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On The Warren Court and Judicial Review*

JESSE H. CHOPER**

I. Introduction

Consensus among its "constituents" has not been one of the identifiable products of the United States Supreme Court since the October Term 1953. If there is any non-controversial statement that may be voiced about the Supreme Court under the stewardship of Chief Justice Earl Warren it is that the Court has not been wanting in either critics or criticism.

It is not my intention to respond to the massive volume of uninformed, unthinking, unbridled, largely undocumented, and generally unsound carping and baiting that has been placed, mainly by irresponsible and legally ignorant attackers, under the heading of "criticism." "Venom," I think, would be a singularly more appropriate term for this commentary. As illustrations, one might point to the statement of the late Senator Harry Byrd of Virginia branding the present Chief Justice as one "who has done and is doing more to destroy the form of government we have in this country than has any Chief Justice in the history of the United States,"1 or the charge of the then president of the National Association of District Attorneys that the Supreme Court is "destroying the nation."2

Not only am I unwilling to dignify such intemperate tirades by responding to them but, to you who are legally literate, I deem it wholly unnecessary to do so. It is enough to say that such vindictive assaults have not been confined

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** Professor of Law, University of California, Berkeley. B.S., Wilkes, 1957; LL.B., University of Pennsylvania, 1960; D. Hu. L. (hon.), Wilkes, 1967. The author wishes to express appreciation to Professors Yale Kamisar, Frank Goodman, and Philip Johnson for their helpful comments on a draft of this paper.
1. 103 CONG. REc. 10675 (1957). See many of the columns by Mr. David Lawrence in the U.S. News & World Rep., e.g., Mar. 7, 1958, at 108; Nov. 8, 1957, at 136; May 25, 1964, at 120.
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5. See Kurland, The Supreme Court Today, 3 Trial, April-May 1967, at 12.

III. The Vinson and Stone Courts

But what of the past? Are Supreme Court judgments that overrule precedents no longer considered worthy and sound or that have highly significant national impact a novel exercise of the Warren Court?

Examination of the work of the Stone Court and of the Vinson Court, of the twelve years preceding the appointment of Chief Justice Warren, reveals that a charge similar to that of Professor Kurland's might well have also been propounded in 1953. Again, mention of only a handful of decisions indicates that those Supreme Courts were not so far behind the Warren Court as some would have us believe in such matters as innovation in the political and legal arena and in reconsideration of precedent.

In *Dennis v. United States,*18 described at the time as “by all odds the most important and far-reaching of the recent civil rights cases,”19 the Vinson Court clearly reformulated, if not eviscerated,20 the Holmes-Brandeis “clear and present danger” test21 which had seemed to have evolved as the governing rule for decision.22 In *Korematsu v. United States,*23 the Stone Court upheld the Japanese exclusion order, a decision then characterized as “the worst blow our liberties have sustained in many years.”24 In *Shelley v. Kraemer,*25 the Vinson Court announced an enigmatic interpretation of the fourteenth amendment’s “state action” element, potentially imposing con-

institutional review by the courts of virtually all commonplace transactions,\(^26\) and whose meaning and scope still baffles many of those who deal with the case.\(^27\) In *United States v. South-Eastern Underwriters Association*,\(^28\) the Stone Court negated a 75-year precedent\(^29\) when it held that insurance was commerce within the purview of congressional regulation. In *Illinois ex rel. McCollum v. Board of Education*,\(^30\) the Vinson Court, then scorned as "eager crusaders,"\(^31\) for the first time, 80 years after the adoption of the fourteenth amendment, held that the first amendment's "establishment clause" invalidated a state-sponsored program, in this case, released time for religious instruction, prompting Mr. Justice Jackson to charge that the Court had become "a super board of education for every school district in the nation."\(^32\) In *Smith v. Allwright*,\(^33\) the Stone Court ruled that a primary election, held not by the state but by a political party, was subject to the prohibitions of the fifteenth amendment, overruling a decision\(^34\) not yet ten years old, and provoking Mr. Justice Roberts to charge that the Court, having overruled three cases that term, had become "the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."\(^35\) And the examples could be multiplied.

The point, of course, is not that the Warren Court has faithfully adhered to the dictates of its predecessors, or that it has gingerly avoided moving into areas of political and legal controversy; rather, it is that the charges brought against the Warren Court for ignoring precedent, advancing novel doctrine, and sponsoring broad redistributions of power in the federal system are not unlike charges that could have been made—and have been made—against every Supreme Court in the nation's history.

We have briefly examined the twelve-year period of the Stone and Vinson Courts that immediately preceded the Warren Court's birth. Perhaps recitation of the cases selected from that period falls short of persuading you that the Warren Court is not a wholly different animal. Perhaps the pace of the Warren Court has been more rapid, its impact wider. But I suspect that stu-

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\(^{27}\) Ibid. See also *Bell v. Maryland*, 378 U.S. 226 (1964) (opinions of Douglas, J. and Black, J.).

\(^{28}\) 322 U.S. 533 (1944).

\(^{29}\) 75 U.S. (8 Wall.) 168 (1868).

\(^{30}\) 333 U.S. 203 (1948).


\(^{33}\) 321 U.S. 649 (1944).

\(^{34}\) *Grovey v. Townsend*, 295 U.S. 45 (1935).

\(^{35}\) *Smith v. Allwright*, *supra* note 33, at 670.
dents of human psychology, if not students of law, would tell us that the heat of the moment colors our judgments and magnifies current events, and that the passage of time produces a strong tendency to accept past momentous events as being quite ordinary.

I further suspect that Supreme Court historians will not judge the twelve years of the Stone and Vinson Courts as being especially eventful. But despite this perspective of the mid-1960's on the tenure of those Courts, Professor Alexander H. Pekelis could write in 1950:

The charges that one finds most clearly formulated in the present offensive against the Court can be summarized as follows:

2. The Court systematically disregards its own precedents....
3. The Court fails to confine itself to the interpretation of the law as it is. In the words of a New York Times editorial, "The majority of the new appointees came to the Court... apparently under the theory that their function was not so much to know and apply the law as it stands, or in case of doubt to interpret it objectively, but to apply a new 'social philosophy' in their decisions. The inevitable effect of such an approach could only be to create uncertainty regarding the law and turn the Supreme Court, in effect, into a third legislative house."

Much the same is now being said of the Warren Court, but the attitude is that the present Court is acting markedly different than any Court before it. Yet Professor Pekelis wrote seventeen years ago of a different Court that many now consider to rank low on the "activist" scale. I suspect that it will be said again of future Courts. Surely it could be said with justice of past Supreme Courts.

IV. The Distant Past

In 1803, the Marshall Court decided *Marbury v. Madison*, holding that the Supreme Court has the power to declare an act of a coordinate branch of the government unconstitutional. Thus, there was the establishment of the power of judicial review. It is surely fair to say that this most historic and momentous Supreme Court ruling was clearly not preordained. Professor Alexander M. Bickel has impellingly demonstrated that the text of the Constitution provides no explicit or even firm support for Chief Justice Marshall's assumption of authority for the judiciary, at least in respect to invalidating acts of Congress and the President. And it is by no means

37. 5 U.S. (1 Cranch) 137 (1803).
generally agreed that the Framers intended to vest the Supreme Court with such an extensive and final command.\textsuperscript{39}

The critics of the Warren Court charge it with “the enhancement of judicial dominion at the expense of the power of other branches of government, national as well as state.”\textsuperscript{40} If this be accurate, it may be confidently said that no Supreme Court opinion in history better fulfills that characterization than does Marbury \textit{v.} Madison.\textsuperscript{41}

But \textit{Marbury}, a decision to which we shall return, does not stand as the sole or even necessarily the most poignant example of the great Supreme Court judgments in history that would fall under the analysis of those who criticize the Warren Court.

Article I, section 8 of the Constitution provides that “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .” The desperate need of the national legislature for this dominion was evidenced by the fact that matters of finance, commerce and business motivated the call of the Constitutional Convention in Philadelphia in 1787.\textsuperscript{42} Under the Articles of Confederation, the infant nation was beset

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40. Kurland, \textit{supra} note 4, at 144.

41. \textit{Supra} note 37. Professor Kurland, and others, also find as an “element that courses through the opinions of the [Warren] Court . . . the absence of workmanlike product, the absence of right quality.” Kurland, \textit{supra} note 4, at 144-45. We are told of “opinions that do not opine.” Again, if this be accurate, it may confidently be said, as Professor Norman Redlich has ably shown, that no Supreme Court opinion in history better fulfills that characterization than \textit{Marbury \textit{v.} Madison}. Redlich, \textit{The Supreme Court—1833 Term—Foreword: The Constitution—“A Rule for the Government of Courts, as Well as of the Legislature.”} 40 \textit{N.Y.U.L. Rev.} 1, 3-5 (1965).

Nor, on this count, does \textit{Marbury} stand alone. As Professor Charles Alan Wright has recently asked:

What Court in the past achieved a higher level of professional craftsmanship than the present Court? The great opinions of Chief Justice Marshall surely fail the test. Marshall discusses issues not properly before him, he flirts with provocative ideas and then puts them to one side, he resorts to esoteric statutory construction to avoid deciding constitutional questions, and he announces important conclusions without any reasoning to support them. Has any later Court done better?


Many of the turgid opinions of Mr. Justice Holmes can be similarly criticized, \textit{e.g.}, the landmark Holmes and Brandeis opinions articulating the “clear and present danger” test, \textit{see} cases cited \textit{supra} note 20; Schenck \textit{v.} United States, 249 U.S. 47 (1919); Abrams \textit{v.} United States, 250 U.S. 616 (1919) (dissenting opinion), which leave the most difficult and provocative questions unanswered. And the examples could be multiplied. \textit{See, e.g.}, the opinion of Mr. Justice Frankfurter in \textit{Lane \textit{v.} Wilson}, 307 U.S. 268 (1939), whose implications are explored in \textit{W. Lockhart, \textit{Y. Kamisar \& J. Choper, supra} note 20, at 1208-10. \textit{See also} Wright, \textit{id.} at 11, regarding Mr. Justice Frankfurter.

with severe economic problems. Protectionist-minded states established discriminatory and burdensome artificial trade barriers against their sister states as well as against foreign nations.\textsuperscript{43} Other countries preyed on the newly established industries in the states by refusing to deal with them on reasonable terms.\textsuperscript{44} The individual states were incompetent to cope with these problems of commerce,\textsuperscript{45} and, under the Articles of Confederation, Congress was equally powerless.

Thus, in brief, the great purpose of the commerce clause was to enable Congress to facilitate interstate trade, to promote development of national industries and markets and, generally, to encourage economic growth. Yet, in \textit{Champion v. Ames},\textsuperscript{46} the famous \textit{Lottery Case}, the Fuller Court (although Mr. Chief Justice Fuller, joined by three of his brethren, dissented) held that the commerce clause authorized Congress to \textit{prohibit} the transportation in interstate commerce of articles intrinsically harmless—a decision whose principle has lead "to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive. . . ."\textsuperscript{47} Thus, despite the purposes of the commerce clause, the Fuller Court upheld Congressional power to hinder interstate trade and, effectively, to destroy those national industries and markets that it wished.

We are told that a major theme of the Warren Court "has been the effective subordination, if not destruction, of the federal system."\textsuperscript{48} If this be accurate, I suggest that much of the job had been done at least a half century before. And it was nearly 100 years before the \textit{Lottery Case} that Thomas Jefferson said of the Marshall Court that it was "the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."\textsuperscript{49}

You will recall that the commerce clause concerns a grant of power to Congress. It is found in article I of the Constitution, which deals with the Legislative power. The commerce clause makes no mention, directly or indirectly, of the Judiciary, whose constitutional power is described in article III. Yet in 1851, the Taney Court, in \textit{Cooley v. Board of Wardens},\textsuperscript{50} found that, in the absence of relevant federal legislation, the federal judiciary itself has the power to strike down state regulations of interstate commerce. Yet, it is the Warren Court that is charged today by some of its lettered observers with

\textsuperscript{43} A. Beveridge, \textit{supra} note 42, at 310-12.
\textsuperscript{44} C. Swisher, \textit{supra} note 42, at 25.
\textsuperscript{45} Stern, \textit{supra} note 42, at 1337-41.
\textsuperscript{46} 188 U.S. 321 (1903).
\textsuperscript{47} \textit{Id.} at 362. See United States v. Darby, 312 U.S. 100 (1941).
\textsuperscript{48} Kurland, \textit{supra} note 4, at 144.
\textsuperscript{49} 15 \textit{WRITINGS OF THOMAS JEFFERSON} 297 (1904).
\textsuperscript{50} 53 U.S. (12 How.) 299 (1851).
enhancing "judicial dominion at the expense of the power of other branches of government, national as well as state," and with "the effective subordination, if not destruction, of the federal system." The implication is that this could never be said before. But it was of the Taney Court that the New York Tribune asserted, "Of all the tyrannies that afflict mankind, that of the Judiciary is the most insidious, the most intolerable, the most dangerous."

In evaluating charges made against the Warren Court from the perspective of Supreme Court rulings many decades earlier, I have not referred to decisions that have, for one reason or another, fallen into disrepute—decisions such as *Lochner v. New York*, *Dred Scott v. Sandford*, *Pollock v. Farmers' Loan & Trust Co.*, or the broad federal immunity doctrine in *McCulloch v. Maryland*. This would be too easy. Rather, we have seen that some of the grand landmarks in the judicial history of the United States, decisions that have preserved and enriched the Union, easily and perhaps more accurately lend themselves to the very indictments brought against the work of the Warren Court. Today, we accept and applaud these great decisions of the past. I suggest that in not too many years, the momentous decisions of the Warren Court, highly controversial and roundly criticized when rendered, will similarly be accepted and applauded. The fact of the matter is that this is already true of many, such as *Brown v. Board of Education* and *Gideon v. Wainwright*, and is increasingly becoming true of a number of others, such as the *Reapportionment Cases* and the *School Prayer Cases*. The passage of time and appreciation of the resulting operation of the decisions seem to soothe the fears of the critics.

52. *Ibid*.
54. 198 U.S. 45 (1905).
55. 60 U.S. (19 How.) 393 (1857).
56. 157 U.S. 429 (1895).
57. *Ibid*.
58. *Ibid*.
60. *Supra* notes 10, 11.
61. *Supra* notes 12, 13.
62. As Dean Erwin Griswold expressed it recently:
We take pride in the administration of justice in this country and rightly so. But it has not always been on the level that it has reached now, and we should hardly be surprised if the present level is not the final one. In each instance, as the level has been raised, those who were currently administering justice have been troubled. It is not easy to accept new things, especially when the impetus comes from elsewhere. . . . Throughout history the judges who have been known as great judges have been innovators. . . . Often, there was much grumbling at the time; but in the perspective of history it becomes clear that they have helped to bring our law up to new levels. These are levels of which we soon become proud once we become accustomed to them, and the newness of the new standard wears off. Griswold, *The Long View*, 51 A.B.A.J. 1017, 1018 (1965).

*Miranda v. Arizona*, 384 U.S. 436 (1966), bears a substantial brunt of most recent criticism, the charge generally being that its obligation on the police to inform the accused,
V. The Theme of Equality

To this point, we have examined two of the "three dominant movements" that Professor Kurland critically finds characteristic of the Warren Court—"the enhancement of judicial dominion" and "the effective subordination . . . of the federal system." But it is the other "theme"—"the rise of egalitarianism"—that he tells us "contains the most novelty." Here he appears during custodial interrogation, of his right to silence and to counsel will severely damage law enforcement; that the rule will "markedly decrease the number of confessions," 384 U.S. at 516 (Harlan, J., dissenting), and "measurably weaken the ability of the criminal law to perform," 384 U.S. at 541 (White, J., dissenting).

It is noteworthy that, in the decision's first year of operation, at least some of the nation's most prominent law enforcement officers have not found this to be true at all. See the statements of Attorney General Ramsey Clark, N.Y. Times, May 1, 1967, at 54, col. 3; and District Attorney of Los Angeles County Evelle Younger, 5 AM. CRIM. L.Q. 32 (1966). But, apart from this, perhaps it is true that Miranda will, at least in the short run, result in a reduced number of confessions and an increased number of failures to convict. If so, this will be due, in many cases, to the fact, as stated by one public official, that too many law enforcement officers "really know very little about scientific criminal investigation—I doubt that some can even take fingerprints properly—but they often become tremendously effective interrogators." Quoted in Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 MINN. L. REV. 1, 52 (1963). Or to the fact, as stated by a former prosecutor, that "the weakest part of police work is their insufficient use of surveillance and interviewing before they 'pop the arrest.'" Id. at 48 n.202. Compare the record in areas where improvements in the quality, training, and facilities of law enforcement officers have been undertaken. See the statement of then U.S. Attorney for the District of Columbia, Oliver Gasch, in the Washington Post, March 26, 1960, § D, at 1.

Perhaps as suggested by Judge Henry J. Friendly, we do not "truly know that, as asserted in Escobedo, 378 U.S. at 488-89 (footnotes omitted), 'a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation,'" Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 955 n.138 (1965). But I think that we may be confident that the Warren Court's Miranda decision will, in the not distant future, be commended as a material motivator of greatly improved law enforcement techniques throughout the country, as has, for example, the Hughes Court's decision in Brown v. Mississippi, 297 U.S. 278 (1936), outlawing the "third-degree"—a decision, concededly involving police conduct of a vastly different nature, that also decreased the number of confessions and convictions.

If law enforcement's failure forcefully to advance its detection proficiency were to deter the Court from recognizing and enforcing vital constitutional protections of those accused of crime, this would truly be "treating the sore by encouraging the infection." Rothblatt & Rothblatt, Police Interrogation: The Right to Counsel and to Prompt Arraignment, 27 BROOKLYN L. REV. 24, 68 (1960). And, although pragmatic considerations certainly must play a role in all constitutional adjudication, surely it is too late in the day to argue that highly important rights must be submerged because their vindication will result in some crimes not being solved. See Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, in POLICE POWER AND INDIVIDUAL FREEDOM 171-72 (Sowle ed. 1962); cf. Schwartz, On Current Proposals To Legalize Wire Tapping, 103 U. PA. L. REV. 157 (1954). Miranda has yet to be accorded the benefits of time. I feel not overly optimistic in believing that its greatest impact will be not so much in protection of the accused, but in protection of the public through invigorated law enforcement and crime prevention long overdue.

64. See text at notes 40 and 51 supra.
65. See text at notes 48 and 52 supra.
66. Kurland, supra note 63, at 144.
to be most disapproving, writing that the present Court has “sponsored [an] egalitarian revolution in judicial doctrine,” while pointing to Mr. Justice Holmes’ dictum of 40 years ago “that the equal protection clause was ‘the usual last resort of constitutional arguments.’” He describes “a good deal of the product of the Warren Court in its search for equality” as “a work of ‘jejune logomachy.’”

Again, the basic charge need not be seriously disputed. More moderate commentators have recognized the “heightened concern for equality before the law” of the Warren Court.

Contrary to the plaint of the hostile critics, I suggest that the Court’s recent turn to egalitarianism is a salutary movement, quite properly fulfilling its role in a democratic society. For, as those who have carefully examined the complexities of our form of government observe, equality is an essential part of democracy; “our type of civilization depends on ‘equal justice under law.’” Indeed, “the premise of democracy is egalitarian.”

Before turning more generally to a discussion of the role of the Supreme Court in a democratic society, some examination of the Warren Court’s employment of the equal protection clause is warranted. Little need now be said in defense of the Warren Court’s first great effort in this connection—its condemnation of all state-imposed racial segregation, thus overturning the Fuller Court’s decision in Plessy v. Ferguson. It should suffice to note that the earliest decisions interpreting the equal protection clause, those of the Chase and Waite Courts, as well as the overwhelming judgment of students of constitutional law, confirm that it was the Fuller Court and not the War-

67. Ibid.
68. Ibid., quoting from Buck v. Bell, 274 U.S. 200, 208 (1927), the Virginia sterilization case, where, one might note parenthetically, the great Justice also noted that “three generations of imbeciles are enough.”
70. See id. at 12, for Professor Kurland’s description of Professor Paul Freund as “the epitome of Judge Learned Hand’s spirit of moderation.”
74. A. Bickel, The Least Dangerous Branch 28 (1962). Even Professor Kurland, at an earlier date, has noted that equality is one of the “fundamental objectives of our legal structure . . . .” Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961).
75. For a listing and description of cases, after Brown v. Board of Education, supra note 9, holding racial segregation invalid in numerous areas, see W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law: Cases—Comments—Questions 1228 (2d ed. 1967).
76. 168 U.S. 557 (1896).
77. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873); Strauder v. West Virginia, 100 U.S. 303, 306-08 (1880).
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ren Court that was unfaithful to the fourteenth amendment's command of equality.

A. Reapportionment

The 1964 Reapportionment Cases,\(^79\) holding that "as a basic constitutional standard, the equal protection clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis,"\(^80\) the other of the Warren Court's grave equal protection judgments, also merits comment. Concededly, the subject matter of these cases, unlike the "hardships being visited on the colored race," was not the "immediate pre-occupation"\(^81\) of those who produced the equal protection mandate. But it was equally apparent that the relevant constitutional language "deals not only with racial discrimination, but also with discrimination whether or not based on color."\(^82\) Thus, it was open to the Court, in the "tradition of a broadly worded organic law... necessarily intended for permanence,"\(^83\) to treat the matter of legislative apportionment within the confines of the equal protection clause.\(^84\)

As to the constitutional standard adopted, it must be perceived that in the Reapportionment Cases the Court "recognized as constitutional rights... 'the democratic ideals of equality and majority rule.'"\(^85\) The Court, cogently fulfilling its role in a democratic society, ruled for the majority of citizens and voters in the nation, mostly living in urban areas, whose political influence was being seriously diluted by state legislatures dominated by minority rural interests. On the question of the standard adopted, I believe it is adequate here to point out, as Professor Carl A. Auerbach has thoroughly and admirably demonstrated, that "no reason consistent with the democratic ideals... has been advanced for not effectuating"\(^86\) the Court's "one man—one vote" principle; that it is

80. Id. at 568.
82. Id. at 60.
83. Id. at 59.
85. Auerbach, id. at 66.
86. Id. at 67.
paradoxical for the advocates of judicial self-limitation to criticize the Court for helping to make the majority rule effective, because the case for self-restraint rests on the assumption that the Court is reviewing the legislative acts of representatives who are put in office and can be turned out of office by a majority of the people.\footnote{87}{Id. at 2.}

But the Court also ruled in the 1964 Reapportionment Cases that a system of legislative malapportionment is violative of equal protection even if the product of a state initiative procedure and even if adopted "by a vote of a majority of a State's electorate."\footnote{88}{Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736 (1964).} Is this consistent with the Court's basic concern under the equal protection guarantee for "democratic ideals"?

It must first be asked, what would such a "majority of a State's electorate" consist of? Suppose that the "majority" of the state's citizens who voted to under-represent, say, the numerically superior urban population, consisted of a high percentage of the rural voters plus a minority of the urban voters. In this instance, the Court's rule is persuasive: surely, the constitutional right of the majority established by the Court should not be swept away by a combined vote of (a) the rural minority and (b) a minority of the urban majority.

But suppose that the "majority" creating the malapportionment included a majority of those that would be under-represented by the apportionment scheme? Of course, it is highly unlikely that the majority could be found to have voted contrary to their seeming interest, especially when we are confronted with the tremendous complexities involved in identifying which "interest" is represented by which "majority."\footnote{89}{See Auerbach, supra note 84, at 55-56; W. Lockhart, Y. Kamisar & J. Choper, supra note 75, at 1894 n.b.} Perhaps this alone justifies the Court's rule. But, although unlikely, it is conceivable. For example, a majority of urban voters might seek to establish rural over-representation, despite the fact that this would be generally disadvantageous to them, in the belief that a rural-dominated legislature would be less favorably disposed toward affording Negroes equal opportunity.

The Court's rule forbids this, reasoning that the "constitutional rights [of an urban citizen who does not want rural over-representation] can hardly be infringed simply because a majority of the people choose that it be."\footnote{90}{Lucas v. Colorado Gen. Assembly, supra note 88, at 736-37.} If the right of an urban citizen "to cast an equally weighted vote,"\footnote{91}{Id. at 736.} is an individual right, in the same sense as the right of a Negro child to an education free from state-imposed racial segregation, surely the Court's position is unassailable, since a plan of racially segregated education, even if enacted by a referendum with the vote of a majority of both racial groups, would clearly vio-

\footnotesize{\begin{itemize}
\item[87.] Id. at 2.
\item[89.] See Auerbach, supra note 84, at 55-56; W. Lockhart, Y. Kamisar & J. Choper, supra note 75, at 1894 n.b.
\item[90.] Lucas v. Colorado Gen. Assembly, supra note 88, at 736-37.
\item[91.] Id. at 736.
\end{itemize}}
late equal protection. But it is not clear that the rights are the same. The Negro child’s right may be vindicated effectively by ordering that he be assigned to an integrated school. The urban voter’s right may only be vindicated effectively by ordering that all urban voters “cast an equally weighted vote.” In our hypothetical, a majority of all urban voters have elected not to cast an equally weighted vote. While it may convincingly be said that urban citizens, challenging urban under-representation enacted not by a referendum but by a rural-dominated legislature, “seek relief in order to protect or vindicate an interest of their own, and of those similarly situated,” the point is considerably more difficult if a truly free-willed referendum of the kind described above has been held.

This is not to contend that the Court’s rule fails. It gains support by reference to other areas of constitutional law in which effectuation of constitutional rights is not hindered by the majority's willingness to waive these rights for themselves. For example, if a referendum were to authorize a state appropriation to construct a Methodist church building, the fact that a majority of non-Methodists had voted approval would not seem to bar an injunction against any state payment pursuant thereto as violative of the first amendment’s establishment clause made applicable to the states by the fourteenth amendment. Perhaps the constitutional right recognized by the Warren Court in the Reapportionment Cases is similar to the right against laws respecting an establishment of religion.

The important point is that despite all the criticism generated by the Reapportionment Cases, virtually no analysis is found of this delicate, narrow problem. Here, I suggest, a most useful service could be performed by those who challenge this aspect of the work of the Warren Court.

B. Choice of Grounds for Decision

Finally, in respect to what may well be considered a wholesome use by the Warren Court of the doctrine of equality, it should be noted that, in many contexts, the Court’s choice of the equal protection clause is effective in fulfilling the Court’s obligations, yet moderate, in that it skillfully permits a measure of free play in the federal system. As Mr. Justice Jackson explained, when the Court invalidates state action as being violative of equal protection, frequently it

\[
\text{does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact} \ldots \]

The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable gov-

ernment than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.94

Only infrequently have past Courts efficiently utilized this device. The most noteworthy example, keenly illustrating Mr. Justice Jackson's rationale, is the 1942 decision in Skinner v. Oklahoma,95 in which the Stone Court struck down the state's Habitual Criminal Sterilization Act, not on the ground that the state was without power to sterilize, but rather because the statute's impact was too narrow, including larcenists but not embezzlers. If Oklahoma wished to sterilize, to deny the basic right of procreation, it must do so on a broader basis. The choice was left to the state.

The two great equal protection decisions of the Warren Court that we have examined have not left a truly effective choice to the state. Rather, the Segregation Cases and the Reapportionment Cases, as a practical matter, clearly applied substantive requirements that cried out for imposition, leaving little room for flexibility.96 But in confronting other sensitive issues, especially in the past several years, the Warren Court has entered the area restrainedly through the use of the equal protection clause. Thus, in Baxstrom v. Herold,97 the Court avoided deciding the increasingly pressing question of whether a mental commitment must be preceded by a fair judicial hearing with a jury. Rather, the Court was able to hold that New York could not differentiate, for these purposes, between those it considered "civilly insane" and those it considered "criminally insane." Referring to such a hearing as a "matter affecting...fundamental rights,"98 the Court declined to hold that due process inflexibly requires it, but rather forced New York to decide whether, as a political matter, it should withdraw the opportunity for such a hearing to those who already were beneficiaries of it under existing state legislation.99

Although this moderate equal protection approach is not without its critics who wish the Court to do more,100 its use, when appropriate, judiciously fulfills the Court's role in the political framework. Thus, in Griffin v. Illi-

95. 316 U.S. 535 (1942).
98. Id. at 113.
100. See Foote, The Proper Role of the United States Supreme Court in Civil Liberties Cases, 10 WAYNE L. REV. 457, 471-72 (1964).
The Warren Court continued to rest with the states the responsibility for deciding whether they shall "provide appellate courts or a right to appellate review at all." Nevertheless, the Court held that if a state chooses to provide appellate review, a matter genuinely affecting "fundamental rights," the "equality demanded by the Fourteenth Amendment" requires that it do not "do so in a way that discriminates against some convicted defendants on account of their poverty."

The "rise of egalitarianism" is conceded, but it is to be commended. In fact, perhaps its rise may not have been extensive enough. Perhaps the decision in *Griswold v. Connecticut* invalidating the Connecticut anticontraceptive law, might better have been grounded in equal protection rather than in the substantive "peripheries," "penumbras," and "emanations" "created by several fundamental constitutional guarantees," or in "the language and history of the Ninth Amendment," or in the seemingly discredited doctrine of substantive due process. The fact appears to be that, in Connecticut, those informed persons who could afford to consult private physicians within or without the state had no difficulty obtaining advice about contraception; that the law was enforced effectively only against birth control clinics which, in the main, aided those "without either adequate knowledge or resources to obtain private counseling."

Had the Court held that the operative discrimination of the law in this "fundamental" area of privacy, requiring "strict scrutiny," violated equal protection, it could have immunized itself from Mr. Justice Black's charge of engaging in "natural law due process philosophy." Also, Connecticut would have been faced with the choice of abandoning its "uncommonly silly law" or applying it generally, rather than upon a politically weak minority—a choice, but one providing an "effective practical guaranty against arbitrary and unreasonable government."

Even *Miranda v. Arizona* might have lent itself to the "egalitarian revolution." Could the Court thus have reserved the question of whether the

105. *See text at note 66 supra.*
106. 381 U.S. 479 (1965).
107. Id. at 488.
108. Id. at 487 (Goldberg, J., concurring).
109. Id. at 499, 502 (Harlan and White, JJ., concurring).
110. Id. at 503 (White, J., concurring).
111. Id. at 504 (White, J., concurring).
112. Id. at 515 (Black, J., dissenting).
113. Id. at 527 (Stewart, J., dissenting).
114. *See text at note 94 supra.*
116. *See text at note 67 supra.*
privilege against self-incrimination extends to custodial police interrogation and proceeded instead under the precept of "equal justice." As Judge J. Skelly Wright reports: "The representative of organized crime, when arrested ... has his lawyer meet him at the precinct station. ... The same is true of the white collar offender—the influence peddler, the income tax and antitrust violators." Could not the Court have held that the "equality demanded by the Fourteenth Amendment" requires no less for the impecunious and unaware during his period of interrogation, "the most critical period of his ordeal"? While some states undoubtedly would respond by denying counsel to all at this time, some would likely provide it to all rather than forbid it across the board, thus providing a factual record of the effect of providing counsel immediately after arrest. Would this judicial approach not have blunted the complaint of Mr. Justice Harlan, and many others, if the Court were later to extend the privilege against self-incrimination, that the Court did not "have the vast advantage of empirical data and comprehensive study"? Of course, without the Court's impetus,

119. Wright, The Supreme Court Today, 3 Trial, April-May 1967, at 14, 16. See also, W. Beaney, The Right to Counsel in American Courts 207 (1955): "[I]t is not uncommon in some cities for a 'mouthpiece' to appear at precinct headquarters before [a "professional criminal" or "syndicate representative"] is brought in. The undefended criminals, for the most part, are perpetrators of amateur crime ... or they are first or youthful offenders." And Professor Wayne LaFave, in his recently published study of police practices in the late 1950's, noted, W. LaFave, Arrest 593-94 (1965): [R]etained counsel often do enter a case shortly after arrest and immediately confer with their clients or are present when the case reaches the district attorney's office. In Milwaukee, they may actually sit in on the police interrogation. Indigent suspects are not afforded counsel at these early stages.

Along the same lines, a recent New York City Bar report disclosed that ... when an employee [of a policy game or other organized criminal activity] is apprehended and brought before the Judge, there appears at his side a bondsman and an attorney, both unknown and unbidden, by the defendant at least. ... [F]requently collectors are back on the street taking bets again a few hours after being arrested. ... Quoted in D. Freed & P. Wald, Bail in the United States: 1964, at 35 (1964).

120. See supra note 108.
122. See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 69 (Howard ed. 1965):

There is no more effective practical guaranty against arbitrary and unreasonable government then to require that the poor and the stupid and the ignorant be subjected to police interrogation in no greater measure than the rich and the bright and the educated; that the protections extended to the favored few be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only the less fortunate and the less endowed to be the subjects of secret and persistent police interrogation and thus to escape the political retribution that might be visited upon them if all segments of society were so affected.
I am confident that little "experimentation" would occur, because the states, acting without the Court's prodding, have not been noted for experimenting by expanding the rights of the accused. Rather, the experience has been quite the reverse.

VI. Judicial Review in a Democracy

We turn then, finally, to a broader appraisal of the work of the Warren Court in light of the peculiar position that the United States Supreme Court—a group of nine men, with lifetime appointments, "hedged about by an unusually intricate impeachment process and an absolute guaranty against diminution of compensation"—occupies in a democratic society.

A. Discussion of Theory

It is not my purpose to enter debate on the question of defining precisely what is "democracy." But I hope that you will accept—at least as a general, working definition—one put together recently by Professor Clifton McCleskey: "[A] democratic political system is one in which public policies are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under conditions of political freedom." I think you will agree, as earlier noted, that, if anything, the Warren Court's reapportionment decisions promote democratic values as so defined. But I think you will further agree that it is not easy to classify the Supreme Court of the United States as established by the Constitution as a democratic institution. Mr. Justice Frankfurter wrote that the Court's

124. Ibid.

125. Consider the oral argument of Assistant Attorney General of Alabama, George Mentz, appearing as amicus curiae for Florida, in the Gideon case. As described by Anthony Lewis in Gideon's Trumpet 179-80 (1964), the following exchanges occurred:

Justice Harlan: "Supposing Betts is not overruled. How many years is it going to take Alabama to pass a law like New York and the other states?"

Mentz: "I don't know, but there is a growing feeling in the trial courts that something should be done."

Justice Harlan: "Even though you know how all of them will come out."

Mentz: "Hope springs eternal." [laughter in the courtroom.]


128. See text at notes 85 and 86 supra.
powers are "inherently oligarchic"; 129 Mr. Justice Brandeis, we are told, was not "wholly without question as to the efficacy and propriety of judicial power in a democratic system." 130 If you refuse to accept the contention that the Court is an antidemocratic institution (although, surely, carefully limited in the exercise of power), 131 then you must agree that it is at least "anti-majoritarian," 132 for even the rarely used control of constitutional amendment does not satisfy the wishes of a simple majority.

It is not my position that the presence of the Court in our political scheme makes our society undemocratic, 133 but with regard to the Court's exercise of the power of judicial review, established in 1803 in Marbury v. Madison, 134 it may truly be said "that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority but against it"; 135 "that judicial review is a deviant institution in the American democracy." 136

This, of course, is by no means to say that the Supreme Court and the doctrine of judicial review do not occupy a meaningful, justifiable, and desirable status in our governmental system. It is merely to state certain premises.

Whether the power of the Supreme Court "to outlaw as unconstitutional acts of elected officials or of officers controlled by elected officials" 137 was intended by the Framers or granted by the Constitution is no longer the real issue. Rather, as Dean Eugene V. Rostow has put it, the power of judicial review "has been exercised by the Court from the beginning. . . . And it stands now, whatever the Founding Fathers may in fact have meant, as an integral feature of the living constitution, long since established as a working part of the democratic political life of the nation." 138 "The weight of . . . history is evidence that the people do expect the courts to interpret, declare, adapt and apply these constitutional provisions, as one of their main protections against the possibility of abuse by Presidents and legislatures." 139

The meaningful and critical issue now is how should this power of judicial

132. See generally McCleskey, supra note 127.
133. See Rostow, supra note 131, at 199-200.
134. See text following note 37 supra.
136. Id. at 18.
137. Rostow, supra note 131, at 193.
139. Id. at 590.
review be exercised? By what standard? By a Court that is "activist" or "restrained"? In meeting these and related issues, a justifying rationale for the role of the Supreme Court and judicial review in a democratic society becomes highly relevant.

Defenders and explicators of judicial review have not been lacking. Lord Bryce thought of the Court as "the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law." Dean Rostow feels that "[t]he discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar." Professor Bickel submits that the Court performs the task, for which "elected institutions are ill fitted," of supporting and maintaining "enduring general values." Professor Charles L. Black contends that "judicial review is the people's institutionalized means of self-control." "[I]t can be justified as something that fulfills popular desire."

But further theory may be advanced. Granting that the Supreme Court is a "deviant institution in the American democracy," it must also be recognized that, in an important sense, the Constitution itself is similarly anti-majoritarian or, if you will, antidemocratic, at least in a limited fashion. Its provisions set the boundaries of each federal department's power vis-à-vis that of the others, of federal power vis-à-vis that of the states, of governmental power vis-à-vis that of the individual. The Constitution commands that these powers may not be exceeded by simple majority will; that a special marshalling of the people's forces is required to alter the boundaries, i.e., to amend the Constitution. Our written Constitution establishes certain "enduring general values," ultimately subject to democratic modification, but only if the "buffer zone" of the amending process is crossed. This "buffer zone"—the difficult requirement of action by majorities of two-thirds and three-fourths—protects these enduring values against hasty, ill-considered, emotion-ridden action and demands sober, deliberative, reflective consideration.

The perplexing questions here are: When is the Constitution violated?

142. Rostow, supra note 131, at 208.
143. A. Bickel, supra note 135, at 27.
144. C. Black, The People and the Court 107 (1960).
145. Id. at 117.
146. A. Bickel, supra note 135, at 18.
147. A. Bickel, supra note 135, at 27.
148. U.S. Const. art. V.
What body of government should decide? *Marbury v. Madison* assigned the task to the Court. And again the question: by what standard should the Court decide?

In exploring this ultimately crucial problem, it seems to me that we must distinguish between two different types of constitutional issues. One is whether authority over the subject matter of federal action has been "delegated" by the Constitution to the national government or whether it has been "reserved to the States."149 For example, under its delegated powers, is Congress authorized to regulate agricultural production,150 to tax gambling,151 to forbid racial discrimination by motels serving interstate travelers,152 to prohibit states from denying the right to vote to those who are not literate in English153? Or are these matters beyond the federal realm and thus reserved to the respective states? Put succinctly, do these federal actions violate "states' rights"?

The other general issue that arises154 is whether a particular exercise of governmental power, national or state, infringes individual rights guaranteed by the Constitution. Without exhausting the list of these individual rights afforded constitutional protection or, in any way, attempting to define their substantive content, one need only refer, as examples, to the original Constitution's prohibitions of bills of attainder and ex post facto laws,155 to the first eight amendments (popularly known as the Bill of Rights), to the fourteenth amendment's guarantees of due process and equal protection.

It seems to me that if the constitutional issue is one only of states' rights, the role of the Supreme Court, in determining whether the national government has unconstitutionally invaded the domain of the states, should be severely limited. The justification for judicial review in this instance, for the final constitutional word to be spoken by a "deviant institution"156 in a democracy, is weak. The states, whose constitutional rights are allegedly being assaulted, are well represented in the councils of national government (especially the Congress) and are in a peculiarly strong position to protect themselves against national encroachment.157 Here, the political process may generally be depended upon to produce a fair judgment. If a majority of the states' representatives (and I believe this is a wholly accurate description of

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149. U.S. Const. amend. X.
154. The matter of division of power among the federal departments is beyond the specific scope of the discussion.
156. A. BICKEL, supra note 135, at 18.
members of Congress) determine that federal power has not been exceeded, then the Court should overturn the decision, if at all, only if it is so clearly in error as not to be "open to rational question."\footnote{158}

But if the issue is one of alleged governmental infringement of individual rights protected by the Constitution, it seems to me that the Court's role should be quite different. These constitutional guarantees—such as the freedoms of speech and religion, the constitutional rights of those accused of crime, the right to be free from certain racial discrimination—are generally rights of "politically impotent minorities."\footnote{159} By definition, the processes of democracy bode poorly for the security of such rights.\footnote{160} Rather, such rights are frequently endangered by popular majorities.\footnote{161} Thus, the task of guarding these constitutionally prescribed liberties sensibly falls upon a body that is not politically responsible, that is not beholden to the grace of excited majoritarianism—the United States Supreme Court. Herein lies the great justification for the power of judicial review, the wisdom of *Marbury v. Madison*. In this area, the Court, if it is properly to fulfill its place in American democratic society, must act more forcefully—perhaps "by creating a presumption against the validity of the contested action,"\footnote{162} perhaps "by more

\footnote{158. Thayer, supra note 140, at 141. Some limited degree of judicial supervision in this area may be justified if the confinement of federal power to that specified in the Constitution is seen as having a purpose beyond the protection of "states' rights", i.e., if a secondary or indirect purpose of providing that the central government be one of limited powers is the protection of the individual against the potential abuses of an all-powerful national government.  

159. Rostow, supra note 131, at 202.  

160. Consider the remarks of former Senator Kenneth Keating, Harvard Legal Aid Bureau Annual Banquet, Feb. 18, 1965, at 18-20:  
I think it is probably fair to say the indigent persons generally, but especially those who are alleged to be not among the law-abiding, are at the tender mercies of all the rest of us, especially those who sit in the Halls of Congress. We are all aware of the weighty influence wielded, for example, by the organized medical profession and the organized bar upon legislation in Congress. It has become commonplace to speak of the "A.M.A. Lobby" or, in the education field, the "N.E.A. Lobby." But there is no lobby of the A.C.D.A., The American Criminal Defendant's Association. . . .  

Fortunately, there are groups such as the American Civil Liberties Union and the NAACP which take a strong interest in the administration of the criminal law as it affects the disadvantaged defendant. But their voice in the legislative process is diluted by the fact that the clientele group for which they purport to speak normally exercises little political power, and, in fact, those in the group who have been convicted of felony have been by law politically sterilized. . . . This is the key explanation of why the recognition of the rights of indigents has been largely confined to the judicial process. And it is one of the great ironies of American life, and always has been, that the Congress and State legislatures will be critical of judicial law-making particularly in the administration of criminal justice, while failing to recognize that the courts cannot but respond firmly to social necessity when the legislative branch abdicates responsibilities for constructive action.  

161. See C. BLACK, supra note 144, at 103-04.  


163. Dowling, supra note 157, at 1176.
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B. The Warren Court’s Role

The Warren Court has admirably fulfilled this critical role. It has courageously spoken in behalf of individual rights and these decisions have produced the bulk of the attack against it. It was for the Warren Court to sustain the promise of the equal protection clause in Brown v. Board of Education, for "neither the Presidency nor the Congress, nor the states acted to protect the rights of Negro citizens."165 Nor, unfortunately, as a realistic matter, should we have expected political protection for the racial minority. It was for the Warren Court to insure a fair and effective political process and "to fill a vacuum created by the paralysis of the legislative branches of our governments"166 in the Reapportionment Cases, for it was clear "that those elected officials, who held their offices by reason of a rotten borough system, could not be expected to vote for its abolition."167 It was for the Warren Court to assure the rights of citizens to be free from unreasonable searches and seizures in Mapp v. Ohio,168 for it was plain that the political process was inadequate; twelve years had passed since the states had been told that such action violated the Constitution, yet more than half of them continued to admit into evidence the fruit of the violation.169 It was for the Warren Court to defend the right of free speech170 against overly broad governmental attacks on communism and "disloyalty," because unlike such countries as France or Italy, communism here is an impotent domestic political force.171 And the examples could be multiplied.

Likewise, in cases involving states’ rights, the Warren Court has acted with suitable restraint. And it has been the refusal of past Supreme Courts to do so that has frustrated efforts to combat frightful national crises such as the Great Depression.172 In sustaining congressional power under the commerce
clause to enact provisions of the Civil Rights Act of 1964, in *Heart of Atlanta Motel, Inc. v. United States*173 and *Katzenbach v. McClung*,174 the Warren Court adhered to an established tradition of granting a strong presumption to an exercise of national control over the economy.175 But, in sustaining congressional power under the enforcement clauses of the fourteenth and fifteenth amendments to enact provisions of the Voting Rights Act of 1965, in *South Carolina v. Katzenbach*176 and *Katzenbach v. Morgan*,177 the Warren Court seemingly adopted a newer theme, granting virtually unlimited power "for a vast expansion of congressional legislation promoting human rights."178 And, in my view, this is as it should be. For the basic issue involved under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment is the same as that under the commerce clause: whether Congress has exceeded its powers and encroached on an area reserved to the states. Given the political influence possessed by the states in Congress, the constitutional issue should virtually always be resolved there.

**VII. Conclusion**

The Supreme Court of the United States need not be, nor is it, "the conscience of the people."179 Nor, for that matter, need it be, nor is it, a "one-man band,"180 that department of government to cure all social and political ills in the country. One need not approve nor agree with every judgment that the Court has made. I certainly do not. I do believe that the strongest indictment of the Warren Court is that it has zealously—perhaps, in some cases, even overzealously—guarded the asserted constitutional rights of those whose only effective forum for expression of those rights has been the Court itself. For example, those disenfranchised Negroes, particularly in some parts of the South, who could not obtain any help from legislatures where they were not represented and those partially disenfranchised citizens in urban centers throughout the country to whom rural dominated legislatures turned their backs. To the charge of protecting the rights of groups such as these, a plea

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175. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); United States v. Darby, 312 U.S. 100 (1941).
179. See text at note 141 supra.
of guilty may well be advised. But for what more important function was the Supreme Court created? Remove this avenue for protection of the constitutional rights of the individual and, I suggest, the fight, inherently incapable of being waged in the legislative halls, has only one remaining battleground. That is the streets. The alternatives to careful judicial review are either disobedience of the law (which could not be changed otherwise) or complacent acceptance (for attempts to sear the consciences of those in power have been notable failures). Both alternatives—violence and decadence—are intolerable. The Warren Court today fulfills the central justification of *Marbury v. Madison*—concern for those about whom the other branches and divisions of government often will not be concerned.