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CONSTITUTIONAL LAW

D. W. ROBINSON, II*

Predictably, the fourteenth amendment and its restrictions on the state governments, particularly in the "civil rights" area, received the most attention during the period under review. New lines were drawn in the definitions of "state action," while the area between a breach of the peace and the protected exercise of first amendment rights was further clouded. Among other questions, segregation, voter apportionment, the right to counsel, and religious freedom received important court attention. This year, like other recent years, has brought far reaching changes to traditional concepts.

THE CONSTITUTION OF THE UNITED STATES

I. THE FOURTEENTH AMENDMENT

A. "State Action"

1. Sit-in Demonstrations

In a series of "sit-in" decisions, the United States Supreme Court expanded the traditional concept of "state action" under the fourteenth amendment to what may prove to be the outer most limits.1 On August 9, 1960, ten Negro demonstrators seated themselves at the lunch counter of the S. H. Kress Company store in Greenville, South Carolina and demanded service. The counter was closed, and upon arrival of the police, the manager asked the demonstrators to leave. When they refused, they were arrested for trespass under the newly amended South Carolina Trespass Statute.2 The affirmance of their convictions by the South Carolina Supreme Court was reversed by the United States Supreme Court in Peterson v. City of Greenville.3 The store manager testified that his decision to refuse the demonstrators service was based partly on private choice and partly on his desire to comply with a Greenville city ordinance requir-

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1. Given the opportunity, a divided Court failed to extend the concept further in Bell v. Maryland, 84 S. Ct. 1814 (1964), Barr v. City of Columbia, 84 S. Ct. 1734 (1964), and Bouie v. City of Columbia, 84 S. Ct. 1697 (1964)—cases not covered by this survey.
ing segregation of the races in lunch counters. In finding that the decision upholding the refusal of service was racially discriminatory and that there was prohibited “state action” or official involvement in the mere existence of the city ordinance, Mr. Chief Justice Warren for the majority said:

Consequently these convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance. The State will not be heard to make this contention in support of the convictions. For the convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.5

In the companion case of Avent v. North Carolina,6 involving a similar city ordinance of Durham, N. C., which had not been called to the state court's attention, the convictions of the lunch counter sit-in demonstrators was vacated and remanded for reconsideration by the state court in light of the Peterson decision. On the other hand, the trespass convictions of demonstrators in five separate department stores in Birmingham, Alabama, where such an ordinance also existed, were simply reversed, although there was no indication that the ordinance had been considered by the state court.7

Perhaps the most far-reaching decision of the group was Lombard v. Louisiana.8 Under circumstances similar to those in Peterson, four demonstrators were convicted in New Orleans of criminal mischief (akin to trespass). No state statute or city ordinance required racial segregation of the lunch counters. However, a few days prior to the demonstration, the mayor and chief of police had issued highly publicized statements con-

5. 373 U.S. 244, 248 (1963).
demning such demonstrations and stating that the laws would be strictly enforced. Mr. Chief Justice Warren said:

As we interpret the New Orleans city officials' statements, they were determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently the city must be treated exactly as if it had an ordinance prohibiting such conduct. . . . The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance; it was not restricted solely to preserve the public peace in a non-discriminatory fashion in a situation where violence was present or imminent by reason of public demonstrations.9

In a separate opinion,10 Mr. Justice Harlan contended that the mere existence of the ordinance or official pronouncement should not, standing alone, be sufficient to constitute "state action" prohibited by the fourteenth amendment. He urged that there should be some showing that the ordinance or pronouncement actually influenced the decision of the private proprietor to refuse service.

While apparently leaving the freedom of the private property owner to discriminate untouched by the racial discrimination prohibitions of the fourteenth amendment, these decisions make it abundantly clear that any lack of neutrality on the part of the state or its subdivisions, through statutes, ordinances, or official declarations, bearing on the decision of the private individual, will constitute "state action" or public involvement in the racial discrimination. At this writing it is safe to predict that even the most insignificant and unknown state health regulation requiring segregation in the private facility will make the state a party to the proprietor's decision to refuse service.11

2. Hill-Burton Participation

The Hill-Burton Act12 established a system of federal aid for hospital construction across the nation. The statutory scheme contemplated a survey of existing hospital facilities by the states, with the federal funds being paid to the state, which in turn passed them on to the particular hospital, private or public,

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where the need for expansion of facilities existed. The act authorized "separate but equal" facilities for Negroes and appropriate regulations to this effect had been prepared by the Surgeon General. Certain Negro doctors, dentists and patients brought a declaratory judgment proceeding against two private hospitals in Greensboro, N. C., which had received Hill-Burton funds, seeking desegregation of their facilities. The Department of Justice intervened in behalf of the plaintiffs seeking to have the "separate but equal" provisions declared unconstitutional. The district court dismissed the complaint for lack of any showing of "state action" under the fourteenth amendment. Sitting en banc, the court of appeals reversed in Simkins v. Moses. Cone Memorial Hosp. in a three to two decision.

Relying upon Burton v. Wilmington Parking Authority, Chief Judge Sobeloff traced the state's participation in the Hill-Burton program, the extensive state-federal sharing in the common plan and program of hospital construction, and the state allocation of the funds, concluding that the hospitals were operating integral parts of the comprehensive state-federal plan to protect the allocation of medical resources in the promotion of public health. The majority concluded that, like the relationship between the municipal parking authority and the private restaurant in Burton, the state had become so involved in the conduct of the private hospitals that their activities were also those of the state, even though the hospitals were not instrumentalities of the state in the strict sense. The court then proceeded to declare the "separate but equal" provisions of the act in violation of the fifth amendment and unconstitutional.

Circuit Judge Haynsworth, joined by Circuit Judge Boreman, in his dissent traced the mechanics of both the state and federal programs to show that neither gave the governments any control in the operation of the hospitals, but rather constituted a form of subsidy, analagous to those given the tobacco industry, soil bank programs, Small Business Administration, aid to colleges, etc. The donor, he urged, could not be deemed "involved" in operation of the donee in a constitutional sense simply because of the gift. He further relied on Eaton v. Board of Managers of

14. 42 C.F.R. § 53.112.
15. 323 F.2d 959 (4th Cir. 1963).
the James Walker Memorial Hosp. as foreclosing the question in the Fourth Circuit.\textsuperscript{17}

3. Common Law Definitions

In \textit{New York Times Corp. v. Sullivan}\textsuperscript{18} the Supreme Court quickly disposed of the contention that no "state action" as contemplated by the fourteenth amendment was involved in the Alabama state court libel action between private parties. The Court held that the trial court's jury charge defining the common law elements of libel constituted the application of state law to the same degree as if the definition had been incorporated in a state statute.

\textbf{B. Civil Due Process and Equal Protection}

1. Segregation in Public Parks

Relying upon the equitable principles of "all deliberate speed" enunciated in the second \textit{Brown} decision,\textsuperscript{19} the United States Court of Appeals, Sixth Circuit, in \textit{Watson v. City of Memphis},\textsuperscript{20} affirmed the district court's refusal to order immediate desegregation of parks owned by the city of Memphis, and the ordering of submission of a plan calling for additional time for desegregation of the facilities. The Supreme Court reversed in \textit{Watson v. City of Memphis},\textsuperscript{21} holding such principles inapplicable. The Court reasoned that, unlike schools, desegregation of parks involved no administrative difficulties requiring more time, and that, in any event, sufficient time had elapsed since the \textit{Brown} decision in 1955 (this action having been instituted in 1960). Said Mr. Justice Goldberg:

\begin{quote}
Since the City has completely failed to demonstrate any compelling or convincing reason requiring further delay in implementing the constitutional proscription of segregation of publicly owned or operated recreational facilities, there is no cause whatsoever to depart from the generally operative
\end{quote}

\textsuperscript{17} 261 F.2d 521 (4th Cir. 1958). There the court had concluded that even though the Wilmington, N. C., hospital had received land and aid from the city and county, it was not a public agency and that its segregated policy toward Negro doctors was not unconstitutional. However, this decision was overruled in a later proceeding with the court relying on the Simkins decision. \textit{Eaton v. Grubbs}, 329 F.2d 710 (4th Cir. 1964).

\textsuperscript{18} 84 Sup. Ct. 710 (1964).


\textsuperscript{20} 303 F.2d 863 (6th Cir. 1962).

\textsuperscript{21} 373 U.S. 526 (1963).
and here clearly controlling principle that the constitutional rights ought to be promptly vindicated.\textsuperscript{22}

Shortly thereafter, deeming the \textit{Watson} decision controlling, District Judge Martin ordered desegregation of the South Carolina State Parks in \textit{Brown v. South Carolina State Forestry Comm'\textsc{n}}.\textsuperscript{23} Judge Martin found the record before him substantially identical to that of the \textit{Watson} case, the South Carolina Negroes having been denied admission to two park facilities solely because of their race in accordance with the statutory laws of South Carolina. For these reasons he felt it unnecessary to consider certain pending discovery motions and granted the plaintiff's motion for summary judgment. However, in view of the far-reaching consequences of the decision, the court postponed the effective date of its order for sixty days.

2. Segregated Schools

In \textit{McNeese v. Board of Educ.},\textsuperscript{24} a Negro brought suit in federal court to require desegregation of school facilities in Illinois, making no effort to exhaust the state administrative remedies. The district court dismissed the action because of this failure.\textsuperscript{25} The circuit court affirmed.\textsuperscript{26} The Supreme Court, speaking through Mr. Justice Douglas, reversed, holding that since the case involved only a federal constitutional right and since there was no underlying or intermingled question of state law, resort to the federal courts was permissible without exhausting any state remedies. However, the opinion went on to note that the available Illinois remedy was not so adequate as to preclude resort to the federal courts.

Following the \textit{McNeese} decision, Judge Martin in \textit{Brown v. School Dist. No. 20}\textsuperscript{27} refused to require the Negro plaintiffs to exhaust South Carolina statutory remedies and ordered eleven Negro children admitted to the previously all-white Charleston elementary schools. The record plainly showed that, in applying for transfers, none of the plaintiffs had exhausted the appellant remedies provided under the school board rules promulgated pursuant to the South Carolina Pupil Assignment Law.\textsuperscript{28} The

\textsuperscript{22} 373 U.S. 526, 539 (1963).
\textsuperscript{24} 373 U.S. 68 (1963).
\textsuperscript{25} 199 F. Supp. 403 (E.D.Ill. 1961).
\textsuperscript{26} 305 F.2d 783 (7th Cir. 1962).
court permitted several white students and their parents to intervene and introduce uncontroverted evidence to the effect that basic differences and disparities existed in the educability of the white and Negro races, which differences formed a rational basis for segregated educational facilities, thereby attacking the factual foundation of Brown v. Board of Educ.29 However, the court felt itself bound in this respect by the previous decisions of the Supreme Court and the Fourth Circuit. The court required general desegregation of all schools in the district beginning with the 1964-65 school year and further ordered the district trustees to give written notice thereof to parents of all pupils. The order of the district court was affirmed and adopted by the court of appeals in a per curiam decision.30

In Goss v. Board of Educ.31 the pupil transfer provisions of another desegregation plan were declared unconstitutional by the Supreme Court. The Tennessee desegregation plans, as approved by the district courts and court of appeals,32 permitted any pupil (without regard to race) to transfer from a school in which he was in the racial minority to a school where he would be in the race of the majority. The Court, speaking through Mr. Justice Clark, noted that even though the transfer provisions were available to both races, they did not provide for transfer from a racial majority to a racial minority and said:

Classification based on race for purposes of transfers between public schools, as here, violate the Equal Protection clause of the Fourteenth Amendment . . . racial classifications are “obviously irrelevant and invidious.”33

3. Elections

A Louisiana statute provided that in all primary, general or special elections the nomination papers and ballots designate the race of the candidates. Negro candidates for election to a school board in 1962 filed an action prior to election to enjoin the Secretary of State from enforcing the statute. Their motions for a temporary restraining order were denied and the validity of the statute upheld by a three-judge court.34

32. 301 F.2d 164 (6th Cir. 1962); 301 F.2d 828 (6th Cir. 1962).
In *Anderson v. Martin* the Supreme Court declared the statute unconstitutional in violation of the due process clause of the Fourteenth Amendment. The decision concluded there was no legitimate state interest in pointing out the race of the candidate as bearing upon his qualifications for office and that the statute had the effect of encouraging a vote for or against a candidate on racial grounds. Concluding that the statute itself promoted the ultimate discrimination, Mr. Justice Clark said:

But by placing a racial label on a candidate at the most crucial stage of the electoral process—the instant before a vote is cast—the state furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.

4. Courtroom Segregation

In *Johnson v. Virginia* the Negro petitioner was convicted of contempt in a traffic court in Richmond. He had been seated peacefully in a section of the courtroom reserved solely for whites and refused to move when ordered to do so by the bailiff. When summoned before the judge, who instructed him to be seated in the Negro section of the courtroom, the petitioner remained standing, stating that he preferred to stand rather than be seated. Upon his refusal to obey the judge’s further direction to be seated he was arrested for contempt. The Supreme Court held that the arrest and conviction were based entirely upon a refusal to comply with the segregated seating requirements and, in reversing, reaffirmed the position that a state could not constitutionally require segregation of public facilities.

5. Freedom of the Press

In what may prove to be one of the year’s most important decisions, the Supreme Court in *New York Times Corp. v. Sullivan* applied the first amendment through the Fourteenth Amendment to limit the state’s right to award damages for the libel of public officials. In 1960 *The New York Times* ran a paid advertisement over the names of a group of individuals, including some Negro Alabama clergymen, seeking support for the

35. 84 Sup. Ct. 454 (1964).
36. Id. at 456.
38. 84 Sup. Ct. 710 (1964).
“civil rights” movement. The ad purported to described certain police activities in Montgomery, Alabama, which descriptions were, in large part, false. L. B. Sullivan, a city commissioner charged with supervision of the police department, brought a civil libel action against The Times and the Alabama clergymen, claiming they had charged him with unfitness in office. Sullivan's demand for a retraction was ignored by the individual defendants, with The Times replying that the advertisement had no reference to him. At the trial Sullivan made no effort to prove actual damages. The trial judge submitted the case under instructions that the statements in the ad were libelous per se and not privileged, leaving to the jury the questions of publication and whether the statements had reference to Sullivan. On the subject of malice, the judge charged that the jury only need find malice to sustain an award of punitive damages. A verdict of 500,000 dollars, the amount requested, was returned by the jury, and the Alabama Supreme Court affirmed, adopting the general common law principles of libel that where the words published injured the person in reputation, profession, trade or business, or charged him with an indictable offense or tended to bring the individual into public contempt, they were libelous per se.39

The Supreme Court reversed, reaffirming previous decisions that freedom of speech protections extended to commercial advertisements of an editorial nature. Tracing the historical purpose of the first amendment to protect debate on public issues, the Court reasoned that erroneous statements were inevitable in free debate and must be protected if freedom of speech was to survive. Then, speaking for the majority, Mr. Justice Brennan said:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.40

Therefore, the Court held, state law could not raise a presumption of the existence of actual malice even though the defamatory words were libelous per se if they were written of a public official in that capacity.

39. 273 Ala. 656, 144 So.2d 25 (1962).
40. 84 Sup. Ct. 710, 726 (1964).
After spelling out this constitutional holding and observing that a new trial would follow, the majority then proceeded to review the evidence to determine whether the record could support a constitutional judgment for Sullivan. In so doing, they concluded there was no evidence of actual malice in that the individual defendants had not authorized the advertisement to be run over their names, and The Times had acted in good faith in accepting the advertisement. Furthermore, the Court concluded that the advertisement could not reasonably be construed as referring to Sullivan. Thus, there was no evidence to sustain a verdict in his behalf.

Justices Black, Douglas, and Goldberg concurring, construed the first and fourteenth amendments as granting individuals the absolute and unconditional constitutional right to criticize public officials in their official capacity regardless of whether the criticism was made with or without malice.

6. Freedom of Religion

The application of another South Carolina statute was held unconstitutional by the Supreme Court in Sherbert v. Verner.41

The appellant, a Seventh-Day Adventist, refused to accept Saturday employment on religious grounds, and was refused benefits under the South Carolina Employment Security Act42 on the ground that she was not “available for work”43 and had refused “to accept available suitable work.”44 The South Carolina Supreme Court had affirmed the court of common pleas’ decision upholding the Employment Security Commission.45 Mr. Justice Brennan, for the majority, reasoned that the state was conditioning appellant’s receipt of unemployment benefits upon her foregoing the practice of her religion and that such state pressure had the effect of burdening the free exercise of religion, in violation of the first amendment, made applicable here through the fourteenth amendment. The Court further held that the record revealed no compelling state interest being enforced by the eligibility requirements as applied to the appellant.

Concurring in the result, Mr. Justice Stewart pointed out that the effect of the decision was to require South Carolina to treat

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45. 240 S.C. 286, 125 S.E.2d 737 (1962).
the appellant as available for work when she refused employment for religious reasons, thereby giving official recognition to her church. Dissenting, Mr. Justice Harlan, joined by Mr. Justice White, relied on *Brownfeld v. Brown*, holding that the free exercise clause was not offended when the state forbade a sabbatarian to do business on Sunday. He argued that this decision had the effect of overruling the *Brownfeld* decision. Furthermore, he reasoned that the effect of this decision was to require the state to single out for financial assistance those whose behavior was religiously motivated, even though it denied such assistance to others whose identical behavior was not so motivated.

Elaborating on the principles laid down in *Engel v. Vitale*, the Supreme Court in cases arising from Maryland and Pennsylvania held that required religious exercises in public schools were unconstitutional, *Abington School Dist. v. Schempp*. The Pennsylvania statute required Bible reading, without comment, at the opening of each school day, but permitted any child to be excused upon the parents' written request. A three judge federal district court enjoined the readings, holding that they were in fact religious services with compulsory attendance. The father testified that he had not sought to have his children excused because of the possible adverse effect on their relations with the other pupils.

The Baltimore case arose on demurrer with the atheist petitioners alleging that, under the rules adopted by the school commissioners, Bible reading and/or use of the Lord's Prayer was required at the opening of each school day, and that even though the pupils were permitted to be excused, the rule was nevertheless a violation of their rights to freedom of religion and separation of church and state. Petitioners alleged that the ceremonies in the public schools had the effect of placing a premium upon religious belief as against non-belief, thereby encouraging the pupils to question the morality and citizenship of atheists. The trial court and the Maryland Court of Appeals sustained the demurrer.

Applying the establishment clause and the free exercise clause of the first amendment, made applicable through the fourteenth

47. 370 U.S. 421 (1962).
50. 228 Md. 239, 179 A.2d 698 (1962).
amendment, the Court held that no state could ally itself to one particular form of religion but that it was required to remain strictly neutral. Said Mr. Justice Clark for the majority:

Applying the Establishment Clause principles to the cases at bar, we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord’s Prayer by the students in unison. These exercises are prescribed as a part of the curricular activities of students who are required by law to attend the school. . . . We agree with the trial court’s finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.51

The Court was careful to point out that the fact that the students could be excused did not mitigate the unconstitutionality of the services, since the very requiring of the exercises violated the Constitution. However, the unconstitutionality of the services was distinguished from the situation where the Bible might be taught in a secular course for its literary and historic qualities.

Mr. Justice Stewart dissented on the ground that so long as the pupils were not compelled to attend the services, no violation of the Constitution would occur. He would have remanded the cases for further hearings on the question of compulsion.

C. Criminal Due Process

1. Breach of the Peace

The series of ensuing decisions in State v. Fields52 and City of Rock Hill v. Henry53 covered in last year’s survey of Constitutional Law54 leaves serious doubt as to the possibility of being guilty of a breach of the peace where first amendment rights concerning “peaceful expression of unpopular views” are involved. After the state court’s affirmance of the conviction of the Orangeburg demonstrators for breach of the peace on the ground that, even though peaceful, they were blocking pedestrian traffic, the Supreme Court vacated the judgment and remanded

it for "consideration in light of Edwards v. South Carolina,"\textsuperscript{55} in Fields v. South Carolina.\textsuperscript{56} Upon consideration, the South Carolina Supreme Court reaffirmed its judgment, relying upon State v. Brown,\textsuperscript{57} in State v. Fields.\textsuperscript{58} Citing the Edwards decision, without further explanation, the Supreme Court reversed, per curiam, Fields v. South Carolina.\textsuperscript{59}

Somewhat more light is shed on the question by the Henry decisions. The state court's affirmance of the breach of the peace convictions of the Rock Hill demonstrators on the ground that they had disrupted work in the city hall and jammed the streets was also vacated for consideration in the light of Edwards.\textsuperscript{60}

On remand, noting the history of the Fields litigation, the South Carolina Supreme Court refused to construe the United States Supreme Court as holding:

\ldots[T]hat one has an absolute right to commit a breach of peace, provided one is engaged at the time in the exercise of a right protected by the First Amendment to the United States Constitution. If one has an absolute right to commit that crime, while so engaged, it would seem to follow that one would have the right to commit other more grievous crimes while so engaged. Since we cannot believe such to be the view of the United States Supreme Court, we approach the reconsideration of this case in the light of our original interpretation of the Edwards decision. We have reviewed the facts in this case, which we found more aggravated than those in the Edwards case, and conclude that there is nothing in the Edwards case to require a reversal of the instant case.\textsuperscript{61}

Subsequently the Supreme Court reversed the judgment in Henry v. City of Rock Hill,\textsuperscript{62} holding Edwards controlling, stating:

Edwards established that the "Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views." \ldots As in Edwards, the South Carolina Supreme Court has here "defined a criminal offense so

\textsuperscript{55} 372 U.S. 229 (1963).
\textsuperscript{56} 372 U.S. 522 (1963).
\textsuperscript{57} 240 S.C. 357, 126 S.E.2d 1 (1962).
\textsuperscript{58} 242 S.C. 357, 131 S.E.2d 91 (1963).
\textsuperscript{59} 375 U.S. 44 (1963).
\textsuperscript{60} Henry v. City of Rock Hill, 375 U.S. 6 (1963).
\textsuperscript{61} 244 S.C. 74, 135 S.E.2d 718, 720 (1963).
\textsuperscript{62} 84 Sup. Ct. 1042 (1964).
as to permit the conviction of the petitioners if their speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.\textsuperscript{63}

Thus, if state court factual conclusions are really binding on the United States Supreme Court, these decisions certainly weaken the doctrine of Terminiello v. Chicago,\textsuperscript{64} and apparently hold that the exercise of first amendment rights by peaceful expression of unpopular views cannot constitute a breach of the peace no matter how disruptive that exercise may be on the community life.

More understandable is the decision in Wright v. Georgia,\textsuperscript{65} involving the application of the Georgia Breach of Peace Statute. Six Negroes playing basketball in the city recreation park normally reserved for whites refused to leave on police order. There had been no disturbance and no other people were present. In reversing the conviction the Court concluded that the generally worded breach of peace statute did not give the petitioners adequate notice that their conduct was prohibited and that the possibility of disorder by others could not justify the exclusion of Negroes from a place where they otherwise had a right to be present.

2. Change of Venue

In Rideau v. Louisiana,\textsuperscript{66} the Supreme Court reversed the refusal of the Louisiana state court to grant a change of venue when the accused’s statement had been given wide TV coverage in the community. A few hours after a man had robbed a bank, kidnapped three employees and killed one, the petitioner was arrested. The next day, and for two successive days thereafter, his interview with the sheriff, in which he made several material admissions, was given wide TV and radio coverage. The judge refused to excuse for cause three members of the jury who admitted hearing or seeing the interview. In the majority opinion written by Mr. Justice Stewart, the Court found a violation of the due process requirements of the fourteenth amendment in the refusal to change venue, since the people of the community had been so repeatedly and intensely exposed to the confession.

\textsuperscript{63} Id. at 1043.
\textsuperscript{64} 337 U.S. 1 (1949).
\textsuperscript{65} 373 U.S. 284 (1963).
\textsuperscript{66} 373 U.S. 723 (1963).
Mr. Justice Harlan joined Mr. Justice Clark's opinion, dissenting on the ground that there had been no showing that the trial was in fact influenced by the adverse publicity.

3. Right to Counsel

Expanding on Hamilton v. Alabama, the per curiam decision of the Supreme Court in White v. Maryland reversed the conviction where the accused had confessed at a preliminary hearing when he had not been represented by counsel. Although a later preliminary was held at which he was represented, the confession from the earlier hearing was introduced in evidence at the trial. The Maryland Court of Appeals had confirmed the conviction on the ground that the preliminary hearing was not a "critical stage" in the Maryland criminal proceedings. However, the Court concluded that because of the use of the guilty plea, the preliminary in this particular case was critical:

Whatever may be the normal function of the "preliminary hearing" under Maryland law, it was in this case as "critical" a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.

However in State v. White, the South Carolina Supreme Court distinguished and refused to follow the White v. Maryland decision in the case of an accused who had not been represented at the preliminary hearing. However, he had made no plea or statement at that hearing, and the court refused to hold that the preliminary was a critical step in the criminal proceedings, tracing the purpose of the preliminary simply to determine if the state could show probable cause in justifying further criminal prosecution. The court noted that a defendant was not permitted to offer any evidence and that none of the evidence at the preliminary was admissible in subsequent proceedings. Under such circumstances, the court held there could be no denial of due process to the accused.

68. 373 U.S. 59 (1963).
69. 227 Md. 615, 177 A.2d 877 (1962).
70. 373 U.S. 60 (1963).
4. Searches and Seizures

In what may prove to be another keystone decision, eight members of the Supreme Court in *Ker v. California*,\(^{72}\) held the prohibitions of the fourth amendment with respect to the standards of reasonableness of searches and seizures applicable to state criminal proceedings through the fourteenth amendment, thereby expanding the principles of *Mapp v. Ohio*.\(^{73}\) However, the decision written by Mr. Justice Clark purported to leave some room for differences between the standards applicable in federal criminal proceedings as distinguished from state prosecutions:

This court's long established recognition that standards of reasonableness under the Fourth Amendment are not as susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution.\(^{74}\)

In this case the petitioners were convicted for the possession of marijuana. After observing contacts between one of the petitioners and a known marijuana dealer, the officers, having previous information that one of the petitioners had been suspected of selling marijuana from his apartment, entered the apartment without a search warrant and found the petitioners there. They appropriated marijuana on the kitchen table, arresting both defendants and, as a result of a subsequent search, found other packages of marijuana in the kitchen and bedroom and in one of the petitioner's automobiles. All of the marijuana found was introduced in evidence. Five Justices concurred in affirming the state court's ruling that the marijuana was admissible in evidence, concluding that, in view of all the circumstances, probable cause did exist to justify the search and seizure. They held that the search and seizure were made incident to a lawful arrest. Mr. Chief Justice Warren, Justices Douglas and Goldberg joined Mr. Justice Brennan’s dissent on the admissibility of the evidence,

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on the ground that the police officers should have announced their presence before quietly entering the apartment without the owners' permission, unless there were compelling reasons why this should not have been done.

II. LEGISLATIVE APPORTIONMENT—ARTICLE I, SECTION 2

In the first of what undoubtedly will be a long line of like cases, the Supreme Court in Wesberry v. Sanders,76 declared unconstitutional, in violation of article I, section 2, Georgia's 1931 Congressional Apportionment Statute. The suit was brought by voters of Georgia's Fifth Congressional District (Fulton, DeKalb, and Rockdale counties) which, according to the 1960 census, had a population of 823,680. The average population of the State's ten districts was 394,012, with one district having only 272,184 persons. Two members of the three judge district court concluded that the apportionment was grossly out of balance, but, relying on Colegrove v. Green,76 dismissed the complaint as raising only "political," non-justiciable questions.77

Speaking for six members of the Court, Mr. Justice Black relied on Baker v. Carr,78 to sustain the jurisdiction of the district court and, after reviewing the constitutional debates on the methods of representation in the legislative branch, said:

We hold that, construed in its historical context, the command of Article I, Section 2 . . . means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's. . . . To say that a vote is worth more in one district than in another, would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the people," a principle tenaciously fought for and established at the Constitutional Convention.79

Mr. Justice Harlan, joined by Mr. Justice Stewart, felt the matter of congressional apportionment was vested by article I, sections 2 and 4, exclusively in that legislative body and was not subject to judicial review.

75. 84 Sup. Ct. 526 (1964).
76. 328 U.S. 549 (1946).
78. 369 U.S. 186 (1962).
79. 84 Sup. Ct. 526, 530 (1964).
III. FULL FAITH AND CREDIT—ARTICLE IV, SECTION 1

Following Vanderbilt v. Vanderbilt, the South Carolina Supreme Court in Murdock v. Murdock, refused to hold that a Kentucky divorce decree was a bar to a South Carolina wife's claim for alimony. The parties had lived in this state until the husband deserted the wife and children and moved to Kentucky. There he obtained a divorce by default. The South Carolina wife was never served in the Kentucky proceedings but brought this action in South Carolina for divorce and alimony, obtaining personal service on the husband. The court said the Kentucky decree was not entitled to full faith and credit on the question of the wife's right to alimony in the South Carolina litigation.

THE SOUTH CAROLINA CONSTITUTION

I. DUE PROCESS, ARTICLE I, SECTION 5

In Sexton v. Harleysville Mut. Cas. Co., the South Carolina Supreme Court was faced with a problem of whether the enforcement of the statutory lien against negligently operated automobiles constitutes the taking of property without due process when the automobile had been stolen from the owner. The statute specifically provides that no lien for the negligent operation of the automobile would come into existence if the automobile had been stolen by the "breaking of a building under secure lock or when the vehicle is securely locked." The constitutionality of the statute having been decided, in Merchants & Planters Bank v. Brigman, in the absence of evidence that the vehicle was securely locked when stolen, the judicial determination that the elements to establish the lien were present and the enforcement thereof did not constitute an unconstitutional taking.

II. DIVORCE, ARTICLE XVII, SECTION 3

As one of the permissible grounds for divorce, article XVII, section 3 of the Constitution of South Carolina lists simply "desertion." In the enabling legislation, however, the Legislature, as a ground for divorce, specified desertion "for a period of one

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84. 106 S.C. 362, 91 S.E. 332 (1916).
year.\textsuperscript{85} In \textit{Nolletti v. Nolletti}\textsuperscript{86} the South Carolina Supreme Court was presented for the first time with the question of the validity of the "one year" requirement as a prerequisite to granting a divorce for desertion. The wife's complaint, filed on August 15, 1962, asserted that she has been deserted by her husband on July 11, 1962, and sought a divorce on the grounds of desertion. In affirming the trial court's dismissal of the complaint, the court compared the one year requirement to rules of evidence designed to insure that a real desertion had occurred and concluded that the requirement was consistent with South Carolina's strong public policy to make marriages permanent and discourage separation. Finding nothing in the specific language or purpose of article XVII, section 3, indicating an intent to restrict the legislative implementation on the grounds enumerated, the court upheld the constitutionality of the statutory one year requirement.

III. Constitutional Amendments—Article XVI, Section 1

As a part of the procedure to amend the state constitution, the amendment is required to be ratified by the General Assembly after voter approval and after being read three times on three separate days in each house.\textsuperscript{87} In \textit{Gebhardt v. McGinty},\textsuperscript{88} the South Carolina Supreme Court was faced with the question of the validity of five constitutional amendments relating to the debt limit of Beaufort County under article VIII, section 7, and article X, section 5. After voter approval, ratifying legislation was introduced in the general assembly which simply referred to the titles of the five constitutional amendments. In the opinion written by Mr. Justice Bussey the ratification was held ineffective because of the failure of the ratifying bill to contain the full language of the proposed amendments. Noting that since 1868 it had always been the practice of ratifying legislation to quote the constitutional amendments in \textit{haec verba}, the court reasoned that the purpose of the "three times reading" requirement of article XVI, section 1, was to insure that the ratifying general assembly be as familiar with the amendments as was the electorate and the prior (and different) general assembly which had proposed the amendments. Therefore the court held the legislation attempting to ratify the amendments by reference, rather than by a full restatement thereof, was void and ineffective.

\textsuperscript{87} S.C. CONST. art. XVI, § 1.
\textsuperscript{88} 243 S.C. 495, 134 S.E.2d 749 (1964).