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Case Comments

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CASE COMMENTS

CONSTITUTIONAL LAW—ALIEN EXCLUSION—EXCLUSION OF ALIEN IS INVALID WHERE RESULT IS A DIRECT AND UNWARRANTED INFRINGEMENT ON FIRST AMENDMENT RIGHTS OF CITIZENS.—In 1969, Ernest Mandel, a citizen of Belgium and a self-professed exponent of Marxist doctrines, was invited to participate in several university and college events in the United States.[1]

Mandel had been in this country on two previous occasions, once in 1962 and again in 1968. During his 1968 visit, Mandel accepted speaking engagements at more than 30 colleges and universities. On both occasions, he was admitted after a finding of political ineligibility under 8 U.S.C. § 1182 (a) (28) of the Immigration and Nationality Act of 1952,[2] and an exercise in his favor of the Attorney General's discretion to admit him temporarily under 8 U.S.C. § 1182 (d) (3) (A) of the Act.[3] The Department of State, however, conceded that Mandel was not informed of this fact.

Mandel's initial application for visa filed on September 8, 1969, was denied and waiver refused. A second application was forwarded along with another request for waiver on October 22, 1969. Plaintiff's counsel was informed by a State Department letter of November 6, 1969, that the earlier waivers were granted on condition that Mandel conformed to the activities stated in his visa applicaion, that in 1968 Mandel did not conform to his itinerary, and on that ground a waiver had not been sought on his September application. However, due to the fact that he may not have known of the condition, the State Department was reconsidering the case. The Bertrand Russell Peace Foundation was advised on January 27, 1970, that, despite a State Department recommendation for waiver, the Immigration and Naturalization Service stated that a waiver was unwarranted. On February 13, 1970, the Service advised plaintiff's counsel that Mandel was ineligible for a waiver due to his "abuse of the opportunities afforded him" in 1968, and "because of his subversive affiliations." On these grounds, the Service found no basis for revising its determination.

The plaintiffs,[4] desiring to hear Mandel speak, alleged that they were unable to set dates for appearances because Mandel's eligibility status precluded assurances of his appearance. They therefore joined Mandel and sought a declaration that on its face and as applied §§ 1182 (a) (28) and (d) (3) (A) of the Act

1 Mandel had been invited to participate in a conference on "Technology and the Third World," a conference on social and economic conversion to the demands of a peace-oriented society, and a conference on "Agencies of Social Change." Mandel v. Mitchell, 325 F. Supp. 620, 623-24 (E.D.N.Y. 1971).

2 8 U.S.C. § 1182(a) (28).

3 8 U.S.C. § 1182(d)(3)(A). Except as provided in this subsection, an alien:

> (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27) and (28)), may after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, . . .

4 The plaintiffs other than Mandel are citizens of the United States who had issued invitations to Mandel in 1969 (*i.e.*, Birnbaum, Heilbroner), or were to participate in programs in which Mandel was also invited to participate (*i.e.*, Chomsky), or wish to have Mandel speak at universities and other forums. Mandel v. Mitchell, 325 F. Supp. 620, 624 (E.D.N.Y. 1971).

were unconstitutional. They also moved for an injunction restraining the enforcement of those provisions.

Since the allegation involved the constitutionality of a federal statute, the case was heard by a three-judge district court. In a 2-1 decision, the District Court for the Eastern District of New York, *held*: § 1182 (a)(28) unconstitutional primarily because it constituted a direct and unwarranted infringement on interests guaranteed citizens by the first amendment—specifically the right to hear and receive information. *Mandel v. Mitchell,* 325 F. Supp. 620 (E.D.N.Y. 1971).

Historically, the rights and freedoms embodied in the first amendment have been placed by the courts in a "preferred position."[5] They have been characterized as "fundamental personal rights and liberties."[6] Referring to the freedom of thought and speech Justice Cardozo stated:

> Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.[7]

Significant here also was the judgement of James Madison that "the freedoms embodied in the First Amendment must always secure paramountcy."[8] That judgement served as the basis for the "preferred position" which the Supreme Court in *New York Times Co. v. Sullivan*[9] characterized as "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[10]

It is evident that great importance has been accorded the interests enumerated in the first amendment. But the cloak of first amendment protection does not extend only to those rights and freedoms specifically designated in the writing. In order for freedom of speech and freedom of press to be meaningful other peripheral rights must be protected. Therefore, although not enumerated in the first amendment, the rights to receive information and to hear speech have been recognized as coming within its purview. In 1943, the Supreme Court declared in *Martin v. City of Struthers,*[11] that the freedoms of speech and press protect not only the right to distribute, but also, and necessarily, the right to receive.[12] Recognition of this allowed the Court to reverse a conviction of a Jehovah Witness who, in violation of a municipal ordinance, proceeded to distribute religious literature door-to-door. Two years later in *Thomas v. Collins,*[13] the Court, in reversing a conviction for contempt, stated that a statute requiring registration prior to soliciting workers to join a union imposed a prior restraint on

5 Marsh v. Alabama, 326 U.S. 501, 509 (1946); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Jones v. Opelika, 316 U.S. 584, 608 (1942) (dissenting opinion); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).
6 Schneider v. State, 308 U.S. 147, 161 (1939).
7 Palko v. Connecticut, 302 U.S. 319, 327 (1937).
8 Cahn, *The Firstness of the First Amendment,* 65 YALE L.J. 464, 473 (1956).
9 376 U.S. 254 (1964).
10 *Id.* at 270.
11 319 U.S. 141 (1943).
12 *Id.* at 143.
13 323 U.S. 516 (1945).

the organizer's right to speak and on "the rights of the workers to hear. . . ."[14] The right to receive information was held, in *Marsh v. Alabama*,[15] to encompass citizens in private company-owned towns. Justifying its decision, the Court stated:

> Just as all other citizens, they must make decisions which affect the welfare of the community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.[16]

A significant decision regarding the right to receive information was made in *Lamont v. Postmaster General*.[17] The Supreme Court declared as unconstitutional a statute which required the Postmaster General to detain foreign mailings of Communist political propaganda until the citizen-addressee indicated his desire to receive them by signing a card so stating. The decision was based upon a recognition of the fact that the right to receive such information was protected by the first amendment, and had the effect of raising "the right to receive a communication to the status of a decisional holding," as well as extending standing to assert a constitutional objection to the receiver.[18] Significant also was the fact that literature dealing with unfavored political doctrine was allowed to enter the United States by virtue of the constitutional right of a citizen to receive information. Justice Brennan, in a concurring opinion, added further justification for the decision when he stated:

> The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[19]

Yet, given the "preferred position" of these rights and freedoms, the first amendment is not an absolute guarantee which forbids limited prohibitions upon their exercise.[20] When limitations have been prescribed, however, their constitutionality has often been challenged, and the courts, to aid in determining whether a particular infringement was constitutional, have employed a number of different tests. Each had as its basis the recognition of the "preferred position" of first amendment interests. It is important to note the particular factual circumstances to which each test has been applied.

In *Dennis v. United States*,[21] petitioners had been indicted in a federal district court for violating §§ 2 and 3 of the Smith Act which made it a crime for anyone to willfully and knowingly advocate the overthrow of the United States Government by force or violence, or to conspire to do so. The constitutionality

14 *Id.* at 534.
15 326 U.S. 501 (1946).
16 *Id.* at 508.
17 381 U.S. 301 (1965).
18 Klein, *Towards An Extension of the First Amendment: A Right of Acquisition*, 20 U. MIAMI L. REV. 114, 141 (1965).
19 381 U.S. 301, 308 (1965) (concurring opinion).
20 Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949); Schenck v. United States, 249 U.S. 47 (1919).
21 341 U.S. 494 (1951).

of these provisions was challenged on first amendment grounds.[22] The Court was of the opinion that the statute involved a direct restriction upon speech, and therefore application of the "clear and present danger test" was required to test its constitutionality.[23] It then had to determine the meaning of that phrase within the context of the case before them. The Court adopted Chief Judge Learned Hand's interpretation which read:

> In each case courts must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[24]

Noting the substantial governmental interest involved, the highly specialized nature of the conspiracy and the discipline of its members, the Court concluded that the convictions were justified,[25] and that the strictures upon that type of speech were not repugnant to the Constitution. Interpreting the *Dennis* decision in *Yates v. United States,*[26] the Court observed that it was not the advocacy of belief in the doctrine of forcible overthrow which could be constitutionally and directly limited, but rather the advocacy directed at inciting action toward accomplishment of that end.[27] It is important to note here that *Dennis* dealt not only with a prohibition upon a particular type of speech, but also with the criminal prosecution and subsequent punishment of anyone who indulged in it.

Another test which has been utilized to determine the constitutionality of legislation prescribing strictures upon free speech was the "balancing of interests test." The test has been applied in situations where the direct and intended effect of a statute was the suppression of free speech as well as in cases where that result was merely incidental and unintended. In *Speiser v. Randall,*[28] a statute requiring veterans to subscribe loyalty oaths prior to being given tax exemptions was declared unconstitutional because it denied them freedom of speech without due process of law.[29] The Court observed that the statute dealt directly with speech and that there was no compelling state interest which would "justify a short-cut procedure which must inevitably result in suppressing protected speech."[30] In *Communications Assn. v. Douds,*[31] the Court upheld the constitutionality of a statute which denied certain governmental benefits to unions whose members had elected Communists to union office. It was found, however, that the purpose of the statute was not to directly limit first amendment interests, but rather to prevent interruptions in interstate commerce,[32] an area clearly within the sphere of governmental concern. The Court stated that basically the problem was one of weighing the statute's effect on first amendment interests against the con-

22 *Id.* at 495.
23 *Id.* at 508.
24 *Id.* at 510.
25 *Id.* at 511.
26 354 U.S. 298 (1957).
27 *Id.* at 321.
28 357 U.S. 513 (1958).
29 *Id.* at 527-29.
30 *Id.* at 529.
31 339 U.S. 382 (1950).
32 *Id.* at 396.

gressional determination that Communist union leaders posed a threat to interstate commerce.[33]

The Court in *United States v. Robel*,[34] offered yet another test, application of which does not depend on the directness of infringement upon first amendment interests. The case involved the constitutionality of a statute which made it a crime for a member of the Communist Party to remain employed in a particular area after it had been designated a defense facility. The Court stated that the statute:

> Contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights.[35]

The Court also observed that the statute imposed a substantial burden on first amendment interests; and to the government's contention that its purpose was to reduce threats of espionage, the Court answered that "the means chosen to implement that governmental purpose in this instance cut deeply into the right of association."[36] The Court concluded by stating:

> When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goals by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.[37]

It is clear from the above cases that two new tests have been formulated to replace the *Dennis* standard.

Just as the rights and freedoms enumerated in the first amendment have been proscribed for various reasons, so too have the rights to receive and acquire information. Within the context of a particular fact pattern, they have been ignored, refused recognition, and ultimately rejected. Since 1958, three major cases have been before the Supreme Court dealing with a citizen's right to travel to foreign countries. In each case a first amendment issue, specifically the right to acquire information, was placed before the Court. In two cases the issue was ignored, and in the third case the Court denied that such a right existed.

Kent v. Dulles,[38] was the first in this trilogy of cases which eventually led to the demise of a potential right. Mr. Kent desired to visit England and Finland, but issuance of a passport was denied by the Secretary of State because Kent was a Communist and had "a consistent and prolonged adherence to the Communist Party line."[39] The denial was overturned, not on a constitutional basis, but rather because the Court found that the Secretary did not possess that power.[40] The Court recognized, however, that the right to travel could not be denied "without

33 *Id.* at 400.
34 389 U.S. 258 (1967).
35 *Id.* at 266.
36 *Id.* at 264.
37 *Id.* at 268.
38 357 U.S. 116 (1958).
39 *Id.* at 118.
40 *Id.* at 129.

due process of law under the Fifth Amendment."[41] Most significant here is the fact that aside from recognizing the values of foreign travel as a potential source of information, the Court failed to give those values first amendment protection.[42]

In *Aptheker v. Secretary of State,*[43] the contention that travel includes some protectable first amendment interest was again ignored. Aptheker was a citizen and a member of the Communist Party whose passport was revoked under § 6 of the Subversive Activities Control Act of 1950 due to his Communist affiliations. Section 6 was declared unconstitutional because it indiscriminately invaded interests protected by the fifth amendment. The Court noted that the restriction was substantial and considered the fact that Congress had a less drastic means for protecting national security which would not burden fifth amendment interests as greatly. However, the argument that a first amendment interest, specifically the right to hear, was included within the right to travel was almost completely ignored.[44] The Court did recognize, however, that "[f]reedom of travel is a constitutional liberty closely related to right of free speech and association."[45]

Whereas comment had previously been deferred, the Supreme Court in *Zemel v. Rusk,*[46] decided to face the issue. Mr. Zemel was an American citizen and had a passport. Because of a break in diplomatic relations, however, all passports were invalidated for travel to Cuba. After his first request for validation was denied, Zemel reapplied stating that the purpose of his trip was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."[47] This request was also denied. A major contention in the suit that followed was that the travel ban amounted to a direct infringement upon first amendment rights to travel. The Court stated:

> While we further agree that this is a factor to be considered in determining whether the appellant has been denied due process of law, we cannot accept the contention that it is a First Amendment right which is involved.[48]

The restriction on travel when weighed against considerations of national security and foreign policy was upheld.[49]

Tracing the historical development from *Martin v. City of Struthers* through *Zemel,* it appears that courts have recognized the right to receive information, either through publication or speech, but only in the passive sense.[50] They have shown unwillingness to include within this right "acquisitive activities, such as foreign travel, which may entail 'undesirable' consequences."[51]

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41 *Id.* at 125.
42 *Id.* at 126-27.
43 378 U. S. 500 (1964).
44 Klein, *Towards An Extension of the First Amendment: A Right of Acquisition,* 20 U. MIAMI L. REV. 114, 122-23 (1965).
45 Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964).
46 381 U.S. 1 (1965).
47 *Id.* at 4.
48 *Id.* at 16.
49 The court specifically noted the recent Cuban missile crises and arrests without charge of United States citizens in Cuba. *Id.* at 14-16.
50 Klein, *Towards An Extension of the First Amendment: A Right of Acquisition,* 20 U. MIAMI L. REV. 114, 140 (1965).
51 Steel, *Freedom to Hear: A Political Justification of the First Amendment,* 46 WASH. L. REV. 311, 337 (1971).

Yet even where the addressee was merely a passive recipient, the courts have, for national welfare purposes, upheld restrictive legislation on the right to receive information. In *Teague v. Regional Commissioner of Customs,*[52] the Court of Appeals for the Second Circuit upheld a statute which directed the Commissioner of Customs to withhold publications originating in China and North Vietnam and to notify the addressee that the material would be released only if the Office of Foreign Assets Control issued a license. The purpose of the statute, however, was to control the flow of currency to hostile nations and the burden on the flow of information was merely incidental. The court recognized this as being sufficient justification for placing restrictions on the right to receive information.[53]

It is to this area dealing with the propriety of placing limitations on first amendment interests that must be added still another dimension: the powers of the federal government in the areas of alien exclusion, foreign affairs and national security.

In the field of the alien "exclusionary power," there are two oft-quoted principles that deserve notice. One, that as an incident of sovereignty, and as delegated to it by the Constitution, the Government has the power to exclude or to admit aliens at such times and under such conditions as it may prescribe.[54] Two, that the decision to exclude an alien is final and conclusive, and not subject to judicial review as it is solely within the political realm.[55] It has also been declared that the right to exercise this power "cannot be granted away or restrained on behalf of anyone."[56]

The fact that the power is broad and at times yields harsh results cannot be denied. In *Lem Moon Sing v. United States,*[57] for example, appellant was born in China, and although not naturalized in the United States, maintained a residence here and was lawfully engaged in the mercantile business for over two years. He left to visit China and during his absence the Appropriation Act of 1894 was passed authorizing "suitable officers" to prevent the unlawful entries of Chinese into the United States. Sing was subsequently denied entry. The Supreme Court declared that Congress had the power to exclude aliens and noted that "to have its policy in that regard enforced exclusively through executive officers, without judicial intervention is settled. . . ."[58] So it appears, as Justice Clark has stated, that the power of Congress to exclude aliens is plenary.[59]

The federal government has also been entrusted with the power to regulate foreign affairs.[60] This power to regulate and conduct our relations with other sovereigns does not emanate from the specific grants in the Constitution, but rather is inherent in sovereignty and is a "necessary concomitant of national-

52 404 F.2d 441 (2d Cir. 1968); *cert. denied,* 394 U.S. 977 (1969).
53 *Id.* at 445.
54 Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).
55 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); Nishimura Ekin v. United States, 142 U.S. 651, 659 (1892).
56 Chae Chan Ping v. United States, 103 U.S. 581, 609 (1889).
57 158 U.S. 538 (1895).
58 *Id.* at 547.
59 Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 123 (1967).
60 Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915).

ity."[61] When decisions are made regarding the conduct of foreign affairs, they generally are deemed to be outside the scope of judicial review.[62] In conjunction with the power to regulate foreign affairs, the federal government also has overall responsibility for national security.[63]

It was against this background that the court was required to test the constitutionality of §§ 1182 (a) (28) and (d) (3) (A) of the Immigration and Nationality Act of 1952, and it is no wonder that they appeared to be grasping at straws in their effort to allow Mandel to enter the United States. Although arriving at what may be considered the proper result, the legal justifications employed were questionable at best.

The majority bases its decision, in part, on the conclusion that the section in question did not meet the standards required for the permissible imposition of strictures on first amendment interests set down in *Dennis*. But the *Mandel* case did not involve the type of circumstance which would warrant application of the *Dennis* standard. Yet the opinion was totally devoid of sufficient justification for its application and indeed it would appear there is none.

As interpreted by the Supreme Court in *Speiser v. Randall,*[64] the *Dennis* standard was to be used in determining the circumstances which would justify punishing speech as a crime. The Court in *Dennis,* when addressing itself to prior cases involving the use of the "clear and present danger" test, of which the *Dennis* standard was an outgrowth, stated:

> The rule we deduce from these cases is that where an *offense* is specified by a statute in nonspeech or nonpress terms, a *conviction* relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a clear and present danger. . . .[65]

Dennis stood before the Supreme Court convicted of a crime for which he had received five years' imprisonment. Obviously, the *Mandel* case did not present this type of situation. He was not convicted of any crime, nor was the case in any way concerned with punishing speech as a crime. Therefore, if the Court's interpretation in *Speiser* was valid, the *Dennis* standard was erroneously applied in testing the constitutionality of the statute in the *Mandel* case.

Also, it will be recalled that prior to applying the *Dennis* standard it must be found that the statute in question involved a direct attempt to infringe upon freedom of speech. However, where the sanction on speech was merely the unintended and incidental effect of a statute which dealt with an interest clearly within the governmental sphere, the balancing of interests was the applicable standard. The Court in *Mandel* concluded that § 1182 (a) (28) was "not within the class of enactments to which the balancing test could apply." It appears that this conclusion was not warranted.

As previously indicated, the federal government has been entrusted with the

61 United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936).
62 Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).
63 Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Chae Chan Ping v. United States, 103 U.S. 581, 606 (1889).
64 357 U.S. 513, 519 (1958).
65 Dennis v. United States, 341 U.S. 494, 505 (1951) (emphasis added).

power to regulate foreign affairs and with the responsibility to provide for the national security. In numerous cases the Supreme Court has recognized that the power to exclude aliens was interwoven with the conduct of foreign affairs.[66] Significant among these cases is *Harisiades v. Shaughnessy*,[67] where the Court stated: "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign affairs. . . ."[68] That the United States was seriously concerned with its foreign relations with Communist countries and with the possibility of aggression emanating therefrom in the early 1950's when the Act was passed cannot be denied. The Committee on Un-American Activities conducted over 10 years of investigation prior to the passage of the Internal Security Act of 1950.[69] Of particular import, however, was the following statement made by the Bill of Rights Committee of the American Bar Association:

> And it would be a rather drastic conception of judicial power which would authorize any court to say that after many months of hearings and the examination of a legion of witnesses and voluminous documents, the Congress was not justified in finding as a fact that the present-day activities of Communist and Communist-front organizations present a "clear and present danger to the security of the United States and to the existence of free American institutions."[70]

Also significant was the finding that travel of Communist Party members was a "prerequisite for the carrying on of activities to further the purposes of the Communist movement," and that attachés "use their diplomatic status as a shield behind which to engage in activities prejudicial to the public security."[71] Clearly these findings influenced the passage of § 1182 (a) (28) of the Immigration and Nationality Act of 1952. Therefore, it appears that considerations of foreign policy and fear for the national security provided the impetus for the placing of restrictions on the travel of certain classes of aliens into the United States, and the subsequent legitimate exercise of that power in this case merely had an incidental and unintended impact upon first amendment interests. It is this reason and the reason previously discussed that warrant the conclusion that the *Dennis* standard was improperly applied in the *Mandel* case. By applying it, however, the Court was able to avoid dealing with a number of issues which, had they been considered, may have resulted in a decision adverse to Mandel's efforts to gain entrance into the United States.

It will be recalled that the power to exclude aliens is enmeshed with the responsibility entrusted to the federal government for the conduct of foreign affairs and national security.[72] Decisions in these areas have generally been thought of as political in nature and therefore subject to the long-adhered-to

66 Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941); United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).
67 342 U.S. 580 (1952).
68 *Id.* at 588-89.
69 H.R. Rep. No. 2980, 81st Cong., 2d Sess. 3886 (1950).
70 *Id.* at 3890.
71 Internal Security Act of 1950, Title 1 § 2.
72 Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941).

principle of judicial nonintervention.[73] Regarding foreign affairs the Supreme Court has stated that:

> They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[74]

The responsibility for national security has been characterized as "the highest duty of every nation," to which *"nearly all other considerations are to be subordinated."*[75]

The power to exclude aliens is perhaps the broadest and most pervasive of all powers, yet the Supreme Court has continuously held that decisions in this area are final and conclusive, and not subject to judicial review.[76] Indeed, in 1953, the Court cautioned itself against interference when it said: "Whatever our individual estimate of that policy and the fears on which it rests respondent's right to enter the United States depends on the Congressional will, and the courts cannot substitute their judgement for the legislative mandate."[77]

These seemingly absolute and sweeping powers, and the principles which have long accompanied them cannot be ignored as one would perhaps ignore a sore arm in hopes that it will go away. They must be dealt with, and if they are to be limited or cast aside, it must be done with ample justification. The majority, however, by reaching the apparently unsubstantiated conclusion that there was here no legitimate exercise of these powers, was able to apply the *Dennis* standard erroneously to avoid the real issue: Where a valid governmental exercise of the power to exclude aliens incidentally infringes upon protected first amendment rights, which, in the balancing of interests, is the more valued? Facing the issue in this manner may have the effect of placing the onus on the Government to justify its decision. Application of the *Dennis* standard, however, cannot have this effect. In *Communications Assn. v. Douds*,[78] the Supreme Court stated:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.[79]

To require the Government to establish that Mandel's presence in the United States would be an imminent danger to national security is also an absurdity, and an impossibility. Yet, the Government is forced to look into its crystal ball in a futile attempt to establish that Mandel's future presence will create such a danger.

73 Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).
74 C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948).
75 Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (emphasis added).
76 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); Nishimura Ekin v. United States, 142 U.S. 651, 659 (1892).
77 Shaughnessy v. Mezei, 345 U.S. 206, 216 (1953).
78 339 U.S. 382 (1950).
79 *Id.* at 397.

Clearly, this has the effect of accelerating the degree of justification beyond possible attainment. If the *Dennis* standard is to be applied in future cases concerned with alien exclusion and subsequent infringements on first amendment rights, it is doubtful that the Government will ever have the ability to exclude an alien despite the fact that his presence here, although it would not pose an imminent threat to national security, would indeed be prejudicial to our best interests. The door would then be wide open for citizen Communists to invite their foreign counterparts to the United States under the pretext of free and open academic debate when in fact another dominant motive may be involved. The Government, on the other hand, would be reduced to a passive onlooker, impotent and unable to fulfill its responsibility for national security. Clearly, then, the *Dennis* standard was intended to be applied only when attempting to establish that a situation which had already occurred in the past presented a clear and present danger which was sufficient to sustain a conviction.[80]

It is apparent, therefore, that the more plausible approach would have been to apply the balancing test rather than the rule of the *Dennis* case. By applying this test, the Court would have recognized that security and foreign policy considerations were instrumental in the passage of § 1182 (a) (28) and also would have given the Government the opportunity to justify its position. Conceding the fact that the exclusion of Mandel was a valid exercise of that power does not necessarily lead to the conclusion that the decision in that regard is nonreviewable. Given the numerous cases that have held those decisions to be final and conclusive, this is a case of first instance. In no other case has the exclusion of an alien been contested on the grounds that it resulted in an infringement upon the first amendment rights of American citizens. Regardless of its pervasiveness and the long line of cases which have adhered to the principle of judicial nonintervention, it is obvious that whenever the valid exercise of the exclusion power results in a burden on interests protected by the Constitution the Government should justify its decision and the courts should intervene, for "deference rests on reason not on habit."[81]

Employment of the balancing test will, however, place a greater burden on Mandel. He will now be faced with the task of overcoming the difficulties presented by the decisions in cases such as *Teague* and *Zemel*. *Teague* established the fact that the right to receive information is not an unfettered right upon which restrictions cannot be placed when such strictures are justifiably imposed for the national welfare. In *Zemel*, the Supreme Court rejected the contention that any first amendment right was involved with travel, and stated that "the right to speak and publish does not carry with it the unrestrained right to gather information."[82] If these decisions are valid, then necessarily the right to hear is not unlimited, nor does it carry with it the unrestrained right to have aliens speak in the United States.

Yet the Government even in the balancing process must overcome the most formidable hurdle: the "preferred position" of the first amendment interests and the values which inhere in a free society. Any time these much-valued

80 Dennis v. United States, 341 U.S. 494, 505 (1951).
81 Baker v. Carr, 369 U.S. 186, 213 (1962).
82 Zemel v. Rusk, 381 U.S. 1, 17 (1965).

freedoms are proscribed, it should be done only with substantial justification. The presumption should favor freedom and "that freedom should have the benefit of every doubt."[83]

Joseph M. David

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — EQUAL PROTECTION CLAUSE — CITY'S ACT OF CLOSING ALL SWIMMING FACILITIES IN RESPONSE TO A DESEGREGATION ORDER DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE. — In 1962, the city of Jackson, Mississippi, maintained segregated swimming facilities, auditoriums, golf courses and parks.[1] Three Negroes brought an action in the United States District Court for the Southern District of Mississippi in which they alleged that the maintenance of these segregated public facilities constituted a violation of their rights under the thirteenth and fourteenth amendments to the United States Constitution. The district court declared that the plaintiffs had been denied the equal protection of the laws.[2] On appeal, the United States Court of Appeals for the Fifth Circuit affirmed[3] and the United States Supreme Court denied certiorari.[4]

Prior to the final disposition of this litigation, Jackson ceased operating all public swimming facilities. The city terminated its lease on one pool owned by the YMCA, sold the pool that had been maintained exclusively for blacks to the same organization,[5] and permitted the others to remain idle. Subsequent to the Court's denial of certiorari, all public facilities, except the swimming facilities, were desegregated. They remained closed to all citizens, black and white alike.

In August, 1965, a group of Negroes brought a second action in the same district court in which they sought a temporary injunction to enjoin discrimination against their race in the use of certain public facilities. They alleged, *inter alia,* that they had been discriminated against by the denial of their right to use the city's swimming facilities. The district court rejected their arguments and held that they had not been denied any constitutional rights.[6] A three-judge panel of the Fifth Circuit affirmed this judgment[7] and on rehearing *en banc,* the decision was again affirmed, six out of the thirteen judges dissenting.[8] On

83 O'Meara, *Freedom of Inquiry Versus Authority: Some Legal Aspects,* 31 NOTRE DAME LAWYER 3, 11 (1955).

1 It would appear that in 1962 the city of Jackson was not even satisfying the now-rejected "separate but equal" standard of *Plessy v. Ferguson,* 163 U.S. 537 (1896). The city maintained and operated five parks. Four were operated for whites only, while Negroes were restricted to only one. The total acreage for the white parks was 555.5 acres, while the black park totaled only 33 acres. In addition, the city maintained and operated four swimming facilities on an all-white basis and only one for blacks; and one eighteen-hole golf course for whites, and only a nine-hole course for blacks. Record at 7.

2 Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962).

3 Clark v. Thompson, 313 F.2d 637 (5th Cir. 1963).

4 Clark v. Thompson, 375 U.S. 951 (1963).

5 The YMCA operated the pool on a segregated basis in the Negro community, but was forced to sell it to Jackson State College when blacks boycotted the facilities. It is now operated and maintained by this college for use by its students and their guests.

6 Palmer v. Thompson, Civil No. 3790(J) (S.D. Miss. Sept. 15, 1965).

7 Palmer v. Thompson, 391 F.2d 324 (5th Cir. 1967).

8 Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969).

appeal, the United States Supreme Court affirmed the decision, with four Justices dissenting, and *held*: Negroes are not denied the equal protection of the laws under the fourteenth amendment to the United States Constitution when city officials close all public swimming facilities in response to a court desegregation order. *Palmer v. Thompson,* 403 U.S. 217 (1971).

The United States Civil War culminated in the enactment of the thirteenth and fourteenth amendments. Although the thirteenth amendment explicitly abolished slavery, the fourteenth amendment[9] has proved to be a more effective vehicle in protecting Negroes from state-enforced segregation. Since 1954, the Supreme Court has handed down numerous decisions declaring discriminatory state action violative of the fourteenth amendment. State and local governments, particularly in the South, have used various devices to circumvent and stifle desegregation orders. Until now, however, few, if any, of these evasive tactics have been completely successful.[10] However, with the advent of *Palmer,* the Court has placed its imprimatur on an alternative to desegregating public facilities. The states are no longer required to accept a neutral position on segregation; they may cease operating a public facility rather than desegregate it.

In the landmark decision of *Brown v. Board of Education,*[11] the Supreme Court struck down a racially segregated system of public education. In focusing primarily on the effects of segregated public instruction on the Negro children, the Court explicitly declared that segregated public schools constituted a denial of equal protection of the laws under the fourteenth amendment.[12] Prior to *Brown,* the Court had granted relief to blacks in a few isolated situations,[13] but no attempt had been made to declare the "separate but equal" doctrine, expounded in *Plessy v. Ferguson,*[14] unconstitutional. In rejecting that doctrine in *Brown,*[15] the Court stated that notwithstanding the fact that facilities may be equal in tangible factors, "[s]eparate educational facilities are inherently unequal."[16]

Even though *Brown* finally and unequivocally declared segregated public schools unconstitutional, the Court was still confronted with the question of implementation of desegregation orders. In the second *Brown* decision,[17] it was

9 U.S. CONST. amend. XIV, § 1 reads as follows:
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 *See, e.g.,* Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964); Hampton v. City of Jacksonville, Florida, 304 F.2d 320 (5th Cir. 1962); Watson v. Memphis, 373 U.S. 526 (1963); and Evans v. Newton, 382 U.S. 296 (1966).

11 347 U.S. 483 (1954).

12 *Id.* at 495.

13 *See, e.g.,* Sweatt v. Painter, 339 U.S. 629 (1950); and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

14 163 U.S. 537 (1896). In *Plessy,* the petitioners claimed that a Louisiana statute requiring separate but equal railway compartments in all trains traveling within the state was unconstitutional. The Court held that the statute was reasonable and that enforced separation did not imply a badge of inferiority. *Id.* at 551.

15 Brown v. Board of Education, 347 U.S. 483, 494-95 (1954).

16 *Id.* at 495.

17 Brown v. Board of Education, 349 U.S. 294 (1955).

determined that appropriate desegregation programs should be developed by local school board authorities and lower level courts on the basis of the particular circumstances existing within the local communities. The Court, however, was unaware that "politics" and opposition to desegregation would eventually divert local attention from desegregation programs to devices which evaded court orders and implemented programs to continue and promote segregated schools.[18]

Griffin v. County School Board of Prince Edward County[19] is, perhaps, particularly indicative of the racial attitudes that survived despite *Brown* and the programs employed by states to defy a court decree. In *Griffin,* the supervisors of Prince Edward County refused to levy school taxes in an effort to resist a desegregation decree. Since the public schools lacked sufficient operating funds, they were forced to close their doors prior to the fall of 1959. Although the public schools were replaced by private institutions created for white students only, it became necessary in the second year of operation for the state legislature to initiate a publicly funded tuition grant program. In striking down this scheme, the Supreme Court intimated that the closing of all schools was unconstitutional because schoolchildren of Prince Edward County were being treated differently from schoolchildren in other counties;[20] however, particular emphasis was placed upon the *purpose* or reason behind the action taken in closing the schools.[21] The Court determined that the schools were closed ". . . for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."[22] *Griffin* established that any state program initiated to defy a court's desegregation order would not be tolerated regardless of state opposition to the principles of law developed in *Brown.*

The racial animosity exhibited by state and local officials in their attempt to circumvent desegregation of Prince Edward County schools was not an uncommon response to court-ordered desegregation. Notwithstanding the fact that the command of *Brown* had been extended to encompass amphitheatres,[23] public beaches and bathhouses,[24] public golf courses,[25] and public parks,[26] many government officials remained unyielding. In *Watson v. Memphis,*[27] Negro citizens of Memphis brought an action in the United States District Court for

18 *See, e.g.,* Cooper v. Aaron, 358 U.S. 1 (1958); Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La. 1960), *motion for stay of injunction denied,* 364 U.S. 500 (1960); Louisiana Financial Assistance Commission v. Poindexter, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968); and St. Helena Parish School Board v. Hall, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam,* 368 U.S. 515 (1962).

19 377 U.S. 218 (1964).

20 *Id.* at 230.

21 *Id.* at 231.

22 *Id.*

23 Sweeny v. City of Louisville, 102 F. Supp. 525 (W.D. Ky. 1951), *aff'd sub nom.* Muir v. Louisville Park Theatrical Association, 202 F.2d 275 (6th Cir. 1953), *vacated,* 347 U.S. 971 (1954).

24 Mayor and City Council of Baltimore City v. Dawson, 123 F. Supp. 193 (D. Md. 1954), *rev'd,* 220 F.2d 386 (4th Cir.), *aff'd per curiam,* 350 U.S. 877 (1955).

25 Holmes v. City of Atlanta, 124 F. Supp. 290 (N.D. Ga. 1954), *aff'd,* 223 F.2d 93 (5th Cir.), *vacated,* 350 U.S. 879 (1955).

26 New Orleans City Park Improvement Association v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd per curiam,* 358 U.S. 54 (1958).

27 373 U.S. 526 (1963).

the Western District of Tennessee in which they sought a declaratory judgment directing prompt desegregation of all public recreational facilities. Even though eight years had passed since the Court first declared segregated public recreational facilities violative of the fourteenth amendment,[28] the city contended that its delay was justified on the theory that interracial disturbances were likely to occur if it was required to immediately desegregate its facilities.[29] After noting that the city officials' asserted fears were based primarily upon personal speculation, the Court proclaimed that the plaintiffs were entitled to prompt vindication of their constitutional right to use and enjoy recreational facilities without regard to race.[30] Mr. Justice Goldberg, writing for the majority, stated that they would no longer tolerate delays in desegregating facilities ". . . except upon the most convincing and impressive demonstration . . . that such delay is manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court."[31]

Although *Brown* provided the foundation for *Griffin* and *Watson,* in reality it was the latter two decisions that gave force and effect to the principles established in *Brown.* Notwithstanding the fact that complete desegregation has not been realized, the Court has continued to adhere to its own command in spite of persistent attempts to defy its mandates. Yet, whenever it has become apparent to state and local governments that they can no longer evade or delay desegregation of its public facilities, they have turned to more subtle means to restrict Negroes' rights.

In 1957, the legislature of Alabama enacted a statute redefining the city boundaries of Tuskegee from a rectangle to an irregular twenty-eight-sided figure. The effect of this statute was to exclude all but four or five black voters from the city boundaries. In *Gomillion v. Lightfoot,*[32] the Court acknowledged Alabama's power to redefine the boundaries of a city within its jurisdiction;[33] it refused to permit the state, however, to exercise this power when the "inescapable human effect" of such a statute denied black citizens their right to vote:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.[34]

Following *Gomillion,* it became apparent that discriminatory state action would not be validated when the ascertainable *effects* of the action deprived Negroes of their constitutionally protected rights. At the same time, with *Burton v. Wilmington Parking Authority,*[35] it became equally clear that the Court would

28 Mayor and City Council of Baltimore City v. Dawson, 123 F. Supp. 193 (D. Md. 1954), *rev'd,* 220 F.2d 386 (4th Cir.), *aff'd per curiam,* 350 U.S. 877 (1955).
29 Watson v. Memphis, 373 U.S. 526, 535 (1963).
30 *Id.* at 539.
31 *Id.* at 533.
32 364 U.S. 339 (1960).
33 *Id.* at 342.
34 *Id.* at 347.
35 365 U.S. 715 (1961).

no longer permit the slightest degree of state involvement in private discrimination. In *Burton,* the proprietor of a restaurant refused to serve a black customer solely on the basis of his race. Since the owner, by himself, could not have been implicated in any violation of the equal protection clause, which prohibits only discrimination involving the state,[36] the Court was confronted with the question of the degree of state involvement necessary to constitute "state action." Based on the fact that the realty was publicly owned, building costs had been partially defrayed with public funds, and the building had been maintained at public expense, the majority deemed the state to have ". . . elected to place its power, property and prestige behind the admitted discrimination . . ." to such an extent that it had become ". . . a joint participant in the challenged activity. . . ."[37] As a result of that involvement, the state had denied the plaintiffs the equal protection of the laws under the fourteenth amendment.

In *Burton,* the majority analyzed the situation in a manner similar to that employed in *Gomillion.* Each decision took cognizance of the subsurface or underlining activities involved, rather than merely determining the result evident on the surface of the action. In *Gomillion,* the legislature had possessed the power to redefine city boundaries, but the execution of that power had been unwarranted because it had been employed in such a manner as to disadvantage one group of citizens relative to another. Similarly, in *Burton,* the state's involvement in private discrimination was not recognized until the Justices scrutinized the entire factual situation. *Burton* thus established a standard for determining state involvement in discriminatory practices that has been consistently adhered to by the Court in desegregation cases: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[38]

The Court extended the underlining principles of *Burton* and *Gomillion* in *Lombard v. Louisiana,*[39] one of the 1963 "sit-in" cases.[40] In *Lombard,* the manager of a department store had refused to serve three Negroes and one Caucasian at the store's lunch counter. Upon their refusal to leave the store, they were arrested and later convicted for violation of a trespass statute. The majority overturned the convictions on the basis of various statements by public officials to the effect that sit-in demonstrations would no longer be tolerated. The majority took the position that the statements commanded continued segregation in restaurants.[41] Since the command had assumed the force and effect of an ordinance,[42] the state was deemed to have involved itself to such a significant extent as to constitute "state action" under the fourteenth amendment. Mr. Justice Douglas, concurring, would have extended the proscriptions of the

36 The Civil Rights Cases, 109 U.S. 3, 17 (1883).
37 Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).
38 *Id.* at 722.
39 373 U.S. 267 (1963).
40 The other three "sit-in" cases are Peterson v. Greenville, 373 U.S. 244 (1963); Avent v. North Carolina, 253 N.C. 580, 118 S.E.2d 47 (1961), *vacated per curiam,* 373 U.S. 375 (1963); and Gober v. City of Birmingham, 41 Ala. App. 313, 133 So. 2d 697 (1961), *rev'd per curiam,* 373 U.S. 374 (1963). These decisions were very similar to *Lombard,* except that they involved an ordinance requiring segregation and not merely official statements.
41 Lombard v. Louisiana, 373 U.S. 267, 273 (1963).
42 *Id.*

equal protection clause even further than the majority. He believed that the restaurant had become an instrumentality of Louisiana the instant it had been granted an operating license by the state.[43]

It was unclear in *Lombard* whether the restaurant had been coerced by the city officials' statements to operate on a segregated basis.[44] However, in *Peterson v. Greenville,*[45] the Court dismissed entirely the issue of whether the private concern had relied upon the dictates of the city:

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice.[46]

It was unimportant to the *Peterson* Court that the proprietor of the restaurant would have acted independently of the ordinance.[47]

The Court's approach in determining state involvement in private discrimination in *Burton* and *Lombard* was refined and extended even further in *Reitman v. Mulkey.*[48] *Reitman* involved a California constitutional amendment which had implicitly repealed two statutes prohibiting discrimination in the sale or rental of private housing. Pursuant to the amendment, the defendant refused to rent an apartment to the plaintiffs solely on the basis of their race. The California Supreme Court determined that the amendment had denied the plaintiffs the equal protection of the laws guaranteed by the fourteenth amendment.[49] The United States Supreme Court relied heavily on the California court's opinion and shared that tribunal's view that the amendment achieved more than the repeal of two antidiscrimination statutes; rather, the state had taken ". . . affirmative action designed to make private discriminations legally possible."[50] The majority rejected the argument, as the California court had, that to declare the amendment unconstitutional would have been to establish a constitutional barrier to repealing a statute.[51]

In *Reitman,* the Supreme Court simply restated its basic policy on racial discrimination: a state need not act with favor toward Negroes; however, it must at least seek a neutral stance. California had retreated from a favored position toward blacks to a less than neutral position. As one commentator has stated:

> California has not "merely" failed to throw the life-preserver: California has put the life-preserver out of convenient reach, so as not to be tempted to throw it, and has passed the word down the line to those she commands, that the life-preserver is not to be thrown.[52]

43 *Id.* at 282-83.
44 *Id.* at 273.
45 373 U.S. 244 (1963).
46 *Id.* at 248.
47 *Id.*
48 387 U.S. 369 (1967).
49 Mulkey v. Reitman, 64 Cal. 2d 529, 540, 413 P.2d 825, 836 (1966).
50 Reitman v. Mulkey, 387 U.S. 369, 375 (1967).
51 *Id.* at 376.
52 Black, *The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 83 (1967).

The Court approached the issues in *Hunter v. Erickson*[53] in a manner similar to *Reitman,* although the principles of law underlining the decisions were distinguishable. In *Hunter,* the local community had approved an amendment to the Akron city charter which stated that all valid fair housing ordinances were ineffective and that all future enactments had to be approved by a majority of the voters before they could become effective. While it distinguished *Reitman,* the Court still ruled that the amendment was unconstitutional since only ordinances relating to racial housing matters were subject to the automatic referendum system.[54] Furthermore, the majority noted that even though the amendment made no distinction with regard to race, it inherently disadvantaged Negroes in their quest for better housing.[55] Akron's desire to move more slowly in the area of racial housing matters was deemed insufficient to justify the impact of the amendment.[56]

Although the Court had voluntarily assumed a vital role in promoting the black quest for recognition in the United States, *Evans v. Abney*[57] established its unwillingness to extend the purview of the fourteenth amendment to encompass all situations in which Negroes viewed state action as discriminatory in nature. In 1911, an individual devised a tract of land to the City of Macon, Georgia, to be used as a park exclusively for white people. City officials later acknowledged their duty to desegregate the park, but opposition to compliance with that duty forced the city to resign as trustee. The Supreme Court determined in *Evans v. Newton*[58] that a transfer of the park land to private trustees was ineffective as a means to avoid desegregation of the park.[59] As a result, the Georgia Supreme Court took the position that *Newton* dictated the failure of the trust, so it remanded the litigation to the trial court.[60] Subsequently, the Georgia Supreme Court affirmed the trial court's determination that the land had reverted to the testator's heirs since the city could not comply with the restrictions that had been imposed by the testator in his will.[61] In *Abney,* the United States Supreme Court affirmed the Georgia court's disposition of the action.[62]

Abney was significant in that it established a limitation on the extent to which the Court would proceed to discover "state action." Although it sifted the facts and weighed the circumstances, the Court was confronted with no alternative but to adhere to the state tribunal's view that the testator's intent must be complied with. Mr. Justice Black, writing for the majority, implied that the Court was compelled to select between two competing interests: the right of an individual to control his property subsequent to death and the freedom of Negroes to use and enjoy charitable trusts without regard to race.[63] This balancing process employed by the majority was not unlike that used in previous decisions. It was,

53 393 U.S. 385 (1969).
54 *Id.* at 389.
55 *Id.* at 390-91.
56 *Id.* at 392.
57 396 U.S. 435 (1970).
58 382 U.S. 296 (1966).
59 *Id.* at 301.
60 Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966).
61 Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
62 Evans v. Abney, 396 U.S. 435 (1970).
63 *Id.* at 447.

however, the first time the Supreme Court permitted a city to *indirectly* terminate, rather than desegregate, a public facility. *Palmer* is an extension of *Abney,* since now state and local governments may *directly* avoid their duty to desegregate facilities.

The effect of the Court's holding in *Abney* is not significantly at variance with that found in *Palmer.* Both decisions indicated the Court's unwillingness to extend the protection of the fourteenth amendment to blacks where there are closely competing interests. Although *Palmer* implied that the majority was skeptical of the consequences that might ensue if five or more Justices were able to dictate to the city of Jackson that facilities may not be closed once they are initiated,[64] the rationale employed in *Abney* was devoid of any such unrealistic considerations:

> A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because *there it is the State and not a private party which is injecting the racially discriminatory motivation.*[65]

In *Palmer,* the majority of the Court ignored established principles of law which had previously provided courts with a foundation on which to expand the purview of the equal protection clause. They distinguished prior decisions, but failed to establish a rational basis for their holding. First, the Court explicitly rejected the long-standing practice in racial desegregation litigation of probing for the purpose or motive behind the action taken.[66] Both *Griffin* and *Gomillion* were decided upon the Court's determination of such factors. Also, as recently as *Abney,* the majority of the Court took such an approach when they determined that the Georgia courts had not construed the will with any discriminatory purpose in mind.[67] Secondly, the majority failed to follow the commands of *Reitman* and *Lombard.* They summarily dismissed the petitioners' argument that the city had openly authorized, encouraged, and fostered racial segregation when it elected a less than neutral position on racial discrimination by closing the swimming facilities and terminating its lease with the YMCA on another pool.[68] Finally, the Court emphatically accepted an argument advanced by the city which had been previously rejected by it in *Watson* and other decisions.[69] For the first time, a city was permitted to avoid desegregation of its facilities on the unsubstantiated grounds of anticipated interracial violence and financial inability.

64 Palmer v. Thompson, 403 U.S. 217, 227 (1971).
65 Evans v. Abney, 396 U.S. 435, 445 (1970) (emphasis added).
66 Palmer v. Thompson, 403 U.S. 217, 224-26 (1971).
67 Evans v. Abney, 396 U.S. 435, 445 (1970).
68 Palmer v. Thompson, 403 U.S. 217, 223-24 (1971).
69 *Id.* at 226.

In *Fletcher v. Peck*,[70] the Court declared that it would not consider the purpose or motive[71] behind a legislative enactment in determining the constitutional validity of it. This view was reiterated in *United States v. O'Brien*[72] when the Court rejected the plaintiff's argument that a statutory amendment was unconstitutional because Congress purposely enacted it to suppress freedom of speech.[73] The majority of the Court noted that the pitfalls in determining the purpose behind such an enactment were too great when the statute was clearly constitutional on its face.[74] However, whatever merit this approach may have had in the *O'Brien* situation, it seems entirely inappropriate to the situation in *Palmer*.[75] First, the Court was not confronted with the task of determining the "purpose" behind numerous legislators voting for an act, as was the case in *O'Brien*.[76] In *Palmer*, the necessary inquiry extended no further than ascertaining the views of the city council. Indicative of those views was the following 1962 news release:

> "We will do all right this year at the swimming pools," the Mayor noted, "but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have intermingling . . . ." He said the City now has legislative authority to sell the pools or close them down if they can't be sold.[77]

Although the views of all the Jackson councilmen were not brought to the Court's attention, the mayor and park director had filed separate affidavits which indicated the historical setting in which the facilities were closed and the general racial animosity existing in Jackson prior and subsequent to *Brown*. The Court could have determined the "purpose" behind the action of other councilmen by inference if it had considered these factors.

A second issue presented in *O'Brien* that was nonexistent in *Palmer* was the fact that if the act had been declared unconstitutional on the grounds of its "purpose," Congress could have reenacted it for other purposes and the Court

70 10 U.S. (6 Cranch) 87 (1810).

71 *Id.* at 130. This distinction between "motive" and "purpose" has never been easily defined. One commentary has suggested that "purpose" is the objective or goal sought by the enacting body, whereas "motives" are the reasons that induce an individual to take certain action. To ascertain "purpose," objective criteria such as the terms of the statute and the historical setting in which the action was taken are considered; however, to determine "motives," the state of mind of the individual taking the action must be examined. *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1091-92 (1969). However, another commentator has stated that the distinctions between the two terms are not so clear and that there are practical dangers in utilizing either of them. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1220-21 (1970). *See also* Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970). Apparently the Supreme Court has not arrived at a clear distinction between these terms. In *Palmer*, the majority stated: "It is true there is some language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality." Palmer v. Thompson, 403 U.S. 217, 225 (1971). Since the two terms lack clarity, and for the sake of consistency, the term "purpose" shall be used throughout the remainder of the comment.

72 391 U.S. 367 (1968).

73 *Id.* at 382-83.

74 *Id.* at 383-84.

75 *See generally* Ely, *supra* note 71, at 1275; and *Developments in the Law — Equal Protection, supra* note 71, at 1097.

76 United States v. O'Brien, 391 U.S. 367, 384 (1968).

77 Jackson Daily News, May 24, 1962, at 1, col. 2.

would have been required to declare the act constitutional.[78] In *Palmer*, if the city had reclosed the pools for another purpose, it would have been required to defend its action;[79] whereas, with a statute, the Court would have been required to acknowledge all evidence of "purpose" in the legislative record at face value. Thus, if the city had reclosed its facilities for other purposes, it would have had a very heavy burden of proof to establish the validity of its actions.

In *Gomillion*, the Court was not concerned with any problems associated with the possible reenactment of the statute. One commentator has suggested that a majority of the Court surely would have rejected the statute if Alabama had reenacted it on other grounds.[80] The *Griffin* Court alluded to the possibility that a state might close schools on grounds other than opposition to race, but was not concerned with the probability of such action: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."[81] The Court also has confirmed lower court decisions which have struck down state legislation designed for the purpose of perpetuating segregated public schools.[82]

Mr. Justice Black, writing for the majority in *Palmer*, acknowledged the fact that some evidence in the record supported the plaintiffs' argument that the city of Jackson had closed the swimming facilities purposely to avoid integration;[83] he adhered to the view, however, that it was not the purpose behind the act that rendered it unconstitutional, but rather the effects of that action.[84] Yet, he summarily dismissed the issue without scrutinizing the actual or probable effects of the city's action.[85] In *Gomillion*, the Court discussed the effects of the statute only because it was so obvious that the purpose behind the enactment was to exclude as many blacks from voting in city elections as possible. In *Palmer*, however, although the purpose behind the city's act was as self-evident as that in *Gomillion*, the "effects" were not equally clear.

One commentary has suggested that the motivating purpose behind an act should be used in certain situations to either predict future effects or to illuminate those already existing.[86] The attitude of state officials, the historical setting in which the act occurred, and the events which generated the act may be examined to ascertain the purpose behind the act and to predict the effects likely to ensue from the act. *Reitman* sanctioned this technique:

> [The California court] quite properly undertook to examine the constitutionality of §26 in terms of its "immediate objective," its "ultimate effect"

78 United States v. O'Brien, 391 U.S. 367, 384 (1968).
79 *See generally* Ely, *supra* note 71, at 1280.
80 *Id.*
81 Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 231 (1964).
82 *See, e.g.*, Bush v. Orleans Parish School Board, 187 F. Supp. 42 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961); Louisiana Financial Assistance Commission v. Poindexter, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); and St. Helena Parish School Board v. Hall, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).
83 Palmer v. Thompson, 403 U.S. 217, 225 (1971).
84 *Id.*
85 *Id.*
86 Note, *Legislative Purpose and Federal Constitutional Adjudication*, *supra* note 71, at 1892-93.

> and its "historical context and the conditions existing prior to its enactment." Judgments such as these we have frequently undertaken ourselves.[87]

The majority of the Court in *Palmer* ignored numerous factors which clearly indicated the city of Jackson's discriminatory purpose behind its act of closing the swimming facilities. The mayor's affidavit established the context in which the pools were closed and the purpose which motivated such action:

> [T]here are large areas of the city occupied almost entirely by white people and *other areas occupied exclusively by colored people.* . . . Prior to 1961 the members of each race *customarily* used the recreational facilities located near their homes. I believe that the *welfare of both races* would have best been served if this *custom* had continued. I fully realize that the City does not have the right to require or enforce separation of the races in any public facility. In 1961 . . . three Negroes filed suit to enjoin the City from denying them the right to use any and all recreational facilities. . . . [T]he City made the decision *subsequent to the Clark case to close all pools* owned and operated by the City to members of both races.[88]

In *Hunter,* the Court utilized similar circumstances to invalidate the city charter amendment which had required the automatic referendum system. The validity of the amendment was assessed against the background in which it was enacted—unsanitary and overcrowded housing.[89] While not specifically discussing "purpose," the *Hunter* Court implicitly relied on the purpose behind the enactment to predict the effects likely to flow from the imposition of the automatic referendum system. After the Court considered the circumstances surrounding the enactment of the charter amendment, the future effects became clear, notwithstanding the fact that the amendment did not seem at odds with the equal protection clause on its face.

Thus, the language in *Gomillion, Reitman,* and *Hunter* offers strong support for the determination of "purpose" in order to enable the Court to identify the "effects." Had the *Palmer* Court recognized that the city of Jackson closed its swimming facilities for the purpose of avoiding desegregation, it could have predicted numerous probable "effects." By ignoring the actual "purpose," however, the majority was able to likewise ignore reality and declare that the closing operated equally on both whites and blacks.[90] Their declaration, of course, was in conflict with numerous "effects" flowing from the council's action. First, the city's action effectively prevented Negroes and whites from attempting to integrate.[91] It is true that a governmental entity need not command integration, yet at the same time it may not place the "life-preserver" out of reach.[92] A second predictable effect was aptly pointed out by both Judge Wisdom of the Fifth Circuit[93] and Mr. Justice White[94] in their respective dissents. Now blacks realize that if

87 Reitman v. Mulkey, 387 U.S. 369, 373 (1967).
88 Record at 20-21 (emphasis added).
89 Hunter v. Erickson, 393 U.S. 385, 391 (1969).
90 Palmer v. Thompson, 403 U.S. 217, 225 (1971).
91 *Cf.* Loving v. Virginia, 388 U.S. 1 (1967).
92 *See generally* Hughes, *Reparations For Blacks?* 43 N.Y.U. L. REV. 1063 (1968).
93 Palmer v. Thompson, 419 F.2d 1222, 1227 (1970) (dissenting opinion).
94 Palmer v. Thompson, 403 U.S. 217, 240 (1971) (dissenting opinion).

they protest against any segregated facilities, they may forfeit them altogether. Jackson Negroes may now adjust their behavior to avoid similar acts in the future.[95] Finally, a third probable consequence of the council's action was simply to label the black man an inferior person.[96]

Mr. Justice Black also rejected the claim in *Palmer* that the council's action in closing the swimming facilities authorized, encouraged, and fostered private racial discrimination. In so doing, he seemed to give *Reitman* a very narrow reading. Although *Reitman* and *Palmer* involved entirely different factual settings, the legal principles underlining *Reitman* are indistinguishable from those rejected in *Palmer*. The *Reitman* Court concluded that "[t]he right to discriminate is now one of the basic policies of the State."[97] California formulated its "basic policy" by constitutional amendment; in *Palmer,* the city of Jackson announced its "basic policy" by simply closing the swimming facilities. The difference between the two formulations is one of method, not substance. What is decisive, though, is the fact that both California and the city of Jackson selected a nonneutral, basic discrimination policy. Also, the command held unconstitutional in *Lombard* is not unlike the council's action in *Palmer*. *Lombard* established the theory that a city could not command restaurant proprietors to deny service to black customers. In contrast, however, the *Palmer* Court sanctioned the right of the city of Jackson to command that blacks not be permitted to swim with whites. The city's action implicitly conveyed to its citizens the idea that it would not tolerate interracial swimming under any circumstances.[98] Clearly, the city had assumed a nonneutral position relative to race.

The majority's apparent reason for rejecting an "encouragement" argument was the lack of evidence or findings of state encouragement of discrimination:

> The implication of petitioners' argument appears to be that the fact the city turned over to the YMCA a pool it had previously leased is sufficient to show automatically that the city has *conspired* with the YMCA to deprive Negroes of the opportunity to swim in integrated pools . . . . [T]here is no such finding here, and it does not appear from this record that there was evidence to support such a finding.[99]

The majority's concern over the lack of evidence of a "conspiracy" between the YMCA and the city was clearly unfounded.[100] The issue before them was

95 This view is not without defect, though. It is conceivable that the city councilmen had a particular aversion for Negroes when associated with interracial swimming that they would not have had with other types of public recreation. *See* Note, *Legislative Purpose and Federal Constitutional Adjudication, supra* note 71.

96 The majority of the Court rejected the petitioners' argument that to deny Negroes the right to enjoy swimming pools constituted a "badge or incident" of slavery. Palmer v. Thompson, 403 U.S. 217, 226 (1971). This appears to be supported by the fact that under the thirteenth amendment, Congress has the power to enact legislation for the purpose of outlawing incidents of slavery. Since Congress had failed to act, there would have been no violation of the thirteenth amendment. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883).

97 Reitman v. Mulkey, 387 U.S. 369, 381 (1967).

98 The fact that city policemen were charged with the duty to enforce the ordinance in *Peterson* and the command in *Lombard* is of little significance in *Palmer*. There are various means available to coerce an individual into following a city's desires.

99 Palmer v. Thompson, 403 U.S. 217, 223-24 (1971) (emphasis added).

100 The Court was of the opinion that if the YMCA had been made a party to the action and the petitioners had presented sufficient evidence to prove that concerted action existed be-

whether the closing of public facilities encouraged discrimination in the enjoyment of pools in the private sector, not whether any "conspiracy" existed.

It would have been mere speculation, of course, to have said that since all public swimming facilities had been closed, numerous private pools would have immediately developed to replace them or that proprietors of existing pools would have automatically initiated a policy of racial discrimination. Probably in 1965, the date when the plaintiffs in *Palmer* filed suit, most, if not all, private pool owners discriminated on the basis of race. Whatever the validity of such conjecture may be, the burden was not on the petitioners to prove that the closing resulted in the encouragement or growth of discrimination in the use of private pools. In *Peterson,* the majority of the Court determined that it was unimportant whether or not the restaurant proprietor had relied on custom and personal feelings rather than the ordinance as a basis for his discrimination policy. That decision clearly established the principle that once a state has commanded a result, it extinguishes the right of an individual to make a selection.[101]

The Court has consistently declared that a delay or refusal to desegregate a public facility on grounds that it could not be operated safely or economically is unconstitutional; yet in *Palmer,* the Court readily adhered to the view that a city was justified in refusing to desegregate its facilities because it feared interracial violence and financial inability to maintain integrated pools. Although Mr. Justice Black acknowledged the validity of the established principles of law prior to *Palmer,* he emphasized that the issue before the Court was whether or not the plaintiffs had been denied their rights by the city's action.[102] Apparently, Justice Black and the majority would have required the petitioners to demonstrate their right to the use and enjoyment of the facilities before they could have argued that the closing was unjustified. Regardless of the position taken by the Court, termination of a public facility to avoid violence and economic loss is analogous to a refusal to desegregate on the grounds that interracial violence and economic loss will ensue. Although, in the latter instance, whites are permitted to use the facilities while blacks are denied that right, the ultimate effect of either situation is to force separation of the races. This is precisely the evil that *Brown* attempted to eliminate.

The majority in *Palmer* emphasized the fact that there was "substantial evidence in the record to support" the district court's finding that the closing was justified.[103] Factually, however, the only evidence which supported such a conclusion was the affidavits filed by the mayor and Jackson's Director of the Department of Parks and Recreation. The Director stated:

> That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the city decided that the best interest of all

tween the city and that organization, the pool formerly leased to the city would have been required to be desegregated. *Id.*

101 Peterson v. Greenville, 373 U.S. 244, 248 (1963).

102 Palmer v. Thompson, 403 U.S. 217, 226 (1971).

103 *Id.* at 225.

> citizens required the closing of all public swimming pools owned and operated by the city. . . .[104]

The majority's unquestioning acceptance of these statements was remarkable since they were based entirely on the personal speculations of the affiant.

The *Watson* Court had explicitly rejected the "safety" argument offered by the city of Memphis to justify its delay in desegregating public recreational facilities, even though some testimony had supported that argument.[105] The Court adhered to the principle established in *Buchanan v. Warley,*[106] that it was unconstitutional to deny an individual his rights simply because others were hostile to their assertion.[107] Similar reasoning was employed by the Court in *Cooper v. Aaron,*[108] when it denied the Little Rock School Board's application for suspension of its school desegregation plan for two and one-half years. The Court declared that preservation of law and order could not be used to deny Negroes their constitutional right to attend desegregated public schools.[109] *Palmer* is, of course, clearly at odds with these decisions.

The *Palmer* Court also recognized the city of Jackson's claim that the swimming facilities could not be operated economically. The park director had stated in his affidavit that for the years 1960 through 1962, Jackson had suffered a yearly operating loss of $11,700 for three city pools. Curiously, however, absolutely no evidence was presented to answer the obvious questions of why the operating losses would necessarily increase if the city was required to desegregate, or why the city had purposely sustained yearly losses while operating the facilities on a segregated basis but could not afford it if required to desegregate them. Furthermore, in *Watson,* the Court summarily dismissed a similar argument by saying: "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."[110] Also, in *Lombard,* the majority implicitly rejected an argument that segregated service in restaurants was required for the economic welfare of the city.[111]

Mr. Chief Justice Burger and Mr. Justice Blackmun emphasized that the city of Jackson would have been "locked-in" forever in the operation of its swimming facilities had it been required to desegregate, regardless of future financial losses. This assumption, however, necessarily ignores the Supreme Court's primary role in desegregation cases of scrutinizing the entire situation by "sifting facts and weighing circumstances."[112] The Court assumed that role in *Burton* and adhered to it through *Reitman* and *Hunter.* Assuming *arguendo* that *Palmer* had required Jackson to reopen its swimming facilities and, in the future, the city had been unable to operate them economically and offered the

104 Record at 18.
105 Watson v. Memphis, 373 U.S. 526, 536 (1963).
106 245 U.S. 60 (1917).
107 Watson v. Memphis, 373 U.S. 526, 535 (1963).
108 358 U.S. 1 (1958).
109 *Id.* at 16.
110 Watson v. Memphis, 373 U.S. 526, 537 (1963).
111 Lombard v. Louisiana, 373 U.S. 267, 271-74 (1963).
112 Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

requisite data to substantiate such a claim, it is unlikely that the Court would require the city to continue operations regardless of its losses.

For seventeen years the Court has emphatically refused to permit state tactics of evasion to deter it in realizing the promise of *Brown*. With the advent of *Palmer*, however, the Supreme Court injects new life into "antidesegregation" states by sanctioning an alternative to desegregation: operation of a facility may be discontinued whenever a state chooses to avoid a desegregation order.

The Court has clearly reversed a trend initiated in *Brown*. A state now has the power to actively force separation of the races by "picking and choosing" to close those facilities it does not wish to share with the black man. Unconsciously, the *Palmer* Court adopted the *Plessy* reasoning *in toto*. In 1896 the *Plessy* Court stated:

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute . . . is a reasonable regulation . . . . In determining the question of reasonableness it [the enacting body] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.[113]

Unless the Court is willing to overrule its holding in *Palmer*, or at least limit its application to the facts, this decision could signal a reversal of all that has been accomplished for the Negro in the last seventeen years.

Gary L. Lennard

CONSTITUTIONAL LAW—DUE PROCESS—EQUAL PROTECTION—INDIGENTS —STATE'S REFUSAL TO PERMIT INDIGENTS TO INSTITUTE DIVORCE ACTIONS WITHOUT PREPAYMENT OF COURT FEES AND SERVICE COSTS IS A DENIAL OF DUE PROCESS.—In 1968 Gladys Boddie and the other named appellants were welfare recipients residing in the state of Connecticut. On March 13th of that year they applied to the Superior Court of New Haven County for permission to prosecute divorce proceedings without prepayment of filing or service fees. Financial affidavits were submitted with their applications. On the following day the clerk of the superior court rejected the applications on the ground that they could not be accepted until the entry fee was paid. Connecticut law requires the payment of a filing fee of $45 for civil suits in the superior court.[1] An additional $15 is usually charged for the service of process by the sheriff, but the charge may be as much as $50 if notice by publication is necessary. Efforts to obtain judicial waiver of the fees and costs were unsuccessful. Appellants then instituted a class suit in the Federal District Court for the District of Connecticut on behalf of women in the state who were receiving welfare aid and who were unable to obtain divorces because of the expense of court fees. The complaint

113 Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

1 CONN. GEN. STAT. ANN. § 52-259 (Supp. 1971).

sought a judgment declaring unconstitutional the requirement that court fees be paid as a condition precedent to judicial relief. Appellants further requested an injunction ordering the appropriate state officials to permit them to proceed with their divorce suits without paying the fees and costs. A three-judge court was convened pursuant to 28 U.S.C. § 2281. Upon motion of the defendant, the complaint was dismissed on the ground that the admittedly undesirable action of the state of Connecticut was not "a denial of a right so fundamental that the Constitution, by the equal protection or due process clause, forbids the state from its continuance."[2] On appeal, the Supreme Court reversed the decision and *held*: a state may not, consistent with the due process clause of the fourteenth amendment, preempt the right to dissolve the legal relationship of marriage without affording all citizens access to the means it has provided for doing so. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

In his opinion for the Court, Justice Harlan adverted to the indispensability of procedural fairness in a legal system and set forth the following argument: (1) Access of prospective plaintiffs to the courts has rarely been asserted as an element of due process since civil remedies are usually not the exclusive means available for dispute settlement. The defendant's access to judicial process, on the other hand, is crucial because, once an action is begun, the court has the exclusive power to fashion a binding settlement. (2) Since Connecticut has reposed in its judiciary the exclusive power to dissolve marriages, a prospective divorce plaintiff is like a defendant: if he is excluded from the court, he is deprived of the only means for vindicating his rights. In neither case is resort to the judicial process truly voluntary. (3) Refusal to admit appellants to the divorce courts deprives them of an opportunity to be heard on a claimed right to divorce. Absent a sufficient countervailing consideration, such a denial is a denial of due process. (4) Since Connecticut's asserted interests in raising revenue, deterring frivolous litigation, and providing notice to defendants do not provide sufficient countervailing considerations, the appellants have been denied due process of law.

The majority opinion is conspicuously devoid of any reference to the equal protection clause of the fourteenth amendment, although, as Justice Brennan observed in his concurring opinion, ". . . this case presents a classic problem of equal protection of the laws."[3] While it is always speculative to draw inferences from what the Supreme Court has not done, it is difficult to resist the conclusion that the *Boddie* decision portends a significant new boundary to the domain of equal protection theory. The discussion which follows is an attempt to evaluate the implications of this decision for the law of equal protection and for the relationship between the courts and the poor. This undertaking will require particular attention to the opinions of Justice Harlan, author of the *Boddie* opinion, on the subject of equal protection.

The usual context of equal protection decisions is an objection by an individual that a state law unfairly places a special burden upon him, or upon a class of which he is a member, which it does not impose upon others. A member

2 Boddie v. Connecticut, 286 F. Supp. 968, 973 (D. Conn. 1968).
3 401 U.S. at 388.

of the armed forces may find that he has been transferred into a state which prohibits his registering to vote as long as he remains in the military service, no matter how long he resides in the state or how strong his ties to the community may be.[4] A prospective plaintiff in a stockholder's derivative suit may discover that his action is barred by prohibitive security requirements which would not apply to a shareholder with larger holdings.[5] In each case it may plausibly be contended that the state law operates to deny certain parties equal protection of the laws. But, if the fourteenth amendment is treated as an absolute mandate for equality, forbidding the state ever to discriminate among its citizens, the legislatures would be paralyzed. Few statutes affect all citizens and probably no statute equally affects all those it touches. The task of the Supreme Court, therefore, has not been to enforce *equality,* but to set minimum standards which temper the necessarily discriminatory actions of state governments.

In discharging this task, the Court initially exercised great restraint and deference toward the legislative judgments of the states. Its early attitude is typified by the 1911 decision of *Lindsley v. Natural Carbonic Gas Co.*,[6] which set down a four-point formula for testing the validity of state laws in light of the equal protection clause:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[7]

Decisions following *Lindsley* have deviated slightly from the literal import of its language. The Court has generally required that the statute have more constitutional merit than mere absence of irrationality and arbitrariness. There must be an affirmative, "rational relation" between the measures taken by the legislature and some legitimate state policy.[8] The language of point three, calling upon the Court to assume any state of facts that "reasonably can be conceived" to

4 Carrington v. Rash, 380 U.S. 89 (1965). Texas' constitutional provision to this effect was held violative of the equal protection clause of the fourteenth amendment. Justice Harlan dissented.

5 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Held: A New Jersey statute requiring security from plaintiff stockholders who hold less than 5% of the corporation's outstanding shares and whose holdings have a market value of under $50,000 does not violate the equal protection clause.

6 220 U.S. 61 (1911). The Court upheld a New York statute which prohibited the pumping of mineral waters from beneath rock for the purpose of extracting carbonic gas. Appellant had argued that the statute denied him equal protection of the laws since his company's business was thereby made illegal while those who pumped the water for other purposes or who pumped it from wells that did not penetrate rock were not affected.

7 *Id.* at 78-79.

8 Williamson v. Lee Optical, 348 U.S. 483, 491 (1955).

justify the law, has been applied with similar moderation. The phrase itself suggests that the Court may rely on highly speculative justifications in order to avoid invalidation of a state law. Although the decisions occasionally border on this extreme,[9] the Court usually seeks to ground the presumption of constitutionality in the firmament of data and experience.[10] With these slight qualifications, the "rational basis" test has remained the measure of compatibility between many state laws and the equal protection clause.

For Justice Harlan, this rule of deference to the state legislature describes the outer perimeter of the scope of equal protection. His view is succinctly stated in his dissenting opinion in *Harper v. Virginia Bd. of Elections*:

> The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy. (Citations omitted.) This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members, and until recently it has been followed in all kinds of "equal protection" cases.[11]

The central features of Justice Harlan's theory of equal protection are, then, respect for state prerogative in questions of policy and a corresponding vigilance against judicial imposition of particular economic, social or political doctrines. But his position did not prevail. As the last sentence of the passage implies, a new criterion of validity under the equal protection clause has grown up beside the rational basis test. Under it, a less restrained Court has ranged widely into areas once considered the exclusive dominion of the state legislatures. Although the presumption of constitutionality endures in cases involving economic and social welfare legislation,[12] it has vanished in many other types of cases. The effect of this development on the degree of justification demanded from the states has led Justice Harlan to refer to the new criterion as the "compelling interest doctrine."[13]

In 1942 the Court decided the case of *Skinner v. Oklahoma*[14] and thereby launched the development of a new concept of equal protection which would lead the Court through an era of historic decisions on segregation,[15] reapportionment,[16]

9 In *Goesaert v. Cleary*, 335 U.S. 464 (1948), the Court upheld a Michigan statute which provided for the licensing of bartenders, expressly disqualifying any woman who was not the wife or daughter of the male proprietor of a bar.

10 *See* Dandridge v. Williams, 397 U.S. 471 (1970) (examination of the problems faced by a state in administering federal Aid to Families with Dependent Children program); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (exposition on the evils of the "strike suit").

11 383 U.S. 663, 681-682 (1966).

12 Dandridge v. Williams, 397 U.S. 471, 485 (1970) (*citing* the *Lindsley* opinion).

13 Shapiro v. Thompson, 394 U.S. 618, 658 (1969).

14 316 U.S. 535 (1942).

15 Brown v. Bd. of Educ., 347 U.S. 483 (1954). The Court held that racially segregated educational facilities are "inherently unequal," and thereby rejected the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

16 Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

welfare,[17] poll taxes,[18] and the rights of the criminally accused.[19] Many of those decisions were to be characterized by concern for the plight of an indigent minority in an affluent majoritarian society. The statute challenged in the *Skinner* case was the Oklahoma Criminal Sterilization Act.[20] It provided for the sexual sterilization of persons defined as "habitual criminals." The exemptions included in the statutory definition had the effect of allowing some persons to escape sterilization whose crimes were only technically distinguishable from the crimes of others. Specifically, it was pointed out in the Court's opinion that the statute would implement its drastic policy on those convicted of larceny or larceny by trick but would pass over those convicted of embezzlement. Of course, the substantive difference between the crimes of larceny by trick and embezzlement turns on little more than the sequence of the acts of acquiring possession and forming an intent to steal.[21] But the Court did not attempt to dispute the existence of a rational basis for this statutory classification; instead, it applied a new and more restrictive standard of equal protection. Writing for the majority, Justice Douglas reviewed a line of recent decisions which propounded a restrictive view of the equal protection clause and found them to be inapposite:

> But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here 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. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. . . . We advert to [these matters] merely in emphasis of our view that *strict scrutiny* of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, *invidious discriminations* are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[22]

A brief statement of the new rule is thus: A statute which infringes basic civil rights is subject to strict scrutiny and it will be invalidated if, even inadvertently, it results in an invidious discrimination. In one sense, the rule of the case is merely a statement of its conclusion. The Oklahoma statute seems to have fallen largely under the weight of the fundamental right it restricted, while the opinion of the Court evidences little "scrutiny" of the state's classification and virtually no analysis of the notion of an "invidious discrimination." However unclear its doctrinal premise might have been, though, the action of the Court was unequivocal—it countermanded the legislative judgment of the state of Oklahoma.

The *Skinner* decision was clearly inconsistent with the "rational basis" formula set out in *Lindsley*. In his opinion for the Court, Justice Douglas relied not upon a conclusion that the statute was arbitrary, but upon the fundamental nature of the civil right imperiled.[23] He did not assume the existence of any

17 Shapiro v. Thompson, 394 U.S. 618 (1969).
18 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
19 Griffin v. Illinois, 351 U.S. 12 (1956). Cases cited notes 41-47 *infra*.
20 Law of May 14, 1935, ch. 26 [1935] Okla. Laws 94.
21 316 U.S. at 539.
22 *Id.* at 541 (emphasis added).
23 Compare with point one of the *Lindsley* formula quoted above.

state of facts that "reasonably can be conceived" to justify the classification; instead, he called for "strict scrutiny" of the statute.[24] Most significant of all, perhaps, was the Court's willingness to invalidate a classification which, "unwittingly, or otherwise," resulted in some discrimination. This undermines the former policy of allowing otherwise rational classifications to stand even if "in practice it results in some inequality."[25] Under the new equal protection doctrine, inadvertent or incidental discriminations could be fatal even where the statute is unquestionably valid on its face.[26]

The *Skinner* decision signalled an end to the "hands off" policy of the Court in conflicts between state power and the equal protection clause—at least in certain kinds of cases. The eventual result was a kind of double standard. Under the rubric of the "rational basis" test, traditional restraint is maintained in matters of economics and social welfare.[27] In the area of personal liberties, however, the Court is far less respectful of state prerogative.[28] This philosophical paradox is understandable in light of the Court's experience during an earlier period of judicial activism when socially progressive programs of the state and federal legislatures were obstructed in the name of due process. The rule announced in *Skinner* permitted the Court to exercise vigorous review of state action in the area of personal liberties without reverting to discredited notions of substantive due process.[29]

Two facets of this new equal protection doctrine are especially significant for the present discussion: first, the Court has often employed it to remove statutory distinctions among citizens on the basis of wealth; second, the Court has been particularly solicitous of the citizen's access to the instruments of judicial process in criminal matters. To a great extent, these two aspects of equal protection theory are coextensive, since they often coincide in criminal cases involving indigent defendants. However, the Court has disapproved of wealth discriminations in noncriminal contexts as well. Justice Jackson's noted expression of judicial distaste for wealth distinctions is found in *Edwards v. California,*[30] a case where the indigent was not a criminal defendant:

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24 Compare with points three and four of the *Lindsley* formula.

25 Compare with point two of the *Lindsley* formula.

26 Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956) (fee charged for trial transcript operated to deprive indigents of adequate appellate review).

27 Dandridge v. Williams, 397 U.S. 471, 485 (1970) (upholding Maryland's maximum grant regulation for ADC benefits which the district court had held to be violative of equal protection); Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding state regulation of "debt adjusting" business); Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding state regulation of optical industry); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1087 (1969).

28 As late as 1966, Justice Harlan insisted that there was no such "dual level test." Katzenbach v. Morgan, 384 U.S. 641, 661 (1966) (dissenting opinion). Three years later, however, he admitted that, in cases as early as *Skinner v. Oklahoma,* 316 U.S. 535 (1942), a special standard of equal protection had been applied to state infringements of personal liberty. Shapiro v. Thompson, 394 U.S. 618, 658, 660 (1969) (dissenting opinion).

29 This distrust of the due process clause is still a cognizable factor of the Court's decision-making. In the *Boddie* case itself, Justice Douglas objected strongly to the substantive due process rationale of Justice Harlan's opinion. 401 U.S. at 384-385. *See also* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 734 (1969).

30 314 U.S. 160 (1941). The Court reversed a conviction under a California law which made it a misdemeanor to bring a nonresident indigent into the state. The law was held invalid as an unconstitutional burden on interstate commerce.

> Does "indigence" as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance like race, creed, or color.[31]

Although Justice Jackson spoke only for himself in his concurring opinion, the sentiments he expressed have since gained recurrent endorsement by the majority. In the more recent case of *Harper v. Virginia Bd. of Elections*,[32] the Court struck down a state poll tax as a discrimination on the basis of wealth, violative of the equal protection clause. In his opinion for the Court, Justice Douglas reiterated the position taken by Justice Jackson: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race (citation omitted), are traditionally disfavored."[33]

Justice Harlan dissented emphatically from the *Harper* decision. Insisting that the only requirement of the equal protection clause is that states refrain from arbitrary classifications, he accused the Court of expanding the clause in order to "impose upon America an ideology of unrestrained egalitarianism."[34] For Justice Harlan, the *Harper* decision exhibited the same kind of judicial interference as that condemned by Justice Holmes in his famous dissent to *Lochner v. New York*.[35] He warned that, although the political-economic leanings of the Court are certainly different than in the days of laissez-faire, and although they may in fact reflect popular sentiment, the Court still oversteps its function when it evaluates state laws by the standard of the personal philosophies of the justices.

Although the Court's antipathy for statutory classifications on the basis of wealth is not doctrinally tied to any specific civil liberty, it must be conceded that this attitude has received its fullest expression in those cases which raise the issue of the procedural rights of indigent criminal defendants. The leading case in this category is *Griffin v. Illinois*.[36] There, the plurality opinion held it a violation of due process as well as equal protection to deny appellate review of a criminal conviction solely because of the defendant's inability to pay for a transcript of his trial. The Court acknowledged that states are under no constitutional obligation to establish procedures for review of criminal convictions. However, once the state chooses to provide a method of appeal, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[37] The principle is summarized in a

31 *Id.* at 184, 185 (concurring opinion).
32 383 U.S. 663 (1966).
33 *Id.* at 668.
34 *Id.* at 686.
35 198 U.S. 45, 74 (1905). Justice Holmes dissented from the Court's invalidation of a New York law which set maximum work hours for bakery employees. The majority had found the law to be an arbitrary interference with liberty, contrary to the due process clause of the fourteenth amendment.
36 351 U.S. 12 (1956).
37 *Id.* at 18-19.

sentence which has been quoted so often that it now approaches the status of a legal proverb: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[38]

Justice Harlan's dissent in *Griffin* serves to highlight one of the most significant dimensions of that decision. Arguing that the crucial factor of "state action" was lacking in the facts of the case, he wrote:

> All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.
>
> The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the states an affirmative duty to lift the handicaps flowing from differences in economic circumstances. . . . [T]he real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.[39]

By traditional standards of equal protection, Justice Harlan was clearly correct. Point two of the *Lindsley* formula explicitly stated that an otherwise rational statute does not offend the equal protection clause simply because, in practice, it results in some inequalities. Yet the infirmity of the Illinois law, as the Court saw it, is precisely that it worked an injustice in practice though valid on its face.[40]

Since its decision in 1956, the Court has extended and elaborated upon the principle of *Griffin* to establish an array of rights under the equal protection clause: waiver of filing fees on motion for leave to appeal[41] or petition for a writ of habeas corpus;[42] free counsel on appeal from a criminal conviction;[43] free transcript of *coram nobis* proceedings,[44] habeas corpus proceedings,[45] preliminary hearing,[46] and trial of a misdemeanor charge.[47] The broad principle of this line of cases was enunciated in *Roberts v. LaVallee*:

> Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.[48]

Among these decisions, two are particularly relevant to the *Boddie* case because they involved a barrier to the indigent at the very door of the court, not simply

38 *Id.* at 19.
39 *Id.* at 34-35.
40 *Id.* at 17, n.11.
41 Burns v. Ohio, 360 U.S. 252 (1959).
42 Smith v. Bennett, 365 U.S. 708 (1961).
43 Douglas v. California, 372 U.S. 353 (1963).
44 Lane v. Brown, 372 U.S. 477 (1963).
45 Gardner v. California, 393 U.S. 367 (1969); Long v. District Court, 385 U.S. 192 (1966); Draper v. Washington, 372 U.S. 487 (1963).
46 Roberts v. LaVallee, 389 U.S. 40 (1967).
47 Williams v. Oklahoma City, 395 U.S. 458 (1969).
48 389 U.S. at 42. Justice Harlan, dissenting, stated in part:

> The decisions cited in the majority opinion fall far short of declaring that any document related to the criminal process, no matter how demonstrably trivial its significance, must be supplied free to indigents simply because the State is willing to make it available to others able to pay for it. . . . I would at least undertake to examine the importance of the particular document in question. *Id.* at 43, 44.

The document in question was a transcript of a preliminary hearing.

an economic handicap in the presentation of his case. In *Burns v. Ohio*[49] the Supreme Court of Ohio had refused to entertain a prisoner's motion for leave to appeal his conviction because he had not paid the required filing fee. In the affidavit of poverty which accompanied his motion, the prisoner asserted that he did not have money to pay the fee, a fact conceded by the state.[50] In overruling the Ohio court's "denial"[51] of the motion, the Supreme Court compared the case to *Griffin*:

> The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the Griffin situation. At least in Griffin, the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.[52]

Thus, state insistence upon a price of admission to its courts was deemed an especially outrageous oppression of the indigent. The Court reaffirmed this position in *Smith v. Bennett*[53] when it condemned Iowa's refusal to docket an indigent prisoner's habeas corpus petition without prepayment of the filing fee. "In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws."[54]

The latter two decisions make it easy to understand why the district court considered the primary question in *Boddie* to be one of equal protection.[55] Nor did Justice Brennan overstate the facts when he characterized the equal protection problem of the case as "classic."[56] The plaintiff protested the state's refusal to entertain her divorce action because of her inability to pay an entry fee, a policy which clearly worked a hardship on indigents as a class. The particular deprivation inflicted is exclusion from the courts of the state. Both the classification by wealth and the restriction of access to the courts have repeatedly been branded by the decisions of the Supreme Court as violative of the equal protection clause. In addition, Connecticut's effective denial of the divorce remedy impairs the freedom of indigents to marry and to procreate. That factor brings the case within the sphere of a personal liberty for which the shelter of the equal protection clause has been considered especially appropriate.[57] The most visible distinction between *Boddie* and the precedent equal protection decisions is that, in the former case, equal access is demanded to a *civil* tribunal in order to vindicate rights

49 360 U.S. 252 (1959).
50 *Id.* at 257.
51 A letter from the Clerk of the Supreme Court of Ohio stating that the policy of that court required prepayment of fees before the prisoner's motion could be filed was treated as a final judgment of the Ohio court. *Id.*
52 *Id.* at 258.
53 365 U.S. 708 (1961).
54 *Id.* at 714.
55 286 F. Supp. at 970.
56 401 U.S. at 388.
57 Loving v. Virginia, 388 U.S. 1, 7 (1966); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

asserted in a *civil* action. It seems clear, though, that this distinction is insufficient to remove *Boddie* from the orbit of current notions of equal protection.

Very generally, it may be observed that the fourteenth amendment directs its prohibitions to all the laws of the states, not to their criminal codes alone. Nor has the Court confined its application of the equal protection clause to criminal cases. As noted above, the clause has been invoked against a wide variety of state actions outside the sphere of criminal law.[58] In the narrow field of equal protection decisions favorable to indigents as litigants, it must be conceded that the cases uniformly arise from criminal prosecutions.[59] It is submitted, however, that this is by accident and not by design. The very hypothesis of the *Boddie* case is that the poor cannot afford to enforce their rights in the civil courts. The absence of appellate decisions on the rights of the indigent civil litigant tends, not to refute, but to support that contention. Inasmuch as admittance to the criminal process is compulsory, it is not surprising that the earliest interpretations of the procedural rights of the indigent under the equal protection clause appear in the context of criminal appeals. Despite this circumstance of its birth, the principle which has emerged has broad application. The validity of the Court's pronouncements in these cases of the right of equal access to judicial process is undiminished in the context of a civil action.

In *Smith v. Bennett*,[60] the Court considered the suggestion that prohibitive fees deprive an indigent of equal protection if he is defending against a criminal charge but not if he is pursuing a civil remedy (specifically, the writ of habeas corpus). The Court refused to reach a decision on the basis of labels, emphasizing instead the importance of the right at stake. While declining to speculate as to whether waiver of fees must be granted in "other actions involving civil rights," the Court held that the state could not constitutionally set the habeas corpus remedy beyond the reach of the poor.[61] This response is in full accord with equal protection decisions since the *Skinner* case. The concern of the Court is for the integrity of the right infringed, regardless of the particular legal category in which it might be classified.

It was hinted in the district court's decision of the *Boddie* case that the right of free access to the criminal process is more important than access to civil courts because of the defendant's exposure to the risk of criminal sanctions; and that, therefore, the financial conditions imposed by the state upon access to criminal appeals are subject to strict standards of equal protection, while conditions imposed upon access to the civil courts need only have a "rational basis."[62] Whether this kind of thinking was operative in the Supreme Court's decision too, one can only speculate. The unsoundness of such distinctions, however, has been very adequately exposed in an article by Thomas Willging. In it the author has catalogued the numerous financial barriers which prevent the indigent from enlisting the judicial machinery in defense of his rights. He points out that the civil-criminal dichotomy is often decisive of "such fundamental questions as

58 Notes 15-18 *supra.*
59 Cases cited notes 36, 41-47 *supra.*
60 365 U.S. 708 (1961).
61 *Id.* at 712-713.
62 *See* 286 F. Supp. at 973.

whether there is a right to counsel or to a transcript of the trial."[63] He elaborates on the devastating effects of such illogical differentiations in an illustrative case—a familiar one, no doubt, to inhabitants of the poorer sections of our cities:

> The so called "civil" problems of the poor may involve the defense of a landlord tenant action for possession. Inability to defend this case for failure to post a bond or to obtain counsel will often result in an eviction from the premises—a result which in one sense is more of a deprivation of liberty than a suspended sentence, perhaps even more than incarceration. . . . [W]hen the procedural fairness of the systems is in issue, it appears incongruous that the indigent tenant may be evicted without an opportunity for an impartial hearing, whereas the financial disabilities of the indigent criminal accused are studiously removed.[64]

His concluding paragraph calls for more attention to substance and less concern for formal labels:

> A system of priorities needs to be established which looks beyond the classical distinctions between civil and criminal cases and the equation of liberty with freedom from incarceration. Recognition that eviction, garnishment, and denial of government benefits can have a greater impact on the individual than some of the milder criminal sanctions is long overdue.[65]

The author might have added that exclusion from the divorce courts can also have such an impact.

Despite the criminal law overtones of the previous indigent-access cases, therefore, the *Boddie* problem was fertile ground for the equal protection rationale of such cases as *Burns v. Ohio*[66] and *Smith v. Bennett*.[67] It has the compelling attraction of "the next logical step." There are many familiar components, but with a new twist, an additional dimension. There is much old and just enough new in the *Boddie* question to occasion the kind of judicial advance that characterizes our evolutionary constitutional common law. For some reason, however, the Court chose not to take that next step. In silently declining to decide the case under the equal protection clause, the Court is led by a Justice who has been a prominent dissenter from its equal protection decisions in recent years. It is therefore not inappropriate to examine briefly his view of the role of that clause.

Justice Harlan's most thorough critique of the new equal protection doctrine was precipitated by the Court's decision of *Shapiro v. Thompson*.[68] It was held in that case that one-year residency qualifications in the welfare programs of two states violated the equal protection clause. The major premise of the

63 Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 270 (1968).

64 *Id.* Justice Douglas made a similar observation in dissenting to the Court's denial of *certiorari* in *Williams v. Shaffer*, 385 U.S. 1037, 1039-1041 (1967). The petitioner challenged the constitutionality of security requirements in Georgia's summary eviction statute. In order to arrest eviction and obtain a trial of the issue of possession, the tenant was required to tender a bond as security for the disputed rent and for litigation costs to the landlord should he be successful at trial.

65 Willging, *supra* note 63, at 306.

66 360 U.S. 252 (1959).

67 365 U.S. 708 (1961).

68 394 U.S. 618 (1969).

majority opinion was that any statutory classification which penalizes the exercise of the right to free travel is unconstitutional "unless shown to be necessary to promote a *compelling* governmental interest."[69] The residency requirements, it was found, inhibited interstate travel by potential welfare recipients but did not serve any "compelling" state interest. In a lengthy dissenting opinion, Justice Harlan sounded a familiar theme:

> For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction. This resurgence of the expansive view of "equal protection" carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of "due process" according to traditional concepts . . . .[70]

Justice Harlan summarized his understanding of the "expansive view" of equal protection in a rule which he extracted from the recent cases: ". . . the rule [is] that statutory classifications which either are based upon certain 'suspect' criteria or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest."[71] Because of the historical origins of the fourteenth amendment, he accepted the "suspect criteria" branch of the compelling interest rule only in cases where the challenged statute contains racial classifications.[72] He opposed any extension of that principle, however, and expressly rejected the notion that wealth is a suspect criterion.[73] He characterized the "fundamental interest" branch of the rule as "particularly unfortunate and unnecessary"— unfortunate, because virtually every state law has sufficient impact upon important rights for the Court to abandon the standard "rational basis" test; unnecessary, because the due process clause of the fourteenth amendment offers sufficient protection to any constitutionally founded interests.[74] In short, the only limit placed on the states by the equal protection clause is that their statutory classifications may be neither arbitrary nor racial. Any conflict between state power and individual liberty must be resolved under the due process clause.

Justice Harlan's vision of due process is as uniquely broad as his theory of equal protection is narrow. Its impact is both procedural and substantive, as he indicated in dissenting to the decision of *Poe v. Ullman*:[75]

> Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given

69 *Id.* at 634.
70 *Id.* at 677.
71 *Id.* at 658.
72 *Id.* at 659.
73 *Id.*; Harper v. Virginia Bd. of Elections, 383 U.S. 663, 683 (1966) (dissenting opinion).
74 394 U.S. at 661-662.
75 367 U.S. 497, 539 (1961). The Court dismissed appeals from the dismissal by Connecticut's courts of declaratory judgment suits which challenged that state's prohibition against the use of contraceptive devices.

> even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.[76]

He steadfastly resists attempts to limit the reach of due process by advocates of the "incorporation theory"— an interpretation of the fourteenth amendment which applies the protections of the clause only to those rights which are enumerated in the first eight amendments to the Constitution.[77] In applying his theory of substantive due process, Justice Harlan employs a balancing technique based on the "ordered liberty" concept of *Palko v. Connecticut*.[78] A well-defined implementation of this due process analysis is found in his dissent to the *Shapiro* decision. The opinion is constructed around four questions:

> *First,* what is the constitutional source and nature of the right to travel which is relied upon? *Second,* what is the extent of the interference with that right? *Third,* what governmental interests are served by welfare residence requirements? *Fourth,* how should the balance of the competing considerations be struck?[79]

Justice Harlan's preference for this scheme of substantive due process springs primarily from his belief that it is more preservative of the principles of federalism than is the current concept of equal protection. It is apparent, however, that his concept of due process possesses that virtue only in the service of a Justice of similar restraint; for the formula he proposes is, in itself, no less vague or elastic than the equal protection doctrine he has so long disputed. The similarity of the two concepts in this respect is revealed in a recent concurring opinion of Justice Harlan himself:

> An analysis under due process standards, correctly understood, is, in my view, more conducive to judicial restraint than an approach couched in slogans and ringing phrases, such as "suspect" classification or "invidious" distinctions, or "compelling" state interest, that blur analysis by shifting focus away from the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.[80]

A Justice bent on unrestrained meddling in the affairs of the states would probably find the generalities of this balancing formula no less congenial than the "ringing phrases" of the equal protection doctrine. The potential of the Harlan due process formula for "blurred analysis" has not been lost on Justice

76 *Id.* at 541.
77 *Id.* at 539-545.
78 302 U.S. 319, 325 (1937). See the separate opinions of Justice Harlan in Griswold v. Connecticut, 381 U.S. 479, 500 (1965); Poe v. Ullman, 367 U.S. 497, 542 (1961); Griffin v. Illinois, 351 U.S. 12, 38 (1956).
79 394 U.S. at 663.
80 Williams v. Illinois, 399 U.S. 235, 260 (1970). Held, a denial of equal protection to incarcerate a convicted defendant beyond the statutory maximum period solely because of his inability to pay a fine and court costs.

Douglas. His concurring opinion in *Boddie* takes note of the subtle operation of substantive due process in the majority opinion, whereby divorce and marriage were determined to be fundamental rights within the sanctuary of fourteenth amendment due process. Some pointed remarks are addressed to Justice Harlan:

> Whatever residual element of substantive law the Due Process Clause may still have, it essentially regulates procedure. The Court today puts "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. . . . I do not see the length of the road we must follow if we accept my Brother Harlan's invitation. The question historically has been whether the right claimed is "of the very essence of a scheme of ordered liberty." That makes the test highly subjective and dependent on the idiosyncrasies of individual judges . . . .[81] (Citations omitted.)

In practice, as well as theory, Justice Harlan's due process principle may be more disruptive of the federal-state balance of power than is the equal protection doctrine. The frame of reference in an equal protection decision is the practice and policy of the state with respect to the rights asserted against that state by a particular party. If a prisoner demands appellate review of his conviction, equal protection analysis centers on the question of whether the state has granted a right to such a review to other citizens, not whether the federal Constitution supplies it.[82] The equal protection clause amounts to a bare mandate for evenhanded treatment of citizens by the states. The content of that mandate is a function of the state's own policy in the particular matter. The right to equal protection of the laws is essentially the right to be treated *the same as* every other person similarly situated. As Justice Blackmun points out in concurring with the decision of *Tate v. Short*,[83] the state can nullify any rights gained in an equal protection decision simply by revoking that right for all. By contrast, a substantive due process decision necessarily raises the right claimed to constitutional status. The initial inquiry of Justice Harlan's scheme is whether the right asserted is so fundamental as to be constitutionally protected. If so, the due process clause will prohibit its unreasonable infringement by the state. Equal protection analysis requires no such preliminary finding of a constitutional right. The advantages of this subconstitutional operation of the equal protection clause are illustrated in an intriguing comment on the invalidation of Oklahoma's criminal sterilization law in the *Skinner* case. As to the novel equal protection rationale of that decision, the following hypothesis is offered:

> One suggestion is that the Court was deliberately avoiding the due process issue by deciding the case on a narrower ground. To put the same point another way, the majority, having so recently led the state legislatures out of the wilderness of substantive due process, may have been disinclined to take them back . . . . But another explanation makes the equal protection ground quite persuasive, even compelling. The statute's exemptions

81 401 U.S. at 384-385.
82 Smith v. Bennett, 365 U.S. 708, 713-714 (1961); Griffin v. Illinois, 351 U.S. 12, 18 (1956).
83 401 U.S. 395, 401 (1971).

> were nicely tailored to cover areas of white-collar crime. Imagine sterilizing a man just because he cheats on his taxes, or offers bribes! And that is precisely what the Court, through Justice Douglas, was saying to the Oklahoma legislature: Think it over; imagine how it would be to sterilize those people. If you should decide to do so, then it will be time enough to decide the issue of due process.[84]

In *Boddie,* too, an equal protection decision would have minimized constitutional trauma. As it is, however, the Court has reached its conclusion by effectively declaring a constitutional right to divorce.[85] Since Connecticut already provides the divorce remedy to those who can afford it, an equal protection rationale would simply have required the state to treat its rich and poor citizens equally in that regard. Such an approach would have been more conservative of federalism than the one embodied in Justice Harlan's opinion.

Whatever the doctrinal ramifications of the decision may be, it is doubtful that the Court's adoption of the due process argument was the result of any dramatic conversion to the long-advocated constitutional theories of Justice Harlan.[86] Nor is it likely that the Court has based its decision on the unuttered belief that the case is distinguishable from *Burns, Smith,* and other "access" decisions in the criminal area. The explanation, it is submitted, is to be found in some of the practical considerations of constitutional decision-making.

The problem of the indigent civil litigant is a pervasive one, of which Mrs. Boddie's predicament is only the tip of the iceberg. Her case exposes the particular inequities of the fee system — as Willging calls it, "a blunt instrument of caseload control."[87] It demonstrates the submerging effect of that system on the rights of indigents. The Court has responded to the problem in as ungenerous a manner as possible, hemming in its decision with qualifying references to good faith, state monopoly of remedies, and the sanctity of a "fundamental human relationship."[88] But even if the fee system were abolished altogether, the path of civil litigation would remain an obstacle course for those without ample financial resources. Security requirements, witness fees, discovery costs and attorney fees are only some of the financial barriers to be overcome.[89] The disgracefully high cost of justice has prompted various proposals, ranging from legislative programs at the state level to judicial declaration of a constitutional right to counsel in civil cases.[90] Nearly all of them would necessitate substantial new burdens on the public

84 Karst, *supra* note 29, at 734.

85 Despite his extensive discussion of the procedural ramifications of due process, Justice Harlan's reasoning is grounded in the substantive conclusion that marriage and divorce are fundamental liberties within the shelter of the due process clause. The holding of the case is framed in terms of the procedural right to a hearing, but it is explicitly and emphatically qualified by the need to preserve rights which involve a "fundamental human relationship." 401 U.S. at 383.

86 In a decision handed down the same day as *Boddie,* the Court held that alternative dollars-or-days sentences are a denial of equal protection in the case of a defendant who cannot afford to avoid incarceration by payment of the fine. Tate v. Short, 401 U.S. 395 (1971). Justice Harlan concurred in the result on the ground that the petitioner had been denied due process. *Id.* at 401 (incorporating by reference his concurring opinion in Williams v. Illinois, 399 U.S. 235, 259 (1970)).

87 Willging, *supra* note 63, at 291.

88 401 U.S. at 382-383.

89 Willging, *supra* note 63, at 269-281; Note, *Litigation Costs: The Hidden Barrier to the Indigent,* 56 GEO. L.J. 516 (1968).

90 Note, *The Indigent's Right to Counsel in Civil Cases,* 76 YALE L.J. 545 (1967).

treasury of the states and cities.[91] Even those enthusiasts who believe the public can afford such reforms recognize that they would not gain immediate public acceptance and that any action of the Court in this area would have to be incremental.[92] The institutional limitations of the Court itself have also been urged as grounds for restraint. It is feared that inflexible judicial solutions might preempt more responsive and comprehensive action by the state legislatures.[93] For all these reasons and more, the Court enters the field of indigent-litigant rights with diffidence. It is reluctant to make of the equal protection clause a banner under which indigents may demand that the public underwrite the expense of their civil suits in the same way that it now bears the burden of their defenses in criminal proceedings. An equal protection decision in the *Boddie* case might well have opened the door for a rapid succession of decisions along the well-worn path of analogous decisions in criminal cases. Such a course of events would almost certainly result in further assaults upon the already strained fiscal and judicial resources of state and local governments. By deciding the case on due process grounds, the Court was able to isolate the particular matter of divorce and to reach the correct result. At the same time, it sidestepped the loaded equal protection question: Can a citizen be excluded from the process of civil justice because of his poverty?

Conceivably, the Court could evade that question permanently. It might continue to measure the indigent's demand for access against the due process clause, removing only those barriers which prevent the vindication of fundamental rights of constitutional dimension. But such a course would not easily be held. Traditions of equal protection in the area of personal liberties comprise one of the deepest and strongest currents of contemporary constitutional law. A far more compelling factor, however, is the existence of the poverty crisis in this country. The alleviation of that crisis will depend largely upon the consolidation of power in the hands of the poor. The assurance that their voices will be heard in our courts, that their causes will be fully and vigorously advocated, would be a significant contribution—one which could very fittingly be made by the judiciary.

Michael J. Cunningham

RACIAL DISCRIMINATION—EDUCATIONAL AND TESTING REQUIREMENTS—RELATION TO JOB PERFORMANCE—EDUCATIONAL AND TESTING REQUIREMENTS MUST BE SIGNIFICANTLY RELATED TO THE SUCCESSFUL PERFORMANCE OF THE JOB FOR WHICH APPLICANTS ARE BEING CONSIDERED.—A group of incumbent negro employees brought a class action against their employer, Duke Power Company, alleging unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964[1] by requiring a high school education or the passing of a

91 Willging, *supra* note 63, at 297.
92 Note, *The Indigent's Right to Counsel in Civil Cases, supra* note 90, at 551-559.
93 Boddie v. Connecticut, 286 F. Supp. 968, 974 (D. Conn. 1968). Note, *Discriminations Against the Poor and the Fourteenth Amendment,* 81 HARV. L. REV. 435, 442-443 (1967).

1 42 U.S.C. § 2000e — 2(h) (1964).

standardized general intelligence test as a condition of employment in, or transfer to, jobs because these requirements operated to disqualify them at a substantially higher rate than white applicants and were not shown to be significantly related to successful job performance.

The United States District Court for the Middle District of North Carolina found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Duke's hiring and promotional practices were openly discriminatory against blacks.[2] Duke's Dan River Plant at Draper, North Carolina, was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance and (5) Laboratory and Testing. Blacks were employed only in the Labor department where most of the jobs involved janitorial work and the highest paying jobs paid less than the lowest paying jobs in the other four departments in which only whites were working. The maximum wage paid to a black in the Labor department, including some with almost 20 years seniority, was $1.645 per hour, while the minimum wage paid to any white employee in the plant was $1.875 per hour.[3] Whites in other departments with comparable seniority to blacks in the Labor department were receiving as much as $3.18 per hour.[4] One year after the passage of Title VII, a black laborer, with 13 years of seniority and a high school education, was promoted to a "learner" position in the Coal Handling department and paid $1.95 an hour; whites without high school diplomas and with the same amount of seniority were earning from $3.00 to $3.66 per hour in the same department.[5]

While Duke abandoned its policy of restricting negroes to the Labor department in 1965, completion of high school was made a prerequisite to transfer from Labor to any other department. On July 2, 1965, the company instituted a policy of requiring satisfactory scores on two professionally developed aptitude tests in addition to a high school diploma in order to qualify for placement in all departments except Labor. Those who were employed prior to this policy and possessed high school diplomas were eligible to transfer to those departments from which blacks had been heretofore excluded. In response to a request from white incumbent employees working in the Coal Handling department, the company permitted non-high school graduates to transfer to other departments upon passing two tests—the Wonderlic Personnel Test and the Bennet Mechanical Aptitude Test. Neither test was shown to be specifically job-related. Duke claimed that it adopted the high school requirement and later the alternative test requirements because its "employees in the advanced departments 'did not have an intelligence level high enough to enable them to progress' in the ordinary line of promotion."[6] Duke further argued that the educational and testing requirements had a genuine business purpose and since the requirements were not intended, designed or administered to further racial discrimination, use of such requirements was permitted by § 703 (h) of Title VII.

The district court held that Title VII was intended to be prospective only

2 Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968).
3 Brief for Petitioner at 5, Griggs v. Duke Power Co., 401 U.S. 424 (1971).
4 *Id.*
5 *Id.* at 6.
6 Griggs v. Duke Power Co., 420 F.2d 1225, 1245 (4th Cir. 1970).

and that residual discrimination arising from prior employment practices was insulated from remedial action.[7] The district court also found that Duke had abandoned its previous policy of overt discrimination and in the absence of a discriminatory purpose, the high school education and standardized requirements were permissible under Title VII. The Court of Appeals for the Fourth Circuit affirmed the district court's holding that absent discriminatory intent, the diploma and test requirements were permissible under Title VII but reversed the district court's holding that residual discrimination arising from prior employment practices was insulated from remedial action.[8] Certiorari was sought and granted. In an opinion by Chief Justice Burger, expressing the unanimous view of the court, the judgment of the court of appeals was reversed and it was *held*: Title VII prohibits an employer from requiring a high school diploma or the passing of a standardized general intelligence test as a condition of employment in, or transfer to, jobs when (1) neither standard is shown to be significantly related to successful job performance, (2) both requirements operate to disqualify negroes at a substantially higher rate than white applicants, and (3) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Title VII of the Civil Rights Act of 1964 requires equal employment opportunities for all races and was enacted to achieve equality of employment opportunities and to remove the barriers which operated in the past to give preference to an identifiable group of white employees over other employees. The key provision of Title VII is section 703 (a) (1) which reads as follows:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.[9]

Despite the enactment of Title VII, and numerous state equal employment opportunity laws which prohibit overt policies of racial discrimination, negro employment opportunities in this country continue to be a problem.[10] Perhaps the problem was best stated by former presidential assistant Daniel P. Moynihan in this way:

> The principal measure of progress toward equality will be that of employment. It is the primary source of individual or group identity. In America what you do is what you are: to do nothing is to be nothing: to do little is to be little. The equations are implacable and blunt, and ruthlessly public.
>
> For the negro American it is already, and will continue to be the master problem. It is the measure of white bona fides. It is the measure of negro competence, and also the competence of American society. Most importantly,

7 292 F. Supp. at 247.
8 420 F.2d at 1230, 1232-33.
9 42 U.S.C. § 2000e – 2(a)(1) (1964).
10 *See* Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

> the linkage between problems of employment and the range of social pathology that afflicts the negro community is unmistakable. Employment not only controls the present for the negro American but, in a most profound way, it is creating the future as well.[11]

The problem continues to exist. Overt discrimination has been replaced by the covert; practices or devices which seem fair or neutral in form are discriminatory in effect or operation. In *Griggs* the Supreme Court recognized the possible discriminatory effect of so-called "neutral practices" when it stated: ". . . [P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[12]

According to one estimate 15-20% of the charges filed under Title VII concern a testing issue.[13] The Equal Employment Opportunity Commisssion (EEOC) has reported a substantial increase in the use of employment tests and a marked increase in doubtful testing practices which tend to have discriminatory effects.[14] *Griggs v. Duke Power Company* is the first Title VII race discrimination case to come before the Supreme Court on the merits and the central issue was one of testing. The legal questions presented to the Court, as outlined in the petitioners' brief, were expressed as follows:

> Whether the intentional use of psychological tests and related formal education requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:
>
> (1) the particular tests and standards used exclude negroes at a high rate while having a relatively minor effect in excluding whites, *and*
>
> (2) these tests and standards are not related to the employer's jobs.[15]

Section 703(h) of Title VII provides that it shall not be unlawful:

> . . . [F]or an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[16]

The judicial interpretation of this section was critical to the holding in *Griggs*. The Equal Employment Opportunity Commission, which is charged with the implementation and administration of Title VII, has interpreted Section 703 (h) in the following manner through its Guidelines on Employee Selection Procedures:

> The use of any test which adversely affects hiring, promotion, transfer or any

11 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 252 (1968).
12 401 U.S. at 430.
13 Cooper and Sobol, *supra* note 10, at 1637.
14 Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1(b) (1971) (hereinafter cited as EEOC GUIDELINES).
15 Brief for Petitioner, *supra* note 3, at 2.
16 42 U.S.C. § 2000e-2(h) (1964).

> other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility . . . and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.[17]

It is further provided that:

> Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which compromise or are relevant to the job or jobs for which candidates are being evaluated.[18]

Neither the district court nor the court of appeals agreed with EEOC's testing guidelines. Both courts were of the opinion that Section 703 (h) was designed to insure employers the right to utilize ability tests in hiring and promoting employees as long as they were not used with a discriminatory purpose. Both courts took notice of the Senate debate over section 703 (h) and of Senate reaction to the Illinois Fair Employment Practices Commission ruling regarding the Motorola Company.[19] The Illinois FEPC ruling was generally understood to mean that standardized tests could never be justified even if the needs of business required them. During the Senate debate on Title VII, Senator Tower stated that the Illinois Fair Employment Practices Commission "established a double standard for hiring, one standard to be applied to whites and another to be applied to negroes."[20] Tower was concerned that the same results might be possible under Title VII because "an employer would be denied the means of determining the trainability and competence of a prospective employee," and that the net effect of Title VII would be establishment of a hiring "quota system."[21]

In an attempt to protect employers against the extreme implications of the Illinois FEPC ruling, Senator Tower introduced the following amendment:

> Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if
>
> (1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin.

17 EEOC GUIDELINES, 29 C.F.R. § 1607.3.
18 *Id.* at § 1607.4(c).
19 110 CONG. REC. 9024-42 (1964). The Illinois FEPC examiner ruled that Motorola had to abandon ability tests for job applicants for three reasons: (1) that the test was unfair to culturally deprived and disadvantaged groups; (2) that the questions did not take into account inequalities and differences in environment; and (3) the standards for passing were based on those of advantaged groups.
20 *Id.* at 9025.
21 *Id.* at 13492, 9027.

> (2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.[22]

Senator Tower explained the purpose of his amendment in the following manner:

> I believe that the proponents of the bill realize that this is not an effort to weaken the bill. It is an effort to protect the system whereby employers give general ability and intelligence tests *to determine the trainability of prospective employees.* The amendment arises from my concern about what happened in the Motorola FEPC case . . . (emphasis added).
>
> Let me say, only, in view of the findings in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the Act, operating in pursuance of title VII, might attempt to regulate the use of tests by employers.[23]

Proponents of the Act were of the opinion that the bill as it stood already permitted the use of job-related tests.[24] Senator Case voiced his opposition to the amendment because he believed it would give an employer an absolute right to use ability tests regardless of whether they were good or bad so long as they were professionally developed.[25] The floor leaders emphasized that the *Motorola* ruling had received extensive review in committee hearings and that a similar situation would not occur under Title VII because the EEOC did not have enforcement powers similar to those of the Illinois FEPC.[26] Under Title VII the EEOC may investigate violations of the title and may attempt to eliminate "any such alleged unlawful employment practices by informal methods of conference, conciliation and persuasion."[27] If the EEOC is unable to secure voluntary compliance, the person aggrieved may bring a civil action in the federal district court. For these reasons the Tower amendment was rejected by the Senate.[28]

Senator Tower modified his rejected amendment and proposed that the following language be incorporated in section 703(h):

> . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[29]

It should be noted that the modified amendment makes no mention of using tests to determine or predict whether an individual is suitable or trainable for a

22 *Id.* at 13492.
23 *Id.*
24 *Id.* at 13503-04, see remarks of Senators Case and Humphrey.
25 *Id.* at 13504.
26 *Id.*
27 42 U.S.C. § 2000e-5(a) (1964).
28 110 CONG. REC. 13505 (1964).
29 *Id.* at 13724.

particular job. Such language was used in the original amendment. Senator Tower's aim was to make sure that employers could use job-related tests. The issue of job-related tests was never disputed by proponents of the Act. Senator Tower stated that the new amendment had been cleared with "the Attorney General, the leadership and the proponents of the bill."[30] Senator Humphrey, a sponsor of the bill, replied:

> Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title.[31]

The modified amendment passed on voice vote without debate and is now included in Section 703 (h).[32] The lower courts failed to take notice of the fact that one of the primary reasons the original Tower amendment was defeated was that the Senate did not want to give employers license to use any test as long as it was professionally developed, not that they objected to job-related tests. The district court reasoned that the tests were valid because they were professionally developed and were not adopted with the purpose of discriminating. They further concluded that Duke had a genuine business purpose in adopting the test requirements. In affirming the district court, the court of appeals focused on the business purposes of the tests and the employer's intent. The court of appeals recognized that whites fared far better than blacks on the tests but they found that the company initiated the policy "with no intention to discriminate against Negro employees."[33] They felt that their conclusion was compelled because Duke had abandoned its overt policies of racial discrimination, the requirements were adopted prior to the passage of the Civil Rights Act of 1964, the standards applied to both whites and blacks and the company had a policy of paying the major portion of the expenses incurred by an employee who secured a high school education.[34]

Although the court of appeals concluded that Duke had a genuine business purpose in adopting its educational and test requirements, it failed to realize that a genuine business purpose assumes the presence of a genuine business need. Judge Sobeloff, the only dissenter in the court of appeals, stated that the only supporting evidence which Duke furnished to establish "business need" was Duke's "ipse dixit."[35] He further stated:

> Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks.[36]

The thrust of petitioners' argument before the lower courts was that the ed-

30 *Id.*
31 *Id.*
32 *Id.*
33 420 F.2d at 1232.
34 *Id.* at 1232-33.
35 *Id.* at 1241.
36 *Id.* at 1245-46.

ucational and test requirements must be job-related in order to be valid under section 703(h). They argued for an implementation of the standards adopted by the EEOC in its testing guidelines. The district court found that the tests given by Duke were not job-related but refused to accept the EEOC Guidelines. The court of appeals refused to adopt the EEOC Guidelines because it felt they were "clearly contrary to compelling legislative history."[37] The court felt that Congress adopted the Tower amendment to guard against "a requirement that employers may utilize only those tests which measure the ability and skill required by a specific job of group of jobs."[38]

In the lower courts and in the Supreme Court the petitioners argued that "the focus must be on the impact and effect of practices rather than merely the motivation behind those practices."[39] Their position was augmented by the fact that a number of federal courts have held that Title VII is not narrowly limited to precluding only racially motivated practices but is also directed against those practices which have a discriminatory impact and effect.[40] A majority of federal courts have held that where apparent neutral practices have discriminatory impact or effect, they violate Title VII unless the employer can show that they fulfill a genuine business need. These cases have not been limited to educational and testing procedures but have also involved union seniority rules, arrest records and nepotism.[41]

The Supreme Court, in reversing the court of appeals, held that "good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[42] The Court further stated that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[43] The plaintiff does not have the burden of establishing discriminatory intent but, "Congress has placed on the employer the burden of showing that *any* given requirement must have a manifest relationship to the employment in question"[44] (emphasis added).

In other words, the employer has the burden of proof to establish that his educational standards and ability tests are job-related. If the employer cannot demonstrate that his requirements are job-related, he has failed to establish genuine business necessity and it would appear that the employer will be unable to sustain his burden of proof.

The Court stated that the Act proscribes practices that are fair in form but discriminatory in practice, that "the touchstone is business necessity."[45] Employ-

37 *Id.* at 1234.
38 *Id.* at 1235.
39 Reply Brief for Petitioners at 1, Griggs v. Duke Power Co., 401 U.S. 424 (1971).
40 *See* Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Hicks v. Crown Zellerbach Corporation, 319 F. Supp. 314 (E.D. La. 1970); Arrington v. Bay Transportation Authority, 306 F. Supp. 1355 (D.C. Mass. 1969).
41 *See* United States v. Sheet Metal Workers, Int. Ass'n, Local 36, 416 F.2d 123 (8th Cir. 1969); Quarles v. Philip Morris Inc., 279 F. Supp. 505 (E.D. Va. 1968) for cases involving seniority rules; *see* Gregory v. Litton Systems Inc., 316 F. Supp. 401 (C.D. Cal. 1970) for a case on an arrest record; *see* Local 53 of International Ass'n of Heat & Frost I. & A. Wrkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969) for a case involving nepotism.
42 401 U.S. at 432.
43 *Id.*
44 *Id.*
45 *Id.* at 431.

ment practices that operate to exclude more blacks than whites are prohibited unless the employer can show a genuine business necessity. The Court made it clear that genuine business necessity is proven when the employment practice is shown to be job-related. Obviously, this standard requires more from an employer than self-serving statements that he has a genuine business purpose. The standard of job-relatedness offers a more objective means of determining which practices are discriminatory than attempts to examine employer motivation or intent.

The Court noted that the consequences of whites faring far better on Duke's testing requirements "would appear to be directly traceable to race."[46] In citing *Gaston County v. United States*,[47] the Court pointed out the inferior education which negroes have long received in segregated schools. Perhaps an analogy can be drawn from this to the common law doctrine that an individual intends the foreseeable consequences of his acts.[48] If a test is not properly validated, is it a foreseeable consequence that blacks with inferior educational opportunities will be excluded at a substantially higher rate than whites? It would seem that giving a standardized general intelligence test, which essentially measures white cultural values, to blacks who have received inferior educations will result in the exclusion of a disproportionate number of blacks and other minority groups from the more desirable jobs.[49] When an employer or labor union foresees such consequences, perhaps it can be said that it is acting with a discriminatory intent. Even though the thrust of the Act is directed to consequences rather than motivation, the foreseeable consequences test can be used to establish intent.

Title VII does not command that an individual be hired simply because he is a member of a minority group and the Act does not "guarantee a job to every person regardless of qualifications."[50] The Court stated:

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation.[51]

There are many tests which have an obvious relation to genuine business need in that they are job-related. For example, it is perfectly reasonable for an employer to give a stenographic test to a prospective secretary. Section 703 (h) requires that "any test used must measure the person for the job and not the person in the abstract."[52] In many instances standardized aptitude tests have been

46 *Id.* at 430.
47 395 U.S. 285 (1969).
48 *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 8a, comment b at 15 (1965).
49 *See generally* J. KIRKPATRICK, R. EWEN, R. BARRETT, AND R. KATZELL, TESTING AND FAIR EMPLOYMENT (1968). *See* Cooper and Sobol, *supra* note 10.
50 401 U.S. at 430; *see also* 42 U.S.C. § 2000e-2(j) (1964), which states that nothing in the Act requires an employer to give preferential treatment to any group or race on account of any existing imbalance which may exist with respect to the total number of or percentage of persons of any race employed by the employer.
51 401 U.S. at 431.
52 *Id.* at 436.

used by employers without proper validation to determine if there is any correlation for the job for which the applicant is being examined.[53] This is the type of practice which the Court recognized as discriminatory when it stated:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant.[54]

After examining the legislative history of Section 703(h), the Supreme Court concluded that the EEOC Guidelines reflected the intent of Congress and were "entitled to great deference."[55] An immediate probable effect of the Court's adoption of the EEOC Guidelines will be that employers, labor unions and private and state employment agencies will take a closer look at their testing procedures. These groups must now have available empirical evidence that their standardized tests are valid and are not being used to discriminate. Where there are higher rejection rates for minority applicants than non-minority applicants it must be shown that ". . . the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[56]

EEOC Guidelines further provide that the "general reputation of a test, its author or its publisher or casual reports of test utility" will not be accepted in lieu of evidence of validity.[57] Those using tests must present empirical evidence that the tests are designed to and do measure essential knowledge, skills or behaviors composing the job in question.[58] The Commission urges that the test be administered and scored "under controlled and standardized conditions" and that supervisory rating techniques be carefully developed.[59] The Commission notes that "minorities might obtain unfairly low performance scores" because "they have had less opportunity to learn job skills" and therefore opportunities should be provided "for retesting and reconsideration to earlier 'failure' candidates who have availed themselves of more training or experience."[60]

Although state civil service commissions are exempt from the provisions of Title VII, *Griggs* will probably still have an impact as is evidenced by a recent federal district court ruling. The U.S. District Court for the Southern District of New York enjoined the use of procedures for advancing New York City

53 *See* J. RUSMORE, PSYCHOLOGICAL TEST AND FAIR EMPLOYMENT — A STUDY OF EMPLOYMENT TESTING IN THE SAN FRANCISCO BAY AREA 3-4 (1967); *see also* Note, *Legal Implications of the Use of Standardized Ability Test in Employment and Education*, 68 COLUM. L. REV. 691 (1968); EEOC Guidelines, 29 C.F.R. §§ 1607.1 *et seq.*

54 401 U.S. at 436.

55 *Id.* at 434.

56 EEOC GUIDELINES, 29 C.F.R. § 1607.4(c).

57 *Id.* at § 1607.8(a).

58 *Id.* at § 1607.5(a).

59 *Id.* at § 1607.5(b)(2).

60 *Id.* at § 1607.5(b)(4), § 1607.12.

teachers into supervisory positions.[61] The court held that the equal protection clause bars the New York City public school system from continuing to require, as a prerequisite to obtaining a supervisory position in the system, a passing grade on special competitive examinations that have a *de facto* effect of discriminating against black and Puerto Rican applicants. Apparently taking its lead from *Griggs,* the court stated "a strong showing must be made by the board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given."[62] It can be expected that other plaintiffs, who bring a cause of action under the equal protection clause of the fourteenth amendment against state civil service commissions and employment agencies to litigate the validity of exams, will ask the federal courts to weigh the "job-related" standard of *Griggs* against state employment procedures.

The ramifications of *Griggs* probably go far beyond the issue of testing and educational requirements. If genuine business need is associated with job-relatedness then it would seem the standard may not only apply to educational and testing procedures but also to other devices used by employers in determining job qualifications. Such employment screening devices as arrest records, character references and credit checks may be open to scrutiny. While *Griggs* adopts the standard of job-relatedness as a means of determining educational and test validity and measuring business necessity, lower federal courts have defined the term business necessity as a practice or policy which is essential to the safe and efficient operation of the business.[63] There does not appear to be any inconsistency in these standards. The common denominator in both standards is whether or not the practice has the foreseeable effect of denying applicants an equal opportunity for employment. If so, it is unlawful under Title VII unless the practice is job-related or essential to the safe and efficient operation of the business. An interesting question, not within the scope of this comment, is whether either standard applies to those who have been convicted of criminal offenses and have paid their debt to society. For example, a bank could show that its refusal to hire a *convicted* embezzler was a job-related standard and essential to the safe and efficient operation of its business, but a private sanitation company which refuses to hire a convicted embezzler as a garbage collector might be hard pressed to meet either standard. On the other hand, a bank's exclusionary policy based on *arrests* without convictions, may be subject to challenge.[64]

Undoubtedly there will be federal courts which will be reluctant to extend the job-related standard of *Griggs* beyond educational and testing requirements. There may even be some courts which will attempt to limit the standards to the similar fact situation of *Griggs*. The latter may argue that the holding only applies to those situations in which an employer formerly had a long-standing policy of overt discrimination. However, the Supreme Court decision was based upon statutory construction and not constitutional grounds and therefore should not be limited to the facts. The overall significance of *Griggs* is that Title VII

61 Chance v. Board of Examiners, 40 U.S.L.W. 2071 (S.D.N.Y. July 14, 1971).
62 *Id.* at 2072.
63 *See* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
64 *See* Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403, 404 (C.D. Cal. 1970), in which the court held that the employer's policy of excluding from employment persons who

has not been reduced to dealing only with those situations in which there is a showing of discriminatory intent. As the Court noted, the objective of Congress in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[65]

The decision should be the demise of at least one form of subtle discrimination — the standardized general ability test which does not measure the man for the job. Perhaps the EEOC Guidelines do not provide the definitive answer for the paper-and-pencil-test problem and they may even prove to be burdensome on the employer. But the burden on employers will not be as pervasive as the burden of the continuing exclusion of many blacks and other minorities from the fruits of economic progress. Hopefully, the decision will mean greater opportunities in employment for minority job seekers.

James E. Farrell, Jr.

CONSTITUTIONAL LAW — EQUAL PROTECTION — DENIAL OF ILLEGITIMATE CHILD'S RIGHT OF INHERITANCE FROM FATHER WHO HAD ACKNOWLEDGED BUT NOT LEGITIMATED HEIR DOES NOT CONSTITUTE A VIOLATION OF CHILD'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT.—On March 15, 1962, a baby girl, Rita Nell Vincent, was born to Lou Bertha Patterson (now Lou Bertha Labine) in Calcasieu Parish, Louisiana. The father of the child was Ezra Vincent who had met Mrs. Patterson in 1961 and who, though not contracting a lawful marriage, had moved in with her during the same year. The child's birth certificate identified the father and mother by name.

On May 10, 1962, the parents jointly executed, before a notary, a Louisiana State Board of Health form acknowledging that Ezra Vincent was the natural father of the child.[1] A month later, the child's birth certificate was changed to give the child Mr. Vincent's name. Mr. Vincent and Mrs. Patterson continued to live together and raise the child until Mr. Vincent's intestate death in 1968.

Thereafter, Mrs. Patterson, as guardian of the child, petitioned a Louisiana state court for a declaration asserting that the child was the sole heir. Collateral relatives of the father contended that they were entitled to the whole estate under Louisiana statutes since an illegitimate child who has been acknowledged but not legitimated by the father is deemed a "natural" child and may take the father's property only to the exclusion of the state when there are no ascendants, descendants, collateral relatives, or surviving wife.[2]

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have suffered a number of arrests without convictions, had a foreseeable effect of denying black applicants an equal opportunity for employment and was therefore unlawful under the Civil Rights Act of 1964. The court noted that the decision did not preclude the defendant from complying with national security clearance regulations.

65 401 U.S. at 429-30.

1 LA. CIV. CODE ANN. art. 203 (West 1952). Louisiana case law reveals that this method of acknowledgement is not exclusive as it pertains to the mother. A mother may acknowledge informally if she calls the child her own, and the fact is common knowledge in the community. *See* Goins v. Gates, 93 So. 2d 307 (La. App. 1957).

2 LA. CIV. CODE ANN. art. 919 (West 1952).

The trial court ruled in favor of the collateral relatives, and the Louisiana Court of Appeals, Third Circuit, affirmed.[3] The Supreme Court of Louisiana denied a petition for writ of certiorari.[4] On appeal, the United States Supreme Court, in a 5 to 4 decision, affirmed. *Labine v. Vincent,* 401 U.S. 532 (1971).

The principal ground for contention in *Labine* has traditionally yielded more than its share of jurisprudential conflict. Although the immediate controversy in *Labine* confines itself to the inheritance rights of a bastard child who has not been properly legitimated by her father according to statute, the dispute in its expanded sense more accurately involves the illegitimate's constitutional right of equal protection under the fourteenth amendment.[5]

During recent years, the Supreme Court has fabricated two tests which assist its members in determining whether a certain statutory provision of a particular state is discriminatory or in contravention of individual rights of equal protection and due process. The first of these tests is whether or not the specific provision has a rational basis in relation to the result that the legislature intended.[6] The second test requires proof of invidious discrimination by the legislature in enacting the provision.[7] As applied to *Labine,* the tests are: (1) whether the technicalities of Louisiana's legitimation procedure have a rational basis with regard to the legislature's interest in protecting and insulating family life; and (2) whether adherence to such technicalities in determining inheritance rights amounts to invidious discrimination against children born out of wedlock. These applications will be discussed separately.

Concededly, it is paradoxical that bastards, as a class—the brunt of relentless discrimination down through the ages—could have produced from their ranks some of the most prominent and powerful figures in mankind's history.[8] However, despite this accolade that history chose to bestow on a select few, the *majority* of illegitimates have continuously encountered numerous disabilities and discriminatory measures, some of which have been intentionally imposed.[9] A few

3 Succession of Vincent, 229 So. 2d 449 (La. App. 1969).

4 Succession of Vincent, 255 La. 480, 231 So. 2d 395 (1969).

5 U. S. CONST. amend. XIV provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6 Sproles v. Binford, 286 U.S. 374 (1931); Sage Stores Co. v. Kansas *ex rel.* Mitchell, 323 U.S. 32 (1944); McGowan v. Maryland, 366 U.S. 420 (1960).

7 Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1945); Morey v. Doud, 354 U.S. 457 (1956); Douglas v. California, 372 U.S. 353 (1962).

8 BURTON, THE ANATOMY OF MELANCHOLY, part 2, sec. 3, p. 504:

> The Kings of Denmark fetch their pedigree, as some say, from one Ulfo, that was the son of a bear. Many a worthy man comes out of a poor cottage. Hercules, Romulus, Alexander (by Olympia's confession), Themistocles, Jugurtha, King Arthur, William the Conqueror, Homer, Demosthenes, P. Lombard, . . . Pope Adrian the Fourth etc., bastards; and almost every kingdom, the most ancient families have been at first princes' bastards; their worthiest captains, best wits, greatest scholars, bravest spirits in all our annals.

9 7 C.J., *Bastards* § 39 (1916). Under early English law:

> . . . He [bastard] was not even entitled to a name unless he gained one by reputation. If he succeeded in thus gaining a name, he could purchase property, but only to him and the heirs of his own body. His incapacities extended even to the church for he was incapable of holy orders and could hold no dignity in the church.

See also W. BLACKSTONE, COMMENTARIES 458-460.

framers of legal systems were quick to recognize the need for ameliorating the bastard's position with regard to his inheritance rights. Through their providence and unrelenting efforts, certain laws were established whereby children born out of wedlock could become legitimated by parental compliance with prescribed legal procedures. Before analyzing Louisiana's acknowledgement and legitimation procedures to test their "rational basis," it may prove helpful for background purposes to survey, briefly, the rationale supporting or denying legitimation as a prerequisite to inheritance under Roman and English legal systems.

Roman law initially did not harbor humanitarian sentiments in favor of illegitimate children.[10] Gradually, however, this conservative attitude was transfigured into a reasonably liberal one, the legal pendulum swinging its widest humanitarian arc under the reign of the emperor Justinian. Notable among this emperor's many modifications of legitimacy laws within the Roman Empire was his provision, in the year 542 A.D., for legitimation by official petition of the father. It must be pointed out, however, that under the Justinian provision mere writing or other informal recognition was not sufficient to legitimate an offspring for inheritance purposes.[11]

Other modes provided under Roman law for the legitimation of bastards during this period of liberalization were: (1) by subsequent marriage of the father and mother; (2) *per oblationem curiae,* whereby the father consecrated his child to the use of the state; (3) under the emperor Anastasius, by adoption—this law, however, being abolished by Justin and Justinian (519 A.D.); (4) by last will and testament of the father, confirmed by the emperor, granted upon the father's petition; and (5) by special dispensation of the emperor, granted upon the father's petition.[12] Of these, the two methods which achieved a permanent status in Roman law were presentation to the curia and subsequent marriage.[13] Legitimation by official petition of the father, described previously, presumably never enjoyed a similar status in Roman law because the father's public statement,

10 Comment, *Legitimation under the Roman Law,* 5 TUL. L. REV. 256 (1930). The author points out that the Roman family was agnatic. Descendants through females were excluded. Property of the family was preserved for its agnatic members. Emperor Augustus permitted men to live with a concubine other than a wife, and unless a father officially adopted the illegitimate child, the offspring received *none* of his property upon his intestate death.

11 *Id.* at 265. Novel 117 c.2 of the year 542 A.D. provided in part:

> We have also decided to ordain that if a man has a son or a daughter by a free wife with whom he could legally enter into matrimony, and he states in a *document executed publicly* or with his own hand, subscribed by three witnesses worthy of credit, or in a testament or on the public records that such son or daughter is his, without adding that he or she is his natural child, such children shall be taken to be his legitimate children, and no other proof of legitimacy shall be required from them, but *they shall enjoy all rights granted by our laws to legitimate children.* (Emphasis supplied.)

12 *Id.* at 256.

13 *Id.* at 260-62. In 443 A.D. the emperors Theodosius and Valentinian provided that a man who had sons by a concubine could leave all his property to them by presenting them to the curia of the city, only when a man had no legitimate offspring and had made a gift or testamentary disposition of the property, proclaiming the illegitimate offspring as beneficiary. Justinian, of course, later liberalized the rule by removing the "no legitimate offspring" exception and by giving the child the right to inherit upon his father's intestacy. It should be noted that this first permanent law of legitimation — presentation to the curia — (ordained by Theodosius and Valentinian) was *not* made because of humanitarian impulses, but rather by reason of sordid motives to help the finances of a tottering empire. Illegitimates after presentation to the curia could be assigned duties of tax collection and property distribution.

though prima facie evidence of paternity, was subject to later rebuttal by evidence to the contrary.[14]

Contrasting the pertinent English law with the Roman laws just described, a dichotomy of sociological values immediately becomes apparent. Under common law, the rights of the bastard were severely restricted. He was treated as a *nullius filius* and, as such, was incapable of inheriting from either the putative father or mother or of having heirs, save those of his own body.[15] He could acquire nothing except by his own efforts.[16] The preservation by the medieval barons of the debaucherous shroud traditionally enfolding the illegitimate was tantamount to their manipulation and control of title to and succession of real property. It is not surprising that this attempt by the barons to perpetuate discrimination against illegitimates for selfish motives perennially brought stern criticism from the ecclesiastical hierarchy who openly advocated legitimation by subsequent intermarriage of the parents.[17]

The only exception to the common law rule denying the bastard inheritance rights — and, indeed, rarely permitted — was legitimation by act of Parliament, as was done in the case of John of Gaunt's bastard children, by a statute of Richard the Second.[18] This extremely conservative policy toward legitimation and the extension of inheritance rights was retained and enforced in England until the passage by Parliament of the Legitimacy Act of 1926 which provided for legitimation by subsequent marriage of parents[19] and allowed the legitimated child to inherit from his intestate father.[20] Evidence of subsequent parliamentary liberalization of bastardy laws to any significant degree has not been noted.

Most jurisdictions in the United States have statutes mitigating in a degree the rigors of the common law and conferring rights which that law formerly denied, and while the statutes show a considerable variance in their provisions, they are all in line with a more liberal and humanitarian public policy than

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The second legitimation procedure—subsequent intermarriage—made permanent under Emperor Augustus, was first introduced by Constantine and was based upon the selfish motive of legitimating one of his bastard sons. Justinian, in 529 A.D., required that such marriage must not otherwise be prohibited by law, and later, in 538 A.D., he provided for legitimation of children by imperial rescript where marriage was not possible or desirable.

14 *Id.* at 265. For a further discussion of legitimation by public statement in Roman law, *see* Gaines v. Hennen, 24 How. 553, 601 (1860).

15 2 PRITCHARD, LAW OF WILLS AND ADMINISTRATION OF ESTATES § 779, p. 315 (3d ed., Anderson, 1955).

16 W. BLACKSTONE, COMMENTARIES 457-58. *See also* Pfeifer v. Wright, 41 F.2d 464 (10th Cir. 1930).

17 Helmholz, *Bastardy Litigation in Medieval England,* 13 AM. J. LEGAL HIST. 360 (1969):

> Of the areas of conflict between Church and State in Medieval England, not many present the apparent clarity of opposition that bastardy litigation does. Maitland described it as a "collision between claims" of secular and ecclesiastical jurisdictions. The most famous instance of this collision was . . . the story of the Council of Merton. The bishops, anxious to bring English law into accord with what they conceived to be clear dictates of religion, reason, and civil law, urged upon the baronage the proposition that children born before the marriage of their parents should be counted as legitimate at English law. The barons refused. . . . No dispute between regnum and sacerdotium in the Middle Ages existed in a vacuum, dependent on rhetoric or on theory alone, and this dispute was, if anything, more concrete than most. It turned around a precise legal issue, namely *inheritance of real property.* (Emphasis supplied.)

18 W. BLACKSTONE, COMMENTARIES 459-60.

19 2 HALSBURY'S STATUTES OF ENGLAND § 1, p. 493 (2d ed. 1948).

20 *Id.,* § 3 at 495.

that of the common law, and to some extent, adopt rules of Roman law.[21] Louisiana, while rejecting any vestige of common law conservatism in this area, adopted a curious combination of Roman and French law to regulate legitimation and inheritance.[22] Although civil law, as adopted, had many advantages over common law, its inherent disadvantage was the public's unquestioning reliance on ancient precepts and dictates.[23] At the surface it appears that this inherent element of indisputability in Louisiana law and the legislature's obsession with preserving family relations have combined, incestuously, to produce a judicial "Loch Ness," recently uncovered in *Labine*.

Louisiana is the only state which discriminates between legitimate and illegitimate offspring with respect to inheritance from the mother.[24] Generally, under Louisiana law, an illegitimate may inherit from his mother only when he has been acknowledged by her, is a "natural child" (having been duly acknowledged by the father), and has no legal sibling or other relations that are legal descendants of the mother.[25] Although this particular statutory provision was not under fire in the *Labine* case, it is replete with pompous conservatism and dogged adherence to the "good old law."

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21 10 C.J.S., *Bastards* § 24a (1938).

22 And this was accomplished despite the fact that *Spanish* law had been the principal law of the territory for many years! Brown, *Legal Systems in Conflict, Orleans Territory, 1804-1812,* 1 AM. J. LEGAL HIST. 35, 53 (1957). At 35, the author explains:

> When Spain in 1769 occupied the Province of Louisiana, originally settled by France, Spanish law was put into force. In 1800, Spain agreed to retrocede the province to France, but formal transfer was delayed until November, 1803. In the meantime, France had sold the area to the U.S. On Dec. 20, 1803, France transferred the province to the United States. During the three weeks of French occupation, the Spanish laws had remained substantially untouched. At the date of transfer to the United States, the laws in force in both upper and lower Louisiana were those of Spain.

In 1808, James Brown and Moreau Lislet were appointed to prepare, jointly, a civil code for the recently purchased territory. At 53, the author continues:

> The obvious implication was that the two jurisconsults would use Spanish law as the basis for the proposed code. However, when the code was presented to the legislature, . . . it was based not on the Spanish law, but on the new French code, the Code Napoleon. To date, no fully satisfactory explanation for this fact has been offered.

23 *Id.* at 51. The cataclysmic character of such reliance was unwittingly magnified in a manifesto addressed to the people of the Territory, signed by certain members of the legislative council and House of Representatives. The document, published in a New Orleans newspaper prior to the submission of Brown and Lislet's code recommendations, declared in part:

> . . . There is no doubt that it is as a consequence of this . . . [realistic] policy that Congress desired to grant to this Territory the privilege of keeping its old laws or of changing or modifying them according as its legislature might find it necessary. Now, everyone knows that those *old laws* are *nothing more but the civil or Roman law* modified by the laws of the government under which this region existed before the latter's cession to the United States. If the title of the books in which those laws are contained is unknown, *if those titles appear barbarous or ridiculous,* those very circumstances are the *most to their credit* because they prove, *by the ignorance* of those who have obeyed them until now without knowing that they were doing so, how *great is their mildness and their wisdom* and how *small* is the *number of disadvantages* resulting from their execution. (Emphasis supplied.)

24 Gray and Rudovsky, *Court Acknowledges the Illegitimate,* 118 U. PA. L. REV. 1, 24 (1969).

25 LA. CIV. CODE ANN. art. 918 (West 1952) provides:

> Natural children are called to the legal succession of their natural mother when they have been duly acknowledged by her, if she has left no lawful children or descendants, to the exclusion of her father and mother and other ascendants or collaterals of lawful kindred.

See also Harris v. Henderson Land, Timber & Investment Co., 9 La. App. 129, 119 So. 494 (1929). For Louisiana case law *exception, see* note 1, *supra.*

Considering the restrictions on inheritance from the mother, it is not surprising that the provisions of the Louisiana Code pertaining to inheritance by the illegitimate from his *father,* suffer equally from burdensome red tape. Under Louisiana law an illegitimate child may inherit from the father as a legitimate child if his parents subsequently intermarry.[26] Furthermore, the law provides for legitimation by notarial act, but tempers the liberal Justinian device, formerly discussed, with two exceptions, the presence of either presenting a bar to legitimation, thus depriving the child of inheritance rights.[27] Whether legitimation by notarial act places the illegitimate on equal footing with the legitimate with respect to inheritance rights is not made clear in the code itself, but at least one Louisiana case has decided the issue in the affirmative.[28] Mere acknowledgement by notarial act[29] of the father confers upon the illegitimate the appellation of "natural child" and permits inheritance by him from his father only to the exclusion of the state.[30] Thus, it is clearly plausible that by strict judicial application of these laws to the facts of a particular case, a result might be reached which is grossly inequitable and which is diametrically opposed to the result intended by the party attempting to comply with the Code provisions.

For example, assume that a father, acting in good faith, desires to acknowledge his illegitimate daughter with the intent to grant inheritance rights to her. If he acknowledges her under Art. 203 of the Code without knowledge of the requirement for a statement of intention to legitimate (under Art. 200), his intention to confer inheritance rights upon his daughter in the event he dies intestate will be summarily disregarded by the court. This, ironically—and indeed, unfortunately—was the state of affairs which precipitated the controversy in *Labine.*[31]

The original question of rational basis for classification now becomes even more significant, and the Code provisions become decidedly more suspect. Some states, including Louisiana, insist that a rational basis exists for providing a precise and extremely technical legitimation procedure which dampens the illegitimate's inheritance rights in view of their ever-present responsibility to: (1) encourage marriage, (2) discourage birth of illegitimate children, and (3) satisfy the powerful and overriding need to be able to determine, promptly, final and definite ownership of property.[32] The efficacy of such systems in achieving these stated

26 *Id.* at art. 199 provides: "Children legitimated by a subsequent marriage have the same rights as if they were born in marriage."

27 *Id.* at art. 200.

28 Davenport v. Davenport, 116 La. 1009, 41 So. 240 (1906).

29 An act not including a statement of father's intent to legitimate — *see* LA. CIV. CODE ANN., art. 203 (West 1952).

30 *Id.* at art. 202 provides:

> Illegitimate children who have been acknowledged by their father are called natural children. Those who have not been acknowledged by their father, or whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards.

Id. at art. 919 provides:

> Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the state . . . .

31 Justice Brennan, in passing, makes a similar observation. Labine v. Vincent, 401 U.S. 532 (1971).

32 Note, *Illegitimacy: Equal Protection and How to Enjoy It,* 4 GA. L. REV. 383, 396 (1970).

purposes has not gone unquestioned,[33] and in Louisiana, particularly, the rational basis of laws, which frustrate the intent of the parties whom they are designed to protect and complicate the means by which a legally insulated party can acquire full legal capacity, becomes obscure.

A brief analysis of the legitimation requirements of the other forty-nine states reveals that Louisiana is far behind the majority in eliminating encumbrances associated with the process.

LEGITIMATION REQUIREMENTS AND HEIRSHIP RIGHTS IN THE UNITED STATES[34]

STATE	*HEIR OF MOTHER*	*HEIR OF FATHER*			*HEIR OF KINDRED*
		By Legitimation	By Acknowledgement	No Formalities	
Alabama	X				
Alaska	X	M			
Arizona	X			X	X (m or f)
Arkansas	X				
California	X		WW		X (m,f if leg.)
Colorado	X	M	or WW or C		
Connecticut	X	M	and WW		
Delaware	X				
Florida	X		WW		X (m,f if leg.)

33 Traditional denial of legal equality to illegitimate children has done little to discourage their conception. Note, *Constitutional Law — Discrimination Based Upon Illegitimacy as a Denial of Equal Protection,* 43 TUL. L. REV. 383, 386 (1969). The author, in order to support this contention, offers the following statistics extracted from Campbell and Cowlig, *The Incidence of Illegitimacy in the United States,* 5 WELFARE IN REVIEW 1, 4 (No. 5, May 1967):

	1940	1957	1965
No. of illegitimate births.	89,500	201,700	291,200
Illegitimate births per 1,000 unmarried women, 15-44 years old. (Illegitimacy rate.)	7.1	20.9	23.4
Illegitimate births per 1,000 births. (Illegitimacy ratio.)	37.9	47.4	77.4

In Louisiana alone, there were 9,567 illegitimate births in 1964. (LOUISIANA STATE BOARD OF HEALTH, REPORT OF THE DIVISION OF PUBLIC HEALTH 21 (1964)).

34 This chart has been prepared from information extracted from U.S. VETERANS ADMINISTRATION, DIGEST OF INHERITANCE LAWS (VA Pamphlet 20-66-1) 1966 (supplemented through 1969) and Krause, *Bringing the Bastard into the Great Society, A Proposed Uniform Act on Legitimacy,* 44 TEX. L. REV. 829 (1966). The chart reflects *minimum* requirements — *e.g.,* if notarial act will legitimate, intermarriage (if not indicated) will do likewise. The symbols used on this chart represent the following:

X — general indicator.
M — marriage, or more precisely intermarriage of child's parents.
P — paternity suit.
A — adoption.
WW — witnessed writing.
C — conduct of the father, witnessed by community.
m — mother's side.
f — father's side.

Georgia	X				
Hawaii	X	M			
Idaho	X		WW		X (m,upon marr.)
Illinois	X	M	and WW		
Indiana	X	M or P	and WW		
Iowa	X	P	or WW		
Kansas	X	P	or WW or C		
Kentucky	X	M	and WW		X (m)
Maine	X	M or A	or WW		X (m or f if leg.)
Maryland	X				
Massachusetts	X	M	and WW		X (m)
Michigan	X				X (m)
Minnesota	X		WW		
Mississippi	X	M	and WW		
Missouri	X	M			
Montana	X		WW		X (m)
Nebraska	X		WW		X (m)
Nevada	X	M	or WW		
New Hampshire	X				
New Jersey	X	M			X (m)
New Mexico	X	M	or WW		
New York	X	P			X (m)
North Carolina	X	M			X (m)
North Dakota	X			X	
Ohio	X	M	and WW		
Oklahoma	X	A	or WW		
Oregon	X			X	
Pennsylvania	X	M			
Rhode Island	X	M	and WW		
South Carolina	X				
South Dakota	X		WW		
Tennessee	X	P			
Texas	X	M			X (m)
Utah	X	A	or WW		
Vermont	X				
Virginia	X	M	or WW		
Washington	X	M	or WW		
West Virginia	X	M			
Wisconsin	X	P	or WW		
Wyoming	X	M	and WW		

The chart, above, illustrates that at least nineteen states currently have a statutory provision whereby a bastard may be legitimated merely by the father's *acknowledgement* of the child in a notarial act. In other words, these states do not have separate procedures for acknowledgement and legitimation, as does Louisiana. Furthermore, all states (exclusive of Louisiana) allow the illegitimate to inherit from his mother without exception. Some states (Arizona, North Dakota, and Oregon) have gone so far as to eliminate all *formal* requirements for acknowledgement and legitimation, but in contrast, as the chart indicates, the majority of states have been cautious in extending the illegitimate's rights of heirship to paternal or even maternal kindred.

The trend, indeed, appears to be in the direction of liberalizing legitimation procedures—a renaissance of the Justinian philosophy which has lain dormant for more than fourteen hundred years. In a proposed uniform act on legitimacy, a noted crusader[35] concerned with the removal of the bastard's sociological shackles has recommended that all states adopt a provision whereby legitimation may be achieved by an act of the father in filing with the court a statement indicating acknowledgement and child's right of inheritance. The author has further proposed a procedure which would allow such act of legitimation to be kept within the confidence of the court until the father's death.[36] Uniform acts approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association have not gone quite this far in establishing uniform legitimation procedures, apparently due to irreconcilable points of view held by the states.[37]

Notwithstanding the apparent reluctance of some states to adopt uniform and liberalized legitimation procedures, another author has suggested that each

35 Harry D. Krause, Associate Professor of Law, University of Illinois, has written several articles on illegitimacy. *See: Bastard Finds His Father,* 3 FAM. L. Q. 100 (1969); *Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on Equal Protection and Paternity,* 36 U. CHI. L. REV. 338 (1969); *Non-marital Child — New Conception for the Law of Unlawfulness,* 1 FAM. L. Q. 1 (1967); *Bringing the Bastard into the Great Society, A Proposed Uniform Act on Legitimacy, supra* note 34; and *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477 (1967).

36 Sections 8a and 8b of the proposed uniform act in Krause, *Bringing the Bastard into the Great Society, supra* note 34, at 835, are as follows:

> § 8a If the father files a statement with the [ ] court identifying his illegitimate child and acknowledging his right to inherit from him, the child shall inherit from his father as if legitimate. The statement shall be executed in accordance with formalities provided by the laws of this state for the execution of wills, and shall not be revocable unless the [ ] court, upon the father's application, determines the acknowledgement to have been based upon a mistake of fact as to paternity. The father shall not inherit from or through the child by reason of such acknowledgement.
>
> § 8b Upon the father's request, or when in the interest of the child or the mother, the court considers such action desirable, the court shall order the father's acknowledgement of his child's right to inherit from him to be kept in confidence until the father's death, the child or person acting on behalf of the child being informed of the child's right to inherit from his father at that time.

37 9B U.L.A. 522 (1966). The Commissioners' prefatory note states:

> The Uniform Illegitimacy Act was promulgated by the Conference in 1922, but has been adopted in only seven states and in those it was deemed desirable *to make a number of amendments.*
>
> The Uniform Paternity Act . . . was originally drafted as a revision of the Uniform Illegitimacy Act, but experience with it at two annual conferences demonstrated that on some of the collateral matters included, there were apparently *irreconcilable points of view.* . . . Excursions into collateral problems, such as legitimation, effect of adoption, and rights of inheritance have been left to other legislation. (Emphasis supplied.)

state should make an *affirmative* effort to establish paternity early in the child's life by requiring the director of welfare, or any officer issuing a birth certificate, to initiate a paternity action. He has envisaged further that this same duty should be imposed upon doctors, hospital administrators, and welfare workers who have knowledge or suspicions of illegitimacy.[38] Professor Krause contends, however, that such affirmative steps would subsequently open a "Pandora's box of difficult problems of value judgment, prejudice, and preference," and that for the present time, it may be advisable to limit the illegitimate's claim to rightful paternity to the degree of equality that *neutral* laws can furnish.[39]

Reflecting cursorily upon the previous analysis of legitimation laws, it is evident, superficially at least, that the laws of Louisiana in this area compare with earlier ones of Rome[40] and England[41] in failing to have a rational basis in relation to the purpose for which they were designed.[42] Considered in a vacuum, however, a statute which appears to have no rational basis does not become constitutionally suspect until, through its application, it is alleged to be arbitrary or invidiously discriminatory. This topic for consideration provides the fuel which will be used to propel the remaining discussion.

Corporations,[43] individuals,[44] and at last children[45] have been recognized in the past by federal courts as being entitled to equal protection rights under the fourteenth amendment. Furthermore, where a denial of some "fundamental human right" is found, the United States Supreme Court has held that strict scrutiny of a classification is essential.[46] In 1968, apparently receptive to this "fundamental human right" philosophy of *Skinner,* the Supreme Court extended equal protection of the laws to illegitimate children by a judgment in their favor in *Levy v. Louisiana*[47] and in a companion case, *Glona v. American Guaranty and Liability Insurance Company.*[48] It is notable that before 1968, there was no Supreme Court case considering the rights of the illegitimate from the standpoint of equal protection.[49]

In *Levy,* the Court declared the Louisiana Wrongful Death Act, under which an illegitimate child had been denied recovery for the death of his mother solely because of illegitimacy, to be unconstitutional as a violation of the equal protection clause.[50] Specifically, it was held that since the illegitimate status of the children had no *rational* relation to the nature of the wrong allegedly inflicted on their mother by the defendants, and since it was *invidious to discriminate* against the children when no action, conduct, or demeanor of theirs was possibly relevant to the harm done to their mother, it would be in violation of the equal

38 Note, *Illegitimacy: Equal Protection and How to Enjoy It, supra* note 32, at 398.
39 Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana . . ., supra* note 35, at 361.
40 See text accompanying note 13, *supra.*
41 See text accompanying note 17, *supra.*
42 See text accompanying note 33, *supra.*
43 Santa Clara County v. Southern P. R. Co., 118 U.S. 394 (1885).
44 Shelley v. Kraemer, 334 U.S. 1 (1947).
45 Knight v. Board of Ed., City of N. Y., 48 F.R.D. 108 (1969).
46 Skinner v. Okla., 316 U.S. 535, 541 (1942).
47 Levy v. Louisiana, 391 U.S. 68 (1968).
48 Glona v. American Guaranty and Liability Insurance Co., 391 U.S. 73 (1968).
49 Krause, *Equal Protection for the Illegitimate, supra* note 35, at 483.
50 Levy, *supra* note 47.

protection clause to deny them recovery.[51] *Glona* held that where a child is killed in an automobile accident, it is a denial of equal protection to withhold relief to the mother under the Louisiana Wrongful Death Act merely because her decedent child was an illegitimate.[52]

Despite the progressive attitude displayed by the Supreme Court in *Levy* and *Glona* toward erasing discrimination between legitimates and illegitimates in state laws, the Court, in *Labine,* refused to adopt a similar rationale in delineating the illegitimate's inheritance rights. It attempted to distinguish *Labine* from the other two cases by pointing out that Louisiana's legitimacy laws had not created an *insurmountable barrier* to the illegitimate child's recovery as was the case in *Levy,* and thus the statute was not invidiously discriminatory.[53] This reasoning appears unquestionably shallow in view of the fact that under Louisiana law, the inheritance rights of the illegitimate child are suspended perilously at the mercy of forces beyond his control and are likely to come to fruition only through the acts of a person or persons with whom he may never have an opportunity to communicate. In a sense, the destiny of his inheritance rights is completely dependent upon the occurrence of a contingency, the nonoccurrence of which precludes his enjoyment of rights on a par with those of his legitimate peers. Couched in this verbal framework, the suggestion that Louisiana's legitimacy laws are discriminatory in character and that they possess a certain propensity toward the creation of insurmountable barriers to inheritance by illegitimates increases in its credibility. But, as Justice Brennan commented in the *Labine* dissent, the "insurmountable barrier" test is not exclusive, and any discrimination which falls short should not be summarily disregarded.[54] Thus, in his opinion, the majority of the Court failed in their judicial duties when they ceased to investigate the constitutionality of Louisiana's legitimacy laws after they became convinced that those laws provided no absolute barrier in relation to the illegitimate's rights. Under Justice Brennan's approach, the question is apparently reducible to a broad consideration of whether state legislation may constitutionally discriminate between children on the basis of their birth in or out of wedlock.[55]

The opponents on either side of this controversy have marshalled themselves into two distinct phalanxes of thought—one professing biology to be controlling in inheritance rights;[56] the other demanding legality (parental compliance with strict statutory procedures) to be the principal criterion.[57] Of the two, inheritance

51 *Id.*
52 Glona, *supra* note 48.
53 Labine, *supra* note 31, at 294.
54 *Id.*, at 300, citing among others: Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Educ., 347 U.S. 483 (1954).
55 Krause, *Equal Protection for the Illegitimate, supra* note 35, at 483.
56 Labine, *supra* note 53, at 301. Justice Brennan comments:

> Certainly there is no biological basis for the state's distinction. Mr. Vincent's illegitimate daughter is related to him biologically in exactly the same way as a legitimate child would have been. Indeed, it is the identity of interest "in the biological and in the spiritual sense," . . . and the identical "intimate, familial relationship" between both the legitimate and the illegitimate child, and their father, which is the very basis of the contention that the two must be treated alike.

See also Levy, *supra* note 47, at 439.
57 Glona, *supra* note 48, at 446. Justice Harlan states:

> . . . If it be conceded . . . that the state has power to provide that people who choose to live together should go through the formalities of marriage and in default, that people who bear children should acknowledge them, it is logical to enforce these

predicated upon biology appears to stand on firmer ground, since it is *that* philosophy which considers the matter from the viewpoint of the *child* who has alleged the discrimination, and not from the standpoint of the *state* which has for the most part imposed it.[58]

In retrospect, the *Labine* case, for all practical purposes, represents an abrupt judicial move on precariously thin ice, and its conclusion is indeed tainted with hypocrisy in view of the Court's current disposition to brandish, in the view of all, the badge of civil rights. The Louisiana legitimacy laws appear to discriminate invidiously without a national basis. Even if Rita Nell Vincent is the only illegitimate child ever to be deprived of her constitutional rights because of archaic statutes which exacerbate the conferral of those rights, we, as citizens, should not feel consoled, nor should the Court consider itself absolved.[59] It is time for the Supreme Court to recognize the plight of the illegitimate and to strike down laws which encroach upon his basic freedoms. It is time for the Supreme Court to rekindle the liberal spirit of *Levy* and *Glona* and to accept the fact that "there are *no* illegitimate children . . . only illegitimate parents."[60]

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requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as biology of those relationships are present. Moreover and for many of the same reasons, why a state is empowered to require formalities in the first place is that a state may choose to simplify a particular proceeding by reliance on formal papers rather than a contest of proof. That suits for wrongful death actions to determine the heir of intestates and the like, must be a constitutional matter, deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition.

58 Krause, *Equal Protection for the Illegitimate, supra* note 35, at 484.

59 It is doubtful that Rita Nell Vincent's experience with legitimacy laws will not be shared by other illegitimate children in the future. Statistics show that one in sixteen children is born a bastard. U. S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S., 47, 51 (1965).

60 Judge Leon R. Yankwich as quoted in *Zipkin v. Mozon,* 1928, which was decided by him in the Superior Court, Los Angeles County, California. Judge Yankwich was later a federal district judge.