garraty, supra note 21, at 894.
misapplied that concept in the *Dred Scott* case by unnecessarily extending slave protection into the territories where it was not needed. Rather than extending protection for slavery in the territories and handicapping Congress in dealing with the slavery question, if the Court would have given the South assurances that current capital investments would have been protected from legislation via the Fifth Amendment (and thus any attempt to abolish existing slavery would have required compensation), then perhaps a purchase solution would have been devised that could have averted the Civil War.

Although some of the preceding discussion is fanciful speculation, its purpose is to highlight the choices and the potential alternate outcomes that were available to the Court at the time. Even though slavery existed for thousands of years prior to the 1800's, it had become a moral issue for many Northerners and for much of the world. Consequently, the Civil War may have been inevitable since Northerners would most likely have been unwilling to pay to abolish a moral evil. Lincoln, shortly before the war, properly characterized the two positions: "You think slavery is right and ought to be extended; while we think it is wrong and ought to be restricted. That I suppose is the rub."54

Through its *Dred Scott* decision, the Court left the nation with a gaping hole in its institutional framework for

54. Id. at 904.
dealing with the slavery question. One economist aptly summed it up: "What was involved in this crisis was an unusually large conflict of interest, one which the routine framework of the society was simply not designed to handle." Only blood could now reveal the future of the Nation and its Constitution.

The Civil War: What Was It All About?

It is without serious contention that slavery was the major issue of the Civil War. Southerners couched secession in terms of States Rights, liberty and self-government, but behind that proposition was slavery or, as noted above, property. On the other hand, the North, fought for preservation of the Union and to eliminate future collision with a Southern nation. But if the North won, left unsolved was the question of what would happen to the freed slaves?

In the South, segregation before the War would have been impossible. Black domestic servants lived closely with their white owners. For the convenience of the masters and control of the slaves, integration was practiced throughout

55. Id. at 266.
57. Id. Morrison states that "in the first years of trial, the prospect of seeing slaves sent no blood leaping through Northern veins. It was the simple sentiment of The Union forever." The destruction of the Union, believed Lincoln, "would be a victory for the enemies of freedom everywhere." Id. at 618.
the South. The closeness, however, often resulted in familial bonds being established between the two races. Whites and blacks frequently cohabitated such that by 1860 at least 12 percent of the blacks in the South were mulattoes; and, the number was growing. In Southern cities, the percentage of mulattoes was three to four times as large; although in absolute numbers, there were never that many blacks concentrated in Southern cities.58

This is not to say that things were great in the South. To the contrary, Southern slave laws reduced the slaves to property. Southerners lived in constant fear of a slave uprising, a race war. De Tocqueville commented that "race war is a nightmare constantly haunting the American imagination."59 Southern law was designed to brutally crush any attempt at rebellion. Limits were placed on manumission to minimize the free black population. "The South became, in a way, a kingdom of fear—fear of the influence of free blacks, fear of the North, fear of abolitionists."60 Whites wanted Blacks close for convenience and control purposes.

"Free" blacks in the South were feared and unwanted, a deadly combination. Brutally disabled by law, free Blacks were heavily regulated as to what they could and could not do. In Maryland, they couldn't even own a dog.61 As one

60. Id.
61. Id.
Georgia judge stated, "the free black resides among us, and yet is a stranger." 62

In contrast to the South, the North was segregated prior to the war and gave birth to "Jim Crow" laws. 63 Although there were no slaves, Blacks were "made painfully and constantly aware that he lived in a society dedicated to the doctrine of white supremacy and Negro inferiority." 64 Conditions for negroes were even harsher in the free states of the West. Alexis de Tocqueville wrote, "The prejudice of race appears to be stronger in the states that have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those states where servitude has never been known." 65 Blacks were excluded from jury service and public transportation, and only five states permitted Blacks to vote. 66 Many states prohibited a Black from even testifying in court where a white was a party.

The earliest school segregation case was in Massachusetts in 1848. 67 A five-year-old Negro girl was

62. Id.
63. Woodward, supra note 51, at 17. Jim Crow is the name given to a series of laws that enforce segregation of the races. Id. at 7. The origin of the name "Jim Crow" is unknown. Thomas Rice wrote a song and dance called "Jim Crow." Jim Crow was also a blackfaced character in a minstrel show in the 1830s. The theme of one of the songs was "Jump, Jim Crow." Morison, supra note 56, at 792.
64. Id.
65. Id. at 20.
66. Id. Those states were Massachusetts, New Hampshire, Vermont, Maine, and Rhode Island.
denied admission to a Boston public school. Charles Sumner, later the Republican leader of the Senate following the Civil War, brought suit to have the child admitted arguing that segregated schools violated the girl's right to equal treatment before the law. Surprisingly, this argument for equality was made before the Fourteenth Amendment's equal protection clause was even grafted onto the Constitution. (In fact, Sumner would be one of the principal architects of the Reconstruction Amendments). Sumner based his argument for equality on the "legacy of the Magna Carta cherished by the colonists and preserved from the earliest times of their self-government."68 He argued that segregation perpetuated racial prejudice and was the "mark of a social caste system."69 This same argument reappeared 106 years later in the landmark case of Brown v. Board of Education. This time, however, the argument failed. The Supreme Court of Massachusetts denied the girl's claim. Chief Justice Shaw's opinion later sounded prophetic in American jurisprudence. In response to Sumner's equal protection claim, Shaw wrote that different classes of people could be treated differently.70 For

68. Id.
69. Id.
70. Id. Judge Shaw wrote: When this great principle [of equality] comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, ... are equally entitled to the paternal consideration and protection of the law,..." Id.
Blacks in Massachusetts, separate educational facilities did not violate the principle of equality.

Finally, even the Great Emancipator, Abraham Lincoln, may have believed in segregation. "We can not, then, make them equals." In 1858 he stated:

> I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races [applause]- that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the black and white races which I believe will for ever forbid the two races living together on terms of social and political equality...I as much as any other man am in favor of having the superior position assigned to the white race."

It would be misleading, however, to state that Lincoln, or even most Northerners, definitely believed in "segregation." Recent scholarship has cast serious doubt on many of these views. 72 Lincoln, during his debate with Douglas, urged the American people to "re-adopt the Declaration of independence, and with it, the practices, and policy, which harmonize with it..." 73 This was an appeal to the great founding principle of equality. According to one historian, Lincoln's central vision of the country was "rooted in the Declaration of Independence and the ideas of liberty and equal opportunity that the Declaration implanted

71. Id. at 21.
Lincoln often professed his belief that "all should have an equal chance." Such diverse views were not the product of an inconsistent politician, but rather demonstrate the uncertainty that belie such concepts as liberty and equality on the eve of the Civil War. The War was not fought for principles, such as equality, but for more concrete gains such as the eradication of slavery. Slavery, as a morally repugnant institution, had fallen into international disrepute and had to be abolished.

The Civil War's Aftermath: A New Constitution

According to Justice Thurgood Marshall, "While the Union survived the Civil War, the Constitution did not." Despite the definite ending of the War in 1865, something more powerful and pervasive than continued warfare and resistance took place: white Southerners resolved to keep the newly freed negro subservient. A Southern underground, the Klu Klux Clan and the Knights of the White Camellia, applied violence and terror to maintain white superiority.

In March, 1865, Congress established the Freedman's Bureau to assist the newly freed Blacks. On January 1, 1863, Lincoln had issued his Emancipation Proclamation ending slavery in the South. The Proclamation, however, was of dubious Constitutional value. It was questionable if

74. Id. at 115.
75. Id. at 116.
76. Marshall, supra note 17, at 1340.
77. Morrison, supra note 56, at 706.
it ended slavery, a property right protected by the Constitution. To rectify this legal problem the Thirteenth Amendment was ratified on December 18, 1865, officially ending slavery throughout the United States. The North's purpose for fighting the war became embodied in the supreme law of the land.

**Reconstruction**

By December, 1865, every former Confederate State except Texas had a new government. State governors in these States convened constitutional conventions which invalidated their former secession laws, repudiated war debts, and recognized the abolition of slavery. Negroes, however, were still not allowed to vote. Furthermore, the new state governments enacted "Black Codes" to keep the Negro "in his place." By the time Congress was scheduled to convene on December 4, 1865, Reconstruction appeared almost complete.  

Liberty alone was insufficient to alter conditions in the South, however. Lincoln expressed this thought when he said: "[W]hat is freedom for the lion is death for the lamb." In a state of nature, freedom is death to the weak. As property, the slaves were protected like all major investments with the full force of the law. Former slaves, having spent their lives as children in the sense that they were never allowed to make decisions affecting their own

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79. Id. at 712.
80. Ingle, supra note 74, at 272.
welfare, left them prey to attack by whites. To maintain the dependency, whites used the law to deny blacks their rights as free citizens. Slavery had ended in name only.

Republican Congressman Lyman Trumball recognized the problem. He stated that the South had replaced the Slave Codes with Black Codes and that these "still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished." Northern Republicans realized that liberty, in order to be effective, necessarily included some form of equality. In March of 1866, led by Republican Senator Charles Sumner of Massachusetts, Congress passed a Civil Rights Bill intending to grant the newly freed Negro some measure of equality.

President Johnson immediately vetoed the Bill because he feared that it would make citizens of Chinese, Indians, and Gypsies as well as Blacks. He even questioned making Blacks citizens: "[F]our million of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and qualities of the United States?"82 Congress passed the bill over his veto and on April 9, 186683 the Nation had its first Civil Rights law.

The 1866 mid-term Congressional elections were a clear repudiation of President Johnson's handling of the defeated South. Congress convened in 1867 determined to counter the

Southern Black Codes. Republicans believed that if these Codes were allowed to exist, then they would have won a "hollow victory." In addition, even though the Civil Rights Act was upheld by two federal circuit courts in 1866 and 1867, Congress feared the Supreme Court would find it unconstitutional.

Consequently, Congress enacted new legislation to counter the recalcitrant South. The Fourteenth Amendment was passed to shore up the Civil Rights Act and it was fully ratified on July 28, 1868. The Fifteenth Amendment, granting Blacks the right to vote, was ratified on March 30, 1870. Two months later, Congress enacted a new Civil Rights Act, and yet another one in 1875, which outlawed discrimination in places of public accommodation. Congress also passed the Military Reconstruction Act on March 2, 1871, which placed the Southern States under military rule and invalidated their existing governments. Radical Reconstruction had begun.

The Civil Rights Act of 1866 was soon tested in the courts. A series of enforcement suits were filed in both state and federal courts, and Negroes won most of them.

85. 18 Stat. L. 140 (1870).
86. 18 Stat. 335 (1875).
From 1865 to 1880, the trend was definitely toward a wider acceptance of Blacks in public places and accomodations.\textsuperscript{89} During this period, the 14th Amendment firstame before the Supreme Court in 1873 in the \textit{Slaughter-House Cases}\textsuperscript{90}. The case involved the constitutionality of a Louisiana law regulating slaughter houses. The Court upheld the law and declared that the primary purpose of the Amendment was to confer citizenship rights on Negroes and to protect them from injustice. Although this may sound like a victory for Blacks, it must be added that the Court then proceeded to define national citizenship as an empty vessel. The Court used the opportunity to emasculate the Amendment’s "majestic generalities." In effect, the priviledges and immunities now had no meaning while the rest of the Amendment was given an extremely narrow reading. The Court attempted to deny that the War and the Amendments had fundamentally changed the nature of the relationship between the national government and the individual. This decision sent the Court down a perilous road. One commentator stated that, "Few cases more pregnant with vast results have ever been in any court."\textsuperscript{91}

\textbf{Early Victories}

In January, 1871, a Negro named Robert Fox boarded a streetcar in Louisville, Kentucky. After paying the five-

\begin{itemize}
\item \textsuperscript{89} \textit{Id.} at 15.
\item \textsuperscript{90} \textit{16 Wall.} 36, \textit{21 L.Ed.} 395 (1873).
\item \textsuperscript{91} \textit{Waite, The Negro in the Supreme Court}, \textit{30 Minn. L. Rev.} 219, 229 (1946).
\end{itemize}
cent fair, he proceeded to sit in the White section of the car. The conductor told him to move to the black section on the outside of the car directly behind the horses. Fox refused and the conductor threw him off the car. Fox filed suit in federal district court against the streetcar company claiming the discriminatory policy of the company was illegal. The court instructed the jury that under federal law, common carriers must serve all passengers equally. The jury awarded Mr. Fox fifteen dollars in damages and $72.80 in legal costs.92

Despite Fox's victory, the streetcar company continued to segregate. As a result, Negro leaders in Louisville decided to challenge the company with a "ride-in." On May 12, a Negro boy boarded the train and sat in the white only section. This time the conductor simply stopped the car and began smoking a cigar. A large crowd, which included the governor of Kentucky and the police chief of Louisville, gathered outside the streetcar. Soon, a mob entered the car, dragged the boy from the car and beat him. The only person arrested was the boy for disturbing the peace. In the city court of Louisville, the judge ruled that the company was not obligated to treat Negroes the same as Whites. The boy was fined and the Negroes of Louisville were warned not to try it again.

Negroes in Louisville continued to board the train and sit in the White section. Some conductors not only stopped the cars, but abandoned them as well. Occasionally, the Black passengers would even begin to drive the abandoned streetcar. Mobs began to attack the Blacks and the city veered on the edge of a race riot. Federal marshalls and the United States attorney backed the Negroes and proclaimed that court action would be taken if necessary. President Grant considered sending federal troops to Louisville to enforce the Negroes rights.

Finally, the streetcar company conceded by permitting Blacks to ride where they chose. Louisville's streetcars remained integrated for several years. Negroes, with federal backing, made significant advances in integrating public facilities until the late 1880s when the Supreme Court began to change the course of history.

In contrast to the Louisville victory in 1871, 163 negroes were murdered in Florida that same year. In the area around New Orleans that year, 300 blacks were murdered. Whites were establishing supremacy through the use of terror.93 Blacks lived in an era of lynching which reached an apex in 1892. The price paid for liberty was not cheap.

There were other court victories, however. In 1873, a Negro woman was removed from a train car reserved for white women. She sued the railroad which was operating under an 1863 Act of Congress which prohibited such discrimination.

93. Morison, supra note 56, at 793.
She was awarded damages which was later upheld by the
Supreme Court. 94

PART II: THE SOUTH TRIUMPHS

Justice

That Justice is a Blind goddess
Is a thing to which we black are wise:
Her bandage hides two festering sores
That once perhaps were eyes.

by Langston Hughes 95

The Court Sends An Ambiguous Signal

Ominous developments for Blacks occurred in the 1876
Supreme Court term. In 1873, following a massacre of blacks
in Louisiana, Cruikshank and several others were convicted
of violating the conspiracy provisions of the 1870
Enforcement Act, which had been passed to enforce the
Fifteenth Amendment. He, as well as others, had used
violence and terror to keep Negroes from voting in National
elections. The Supreme Court held that "it does not appear
in these counts that the intent of the defendants was to
prevent the parties from exercising their right to vote on
account of their race, etc., it does not appear that it was
their intent to interfere with any right granted or secured
by the Constitution or laws of the United States. We may
suspect that race was the cause of the hostility; but it is

L.Ed. 675 (1873).
not so averred." The indictments did allege, however, that "the parties" were Negroes, but the Supreme Court conveniently ignored this evidence.

During that same term, the Court decided the case of United States v. Reese. Reese had been prosecuted under the 1870 Enforcement Act for refusing to allow a Negro to vote in Kentucky. This time the Court held that the 1870 Act was "not appropriate legislation" and was therefore unconstitutional. According to the Court, the Amendment merely created a right not to be discriminated against; it did not create a right to vote. The Cruikshank and Reese decisions were dark clouds on the horizon of Black progress.

A Clear Message To Women

In 1873, the Court ruled that the Fourteenth Amendment did not prohibit a state from excluding females from the practice of law. Unlike other groups, women were not entitled to equal protection of the laws. In 1875, the Court held that neither the Fourteenth nor the Fifteenth Amendment gave women the right to vote. According to the Court, the War had changed very little.

Leading A Counter-Revolution

96. 92 U.S. 542, 23 L.Ed. 588 (1876).
97. 17 Wall. 445, 21 L.Ed. 675 (1873).
In 1876, Reconstruction ended. In 1877, the Court first encountered "Jim Crow" in another case coming up from Louisiana, *Hall v. DeCuir.* Under a Louisiana statute passed during Reconstruction, common carriers were forbidden from discriminating on the basis of race. A Black woman purchased a ticket on a steam boat from New Orleans to another point in Louisiana. When she was ejected from a white cabin, she filed suit in state court. The Louisiana Supreme Court upheld her claim. The United States Supreme Court reversed, however, holding that the law was unconstitutional. Further, the Court found that it violated the commerce clause of the United States Constitution as only Congress had the power to regulate interstate commerce. In finding that the law infringed upon interstate commerce, the Court stretched the commerce clause in a way that was not repeated again until 1942. The Court stated, "While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."

Despite the *Hall* decision, a note of hope sounded in 1880 when the Supreme Court struck down a West Virginia law which prohibited Blacks from serving on juries. In *Strauder v. West Virginia,* the Court, under the Fourteenth

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100. Urofsky, *supra* note 83, at 474.
101. 95 U.S. 485, 24 L.Ed 547 (1877).
103. 95 U.S. 485.
104. 100 U.S. 303 (1880).
Amendment, held that States may not officially discriminate against Blacks in the selection of juries. The Court noted that such a law implied legal inferiority in civil society and constituted a step toward reducing the race once more to servility. 105

In 1881, the Court decided Neal v. Delaware.106 Delaware's Constitution gave free white males the right to vote. A state statute limited jurors to qualified voters, thus explicitly excluding blacks. Justice Harlan wrote the opinion of the Court declaring that these Delaware laws, when taken together, were unconstitutional under the Civil War Amendments.

When the Strauder and Neal cases are read together with the Rives decision,107 there is little to thank the Court for. In Virginia v. Rives, the Court held that the absence of blacks from jury panels did not necessarily mean that blacks had been deliberately excluded by the state. Overt legal discrimination was unconstitutional whereas "coincidental" exclusion was not.

Extralegal discrimination was also widespread during this time. In 1879, William Davis, Jr., a former black slave, attempted to enter the New York City Grand Opera House, but he was turned away by the doorkeeper. In Topeka, Kansas, Bird Gee was refused service in a hotel dining room.108 The Justice Department filed suits in these and

105. Strauder v. West Virginia, 100 U.S. 303 (1880).
106. 103 U.S. 370 (1881).
107. 100 U.S. 303 (1880).
several other cases to stop the illegal discrimination, and they became known as the Civil Rights Cases.

In 1883, for the third time in U.S. history, the Supreme Court used its awesome power to declare an act of Congress unconstitutional in the Civil Rights Cases.¹⁰⁹ Despite passage of the thirteenth, fourteenth, and fifteenth amendments, the Court held that Congress lacked the power to pass the 1875 Civil Rights Act. The provisions in the amendments granting Congress the power to enforce their substantive provisions by "appropriate legislation" did not reach private acts of discrimination, according to the Court. As to the fourteenth amendment, the Court stated, "it is state action... that is prohibited. Individual invasion of individual rights is not the subject-matter of the [14th] amendment." As to the Fifteenth, the Court stated, "An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; ... but unless protected in these wrongful acts by some shield or state authority, he cannot destroy or injure the right;..." Finally, the Court proceeded to banish the Thirteenth Amendment from the Constitution. It held that "it would be running the slavery argument into the ground to make every act of discrimination which a person may see fit to make as to the guests he will entertain, or

¹⁰⁹. 109 U.S. 3 (1883)
as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." 110 This decision marked a dark day for Black history.

Using the same inkstand that Chief Justice Taney used in writing the Dred Scott opinion, Justice John Marshall Harlan penned a most eloquent dissent. The only Southerner, and a former slave owner, Harlan was the lone champion of the blacks. 111 He wrote: "Constitutional provisions adopted in the interest of liberty, and for the purpose of securing freedom through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish...and which they supposed they had accomplished by changes in their fundamental law." 112

The Civil Rights Cases, along with the DeCuri decision, meant that neither the State, nor the Federal government, could address societal discrimination. Congress was only entitled to prevent States from acting overtly, such as attacking an explicit state law prohibiting blacks from serving on a jury. No government, however, could deal with private acts of discrimination. As a result, Blacks now stood defenseless against the hatred of Southern Whites.

110. 109 U.S. 3, 3 S.Ct. 18 (1883).
111. Id.
112. 109 U.S. 3, 26 (1883).
Nevertheless, the Court made rather surprising moves in two other decisions. In *Ex Parte Siebold*, 113 the Court upheld the 1871 Civil Rights Act requiring state officials to enforce federal laws when supervising national elections. The Court upheld the Act, however, on the basis of Article I, section 4 of the Constitution, which grants Congress the power to conduct elections.

The Court again used the same Article I provision to uphold the Klu Klux Klan Act114 in *Ex parte Yarbrough*.115 Yarbrough had been part of the Southern intimidation 'committee'. "Bands of horsemen showed up at southern polling places and announced to no one in particular, 'the hanging starts in fifteen minutes, boys,'." For these types of acts, Yarbrough was prosecuted under the conspiracy section of the Act for interfering with a federal election. The Court, however, indicated a supreme dislike for the Civil War Amendments.

In essence, the High Court was lead a counter-revolution against the Civil War Amendments. In 1884, the Court held that states, unlike the federal government, were not required to comply with the Sixth Amendment requirement that criminal prosecutions begin by grand jury indictment.116 If the states used grand juries, however, they could not explicitly exclude Blacks from them.117

113. 100 U.S. 371 (1880).
114. The Enforcement Act of April 20, 1871.
115. 110 U.S. 651.
117. [cite]
If a State law explicitly discriminated against Blacks, the Court used the Civil War Amendments. Otherwise, the Court stuck its head in the sand; it refused to recognize the creation of a new Constitution. Instead, the justices tried to overlook the Civil War entirely and returned to the Constitution of pre-war years. There was, however, one exception, the protection of property rights.

**A Mistaken Victory For Civil Liberty**

In the face of blatant discrimination involving property rights, the Court applied the Civil War Amendments. In 1872, California segregated its school system establishing separate schools for Chinese and Japanese. A San Francisco ordinance outlawed laundries in wooden buildings unless the owner secured a license. Of the 320 laundries in the city, 310 were wooden and 240 were operated by Chinese aliens. The Chinese filed 200 applications for licenses and all were refused whereas all but one filed by non-Chinese had been granted. Several Chinese, including Yick Wo, had been convicted of operating a laundry without a license even though the fire warden and the sanitary inspectors had approved their establishments. It was clear that the Chinese property rights were being discriminated against in favor of white business owners. In *Yick Wo*, the Court held that the "rights of the petitioners... are not less because they are aliens and

subjects of the Emperor of China." The Fourteenth Amendment therefore applied to aliens as well as citizens.

In addition, the Court was willing in this case to look behind the neutral face of the statute and examine its effects. The court stated, "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."\(^{119}\)

The *Vick Wo* case is easily misread. Its language seems to imply the destruction of all barriers based on race or ancestry.\(^ {120}\) That is, if an alien is protected from this type of minimum discrimination, why could not Blacks expect the same? When the case is seen in the light of the other Court decisions of the time, however, it is clear that it stands only for the protection of property rights.

**Mississippi Leads The South**

Sensing the limited role the Amendments were to play in shielding Blacks, Mississippi pioneered methods that technically applied to everybody, but actually eliminated

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\(^{119}\) 118 U.S. 356 (1886).

\(^{120}\) Without over analyzing the language, the wording of the decision seems to indicate an independent source for "equal protection" other than the Fourteenth Amendment, such as the Magna Carta. This same shading will appear again in Skinner and Griswold.
only the Negro. In 1890, a new state constitution promulgated and a delegate described the new devices as "a monument to the resourcefulness of the human mind." All voters now were required to read and interpret a portion of either the state or federal constitution. "This, of course, dumped the final decision into the lap of the examining registrar... who knew exactly what to do." Other states soon followed Mississippi's lead, and the effect on Black voting was immediate. "For the Negro in Mississippi—the state which had invented the Black Code in 1865, pioneered the "Mississippi Plan" in 1875, and led the way to disenfranchisement in 1890— the future looked bleak indeed..." 

Solution For the American Indian: Death

Only the United States policy towards the American Indian was worse than its policy towards Blacks. Not only did the new Constitution as glossed over by the Court fail to protect Blacks, it utterly failed to stop the systematic extermination of the Indian. Genocide was the official policy of the United States in dealing with the native tribal peoples of America. The familiar saying, "the only good Indian is a dead Indian," reflects this policy. In 1890, the Black Hills of South Dakota gave stage to the final resistance of the Sioux Nation, and the last gasp of

122. Id.
the American Indian. The massacre at Wounded Knee intimated the final solution to the Indian problem. No International Law, no Treaty, nor any provision of the United States Constitution shielded the innocent men, women and children from slaughter. General George Schofield, Commander of the Department of the Missouri, confessed, "I wanted no other occupation in life than to ward off the savage and kill off his food until there should no longer be an Indian frontier in our beautiful country." One of General Philip Sheridan's aides commented:

There is no doubt the Indians have, at times, been shamefully treated... And there is no doubt a man of spirit would rebel... However, it is useless to moralize about the Indians. Their fate is fixed, and we are so near their end, it is easy to see what that fate is to be. That the Indian might be collected, and put out of misery by being shot deliberately, (as it would be done to a disabled animal), would seem shocking, but something could be said in favor of such procedure.124

It became painfully clear that America was for whites only.

The Death Knoll is Sounded for American Blacks

In 1890, the Court decided L.N.O.&T. Ry. Co. v. Mississippi.125 Mississippi passed a statute requiring railways to provide separate but equal accommodations for White and Negro passengers traveling within the state. The railway company was prosecuted by the state for failure to

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123. General Sheridan was in charge of the Indian campaigns in the West.
125. 133 U.S. 587 (1890).
provide the separate cars. The Supreme Court of Mississippi held that the law applied only to intrastate commerce and was valid. The United States Supreme Court concurred with the Mississippi Supreme Court and upheld the law as constitutional. Justice Harlan dissented stating that he could not see any difference between this case and the Hall v. DeCuri case. Harlan argued that under the Hall case, it was clear that it involved interstate commerce.

In the Hall case, Louisiana had prohibited discrimination on steam boats traveling within its borders and the Court had defeated the legislation claiming that it was interstate commerce and was therefore left to Congress alone to regulate. In the Mississippi case, the state had mandated discrimination on railroads traveling within the state and the Court had declared it was intrastate commerce and properly within the state's power to regulate. In creating this zone of inactivity, the Court had shown its intent, not merely to limit black progress, but to assist segregationist forces in rolling back the limited advances previously made.

Other cases involving blacks continued to come before the Court, but the crushing blow to black equality, and ultimately to black freedom came in 1896. In 1890, the Louisiana legislature passed a law to segregate passenger trains. Such laws were already in existence in Florida, Mississippi and Texas, and had recently been sanctioned in

126. See Waite, supra note 87, at 245-47.
the Mississippi railroad case discussed supra. All 18 black Louisiana state senators vigorously opposed the law, but to no avail. The American Citizens' Equal Rights Association of Louisiana Against Class Legislation issued a formal protest which argued: "[T]he boast of the American people is this government is based upon the self-evident truth, that all men are created equal." After this appeal to basic American values, the document continued its appeal: "We beg leave to observe that such measures becoming the law of the land would place the most innocent and the most defenseless at the mercy of the most brutal."\textsuperscript{127} But such appeals went unanswered.

A black attorney and physician in New Orleans, Louis A. Martinet published the Crusader. On July 19, 1890, Martinet declared a strategy for dealing with the new law: "The bill is now law," he wrote. "The next thing is what are we going to do? [He suggested a boycott of the railroads first]. . . The next is for the American Citizens Equal Rights Association to begin to gather funds to test the constitutionality of this law. We'll make a case, a test case, and bring it before the Federal Courts on the grounds of the invasion of the right to travel through the States unmolested. No such case has been fairly made or presented."\textsuperscript{128} In September, 1891, 17 black men joined Martinet to form the Citizens Committee to Test the Constitutionality of the Separate Car Law. Included among

\textsuperscript{127} Stevens, supra note 88, at 40.
\textsuperscript{128} Id. at 42.
these were attorneys Albion Tourgee and James Walker, who would later figure prominently in the group's legal challenge. The group raised $1,500 for the challenge and an "almost white" man purchased a ticket from New Orleans to Mobile, Alabama. Their first test case was unsuccessful, however, because the Louisiana Supreme Court ruled in 1892 that the separate car law could not be enforced on interstate travelers due to the commerce clause of the United States Constitution. Martinet wrote jubilantly in the Crusader: "The Jim Crow car is ditched and will remain in the ditch... Jim Crow is as dead as a door nail."¹²⁹

Homer Plessy, a black man who looked as nearly white as possible, became the second test case. He purchased a ticket from New Orleans to Covington, Louisiana. On June 7, 1892, he refused to leave the white section and was arrested. Martinet's group posted the $500 bail for Plessy. Louisiana Criminal Court Judge John Ferguson heard Plessy's case and dismissed his contentions that the law was unconstitutional.

The New Orleans Times-Democrat editorial more than reflected local opinion when it wrote of Judge Ferguson's action: "It is to be hoped that what [Judge Ferguson] says will have some effect on the silly negroes who are trying to fight this law. The sooner they drop their so-called 'crusade' against 'the Jim Crow Car,' and stop wasting their money in combatting so well-established a principle--the

¹²⁹. Id. at 48.
right to separate the races in cars and elsewhere—the better for them."\textsuperscript{130}

Plessy appealed to the Louisiana Supreme Court. Relying on the 1849 Massachusetts case argued by Charles Sumner\textsuperscript{131} and the fact that Congress had segregated the District of Columbia's schools, the Court found no constitutional violation and dismissed Plessy's appeal.

Plessy's last hope was directed at the United States Supreme Court. Albriam Tourgee wrote to Martinet in 1893 while the case was on appeal to the U.S. Supreme Court and urged that it be withdrawn: "There are five [justices] who are against us. Of these one may be reached, I think if he 'hears from the country' soon enough. The others will probably stay where they are until Gabriel blows his horn. The Court has always been the foe of liberty until forced to move on public opinion...."\textsuperscript{132} Tourgee proposed to delay the case and work instead to sway public opinion in Blacks' favor, but Tourgee's advice went unheeded.

Tourgee argued the case, \textit{Plessy v. Ferguson},\textsuperscript{133} on April 13, 1896. He passionately argued that "all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of happiness..." He continued his argument that "the law is a violation of the fundamental principles of all free governments and the Fourteenth

\textsuperscript{130} Stevens, \textit{supra} note 88, at 50.
\textsuperscript{131} See notes 67-70 \textit{supra} and accompanying text.
\textsuperscript{132} Stevens, \textit{supra} note 88, at 51-52.
\textsuperscript{133} 163 U.S. 537 (1896).
Amendment..." The Court, however, disagreed with Tourgee.

Writing for the majority, Justice Brown wrote that "a statute which implies merely a legal distinction between the white and colored races...has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude...We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored races with a badge of inferiority. If this be so, it is not by reason of anything found in the Act, but solely because the colored race chooses to put that construction upon it." The Court, like the Louisiana high court, cited the 1849 Massachusetts case and the fact that the District of Columbia had segregated schools as precedent for its decision.

Neutral in appearance, the Court's opinion was a death sentence for black freedom in light of the circumstances of the time. Equality was not as much the issue as liberty, but the Court chose to ignore the connection between the two. As one historian wrote, "[T]he North may have won the war, but the South won the peace. It preserved the essence of slavery: a pool of cheap, subservient labor--but escaped the capital outlays and social obligations that slavery imposed on the masters." The Supreme Court in Plessy

134. Stevens, supra note 88, at 53.
135. 118 U.S. 356 (1886).
136. [cite]
effectively negated all Black progress to date and sanctioned a hell on earth for all Black Americans.

Again the lone dissenter, Justice Harlan wrote an eloquent and often quoted opinion. Harlan warned the majority, "The thin disguise of 'equal' accommodations [will] not mislead any one, nor atone for the wrong this day done." More than any other, his opinion captured the spirit of the new Constitution. He reminded his brethren that the real issue was liberty: "The white race deems itself to be the dominant race in this country. And so it is... So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." He continued to expound upon this new Constitution that had been forged in the Civil War and its aftermath: "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste there. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Such a statement is clearly in line with the Magna Carta, the Declaration of Independence and the French Declaration of the Rights of Man. Harlan recognized what the majority refused to see: "The destinies of the two races [are] indissolubly linked together, and the interests of both require that the government of all shall not permit the seeds of race hate to be planted under the sanction of law."

In essence, Harlan was argued that liberty, equality and
brotherhood, the symbols of our western heritage, are "indissolubly linked together." Now blessed by the High Court, the Constitutional order plunged the nation into another century of turmoil over the "Negro question."

**The White South Rises**

Slavery was replaced in the end by a caste-class system. In 1898, the Court refused to overturn a Black man's murder conviction even though Blacks had been excluded from the jury in what appeared to be a violation of *Strauder v. West Virginia*. Mississippi restricted jurors to eligible voters and a poll tax. This restriction, combined with a literacy test, barred blacks from voting. Thus, blacks were effectively excluded from juries in contravention of prior Supreme Court precedent. The Court, in what one historian describes as "a marvel of formalistic logic, looking only at the letter of the law," saw no Constitutional violation.

In the same term, in *Williams v. Mississippi*, the Court upheld the Mississippi laws that effectively excluded Blacks from juries. The state required payment of a poll tax and passage of a "literacy" test before one could vote. As part of the literacy test, voters were required to read and interpret any part of the United States Constitution to the satisfaction of local election officials. If you had been able to vote in 1866, or were a descendant of a person

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137. 163 U.S. 537 (1896).
138. Urofsky, supra note 83, at 482.
139. 170 U.S. 213 (1898).
who could vote on that date, then you were exempt from the requirements. Hence, the law was entitled the grandfather clause because by now most voters, unlike the Supreme Court, were at least twice removed from the Civil War. Because the grandfather clause only exempted white voters from the requirements since they were the only ones who could vote immediately after the Civil War. This effectively disenfranchised Blacks. Louisiana and other Southern states immediately took the Court's cue and adopted new state constitutions that incorporated the use of poll taxes, literacy tests and the "grandfather" clause.

The final blow for Blacks came in 1899 in Cummings v. Board of Education. The case involved a poor school district in which the School Board closed the only black high school, kept the white highschool open, and refused to admit Blacks to the White school. The trial court restrained the board from using public funds to support the white high school until equal provision could be made for the black school. The State Supreme court reversed the trial court. The United States Supreme Court refused to find a Constitutional violation and in essence approved the principle "separate and nonexistent." Even more surprising was Justice Harlan's opinion for the Court which stated, "the education of people in schools maintained by state action is a matter belonging to the respective states, and any interference on the part of Federal authority with

140. 175 U.S. 528 (1899).
141. Stevens, supra note 88, at 154.
the management of such schools cannot be justified except in clear and unmistakable disregard of rights secured by the supreme law of the land."

The North finally acquiesced in these developments. In 1900, South Carolina Senator Ben Tillman was able to declare before Congress: "You [the North] do not love them any better than we do. You use to pretend that you did, but you no longer pretend it."

He further stated, "We took the government away. We stuffed ballot boxes. We shot them...With that system...we got tired ourselves. So we called a constitutional convention, and we eliminated...all of the colored people whom we could."\footnote{143} The new tactics were devastatingly effective. For example, in 1896, there were 130,334 blacks registered to vote in Louisiana. Eight years later, the number had fallen to 1,342.\footnote{144} Due to the use of terror and naked brutality, this same dramatic decline occurred wherever there were black voters. By 1900, Blacks had completely lost the ballot.

As the brutality raged from 1892 to 1913, at least 50 Negroes were lynched annually in the South. From 1889-1918, 2,522 Negroes were lynched throughout America including some in Ohio, Illinois and Indiana. In 1908, within one half-mile of Lincoln's old home in Springfield, two Negroes were lynched for a crime that was never even committed.\footnote{145}

\footnote{142. 175 U.S. 528 (1889).} \footnote{143. T. Gossett, Race: The history of an Idea in America 266 (1963); Friedman, supra note 59, at 507.} \footnote{144. Morison, supra note 56, at 791.} \footnote{145. Id. at 794.}
American author H. L. Menken described a typical Southern lynching as one "in which, in sheer high spirits, some convenient African is taken at random and lynched, as the newspapers say, 'on general principles'." In Waco, Texas in 1916, a negro male, sentenced to death for murder, was seized by a mob, mutilated and burned alive. A crowd cheered and carried away "collops of his flesh as souvenirs." As one historian wrote, "[S]adistic cruelty is no monopoly of our late enemies, or of remote eras, but part of the devil that is in all of us." Not until 1918 was anyone was punished in the South for participating in a lynching.

The South did not, however, have a monopoly on the use of force and intimidation. In the West, in Rock Springs, Wyoming, race riots in the 1880s ended with twenty-eight Chinese dead. In Tacoma, Washington, Whites torched the Chinese section of the city. An 1880 California law prohibited any corporation from employing "in any capacity any Chinese or Mongolian." In 1906, the San Francisco School Board created an international incident when it segregated Japanese, Chinese and Korean students in public schools. The Japanese government protested to President Roosevelt and he was eventually able to persuade the school

146. Id. A collop is a "piece of meat made tender by beating." See Webster's Dictionary.
147. He is referring to the Germans and Japanese during World War II.
148. Id. at 794. He was writing in 1964.
149. Id.
150. Friedman, supra note 59, at 510.
board to rescind its decision in return for a promise to halt Oriental immigration. America was to be a nation for whites only.

A War of Ideas

In 1859, at the dawn of the Civil War, Charles Darwin published The Origin of Species. In 1925, in the famous Scopes trial ("Monkey Trial") in Tennessee, William Jennings Bryan, former candidate for President, won a victory for God and country over famed criminal lawyer Clarence Darrow.151 It was seen as a fundamentalist victory over the theory of evolution. Due to the trial, the evolutionary theory became the underpinning of a world wide system of racism and for Southerners as well as for other white-supremacist groups. White America looked upon itself as superior, "[i]ndeed, as the climax of human evolution."152 Darwin’s ideas of evolution and natural selection entered Western thought and were later used to give legitimacy to a racist-militarist mind at the turn of the twentieth-century. Even the Nation’s leader, President Theodore Roosevelt, felt that blacks, "as a race and as a man... [were] altogether inferior to the whites."153

Social Darwinism, reawakened in the ideologies of the Facist, produced barbarism. Hitler proclaimed, "The stronger has to rule. Only the born weakling can consider

152. Friedman, supra note 59, at 509.
153. Urofsky, supra note 83, at 483.
this cruel. The fight for daily bread makes all those succumb who are weak, sickly, and less-determined."\textsuperscript{154} Darwin’s theory is not to be blamed. Southerners and Facists adapted the theory to justify their behavior in a world that had dramatically changed. As one American historian stated, "Whatever the original causes [of discriminatory laws], race did become part of the story: xenophobia, fear of the strange, and the eugenics fever of the 1890s."\textsuperscript{155}

However, another development in Western thought rose to meet this "eugenics fever of the 1890s." In 1893, a British lawyer traveling first class by train in South Africa was told to move to the colored section of the train because, according to the conductor, there are "no colored attorneys in South Africa." The attorney protested, saying that he had been called to the bar in London and he always traveled first class. The conductor told him to "just move your black ass back to third class." When the attorney refused again, he was thrown off the train. He yelled back, "This is very unchristian." The English attorney was Mohandas K. Ghandi and he was about to lead a world revolution.\textsuperscript{156}

In talking to a rich Indian in South Africa, Ghandi was amazed that a "colored" could employ a white attorney but could not walk down the street with him. Ghandi stated that it must be fought: "We are children of God like everyone else. I will write to the press and I will use the

\textsuperscript{154}. Garraty, \textit{supra} note 21, at 960.
\textsuperscript{155}. Friedman, \textit{supra} note 59, at 510.
American Blacks began to fight as Ghandi did in South Africa and later in India; they would battle for public opinion and in the courts.

"Darkest For the Dark People"

One historian aptly described the thirty year period from 1890 to 1920 as "the darkest for the dark people...." Manifest destiny, an old American belief that Americans had a God-given duty to bring the blessings of a Christian and democratic culture to poor, blighted creatures in other parts of the world, now fused with the Darwinian notion of survival of the fittest: "To prove its fitness a nation had to struggle, if no longer against half-savage Indians, then...against 'lesser breeds without the law'."

In 1898, America went to war with Spain. During the suppression of the Cuban revolt, the Spanish military indiscriminately incarcerated Cubans in concentration camps which infuriated Americans. The trigger for the Spanish-American war was the sinking of the Maine in Havana Harbor. In the end, America had new conquests, including the Philippines and Cuba, and new peoples to rule.

Some Americans were opposed to the acquisition for, as anti-imperialists believed, it was a "monstrous perversion

157. Id.
158. Morrison, supra note 56, at 793.
159. Americans just 40 years later would not be so incensed by interning Japanese citizens. See notes 300-318 infra and accompanying text.
of American history to conquer and rule an Oriental country." President McKinley, however, knew American history better as evidenced by his statements to a Methodist delegation, "[the goal was] to take them all and to educate the Filipinos, and uplift and civilize and Christianize them." To another group he stated, "No imperial designs lurk in the American mind. They are alien to American sentiment, thought and purpose.... If we can benefit those remote peoples, who will object? If in the years of the future they are established in government under law and liberty, who will regret our perils and sacrifices?"\textsuperscript{160} America attempted to civilize their "little-brown brothers."\textsuperscript{161}

In 1901, in the \textit{Insular Cases},\textsuperscript{162} the Court decided whether the constitution protected these newly acquired peoples. The Court ultimately held that the Constitution did not apply to most of the issues. However, in \textit{Weems v. United States}, the Court held that a Filipino man, convicted of stealing a small amount of money and subsequently sentenced to 15 years imprisonment at hard labor, violated the Eighth Amendment's ban against "cruel and unusual punishment." This was the first time in American history that the Eighth Amendment had been applied on behalf of a convicted defendant.

\textsuperscript{160} Morison, \textit{supra} note 56, at 805.
\textsuperscript{161} Ingle, \textit{supra} at 74, at 366.
\textsuperscript{162} Urofsky, \textit{supra} note 83, at 484-87.
Later, America's dominion over these foreign peoples was used to justify Southern dominion over America's lesser beings: blacks. An article in the Atlantic Monthly argued that "[i]f a stronger and cleverer race is free to impose its will upon 'new caught, sullen peoples' on the other side of the globe, why not in South Carolina and Mississippi?" 163

In 1901, America entered the Progressive era. Theodore Roosevelt called his policies the "Square Deal" and Wilson called his the "New Freedom". 164 In 1913, Wilson wrote, "There is nothing short of a new social age, a new era of human relationships, a new stage-setting for the drama of life." 165 Americans began to attack all sorts of social evils; all but one.

Americans were enlightened in a perverse manner towards blacks. President Wilson "promoted segregation as an enlightened and scientific response to racial divisions, a progressive solution." 166 At Yale and Columbia, students listened to lectures on blacks' "incorrigible morals." 167 The superior race "intelligently" basked in the glory of human evolution as "respectable racism flourished," 168 while the Court continued to lend respectability to this kind of racism.

164. Id. at 811.
165. Id. at 812.
166. Id. at 11.
167. Id.
168. Id.
In 1910, the Court extended plessy in Chiles v. C.& O. Ry. Co. and allowed railroads to discriminate against blacks in the absence of state requirements. Chiles, a Negro, purchased a ticket from Washington, D.C. to Lexington, Kentucky and refused to leave the car reserved for whites. A police officer ejected him from the car and Chiles subsequently filed suit against the railroad company. The Court found that the carrier was entitled to establish such regulations. The majority concluded, "The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation... has been discussed so much that we are relieved from further enlargement upon it."\textsuperscript{169} Segregation was completely sanctioned by law as much as was then possible.

\textbf{The Tide Ebbs and Flows: The First Sitting of Charles Evans Hughes}

With the arrival of Justice Charles Evans Hughes, however, the tide began to turn slightly. In 1911, in the Peonage Cases, the Court held that the peonage systems operating in the South violated the 13th Amendment. In Alabama, if a written labor contract was not performed, the employer could have the employee arrested, and the employee could then be forced to work off his contract and any fine assessed by the court in the service of the employer. The law had as its primary objective the protection of white

\textsuperscript{169}. 218 U.S. 71 (1910).
employers against black laborers. In Bailey v. Alabama (1911), Bailey, a Negro, had been convicted of breaking his labor contract. Justice Hughes held for the Court that the law violated the 13th Amendment prohibition against involuntary servitude. Justice Holmes, the Court’s great liberal, dissented. He implied that his brethren had made an exception in this case because it involved the South. He argued that, "We all agree that this case is to be considered and decided in the same way as if it arose in Idaho of New York." By ignoring that this was the South, Holmes engaged in the same abstract fiction that upheld the Mississippi "grandfather clauses" above.

In United States v. Reynolds, the Court struck down another aspect of the peonage system. After Alabama allowed a private person to pay the fine of a convicted man, the state then assigned that person’s labor. The Justice Department looked for a test case to challenge this system which it termed an "engine of oppression" against blacks. A unanimous Court struck down the system "in a formalistic and defensive manner--as if the justices knew it was wrong to permit blacks to be so mistreated, but could not figure out why."

The peonage system continued, however, despite these rulings. In 1921, a Georgia farmer, John Williams, who had been buying blacks from the state for years, panicked when

170. 219 U.S. 219 (1911).
171. 235 U.S. 133 (1914).
172. Urofsky, supra note 83, at 492.
he learned that the FBI was investigating him. He murdered all of the potential 'slave' witnesses, 10-12 blacks. His brutality aroused public sentiment but it did not end peonage. 173 The Atlanta FBI office investigated 115 peonage cases in 1922 without any resulting convictions. 174 Peonage did not die with the these Supreme Court cases.

In 1914, the Court heard its first "Jim Crow" case: McCabe v. Atchison, Topeka & Santa Fe Railway. 175 According to one historian, Hughes "refused to wink at the facts." The McCabe case involved an Oklahoma law which required separate rail coaches for whites and blacks, but which exempted blacks the luxury cars, i.e., sleeping and dining cars. In a 5 to 4 decision, the Court held that the law was unconstitutional. Hughes, writing for the majority, stated that equal facilities had to be made available for blacks, regardless of whether there was a demand for the facilities. Since the law was actually passed after McCabe filed suit, the Court could have dodged deciding the merits of the case, but Hughes wanted to put the states on notice that separate facilities also meant available and equal facilities.

In 1915, the Court heard the "grandfather cases" that were discussed above. Oklahoma, like Mississippi, Louisiana and many other southern states, had passed a literacy requirement for voting and had exempted those who had been eligible to vote on January 1, 1866 or were lineal

173. Whitehead, FBI Story, 73 (19 ).
174. O'Reilly, supra note 159, at 15.
175. 235 U.S. 151 (1914).
descendants of such persons. In *Guinn v. United States*, the Court held that such laws violated the 15th Amendment of the Constitution.176 During that same year, the Ku Klux Klan of Reconstruction days was revived in Georgia.

**A Social Victory For Women**

Hughes left the bench in 1916 to run as the Republican candidate for President against the Princeton professor, Woodrow Wilson. Like Theodore Roosevelt in 1912, Hughes openly campaigned for women's suffrage and advocated a constitutional amendment guaranteeing such a right. In 1917, Montana Republicans elected the first woman to Congress, Representative Jeanette Rankin. She arrived in Washington just in time to vote against American entry into World War I. Although President Wilson personally opposed a women's suffrage amendment, he urged Congress to pass it in order to maintain the nations morale and support for the war. On August 26, 1920, the Nineteenth Amendment was appended to the Constitution granting women the right to vote. While Blacks were losing political power, women were gaining it.

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A New Attack To Advance Personal Liberties

In the early 1900s, numerous groups were formed to advance civil liberties. In 1909, the National Association for the Advancement of Colored Peoples was formed, in 1913, the Anti-Defamation League was founded, and in 1916, the American Jewish Congress was formed. These groups assaulted segregation in the courts.

In one of its earliest cases, the NAACP in 1917 won an important victory. The cases involved a city ordinance in Louisville, Kentucky that prohibited blacks from occupying houses in areas where the majority of houses were owned by Whites. In Buchanan v. Worley, the Court ruled that this law deprived a person of an essential element of his property -- the right to dispose of it -- in violation of the 14th amendment. Such an ordinance "passes the legitimate bounds of police power and invades the civil right to acquire, enjoy, and use property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment."

World War I

World War I had little impact on American civil liberties other than fostering the birth of the American Civil Liberties Union in 1920. Congress passed the

177. Walker, supra note 148, at 47.
178. 245 U.S. 60 (1917).
179. Id.
180. Congress declared war on April 6, 1917 and the Germans signed the Treaty of Versailles on June 28, 1919.
Espionage Act in 1917 and the Sedition Act in 1918 to silence opposition to the war. The government was empowered to suppress any material or utterances it found treasonable or seditious. It was a crime to "utter, print, or publish disloyal, profane, scurrilous, or abusive language about the form of government, the Constitution, soldiers, flag, or uniform of the armed forces...."\textsuperscript{181} In effect, one of American's most cherished rights, the right to criticize, could not be exercised against the government.

The Court heard several cases involving these Acts. In \textit{Schenck v. United States},\textsuperscript{182} the Court unanimously upheld the conviction of the Socialist party General Secretary Charles Schenck against a First Amendment challenge. He had been convicted of mailing antiwar leaflets to draft-age men. Justice Holmes formulated his famous "clear and present danger" test and argued that "the most stringent protection in the world would not protect a man in falsely shouting fire in a theater and causing a panic." A week later, the Court again unanimously upheld the conviction of Eugene Debbs for a speech he gave condemning the war at a Socialist party convention in Ohio.\textsuperscript{183}

The third case under the Acts, \textit{Abrams v. United States}\textsuperscript{184}, however, caused Justices Holmes and Brandeis to break with the majority and write an impassioned dissent

\textsuperscript{181.} Sedition Act 1918. This Act was very similar to the Sedition Act of 1798.
\textsuperscript{182.} 249 U.S. 47 (1919).
\textsuperscript{183.} Debbs v. United States, 249 U.S. 211 (1919).
\textsuperscript{184.} 250 U.S. 616 (1919).
concerning First Amendment protections. The facts were not very different from the other two cases: Abrams distributed leaflets denouncing American military intervention in Russia following the Bolshevik revolution in 1917. However, Holmes's "dissent marks the beginning of modern First Amendment theory. He gave judicial notice to the idea... that free speech was the basis of democratic self-government." 185

The war anticipated a future problem that America later faced in world affairs. President Wilson, in attempting to formulate a peace settlement that would avoid future such conflicts proposed several policies under his Fourteen Points plan. In one of his speeches, he advocated, "What we seek is the reign of law, based upon the consent of the governed and sustained by the organized opinion of mankind." 186 In his last speech, he argued that "the impartial justice meted out must involve no discrimination... It must be a justice that plays no favorites and knows no standard but the equal rights of the several peoples concerned." 187 These were lofty goals and high moral pronouncements but America was not yet ready to fully embrace them. America could preach to the rest of the world, but she would not alter her own pattern of living.

185. Walker, supra note 147, at 27.
186. Four Ends speech on July 4, 1918.
187. The Five Particulars speech of September 27, 1918.
A story of a conversation between President Wilson and France’s Clemenceau was circulating in Paris at the time, and it highlights the hypocrisy:

Wilson: My one objective in promoting the League of Nations is to prevent future wars.
Clemenceau: You can never prevent war by no matter what scheme or organization unless we can all agree on three fundamental principles.
Wilson: What are they?
Clemenceau: First, to declare and enforce racial equality. Japan already has a resolution to that effect before the Conference. She demands that it be incorporated in the Treaty. Do you accept?
Wilson: No, I’m afraid not. The race question is very touchy in the United States, and the Southern and West Coast senators would defeat any treaty containing such a clause.
Clemenceau: The second thing we must do is to establish freedom of immigration; no country to close her borders to foreigners wishing to come to live there. Do you agree?
Wilson: No, my country is determined to exclude Orientals absolutely, and Congress is already considering restrictions to European immigration. 188

In the end, in the conversation, Wilson was unable to agree with Clemenceau on any specific policy and concluded that the League was doomed. The only hope of maintaining peace was the traditional one of keeping the enemy weak and remaining strong yourself.

America was unable to face the world if it meant having to alter its domestic policies of racism. Instead, America rejected the Treaty and elected a President who promised "normalcy", "serenity" and "equipoise." 189 "The United States had come out of the war as the preeminent world power, but for two decades the country, with rare exception,

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188. Morison, supra note 56, at 877.
189. Warren G. Harding was elected in 1920. Garraty, supra note 21, at 1006.
followed a policy of withdrawal."190 Congress imposed a quota system restricting immigration to "preserve America as an outpost of Anglo-Saxony," and the Ku Klux Klan again began to wage war against Catholics, Jews, Negroes and foreigners.191

During the war, an Englishman, who had formerly lived in South Africa, wrote a book on the American South entitled "From A South African Point Of View."192 He found conditions very similar. He wrote, "How often the very conditions I had left were reproduced before my eyes, the thousands of miles melted away, and Africa was before me."193 He ominously predicted that the South and South Africa would follow parallel future courses and it very nearly happened.

The year following the war saw some of the greatest interracial strife in the nation's history. Twenty-five cities were engulfed in race riots in 1919. The riots were not limited to the South; they were all over the country. The worst riot took place in Chicago where seventy Negroes were lynched; some of them were still wearing their veterans uniform. "Mobs took over cities for days at a time, flogging, burning, shooting, and torturing at will."194 The Southern Way had become the American Way.

190. Id.
191. Id. at 1010.
192. The Englishman is Maurice S. Evans. See Woodward, supra note 51, at 111.
193. Woodward, supra note 51, at 112.
194. Id. at 114.
Back Home: Holmes Changes The Direction of the Court

One of the 1919 riots, the "Elaine Riot" in Arkansas, caused the Court to once again stretch the Bill of Rights to protect blacks from the horrors of oppression. On September 30, 1919, a congregation of blacks had assembled in their church to discuss hiring an attorney, Bratton, with the ultimate aim of taking legal action against local landowners that were practicing extortion against them. They were attacked and fired upon by a group of white men and, in the disturbance that followed, a white man was killed. "The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes...."

Another white man was also killed in the disturbance. Many negroes were arrested, including O.S. Bratton, the son of the attorney whom the blacks were contemplating hiring. When O.S. Bratton and five negroes were subsequently indicted for murder, the blacks argued that the white must have been killed by the other whites. Bratton's charges were dismissed and the judge of the court, in which the five other negroes would be tried for murder, escorted him secretly out of town in a closed automobile to avoid a potential mobbing. The Governor of Arkansas appointed a special commission, the Committee of Seven, to investigate the "insurrection" in the county. The local papers published "inflammatory" articles, such as a statement by
one of the Committee of Seven that the trouble was "a
deliberate planned insurrection of the negroes against the
whites, directed by an organization known as the
'Progressive Farmers and Household Union of America,'
established for the purpose of banding negroes together for
the killing of white people."

Shortly after the arrest of the five blacks, a mob
marched to the jail where they were being held to lynch the
blacks, but were prevented by the presence of United States
soldiers and a promise of the Committee of Seven that "they
would execute those found guilty in the form of law." The
Committee "made good their promise by calling colored
witnesses and having them whipped and tortured until they
would say what was wanted, among them being the two relied
on to prove [the five black's] guilt." In a circus-like
atmosphere, the trial lasted only forty-five minutes and the
jury returned a guilty verdict in less than five minutes.
The boy's court-appointed lawyer did not ask for a delay, or
for a change of venue; he did not consult with his clients;
he did not call any witnesses that were available to testify
for the boys; and he did not allow the boys to testify in
their own defense. Finally, it was clear that no member of
the jury could have acquitted the defendants and continued
to live in the area. Even if the jury would have acquitted
them, the boys would have been immediately lynched.
It was under this set of facts that the Supreme Court was asked to review its 1915 decision of *Frank v. Mangum*.\(^{195}\) In the *Mangum* case, the issue was mob domination of a trial involving a white defendant. The Supreme Court had not found any constitutional violation because it believed that the "corrective process" of the state was sufficient to overcome any unfairness in the trial.\(^{196}\) Just eight years later in *Moore v. Dempsey*,\(^{197}\) the Court was asked again to review state convictions for murder in which a mob mentality had dominated the trial. Justice Holmes, dissenter in the 1915 case, now wrote the majority opinion stating "a trial for murder...in which the accused are hurried to conviction under mob domination without regard to their rights is without due process of law and absolutely void."\(^{198}\) The conviction was reversed. The horrible reality of Southern racism had again caused the Court to change its position on Civil Liberties in a relatively short period of time.

Finally, the Court took the lead in reversing the trend of subjugating the "colored" Americans. This was in direct opposition to the other political branches. President Wilson was fond of telling "darky" stories to his cabinet and he ordered federal buildings to be segregated. "While the nation prepared to fight a war to make the world safe

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196. *Id*.
197. 261 U.S. 86 (1923).
198. *Id*. 
for democracy, workmen in the capital tacked up "White Only" or "Colored" signs over every federal toilet."\textsuperscript{199}

\textsuperscript{199} Kluger, Simple Justice 111 (19\hspace{1em}).
Ambiguity During the Taft Twenties

Since the Hurtado case in 1884, the Court emphasized protection of private property and de-emphasized personal liberty. The Fuller Court\textsuperscript{200} had transformed the Civil War Amendments into a sanctuary for businessmen from state or federal regulation. Under the new doctrine of Substantive Due Process or freedom of contract, the Court placed property rights above human rights. As one writer stated, the liberty and property language of the 14th Amendment "came to be a single word with a constant shift of accent to the right."\textsuperscript{201} The triumph of Substantive Due Process was reached in 1905 in \textit{Lochner v. New York}\textsuperscript{202}. The Fourteenth Amendment became a swift sword in the hands of the Court when it was used to strike down regulations affecting private business affairs, but it remained sheathed when the Court confronted questions of personal freedom.

In 1908, in \textit{Twinning v. New Jersey},\textsuperscript{203} the Court ruled that the personal rights enumerated in the Bill of Rights did not apply to the states through the Fourteenth Amendment.\textsuperscript{204} There were, however, some pro-civil rights decisions. In 1914, the Fourth Amendment protection against unreasonable search and seizure was given teeth in \textit{Weeks v.}

\textsuperscript{200} The Court from 1888-1910.
\textsuperscript{201} C. Fairman & S. Morrison, The Fourteenth Amendment and the Bill of Rights: The Incorporation Theory (1970), introduction by: Leonard Levy, quoting Walton Hamilton at XVII.
\textsuperscript{202} 211 U.S. 78 (1908).
\textsuperscript{203} Id.
\textsuperscript{204} Twining v. New Jersey, 211 U.S. 78 (1908).
United States. The Court used its supervisory powers over federal courts to develop the exclusionary rule. Thus, a search conducted by a federal law enforcement officer in violation of the Fourth Amendment would cause the resulting evidence to be barred from being introduced into court. However, per Twining, the rule was not applied to state trials because the Fourth Amendment was not applicable to the states. In addition, the Taft Court in 1927 fashioned a major exception to the Weeks rule known as the "silver platter" doctrine. Under the doctrine, evidence that was obtained by state officials in an illegal search could be used by federal officers so long as there had been no federal involvement in the search.

In 1923, the Court applied the Lochner doctrine in striking down a Nebraska law that forbade the teaching of foreign languages. In Meyer v. Nebraska, the Court held that the law interfered with the right of contract as well as other rights and privileges "long recognized at common law as essential to the orderly pursuit of happiness by free men."

The Klan succeeded in getting a law passed in Oregon that required all children to attend public schools. The intent of the law was to destroy Catholic schools. The

206. The doctrine was fashioned in Byars v. United States, 273 U.S. 28 (1927) and Gambino v. United States, 275 U.S. 310 (1927).
207. 262 U.S. 390 (1923).
208. Id.
209. Urofsky, supra note 83, at 641.
Court held the law unconstitutional in *Pierce v. Society of Sisters*\(^{210}\) because it interfered with protected property and personal rights. The law had attacked the property rights of the school and had interfered with the right of a parent to determine a child's education.

In 1925, in *Gitlow v. New York*,\(^{211}\) a direct attack was made on the doctrine that the Bill of Rights did not apply to the states. Gitlow, a Communist, had been convicted under a state law for publishing a newspaper. Although the Court affirmed the conviction, the majority for the first time put forth the incorporation doctrine by which the Bill of Rights would be selectively applied to the states. In this case, it was merely dictum since it did not help Gitlow.

With the lassie-fair philosophy dominating the Court, Blacks also suffered defeat in *Corrigan v. Buckley*,\(^{212}\) when the Justices held that a private agreement among whites in Washington, D.C. not to convey property to blacks, did not violate the Constitution. The Court actually ruled that the issue was so clear that there was no substantial constitutional question involved in the case.

A year later, in Mississippi, a citizen of Chinese descent had been denied admission to a white high school and had instead been forced to attend a segregated "colored school." Whether Chinese were "colored" was the primary

\(^{210}\) 268 U.S. 510 (1925).
\(^{211}\) 268 U.S. 652 (1925).
\(^{212}\) 271 U.S. 323 (1926).
issue in the case.\textsuperscript{213} In affirming the right of the state to send the Chinese student to the "colored" school, the Court, although indirectly, came very close to holding that Plessy applied to public schools.

In 1927, Holmes wrote an extraordinary opinion in \textit{Buck v.Bell},\textsuperscript{214} upholding a Virginia statute that provided for the forced sterilization of inmates afflicted with hereditary insanity or imbecility. The decision rested upon logic drawn from a 1905 case in which the Justices had upheld compulsory vaccination.\textsuperscript{215} Holmes, applying the analogy of forced vaccination, coldly stated that the Fourteenth Amendment was no bar to forced sterilization of mental defectives. According to Holmes, "three generations of imbeciles are enough."\textsuperscript{216}

A historian summarized the Taft Court's decisions as displaying "an almost cavalier disregard of civil liberties; at the same time, however, the Court took the first steps in formulating the modern view of the Bill of Rights."\textsuperscript{217} The conservative Justices of the Taft Court never intended that human rights would displace property rights as worthy of their most stringent protection. But, they, like most Americans, never counted on changing world events.

The Court in the twenties mirrored the nation. Racism even appeared in the 1928 presidential election.

\textsuperscript{213} Gong Lum \textit{v.} Rice, 275 U.S. 78 (1927).
\textsuperscript{214} 274 U.S. 200 (1927).
\textsuperscript{215} Jacobson \textit{v.} Massachusetts, 197 U.S. 11 (1905).
\textsuperscript{216} 274 U.S. 200 (1927).
\textsuperscript{217} Urofsky, \textit{supra} note 83, at 633.
Republicans emphasized the fact that the Democratic candidate, Al Smith, was a Catholic. Democrats countered with a doctored photo showing the Republican candidate, Herbert Hoover, dancing with a black woman. The Court was very much in step with the other branches of government on both social and economic policy: a WASP mentality dictated who was 'fittest' to rule.

The Court Takes on Texas

In 1927, the same year as Buck, Blacks in Texas won a victory. A Texas statute decreed that "in no event shall a Negro be eligible to participate in a Democratic primary" in Texas. In Nixon v. Herndon, a Black named Nixon attempted to vote in the Democratic primary but was refused a ballot. Justice Holmes speaking for a unanimous Court, said: "It seems to us hard to imagine a more direct and obvious infringement of the 14th Amendment."

In the next session after the Herndon decision, The Texas legislature passed a new law giving political parties the power to prescribe voting qualifications. The Democratic State Executive Committee promptly passed a rule allowing only white Democrats to vote in the primary. Again, Mr. Nixon attempted to vote but was denied a ballot because he was black. In 1932, in Nixon v. Condon, in a 5 to 4 decision, the majority held that state action was

218. Ingle, supra note 74, at 387.
220. Id. at 540.
221. 286 U.S. 73 (1932).
involved and that Nixon had been illegally denied an opportunity to vote. Justice Cardozo, speaking for the majority, stated, "Whether in given circumstances parties...are agencies of government within the 14th and 15th Amendments is a question which this Court will determine for itself. It is not concluded upon such inquiry by decisions rendered elsewhere.... The 14th Amendment, adopted as it was with special solicitude for the equal protection...of the Negro race, lays a duty upon the Court to level by its judgment these barriers of color." 222

Undeterred, Texas Democrats tried again in 1932 to exclude Blacks from voting; this time they succeeded. Grovey, a Negro, was denied an absentee ballot by a county clerk pursuant to a Democratic party rule that permitted only white males to be party members. 223 The Court, in Grovey v. Townsend, 224 unanimously held that the county clerk's action did not constitute state action under the Fourteenth Amendment and was thus valid.

**The Horror of Repression**

From 1900-1930, 1,741 persons were lynched in the United States. 225 About 25 percent had been accused of attempted rape. A negro accused of raping a white girl was

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222. *Id.* at 88.
223. Grovey v. Townsend, 295 U.S. 45 (1935). The State Democratic convention adopted the following resolution: Be it resolved that all white male citizens of the State of Texas who are qualified to vote...shall be eligible for membership in the Democratic party.
224. *Id.*
a "typical appeal to race prejudice." From 1931-1935, 84 persons were lynched. From 1889-1935, 71 Negroes had been lynched for merely "insulting" white women.

The Great Depression

On October 29, 1929, the stock market crashed and ushered in the Great Depression. By 1932, the country faced a relief crisis as unemployment reached 15 million people. Minorities, however, were last on anyone's list for help. In Houston, officials announced that "Applications [for relief] are not being taken from unemployed Mexican or colored families. They are being asked to shift for themselves." Unfortunately, this position was not unique: Blacks were expected to suffer wherever they lived.

Nevertheless, Blacks were not powerless. Between the World Wars, local chapters of the NAACP increased from 50 to 500. In 1930, the NAACP was able to block President Hoover's first nominee to the Supreme Court: North Carolina Federal District Judge John Parker, a staunch opponent of black suffrage. Because of his anti-black record, the NAACP pressured the Senate to reject Judge Parker's nomination. In 1934, the NAACP held a conference in New York and charged Charles Houston with the task of mapping out the first

226. Id.
227. Id.
228. Garraty, supra note 21, at 1012.
230. R. Nash, From These Beginnings 211 (1978).
coordinated strategy to challenge in court racial inequalities.231

In addition, Blacks had become an attractive voting block for New Deal Democrats. Large numbers of Blacks had migrated to the North where they were able to vote. By the mid-forties, more than half of the nation’s Blacks lived outside the South.232 Although Blacks had traditionally voted Republican, this trend began to shift during the depression as Blacks turned to the Democratic Party under Roosevelt.

**New Wind: Charles Evans Hughes**

Charles Evans Hughes returned to the Court as Chief Justice in 1930. In one of his first opinions, he persuaded a bare majority of the Court to strike down a state law that restrained the First Amendment. In *Gitlow*, the Court held the First Amendment applicable to the states, but left standing Gitlow’s conviction, a Phryric Victory. Next, the Court moved forward and struck down a state law on First Amendment grounds in *Near v. Minnesota.*233

The *Near* case arose as follows: In the 1920s a number of "cheap, ephemeral scandal sheets ... used for extortion, blackmailing petty crooks, or pressuring concessions from venial public officials" emerged. Minnesota passed a law in 1925 to deal with the problem of the scandal sheets, which

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233. 283 U.S. 697 (1931).
was dubbed the "Minnesota Gag Law." A state judge acting without a jury could prevent the publication of any newspaper if he found it "obscene, lewd, and lascivious" or "malicious, scandalous, and defamatory." It was seen nationally as a model law and many states considered following Minnesota. Jay Near and Howard Guilford established The Saturday Press in 1927 and they planned to run stories exposing corruption in the Twin Cities' (Minneapolis and St. Paul) Police Departments. Minneapolis Police Chief Frank Brunskill sought to ban the paper before it was published. Soon after the first issue hit the streets, two gun men attempted to kill Guilford. In the next issue of the Saturday Press, Near reported that the police were connected to the underworld and informed them and the mob that: "If the ochre-hearted rodents who fired the shots into the defenseless body of my buddy thought for a moment that they were ending the fight against gang rule in this city, they were mistaken." The story went on to insult local officials and called the county prosecutor a "Jew Lover."

The county prosecutor, Floyd Olson, promised "to put out of business forever the Saturday Press and other sensational weeklies." Arguing that the paper defamed a long list of local officials and the entire Jewish community, Olson convinced a local judge to issue a temporary restraining order barring publication of the
paper. After the Minnesota Supreme Court had upheld the publication ban, the ACLU became involved in the case.

In 1930, the case reached the United States Supreme Court with a change in leadership: Chief Justice Hughes, "a more liberal and rights-oriented" jurist replaced the "conservative, property-conscious" C.J. Taft. During the Court's discussion of the case, the new Chief Justice emphasized the application of the First Amendment's protection of the press to the states. Brandeis, Holmes, Stone and Roberts agreed with the Chief Justice, and the Minnesota law was held unconstitutional under the First Amendment's guarantee of no prior restraint on press publications. The victory created a First Amendment bulwark against any government action that impinged upon the freedom of the press. It was even the deciding case some forty years later in the Pentagon Papers case.

The Court Dampens Oppression

In the middle of the Depression in March 1931, a group of Black youths, hitching a ride on a freight train in Alabama, forced some White youths off the train after a fight emerged. The Whites complained to the stationmaster and wanted charges filed against the Blacks. When the train reached Paint Rock, Alabama, newly deputized sheriff's deputies searched the train and rounded up nine Blacks and two White girls. The Blacks were roped together and put on a truck to be taken to Scottsboro. Before the truck left,
one of the White girls calmly told a sheriff’s deputy that the blacks had raped her and her friend. The blacks were tried and convicted of raping the white girls, despite testimony that indicated they had not been raped. The two doctors that examined the girls contradicted the girls story and one of the accused men was so painfully disabled by venereal disease that it was almost impossible for him to even commit the act, much less keep the girls from contracting the disease.234

The adults were all sentenced to death. The 12 year-old boy, also found guilty, was granted a mistrial due to a hung jury over the issue of whether to give him death as well. After the trial, protests came to Alabama from all parts of the United States and even from some foreign countries. The American Communist Party and the NAACP battled over who would represent the boys on appeal and the Communists won. This proposed alliance of the Communists with the Blacks raised great fear among Whites.235

The cases became known as the Scottsboro boys case. In the first case to reach the Supreme Court, Powell v. Alabama,236 the Court overruled Hurtado and held that the Fifth and Sixth Amendments applied to the states.237 Although an attorney represented the boys, the Court found that the representation had been inadequate. For the first

234. D. Carter, & Scottsboro, A Tragedy of the American South.
235. O’Reilly, supra note 159, at 17.
236. 287 U.S. 45 (1932).
237. Id. The companion cases were Patterson v. Alabama and Weems v. Alabama.
time, the Court held that the Due Process Clause of the Fourteenth Amendment incorporated the Sixth Amendment requirement that a defendant be given 'effective' assistance of counsel, at least in capital cases. The convictions were reversed and the state of Alabama was ordered to retry the boys.

During the second trial, it was revealed that the girls had been prostitutes and had often taken money from black as well as white customers. In addition, one of the girls, when asked by the boy's defense attorney, famed criminal lawyer Leibowitz, if any rape had occurred on the train, she answered, "No. Not that I Know of." She stated that the other girl could not have been raped either, because she had been with her the whole time. In closing argument, the prosecution told the jury, "Show them that Alabama justice cannot be bought and sold with Jew money from New York." Even with the new testimony, the jury still returned a guilty verdict with punishment set at death in the electric chair. Judge Horton, the trial judge, was so appalled by the verdict that he threw it out because it was contrary to the weight of the evidence. Shortly after the trial, Judge Horton was voted out of office for his decision.

Another trial resulted in another guilty verdict and death sentences. Upon appeal, the boys argued that the state had consistently kept Blacks off jury lists and that they had thus been denied equal protection of the law.  

Chief Justice Hughes wrote the majority opinion, reversing their convictions and again ordered new trials. The Court took a new approach to constitutional violations. It had consistently held that outright exclusion of Blacks from jury panels was unconstitutional. Now Hughes declared, however, that "[w]hen a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights." The fact that no Negro had been called for jury service in the county and the fact that, although there were qualified Negroes in the county, none were on the jury roll, was sufficient for the Court to find state discrimination in violation of the Constitution. This was an entirely new approach to constitutional interpretation involving personal rights.

Another horrendous case involving the treatment of a Black suspect again caused the Court in 1936 to reverse its

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240. See Neal v. Delaware 103 U.S. 370 (1881); Ex parte Virginia 100 U.S. 339 (1880); Strader v. West Virginia, 100 U.S. 303 (1880).
241. 294 U.S. 590.
242. New guilty verdicts were obtained by the state and new appeals were drawn up by the defense counsel until the state finally agreed to a compromise in 1937. Some of the boys were released in the late 30s and 40s but the last boy was finally released in 1950 after having served 19 years in prison. In 1976, the only one of the nine still living was granted a full pardon by the state.
course and hold another provision of the Bill of Rights applicable to the states. In 1934, two Negroes were indicted for murder in Mississippi. According to the dissent of two Justices of the Mississippi Supreme Court, the same day the crime was discovered:

...a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. [ A couple of days later the same deputy arrested him and on the way to jail he] went by a route which led into [Alabama]; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring he would continue the whipping until he confessed, and the defendant then agreed to confess....

The other two defendants, Ed Brown and Henry Shields, were also arrested. According to the dissenting Justices:

On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men...came to the jail ...and [Brown and Shields] were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter and detail as demanded....in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers....Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval

243. 173 Miss. 563, 572, 161 So. 465, 470 (1934).
account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.\textsuperscript{244}

The Mississippi Supreme Court upheld the convictions, even though the deputy admitted the whippings. The only evidence against the men was the confessions, and thus the only question on appeal was whether the United States Supreme Court would hold the states accountable under the Fourteenth Amendment Due Process clause.\textsuperscript{245} The result was a declaration that the use of the confessions constituted a denial of due process. Other state courts were put on notice that "whenever the Court is clearly satisfied that such violations exist it will refuse to sanction such violations and will apply the corrective."\textsuperscript{246}

\section*{PART III: A NEW CONSTITUTION}

\textbf{Out Of the Ashes Rises A Phoenix}

In the midst of the Depression, Franklin D. Roosevelt was sworn in as President in 1933. During the crisis, Roosevelt operated a "kind of constitutional dictatorship."\textsuperscript{247} In attempting to alleviate the economic crisis that had befallen the nation, he launched a massive

\textsuperscript{244.} Id.  
\textsuperscript{245.} In federal court under the Weeks exclusionary rule, there is no question that the confessions would have to be excluded from the trial as violations of the Fifth Amendment's protection against forced incrimination.  
\textsuperscript{246.} 297 U.S. 278 (1936).  
\textsuperscript{247.} Garraty, \textit{supra} note 21, at 1013.
and highly unorthodox, federal governmental intervention program, the New Deal. In dealing with the national crisis, nothing seemed to stand in his way except the Court. Just when the New Deal appeared to have overcome all obstacles, the Supreme Court began striking down the new legislation in 1934.\textsuperscript{248} By 1935, the Court was clearly opposed to the President and Congress over the issue of private property.

Roosevelt's New Deal was on a collision course with the Supreme Court's interpretation of the Fourteenth Amendment. Although the Supreme Court had emasculated the Fourteenth Amendment as a source of protection for Blacks, the Court had used the Amendment as a vehicle to protect private property under the guise of the Substantive Due Process doctrine. 'Lochnerizing' symbolized the activist approach taken by the Court in its drive to protect American business from federal or state regulation. From 1935 to 1937, the Supreme Court waged a bitter war with the New Deal to prevent government from regulating private property.

The issue facing the nation was as "important and as divisive as the issues involved in the Dred Scott and Reconstruction crises."\textsuperscript{249} There were some, like Louisiana Governor Huey Long, that were delighted that the Court had intervened and "saved...[the] nation from fascism."\textsuperscript{250}

\textsuperscript{248} The Court held unconstitutional a section of the National Recovery Act in Panama City Refining v. Ryan, 293 U.S. 539 (1934) (the "Hot Oil case").
\textsuperscript{249} Lasser, supra note 40, at 111.
\textsuperscript{250} Id. at 133.
Former President Hoover declared, "whatever violates, infringes, or abrogates fundamental American liberty violates the life principle of America as a nation.... Thank God for the Supreme Court." 251

During the thirties, the world fell into a deep economic depression during the thirties which eventually developed into political oppression. In the same year that Roosevelt had assumed office, Adolph Hitler had assumed power in Germany. Hoover, in a speech celebrating the Bill of Rights captured the fear of the time:

In the hurricane of revolutions which have swept the world since the Great World, men, struggling with the wreckage and poverty of that great catastrophe and the complications of the machine age, are in despair surrendering their freedoms for false promises of economic security. Whether it be Fascist Italy, Nazi Germany, Communist Russia, or their lesser followers, the result is the same. Every day they repudiate every principle of the Bill of Rights. Freedom of worship is denied. Freedom of speech is suppressed. The press is censored and distorted with propaganda. The right of criticism is denied. Men go to jail or the gallows for honest opinion.... Here is a form of servitude, of slavery- a slipping back toward the Middle Ages. Whatever these governments are, they have one common denominator- the citizen has no assured rights.... Here is the most fundamental clash known to mankind-...men who are slaves of despotism, as against free men who are masters of the State. 252

Outrage that the Court was destroying the nation by stifling a popular President's program to alleviate the suffering of the nation was on the other side of the debate. One congressman in 1935 wrote, "It amazes the public that

251. Id. at 136.
nine men, sitting as a supreme court, are willing to stop the wheels of recovery when it is perfectly apparent that the people of every State of the Union want the machinery of government to go ahead."253 Another congressman saw the battle as one between "democracy and plutocracy." The will of Congress was being "thwarted by an oligarchy of 'untouchables' beyond governmental reach and utterly indifferent to human rights."254 To some in Congress, the Justices were "a group of public dictators and tyrants and without responsibility to anyone."255

The 1936 Presidential election focused on this contest of Titans: the President versus the Supreme Court. After winning the greatest election victory in United States history, Roosevelt felt that he had received a mandate from the people concerning the New Deal: the Court could not be allowed to stand in the way. Roosevelt rejected the idea of a constitutional amendment because it was believed that "judges who resort to a tortured construction of the Constitution may torture an amendment. You cannot amend a state of mind and mental hostility to the exercise of governmental power."256 The history of the Civil War Amendments had already demonstrated the validity of this position. He explained to the nation, "We must find a way

254. Id. at 148.
255. Id. at 149.
to take an appeal from the Supreme Court to the Constitution itself."257

In February 1937, Roosevelt introduced his plan, the Court-packing plan. His method of changing the Court's direction was to alter the Court's composition. According to Roosevelt, the system was fine; it was the current occupants that were faulty. Roosevelt's plan, however, was never adopted.

Two of the Justices realized that the Supreme Court as an institution was in danger. In order to preserve that institution, Justices Hughes and Roberts changed their votes:258 the famous "switch in time that saved nine."259 The Court made a hasty retreat, "a retreat to the constitution," as Justice Jackson described it,260 and immediately began to uphold the New Deal legislation. Substantive Due Process was replaced with judicial laissez-faire in regards to economic legislation. Legislation effecting economic or property rights was no longer sacrosanct.

In exchange for giving up protection of economic rights, however, the Court began to more aggressively pursue the protection of human rights. In 1938, Justice Stone authored the most famous footnote in history. In United

257. Lasser, supra note 40, at 152.
258. Beginning in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1938), the Court upheld economic legislation.
259. Mason, supra note at 113.
260. Id. at 112.
States v. Carolene Products, 261 the Court upheld legislation regulating business activity and in a footnote carved out a niche for itself in an almost face saving trade for having given up protection of private property. Instead of property rights, human rights hence forth occupied a "preferred position." 262 The footnote stated that a "more exacting judicial scrutiny" would be conducted on legislation that contravened specific constitutional prohibitions, such as the Bill of Rights, or that restrict the political process. A "more searching judicial inquiry" was be conducted as to whether prejudice against discrete and insular minorities" was constitutional. 263 The cases cited were the cases in which the Court had previously protected human rights and had been politically unopposed: the Nixon cases or the Pierce and Meyer decisions. Stone even cited Justice Holmes' dissent in the Gitlow case. The Court was taking its cue from the political branch, backing off from protecting property rights and following the path of least resistance by protecting human rights. The very fact that the Court used a footnote to indicate its new direction demonstrates how timid the Court was about pursuing this new direction. Roosevelt had clearly and decisively won the war. However, out of the ashes of the Roosevelt defeat, a new Civil Rights Phoenix began to rise.

261. 304 U.S. 144 (1938).
262. The phrase "preferred position" was first used by Stone in his dissent in Jones v. Opelika, 316 U.S. 584, 608 (1942). It was adopted by the majority in Murdock v. Penn. 319 U.S. 105, 115 (1943).
263. 304 U.S. 144, 152 n.4 (1938).
The Phoenix is Not Yet Ready to Fly

In 1937, the Court had not yet realized its new wings: it denied a challenge by Blacks to a state's use of the poll tax. The majority felt that the "privilege of voting is not derived from the United States, but is conferred by the state, and save as restrained by the Fifteenth and Nineteenth Amendments... the state may condition suffrage as it deems appropriate."264 The poll tax remained to discourage Black voters.

Moreover, the Court retreated in holding that the double-jeopardy clause of the Fifth Amendment did not apply to the states in Palko v. Connecticut.265 Upon a subsequent conviction initiated by the prosecution, Palko was convicted of a greater charge. The Court held that the provisions of the Bill of Rights were not automatically extended to the states via the Fourteenth Amendment. Rather, only those rights that the Court found "implicit in the concept of ordered liberty" and those principles that are "so rooted in the traditions and conscience of our people as to be ranked fundamental" were to be applied to the states. For Justice Black, this idea of selective incorporation smacked of Substantive Due Process and he would have nothing to do with it. He advocated "total incorporation" of the entire Bill of Rights, nothing more or less.

Wings Beginning to Fill With Air

In DeJonge v. Oregon,266 however, the Court gave an indication of the new direction it was taking when it invalidated the state conviction of a Communist speaker at a party rally. Hughes stated that such state action violated Due Process because "peaceable assembly for lawful discussion cannot be made a crime."267 This new Roosevelt Court (1937 to 1949) soon created a civil liberties revolution.

All Out Assault Upon The Citadel

In 1938, it appeared business as usual in the country. The New Deal's war on crime had not extended to Black lynchings. In a highly publicized decision, Roosevelt refused to sign an anti-lynching bill for fear of alienating Southern Democrats.268

However, in 1939, the administration's policies began to change as native American fascists and Nazis in Germany began to draw parallels between the Third Reich's handling of the Jews and the United States policy towards the Negro. In addition, the Communist party attempted to attract Negroes. They offered the promise of an all-Negro state and they elected a Negro to run as Vice-President on their ticket.

266. 299 U.S. 353 (1937).
267. Id.
268. Nash, supra note 226, at 211.
Although no civil rights legislation was proposed during the Roosevelt administration, Blacks benefited from the New Deal.269 Roosevelt ended segregation in federal offices and appointed men to his "black cabinet." Attorney General Frank Murphy established a Civil Rights Section in the Justice Department. He considered racial intolerance, "the most un-American...thing in our life today."270 He stated, "I am anxious [that the Justice Department] should be a force for the protection of the people's liberties."271

The Supreme Court, however, had already begun to publicly side with Blacks. In 1937, Blacks in the District of Columbia had requested the Sanitary Grocery Company to adopt a policy of employing Negro clerks in its stores. The company ignored the request and Blacks began to picket a company store carrying signs that stated "DO YOUR PART! BUY WHERE YOU CAN WORK! NO NEGROES EMPLOYED HERE!" They threatened to picket other stores when a lower court granted the company an injunction. The Supreme Court in 1938, reversed the lower court, stating, "The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite important to those concerned as

269. The evidence of this is the large number of Black voters who shifted allegiance from the Republican party to the Democratic party during Roosevelt's administration. See Morison, supra note 56, at 984; Garraty, supra note 21, at 1019.
270. O'Reilly, supra note 159, at 23.
fairness and equity in terms and conditions of employment [are to unions]. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."272

The most important case of 1938 for Blacks was Gaines v. Canada, Registrar.273 Gaines, pursuant to state law, was refused admission to the University of Missouri Law School. Missouri did not have a law school for Blacks, but the state Supreme Court had stated there was a "legislative purpose to establish one". Speaking for the Court, Justice Hughes said that the state had recognized its obligation to provide Negroes with substantially equal education. However, in this case the education was not in fact equal. He found that the state had not met its obligation even though it had paid tuition fees for Blacks attending schools in another state. Because the Negro had to go out of state, it denied him equal protection of the laws of that state in violation of the Fourteenth Amendment. This was a clear reversal of the Cumming decision. The Court was beginning to tie a noose around segregation.

In 1939, the Court declared an Oklahoma attempt to disenfranchise Blacks as unconstitutional. The Grandfather portion of the Oklahoma constitution had been invalidated in

Following that decision, the state tried to disenfranchise all those who were qualified to vote, but had not registered between April 30 and May 11, 1916. The only exceptions were those who had voted in 1914. The catch in this scheme was that only whites voted in 1914 because of the Grandfather Clause which the Court did not strike down until 1915. What is noteworthy about this state, and other similar states, was their tenacity in the face of an ambiguous Supreme Court. This was also a problem for the Court in the fifties and sixties.

Justice Frankfurter said, "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race... The practical effect [is to deny Negroes the vote.]" He added, "The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiation and enterprise." 275

This holding was revolutionary. A new Bill of Rights was emerging. When compared to Brown v. Board of 1954,

274. Guinn v. United States, 238 U.S. 347 (1915). The provision exempted from a literacy test for voters those who on January 1, 1866 or any time thereafter were entitled to vote or were lineal descendants of such persons.
discussed below, the same analysis is performed, only sixteen years earlier. The Court considered the practical effect of any legislation as well as the special condition of the Negro.

In *Chambers v. Florida*, 276 in 1940, the Court expanded the *Brown v. Mississippi* decision that Due Process forbids the state's use of coerced confessions to include psychological coercion. Unlike the *Brown* case, in *Chambers* there was no admission by state officers that physical force or violence was used. The Court proceeded to go beyond the physical violence threshold and held that psychological coercion was just as invalid under the Constitution. Justice Black wrote, "The record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these young tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisors or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance." 277 Even though the Chambers' conviction was supported by other evidence, the Court reversed it. Future Courts, such as the Warren Court, would only fashion new remedies to deal with the already recognized coercion problem, such as in

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276. 309 U.S. 227 (1940).
277. Id. at 276.
Miranda and Escobedo. The Hughes Court, however, breathed life into a new Constitution.

Nevertheless, the Court was not as sensitive to other groups rights. In Minersville School Dist. v. Gobitis, two Jehovah’s Witness school children refused to salute the flag in class and were subsequently expelled from school. Justice Frankfurter held that the constitution had not been violated. He found that the nation could demand adherence to its national symbols, especially when the potential for war was so near. He argued, "The ultimate foundation of a free society is the binding tie of cohesive sentiment." It was, in essence, the Court’s opinion that survival transcended the Constitution.

Two things reassured Frankfurter that he had made the right decision: "One was the overwhelming vote of eight to one. The other was the presence of Chief Justice Hughes among the eight for Hughes, more than any other member of the Court, had spoken up in the past for the liberties protected by the Bill of Rights." Justices Black, Douglas and Murphy, all generally considered fervent adherents to the Bill of Rights, sided with the majority. The lone dissenter was Justice Stone.

One of Hughes last decisions in 1941, Mitchell v. United States, was another victory for Blacks. Mitchell, a black congressman from Illinois, had taken a train from

278. 310 U.S. 586 (1940).
280. 313 U.S. 80 (1941).
Chicago to Hot Springs, Arkansas. When the train pulled into Arkansas, the conductor made him leave his first-class accommodations and forced him to take a seat in the colored section under the threat of arrest. Mitchell complained to the Interstate Commerce Commission, but his suit was dismissed. Mitchell appealed and a three judge Illinois District Court supported the Commission's findings. The U.S. Attorney General filed a brief against the lower court's judgment in the Supreme Court, while ten Southern states filed briefs in support of the judgment. Chief Justice Hughes, writing for a unanimous Court, set aside the Commission's order as a violation of the Act. Hughes wrote that "[t]he question of whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental right which is guaranteed against state action by the Fourteenth Amendment [citations omitted] and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust." The end of all officially sanctioned segregation was not far away.

281. He charged the railroad had violated the Interstate Commerce Act which made it unlawful to "subject any particular person...to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Id.
282. 313 U.S. 80 (1941).
The Crucible Of World War II

On September 1, 1939, Germany invaded Poland initiating the Second World War. America, still under isolationist sway, maintained neutrality. Roosevelt felt that Hitler must be stopped and pledged to provide aid to the allies. America was to become the "Arsenal of Democracy." 283 Blacks, however, threatened to internationally embarrass Roosevelt. A. Philip Randolph, president of the Brotherhood of Pullman Porters, threatened a massive march of 100,000 Blacks on Washington if discrimination in the armed services and defense industries was not ended. Fearing that the Germans would use America's racial problem as propaganda, Roosevelt finally agreed to Randolph's demands and issued an executive order banning such discrimination. 284 He also established the Fair Employment Practices Committee.

On January 6, 1941, just before America entered the war, Roosevelt delivered his Four Freedoms speech to Congress and the nation which outlined the war aims of the United States. He began by stating: "I suppose that every realist knows that the democratic way of life is at this moment being directly assailed in every part of the world....Therefore, as your President...I find it unhappily necessary to report that the future and safety of our country and of our democracy are overwhelmingly involved in

283. President Roosevelt's speech, The Arsenal of Democracy, broadcast from the White House on December 29, 1940, reprinted in Copeland, supra note 248, at 517.
284. Nash, supra note 226, at 212.
events far beyond our borders." The President was more prophetic than even he knew. After Pearl Harbor, on December 7, 1941, America was again dragged into world events. This time, however, America was unable to return home to business as usual, to normalcy. The option to close the doors behind and ignore our great sin, as we had done after World War I, was not an option in the post-war world.

Roosevelt went on in his speech to declare the war aims of the nation:

In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want—everywhere in the world.

The fourth freedom is freedom from fear,...—anywhere in the world.

Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights and keep them....

In light of these aims, America was forced to openly confront its treatment of Black Americans after the war. The Negro problem could no longer be ignored.

In fact, the Axis powers made great use of America’s Negro problem. In January of 1942 in Missouri, a Negro, Cleo Wright, was arrested for attempted rape of a white woman. A white mob broke into the jail and attacked Wright. They tied his feet to the rear of a car and dragged him through the Black section of town. They then poured

gasoline on him and burned him to death. German and Japanese radios immediately began broadcasting discussions of the lynching on programs all over the world. Attorney General Biddle gave a Justice Department press release:

With our country at war to defend our democratic way of life throughout the world, a lynching has significance far beyond the community, or even the state, in which it occurs. It becomes a matter of national importance and thus properly the concern of the federal government.

After a FBI investigation, the federal grand jury in St. Louis refused to return any indictments because there had been no violation of any federal law in their opinion. Throughout the war, Negro lynching continued. Although a federal grand jury returned an indictment in 1942, the defendants were acquitted at trial. In 1943, there were bloody race riots in Detroit, New York and Los Angeles, some of which lasted for as long as a week. After the riots, the nation undertook efforts to promote racial harmony out of fear that the Germans and Japanese would exploit the racial discontent and thereby weaken America's war effort. America was beginning to realize the international consequences of its internal racial problems.

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286. In October 1942, two Negro boys, sixteen and fourteen, were hanged from a bridge by the Klan. They had been taken from an unguarded jail in Quitman, Mississippi where they had been charged with molesting a white girl. During the same month in Laurel, Mississippi, a Negro farmer had been convicted of killing his white employer during an argument. He was seized from jail and lynched in public. In Paris, Illinois, a Negro was "hunted down and shot to death by a mob of white farmers, ...under the leadership of an Indiana sheriff and his deputies." The farm community had been aroused by baseless rumors. See M. Konvitz, The Constitution and Civil Rights 84-85 (1946).
The Court During The War

In 1941, Chief Justice Hughes retired and Justice Stone, author of the famous footnote in Carolene Products, was elevated to Chief Justice. During the war years, however, the Court was extremely timid. At times it would continue the Civil Rights advance, but most often it attempted to avoid conflict, even if this meant halting Civil Rights progress.

In 1941, the Civil Liberties Section of the Justice Department prosecuted several corrupt New Orleans election commissioners under the Klu Klux Klan Act of 1870. The state election officials had falsely counted the ballots for a congressional race. The issue in United States v. Classic288 was whether the Constitution secures to Louisiana voters the right to have a primary ballot counted. The Supreme Court held that Congress had the power under Article I of the Constitution to regulate federal elections. This contravened its previous ruling, where it declared suffrage to be a state concern.

In 1942, an Oklahoma law, similar to the one upheld in Buck v. Bell, required the forced sterilization of habitual criminals. Without overruling Buck, the Court held that the statute violated the equal protection clause. Writing for the majority, Justice Douglas clearly indicated that the Darwinian notion of survival of the fittest and its bastard

288. 313 U.S. 299 (1941).
offspring, the notion of racial purity, had lost general acceptance in the Court. "We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."289 In essence, the Court found that each being had some quantum of basic rights that the state could not take away.

In the same term, the Court diminished the right to counsel, finding that it was not that basic of a right. Just before the war began in 1941, the Court in Smith v. O'Grady290 had extended the 1932 Powell holding by requiring counsel for all indigent defendants, even if an attorney had not been requested. With the advent of war, however, the Court reversed this trend and in Betts v. Brady,291 held that counsel, although still required in all capital cases, was not essential in all state criminal trials. The Court believed that appointment of counsel was not necessary in the ordinary trial. The majority noted the fact that the Powell case had involved "ignorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel [and] were hurried to trial for a capital offense without effective [counsel]..." 292 Instead of a mandatory rule, the Court returned to examining the fairness of each criminal trial. This was the Justices' compromise contribution to the war effort, since the nation could not

290. 312 U.S. 329 (1941).
291. 316 U.S. 455 (1942).
292. Id. at 463.
afford the O'Grady standard during wartime, and the Court would not accept unfair trials.

After the Gobitis decision in 1940, a nationwide wave of violence was directed against Jehovah's Witnesses. In Kennebunkport, Maine, one of their meeting halls was burned. In Indiana, a lawyer representing them was beaten and forced out of town. Jackson, Mississippi banned the Witnesses. In some states, children who continued to refuse to salute the flag were declared delinquent, and committed to reformatories.293

As soon as possible, Justices Black, Douglas and Murphy deserted the Frankfurter position and joined Justice Stone.294 During the interim, the Court personnel also changed.295 The Gobitis case became ripe for overturning.

In 1943, in West Virginia Board of Education v. Barnette,296 the Court did just that. Several Jehovah's Witnesses were expelled from West Virginia schools and threatened with incarceration. Parents of the children were prosecuted. Some of the parents challenged the law in federal district court. In one of the supreme ironies of history, one of the three judges hearing the case was Judge

293. Quarrels, supra note 275, at 299.
294. The first opportunity was in a tax case, Jones v. Opelika, 316 U.S. 584 (1942). It was a 5 to 4 decision barely upholding the tax.
295. Justices Hughes and Justice McReynolds retired being replaced by Justice Stone, who was elevated to the Chief Justiceship and U.S. Attorney General Robert Jackson and Senator James Byrnes. Justice Byrnes resigned within the year to become director of the war mobilization effort and was replaced by Justice Rutledge who was a "staunch libertarian." [cite]
296. 319 U.S. 624 (1943).
John Parker, the same judge that the NAACP had pressured the Senate to refuse in 1930. Judge Parker and his colleagues noted that four of the Justices since the Gobitis case had repudiated their positions, and instead of relying upon the clear Supreme Court precedent, the panel issued an injunction against enforcement of the flag salute requirements. Judge Parker eloquently explained, "[W]e feel we would be recreant to our duty as judges if through a blind following of a decision which the Supreme Court itself has thus impaired as authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."  

The Court upheld Judge Parker's decision in a remarkable turnabout. The violence directed against the Witnesses and the Nazis example in Europe surely influenced this reversal. Writing for the new majority, Justice Jackson stated, "Those who begin coercive elimination of dissent soon find themselves dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."  

During the war, most Blacks complied with their draft notices. However, Winfred Lynn, a black gardener, decided

297. Judge Parker was also one of three publicly announced candidates considered by Eisenhower to fill the Chief Justice position vacated by the Death of Chief Justice Vinson. The position ultimately went to Earl Warren. See J. Pollack, Earl Warren: The Judge Who Changed America 151-54 (1979).
300. 319 U.S. 624, 641.
to challenge the illegally segregated draft when he informed the draft board that he was "ready to serve in any unit of the armed forces of my country which is not segregated by race." 301 His purpose, as described by one historian, was to expose the "blatant contradiction between American ideas of equality and the stark facts of racism and discrimination." 302 Lynn's challenge was important because if successful, it would disrupt the nation's military during war time. However, if unsuccessful, it would be a great set-back for black civil rights.

Lynn was arrested for refusing to report for induction. He then filed a writ of habeas corpus contesting his detention. The District Judge ruled that Lynn could not challenge the draft because he had not been drafted. Lynn then agreed to submit to induction in order to challenge the draft. The district and circuit courts ruled against Lynn's habeas challenge. The Supreme Court, however, refused to hear Lynn's case because he had been transferred overseas by the military and was therefore considered to be no longer in the custody of the respondent named in the suit. 303

301. Walker, supra note 148, at 165. Lynn's case was based on the Selective Service Act which stated, "in the selection and training of men under this act...there shall be no discrimination against any person on account of race or color." Id.
302. Id. at 164.
303. Id. at 163-165.
Civil Rights Defeats: America's Concentration Camps

Once war broke out, many in the nation felt as Frankfurter had in the Gobitis case: survival took precedence over principles. In California, shortly after the war began, Attorney General Earl Warren declared, "[T]he Japanese situation as it exists in this state today may well be the Achilles' heel of the entire civilian defense effort." The commander of the Western Defense Command, General John DeWitt, declared, "A Jap's a Jap. They are a dangerous element, whether loyal or not." Three months after Pearl Harbor, General DeWitt requested that all 112,000 Japanese in California be relocated. Washington, D.C., however, was skeptical of the idea. The media then joined the call for relocation. Expressing the attitude of the day, Washington columnist Walter Lippmann stated, "I understand fully and appreciate thoroughly the unwillingness of Washington internment of all those who are technically enemy aliens... However, the Pacific Coast is officially a combat zone, some part of it may at any moment be a battlefield. Nobody's constitutional rights include the right to reside and do business on a battlefield."

In 1942, Warren, exhibiting the typical racism towards Orientals in California, told a congressional committee:

304. Id. at 136.
306. Id.
308. Future Supreme Court Justice Tom Clark, who had been sent by the Justice Department to participate in the evacuation said, "I think that you have to live it to
"We believe that when we are dealing with the Caucasian race, we have methods that will test the loyalty of them. But when we deal with the Japanese, we are in an entirely different field and we cannot form any opinion that we believe sound."\textsuperscript{309} Warren began to round up the Japanese Americans as spies on the doctrine of "constructive treason." The doctrine reasoned that since spies try to look innocent, innocent behavior was proof of guilt. Thus, innocent Japanese-Americans could be arrested even if, or especially if, there was no reasonable suspicion of their involvement in criminal activity.\textsuperscript{310}

Not everyone was in agreement with Warren, however. FBI Director Hoover reported that "the army was getting a bit hysterical"... Attorney General Biddle advised Roosevelt that the Army had "no reasons for mass evacuation..." Secretary of War Henry Stimson added, "We cannot discriminate among our citizens on the ground of racial origin.... [Any forced evacuation would tear] a tremendous hole in our constitutional system."\textsuperscript{311}

Ignoring his advisors, President Roosevelt issued Executive Order 9066 delegating to the military sweeping power over the 120,000 Japanese-Americans on February 19, 1942.\textsuperscript{312} At first, the military ordered only a curfew for

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understand the feeling Californians had about the people of Japanese descent after Pearl Harbor." \textit{Id.} at 11.
309. \textit{Id.} at 12.
310. See Bork, supra note 3, at 211.
312. Although the order did not mention Japanese-Americans, its intent was clear. The order authorized the secretary of
\end{flushleft}
Japanese-Americans living on the West Coast. Later, they were asked to voluntarily relocate inland. Those that did leave voluntarily were not welcomed, however. Governor Chase Clark of Idaho stated publicly, "The Japs live like rats, breed like rats, and act like rats. I don’t want them coming into Idaho...." 313 Finally, General DeWitt gave the Japanese 48 hours to leave the West Coast and move to relocation camps located in the desert regions of western states like Arizona.

To their credit, most Japanese-Americans complied with the orders. Nevertheless, there were a few that attempted to resist. Gordon Hirabayashi entered the Seattle FBI office and asked to be arrested for violating the curfew order. He handed an FBI agent a statement entitled "Why I refused to register for evacuation." His statement was a simple plea for justice:

This order for the mass evacuation of all persons of Japanese descent denies them the rights to live.... [Native-born American citizens] are denied on a wholesale scale without due process of law and civil liberties...If I were to register and cooperate under those circumstances, I would be giving helpless consent to the denial of practically all of the things which give me incentive to live. I must maintain my Christian principles. I consider it my duty to maintain the democratic standards for which this nation lives. Therefore, I must refuse this order for evacuation. 314

Hirabayashi’s plea for justice was denied.

313. David, supra note 234, at 33.
314. Irons, supra note 307, at 40.
Fred Korematsu underwent plastic surgery to alter his appearance and was planning to marry a Caucasian when he was arrested in San Leandro, California on May 30 for violating the relocation order. Mitsuye Endo complied with the relocation order and reported to a San Francisco assembly center. She subsequently had her attorney file a habeas corpus petition to challenge the government's right to hold her.

Hirabayashi's case was the first to be heard in the Supreme Court where, just weeks after deciding the Barnette flag-salute case, a unanimous Court upheld the curfew. Justice Stone's majority opinion justified the upholding of the curfew by claiming military necessity and the fact that the Japanese had failed to become an "integral part of the white population." Instead, they had maintained their "attachments to Japan and its institutions." The military was entitled to impose such orders on "residents having ethnic affiliations with an invading enemy."315

Justice Murphy couldn't agree with the majority and yet he couldn't bring himself to dissent. Instead, he wrote a concurring opinion that sounded like a dissent:

"Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideas.... To say that any group cannot be assimilated is to admit that the great American experiment has failed."316 Although many liked to agree with Justice Murphy, the truth was that our traditions

316. Id. at 110-11.
and ideas were grounded in distinctions based on color and ancestry. Justice Murphy added that the "order bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany."\(^\text{317}\) Unfortunately, Murphy too accurately reflected reality.\(^\text{318}\)

Even Murphy was willing to concede that the constitution tolerated "some inconvenience based on race" if the "necessity was sufficiently overwhelming." War was sufficiently compelling for Murphy if the convenience was merely a curfew.

Fred Korematsu's case\(^\text{319}\) moved Murphy to dissent. Murphy could not support the Japanese-American relocation stating, the "action falls into the ugly abyss of racism." He believed that the relocation was based on the "erroneous assumption of racial guilt" and not military necessity.\(^\text{320}\)

Justice Black, now writing for only a six-man majority, upheld the relocation, arguing that "hardships are part of war and war is an aggregation of hardships." He took great pains, however, to deny that Korematsu's treatment was based on "hostility to him or his race." The majority argued this time that the ruling was instead based on "evidence of disloyalty."\(^\text{321}\)

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\(^{317}\) Id.
\(^{318}\) In 1935 and 1938, the Nazis "drive for 'racial purity' was taken up in earnest in decrees." Garraty, supra note 21, at 1055.
\(^{319}\) Korematsu v. United States, 323 U.S. 214 (1944).
\(^{320}\) Id. at 235.
\(^{321}\) Id. at 223.
On the same day as the Korematsu decision authorizing the relocation of Japanese-Americans, the Court unanimously granted Endo a writ of habeas corpus. In this case, the Court held that loyal Japanese-Americans could not be detained at inland points. Justice Douglas' majority opinion attempted to skirt the larger issues and free Endo on technical grounds. In the final analysis, the Court decided to directly challenge the President who had almost destroyed the Court, as evidenced by the Lynn, Hirabayashi and Korematsu cases. As in 1937, however, the Court saved face by freeing Endo while still upholding the government's authority to conduct military operations.

Civil Rights Victories

Unlike the first World War, the Second World War produced very few free speech cases as a result of a concerted effort on the part of Attorney General Francis Biddle not to prosecute political cases. In 1944, the Court had the opportunity to review the conviction of a white racist under the Espionage Act of 1917. Hartzel mailed 600 flyers out in 1942 advocating the abandonment of the war against Germany and for whites all over the world to join together in an international race war of whites against all other races. The Court overturned his conviction on

322. 323 U.S. 283 (1944).
323. [cite]
statutory grounds holding that Hartzel lacked the requisite intent to affect military operations.

Also in 1944, voter discrimination from Texas reappeared in Smith v. Allwright\textsuperscript{325} and the Court felt secure enough to act. The Texas Democratic party refused to allow Negroes to vote in the primary and Smith filed a damage suit under the federal civil rights statutes. Relying on United States v. Classic, the Court overruled its unanimous Grovey decision, which had upheld the exclusion of Negroes from party primaries just nine years ago. The Democratic Party Convention in Grovey had been "unfettered by statutory control" and thus was not state action as required by the Fourteenth Amendment, whereas in the Nixon cases, the Court had found statutory authorization for the party's action and had thus found the exclusion of Blacks unconstitutional. The Court stated that "[s]uch a variation of the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nomination of the Democratic Party in Texas.... Federal courts must for themselves appraise the facts leading to the conclusion." The Court no longer ignored legal formalities. The result was now as important as the overt representations made by the state.

In Steele v. Louisville & N.R.R. Co,\textsuperscript{326} the Court continued to advance civil rights for blacks in a case

\textsuperscript{325} 321 U.S. 649 (1944).
\textsuperscript{326} 323 U.S. 192 (1944).
Justice Murphy described as an "ugly example of economic cruelty against colored citizens." Blacks sought an injunction against a railroad to prevent it from entering into a collective bargaining agreement which discriminated against blacks. The Court unanimously upheld the injunction.

In 1944, Gunnar Myrdal published his monumental work, "An American Dilemma," detailing the plight of Black Americans. He wrote that "[s]egregation is so complete that the white Southerner never sees a Negro except as his servant.... Today, the average Southerner of middle or upper class status seems... to judge all Negroes by his cook." Myrdal's report was later cited in the Brown v. Board decision just a decade later as support for overturning segregation in public schools.

Myrdal's report of Negro conditions is also verified by the Supreme Court case of Pollock v. Williams that same year. The case illustrates that Blacks lived in virtual slavery. Pollock was charged with violating a Florida peonage statute. He had broken his 5 dollar labor contract and was fined $100. If he could not pay the fine then he would have to serve 60 days in jail. The Supreme Court stated, "He was an illiterate Negro laborer in the toils of the law for want of $5." Holding the law in violation of

327. Id. at 208-09.
the Thirteenth Amendment, the Court ordered Pollock's release.

In 1945, the Court upheld a New York Civil Rights Law encouraging other states to follow suit. Every labor organization was forbidden to deny membership because of a person's race, color or creed. The Railway Mail Association limited its members to Caucasians and native American Indians. The association argued that the state law violated the due process and equal protection clauses of the Fourteenth Amendment, and that the law was in conflict with federal power over post offices. These arguments had worked previously, but now the Court rejected the contentions and upheld the power of the state to attack racial discrimination.

Also in 1945, the Court advanced federal authority to protect civil rights. In a monumental blow to southern apartheid, the Court held that a dead negro, murdered by state law enforcement officers, had clearly been deprived of life without due process. In Screws v. United States, 330 a case the Court described as "a shocking and revolting episode in law enforcement," 331 Georgia lawmen had beaten to death a Negro prisoner in their custody. Because the state refused to indict the officers for murder, the Justice Department initiated prosecution under the Civil Rights Acts of 1871. Screws, the Sheriff of the County and the leader of the arresting party, challenged his conviction under the

330. 325 U.S. 91 (1945).
331. Id.
statute, arguing that he had committed murder, not civil rights violations. The federal statute authorizes punishment for deprivation of rights by those who act "under color of law." Screws argued that since no state statute authorized his actions, his actions were not performed "under color of law," i.e., he had acted outside the law not under it. The Court simply held that Screws and the deputies had acted as law enforcement officials of the state and had thus acted "under color of law."

Screws' next argument was that punishment for deprivation of civil rights was too vague to inform individuals of what conduct was prohibited. He contended that a state official might not know for months what actions deprived someone of due process of law since the Supreme Court could declare new rights at any time. The majority opinion listed several recent cases, such as Powell, Betts, and Barnette, in which the Court's rights interpretation had shifted over the years. The opinion also recognized that the determination of rights had been highly dependent on the "prevailing view of the Court as constituted when the case arose." Thus, state officials would not be able to tell in advance whether their actions were illegal under the statute. This reasoning almost proved to be a major flaw in the civil rights statutes. The Court added the requirement that civil rights violations must be committed willfully; in order to violate the statute, a person would have know what right of which he was depriving someone.
In cases like Screws, everyone had plenty of notice that the type of actions they had engaged in were unconstitutional. "Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process guarantees him." 332 The Court, however, reversed the convictions and remanded the case for a determination of the willfulness on the part of the defendants. The Screws case later served as precedent for the Justice Department's all-out assault to protect Civil Rights in the fifties and sixties.

Wars End

According to Theodore H. White, "for a proper historian of our times there was only one overpowering beginning— the Year of Victory, 1945. All things flowed from that victory,..." 333 In April 1945, President Roosevelt died and Harry Truman succeeded to the presidency. That same month in San Francisco, the United States joined other nations in forming the United Nations. The "ruthless tyranny of the Nazi regime" and the "wholesale slaughter" of minorities brought about a "widespread insistence that human rights must be internationally protected." 334 The preamble to the Charter speaks of faith in "fundamental human rights" and lists among the United Nations purposes: "To achieve

332. Id. at 106.
333. Id. at 2.
international cooperation... in promoting and encouraging respect for human rights and for the fundamental freedoms for without distinction as to race, sex, language, or religion;" In 1948, a unanimous United Nations General Assembly adopted the Universal Declaration of Human Rights.

On May 7, the Germans surrendered. On August 6, an atomic bomb exploded over Hiroshima, while on August 9, another one exploded over Nagasaki, defeating Japan. A new menace, however, threatened the Free World. This new menace, unlike the German and Japanese, threatened the very foundations of the West: capitalism. The great menace was Communism. A Cold War engulfed the globe and America could not return home and close its doors as it had done after World War I.

Two forces worked to shape post-war America. First, Americans were appalled at the Nazis concentration camps. Many began to compare the racial violence in America to the "horrors of Nazism and Facism." Future Presidential candidate Hubert Humphrey wrote that by "fighting demonic racism abroad, the American nation became more embarrassed by its own racism at home." James Baldwin describes the experience of black American soldiers:

You must put yourself in the skin of a man who ... is a candidate for death in its defense, and who is called a

336. FBI Director J. Edgar Hoover so testified before Truman’s Committee on Civil Rights. Walker, supra note 148, at 29.
"nigger" by his comrades-in-arms and his officers;... who watches German prisoners of war being treated by Americans with more human dignity than he has ever received at their hands. And who, at the same time, as a human being, is far freer in a strange land than he has ever been at home. HOME! The very word begins to have a despairing and diabolical ring. You must consider what happens to this citizen, after all he has endured, when he returns - home;... ride, in his skin, on segregated buses; see, with his eyes, the signs saying "White" and "Colored,"... imagine yourself being told to "Wait." And all this is happening in the richest and freest country in the world, and in the middle of the twentieth century."\textsuperscript{338}

The returning black soldiers simply refused to endure the America they had left in 1942.

Second, Americans saw a vast Communist conspiracy at work, and with the fall of China in 1948, it appeared that Communism would spread throughout the world. According to the United States, the source of all evil in the world was Moscow and it had to be contained. By 1950, America was engaged in a hot war in Korea to stop the spread of Communism.

America, however, had an image problem with the third world: on the one hand it professed the evils of communism, while on the other hand it maintained a racially segregated society. With the United Nations headquartered in New York, a window on America's racial problems was suddenly thrown wide open. Delegates of all races and from all over the world were able to look in upon American apartheid. To many, these practices were a complete shock. Previous reports of such practices had been dismissed as propaganda. Now the delegates saw first hand America's original sin.

\textsuperscript{338} Id. at 19.
"The publicity thus focused upon this weak joint in America's moral armour caused genuine and practical embarrassment to the State Department in the conduct of foreign affairs."339

Together, these forces explain the final assault upon the citadel of racism in America. The Supreme Court was destined to play a vital role in reshaping post-war America. After all, it was partly responsible for creating the apartheid society.

Immediately after the war, the Allies prosecuted the Nazis for war crimes. As early as 1942, Roosevelt and Churchill warned the Nazis that they would be held responsible for "crimes against humanity" for perpetrating the "Final Solution."340 The trials began in Nuremberg and continue today producing over two thousand verdicts against Nazi war criminals.341 Twelve were sentenced to death for taking Germany to an "unimaginable depth of depravity."342 The West has never forgiven the Germans for the atrocities committed during the war.

The United States also prosecuted Japanese officials for war crimes, although not as vehemently. Whereas civilians for the most part conducted the Nuremberg trials, in the East, the military under General Douglas MacArthur conducted them. The Supreme Court reviewed the validity of

341. None of the Nazis convicted at Nuremberg appealed their verdicts in the United States Supreme Court or in any other Allied court. Urofsky, supra note 83, at 742.
the MacArthur trials in General Yamashita's case.\textsuperscript{343} Justice Murphy and Justice Rutledge saw the Yamashita trial as an "unadulterated legal lynching"\textsuperscript{344} in which the military "took bloody revenge for the crimes of others by executing the most important figure they happened to catch."\textsuperscript{345} In Murphy's words, the trial was "retribution in a cloak of false legalism."\textsuperscript{346} The general "was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war."\textsuperscript{347} Justice Rutledge stated the trial lacked "any semblance of trial as we know that institution."\textsuperscript{348} The majority skirted the issue and held that they were powerless to review Yamashita's conviction because the constitution did not extend to war criminals.

In 1949, the Court again upheld another war crimes conviction in \textit{Hirota v. MacArthur}.\textsuperscript{349} In a concurring opinion, Justice Douglas argued that war trials were a form of political reprisal and therefore beyond the scope of

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\item \textsuperscript{343} In re Yamashita, 327 U.S. (1946).
\item \textsuperscript{344} Frank, Justice Murphy: The Goals Attempted, 59 Yale L.J. 13 (1949).
\item \textsuperscript{345} Id.
\item \textsuperscript{346} Id. at 26, 30 (1946).
\item \textsuperscript{347} Id. at 27-28.
\item \textsuperscript{348} Id. at 61.
\item \textsuperscript{349} 338 U.S. 197 (1949).
\end{itemize}
judicial review. Again, the Court made political decisions to avoid another collision with the executive.

The Court ventured to invalidate martial law in the territory of Hawaii on the basis that Congress had not authorized the military's action. The military claimed that the Constitution did not extend to Hawaii and that the Hawaiians, because of their peculiar racial combinations, could not be trusted for jury service. The majority rejected both of these contentions, and Murphy in a concurred, declaring that this "iniquitous doctrine of racism to justify the imposition of military trials" was "especially deplorable." As Harlan had in the century before, Murphy concluded that "Racism has no place whatever in our civilization." 351

The Supreme Court Attempts to Further the Cause of Freedom

The post-war Court seemed ready to advance the nation's freedom agenda. The Court was given an opportunity in 1946 to again assault segregation in transportation in Morgan v. Virginia. 352 A Negro woman took a bus trip from Baltimore, Maryland to Virginia where she was ordered by the driver to make room for white passengers by sitting in the back of the bus. Morgan refused and she was prosecuted under Virginia Jim Crow laws. The state supreme court upheld the conviction. The United States Supreme Court, however, found

350. Id. at 199.
352. 328 U.S. 373 (1946).
the state law to be a burden on interstate commerce and therefore unconstitutional. Justice Burton, the sole dissenter in the case, argued that the Court had not only invalidated the Jim Crow laws of ten states, but had also in principle invalidated the civil rights laws of eighteen other states.

Justice Burton was almost right. However, he failed to account for the Court's ingenuity. In 1948, the Court was faced with invalidating a Michigan, Civil Rights Law which forbade discrimination. The Bob-Lo Excursion Co. operated a steamboat which transported passengers to an amusement park. The company refused to transport a Negro girl to the park which was located on an island on the Canadian side of the Detroit river. The company argued that the state law regulated foreign commerce and was therefore invalid.

The Court skillfully maneuvered past the dilemma. This commerce, although technically foreign, was actually "highly local," because the island was "economically and socially, though not politically, an amusement adjunct of the city of Detroit."353 The logic of the Mississippi and Louisiana travelers354 came full circle in fifty years.

Also in 1948, the Court handed down two unanimous decisions regarding racially restrictive covenants: Shelley

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354. In Louisiana, the Court had stated travel by a Black woman within the state on a steamboat was intrastate commerce and invalidated a state civil rights law. In Mississippi, the Court upheld a state segregation law for a Black man traveling on a train within the state as intrastate commerce.
v. Kramer\textsuperscript{355} and Hurd v. Hodge\textsuperscript{356}. In the first case, J.D. and Ethel Shelley had bought a new home in St. Louis, Missouri in a neighborhood restricted by property deeds to whites. In 1917, in Buchanan v. Worley,\textsuperscript{357} the Court struck down a city ordinance that restricted certain neighborhoods to whites.\textsuperscript{358} Although, in 1922, in Corrigan v. Buckley,\textsuperscript{359} the Court had upheld private restrictive covenants as beyond the reach of the Fourteenth Amendment because of the amendment’s state action requirement. In addition, in 1945, the Court had refused to review its Corrigan ruling.\textsuperscript{360} Just three years later, the Court undertook a re-evaluation of housing segregation via private restrictive covenants.

Judge Vaughn, the trial judge in the Shelley case, held that the private agreements were not valid because not all residents of the neighborhood had signed them and because five of the houses in the neighborhood had been occupied by blacks since 1882. The Missouri Supreme Court reversed Judge Koerner and ordered him to enforce the covenants.

The United States Supreme Court used the opportunity to extend the concept of state action to include enforcement actions in state courts. The covenants themselves were not illegal, however, since private acts of discrimination still did not fall within the Fourteenth Amendment. No one could

\textsuperscript{355} 334 U.S. 1 (1948).
357. 245 U.S. 60 (1917).
358. See supra note 165 and accompanying text.
359. [cite]
enforce such agreements in any court in the land, thus rendering them worthless.

Hurd v. Hodge\textsuperscript{361} involved restrictive covenants in the District of Columbia where the Fourteenth Amendment would not reach because it was not a state. It was contended that enforcement of restrictive covenants violated the Fifth Amendment due process clause instead. The Court instead relied upon the Civil Rights Act of 1866 and stated that judicial enforcement of restrictive covenants would violate the Act. The Court decided it need not answer the argument that restrictive covenants violated the United Nations Charter, and held that, even in the absence of a statute, enforcement of the covenants would be contrary to United States public policy.

The Court in 1948 dealt with discrimination against Asian-Americans. California forbid aliens ineligible for American citizenship from owning agricultural land. In 1934, Kajira Oyama purchased several acres of agricultural land in the name of his son, Fred, an American citizen. In 1944, California claimed the property as forfeiture for violation of the Act. Chief Justice Vinson held that the statute denied Fred Oyama equal protection because it discriminated against him solely on the basis of the origin of his parent's country.\textsuperscript{362} Fred had to assume an "onerous burden of proof" to keep the property which "need not be borne by California children generally." Justice Murphy's

\textsuperscript{361} 334 U.S. 24 (1948).
\textsuperscript{362} Oyama v. California, 332 U.S. 633 (1948).
opinion details the history of racial discrimination in California which resulted in the passage of the statute. He characterized it as "racism in one of its most malignant forms." In a further blow to racism that term, the Court struck down another California statute which banned Japanese from commercial fishing.363

The Court continued to weaken segregation; this time in the field of education. Ada Sipuel attempted to enter the University of Oklahoma Law School but was denied admission. She was told that a black law school was being built and that she would have to wait for it to open. In Sipuel v. Board of Regents,364 the Court declared that the state had to provide her with a legal education "as soon as it does for applicants of any other group." The state created a law school by roping off a section of the state capitol and assigned three teachers to instruct her. When Sipuel reappealed to the Supreme Court complaining that the facility was unequal, the Court refused to consider the issue.

Just two years later, the Court made a sweeping assault upon segregation. In one day, the Court handed down three civil rights victories: McLaurin, Henderson and Sweatt.

After Sipuel, the University of Oklahoma admitted sixty-eight year old George McLaurin to a graduate program in education. McLaurin, however, was segregated from the other white students. He was forced to sit outside the

classroom in the hall and to eat alone in the cafeteria, among other things. When the NAACP challenged these rules, the University allowed him inside the classroom, but roped off his seat with a sign that said "Reserved For Colored." Chief Justice Vinson, for a unanimous Court, struck down the University's rules, stating that they imposed inequality upon McLaurin even though he was allowed to attend the same classes as whites.

McLaurin, coupled with Sweatt v. Painter, 365 sounded the death knoll for segregation. Herman Sweatt applied in 1946 to the University of Texas Law School. The district court gave the state six months to establish law schools for blacks or admit Sweatt and other blacks to U.T. The state hurriedly formed a law school at Texas Southern University. Sweatt refused to attend the new "law school," claiming it was unequal. The Court declared the black school unequal on the basis of intangibles, "those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the questions close." 366

366. Id. at 633.
Under this test, no separate facility would be able to pass constitutional muster. Segregation was breathing its last breaths.

The last case issued that day was *Henderson v. United States*. Henderson was traveling by train from Washington, D.C. to Atlanta. He protested the railroads practice of setting aside one table, separated by a curtain, for blacks, while maintaining ten tables for whites. The Court applied the Mitchell rule and declared that this arbitrary allocation of tables violated the Interstate Commerce Act which required equal access by passengers to train facilities.

An International Human Rights Movement: A Response to Communism

Following the First World War, President Roosevelt, like Wilson, believed in an international organization to ensure the peace: the United Nations. British Prime Minister Winston Churchill delivered his "Iron Curtain" speech on March 5, 1946, signaling the beginning of the Cold War with Russia. The Cold War officially began on March 12, 1947 with the Truman Doctrine in which the President promised to aid to fight Communism anywhere in the world, beginning with the Greek Civil War. As the President described the contest:

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At the present moment in world history nearly every nation must choose between alternate ways of life...
One way is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression.
The second way of life is based upon the will of a minority imposed upon the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms.368

Truman's message bears a striking resemblance to Herbert Hoover's speech in praise of the Bill of Rights. Both Presidents accurately described the oppression of Blacks in the United States as Communist oppression around the world. As one historian describes the situation: "Communist propaganda had long used stories of racial discrimination and injustice to discredit American capitalism and democracy in the eyes of the world." It became even more important as the competing ideologies began struggling for world leadership. "It came near the focus of antagonism when the center of rivalry between Russia and America shifted to Asia and the two systems began to contend desperately for the friendship of the great colored races of the Orient. In this struggle the issue of segregation ... became international in scope."369 The nation was forced to examine itself in the mirror of world public opinion.

In June of 1948, the United Nations, by unanimous vote, adopted the Universal Declaration of Human Rights. It was a

368. President Truman's speech on March 12, 1947, reprinted in Hofstader, supra note 281, at 403, 405-06. For President Hoover's speech, see note 233 supra and accompanying text.
"common standard of achievement for all peoples and all nations," designed to secure "universal and effective recognition and observance" of basic human rights such as: freedom from arbitrary arrest, detention, or exile; right to a fair and public hearing by an independent and impartial tribunal; freedom of thought, conscience and religion; and freedom of peaceful assembly and association.\textsuperscript{370}

President Truman also recognized the necessity of attacking America's internal racial problems in his message to Congress in December 5, 1946. In 1947, he established the President's Committee on Civil Rights. Among the Committee's priorities was to examine possible federal action against segregation. The Committee's report, "To Secure These Rights", called for the "elimination of segregation, based on race, color, creed, or national origin, from American life."\textsuperscript{371} The Committee proposed that a permanent Civil Rights Commission and a Fair Employment Practices Commission be established; that a federal antilynching law be enacted; that discrimination in transportation be outlawed; and that blacks attempting to vote should be protected.\textsuperscript{372} The President presented to Congress a program that was intended to secure these "rights of civilization for the American Negro." However, the program caused a revolt in the President's own party and it was allowed to die in committee.

\textsuperscript{370} [cite]
\textsuperscript{371} Woodward, \textit{supra} note 51, at 136.
\textsuperscript{372} Ingle, \textit{supra} note 74, at 451.
In July 1948, Truman ordered the complete integration of the armed forces. He also issued an executive order ending discrimination in federal employment.373 Because of a "conspiracy of silence", however, news of the executive orders were kept from the press and consequently the public did not become aware of the new policy until 1953.

There were other key indicators of the awareness of the necessity of internal reform as well. During the 1948 Democratic Convention, Minneapolis Mayor and candidate for Senate, Hubert Humphrey, led and won a platform fight over the inclusion of a strong civil rights plank. Both Truman and Humphrey won their election bids in 1948, proving that the nation was ripe for civil rights reform. "The party of white supremacy had become on the national plane the outspoken champion of Negro rights,..."374

Journalist I.F. Stone wrote an article in August of 1948 that praised a Pittsburgh reporter for a series called "In The Land of Jim Crow." Stone stated that the reporter had discovered that "the Southern Negro exists in a twilight between slavery and freedom. This is important because it is not 'news'. We know that fact so well that we stowed it away long ago on the back shelves of our minds, with that comfortable absent-mindedness which converts bystanders into accomplices."375 Journalists like Stone were intoning Americans to wake up to the problem of racism in America.

374. Id. at 129.
If America remained asleep, she might one day wake up in a world that was the bastion of apartheid as opposed to the bastion of freedom. America's identity as a nation was at stake.

**An Outbreak of Freedom**

The world during the late forties was an uncertain one. In 1945, Ho Chi Minh proclaimed independence from France for the Democratic Republic of Vietnam. He quoted in his declaration the American Declaration of Independence that "All men are created equal." Mao Tse-tung and the Communist had completed the take over China in 1947. That same year, India broke free of British rule and then became engulfed in religious/class warfare. Around the world, ideas of liberty, equality, and brotherhood were once again breaking out.

One of the lessons from India was later transported back to America during the fifties and sixties: the idea of non-violent revolution. When Ghandi was fighting British rule, he argued persuasively that all forms of social apartheid must be eliminated. Ghandi's principles were that: 1) Indians must prove themselves worthy of freedom; 2) No Indian must be treated as the British treat us; Indians must remove untouchability from our hearts and from our lives; and, 3) They must defy the British. Ghandi translated the ideas of liberty, equality and brotherhood

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376. *Ingle, supra* note 74, at 447.
377. *Id.*
into a twentieth century cry for battle. He engaged the British in a battle for world public opinion and won. In one demonstration, Indians gathered en mass to be beaten by British troops. One British reporter was so moved by what he saw that he telegraphed back to England: "What ever moral ascendancy the West held was lost here today. India is free. For she has taken all that steel and cruelty can give and she has neither cringed nor retreated." 378 India became independent in 1947. Non-violent protest had won and would soon spread to America.

The Incorporation Debate

The theoretical underpinnig of the Court in applying selected provisions of the Bill of Rights to the states came under increasing attack during this period of time. Many commentators believe that the Court during the forties halted the progress of incorporating the Bill of Rights into the Due Process clause of the Fourteenth Amendment. In 1947, the Court in Adamson v. California, 379 declined to interfere with a state conviction for murder after the prosecution had commented on the defendant's refusal to testify. This would have clearly constituted reversible error in federal court because of the Fifth Amendment's privilege against self-incrimination. The Court followed its holdings in Twining v. New Jersey and Brown v. Mississippi that the "due process clause forbids compulsion

378. The movie "Ghandi."
to testify by fear of hurt, torture or exhaustion," and that it does not include an absolute right against self-incrimination. In this case, comment upon a defendant’s refusal to testify did not violate the fundamental fairness test formulated in *Palko*.

Justice Black, the leading proponent of the total incorporation theory, dissented in the case, stating that the Due Process Clause of the Fourteenth Amendment incorporated the entire Bill of Rights, nothing more or less.

The Court also refused to apply the double jeopardy clause to a death penalty case in Louisiana. Justice Black argued for the majority. Justice Frankfurter, concurring,

argued that the Fourteenth Amendment "left the States free
to carry out their own notions of criminal justice..."
Justice Burton, joined by Douglas, Murphy and Rutledge,
dissented. They believed the constitution forbade "death by
installments."

In Wolf v. Colorado,^{381} the Court unanimously held that
"the security of one's privacy against arbitrary intrusion
by the police ... is basic to a free society." In applying
the Fourth Amendment to the states, however, the Court split
on enforcement. The majority held that the exclusionary
rule developed in the Weeks case in 1914 was not applicable
to the states because it was merely a rule of evidence and
not a constitutional mandate. Justices Murphy, Rutledge and
Douglas dissented, stating that the Fourth Amendment without
the exclusionary rule was a "dead letter."

In 1949, the "twentieth century Jeffersonians,"
Justices Rutledge and Murphy died, marking the end of the
Roosevelt Court. Journalist I.F. Stone paid a rare tribute
to Justice Murphy calling him "in so many ways like those
tribunes the plebs of Rome elected to wield the veto in
their protection." Stone quite accurately summmed up the
Court's history when he added, "We are not accustomed to
seeing the veto power of the Supreme Court wielded in that
way. Traditionally, the Court has been the tribune of the
big property owner, his final bulwark against reforms."^{382}

381. 338 U.S 25 (1949).
382. I. Stone, Frank Murphy: The Quality of Mercy,
Washington post, July 22, 1949, reprinted in I. Stone, The
Another writer in 1949 remarked that "it would appear that the 1948 term of the Supreme Court marked the end, for a while at least, of an expanding definition of civil liberties."\(^{383}\) It was, however, a beginning and not an end for the writer expressed the thoughts of one who has been through a mighty hurricane and cannot yet envision the tidal wave that awaits.

**The Early Fifties**

In July, 1949, three sheriff's deputies in Los Angeles county raided a narcotic suspect's house to seize illegal narcotics. The suspect, Rochin, grabbed two capsules from his night stand and swallowed them to prevent the officers from acquiring them. Although the officers jumped on the suspect's stomach, this did not produce the contraband. Rochin was taken to a hospital where his stomach was pumped. He vomited two morphine capsules which were used against him at his trial. Justice Frankfurter wrote for the majority that these methods were "to close to the rack and the screw," and, applying the Palko test, violated due process because they "offend 'a sense of justice'."\(^{384}\)

Black voting in presidential elections had increased in the past decade from 1 million in 1940 to 3 million in 1948 as a result of the Supreme Court's new direction. However, some states were still attempting to deny blacks the vote.

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In Fort Bend County, Texas, the Jaybird Democratic Association provided the means for denial. The association was organized in 1889 and was limited to white voters. The association held a pre-primary election and the winner then proceeded unopposed to the Democratic primary where he would be elected. Then, since Texas was a one-party state, the candidate was elected in the general election. In Terry v. Adams, District Judge Kennerly ruled that the association's exclusion of blacks violated the Fourteenth Amendment. The Fifth Circuit held that the association was a private organization and did not involve state action, and therefore that it did not implicate the Fourteenth Amendment. 385

In South Carolina, the Fourth Circuit ruled differently. 386 The state attempted to completely divest itself of control over the Democratic party. Democratic "Clubs" formed as private associations, much like the Jaybird Associations in Texas. The Clubs' sole purpose was to control the elections in South Carolina. The Fourth Circuit invalidated the Clubs' exclusion of Blacks on the basis of Smith v. Allwright, like the Texas federal district court. The Fourth Circuit, however, relied upon the Fifteenth Amendment instead of the Fourteenth.

The Supreme Court upheld the Texas district court, finding that the Jaybird primary was an integral part of the election process. Relying on Shelly v. Kramer, the Court

stated that the Fourteenth Amendment covered "exertions of state power in all forms."\textsuperscript{387}

In 1948, the Justice Department, under the direction of Attorney General Tom Clark, indicted the leaders of the Communist Party for attempting to overthrow the government under the Smith Act.\textsuperscript{388} In \textit{Dennis v. United States}, the Supreme Court upheld the convictions. Rodger Bladwin of the ACLU stated it was "the worst blow to civil liberties in all our history."\textsuperscript{389}

\textbf{The Court Overcomes Its Fear}

In 1952, the United Steel Workers threatened to strike during the midst of the Korean War. President Truman, acting without Congressional authorization, ordered the Secretary of Commerce to seize the steel mills in the interest of national defense. The steel companies sued the government, arguing that the executive had usurped the power of the legislature: the President was lawmaking which was a function given to Congress. Most contemporaries believed that the companies could not win because the Court was composed of Roosevelt or Truman appointees. Instead of dismissing the case for lack of standing, the Court ruled against the executive and invalidated the seizures.\textsuperscript{390}

\textsuperscript{387} Terry v. Adams, 345 U.S. 461 (1953).
\textsuperscript{388} During the trial, Federal Judge Medina cited the defense attorneys for contempt. They were eventually sent to prison and disbarred. \textit{See} Walker, \textsuperscript{supra} note 148, at 186.
\textsuperscript{389} Walker, \textsuperscript{supra} note 148, at 187.
\textsuperscript{390} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
case is important because it indicates that the Court had fully recovered from its 1937 fright.

**Setting the Stage**

During the 1930s and 40s, the NAACP had undertaken an assault upon the "segregation fortress" of education. The "beachhead strategy" of Thurgood Marshall had been successful in opening graduate and law schools to blacks. Now the NAACP planned to attack again. This time the focus was on elementary and high schools. Test cases were organized in Topeka, Kansas; Clarendon County, South Carolina; Prince Edward County, Virginia; and in the District of Columbia. In Topeka, the three-judge panel ruled that Plessy was still good law, that the facilities were equal, and that the petitioners would get no relief. In the other cases, the three-judge panels ruled that the schools were unequal, but that the state would be given time to correct the problem. In the District of Columbia, the court simply refused to overturn long-standing precedent. Thurgood Marshall anticipated these results; his real aim was to put the issue squarely before the Supreme Court.

The prospects for overturning Plessy were uncertain. The Reconstruction Congress that passed the Civil War Amendments repeatedly voted funds for the segregated schools in the District of Columbia. The Congressional debates indicated they had not intended to prohibit state-sanctioned racial segregation. The war was fought over liberty, not
equality. On the positive side, the petitioners were strengthened by the recent direction of the Court in weakening segregation.

In 1952, the Court granted probable jurisdiction in the cases and then rescheduled them several times. Although the Court finally heard initial arguments, it then redocketed the cases for re-argument once more. It appeared that the Justices were having a difficult time deciding upon a solution.

The Hughes, Stone and Vinson Courts in Summary

On September 8, Chief Justice Vinson died suddenly. He had presided over a deeply divided Court. During Vinson's last term, over 201 dissenting opinions were written. Generally regarded as a failure as Chief Justice, Vinson died penniless, disappointed and unhappy.\(^{391}\) In appraising his times, one historian wrote, "Seldom did the Vinson Court rule in favor of civil liberties or free speech."\(^{392}\) However, the Vinson, as well as the Stone and Hughes Courts, have been slighted by history because of a tendency to begin modern constitutional law with 1954's \textit{Brown v. Board of Education}.\(^{393}\) In fact, according to one scholar, the Vinson

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392. \textit{Id.}
Court was the most activist court in terms of civil rights even when compared to the Warren Court. 394

The history documented in this paper has gone largely unnoticed. Judge Robert Bork is a prime example. Bork depicts the years 1937 to 1954 as the Court's withdrawal from economic substantive due process, the "Discovery of 'Discrete and Insular Minorities'," and the laying of a substantive equal protection foundation based solely on the Skinner decision. 395

Bork is not alone failing to see the civil liberties progress made by previous Courts; his error is made by most historians. In fact, focusing on the cases of these Courts alone, no pattern emerges. When the Court is viewed as one actor on a large stage, however, this lack of a pattern can be explained by political and other other factors.

In the 1920s and 1930s, social research proved that Negroes were not mentally or physiologically inferior. Sociologists refuted the notion of white supremacy and concluded that the low esteem of blacks was a result of the white oppression. Environment, not genes, made them "inferior." 396 The logical conclusion, then, was that the environment must be changed.

The reaction to Hitler and the systematic murder of six million Jews also stung the American conscience. The West competed with Communism for influence among the "colored"

394. S. Ulmer, Constitutional Law 409-10 [hereinafter Ulmer]. See infra notes 466-74 and accompanying text.
395. See Bork, supra note 389, at 58-69.
396. Garraty, supra note 21, at 1141.
peoples of the world. In the ideological battle with Communism and the fight to contain it, Americans engaged the Soviets in a bidding war for moral as well as economic superiority. The world was encouraged to compare the two systems. To effectively compete, America had to dismantle its Albatross of apartheid. The course that future Courts would sail had been charted in the threatening waters of the 1930s and 40s.

PART IV. THE FINAL CHAPTER

Legal principles have a tendency to expand to the limits of their logic—and often beyond. 397

Professor Coffee

A Wild Card Enters the Picture: Earl Warren Becomes Chief Justice

Eisenhower's first choice to replace Vinson was Secretary of State John Foster Dulles, but he declined. Dulles believed that he had more important matters to tend to in foreign affairs. The President's second choice was Thomas Dewey, but he also refused citing his age of fifty-one. 398 Eisenhower did not at first want to give the Chief Justiceship to Warren. He altered his position only after Vice-President Nixon told him, "You must get Warren out of California. He has control of the Republican Party

397. Professor Coffee of Columbia University discussing insider trading. Wall Street Journal [cite].
398. Dewey was never officially offered the position. There was, in addition to his age, the fear that he would not be confirmed by the Democratically controlled Senate. See Pollock, supra note 387, at 150.
machinery and we can't do business with him." Warren wanted the Chief Justice position and would not budge.

In the end, Eisenhower appointed Warren to the Supreme Court. When Warren faced opposition in the Senate, Eisenhower backed him 100% stating, "Earl Warren is one of the finest public servants this country ever produced. If the Republicans as a body should try to repudiate him, I shall leave the Republican party...." 400

The School Cases

When Warren arrived on the Court, the school segregation cases had already been argued. Warren, was a wild card; no one could predict his later actions concerning segregation, especially given his previous actions in California during the war. In a conference held before re-argument of the cases, Warren expressed moral outrage at segregation and stated his personal view that the only basis for segregation and separate but equal rights was the inherent inferiority of the colored race. He told the other Justices that he could not understand how in the present day and age, one group could be denied rights based on race. Warren ignored for the most part legal argument and spoke as if he had been elected President, not as the new Chief Justice. 401

400. Pollack, supra note 387, at 171.
Thurgood Marshall, the descendant of a slave, argued the case for the NAACP. John Davis, former Democratic presidential nominee in 1924, and a man King George V of England called "the most perfect gentleman I have ever met," argued the case for the school board. The drama was almost overwhelming. In an event staged by the gods, the Southern patrician stood before the High Court on equal ground with the descendant of slaves and argued for the Justices to bless a system in which the two men could not even swear an oath on the same Bible. 402

Marshall argued that segregation was having detrimental effects on blacks and encouraged the Court to overrule Plessy. Davis cautioned the Justices from assuming the role of a "glorified Board of Education." He even argued that the Court would be assuming the uncommon role of establishing public policy, a responsibility the Constitution had cast upon the legislative branch. 403 He closed the statement, "No man will treat with indifference the principle of race. It is the key to history." 404

Warren lead the Court to a unanimous decision in Brown v. Board of Education of Topeka, 405 stating that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are

402. See Woodward, supra note 51, at 102. Jim Crow Bibles were used for Negro witnesses in Atlanta courts.
403. This same criticism is leveled at the Warren Court by Judge Bork. See Bork, supra note 389, at 58.
404. Pollack, supra note 387, at 173.
inhomately unequal." In the District of Columbia case, Warren had a more difficult legal argument to make. Unlike the Fourteenth Amendment which applies only to states, the Fifth Amendment does not contain an equal protection clause. Warren used the Fifth's Due Process clause to achieve the same result as in Brown stating, "the concepts of equal protection and due process, both stemming from our American idea of fairness, are not mutually exclusive." 407

Historians and commentators have sung the praises of Brown v. Board as if it were a bolt of lightning from heaven sent to strike down segregation. In fact, the decision was but a small step from Sweatt v. Painter's holding that black schools were unequal because of "those qualities which are incapable of objective measurement but which make for greatness in a law school." This phrase, quoted by Warren in the Brown opinion, is simply translated into "separate educational facilities are inherently unequal." The groundwork had already been laid. Brown v. Board was the cream de la resistance.

Although it is impossible to measure what would have happened without Warren, it is possible to explore the environment from which the decision was made. The past Court's decisions give an indication of the direction the Court was taking. In addition, world events had made it virtually impossible for America to maintain racial segregation and continue its moral leadership against

406. Id. at 496.
Communism. Some force would have had to act upon the system. The Supreme Court was the logical actor since it had shielded the segregationist forces in the first instance.

The Court did not decide a remedy for the cases until a year later. In Brown II, Warren stated that desegregation must proceed "with all deliberate speed." Many in the South were delighted with Brown II. The Lieutenant Governor of Georgia stated that the Federal judges in his state were "steeped in the same traditions that I am . . . . A 'reasonable time' can be construed as one year or two hundred... Thank God we've got good Federal judges." To their credit, Federal judges began to implement the Supreme Court's ruling to the amazement and disappointment of segregationists. In fact, the Fifth Circuit carried the blunt of the struggle. The Supreme Court decided relatively few cases during the Warren Court regarding segregation.

Public Reaction

For the most part, Americans supported the position Warren had taken in Brown. In 1955, President Eisenhower had a heart attack and it appeared that he would not run for re-election in 1956. Even after the Brown decision, the Republicans considered Warren as the next strongest

410. Eisenhower announced on February 29, 1956 that he would run, but throughout the year it appeared he might not make it and Warren was the likely successor. See Pollack, supra note 387, at 183.
candidate to run. A poll showed that he could defeat any potential Democratic nominee by a large margin.411 In December, the President said of Warren: He "wants to go down in history as a great Chief Justice and he certainly is becoming one. He ... is getting the Court back on its feet and back in respectable standing again."412

Adlai Stevenson, the Democratic challenger in 1956, publicly supported the Brown decision in a campaign speech.413 Vice-President Nixon also tried to capitalize on the decision when he stated in a campaign speech: "speaking for a unanimous Supreme Court a great Republican Chief Justice, Earl Warren, has ordered an end to racial segregation in the nation's schools."414 Even President Eisenhower, nine years later in his memoirs wrote regarding the Brown decision, "There can be no question that the judgment of the Court was right."415 Finally, a Gallop poll taken shortly after the decision indicated that a large majority of Americans supported the decision.416

411. Pollack, supra note 387, at 183.
412. Lasser, supra note 40, at 167.
413. Id. at 184. ("I do not agree that the Supreme Court exceeded its proper authority on school segregation. I think rather that these rulings are correct interpretations of the Constitution.") Id.
414. Id. at 167.
416. The poll showed that 72% of Easterners, 57% of Midwesterners, and 65% of Westerners supported the decision. In the South, opinion varied widely. A few supported the decision, some accepted the decision and others pledged all out defiance. Lasser, supra note 40, at 163.
Television: An American Revolution

The nation underwent a sudden transformation during the fifties that had an enormous impact on the outcome of civil rights: television. In 1950, there were only 4.4 million televisions in American homes. By 1960, 45 million, or 88% of all households, owned televisions. In 1954, television demonstrated its muscle when Edward R. Murrow's program, "See It Now," destroyed Senator Joseph McCarthy. McCarthy, beginning in February 1950, had fed on the "Red Scare". In a speech in West Virginia, he declared, "I have here in my hand a list of two-hundred and five who are known to the Secretary of State as being members of the Communist Party and who are still working and shaping the policy of the State Department." McCarthyism was born.

Using the Senator's own words, Morrow built a case against McCarthy that "galvanized the nation." Murrow concluded his program: "We will not be driven by fear into an age of unreason, if we dig deep into our own history and our doctrine and remember that we are not descended from fearful men, not from men who feared to write, to speak, to associate, and to defend causes which were for the moment unpopular." As a result of Murrow's program, the nation, and eventually even the Senate, turned against him. By December 1954, McCarthy received a rare censure from his colleagues

417. Garraty, supra note 21, at 1136.
in the Senate for bringing that body into disrepute. Television was now a force in American politics. According to Historian White, "Television in modern politics has been as revolutionary as the development of printing in the time of Gutenberg." 419

**Extending Brown**

In 1955, the Court extended Brown to segregated beaches and golf courses. Segregated parks in 1958 and segregated courtrooms in 1968 were declared unconstitutional. All the opinions were short and merely cited Brown with a statement that segregation was unconstitutional.

**The South Plots Again**

Mississippi came forward in her "historic role as leader" of race policy in the South. Citizens Councils were formed with the intent of defeating desegregation. Virginia closed the public schools and the state paid the fees for whites to attend 'private schools.' Southern Governors began to revive the pre-Civil War doctrine of nullification, now titled interposition. 420

The segregationists were not the only ones to act. In 1955, the Interstate Commerce Commission issued an order

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420. Ingle, supra note 74, at 469. (The doctrine is that the state can interpose itself between the federal government and an individual and nullify the actions of the federal government. Justice John Minor Wisdom states the Supremacy Clause of the Constitution makes "hash" out of the doctrine).
directing all interstate transportation facilities to desegregate. In 1956, Martin Luther King Jr. organized a bus boycott in Montgomery, Alabama to protest local segregation. King, a follower of Ghandi, set the direction for black protest: non-violent political action in the Ghandi tradition. President Eisenhower asked the FBI to make an extended cabinet presentation on racial tension and civil rights. In 1957, Congress passed a new Civil Rights law, the first since 1870. The law was aimed at protecting blacks’ right to vote under the Fifteenth Amendment.

In Money, Mississippi, a brutal murder in 1956 received national attention. Emmett Till, a fourteen year-old black from Chicago, had gone to visit relatives in Money. Two men kidnapped and murdered Till, and then dumped his body in the Tallahatchie River because he had whistled at a white woman, the wife of one of the men. When his body was found, he had a .45 caliber bullet hole in his head and a heavy fan tied around his neck. The state court jury acquitted both of the men and the federal grand jury refused to indict. Illinois Communists took up Till’s cause and demanded that Eisenhower act. Even Chicago Mayor Richard Daley wired the White House urging the President to intervene, but nothing was done.

421. O’Reilly, supra note 159, at 41.
422. Id. at 41-42.
The War Turns Hot

The battle lines were drawn. In February 1956, Ms. Atherine Lucy attempted to enroll at the University of Alabama, but was denied. Eisenhower refused to act. In an act of defiance, 101 members of Congress signed the "Southern Manifesto," a pledge to use all lawful means to oppose desegregation. The Richmond News Leader published the following challenge:

[I]n a fraternity of politicians and professors known as the united States Supreme Court choose to throw away the established law. These nine men repudiated the Constitution, spit upon the Tenth Amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology. If it be said now that the South is flouting the law, let it be said to the high court, You taught us how.423

The situation finally exploded in Little Rock. Arkansas Governor Orval Faubus, formerly a moderate on segregation who had previously won the black vote, decided to oppose school segregation for political purposes. In 1956, the Arkansas NAACP filed suit, as did others across the country, to force the local school boards to desegregate the schools. The federal district court approved a plan to admit nine black students as a start towards integration. Faubaus, however, under the pretext of maintaining the peace, sent the National Guard to Little Rock to keep black students out of the white high school. One, Elizabeth Eckford, a fifteen year-old black student, attempted to enter the school but was turned away by bayonets. Some one

423. Urofsky, supra note 83, at 776.
in the mob that had gathered began yelling: "Get a rope and drag her over to this tree." A white NAACP member escorted Elizabeth to a city bus and away from the crowd.

The nation, now a participant in the struggle via Television, was shocked that state troops were being used to resist Federal law. The NAACP went back to court to enjoin the Governor and the federal district court enjoined Faubaus from using the guardsmen. Governor Faubaus removed the troops leaving only the local police to handle a now hostile community. When several black students were secretly admitted to the high school, a local crowd began to go wild. One local official suggested that they let the crowd have one of the students to lynch so that they could get the others out. An assistant police chief asked them, "How are you going to choose?" The students were placed in cars and driven out of the school under orders not to stop under any circumstances. President Eisenhower decided he did not want the nation to watch televised lynching and sent in Federal troops to enforce the Supreme Court's decision. He stated he was acting so that the "blot on our name in the world community will be removed."425

In 1958, the Court was asked by the Little Rock school board to rescind its order in order to restore peace in the community and prevent bloodshed. Warren called a special summer term to consider the Little Rock issues, and in

424. Irons, supra note 307, at 111.
Cooper v. Aaron,\textsuperscript{426} declared that "Constitutional rights ... are not to be sacrificed or yielded to the violence and disorder. ... Law and order are not to be preserved by depriving the Negro children of their Constitutional rights." Human rights now truly occupied a preferred position in the Constitution.

\textbf{The Court is a Little Pink\textsuperscript{427}}

In 1951, the Court had upheld the convictions of several Communist Party leaders in Dennis v. United States.\textsuperscript{428} Four years later, in Peters v. Hobby,\textsuperscript{429} Dr. John Peters, a Yale Medical school professor had been dismissed as a consultant to the United States Public Health Service because an official had a reasonable doubt about his loyalty. He protested that he had never been a communist, but he was never given an opportunity to defend himself. He was not even allowed to know who had made the statements against him. The United States Solicitor General refused to argue the case before the Court because he believed the position was "conscienceless." Assistant Attorney General Warren Burger stepped forward to argue the case. He lost, 7-2. The Warren Court ruled that Dr. Peters had been wrongfully discharged.\textsuperscript{430}

\textsuperscript{426} 358 U.S. 1 (1958).
\textsuperscript{427} Richard Nixon, during a congressional race in California, had claimed that his opponent, if not outright "Red" (Communist), was at least a little "Pink."
\textsuperscript{428} 339 U.S. 162 (1951).
\textsuperscript{429} [cite]
\textsuperscript{430} Pollack, supra note 387, at 185. This series of cases indicates that Warren had undergone a radical
In 1956, there were a series of cases where the Court held in favor of communists.\textsuperscript{431} In \textit{Pennsylvania v. Nelson},\textsuperscript{432} the Court ruled that an admitted communist could not be prosecuted under state law because Congress had preempted the area of sedition with the Smith Act. The public saw this as another victory for the communist.

In \textit{Mesarosh v. United States}, the Court reversed the convictions of five communists because the FBI's key witness was suspected of having lied. Warren rebuked the government stating, "The dignity of the United States Government will not permit the conviction of any person on tainted testimony ... [We must] see that the waters of justice are not polluted. The government of a strong and free nation does not need convictions based on such testimony."\textsuperscript{433}


\textsuperscript{432} 350 U.S. 497 (1956).

\textsuperscript{433} An event which transpired in California tends to indicate that Warren was very sensitive to this belief. In 1938, Earl Warren's father had been brutally beaten to death in Bakersfield, (Kern County) California. Warren was District Attorney of Alameda County at the time. Warren sent some of his men to investigate the murder. One of the investigators said, "The Chief wanted his father's murderer apprehended, but he refused to break any of his own rules or use his office to convict a guilty man without solid, legally secured evidence." The Bakersville Police Chief wanted to "put a stool pigeon and plant a dictaphone" in the cell of a prisoner suspected of committing the murder but Warren refused saying, "We don't break the law when trying
On June 17, 1957, dubbed "Red Monday", the Court rendered three more decisions in favor of communists.\textsuperscript{434} One of the cases, \textit{Jencks v. United States} received national attention. Clinton Jencks, a labor leader, swore he had never been a Communist Party member.\textsuperscript{435} Jencks was indicted for perjury and the FBI gave the trial judge a file of statements made to the effect that he had been a Party member. Jencks was not allowed to examine the witnesses, nor was he able to see the file. In an 8 to 1 decision, Justice Brennan held that Jencks had the Sixth Amendment right to be confronted with the witnesses against him. Attorney General Brownell lamented that the decision would cause "an emergency in law enforcement."

Finally, in \textit{Kent v. Dulles},\textsuperscript{436} the Court held that Secretary of State John Foster Dulles could not deny Rockwell Kent a passport to leave the country to attend the World Council for Peace in Helsinki. Dulles had denied the passport because Kent had refused to sign an affidavit that denied membership in the Communist Party.

\footnotesize{to enforce the law." Pollack, \textit{supra} note 387, at 60-62; Schwartz, \textit{supra} note 301, at 9-9.  
\textsuperscript{435} Under the Taft-Hartley Act, all union officials had to swear that they had never been a member of the Communist Party.  
\textsuperscript{436} 357 U.S. 116 (1958).}
Reapportionment Becomes a Judicial Function

As a part of the struggle over Black civil rights, the Supreme Court reversed longstanding tradition in 1960 to deal overt racial discrimination in the drawing of political boundaries. In 1946, in Colegrove v. Green, the Court refused to correct gross malapportionment in Illinois congressional district elections. Justice Frankfurter stated that relief was beyond the competence of the Court to grant. Frankfurter, in line with Stone's footnote in Carolene Products, was quick to point out that the basis of the suit was "not a private wrong, but a wrong suffered by Illinois as a politity." This was an appeal to "reconstruct the electoral process of Illinois." It was therefore a political question and had to be decided by a resort to politics and not to the courts.

Gomillion v. Lightfoot began a process that eventually overruled Colegrove. In 1957, Tuskegee, Alabama redrew its city boundaries in an effort to disenfranchise black voters. The city, previously square-shaped, was transformed into a twenty-eight-sided figure. The effect was to exclude almost all of the city's 400 black residents, keeping only the whites. The Court noted that the action was "not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." It was blatant

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438. Frankfurter was refereeing cases in which blacks had been denied political rights such as Nixon v. Herndon, 273 U.S. 536 (1946). See supra note [ ] and accompanying text.
discrimination against blacks in violation of the Fourteenth Amendment and was therefore unconstitutional.

It was a small step from Gomillion to Baker v. Carr in 1962. Justice Brennan in a massive 161-page opinion held unconstitutional Tennessee's malapportioned congressional districts. Cities were underrepresented as Congressmen in city districts represented greater numbers of people than in rural districts. In a farewell dissent, Justice Frankfurter called the case a "massive repudiation of the past."

With Frankfurter off the Court, the brakes were removed and the pace of the Court in reshaping America quickened. In 1964, the Court spelled out the practical ramifications of Baker v. Carr in Reynolds v. Sims. Under the Equal Protection Clause, apportionment meant one-man, one-vote. The Chief Justice wrote that "[l]egislators represent people, not trees."

Criminal Procedure

Three months after Warren's arrival on the bench, the Court upheld the conviction of a gambler in Irvine v. California. The police had illegally entered the man's house and had planted a wiretap. The Court allowed the

440. Id.
441. 369 U.S. 186 (1962).
442. 377 U.S. 533 (1964). In using the Fourteenth Amendment's Equality Clause instead of the Fifteenth Amendment, the next question was: what is equal treatment with respect to voting. The answer must be that one man's vote must be equal to another's.
state to use the evidence obtained as a result of the illegal search. Justice Clark said, "Had I been here in 1949 when Wolf was decided I would have applied the doctrine of [Weeks (1914)], to the states." However, since Wolf was the law, Clark reasoned that the exclusionary rule did not apply to the states and thus the evidence could be used against Irvine.

In 1961, Justice Clark wrote the opinion that partially overturned Wolf and applied the Weeks rule to the states. Clark was encouraged by the fact that over one-half the states had already applied the exclusionary rule via their own constitutions. Dollree Mapp was arrested for possession of obscene material in Cleveland, Ohio after police had searched her house without a warrant. Mapp's attorney did not even argue the settled legal question that her rights under the Fourth Amendment had been violated. Instead, he argued that the Ohio law forbidding possession of obscene material was unconstitutional. In writing Mapp v. Ohio, Justice Clark had a chance to vote in Wolf after all.

In 1962, Clarence Gideon wrote Chief Justice Warren a handwritten note claiming, "I did not get a fair trial. The question is very simple. I requested the court to appoint me attorney and the court refused." Gideon was convicted of

444. 347 U.S. 128 (Justice Clark concurring).
446. David, supra note 234, at 54.
448. David, supra note 234, at 56.
burglarizing a poolroom in Florida and was given five years in prison. Warren persuaded Abe Fortas\textsuperscript{449}, one of the best attorney's in Washington, D.C., to argue the case before the Court. Many commentators hoped the Court would overrule its Betts decision which had cut back during the war on an indigent defendant's right to a free attorney.\textsuperscript{450} The Court unanimously overturned its 1942 \textit{Betts v. Brady} ruling, and held that in all felony cases, indigents must be given an attorney if they request one.

In 1964, the Justices once again expanded the right to counsel in \textit{Escobedo v. Illinois}.\textsuperscript{451} Danny Escobedo had been arrested for the murder of his brother-in-law. Danny's lawyer was standing outside the interrogation room where police were questioning him and refused to let the attorney see his client. Danny gave the police a full confession before his lawyer was allowed to see him. The Court held that the failure to request a lawyer did not waive the right to have one and reversed Danny's conviction.\textsuperscript{452}

\textsuperscript{449.} Fortas was a personal friend of Lyndon B. Johnson and was later appointed to the Supreme Court by Johnson. 
\textsuperscript{450.} In 1948, John Frank in reviewing the 1947-48 Supreme Court term stated, "One can hope that eventually the Court will overrule Betts v. Brady, and its successor at the 1947 term, Bute v. Illinois, and hold that the right to counsel is a requirement of civilized society in any serious criminal case." In 1961, the Court adopted Franks position. Frank, The United States Supreme Court: 1947-48, 16 Chicago L.Rev. 1, 21 (1948). 
\textsuperscript{451.} 378 U.S. 478 (1964). 
\textsuperscript{452.} In 1968, Escobedo was convicted of trafficking in narcotics and was sentenced to 22 years in prison. See David, \textit{supra} note 234, at 84.
It was a small step from Escobedo to another landmark decision, Miranda v. Arizona, which held that policemen were required to inform suspects of their right to an attorney. Since Brown v. Mississippi, the Court delivered 36 opinions regarding the voluntariness of confessions. In 1963, after reviewing 126 state supreme court cases involving confessions over a 17 month period, a political scientist at the University of California concluded that the United States Supreme Court’s subjective test regarding the voluntariness of confessions did not provide adequate guidance to the states. The Court began searching for a case to provide a "bright line" test to clarify the situation.

In 1963, Miranda had been convicted of kidnapping and raping Lois Ann in Phoenix, Arizona. After being identified by Lois as the one who raped her, Miranda confessed to the police. Miranda’s attorney was forced to argue that Miranda had not voluntarily, knowingly or intelligently waived his rights because he had never even been advised of his rights. The Court agreed. Before a confession would be admissible, the police would have to inform a suspect that he had the right to remain silent; and that he had the right to an attorney and would be given one free if he couldn’t afford one. According to the logic of

455. Id.
Escobedo, if a suspect must explicitly waive his rights, he must at least know that which he is waiving.457

One of the major problems the Court faced in finding new constitutional rights for defendants was the possibility of freeing thousands of prisoners and making the states undertake an overwhelming burden of retrying them. As in Miranda, the new procedures could not have been applied to previous convictions; they had just been invented. Such a prospect was even more frightening given the fact that crime rates had been rising six times faster than the population since 1958; rising crime paralleled the Court's expansion of criminal procedural rights.458

As early as 1948, commentators solved the problem of creating new procedural rights for criminal defendants without upsetting thousands of prior convictions by applying the law prospectively. In arguing for the overrule of Betts, one commentator wrote, "Such an overruling need not, as is sometimes feared, result in a general delivery of the jails... An extensive analysis of the literature by Justice Gilkison of the Indiana Supreme Court during the past year is a reminder that a decision overruling a constitutional precedent may be made prospective if circumstances warrant."459 On June 13, 1966, Chief Justice Warren ruled

457. In 1967, Miranda was convicted of armed robbery. He was paroled and then rearrested in 1974 for carrying a handgun. In 1976, he was stabbed to death in prison. See David, supra note 234, at 84.
that the Miranda decision would be applied only to cases prospectively. Without this device, such rulings as Miranda would have been impossible.

By 1968, the Court began to be blamed for a dramatically rising crime rate. Law enforcement officials claimed the Warren Court had handcuffed them. Conservatives argued the Court was "coddling" criminals. The Presidential election that year focused in large part on law and order. Candidate George Wallace was fond of telling audiences, If you walk out of this hotel tonight and somebody knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday they'll try the policeman instead of the criminal."^460

**Declaring God Unconstitutional**

In 1962, the Court delivered another bombshell: *Engle v. Vitale*, (the Regent's Prayer Case).^461 In 1958, the ACLU protested the use of the Lord's Prayer in public schools. The New York Regents compromise position was a nondenominational prayer which read: "Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessing upon us, our parents, our teachers, and our country."^462 Justice Black wrote for the 8-1 majority striking down the

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460. F. Graham, The Due Process Revolution: The Warren Court's Impact on Criminal Law; Formerly,... The Self-Inflicted Wound 10 (1970). (The book shows a pair of handcuffs on the cover symbolizing both police work and the idea of a "Due Process Revolution" handcuffing the police.)


prayer on First Amendment grounds. He stated, "It is no part of the business of government to compose official prayers."

A year later, the Court held that state laws authorizing Bible reading in public schools was unconstitutional in Abington School District v. Schempp and Murray v. Curlett. Justice Clark wrote that the Establishment Clause of the First Amendment "committed [the state] to a position of neutrality" in relations between man and religion.

Public reaction opposed the decisions. A Southern congressman from Alabama expressed his anger at the Court by stating, "They put the Negroes in the schools and now they're driving God out." A Northern congressman expressed his fear that the Court had undermined the very conception of America as a nation. "Under similar misinterpretations of the intent of the First Amendment's establishment clause, I fear for the very survival of the spiritual and moral values which set our and other nations so far apart from the sterile materialism of our Communist enemies." Senator Sam Ervin retorted that the Court had "made God unconstitutional." The Wall Street Journal wrote that it was "wholly ridiculous [that Bible reading],

463. 374 U.S. 203 (1963). (Murray in the second case in Madalyn Murray O'Hair, a well known atheist activist.)
466. Walker, supra note 148, at 225.
followed by generation after generation without injury to our institutions, is now suddenly become a thing to undermine the Republic." 467 Many feared that the Court was "hell-bent on imposing integration, Communism, atheism, and pornography on the country." 468 These cases attacked cherished symbols of American life without offering the public compelling justification as to the need for such sudden change.

Summarizing the Bill of Rights: Individual Privacy

In 1965, the Court struggled to protect Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut.469 A state law made it illegal to give birth control information or medical advice to married persons. Griswold was convicted of violating the law and was fined $100. She appealed her conviction to the United States Supreme Court arguing that it violated the First Amendment. Justice Douglas wrote for the majority that the "First Amendment has a penumbra where privacy is protected from governmental intrusion." In addition, other Amendments create zones of privacy: the Third Amendment’s prohibition against quartering troops; the Fourth Amendment’s search and seizure requirements; the Fifth Amendment’s Self-Incrimination Clause; and the Ninth Amendment’s reservation

467. Lasser, supra note 40, at 182.
of rights to the people. He concluded by saying, "We deal with a right of privacy older than the Bill of Rights."

This language exhibited direct reliance upon natural law, rights which existed even before the Constitution. The language of the Declaration of Independence is most analogous: "We hold these truths to be self evident..."

Justices Goldberg, Warren and Brennan concurred in the judgment by stating that they believed the concept of personal liberty in the Fourteenth Amendment protects a couples fundamental rights. Fundamental rights are found by looking to the "traditions and conscience of our people" to determine whether a principle is "so rooted" as to be so ranked. This was the thirties language of Cardozo and Frankfurter:470 "implicit in the concept of ordered liberty."

Justice Black dissented.471 Black's theory had been revealed to him through the history of the Fourteenth Amendment which he set forth in his dissent in Adamson v. California in 1947. As an advocate of "total incorporation", for decades he argued for the application of more and more provisions of the Bill of Rights to the states. This time, however, he believed the Bill of Rights did not protect privacy. He also believed that the Fourteenth Amendment's concept of Liberty via Due Process meant solely the Bill of Rights. Privacy, not being included explicitly in the Bill of Rights, simply did not

470. See supra notes 372-75.
471. He was joined by Justice Stewart.
exist elsewhere either. Any other form of analysis smacked of Substantive Due Process and for Black, that had died a complete death in 1937. He wrote, "The scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the 'collective conscience of our people'."

I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident; that all men are created equal."

Martin Luther King, Jr.472

Summary

Civil Rights during the Warren Court expanded into so many areas that it is not possible to detail them all as I have attempted to do in the first half of this paper. It should be apparent by now that the "modern era" for civil rights did not begin in 1954.473 The Warren Court inherited a trend that was destined to continue.

Research demonstrates that the Civil Liberties Revolution did not begin in the Warren Court. Courts from

473. Levine, Civil Liberties and Civil Rights, 19 (19 ) ("The modern era of constitutional law began with the Supreme Court's 1954 decision in Brown."); See Bork, supra note 3, at 74. (Brown was "a case that proved to be the defining event of modern American constitutional law.)
1903 to 1968 in cases involving "underdogs": states won 93.6% in the Fuller, White and Taft Courts; 50.2% in the Hughes, Stone and Vinson Courts; and 24.2% in the Warren Court. One author stated, "the ability of the states to win any civil liberty case in the Warren Court was strikingly diminished when compared with earlier Courts." In examining the nineteen instances in which the Court applied a provision of the Bill of Rights applicable to the states, the Courts compare as follows: six were applied by the Warren Court; five were applied by the Hughes Court; five were applied by the Vinson Court; one was applied by

474. The Chief Justices were: Fuller (1888 to 1909); White (1910-1921); Taft (1921-1929); Hughes (1930-1940); Stone (1941-1945); Vinson (1946-1952) and, Warren (1953-1968).
475. Underdogs are defined as blacks, aliens, criminal defendants, subversives, and labor unions. Ulmer, supra note 390, at 409.
476. Ulmer, supra note 390, at 409.
the Taft Court\textsuperscript{480}; and one was applied by the Fuller Court.\textsuperscript{481} In fact, when the disparity of years is adjusted for,\textsuperscript{482} the most activist Court was Vinson’s Court followed by Hughes’ Court.\textsuperscript{483} These numbers hide as much as they reveal, however. The Vinson Court, for instance, applied the Fourth Amendment Search and Seizure Clause but it was the Warren Court that applied the onerous exclusionary rule to the states. From this comparison, it is clear that the civil liberties expansion via the Fourteenth Amendment began well before the Warren Court began.

World events, such as World War II, as well as technological developments, television, also played a part in pre-determining the role the Warren Court would play. Omitted in large part from this story is the role of organizations, such as the NAACP, the ACLU, the Congress of Racial Equality, played in transforming American society.

**Epilogue: What Became Of The Revolution**

The Burger Court did not undue everything the Warren Court had done. In fact, in many areas it continued to advance personal rights. The Roe\textsuperscript{484} decision is an example

\textsuperscript{480} Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment Freedom of Speech).
\textsuperscript{481} Chicago, B. & Q. Railway Co. v. Chicago, 166 U.S. 226 (1897) (Fifth Amendment Just Compensation Clause).
\textsuperscript{482} The Warren Court sat for sixteen years; the Vinson Court sat for six years; and the Hughes Court sat for ten years.
\textsuperscript{483} See Ulmer, supra note 390, at 410-11.
\textsuperscript{484} Roe v. Wade, 410 U.S. 113 (1973).
of the extension of such rights. In the area of school integration, the Burger Court issued *Swann v. Charlotte-Mecklenburg Board of Education*,485 authorizing federal court-mandated busing.

In some areas, the Court has cut back on some of the Warren Court advances. The Court fashioned numerous exceptions to the exclusionary rule, such as emergency and "good faith." After declaring capital punishment unconstitutional, the Court reversed within a few years and held it constitutional again.486 The Court also dampened Black progress in Bakke.

Historian White describes the era, 1956-1980, as a "New American Revolution."487 This was a period of great change in American society. He describes the 1960s as the "storm decade... which opened an age of experiment, an age of hope." He labels the passage from the sixties to the seventies a "passage of paradox." The sixties began with President Kennedy's great mission to make "America open to all" but that by the end of the seventies, Americans were being categorized by race, sex, and ethnic heritage. He concludes that, "by the end of the seventies, America was, officially, in many jurisdictions a racist society. In trying to eradicate racism, the politics of the sixties and

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seventies institutionalized it..." According to White, "the passage of paradox had begun by trying to eliminate the forced busing of little children to specified schools because of their race and color. It ended insisting on it." 488

Conclusion

A recent movie, "Come See The Paradise," attempted to tell the story of the Japanese internment during World War II. However, Hollywood credited the Supreme Court with abolishing the camps by declaring them unconstitutional. The important point is not that Hollywood's version is historically inaccurate, but that in American culture, the Federal Courts, especially the United States Supreme Court, has been shrouded in reverence as the dispenser of goodness and mercy. Often forgotten is the role the Federal judiciary played in stifling civil rights advances and in derailing America's search for a more equitable and just society. Conversely, those that believe like Judge Bork, that the Supreme Court since Earl Warren is charting new ground by suddenly reading their own personal views into the Constitution, have also misunderstood the historical role of the Court. From a historical prospective, the Court simply began to undo what it had previously done. In the final analysis, what is clear is that the Court is an institution composed of ordinary people who are subject to the passions

488. *Id.* at 5.
and prejudices of their day and time. The Justices are not, and can never be, Olympic gods or hellish demons unless our society so commands, for the Court is above all else a product of our society.

The Final Conclusion

In a discussion with a skeptical Professor Hyman, the argument was made that this analysis strings together previous legal precedents and ignores the impact of the Court’s decision. Professor Hyman held to the belief that Brown v. Board was monumental because of the changes it wrought in our society. Previous Supreme Court decisions, such as those in the Hughes, Stone and Vinson Courts, had little impact on the overall society.

The question can then be addressed methodologically by looking at the lower courts to see what changes the Warren Court’s opinions caused. Many historians have already examined the Circuit level. Several have even concentrated on Black Civil Rights: especially concentrating on the Fifth Circuit. Read and McGough in their examination of Judicial integration of the South, focus primarily on the Fifth Circuit. Their conclusion is that the Fifth Circuit bore the brunt of desegregating the South.
Another approach to examining the impact of the Warren Court would be to examine the district court level. District Court histories are scarce at present moment. In addition, none of the works on district courts focus civil liberties/ human rights during this time period. This will be the focus of the next section.
CIVIL RIGHTS LITIGATION: AN UNCERTAIN TRADITION

VOLUME II

FIRING LINE: CIVIL RIGHTS LITIGATION IN THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

by

LLOYD E. KELLEY
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"Federal district judges who are often reversed in civil rights cases have no intention of flouting the law and do not lack good faith. They do not consciously yield to local prejudice at the expense of their philosophy of law and integrity as a judge.
Circuit judges are not more courageous or more enlightened than district judges. They are just not on the firing line. . . ."1

Justice John Minor Wisdom, Fifth Circuit Court of Appeals

In Volume One, I concluded that the 1954 Supreme Court decision, Brown v. Board of Education, had only minimal impact upon the legal landscape. This Volume will focus on civil rights litigation in the Southern District of Texas from 1950 to 1974, and will address whether the same result was reached there.

I have examined all civil rights cases2 filed in the Federal District Court for the Southern District of Texas, Houston Division3 from August, 1954 to December, 1973.

2. By "civil rights" I mean the traditional civil rights suits normally thought of, such as discrimination suits or First Amendment (free speech, religion...) suits. I have also included prisoner civil rights suits and habeas corpus petitions. In many instances, the use of habeas corpus or civil rights is identical and only the form of the suit is different. [For example, a prisoner may sue under a civil rights statute because he was denied effective counsel or he may seek release from prison for the same reason by filing a habeas corpus petition.]
Methods of My Madness

I began this project in a fog. I was guided only by Professor Hyman who ordered me to go and "look at the cases." Often I lamented how much more fun, and simpler, it would be to write on appellate courts. With appellate courts the data is readily available, and opinions are published and easily accessible by computer. However, by looking at the individual cases filed in the district court I was startled by something that was not there. Instead of seeing a large number of civil rights cases being filed following the 1954 Brown v. Board of Education, the docket was virtually void of filings. The question then led me to re-examine the doctrinal history of the Supreme Court which culminated in a re-appraisal of that history. This re-evaluation became Volume I of my thesis.

In addition, the wisdom of looking at the district court was confirmed by a special issue of the Law & Society Review which is entirely devoted to longitudinal studies of trial courts. A review of the currently available scholarship on courts made apparent the surprising lack of work on trial courts. As noted legal historian Lawrence M. Friedman writes in the issue:

[T]he social conditions for longitudinal court studies were not ripe before a small, dignified revolution took place in legal history and in legal studies generally... Before [Professor J. Willard Hurst], American legal history was an arid, stunted field primarily concerned with the evolution and

development of legal doctrine; it was in some ways a colonial lapdog of English legal history; and like legal scholarship in general, it centered almost exclusively on appellate courts.\textsuperscript{5}

Friedman also states that law in American society was a tool which individuals manipulated to achieve certain ends. "Since law was an instrument, doctrine and legal theory were less important than law as actually used and experienced."\textsuperscript{6} Thus, Friedman argues that it is wrong to "concentrate on flashy events at the appellate courts." According to Friedman, legal historians should not neglect trial courts.

I began my research using the traditional law school methods.\textsuperscript{7} Unfortunately, this soon proved inadequate since only a small portion of a district court’s rulings are ever published. I then had to go directly to the court’s docket books.

Every time a law suit is initiated in a Federal District Court a docket sheet is prepared. This is a court’s working record and provides essential information about the case such as: the parties’ names, the type of suit, the activity that has occurred and the attorneys involved.\textsuperscript{8} These records, however, are not computerized. They can only be accessed by physically "turning the pages"

\textsuperscript{6} Id.
\textsuperscript{7} This included using the Digest system as well as using computer aided research tools such as Lexis and Westlaw.
\textsuperscript{8} See example in Appendix A.
of the docket books and reviewing each case that has been filed.

To further complicate the project, this period of study underwent a litigation explosion.\textsuperscript{9} Added to the criminal cases handled by the court in 1956, 1055 civil cases were filed in the Southern District of Texas. This number grew to 1711 civil cases in 1974. Buried within these civil cases were the civil rights cases. Once a case was identified as a civil rights case, the entire record could be ordered from storage at the Federal Archives in Fort Worth. Such files often contained a copy of the pleadings, motions filed by the parties and rulings rendered by the court. The most arduous task of this project was identification of the civil rights cases and those cases which warranted further examination. For these reasons, I believe Volume III of the thesis is my most important contribution to this history project. I have annotated each civil rights case and then cross-indexed many of the cases with published sources. This will greatly ease the research burden for any future historians or court researchers.

To further aid my understanding of the processing of cases through the Federal system, I worked as an intern for Judge John R. Brown, former Chief Judge of the Fifth Circuit, and for Judge David Hittner of the Southern District of Texas. These internships provided invaluable insight on the internal workings of the federal courts.

\textsuperscript{9} See Chart on opposite page.
The Southern District

The United States Supreme Court was the only court specifically created by the United States Constitution. Beneath the Supreme Court, Congress created 11 Federal Appellate Circuit Courts.\(^\text{10}\) Texas falls within the Fifth Circuit. The Federal District Courts are immediately under the Circuit Courts, and are the "work horses" of the federal system. Cases are initially filed, facts are determined, and the majority of cases are forever disposed in these federal trial courts. Very few cases are appealed from the district court and even fewer are reversed.

Congress divided Texas into four districts. Each District is further divided into divisions. The Southern District is currently divided into seven\(^\text{11}\) divisions: Houston, Galveston, Victoria, Corpus Christi, Brownsville, McAllen and Laredo.\(^\text{12}\) Contained within these seven divisions are 43 Texas counties and, most importantly, the Texas Prison System.\(^\text{13}\)

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10. There were ten Circuit Courts until the late 1970's when Congress split the Fifth Circuit creating the new Eleventh Circuit.
11. Through the 1960's and early 1980's, the District contained six divisions. McAllen was later added.
13. The Prison System lies almost exclusively within the Southern District. A small portion of the Prison System is within the Eastern District of Texas. However, this is only of consequence as to the number of filings that will be received in a district, not as to the effect a particular District will have over the prison System. Justice William
Findings

One conclusion is readily evident from my research. If the problem of writing history of the distant past is having to discern from only a few drops the contours of a once mighty stream, then the problem of the modern era is the flood of evidence which completely obscures the river bed. Because the sheer volume of data and material makes it impossible to cover every important topic and case, I have selected only a small group of cases which highlight issues common to many cases.

The number of civil cases in the Southern District rose dramatically in the early 1950s until 1958 when they fell just as dramatically. In 1957, Congress increased the amount required to bring a diversity action causing civil filings to fall by almost 50%. The number of civil filings then rose at marginal rates of around 10% until 1965. In 1964, the civil filings jumped more than 30% and steadily ascended until 1972. In 1972, the number of filings began to taper off slightly.

What caused this movement in civil filings? One easy answer is that the population of the state was increasing.

Wayne Justice of the Eastern District of Texas was able to shepherd a case filed in that district during the late seventies and early eighties that eventually became a landmark case causing the state to revamp the entire prison system. That case was Ruiz v. Estelle, 503 F. Supp. 1265 (1980). See S. Martin & S. Ekland-Olson, Texas Prisons: The Walls Came Tumbling Down (1987); B. Crouch & J. Marquart, An Appeal to Justice: Litigated Reform of Texas Prisons (1989).

15. See Chart.
TOTAL CIVIL CASES
1955 - 1974

Number of Cases
Cases Filed By Year

Federal District Court, S.D. Texas
This, however, cannot fully explain the explosion in litigation that occurred in the 1960s. The explanation has alluded many researchers due to the fact that the Federal Court System did not adequately classify civil actions until the late 1960s.

Although many might guess that following the Supreme Court's decision in Brown v. Board of Education, civil rights cases\textsuperscript{16} accounted for a large portion of the increase in civil filings, this conclusion would be incorrect. Beginning in 1955, traditional civil rights filings actually decreased. This trend continued until 1966 when traditional civil rights filings increased dramatically and continued to increase throughout the period of study. Change in Supreme Court doctrine was not the reason for the increase in prisoner filings, but rather congressional action. Despite the wide publication of Brown, it had little effect on civil rights filings.

In 1957\textsuperscript{17} and 1960,\textsuperscript{18} Congress passed relatively mild civil rights bills. However, in 1964, Congress passed a massive civil rights bill aiming primarily at public accommodation, transportation and employment

\textsuperscript{16.} Here I am referencing discrimination cases.
\textsuperscript{17.} In 1957, Congress passed The Civil Rights Act of 1957. It was the first civil rights legislation passed by Congress since the Reconstruction. The Act created the Civil Rights Division of the Justice Department and prohibited any one from interfering with voting in Federal elections.
\textsuperscript{18.} The Civil Rights Act of 1960 attempted to strengthen the 1957 Act and again dealt primarily with voting.
discrimination. The following year, Congress passed the Voting Rights Act, which was intended to apply only to southern states. This act directly assaulted the white political machine that dominated the South. Finally, Congress passed another civil rights act in 1968 which prohibited discrimination in housing. When one looks at the type of civil rights cases filed, the influence of Congressional legislation becomes apparent.

Unlike the glorious victory in Brown, most civil rights suits ended in defeat for the plaintiff, especially in the early years. Although many school desegregation suits were filed in the Southern District, it took years for the district court to act. Even when the district court finally acted, the decision was not final. Many years were consumed in appeal after appeal. Most of the school suits brought in the 1950's were still active in the 1970s, long after elementary school children had gone on to college.

The traditional civil rights cases, however, pail in comparison to prisoner civil rights filings. The prisoner suits exhibit a pattern similar to the traditional civil rights filings. Prisoners filed only a trickle of cases until 1961. From 1961 to 1966, the filings increase dramatically. After a brief but significant decline,

19. The Civil Rights Act of 1965 prohibited discrimination in employment, public transportation and accommodations etc. It also created the Equal Employment Opportunity Commission. 20. The plaintiff is the one who files a lawsuit complaining of actions by the defendant. 21. See Chart.
prisoner cases again began to climb in 1968 reaching new heights during the 1970s.

Unlike other civil rights cases, congressional action does not explain the increased filings in prisoner cases. Simply the fact that there were more prisoners was one reason for the rise in filings. The population of the state was rising, as well as the prisoner population.

The pronouncement of new Supreme Court decisions in the area of criminal procedure in the early 1960s also corresponds to the rise in prisoner filings. Most importantly, these Supreme Court criminal procedure decisions caused lawyers, laymen and especially prisoners to believe that great changes were occurring in the law.

Famed California attorney, Melvin M. Belli, wrote a book in 1968 titled, "The Law Revolution," which discusses the Supreme Court's criminal procedure decisions such as Mapp, Gideon, and Miranda. Belli writes that "for many attorneys and laymen, recent developments in the law have come as a shock. 'What's happening to the law?' some ask. Others wonder: 'is the law becoming a happening?'"22 One member of the Supreme Court even remarked that the Court's decisions were like a railroad ticket: "good for this date and train only."23 In fact, one saying during the 1960s was that "typewriters have replaced the hacksaw" for breaking out of prison.24

23. Id.
TOTAL CIVIL CASES
1955 - 1965

Number of Cases
- Cases Filed By Year

Trend
TOTAL CIVIL CASES
1965 - 1974

Number of Cases

Cases Filed By Year

Federal District Court, S.D. Texas
Reality, however, was altogether different than these persons' perceptions. More men gained freedom through escape than through the Federal courts. Ninety-seven percent of the prisoner petitions were denied by the Southern District of Texas from 1955 to 1973. Further, only about 18% of these cases were appealed. On appeal, the overwhelming majority of denials are affirmed. Lastly, even if the prisoner was successful at the trial court or appellate level, he did not necessarily win freedom. In the majority of cases, all he won was a new trial including re-sentencing.

These are not new findings. A California prisoner writing in 1968 describes the disillusionment associated with "writ-writing." He stated that prisoners too often rely on dictum in an opinion to appeal to the Federal courts. When asked, "Is there any similarity between the facts of your case and [the case being cited]?) the prisoner will reply, "Hell, I don't know, but this is what the court said."

Despite the large increase in filings, the proportion of prisoner suits to the total prison population remained small throughout the time period. Even prisoners

25. Id.
26. A "writ-writer" is technically a prisoner who files a habeas corpus action seeking redress of a constitutional violation. This term also included prisoners filing civil rights (1983) suits against the state, prison or prison officials etc. seeking redress of their constitutional complaint.
28. See Chart.
TOTAL RIGHTS FILINGS
1955 - 1973

Non-Prisoner Filings
Prisoner Filings

Prisoner includes habeas & civil rts
PRISONER POPULATION
1920 - 1980

Thousands


Prisoners/10,000s

Prisoner Population Trend
POPULATION
1920 - 1980

Population/Prisoners Trend
sentenced to death seemed reluctant to file Federal actions to contest their convictions. Of the 114 prisoners who waited on Texas' death row from 1950 to 1972, only 33 sought Federal habeas relief.²⁹ Of the 114, only four were granted habeas relief by the District Court and only five from the Fifth Circuit. In short, the litigation fever never really spread among the condemned.

Typical civil rights cases during the 1950s and 1960s were litigated as follows. A prisoner filed a writ of habeas corpus or a civil rights suit; his petition was then denied by the trial court, and was never appealed.³⁰ These statistics, however, hide as much as they reveal.³¹

For every case filed there is a story; these stories are fascinating and often tell much more than the outcome indicates. Unfortunately, there is simply not enough time

²⁹. W. Bowers, Legal Homicide; Death as Punishment in America, 1864 - 1982, 505-10 (1984). Bowers list contains only the 105 Texas inmates who were executed in Texas. He did not know how many inmates had been granted habeas corpus petitions by a Federal court and thus kept them from execution. Id. at 16.
³⁰. See Chart.
³¹. John Steinbeck makes a point about such "lifeless rationality" when numbers form the total basis of analysis. In attempting to describe a type of fish, the Mexican Sierra, he states that there are two realities. One reality can only be explored by sitting in a "laboratory, open an evil smelling jar, remove a stiff colorless fish from the formalin solution, count the spines and write the truth..." But Steinbeck believes that the fish is more than a sum of its parts. He states that "you have recorded a reality which cannot be assailed-probably the least important reality concerning either the fish or yourself" He goes on to state that "[t]he man with his pickled fish has set down one truth and recorded in his experience many lies. The fish is not that color, that texture, that dead, nor does he smell that way." John Steinbeck as quoted in T. Peters and R. Waterman, In Search of Excellence, 46 (1982).
or space to tell all of the stories in this paper. I have therefore selected only certain cases to describe civil rights litigation in the Southern District. It is important to make clear, however, that the following cases are not statistically representative but, in my opinion, reflect the true reality of civil rights in the Southern District.

First, an explanation of the mechanics is necessary. How would a prisoner petition a Federal court and why would he petition in the 1960s? Prisoners simply wrote their complaint without the assistance of counsel. Others obtained the assistance of "writ writers" or "jailhouse lawyers," fellow prison inmates who had become familiar with the legal process. Writs are simply handwritten notes to the court complaining of some aspect of the prisoner's incarceration. The description of habeas corpus as it was actually used by prisoner is very much like the description given of how informal writs were used as far back as the 12th century in England.

They were formed of slips of parchment varying in size with what had to be written upon them. Some of them are barely as wide as is a little finger. They are almost invariably written in Anglo-French. A very few are in Latin... Not a single one of them is addressed to the King nor to his Council... They are largely used by very poor people. No rules as to form affect them, so that, no expert knowledge being necessary, they can be framed and presented by anyone who can write or get another to write for him. There is no evidence that any fee was payable....

32 C.H.S. Fifoot, History And Sources of the Common Law, 51-52 (19700.)
One judge stated that in the 50s, he had a daily correspondence with the inmates of the prison in his jurisdiction. He stated, "Often I would have to pay postage due, to obtain delivery of these handwritten, almost illegible requests for federal intervention".  

Federal judges attempted to categorize complaints into one of two legal challenges. If a prisoner was challenging the fact or length of his custody, then a writ of habeas corpus was pursued. This procedure required that the prisoner first exhaust all available state judicial or administrative remedies. If the prisoner was seeking damages for a deprivation of a constitutional or federally created right, then a suit under 1983 of the Civil Rights Act of 1871 was pursued. Under this procedure, the prisoner was required to first seek permission of the court to proceed pro se or in forma pauperis, and did not require exhaustion of state remedies before proceeding in state courts.

Judges were less than enthusiastic about prisoner complaints. As early as 1961, one federal appellate court judge complained of the habeas corpus petitions. He stated that the habeas corpus was "truly a troublesome part of our

PRISONER ACTIVITY
1955 - 1974

Habeas Filings

Prisoners/in tens

Prisoner Population/ Habeas Corpus Cases
appellate jurisdiction. In individual cases I find it very burdensome because continuously we are having to review the careful judgments of two great state courts....Moreover, it is a heavy one, vastly increasing our judicial business."36 In 1960, that an estimated average of six writs per day went from the penitentiary to the federal courts. The number had even gone as high as 15 in a single day.37 Some judges felt that the trend was not due "entirely or perhaps mainly to definite Supreme Court rulings, but is more the result of a growth in knowledge by the prisoners, aided by the privileges granted in the prisons allowing the inmates to study judicial cases and authorities."38 One commentator noted that the regulations in the Texas State Penitentiary were more liberal than other states as there were no restrictions on books and no special limits on the amount of time a prisoner could spend on his legal studies.39

The sentiments of other Federal judges were echoed by the judges of the Southern District of Texas. Most of the judges considered prisoner complaints "frivolous."

Judge Thomas M. Kennerly and the Election Cases

Each judicial district possesses varying numbers of judges and workloads due largely to congressional politics. From 1950 to 1974, seven judges sat on the Southern District.

Judge Thomas M. Kennerly was appointed to the bench by President Hoover in 1931. As the Texas Bar Journal stated in 1954, "For almost a quarter of a century Thomas Martin Kennerly was the United States District Judge for the Southern District of Texas." Kennerly is most recognized for his rulings in the Texas election cases.

In 1932, the Texas Democratic party voted to exclude blacks from voting or participating in the Democratic primary election. Julius White, a black, sued the Harris County Democratic Executive Committee, arguing that his right to vote was being abridged in violation of the Fourteenth Amendment. Judge Kennerly stated that the recent Supreme Court opinion of Nixon v. Condon leaves little to be said. If the action of the Democratic party

40. See M. Ballard, Bill to Add U.S. Judges Shortchanges Texas by 6: Legislation Would Add 3 New Courts in Southern District, 1 In Western, Texas Lawyer, June 18, 1990 at 4. "U.S. Senate legislation that would give Texas four new federal judges is being met with brickbats instead of accolades. Federal officials in Texas... are outraged that a bill pending...cuts the recommended number of new judges in Texas from 10 to four. And they're calling the measure a grab for patronage that further threatens Texas' already overwhelmed civil dockets...The Biden bill 'places judges based on politics and not need'...." Id.
41. White v. County Democratic Executive Committee of harris County, 60 F.2d 973 (1932).
42. 52 S.Ct. 484 (1932).
was state action, then it would without doubt be unconstitutional. Kennerly added that "[u]nlike Moses, who refused to be known as the son of Pharaoh’s daughter, the Democratic Party in Texas has . . . chosen to be known as a child . . . of the state of Texas . . . ."43 After finding the actions of the Democratic Party to be unlawful, Kennerly then held that he lacked the power to grant the plaintiff his requested relief, a writ of mandamus, and dismissed his complaint.

In 1933, M.W. Drake, a negro of Houston, filed a civil rights action in the Southern District seeking to enjoin the upcoming city elections because blacks would be excluded from the Democratic primary. Drake cited Kennerly’s recent opinion in White, indicating he was asking for the same rights with a different prayer of relief.

Kennerly again demonstrated his skill at maneuvering a case through the rough legal waters. He held that the Democratic executive committee of the city did not receive its powers over member qualifications from a state statute, and that therefore it "must be assumed that such committee is acting under powers inherent in the Democratic Party....and not acting under powers conferred by the state...."44 Without state action, the Fourteenth Amendment did not apply and the plaintiff was not entitled to relief.

In 1950, Judge Kennerly again faced Negro voters seeking admission to the Democratic primary. John Terry

43. 60 F.2d 973, 975 (1932).
44. 2 F.Supp. 486, 489 (1933).
sued the Jaybird Democratic Association of Fort Bend County [commonly called the Jaybird Party] 45 for $5,000.00 in damages for being deprived of his right to vote and sought an injunction against the Party from future discrimination.

In discussing the facts of the case, Judge Kennerly seemed to apologize for the conduct of the Whites. He stated, "In seeking to understand the Jaybird Democratic Association...it is necessary to keep in mind conditions throughout the South during the so-called Reconstruction Period, and particularly in those localities like Fort Bend County where Negroes greatly outnumbered the whites." 46 He cited the fact that from May to September of 1867 there were admitted to vote in Fort Bend 153 white voters and 1334 black voters. He described how immediately following the Civil War, the military had control over state affairs and elections, but that after military control was discontinued "[t]he colored people, only recently freed, were controlled by the white newcomers." The result, he stated, was corruption, graft, dishonest government and "arrogance toward the native white citizens." Kennerly concluded, "Finally the condition became so intolerable that the Democrats, joined perhaps by a few good Republican citizens," formed the Jaybird Association in 1889 to secure honest government. 47

45. 90 F.Supp 595 (1950).
46. Id. at 597.
47. Id.
Kennerly noted that the question of Negro voting rights under the Constitution had come before both Federal and State Texas Courts many times in the last quarter of century. In seeking to uphold the Associations rights to exclude blacks, the Defendants cited Kennerly’s opinion in Drake; the Plaintiffs cited Kennerly’s opinion in White.

Kennerly reminded the Defendants that they had overlooked the Supreme Court’s decision in Smith v. Allwright. Kennerly stated that what he had stated in White was applicable here: the Plaintiff was entitled to judgment and would be legally entitled to vote in the upcoming Jaybird Primary.

The Defendant appealed to the Fifth Circuit, where Kennerly’s decision was reversed. The Fifth Circuit held that the actions of the Jaybird Association were not state action and therefore not in violation of the Fourteenth Amendment. The Supreme Court, however, agreed with Judge Kennerly that there was state action and reversed the Fifth Circuit.

In 1950, another discrimination suit came before Judge Kennerly. A group of Negroes sued the City of Houston and its Mayor, Oscar Holcombe, to force the city to discontinue its policy of segregating public golf courses. Kennerly cited Plessy v. Ferguson as the leading case upholding such segregation. He read the recent Supreme Court decisions in

49. The Plaintiffs had earlier waived their claim for money damages.
Sweatt v. Painter and McLaurin v. Oklahoma State Regents as standing for the proposition that segregation was still lawful. Kennerly found that the only requirement was that the facilities provided for each race must be "substantially equal," and that the city golf courses provided to blacks and whites met this standard. Although the case was later overturned on appeal, the city continued to delay desegregating the golf courses until after Judge Kennerly was off the bench.

Judge Ben C. Connally

Ben Connally was a partner in one of Houston’s leading law firms, Butler, Binion, Rice & Cook, when he was appointed by President Truman to the Federal Bench in 1949. In 1955, Judge Connally presided over a discrimination case brought by M.W. Plummer. The complaint attacked the segregated cafeteria located in the Harris County Courthouse. Plummer argued that he was being denied equal protection of the law under the Fourteenth Amendment. Connally agreed.

Empowered by the Supreme Court’s decisions in Sweatt, McLaurin and now Brown v. Board, Connally skirted the argument made by the County that the cafeteria had been

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52. See C. Davidson, Negro Politics And The Rise Of The Civil Rights Movement In Houston, Texas, Doctorial Dissertation 50 (1968) (on file in the Texas room at the Houston Public Library).
55. 347 u.s. 637.
leased to a private individual and was therefore not state action. Well in advance of the Supreme Courts opinion in *Burton v. Wilmington Park Authority*, Connally reasoned that the cafeteria and the county were "too close, in origin and purpose, to the functions of the County government to allow the concessionaire the right to refuse service without good cause." He noted that the county had not provided separate facilities for blacks and therefore ordered the discrimination to cease. Connally's opinion was later affirmed upon appeal.

Connally, along with most judges, lost patience with some of the actions filed in his court a decade later. In 1965, Willie Brooks, an inmate in the Texas Department of Corrections [hereinafter TDC], filed for a writ of habeas corpus. Connally, Chief Judge by then, found the petition to be frivolous. Brooks had been convicted and sentenced to fifty years in prison for raping a white girl. Connally wrote in the introduction to his opinion: "[A]s seems to be true in every case in this period of racial conflict and tension - all else having failed - collateral attack is now made on the judgment on racial grounds."

Brooks incredulously complained that blacks were purposefully included on the grand jury that indicted him. Brooks had originally been charged by an all-white grand

56. In this case the Court developed the theory of "symbiotic relationship" to reach previously considered private action.
jury. The state district judge recognized in advance the invalidity of "this long standing practice of exclusion" and voided the indictment. A new grand jury was assembled, consisting of two blacks out of 16. Connally carefully stated that this case was not about exclusion or about "token representation, as where a single negro is uniformly included in an effort to pay lip service to the constitutional principle involved." Connally then asked a rhetorical question, "If a jury commissioner knows the race of a prospective juror, can that fact be completely erased from his mind in making his choice?" Connally found that in this case, there was no "systematic and purposeful inclusion" of negroes on the grand jury and denied Brooks' petition.

One of the most frequent complaints in writs of habeus corpus filed in the Southern District, as well as around the country, is that a prisoner's counsel was ineffective. One prisoner states that "[t]he indigent defendant for whom the court appoints a public defender is convinced from the beginning he will not receive a fair and impartial trial." Another prisoner stated, "For a hundred grand, Williams [a famed Washington criminal lawyer], will guarantee that you don't go to the joint." This led to the philosophy that

59. Id. at 746.
60. Id. at 748.
61. The Sixth Amendment requires that a person have "effective assistance of counsel."
"[i]f you're going to do wrong, make a bundle and buy justice like you would a hundred grand loaf of bread."63

This sentiment was also expressed by William F. Walsh, a noted Houston criminal defense lawyer. During a speech Walsh gave at the Houston Bar Association Criminal Law Institute on October 9, 1964, he stated that when "you are appointed to represent [the criminal defendant], as far as he is concerned, you are part of the establishment....Because the Judge has selected and appointed you, his first inclination is to regard you as being on the side which wants to try to put him in the penitentiary."64

Prisoners regard court-appointed public defenders, employed, inexpensive private counsel, and defending oneself as the same: all will invariably result in conviction.65 Walsh advised other attorneys, "in the initial interview with your appointed counsel you endeavor to convince him that you will do for him just what you would do if he were paying you a $10,000 fee." Walsh cautioned that if this wasn't done, "he will be exposed to a group of guardhouse lawyers who will do nothing but talk about this sort of thing...and will urge him to file some kind of motion with the District Court saying that your representation was ineffective or something like that." Walsh believed that effective assistance of

63. Id at 347.
64. Institute on Defense of Accused In Federal Court, transcript. 25-26 [In possession of author].
counsel for the most part was simply "a good job of public relations."66

Not all prisoners, however, shared such negative viewpoints toward appointed public defenders. As the story is told by an attorney during the 1960s, three individuals, who were unable to speak English, were being tried in Laredo. Two of them had employed counsel and the third had not. Judge Allred stated, "Let's move ahead with the trial. I will represent you." The trial proceeded and at the conclusion, Judge Allred stated, "I find you guilty, you guilty, and I find my client not guilty." The Judge then turned to the interpreter and told him to explain the verdict to his client in Spanish. The man replied through the interpreter, "Judge, I thank you very much, and I will never do it again."67

In 1967, Connally encountered an ineffective assistance of counsel case, however, that may have been genuine. Freddie Breedlove was convicted of murder. His court-appointed attorney had been licensed only two years when he was given the murder case. In addition, this was the first criminal case he had tried to conclusion. The attorney agreed with the prosecutor that the colored members of the jury could be excused. Thus, Freddie was tried to an all-white jury.

66. Id.
67. Institute on Defense of Accused In Federal Court, transcript pp. 71-72.
At the time of the shooting, a large crowd of 30 to 40 people were present. Without objection from Breedlove’s attorney, the prosecutor asked one of the police officers, "Has it not been your experience that when something like this happens (a shooting) and there are a bunch of niggers present, they will fly like birds?" Judge Connally stated that he failed to see "how it caused harm to the petitioner." Connally then thanked Charles Thrash, the attorney who represented Breedlove in his habeas case, "The Court expresses its appreciation to Mr. Thrash for careful investigation and scholarly presentation of the points, hampered as he undoubtedly was by complete lack of merit in the points which petitioner advanced." Judge Joseph Ingraham and the Prisoner Cases

In 1954, Judge Kennerly took senior status and President Eisenhower appointed Joseph McDonald Ingraham to replace him. Ingraham had been an establishment lawyer spending most of his career with Texas’ oldest law firm, Baker & Botts. He ran unsuccessfully for Congress in 1948 and three times for associate justice of the Texas Supreme Court. Along with John R. Brown, John Minor Wisdom, and Albert Tuttle, who were later appointed to the Fifth Circuit, Ingraham helped swing the presidential nomination away from Senator Taft toward General Eisenhower at the

69. Id.
Republican convention. Ingraham's efforts were rewarded with an appointment to the Federal bench.

One of Judge Ingraham's earliest cases involved a civil rights suit filed against Judge Connally. Frederick Griffin had sued Philander Smith College located in Little Rock, Arkansas. Judge Connally granted the defendant's motion to dismiss the suit. Griffin then sued Connally for $125,000.00, claiming he had been denied "fair and impartial justice."\(^{70}\) Griffin, acting pro se, was outmatched by the legal help received by Connally. Connally was represented by David Searls, a leading partner at Vinson & Elkins, and by Leon Jaworski, later special prosecutor in the Watergate affair during the early 1970s. The suit against Connally was dismissed because, as Ingraham aptly pointed out, "judges are exempt from civil liability in a civil action for acts done by them in the exercise of their judicial functions. No matter what their motives may be, they cannot be inquired into."\(^{71}\)

Ingraham handled a majority of the prisoner suits while he was on the bench, especially the habeas corpus cases. Otis Bryant,\(^{72}\) an inmate at TDC, petitioned the court in 1960 to proceed in forma pauperis in order to sue Retrieve State Farm warden, Z.E. Harrelson. Bryant claimed he was forced to work in the fields, whipped by the warden, and placed in solitary confinement in violation of his

\(^{71}\) Id.
constitutional rights, specifically the Eighth Amendment's prohibition against cruel and unusual punishment. Bryant sought $50,000 damages under Civil Rights statutes.

Demonstrating his lack of legal skill, Bryant attempted to meet the diversity requirement under federal diversity jurisdiction law. Bryant argued that he was not a citizen of Texas, but instead a citizen of the United States (he also did not claim citizenship of any other state). Because warden Harrelson was a Texas citizen, Bryant argued that diversity existed. Judge Ingraham, almost as if he were toying with Bryant or was tired of frivolous petitions, stated that Bryant's allegations were "incomplete" and "insufficient to support diversity jurisdiction." Judge Ingraham pointed to an obvious fact (obvious to any lawyer), that the establishment of diversity was not a necessary prerequisite in this case because Bryant sought relief under federal laws and not under the diversity statutes. Judge Ingraham then looked to the merits of Bryant's complaint and noted that he had not claimed any serious bodily injury. In fact, Bryant had failed to claim that he was physically harmed by Harrelson. Judge Ingraham held that an allegation of a single whipping without "talk of any injury" was insufficient to invoke the Civil Rights statutes, citing the courts refusal to interfere with prison discipline as his reason. Judge Ingraham concluded that a "federal court will not grant leave to a poor person to proceed in forma

73. Id. at 739.
74. Id.
pauperis. . . if it is clear that the proceeding which he proposes to conduct is frivolous and without merit."\textsuperscript{75}

In 1961, Judge Ingraham denied inmate Billy Blythe's petition\textsuperscript{76} for leave to proceed in forma pauperis against O.B. Ellis, the Director of the Texas Department of Corrections, for damages of $100,000 for violation of his Eighth Amendment right. Judge Ingraham, irritated at Blythe's lack of legal skill, stated:

No diversity of citizenship exists, for both are Texas citizens. Plaintiff cites no federal statute under which he purports to sue. Although it would seem that there are certain minimum standards of pleading applicable even to laymen, inasmuch as plaintiff is obviously unfamiliar with law, it will be assumed that the suit is brought [under \textsuperscript{77}]

Blythe's complaint was that he had undergone surgery for a hemorrhoidal condition. Later that same month he went to see the warden, Ellis, about a personal problem and that Ellis, maliciously and without justification, had placed him in solitary confinement. Blythe stated that the place of solitary confinement was unpleasant and was a detriment to his health. "It was subject to flooding due to poor plumbing," he wrote Judge Ingraham. When he was released from solitary confinement, he was sick and additional surgery was necessary because of the horrible conditions under which he had been forced to live. Blythe called his treatment cruel and unusual punishment. Judge Ingraham disagreed. He found that the complaints were matters of

\textsuperscript{75} Id. at 740.
\textsuperscript{76} Blythe v. Ellis, 194 F.Supp. 139 (S.D.Tex. 1961).
\textsuperscript{77} Id.
internal discipline and refused to allow Blythe to proceed with his suit. Judge Ingraham noted there had been no intentional infliction of serious bodily injury, nor was Blythe intentionally deprived of essential medical care, either of which would have been actionable under federal law. Judge Ingraham ended with a reference to his Bryant decision that "frivolous" complaints would not be allowed. Within a decade, however, this case was viewed as progressive, standing for the proposition that medical care for prisoners was a federal civil right.\footnote{78}

Several other similar prisoner petitions were decided by Judge Ingraham.\footnote{79} In 1964, Willie Earl Clark petitioned Judge Ingraham for a writ of habeas corpus.\footnote{80} He had been convicted of burglary, and was sentenced to life imprisonment under the Texas habitual offender statute. He had exhausted his state remedies and now petitioned the federal courts for relief. Clark complained that at the time of the offense, he was legally insane. He argued that one who is legally insane is therefore not criminally responsible for his actions. In 1931, Clark had been declared insane and committed to a mental institution. He was diagnosed as suffering from syphilis: general paresis. In 1935, he was discharged as "improved". In considering Clark's petition, Judge Ingraham found that insanity was a

legal term and that two types existed: 1) insanity as it related to mens rea and the commission of a crime; and, 2) adjudication of insanity by a court for commitment to a hospital. The first required a showing that at the time of the offense, the accused was unable to distinguish right from wrong. In a commitment proceeding, the accused's general mental condition is at issue. Clark had insisted that the state, however, had to prove that he was sane. Judge Ingraham, noting that Clark was correct in his assertion of state evidentiary rules, declared that "it is not a fundamental right that a person who has been adjudged insane on one standard must be free of all criminal responsibility (which is based on a different standard) until that prior adjudication is reversed."\(^{81}\) Ingraham discounted Clark's argument by noting that it had been twenty-nine years since his release and two intervening felony convictions later that Clark had waited to assert his insanity claim.

In deciding the petition, Judge Ingraham stated that the purpose of a writ of habeas corpus was to determine whether a person was being held in violation of his constitutional rights. The misapplication of state law does not in an of itself constitute a denial of due process. It may be "required by state law, but it is not required by the constitution of the United States."\(^{82}\) Judge Ingraham also stated that he did not have the authority to determine the

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\(^{81}\) Id. at 258.

\(^{82}\) Id. at 257.
sanity of a defendant at the time of his trial. According to Judge Ingraham, Clark received a fair trial and that was all that was required.

The Fifth Circuit Court of Appeals disagreed with Judge Ingraham.\(^{83}\) Circuit Judge Hutcheson wrote the opinion for the court, which reversed Judge Ingraham by a two to one panel vote. Hutcheson viewed the error to be Ingraham's refusal to decide whether Clark was insane at the time of his trial in 1960.\(^{84}\) Quoting Sander v. Allen,\(^{85}\) the court stated, "the trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very ideas of free government."\(^{86}\) The court reversed the lower court based on substantive due process, referring to natural rights and "fundamental fairness," terms often slung around as weapons in the incorporation debate. The case was remanded to Judge Ingraham's court to determine whether Clark's state trial counsel was aware of his 1931 lunacy adjudication. If he was not aware of it, then Judge Ingraham was to decide if Clark was sane at the time of his trial. Judge Ingraham made the finding and dismissed Clark's petition.

In 1964, Judge Ingraham examined a motion to reinstate Tommy Greer's petition for habeas corpus.\(^{87}\) Judge Ingraham

84. Id. at 556.
85. 100 F.2d 717, 720 (D.C.App. 1938).
86. Id.
sarcastically noted that Greer was not a stranger to his court. Previously Greer was denied leave to file a petition to file in forma pauperis. His motion for rehearing was denied because he was being held on other charges (Greer had been convicted of four other felonies in Liberty County besides the one he was complaining of). The Fifth Circuit Court of Appeals reversed Ingraham. Greer had been sentenced to life imprisonment in Harris County in 1957 for burglary, and he claimed that in that case, the state violated his due process rights.

Habeas corpus petitions required the immediate release of a prisoner. Since Greer was being held on other charges, Ingraham found that habeas corpus could not issue because even if Greer won, he could not be released. Thus, Judge Ingraham again dismissed Greer's petition.

In 1965, James Collins applied to the Southern District for habeas corpus. Collins was convicted of car theft and sentenced as a habitual offender. He claimed that inadmissible statements were used at his trial, that the police conducted an illegal search and seizure and that the state court failed to conduct a preliminary hearing as required by state law. Judge Ingraham dismissed Collins' first two claims as broad allegations. Ingraham found that an application for habeas corpus must state facts which entitle the person to relief. He added that if Collins

88. Greer v. Ellis, 306 F.2d 587 (5th Cir. 1962).
91. Id.
meant "confession" when he said "statement," then "a constitutional deprivation may lurk in the background." But Collins, like any other petitioner, must inform the court of facts, not mere assertions. As to the last claim, Judge Ingraham found that even if Collins had given facts to support the claim, no constitutional deprivation would be present because a preliminary hearing is not a constitutional right which, "if denied would require release defendant's on habeas corpus." Collins petition was again denied.

For the first half of the 60s decade, it does not appear that Judge Ingraham was a party to any revolution. He adhered to the traditional principles that federal courts should not intervene in state matters unless absolutely necessary.

Judge James L. Noel

Like Ben Connally before him, James Noel was a partner in the Houston firm of Butler, Binion, Rice & Cook. Most interestingly is his wife, who had been a partner of Baker & Botts during the 1940's. In 1961, President Kennedy appointed Noel to the Southern District.

Inscribed on the United States Supreme Court Building in Washington, D.C. are the words "Equal Justice Under Law." However, the following cases demonstrate that the reality is too often "unequal justice," due largely to the fact that

92. Id. at 640.
93. Id.
the courts treat differently even those defendants charged together for commission of the same crime. Little can be said in this account of the 71% who awaited death in Texas and never sought relief from the District Court. However, the following story is of one of the 8% in which relief was granted.

In order to give more life to the dry issues usually presented in court opinions, the following case will be explored in more depth than usual. It will also highlight how a case changes as it moves through the states institutions and makes its way to Federal court.

On July 22, 1959, The Houston Post's front page read, "Boy's Killer May Be 2-Time Slayer."94 The article read, "[t]he second sex killing of a child in three weeks sent Houston police on a round-the-clock search for a sex pervert who preys on children in the 10 to 12 age bracket."95 The paper reported that 12 year old William M. Bodenheimer III's nude body had been found crammed into an unused refrigerator Tuesday morning about 9 AM in the 1500 block of West Gray. The lot was known among neighborhood children as "the Sixties." The boy, known as Billy, described as an "amateur natural scientist," liked to go to the lot to catch snakes and bugs. About 3 PM, Monday, he told his mother he was going swimming in the Dunlavoy Park

95 Id. at 6.
pool, a few blocks from his house. Billy had planned to attend the Houston Buffs baseball game Monday night with Jack Webb of the Houston Big Brothers organization. (Billy's parents were divorced and his father lived in California at the time.) After Billy never returned from swimming, his mother called her fiance, Frank Field, and a search began for the boy. The next morning, Billy's 11 year old sister, Elaine, found Billy's bike laying outside a shack about three blocks from Billy's home. The shack had been used as an office for a dirt business conducted sporadically from the empty lot throughout the summer. The inside of the shack was cluttered with a desk, a couple of lawn mowers, scattered newspapers and a couple of dusty beer bottles. However, no one had been around the shack in weeks. Mr. Field peered into the shack and noticed the boy's jeans and swimming trunks piled on the floor. He dashed to the refrigerator and opened the door. Billy's nude body was stuffed inside. Mr. Field quickly closed the door and the police were called.

At the scene a Houston Police detective made the observation, "It's murder, I think. It just doesn't figure that a boy his age would pull off his clothes, climb into a refrigerator, slam the door and sit there to die." The police's chief suspect was a 25-year old white male.

Carl Whorton, 13, told police that he had bumped into Billy at the swimming pool on Monday between 6 and 8 PM.

96. Houston Chronicle, Icebox Death of Schoolboy May Be Murder; Man Sought", July 21, 1959, front page.
Carl stated that about five minutes later, he noticed Billy leaving the pool in a hurry. The paper speculated that Billy may have been in a hurry to go to the baseball game.

Harris County pathologist, Dr. Jachimezyk, stated that he believed that the "boy put up a good fight." He believed that Billy was attacked elsewhere, then brought back to the West Gray shack and put into the refrigerator in a clumsy attempt to simulate an accident, since there were no signs of a struggle inside the shack. However, the paper pointed out that if the killer brought the boy's body back, he also brought his bicycle back. Dr. Jachimezyk placed the time of death between 4:30 and 10 PM.

Mr. Bobbitt, the operator of a glass company across the street from the shack, said he was at his desk all day Monday except for brief intervals. His desk faced directly towards the shack. He stated that he had not noticed anyone around the shack all day and that the bicycle was definitely not laying on the lot when he left his office at 5:55 PM. Felix Billingsley, the owner of a pet supply shop at 1502 West Gray reported that he was at his shop until 6:10 and that nothing unusual happened in the lot. He did not recall a gang of Negro youths in the area and could not remember whether a bicycle was in the lot when he let. George Horan, a 12 year-old boy, told police that he, his brother Tommy, and four other boys had walked past the shack between 7:15 and 7:30 Monday night and the bike was laying on the lot then.
The Houston Post, using Dr. Jachimezyk's autopsy report, highlighted the similarities between Billy's murder and the murder of a 10 year-old black girl, Mattie Louise Mitchell. Mattie's body was found on June 28, 1959, just two miles away from the shack where Billy's body was found. Both children had first been strangled and then sodomized. Both children also had bite marks on their bodies. Because of these similarities, Houston homicide detectives speculated that both children could have been murdered by the same person. According to the detectives, the prime suspect was a 45 year-old man who was charged on July 10 with the attack of an 18 year-old dancer. That woman was able to obtain her attacker's license plate number after the attack. He was also suspected of attacking a 12 year-old boy and forcing him to commit "unnatural sex acts" on July 5, 1959. The boy remembered a number on the windshield safety inspection sticker which matched the 45 year-old man's car. The police were also looking for a 25 year-old man who had been cruising the West Gray-Richmond area while making overtures to young girls.97

The next day, Thursday, July 23, 1959, the Houston Chronicle reported that the break in the case came about midnight Tuesday when a patrolman remembered that a boy named Joe Edward Smith had recently been released from the boys prison in Gatesville. Smith had a record for sex

97 Id. Houston Post, July 22, 1959, front page, co. 1, p. 6.
offenses and lived in the West Gray area.\textsuperscript{98} Other facts which pointed the finger at Smith were reported by the Houston Press as follows. "An alert officer caught the phonetic likeness between a real and a misspelled name....A nervous boy made one little slip of the tongue....Each a minor thing in itself, the two were combined by weary detectives early today to start a chain of evidence that bought confessions from five teenage Negroes...."\textsuperscript{99} Five Negro teenagers had confessed to killing Bodenheimer.\textsuperscript{100} Joe Edward Smith, 17, was described by officers as the "ringleader" of the gang.\textsuperscript{101} Ira Lee Sadler, 13, Adrian Johnson, 17, David Arthur Clemons, 15, and Charles Archer, 15, were also arrested for the crime.

Police told reporters that three police divisions joined in the day and night investigation and that they questioned hundreds of witnesses in the area and learned that a gang of Negro youths had been active in the area. They had been robbing newspaper boys in the area. While checking on a possible connection between the robberies and the murder, an officer recalled that one of the newsboy victims had reported that he was robbed by a boy named Joe who had a half-brother named "Urralee."\textsuperscript{102} The officer concluded that Uralee might be the slurring of "Ira Lee".

\textsuperscript{98} Houston Chronicle, "murder Suspects", July 22, 1959, sec.1, p. 5.
\textsuperscript{99} Houston Press, "5 Confess Ice Box Murder- Wanted "Something to Do''", July 22, 1959, front page.
\textsuperscript{100} Houston Post, July 23, 1959, front page.
\textsuperscript{101} Houston Press, "5 Confess", July 22, 1959, front page.
\textsuperscript{102} Id.
Joe Smith was arrested first but denied everything. His half-brother Ira Lee was arrested and questioned by the police. The detective who questioned Lee stated, "The boy was a pretty tough case. He started out by denying everything, but he began to get confused as the questioning went on and he finally made a slip and mentioned a 'red and white bicycle.' He knew immediately he had trapped himself. He tried to cover up, then broke down and said he would confess the whole thing and give the names of all the others." The police also reported that Sadler and Lee had previous records for sex perversion.

Four of the boys made written statements admitting the murder. Later the same day, all four repudiated their statements. They told a Post reporter that "they confessed because they were 'scared' of the police." The boys stated that they had been boxing at "Fat Boy's" house from 5 PM until 10 PM, nine blocks away from the shack. The boys' alibi was "corroborated by more than a half-dozen Negro residents of the area."

Israel Jackson, 19, said the boys borrowed two pairs of boxing gloves from him about 6 PM and that they took turns boxing in his front yard until dark. Then they moved down the block to fight under a light outside the Canteen, a combination shine stand and teen age soft drink stand at the

103 Houston Press, July 22, 1959, p. 3.
corner of West Clay and Gross Street. About a dozen youths took part in the round-robin, boxing matches. Jackson stated that, "It's impossible that they killed the white boy because they were here."106

Frank Elliott Smith, 30, the operator of the Canteen, stated that he had been training professional boxers for 12 years and further, that "whenever I see boxing, I go to watch." He confirmed Jackson's statement that the boys were boxing on Monday night. Another neighbor, Mrs. Frances Hollins, 29, said that she saw the boys boxing at 6:30 "for sure." She said, "I can't believe these kids did it. How could they do it on West Gray, as busy as it is, without somebody seeing them? Everybody would have seen it if the colored boys had been fighting a white boy right on West Gray in the open."107 Other witnesses also saw the boys boxing. Although the witnesses conceded that the boys could have slipped away, they believed it was unlikely. Clemons, one of the suspects, told police that they left for about an hour, and that after the attack, they returned to the Canteen.

A newspaper distributor, Arthur Breitkreuz, 28, told police that he had been cruising West Gray Monday evening with some of his newspaper boys. They were attempting to locate the boys who had robbed them Saturday night. He stated that he definitely saw Ira Sadler and Joe Edward Smith outside a cafe (the Canteen) about 6 PM Monday night.

106 Houston Post, July 23, 1959, front page.
107 Id.
Police did not take a statement from the fifth boy, Charles Archer, because he had a speech and hearing impediment. Joe Edward Smith and his half-brother Ira Lee Sadler were the first arrested. Smith was arrested without a warrant by Lt. T.F. Clark at his home on July 21, at 11:15 PM. Sadler was arrested at the hospital where he had been taken because of a stomach ache. Smith and Sadler implicated the other boys. All of the boys had previous juvenile arrest records. However, only Smith and Johnson were old enough to be tried for murder.

The paper reported that there were wide discrepancies in the statements and that the police were taking new statements Wednesday night in an attempt to iron out the discrepancies. David Clemons was the first to make a statement after having been taken to the death scene. In the presence of police officers he "repudiated his earlier repudiation." In his statement, he stated that the white boy was coming toward them on a bicycle near the pet supply shop. When he got close, they pushed him off. He got up and ran but they chased him, threw him down, and then dragged him into the shack. Clemons then said, "Let's molesterate him." (sic) He, Smith, Johnson, and Archer then sexually abused the boy while Sadler went and brought the boy's bike over to the shack. Sadler then stayed outside and acted as a look out. Although similar, the confessions differed as to who placed the boy into the ice box. Johnson

108 Id.
also named five other boys besides the ones arrested as part of the "murder gang."

Murder charges against Johnson and Smith were filed at 3:15 Thursday after the police lab completed tests on a single strand of hair taken from Ira Lee Sadler. It matched the hair found Billy Bodenheimer.

On Friday, the paper reported that a woman pedestrian, Beverly Ann Neal Giesenschlag, 21, heard muffled screams coming from the dirt-yard shack about 3:30 PM Monday. She stated that she was on her way to meet her husband at the Mrs. Baird Bakery when she heard a young boy screaming. She also reported seeing a bicycle lying near the shack.

Gloria Jean Moore, 18, overheard a conversation between Joe Edward Smith and a friend on Tuesday morning before she learned of the murder in the paper. Smith asked his friend, "Did you see something in the icebox?" Then someone asked-she wasn't sure who- "Did it stink?" The conversation occurred several hours before the body was found.

The paper reported that another promise of corroborative evidence had evaporated. Sadler had said in his statement that a brown belt with a fancy buckle was taken from Billy's pants, and that he thought that Archer had taken it home. The police then found such a belt in Archer's house. When Mrs. Bodenheimer "heard of the belt 'clue'," however, she "telephoned the police that her son was wearing no belt."\textsuperscript{109} Mrs. Bodenheimer also added that

\textsuperscript{109} Id
her son couldn't have bought a belt after leaving the house because he had left his billfold, with all of his money, $2, at home.

The paper also reported that Roy Eugene Miller, 16, and Robert Leroy Miller, 13, were arrested after being implicated in the murder by Johnson. The Miller boys stated that they, along with the others, attacked Billy between 4 and 5 PM and then went boxing afterwards.

On July 24, 1959, the Houston Chronicle ran the story that "Probation Men Saw 'Pattern for Murder'." The probation authority had warned Gatesville officials not to release Sadler to the same home as Smith. They stated, "These two boys must not get back together." A probation official told reporters that, "There is a pattern for this murder. We knew it was coming....We had seen their records and the pattern for murder was forming...."

In August, Adrian Johnson stated that he signed a confession two days after he was arrested "because they weren't going to let me go until I told them what they wanted to hear." He said that he was struck with the butt of a shotgun by a policeman who questioned him. All seven of the boys arrested in the case had signed confessions. All had later repudiated those confessions.

112. Houston Post, September 21, 1959, front page.
Only 2 boys were tried for murder, however, since the other boys were not yet old enough.

Adrian Johnson and Joe Edward Smith were indicted for murder on July 29, 1959. After Smith moved to be tried separately, Judge Duggan severed the case. A committee, headed by a black Houston doctor, Dr. C.W. Thompson III, raised money for the boys defense. Dr. Thompson stated that they were not concerned with the boys innocence or guilt, "but since they had been arrested in the manner in which they were, we felt they needed counsel which their families could not afford." They were able to raise enough money to hire attorneys to defend Johnson and Smith. Johnson's attorney was Bernard Goulding. Frank Briscoe, first assistant, to Dan Walton, Harris County District Attorney, prosecuted the case for the state. Lee P. Ward, Jr. was assigned to assist Briscoe.

Part of Goulding's defense strategy was to introduce into evidence a letter written by Mrs. Bodenheimer to the Houston Post thanking Houston for its tolerance. The letter read:

Since my son's death I have been largely sustained by the sincere sympathy of the whole community, but the attitude on the part of some has alarmed me. I have felt from the beginning that some abstract evil force killed my son. The person or persons responsible is ill and to find a scapegoat will not absolve society from its share of guilt.

People who are oppressed and deprived by society hit back. Finding my son's murderer will not keep alive some child who now lives -- more

murderers will be bred by the conditions which bred his murderer.
As long as we foster the sickness of slums and segregation we shall all be infected by it. This is not to say that I am convinced of the guilt of certain suspects, but merely that the anger directed against them would be put to better use if turned toward those conditions which breed crime.114

At this point in the story, all that has been described is a sensational murder. This case as it works its way through the courts, however, highlights many aspects of the American judicial system. One of the most important issues was the validity of the boys confessions. Some believed that the police simply made a sweep through the neighborhood and in essence "rounded up the usual suspects,"115 and then beat confessions out of the boys. Others believed that these boys were guilty and had demonstrated a lack of desire to conform to the rules of society.116 How did the judicial system deal with these issues?

This case also highlights the use of habeas corpus during the 1960's by aggressive defense lawyers. Issues of life and death depended often on the skill of the lawyer, not on the basis of guilt or innocence. We now turn to the court proceedings and observe how this amass of factual information is either discarded or turned into crucial issues, depending on the judicial procedure involved.

114. Id.
115. Interview with James Hippard, Smith’s attorney on appeal, February 5, 1990.
116. Interview with Sam Robertson, Justice, Texas 14th Court of Appeals, February 9, 1990; Chief probation officer Paul Irick’s statement, Houston Chronicle, July 24, 1959, section 1, p.7.
On September 21, 1959, the trial of Joe Edward Smith began in State District Judge Ed Duggan's court. At the start of the trial, Johnson’s attorney, Bernard Goulding, indicated that his strategy was to contend that Johnson witnessed, but took no part in, the slaying of 12-year-old William Bodenheimer. 117 The prosecution made it plain that they sought to send Johnson to the electric chair.

Jury selection in Johnson’s case began on September 21, 1959. Frank Briscoe ensured that no blacks were chosen for the jury.118 Briscoe also struck a potential juror who stated he did not condone police brutality. Goulding probed the prospective jurors for racial prejudice. He

117. Houston Post, September 22, 1959, front page.
118. Two black housewives were dismissed because they opposed the death penalty. One black was dismissed because he already believed Johnson was innocent. Additionally, black mailman was rejected by the state without a reason. After Batson v. Kentucky, U.S. (1987), this would be enough to overturn the conviction. The question would center over whether the new Supreme Court rule was to be applied retrospectively or prospectively only. The problem with retrospective application is that it overturns many convictions that were conducted according to the standards applicable at the time. By reversing the convictions many years later, it becomes very difficult for the state to retry the cases because witnesses die or become unavailable and evidence may no longer be kept. Thus, many convicted criminals are freed. However, if these are truly constitutional mandates, then they apply to everyone and not just to the lucky petitioner that the Court happens to pick, out of the many cases raising the identical issue, to free on the newly "discovered" constitutional right. As constitutional scholar Gerald Gunther stated, "[t]hat problem was raised especially by the Warren Court's rapid expansion of federal constitutional rights in criminal proceedings." The general rule was retroactive. Beginning in 1965, the Court held that it would withhold retroactive effect for its ruling under some circumstances. This rule "has given rise to repeated controversies" since it was announced. Gerald Gunther, Constitutional Law 29 n.7 (2nd ed. 1985).
asked the panel if they "belong to organizations advocating white supremacy or to civic clubs that have announced their opposition to desegregation."\textsuperscript{119} This evidenced the racial tensions not only of this particular case, but the racial tension of the time as well. In the end, Goulding bungled his job by allowing one of Briscoe's relatives to be chosen as a juror in the case.

An all white jury assembled on September 23, 1959 to hear the case against Johnson. The state called twenty-two witnesses on the stand and closed its case in one day. The most damming piece of evidence was Johnson's confession. After Briscoe introduced the confession, the defense offered only a routine objection to the confession: that the statement was "immaterial and irrelevant and concerns extraneous offenses not mentioned in the indictment." Judge Duggan quickly overruled the motion and the defense never again raised the issue that the confession had been coerced. They objected much more strenuously to the introduction into evidence of the refrigerator which was wheeled into the courtroom by the state. The defense claimed the "white coffin" was "highly prejudicial and inflammatory" and represented "improper conduct" on the part of Briscoe. However, Judge Duggan again overruled their motion.

The state also called Baptist minister, Rev. Jimmy Ray Amos, to the stand. Jimmy Amos was the manager of a Chuck

\textsuperscript{119} Houston Post supra, note 1.
\textsuperscript{120} Houston Post, September 23, 1959, front page.
Wagon hamburger stand in the 1900 block of West Gray. He testified that Adrian Johnson approached his stand 5 or 6 minutes after 6 P.M. on the day of the murder. He stated that he last saw Johnson walking down West Gray in the direction of the shack.

Goulding's cross-examination of other state witnesses, included Lt. Mouser, the arresting officer, which concentrated on Johnson's arrest. Lt. Mouser testified that Johnson had been arrested at his uncle's house without a search or arrest warrant. 121

The main witness for the defense was Johnson himself. He spent two hours on the stand and testified that he was "never anywhere near" the shack. Goulding later called other witnesses to support Johnson's contention that he was blocks away at an impromptu boxing match between 6:30 and 7 P.M., the time his statement alleges that he killed the boy.

Johnson also told the jury that he signed the confession because the two police officers had driven him near Humble and had beaten him with their fists and a shotgun. Johnson testified, "I asked could I see my mother or a lawyer. They said after I got to the police station and signed a statement I could see my mother." 122 He told

121. Again, this would probably invalidate Johnson's confession under later Supreme Court cases. See note 2 supra.
122. Houston Post, September 23, 1959. This case is being decided before Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to provide indigent counsel in felony trials) and its progeny: Escobedo v. Illinois, 378 U.S. 478 (1964) (right to an attorney when requested by suspect who is the focus of an investigation).
the jury that he signed the confession without reading it, denying everything in the statement, sentence by sentence, as Goulding read it aloud. Goulding then asked Johnson to stand and show the jury a bruise located below his waist, which prosecutors had contended he had gotten during the attack on Bodenheimer. Johnson stated he had this "bruise" all his life.

Later, in rebuttal, the state chemist testified that he had examined Johnson during the lunch recess and stated it was a new and different mark. To forestall the brutality charge, the state put a Houston Post reporter on the stand and he testified that he had seen Johnson about 3 A.M. the night Johnson was arrested, and then later that day at about 8 PM. The reporter stated Johnson didn't appear beaten at either time. The state also introduced a photo of a stripped Johnson taken at 3:30 AM the night he was arrested to prove Johnson had not been beaten.

Another rebuttal witness, Routte, was called by the state to talk about Johnson's arrest. Briscoe asked the witness, "I will ask you if it isn't true that this defendant, in the past, has had occasion to commit rectal sodomy upon you."\textsuperscript{123} The witness replied that he couldn't answer the question. Goulding's assistant thundered an objection and demanded that the jury be retired. While the jury was out, Briscoe was placed on the stand and demanded to know if he had any information that Johnson had been

charged or convicted of sex perversion before the murder date. Briscoe replied, "No, sir." The defense complained to the court that Briscoe had been guilty of "gross misconduct" and "bad faith" in asking the question. Briscoe then handed Judge Duggan a police statement taken from the witness, which described sex relations with Johnson. Defense counsel moved for a mistrial; Judge Duggan denied it. Judge Duggan also refused to allow the statement to go to the jury and admonished the jury to disregard Routte's testimony when they returned.

The defense tried to introduce into evidence an attempt by police to take a second statement from Johnson on August 15, a month after the murder, but Briscoe objected. The defense asserted that it was all part of a pattern of police coercion and that such practices had been ruled illegal by the Supreme Court. After Judge Duggan overruled his objection, Goulding's assistant whispered confidently, "This reverses it."125

After four days of trial, both sides rested and began fighting over the judge's charge to be given to the jury. The defense raised 43 objections to the charge. The newspaper described that battle as a "legal ping-pong game [that] could bounce between state and defense for some time." Some of the defense motions were described at the

124. Id.
125 Houston Post, "Law Rarely Used Snags Trial's End", September 26, 1959, front page.
126. Houston Post, "Law Rarely Used Snags Trial's End", September 26, 1959, pg. 3.
time as "novel legal conceptions." Today they would be
called bizarre. For example, the defense asked the court to
instruct the jurors that all officers in the case had
violated the law by improperly arresting and abusing
Johnson. These, as well as the other objections, were
overruled by Judge Duggan.

During closing arguments, the prosecution built its
death penalty demand around Johnson's statement. The paper
reported it was the "state's indispensable centerpiece in a
web of otherwise circumstantial evidence." Briscoe called
Johnson a "scheming liar," one of the "architects" of a
"vile and despicable sex slaying." Later, Goulding argued
that Johnson was a "hapless boy so cowed by gun-heavy
policemen that, why, that boy would have confessed to having
shot President Lincoln." He urged, "They have got the wrong
boy. The monster who committed this outrageous deed is
still at large." Lastly, Goulding accused the state of
racism.

During rebuttal argument, Briscoe replied to Goulding's
charge of racism: "Counsel says this is a case of white
against black. It is not... It is a case of right and
wrong." Briscoe did agree with Goulding on one point,
however: Johnson could not have conjured up his story of
being driven to Humble and beaten by officers. Briscoe
looked accusingly towards Goulding, stating, "I think the
story was conjured up by a much more fertile imagination.\textsuperscript{127}

On Saturday, the jury deliberated for four and one-half hours before they returned a verdict of guilty with punishment assessed at death. Johnson was stunned. He muttered, "I didn’t expect this, I thought it would be not guilty." Johnson joined three others on death row in the county jail. A few days later, the Post described Johnson and the others on death row as "quiet, calm, even spiritless, as if the weight of the judgments had crushed their human vitality."

What alternatives were available to Johnson? He was first required to appeal his case through state appellate procedure. During that time in Texas, death penalty cases bypassed the intermediate appellate courts and went directly to the State’s highest criminal court, the Texas Court of Criminal Appeals.\textsuperscript{130} After a State’s highest court rules on an issue, the person may then appeal to the United States Supreme Court for a writ of certiorari. If certiorari is denied, the person may still proceed in Federal Courts for review of his conviction through the writ of habeas corpus.

Immediately after the sentence, Johnson appealed. First, he appealed to the Texas Court of Criminal Appeals. There, Johnson asserted that the admission of his statement

\textsuperscript{127} Id. See, Johnson v. State, 336 S.W.2d 175 (Tex. Crim. App. 1960).
\textsuperscript{128} Id.
\textsuperscript{130} The Texas Supreme Court handles only civil appeals.
was improper, that testimony regarding his sexual conduct was improperly admitted, and that evidence at his trial did not support the verdict. The court rejected Johnson's first contention stating that he had not made any objections to the statement's introduction at trial on grounds that it had been involuntarily made. As to the second contention, the court stated that no reversible error had been made. Finally, the court stated the evidence was sufficient to support the verdict. On April 27, 1960, the court unanimously affirmed Johnson's conviction. The defense filed a motion for rehearing, which was later denied on June 22, 1960.

After his appeal was denied by the highest court in the state, Johnson appealed to the United States Supreme Court. In his petition for certiorari, he primarily urged that his confession was obtained through police coercion. The Court, however, denied certiorari.

On March 10, 1961, Johnson applied for a writ of habeas corpus to the United States District Court for the Southern District of Texas, which was received by Judge Ingraham. In his petition, Johnson alleged that his

134. The U.S. District Court for the Southern District of Texas had the most judges of any federal district in the state. It contained 4 active judges and one retired judge. They were: Joe M. Ingraham, Allen B. Hannay, Ben C. Connally, Thomas E. Kennerly, and Thomas M. Kennerly (retired). Texas Almanac 1961-62, 449 (1961)
judgment and sentence violated the due process clause of the Fourteenth Amendment on at least three grounds. 135

1. His conviction was based on a coerced and forced confession; obtained by law enforcement agents after protracted questioning, during which time he was denied counsel and was not advised of his rights and was detained without authority. 136

2. He was sentenced "to his doom solely on the basis of a confession obtained by threats, force, coercion and subtle illegal practices, while illegally restrained."

3. He was denied a state statutory right to testify that he was removed from jail by Texas Rangers for the purpose of procuring from him another confession.

4. The trial court permitted the state to introduce a collateral crime, Routte's testimony, that was not embraced in the indictment. 137

Judge Ingraham held hearings on Johnson's petition for two days, May 2 & 3, 1961. After listening to fifteen witnesses, Judge Ingraham initially had trouble deciding the case because it appeared that federal courts lacked jurisdiction. A jurisdictional question arose because,

135. I counted four grounds.
136. In this same year, 1961, the Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), first applied the exclusionary rule to the states. Now, statements obtained in violation of the U.S. Constitution were inadmissible in court. At this time the Court was still following the practice of retroactive effect to Constitutional pronouncements. See note 2 supra. Miranda v. Arizona, 384 U.S. 436 (1966) had obviously not been decided yet.
normally, state remedies must be exhausted as a prerequisite to federal jurisdiction.\textsuperscript{138} The exhaustion doctrine required that before relief could be sought in federal court, a petitioner had to resort to state habeas corpus remedies first. Johnson did not seek a writ of habeas corpus in the Texas Court of Criminal Appeals. In addition, Johnson did not exhaust his state remedy as to the coercion issue because his attorney had failed to object at trial to the admission of the statement on the grounds that it had been involuntarily taken.\textsuperscript{139} The defense offered only a routine "relevancy" objection against the statement. The Court of Criminal Appeals refused to consider Johnson's assertion that the statement was coerced because he failed to make that specific objection at trial.\textsuperscript{140} Thus, due to lack of an objection, nothing had been preserved for appeal.

Rather than send the case back to state court, Ingraham held that Johnson satisfied the exhaustion requirement because the state court decided the issue against him and because the Supreme Court denied certiorari. Ingraham reasoned that the coercion issue was rejected by the Court of Criminal Appeals when they wrote that "no error appears in the admission of said written statement into evidence." In a footnote, Ingraham stated that he believed the issue was addressed and decided by the Court of Criminal Appeals.

\textsuperscript{138} 28 USCA sec. 2254 required that a petitioner exhaust state remedies before being eligible for federal remedies. This is still the law.
\textsuperscript{139} Refer to note 4, supra, and accompanying text.
\textsuperscript{140} Refer to note 14, supra and accompanying text.
despite their assertion that Johnson failed to object and preserve the issue for appeal. In effect, Johnson objected when he moved to strike the statement at the close of the trial. Having navigated his facts through the choppy waters of the exhaustion doctrine, Ingraham then bolstered his weak legal argument with a common sense argument. He reasoned, "petitioner need not endlessly pursue collateral state remedies nor relitigate fruitlessly constitutional issues."\textsuperscript{141} 

Judge Ingraham reviewed the substantive issues underlying Johnson's claim for relief. Unlike his usual handling of prisoner petitions, Ingraham considered each issue very carefully and wrote a very detailed opinion. In deciding the coercion issue, he stated: "It is elementary, of course, that a coerced confession may not be received in evidence in a criminal case,..."\textsuperscript{142} In reviewing the facts of this case in light of the law, Ingraham stated, "After closely observing petitioner's demeanor and responses to cross-examination [during the two day hearing conducted in Ingraham's court], the court is not impressed with his credibility. It is not hard to understand why a jury rejected his testimony as false. His tale of beatings and abuse struck this court as pure fabrication."\textsuperscript{143} 

\textsuperscript{141} 194 F.Supp 258, 259 (1961).
\textsuperscript{142} Id. Judge Ingraham cited the seminal case of Brown v. Mississippi, 297 U.S. 278 (1936). There the Supreme Court had been confronted [describe case and subsequent doctrinal history] (Matt, this is not a test.)
\textsuperscript{143} 194 F.Supp. 258, 263 (1961).
Ingraham relied heavily on the testimony of two news reporters that testified at the hearing. Jim Maloney and Lee Tucker, reporters for the Houston Post and KPRC-TV, both testified that Johnson had not made any brutality charges, nor had they observed any evidence of mistreatment, when they saw him the night and following morning of his arrest. Ingraham concluded that the Johnson's statement had been voluntarily given. He stated, the "dispute came down finally to a choice between petitioner's spurious story and the overwhelming array of credible testimony to the contrary." 144

Johnson complained that he had not been allowed to testify about his removal from the county jail by Texas Rangers. Johnson claimed that the testimony was relevant to prove his allegation that there was a continuing plot of police coercion and brutality. In response, Ingraham stated that the matter "... was wholly one of relevancy without constitutional significance." 145 He added that Johnson's "credibility with respect to this incident... was no more impressive than in connection" with the other.

Ingraham pursued this same line of analysis in dismissing Johnson's objection to Routte's testimony. It

144. Id. at 264.
145. Habeas corpus relief may only be granted when a federal right, statutory or constitutional, has been infringed. An issue of relevancy is one for state courts to decide and federal courts are powerless to directly alter the result. This is a direct result of federalism. Only by grounding the claim as a procedural or substantive due process denial, could the federal court reverse the state court on this issue.
was an issue for state courts; no constitutional right had been violated. Johnson's application for writ of habeas corpus was denied. He then appealed this denial of habeas corpus to the United States Fifth Circuit Court of Appeals.

The three judge panel\textsuperscript{146} rejected Johnson's appeal on December 8, 1961. They stated that "we find no valid criticism of the district courts findings of fact. In an unusual fashion, the Fifth Circuit's opinion praised Ingraham. It stated, "For the reasons stated in the excellent opinion of Judge Ingraham, the judgment of the district court is Affirmed."\textsuperscript{147} On April 19, 1962, Johnson was executed.

Frank Briscoe resigned from the District Attorney's office in 1960.\textsuperscript{148} Briscoe's assistant in Johnson's trial, Lee Ward, took over the case against Joe Edward Smith. Smith's attorneys were Jo Winfree Sr. and his son, Jo Winfree Jr. On Monday, April 12, 1960, jury selection began and Winfree and son started out as poorly as Goulding had. One of the jurors selected was related to a Houston Police detective. However, that was not the most serious error committed in the trial.

On Tuesday, an all white jury had again been selected to hear the case and the prosecution began presenting

\textsuperscript{146} The three judges were:
\textsuperscript{147} Id.
\textsuperscript{148} Briscoe resigned to run against Dan Walton, the District Attorney. In a campaign that focused on plea bargaining, Briscoe labeled Walton, "Dealing Dan". Briscoe won the election and became the Harris County D.A. in 1961. Interview with Justice Sam Robertson January 29, 1990.
evidence. Mr. Field, former fiance and current husband of Mrs. Bodenheimer, testified about finding the body. He stated that he opened the refrigerator door only three or four inches, saw a body, closed the door, and then ran to call the police. During cross-examination, Winfree asked, "Now just why were you so gentle in just pulling it [the refrigerator door] open three or four inches, why didn't you reach there and pull open the door." 149 Field replied that he suspected Billy's body might be there and that he did not want to see "sights it might take years to forget." Winfree then asked, "Well, just why did you suspect that boy's body would be in that refrigerator, nobody had suggested it to you, had they?" 150 He next asked why Field chose to open the refrigerator door instead of looking around the shack first. Field replied he did not know. Later Winfree, who had premised his defense on alibi, asked Field, "Well, didn't it ever occur to you that Bill might still have been alive and you could have saved his life if you had pulled him out of there?" 151 Winfree pursued Field on this point. "and instead of opening the door wide and getting the boy out if he was alive and giving the boy an opportunity to breathe, and instead of opening the door wide and pulling the boy out of there, you slammed the door on him again, didn't you?" Then he asked Field how long he had been "courting this boy's momma" before the murder? Winfree also

149. Trial Transcript, p.12.
150. Id.
151. Id.
asked how long after the murder they had been married. Then Winfree asked, "Now, you don't know who put that boy's body in there, do you?" In response to Winfree's suggestions, Field snapped back that "the rather nasty implication that I closed the door on this live boy doesn't hold water, either, if I may say so." Winfree pursued, "You say 'the rather nasty implication,' but you didn't know whether he was alive or dead, did you?" Field stated he couldn't prove the boy was dead but "I in my own mind was sure he was dead."

This attack on Field only damaged Smith's case. It had nothing to do with his defense of alibi. Smith was claiming he had nothing to do with the murder and was miles away from the scene when it occurred. Winfree, in Perry Mason style, was attempting to place the blame on someone other than Smith. This ineffective attempt to place the blame for the murder on Mr. Field, a person with whom the jury would sympathize, only tended to cast doubt on Smith's claim of alibi.

To worsen the situation, a surprise witness stunned the courtroom spectators on Thursday. This witness testified that he and his 10-year old son, a school-mate of Billy, were parked in his car by the Chuck Wagon hamburger stand on July 20, 1959, shortly after 6 P.M. Bates stated that he saw Smith walk past the Chuck Wagon stand with a group of boys headed towards the 1500 block of West Gray. He added

152 Id. at 15.
153 Id.
that a few minutes later the Bodenheimer boy left the Chuck Wagon stand on his bicycle headed in the same direction. Bates testified that he heard Smith say, "Lets get that white kid when he comes out of here." 154

Lt. T.F. Clark of the police department testified that Smith was arrested without a warrant at his home on July 21, 1959. He was arrested and taken to the station for questioning concerning several robbery cases. During the questioning, Clark testified that Smith implicated himself in the murder and signed a written statement after being "duly warned." The statement was then admitted into evidence over defense counsel’s objection. The "confession" stated that Smith, Saddler, Johnson, Clemens, and Archer were walking down West Gray around 6 P.M., attacked Bodenheimer, and that Johnson "put the white boy in the ice box that was inside the little house." 155

The strongest defense witness came from a woman who testified that she heard a child’s scream in the shack as she walked by about 3:30 P.M. This directly contradicted the time frame established by the state.

When Smith took the stand, he denied ever being present when Bodenheimer was killed or molested. He repudiated his written statement and stated that while he was being interrogated, the police officers slapped, struck, kicked, and beat him. Smith testified, "He said, I am tired

of you lying to me. He said, you had me up all night, and I told him I wasn’t lying."\textsuperscript{156} Winfree asked, "Did he at any time tell you that any statement that you would make could be used against you?" Smith replied, "No, sir."\textsuperscript{157} Furthermore, Smith testified that they held a gun to his head, and made him stand against the wall with his hands outstretched. Winfree had Smith demonstrate to the jury how the officers had beaten him. Winfree, however, cautioned Smith, "Now, use me, but don’t slap me as hard as they did you...."\textsuperscript{158} Smith stated that the reason he signed the confession was because of what the officers had done to him and to keep them from beating him.\textsuperscript{159} However, when Winfree asked him, "State whether or not those pistols that they had, that you mentioned a while ago, frightened you?" Smith answered, "No, sir, they didn’t." Winfree asked him the question again and the prosecutor objected that Winfree was arguing with his own witness. Winfree informed the judge that Smith had misunderstood the question. Winfree then asked the question again. "What did you say, did you say those pistols frightened you?" Smith replied, "No, sir, they didn’t but the beating me was – I knowed they wasn’t going to shoot me but they were beating me and hitting me with the gun."\textsuperscript{160} Smith maintained that he never even read

\textsuperscript{156} Trial transcript, p. 66.  
\textsuperscript{157} Id.  
\textsuperscript{158} Id.  
\textsuperscript{159} Id. at 66–67.  
\textsuperscript{160} Id.
the statement and signed it only because of the physical abuse he was suffering at the hands of the police.

The State called several reporters who had seen Smith on the night and following morning of his arrest. They all testified that he had not appeared mistreated. One reporter testified that he had asked Smith if he had been mistreated in any way and he answered "no."\textsuperscript{161}

Although several witnesses testified in support of Smith's alibi defense, Nothing seemed to offset the state's case. The jury took less than two hours to return a guilty verdict and assess the death penalty.\textsuperscript{162}

Dr. Thompson, the head of the committee that raised funds for the boys defense, wrote about the trial in a letter to the Fifth Circuit. It indicates the way the black community felt about the Smith case. He stated:

\begin{quote}
It had always been my impression until witnessing portions of Joe Edward Smith's and Adrian Johnson's trial that the purpose of the courts was to attempt to seek the truth, then to administer justice after all facts were weighed. I was quite shocked to find out that it is more important to "win a case" than to present the truth. Many of the facts presented in these two trials which were in the accused favor were never allowed to reach the jury, however, the presiding judge allowed any sort of evidence against the boys objected to by their counsel be introduced. If he had been impartial he should have treated both sides equally...We yet feel that if they are guilty they should receive their just punishment. There are, however, so many facets in this case which do not fit together and there are numerous questions which are yet unanswered.\textsuperscript{163}
\end{quote}

\footnotesize
\textsuperscript{161} Id.
\textsuperscript{162} Houston Post, April 15, 1960, Front Page.
\textsuperscript{163} Letter by Dr. C.W.Thompson, III, to the Fifth Circuit Court of Appeals, October 26, 1962.
After the trial, Winfree continued to represent Smith on appeal. Assistant District Attorney, Sam Robertson, handled the Smith appeal for the State. Smith argued that his arrest without a warrant was illegal, and that his confession was not freely and voluntarily given and was therefore in violation of the due process clause of the Fourteenth Amendment. In addition, he argued that his confession was void because he had not been taken before a magistrate as required by state statute. Both grounds of appeal were discussed and dismissed by the Texas Court of Criminal Appeals on January 11, 1961. Smith then requested that the court rehear his appeal. This plea was denied on March 29, 1961. Smith appealed from the Texas Court of Criminal Appeals ruling by applying to the United States Supreme Court for a writ of certiorari. His application, however, was denied on October 16, 1961. The case did not end here. Winfree's next step was to file for a writ of habeas corpus for Smith in the United States Federal District Court.

On February 21, 1962, Winfree filed the petition for writ of habeas corpus in the Southern District of Texas, and presented to this court the same argument made earlier to the Texas Court of Criminal Appeals.

Judge Noel heard Smith's petition and dismissed the latter contention by stating that it was a matter of state

law and that under Texas law, failure to bring an accused who confesses before a magistrate bears only upon the fact question of voluntariness of the confession.

The test for Smith's due process argument was whether his confession was voluntary. Noel stated he was applying the test developed the previous year by the Supreme Court in Culombe v. Connecticut.\textsuperscript{166} He explicitly referred to Justice Frankfurter's suggested criteria of voluntariness which included: the duration and conditions of the detention, the physical and mental state of the accused, and the manifest attitude of the police toward the accused.\textsuperscript{167} The judge noted that the question of voluntariness of the confession had been "determined adversely to the petitioner by the jury, the trial court and the highest court of the State of Texas."\textsuperscript{168} Judge Noel stated that the "undisputed portion of the record does not warrant a finding that the confession was coerced as a matter of law. As a matter of fact, the only testimony this court regards as being in support of petitioner's contention that his confession was involuntary is that of petitioner himself."\textsuperscript{169}

Judge Noel also rejected Winfree's contention that Smith's confession violated the Supreme Court's recent decision in Mapp v. Ohio,\textsuperscript{170} stating that Mapp is limited to cases of illegal search and seizure. Noel concluded by

\textsuperscript{166} 367 U.S. 568, 602 (1961).
167. Id.
stating that Smith "willed to confess and therefore, his confession was properly admitted in evidence against him...." Noel found no denial of due process and subsequently dismissed the petition.

Winfree appealed to the United States Fifth Circuit Court of Appeals. The Fifth Circuit,\textsuperscript{171} indicating that their patience had grown thin with Smith's appeals, stated, "We have before us the same contentions that Smith urged at trial; on his appeal to the Texas courts from his conviction; on application for certiorari to the United States Supreme Court; and in his petition for writ of habeas corpus in the United States District Court. Each court has rejected his contentions...."\textsuperscript{172} The court stated that it "is elementary constitutional law that a coerced confession may not be received in evidence and used against an accused." They then cited a number of cases to support that principle. In addition, they stated sardonically, "citation of authority is unnecessary for the principle that a free, voluntary and non-coerced confession may be" used against a declarant.\textsuperscript{173} The court concluded that, "We are in agreement with the well written opinion of District Judge Noel in which he carefully discussed the issues involved and disposed of them correctly."\textsuperscript{174} Smith's appeal was denied.

\textsuperscript{171} The three judges panel consisted of Justices Hutcheson, Wisdom, and Gewin. Justice Gewin wrote the opinion of the court. Smith v. Heard, 315 F.2d 692 (5th Cir. 1963).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} 315 F.2d 692, 694 (5th Cir. 1963).
At the same time his mother had written the White House seeking President Kennedy's help in delaying Smith's appointment with death, which was scheduled for January 3, 1963. A few days before Christmas in 1962, an assistant special counsel to the President wrote her back stating:

[W]e are satisfied that your son had excellent legal counsel and that there is almost no chance that your son will be executed on January 3. His case is pending before the Fifth Circuit of the Federal Court of Appeals which is as good a court as exists in this particular type of case. We understand also that if his case should be lost in the Fifth Circuit there is an excellent chance that it will be taken to the Supreme Court. Moreover, the active interest of the Civil Liberties Union assures that the case will receive careful consideration. We have searched...and conclude that there is no proper action that the Department of Justice, or any other branch of the government, can take in the case at this time. I know that no dissertation or sermon on the difficult obstacles to pure justice would be helpful at this time. I can, however, assure you of our interest and suggest that you keep us advised as the case proceeds through the judicial system.\footnote{175}

In 1963, Smith appealed the Fifth Circuit's ruling by again seeking a writ of certiorari\footnote{176} from the United States Supreme Court. It was again denied. Smith appeared headed for the same fate as Johnson. However, one Sunday afternoon, James Hippard, a local Houston attorney received a call from Mary Beach, a woman described as very active in liberal politics. She asked Hippard to take over the Smith case because she had become convinced that he was

\footnote{175. Letter from Lee C. White, Assistant Special Counsel to the President, December 21, 1962.} \footnote{176. Smith v. Heard, 375 U.S. 883 (1963).}
innocent.\textsuperscript{177} Hippard couldn’t refuse and took the case pro bono. He recalled that he "got hooked into it and couldn’t let go."\textsuperscript{178}

Hippard decided to start over with new issues. He applied for a writ of habeas corpus to the Texas Court of Criminal Appeals, which denied his request on November 7, 1963. Even though Hippard knew he would lose, he applied there first to satisfy the requirements of the exhaustion doctrine and to stall for time. Smith was scheduled to be executed on November 8, 1963.

Hippard immediately filed another petition for writ of habeas corpus in the Federal District Court. Judge Noel stated that "Petitioner is again before this Court upon application for writ of habeas corpus." After reviewing the case history in the federal courts, Noel noted that the grounds asserted in Smith’s second application were not asserted in his first. According to a recent holding by the Supreme Court, this required the court to consider the new grounds asserted by Smith.\textsuperscript{179} The new grounds were that the State failed to introduce evidence establishing all the elements of the crime; and that Smith’s conviction violated the equal protection clause of the Constitution.

Noel dismissed Smith’s first contention stating that Hippard had misinterpreted the case upon which he was relying. Judge Noel stated there was a difference between a

\textsuperscript{177}. Interview with James Hippard, now a law professor at the University of Houston.

\textsuperscript{178}. Id.

conviction based upon evidence deemed insufficient as a matter of state criminal law and one so "totally devoid of evidentiary support as to raise a due process issue." 180 Only the latter would afford a prisoner a remedy in a federal court. Judge Noel, showing his irritation at the reappearance of Smith's case, stated, "This Court carefully reviewed the entire trial record before making its determination of petitioner's first petition for writ of habeas corpus and has now done so a second time in connection with this his second petition." 181

Noel continued, "I find that not only is there any or some evidence to support this element, there is ample evidence from which a jury could rationally convict. Petitioner's confession alone, the voluntariness of which has been previously determined by the jury and this court,..." is sufficient evidence. 182 He ruled that a writ of habeas corpus could only be issued if there was no evidence at all and that is "just not the case here." 183 Smith's second writ was again denied.

Hippard then filed a petition in the District Court for a certificate of probable cause, leave to appeal in forma pauperis, and for a stay of execution. Judge Noel denied all three requests. He stated that "it has been assumed

181. Id. at 153.
182. Id. at 154.
183. Id.
petitioner was non-indigent. Petitioner's case has been fully presented and argued by counsel. 184

Judge Noel quoted from a recent Supreme Court decision that set standards for handling in forma pauperis requests. Noel quoting, wrote:

When society acts to deprive on of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The method we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged. Second, the preference to be accorded criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement. 185

Judge Noel again discussed the extensive appeals already had in this case. He stated in an almost prophetic statement, "Thus, petitioner has had fair and sober consideration of his rights...and has now been tested five times. To further delay execution of the sentence...will not only unquestionably erode the efficacy of state law enforcement, it will invite disrespect for the processes of the federal courts." 186 Smith's applications were dismissed as "frivolous, without merit, and therefore not in good faith." 187 Despite Noel's findings, the Fifth Circuit

185. Id.
186. Id. at 160.
187. Id.
granted Smith a stay of execution and the right to proceed in forma pauperis on December 4, 1963.

Hippard appealed Noel's decision to the Fifth Circuit.\textsuperscript{188} The court began its opinion by saying, "This case is now in the throes of the piecemeal, post-conviction, collateral litigation of issues which had become the established practice where there is a conviction carrying a substantial penalty...it had already run the gamut of litigation on the merits...."\textsuperscript{189} After an extensive opinion, the court again affirmed Judge Noel's decision.

Hippard began the process to apply to the Supreme Court for a writ of certiorari. On May 20, 1964, the Fifth Circuit issued a mandate to stay Smith's execution so that he could apply for the writ. On September 2, 1964, Hippard filed a motion requesting the Fifth Circuit to further extend its mandate staying Smith's execution. He now asserted a new constitutional principle just announced by the Supreme Court in Jackson v. Denno.\textsuperscript{190} He abandoned his certiorari application and informed the Fifth Circuit that "[a]n intensive reexamination of the law in light of the Court's opinion has convinced counsel for appellant of the futility of such application and so none has been made."\textsuperscript{191}

\textsuperscript{188} The three judge panel consisted of Justices Hutcheson and Bell with Federal District Court Judge Brewster sitting by designation. Judge Brewster wrote the opinion for the court. Smith v. State, 329 F.2d 498 (5th Cir. 1964).
\textsuperscript{189} Id.
\textsuperscript{190} 378 U.S. 368 (1964) (The Court stated that a judge must make an independent finding, out of the presence of the jury, that a confession was voluntary. This ruling was also to be retroactively applied.)
Hippard requested that the Fifth Circuit reverse Smith's conviction in light of the new case. The court denied his request on September 24, 1964.

On December 2, 1964, Hippard then filed a third application for a writ of habeas corpus in the Texas Court of Criminal Appeals asserting the Jackson v. Denno claim. This was also denied without an opinion being filed. 192

Hippard again filed an application for writ of habeas corpus in the District Court. On December 7, 1964, Smith was granted another stay of execution just in time. He had finished his last meal when word came of a 30-day stay. 193 Judge Noel was not happy, however, to see the case again. Hippard asserted that Smith had been denied a fair trial guaranteed under the Fourteenth Amendment because the judge did not make a preliminary finding himself, out of the presence of the jury that the confession was voluntary as required by the recent Supreme Court ruling in Jackson v. Denno. Judge Noel explained the issue as follows: "[D]id the trial court give the confession of Joe Edward Smith that character and quality of preliminary consideration as to voluntariness required by the new concept...." 194 Judge Noel conducted a hearing and heard testimony from Judge Duggan, Smith's trial court judge. Hippard cross-examined the judge on the issue of his making an explicit finding that the confession was voluntary. Judge Duggan stated, "I

192. Id.
would say that in my own mind I made the decision that the statement was voluntary, yes, sir." But Hippard pursued the Judge on the issue and the Judge replied, "Mr. Hippard, I have to live with my own conscience. Now, I make formal findings of fact and law. We didn't do it in those days. We were not required to. But as I go along, I decide in my own mind that it is voluntary...." 195 Hippard later described Judge Duggan as "intellectually dishonest" for creating this fiction that he had decided the issue "in his mind." 196

Judge Noel decided that Judge Duggan had met the Jackson requirements of an independent determination of voluntariness, even though he never excused the jury and made no record of the finding. Judge Noel denied Smith's petition for writ of habeas corpus and his request for stay of execution.

Hippard again appealed Judge Noel's decision to the Fifth Circuit. 197 The Court sat on the case for over two years. On January 30, 1968, Hippard wrote a letter to Smith stating that he had not forgotten him. Hippard also stated, "I am at a loss to explain why they have taken so long to decide your case, but I do not think it would be wise to press the court." 198 Hippard also added that he

195. Id. at 865.
196. Interview with Professor Hippard.
197. The panel consisted of Justices Wisdom, Gewin and Judge Brewster sitting by designation. Smith v. Texas, 395 F.2d 958 (5th Cir. 1968).
believed that Smith was entitled to a new trial and that once a new trial was granted, the State would be unable to make a case against him.\textsuperscript{199}

The Court finally issued a decision on June 10, 1968. After reviewing the history of Smith's appeals, the Court stated that Smith had "been blessed from the beginning with able counsel, experienced in trials of criminal cases, who advocated his claims aggressively all the way." The court added that "[i]t finally appeared for a short time, however, that the opinion of this Court in 329 F.2d 498...had put an end to appellant's post-conviction litigation...."\textsuperscript{200} The Court quoted Hippard's motion withdrawing his appeal because of its "futility."

The Court addressed Hippard's Jackson claim. The court stated, "The little boy lost his life under the most merciless circumstances at the hands of the appellant and four confederates...." This gave a clear indication that the Court had no doubt as to Smith's guilt. However, the Court sided with Hippard in interpreting Jackson to require that a judge's finding that a confession is voluntary must "appear from the record with unmistakable clarity." The Court found that there had been no such ruling in this case. The Court then had to decide if Jackson was to be applied retroactively. Quoting from the Supreme Court, they found that subsequent Supreme Court decisions made it clear that Jackson had retroactive effect: "We gave retroactive effect

\textsuperscript{199} Id.
\textsuperscript{200} Id. at 959.
to Jackson v. Denno, because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature.... 201 The Court decided to allow the State to hold a hearing to determine if Smith's confession was voluntarily given. If the State did not hold such a hearing within a reasonable time, Smith was to be released. 202

In two cases that the Supreme Court had sent back down for Jackson v. Denno hearings in 1964, the Texas Court of Criminal Appeals had held that a new trial had to be granted because Texas had no procedure for holding such an evidentiary hearing. However, the Texas Legislature had subsequently adopted a Revised Code of Criminal Procedure that allowed for such post-conviction hearings making new trials unnecessary.

The State gave Smith a Jackson v. Denno hearing. The same Judge Duggan presided and found that the confession had been voluntarily given. An even more important development, however, had occurred in the interim. On June 2, 1967, the Supreme Court stayed all executions and in 1972 the Supreme Court declared the then existing death penalty unconstitutional in Furman v. Georgia. 203 On September 12, 1972, Governor Preston Smith commuted Smith's sentence from death to life in prison. 204 The death penalty was later

201. Smith v. Texas, 395 F.2d 958, 963 (5th Cir. 1968).
202. Id.
203. 408 U.S. 238 (1972).
204. Letter from Cay Cannon, Texas Department of Criminal Justice(formerly named Texas Dept. of Corrections), February 15, 1990.
declared constitutional in 1976 in *Gregg v. Georgia*\(^{205}\), but this did not affect Joe Edward Smith, since his sentence had already been commuted. In a sense, however, Hippard had missed the truly winning issue. On July 17, 1968, the Texas Civil Liberties Union sent Hippard a letter asking him to allow the American Civil Liberties Union to represent Smith on appeal. The ACLU stated they were engaged in a campaign to abolish the death penalty and thus wanted to represent Smith.\(^{206}\) Hippard replied that he did not want the ACLU to include Smith’s case in their present efforts regarding the death penalty unless it was in some sort of class action. He felt that a class action suit would benefit Smith as well and that the recent Fifth Circuit Court ruling in Smith’s favour was more important that the death penalty challenge.\(^{207}\) It was a class action challenge in *Furman* that eventually saved Smith from execution.

In 1971, columnist Lynn Ashby of the Houston Post wrote an article: "41 Hope and Wait for Death".\(^{208}\) He reported that Joe Edward Smith had spent more time on Death Row than anyone else in Texas history. He had been granted a record 22 stays from his date with the electric chair. Ashby stated that "[h]e is the centerpiece in a gruesome tug-of-war between a peoples’ fear of punishing the innocent and

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206. Letter from Doran Williams, executive director of the TCLU to James Hippard, July 17, 1968. (In private papers of James Hippard, professor of Law, University of Houston).
207. Letter from Hippard to Doran Williams, executive director of the TCLU, July 18, 1968.
its equally strong fear of letting the guilty go free. Joe
sides with the former. 'I'm innocent. I didn't do it, and
someday I'll go free,' he says, almost cheerfully.'209
Ashby pointed out that every one of the 41 men on Death Row
had some kind of appeal going on. Joe is number 433 and
would have been the 433rd prisoner executed at Huntsville.
Joe had seen 20 other men "shuffle down the hall" on their
way to their deaths. Joe had received stays from Governors
Price Daniel and John Connally, Acting Governors Culp
Krueger and Preston Smith, Judge James Noel and the Fifth
Circuit. On July 7, 1980, Smith was released from prison on
parole.210 More than anything else though, Joe had beaten
death because of the effort of his attorneys, especially
Hippard. Dr. George Beto, director of the Texas Dept. of
Corrections, stated, "Philosophically, I'm not against
capital punishment, but I'm disturbed about the inequities
involved." He noted that the population of Death Row is
basically poor and uneducated.211

This case reveals many aspects of legal practice during
the sixties. One of the most interesting aspects is the
manner in which legal issues are defined. The black
community saw the cases differently.212 Dr. Thompson voices
their concern in a letter to the Fifth Circuit seeking a new
trial for Smith:

209. Id.
210. Letter from Cay Cannon, Texas Department of Criminal
212. These are taken from a letter written by Dr. Thompson,
head of the defense committee discussed supra.
Why was Joe Edward Smith taken from his home without his parent's consent? Why didn't the Houston Police Dept. follow up on information on the white male suspect, Donald Payne, who was listed as one of the F.B.I.'s most wanted criminals. He had been listed in a "National Magazine" as the "perpetrator of the vicious sex attack on a 12 year-old boy in Houston, July, 1959."[^213] "What about Mattie?" She was the other child killed just 2 miles from where Bodenheimer was found. The autopsy report "disclosed striking parallels" between the two cases. [He then discusses in detail the similarities.] "This is where the parallel ends," he stated, "because detective and patrolmen roamed the West Gray area for hours..." finally closing their case by arresting the black youths.

Dr. Thompson asked how five or seven boys could commit such an act in the shack which was "the size of a freight elevator"; and the pathologist stated the boy put up a good fight; yet, the detectives stated that there was no sign of a struggle in the shack. He also questioned the lack of fingerprints in the case.

Dr. Thompson wanted to know how Johnson could be "convicted of murdering the youth at 3:30 P.M. and Smith convicted of murdering him at 6:00 P.M. --- Was he killed twice?" Dr. Thompson questioned how Carl Wharton could have "bumped into Bill while swimming...sometime between 6 & 8 P.M. --if the state fixed the time of death at 3:30 P.M.?"

[^213]: Id.
Dr. Thompson questioned the actions of Dr. Field in opening the refrigerator door. He asked, "Is that a normal reaction for someone looking for a missing person? Why didn’t he pull him out and attempt to revive him?"

Dr. Thompson wanted to know why Smith had been arrested without a warrant and not taken before a magistrate. He wanted to know why a confession was forced from him in violation of the fourteenth amendment. Thompson stated, "A boy of [Joe’s] mentality could very easily under a little persuasion and physical abuse sign any confession."

Finally, Thompson wanted to know "what happened to Johnson’s lawyer who was to have been in Washington in an attempt to get a Supreme Court Justice to intercede and stay the execution?" Thompson stated that he spoke to the justice who was to have been contacted and he stated the attorney never spoke to him about the Johnson case.

Some of Dr. Thompson’s concerns did become issues that were adjudicated by the courts. Most of the issues, however, were never discussed. Many issues are still unresolved. Did Johnson and Smith have good lawyers? The United States Constitution guarantees defendants "effective assistance of counsel." Smith was satisfied with Winfree even though it appears he didn’t do a great job on the case. But again the question becomes, what is "effective" assistance of counsel? Smith, unlike most habeas corpus petitioners who are pro se, at least had lawyers on appeal.
Many of these same issues are still unresolved by the courts.

While the Federal Courts attempted to resolve great constitutional issues, life continued for Smith and 34 other men on Texas death row during the moratorium. In January, 1971, Newsweek magazine ran a story in anticipation of the Supreme Court's capital punishment ban. The story began with a description of life on death row.

Joseph Edward Smith eats two meals a day off a metal tray with a spoon - the only utensil he is trusted with. Three times a week, he is allowed to walk for two hours around a barren, 20-foot-square "recreation" room. The rest of the time he spends reading books ("those I can participate in," he says, "like Oliver Twist" and "The Idiot") or playing chess by sprawling on the floor of his cell and reaching through the bars to an adjoining cell. It is hardly enough activity for Joe Smith, a stocky 29-year old Negro who has followed the same pattern for the past nine years. "When I was out in the street, says Smith, "I played all types of sports. Now I do push-ups and I have a rubber ball I squeeze and I try to run in place. Sometimes I get to thinking I'm Gale Sayers or something and I forget my cell is only 5 feet by 9. But there ain't nothing like running into them bars to bring you back to reality." 214

Justice ran into "bars" as well. Joe Edward Smith's case highlights another inequity: two identical cases were handled very differently. The trials of Adrian Johnson and Joe Edward Smith were separated by only a few months and the skill of their lawyers. The result was "unequal justice." How could Johnson be executed and Smith eventually be freed for the same crime, raising the same issues? Much depended upon the times and the advent of circumstance. Smith's

letter to Hippard indicates that he knew and appreciated the value of his attorneys. He stated, "I thought that I were fortunate to have Mr. Winfree as an attorney, and was I do believe; now that you are representing me I think that I am also fortunate and believe if there is any relief to be had...you will see that we receive it." 215 Perhaps Smith lived because his attorneys, using the new Warren Court ammunition, 216 refused to quit.

One Man One Vote

In a series of cases in the late 1950s and early 1960s, the Supreme Court entered the once sacred domain of legislative apportionment. Texas was ripe for attention since Congressional districts had not been reapportioned since 1933. On March 26, 1962, the Court handed down the landmark decision of Baker v. Carr. 217 A year later, George H.W. Bush, as Chairman of the Harris County Republican Party, filed suit in the Southern District on the basis that the Texas statute apportioning congressional districts was unconstitutional. 218 The case fell in Judge Ingraham’s court and he requested the Chief Judge of the Fifth Circuit to designate the members of the three-judge Federal District Court that would hear the case. Judge Noel and Judge John R. Brown were designated. Judges Brown and

215. Letter from Joe Edward Smith to Hippard, no date.
216. Professor Hippard stated that the Warren Court in the sixties was giving defense attorneys new ammunition to throw on an almost daily basis. Interview with Hippard.
Ingraham held the Texas system unconstitutional and Judge Noel dissented. Judge Brown, writing for the 2-man majority, stated, "This case is one of many following in the wake of the celebrated decision in Baker v. Carr...." It was apparent from the majority's opinion that they were frustrated with the lack of guidance given them by the Supreme Court. As if anticipating Reynolds v. Sims, Judge Brown added that "Baker v. Carr is not the last word. It is only the latest word, and more are bound to follow." But willing to plow ahead in the face of uncertainty, Brown stated that future Supreme Court decisions on the subject "cannot help but be informative, if not decisive, as the District Courts' on the front line, [cite omitted] undertake this recently imposed serious judicial function." Rather than wait, however, the court chose to go forward and declare the Texas scheme unconstitutional and threatened to force state-wide elections if new, conforming boundaries were not drawn by November 1963. Judge Brown concluded that the "[t]ime is short, but there is still much time left...Texas is not without resources. It has shown a capacity throughout its colorful and productive history to take decisive action." Judge Ingraham wrote a very short concurrence in which he stated, "We can expostulate about economic and cultural interests, ethnic groups, language, acreage, scenery and the

220. Id. at 504.
221. Id. at 512.
222. Id. at 516.
like until the world looks level." He added, however, that such considerations would not offer any guidance but would only confuse and delay. He concluded by saying, "Have we come to a denial, have we come to a breach of the Great Compromise, which has served us so long and so well, by which representation in the house of Representatives was to be based on population and representation in the Senate to be divided equally among the States." 223

Judge Noel was angered; 224 he began his dissent by scolding the other two Judges. He stated, "This being a trial court, it is well to state the chronology of significant events..." What he was communicating to the other two members, here and throughout his opinion, was that they were not the Supreme Court and they should wait for further guidance before invalidating the entire Texas scheme for electing Congressmen. Judge Noel characterized the relief granted as "unique in the annals of federal jurisprudence..." 225 He attacked every aspect of the majority's opinion, arguing that their remedy of electing Congressmen state-wide would injure rural inhabitants more than the current system harms metropolitan residents. He warned the majority that the purpose behind having to call a three-judge court was the result "of an attempt by Congress

223. Id.
224. It is interesting to note that the split occurred along Party lines. The two Republicans voted to give the Republicans extra seats in Congress and the lone Democrat arguing for the status quo in which the state would remain Democratically gerrymandered.
225. Id. at 520.
to lessen public resentment to the effect of the decision in *Ex Parte Young*. In closing, he argued, "most emphatically, the Texas Legislature should be given the opportunity to solve this basically local problem without coercion from the federal courts."

Unpersuaded by Judge Noel's passionate plea for judicial restrain, the Supreme Court affirmed Judge Brown's and Judge Ingraham's opinion. Texas had to change its method of electing Congressmen. In the end, Harris County received one extra Congressional seat, giving it a total of three. George Bush, a short time later, occupied one of these seats.

Judge John V. Singleton, A New Breed of Judge

John Singleton had been a partner at Fulbright, Crooker, Freeman, & Bates (now Fulbright & Jaworski), one of Houston's big law firms. In 1966, President Johnson appointed him to the bench. In a survey, lawyers responded that he is not always courteous and he "can get crusty at times." Without a doubt, Judge Singleton did not belong in the same group as Ingraham, Noel, Hannay, or even Connally. He was a maverick.

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226. Id. at 530.
227. Id.
229. In a follow up case after the Supreme Court had blessed the majority, 251 F.Supp. 484 (1966), Noel was not as hostile but was continued to oppose Federal interference in Texas elections.
Although the numbers indicate that he did not grant any more habeas corpus petitions or prisoner suits than the other judges, the language that he uses in his opinions is certainly different. In one case, a petitioner sought habeas corpus relief for six years on the claim that he should have been entitled to credit for the years he spent in a state mental hospital. Judge Singleton stated, "With reluctance this court holds that he is not entitled to that relief."\textsuperscript{230}

In another case, a petitioner was dissatisfied with the counsel he hired. Singleton stated, "the Fifth Circuit draws a distinction between retained counsel and appointed counsel. The facts here would show a deprivation of petitioner’s rights if his counsel was appointed, but since petitioner had enough money to pay for a retained attorney during trial he must meet the additional burden of showing the state knew that petitioner could not appeal because he was indigent. This court hopes this circuit reexamines this rule."\textsuperscript{231} In closing, Singleton states that "until this rule is changed, this court shall follow, however reluctantly, the law of this circuit."\textsuperscript{232}

In another tragic case similar to the one related above, Willie Gilber petitioned the court for habeas corpus after having imprisoned for a murder charge. His co-

\textsuperscript{230} Parker v. Estelle, 422 F.Supp. 35 (1976).
\textsuperscript{232} Id. at 968.
indictee was executed in 1954. At issue was whether Gilbert’s confession was voluntary.

In January 1953, Harris County Sheriff "Buster" Kern was investigating the murder of a woman who was working in her flower shop on North Shepherd in Houston. The Sheriff set up temporary headquarters near the flower shop and began to question suspects about the case. Within 24-hours of the woman’s murder, Gilbert had been arrested by the police. The police stated that Gilbert was arrested for tire theft, but Singleton found that the true reason for Gilbert’s arrest was to hold him for the murder investigation. Gilbert testified that he was repeatedly beaten by police, and kept in total isolation until he confessed. Officers also rounded up several people who worked and lived in the neighborhood, including a nine-year old girl. Singleton noted that "[a]ll with the exception of the little girl testified that they were beaten, but this was denied."

Later, Judge Singleton stated that the "treatment accorded by the Sheriff’s Department to other persons involved in the investigation indicate the callous attitude with which the murder investigation was conducted and compels a court to take with a grain of salt their statements that petitioner was not treated in a similar manner."233 Finally, Singleton noted that Gilbert was classified as a "moron" and stated, "These facts, I think compel a conclusion that petitioner’s confession was involuntary."234

234. Id. at 853.
In another case, Singleton was outraged by the way a minor had been treated. A telephone caller to the Pearland Police Department accused 15-year old Gerald Hegwood of stealing a bicycle. The police picked up Gerald and he drove them to where the stolen bicycle had been partially dismantled. Gerald maintained that he received the bike in a trade. Gerald’s father told the police that the bike had been dismantled because he was repairing it for his son. The police filed an offense report which led to the filing of a delinquency petition. Singleton commented that he detailed the events "in order to emphasize this Court’s firm conviction that the petition was filed before an adequate investigation had been conducted....Shocking though the dearth of evidence may be, retrial of Gerald Wayne might not have been necessary had there been any attempt in subsequent proceedings to ameliorate these deficiencies." Mr. Hegwood met with the Police Chief and a Juvenile Officer and they told him he did not need a lawyer at his sons hearing since they would represent him. The hearing lasted five minutes and Gerald Wayne was adjudicated delinquent. Singleton complained that the "hearing, instead of proving an independent and impartial fact finding, became nothing more than another step down the predetermined path to guilt."

In the time immediately before the Supreme Court case decided the issue, In Re Gault, Singleton held that

236. 385 U.S. 965 (1967).
juveniles have due process rights under the Constitution and granted the petition.

In 1970, Vincin Campise was arrested for murder in Brazos County. The Sheriff placed him in solitary confinement for discipline after Campise was found in "possession of hacksaw blades and for banging on the bars of his cell with a tin cup." In graphic detail, Singleton described the conditions under which Campise lived while in solitary confinement. Campise brought a civil rights suit under 42 U.S.C. sec. 1983 for damages because the Sheriff, acting under color of law, had deprived him of his right to be free from cruel and unusual punishment. Singleton found for Campise. Singleton, however, had to act clearly in awarding damages. Since Campise was lawfully in custody, he couldn’t recover for lost wages. He was entitled to punitive damages as well as attorney’s fees. Singleton awarded Campise $10 in actual damages, $1,500 in punitive damages and $750 in attorney’s fees.

CONCLUSION

This study of the district court led me to re-think the doctrinal history of the United States Supreme Court. In essence, my conclusion is Volume I. In its own right, however, Volume II illustrates the workings of a trial court. From these nonrepresentative stories, one can begin to understand how a district court processes a law suit. It
is from cases like these that great Constitutional doctrine is developed.

From a methodological viewpoint, the vast amount of data contained in the modern age allows historians the freedom to draw almost any picture. The true art is to reconstruct reality as it existed at the time. I have attempted through this study to accurately reflect a crucial time for American legal developments.