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DILEMMIC ASPECTS OF THE DOCTRINE OF "CONSTITUTIONAL FACT"

FRANK R. STRONG*

The doctrine of "constitutional fact" requires that the United States Supreme Court make an independent examination into facts "decisive of constitutional issues." Although the doctrine fell into disrepute in the 1920's and 1930's when employed in judicial review of economic regulation, it has been revived in cases involving civil liberties, notably cases involving determinations of obscenity for first amendment purposes. The author reviews the decisions of the 1967 Term of the Supreme Court and concludes that the doctrine enjoys continuing vitality. He suggests, however, that its expanding use may increase to crisis proportions the Court's already burdensome workload.

In earlier pages of this *Law Review* there appeared a demonstration of the persistence of the doctrine of "constitutional fact."¹ While exhausting to the reader, the article did not exhaust the subject. Yet it was sufficiently inclusive to establish the fact of continuing vitality of a doctrine that leading writers have long attempted to consign to constitutional oblivion. Accordingly, the present article will not essay further proof save to slip in a footnote calling attention to the confirming line of cases involving alleged prosecutorial toleration of false testimony.² Rather,

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¹ Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

² *Miller v. Pate*, 386 U.S. 1 (1967) (unanimous opinion by Stewart, J., reversing on basis of Court's own evaluation of uncontradicted evidence produced on habeas corpus); *Napue v. Illinois*, 360 U.S. 264 (1959) (unanimous opinion by Warren, C.J., reversing state supreme court after an independent evaluation of the facts); *Hysler v. Florida*, 315 U.S. 411 (1942) (Frankfurter, J., for majority affirms judgment of conviction but only after independent examination of the record; Black, Douglas and Murphy, JJ., dissent after a reexamination of the record highlighted by inclusion in appendix form of evidential material). See also *Giles v. Maryland*, 386 U.S. 66 (1967). By far the strongest statement on the doctrine is that of Chief Justice Warren in *Napue*. He first rejects the State's claim that under *Hysler* the Court is "not free to reach a factual conclusion different from that reached by the Illinois Supreme Court This Court made its own 'independent examination' of the allegations there to determine if they had in fact met the Florida standard" 360 U.S. at 271. Continuing, the Chief Justice asserted that "the duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate." *Id.* There follow in the text general citations to *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), *Cooper v. Aaron*, 358 U.S. 1

this sequel is written because developments since the preparation of the basic analysis further highlight the current strength of the doctrine and the dilemmic aspects of its persistence.

THE DOCTRINE PERSISTS AT THE 1967 TERM

Pre-*Miranda*³ cases of alleged coerced confession continue to reach the Supreme Court. Of those at the 1967 Term, four, all per curiam, disclose no disposition on the part of the Court to forsake the doctrine of constitutional fact.⁴ In none does the Court resolve issues of disputed testimony, nor does any rank as a major determination. Yet each reflects the Court's sense of an inescapable responsibility to make an independent examination of the record,⁵ and the very absence of lengthy opinions in reversal suggests adherence to quite settled doctrine.

After conflict within the Court concerning the scope of review of constitutional facts in cases of alleged discrimination in jury composition,

(1958), and quotations articulating the doctrine from *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). The text is then supplemented by a footnote citing to sixteen expressions of the doctrine, two in dissenting opinions, and tracing recognition of the principle back to Mr. Justice Holmes in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ *Darwin v. Connecticut*, 391 U.S. 346 (1968); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968); *Brooks v. Florida*, 389 U.S. 413 (1967); *Beecher v. Alabama*, 389 U.S. 35 (1967); cf. *Johnson v. Massachusetts*, 390 U.S. 511 (1968).

⁵ In the *Greenwald* per curiam decision the Court refers to the need to make "an examination of the record," 390 U.S. at 520, which is surely elliptical for "our own examination of the record," the language employed in *Brooks*, 389 U.S. at 415. There is no such expression in either of the other per curiams, yet context and supporting citations serve the same function. Thus in *Beecher* the Court states:

[W]e need not resolve this evidentiary conflict, for even if we accept as accurate the State's version of what transpired there, the uncontroverted facts set forth above lead to the inescapable conclusion that the petitioner's confessions were involuntary. See *Davis v. North Carolina* [A] realistic appraisal of the circumstances of *this* case compels the conclusion that this petitioner's confessions were the product of gross coercion. 389 U.S. at 37-38. And in *Darwin* Mr. Justice Harlan is "unable to agree with the basis on which the Court reverses petitioner's conviction I cannot join the Court in what seems to me no more than a substitution of its view on a close factual question for that of the state courts." 391 U.S. at 350. Mr. Justice White, dissenting separately without opinion, does not disclose whether he is now opposing the doctrine of "constitutional fact." Dissent was also registered in *Greenwald* and *Johnson* but there is no indication in either that any member of the Court is questioning the doctrine. The fact that in *Beecher* four Justices shift the constitutional basis for intervention from *Brown v. Mississippi*, 297 U.S. 278 (1935), to *Malloy v. Hogan*, 378 U.S. 1 (1964), has no significance for the matter under present consideration.

*Whitus v. Georgia*⁶ recently returned to the rule of *Norris v. Alabama*⁷ and *Pierre v. Louisiana*⁸ that even disputed facts of constitutional pertinency must be examined and determined by the Court independently of prior inquiry and solution by state courts.⁹ The decision was unanimous, the judicial language unmistakable. At the 1967 Term, *Whitus* figured in six per curiams. Three Georgia convictions were overturned on direct citation of it without more.¹⁰ In a fourth case from Georgia¹¹ and in one from Alabama,¹² reversal and remand resulted from the Court's findings that petitioners' prima facie cases of discrimination had not been rebutted. *Norris* and *Whitus* were both cited in the review of the Georgia conviction, but only *Norris* in the other. However, it was in the Alabama per curiam that there appears the language of "constitutional fact": "On our independent examination of the record, we are unable to discover any evidence adduced by the State adequate to rebut petitioner's prima facie case."¹³ Supreme Court review in a third case involving issues of burden of proof resulted in a stalemate, four Justices voting for reversal, four taking the position that certiorari to the Sixth Circuit Court of Appeals had been improvidently granted, and Mr. Justice Marshall not sitting.¹⁴

In decisions of the 1967 Term involving substantive civil liberties, the "constitutional fact" doctrine enjoyed varying emphases of reaffirmation. The extremes came in extensions of *New York Times v. Sullivan*.¹⁵ *Beckley Newspapers Corp. v. Hanks*¹⁶ applied to newspaper libel of a clerk of court and *St. Amant v. Thompson*¹⁷ to libel of a deputy sheriff by a candidate for United States Senator, the *Times* rule of "reckless disregard for truth or falsity." Technically, reversal and remand were in each instance grounded upon misapplication of the governing malice standard by the respective state supreme courts.¹⁸ Yet for the doctrine

⁶ 385 U.S. 545 (1967).

⁷ 294 U.S. 587 (1935).

⁸ 306 U.S. 354 (1939).

⁹ The jury discrimination cases up to the 1967 Term of Court are discussed in Strong, *supra* note 1, at 244-49.

¹⁰ *Sullivan v. Georgia*, 390 U.S. 410 (1968); *Anderson v. Georgia*, 390 U.S. 206 (1968); *Cobb v. Georgia*, 389 U.S. 12 (1967).

¹¹ *Jones v. Georgia*, 389 U.S. 24 (1967).

¹² *Coleman v. Alabama*, 389 U.S. 22 (1967).

¹³ *Id.* at 23.

¹⁴ *Anderson v. Johnson*, 390 U.S. 456 (1968).

¹⁵ 376 U.S. 245 (1964). The *Times* and immediately subsequent libel cases are considered in Strong, *supra* note 1, at 267-70.

¹⁶ 389 U.S. 81 (1967).

¹⁷ 390 U.S. 727 (1968).

¹⁸ Mr. Justice Fortas dissented in *St. Amant*, convinced that "under *New York*

under study there is significance in the manner in which the Court's opinions indicate extensive and intensive examination of the respective records.¹⁹

In contrast to these somewhat tangential treatments is Mr. Justice Marshall's disposition, for all but Mr. Justice White, of *Pickering v. Board of Education*.²⁰ Again reversing and remanding, this time with respect to a decision of the Supreme Court of Illinois, the Court extended *New York Times* to a

case in which a teacher has made erroneous statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.²¹

An appendix to the opinion of the Court, after setting forth Mr. Pickering's Letter to the Editor, critical of his superintendent and the local board, proceeds to an analysis of that letter. Whereas the board, after the required hearing on its dismissal of Mr. Pickering, had found eight principal statements to be false, "[o]ur independent review of the record convinces us" that only four of the eight were false and that the falsity was "perfectly consistent with good-faith error. . . ."²² To the statement that the Court made its own independent examination of the record was appended a two paragraph footnote worthy of quotation in full:

This Court has regularly held that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case. *E.g.*, *Norris v. Alabama*, 294 U.S. 587 (1935); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). However, in cases where the upholding or rejection of a constitutional claim turns on the resolution of factual questions, we also consistently give great, if not controlling, weight to the findings of the state courts. In the present case the trier of fact was the same body that was also both the

Times, this libel was broadcast with 'actual malice'" 390 U.S. at 734. In *Hanks* he took no part. In each case Black and Douglas, JJ., concurred in result, consistent with the position taken by them in *Times*.

¹⁹ In *Hanks* the Court was satisfied of the lack of actual malice by "[o]ur examination of the whole record" 389 U.S. at 83. The prevailing opinion in *St. Amant* devotes two paragraphs to "facts in this record" which "support our view." 390 U.S. at 733.

²⁰ 391 U.S. 563 (1968).

²¹ *Id.* at 572-73.

²² *Id.* at 578, 582.

victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal. The state courts made no independent review of the record but simply contented themselves with ascertaining, in accordance with statute, whether there was substantial evidence to support the Board's findings.

Appellant requests us to reverse the state court's decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the board's multiple functioning *vis-à-vis* appellant. Compare *Turney v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955). Accordingly, since the state courts have at no time given *de novo* consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board.²³

By laying emphasis on the second sentence, the first portion of this footnote could be read as weakening the doctrine of "constitutional fact" in Supreme Court review of state court dispositions not involving appeal from administrative action characterized by a blending of function. However, there is good reason to doubt such intent. The cases cited in support of the assertion of the first sentence are leading decisions of that exact type. And while judicial language is available from the 1950's to support the second sentence, none is cited, suggesting that the caveat serves more as a polite nod to the period of Justice Frankfurter's maximum influence on the issue of scope of review than as an intended present cloud on the inconsistent position taken in the preceding sentence. There is also extrinsic support for this view in statements appearing in opinions in two contemporaneous cases. One is Mr. Justice Fortas' dissent in *Ginsberg v. New York*.²⁴ Critical of the majority for refusing to face and resolve the question of the obscenity or non-obscenity of the "girlie" magazines for a youth of sixteen, the Justice observes that "this Court has made strong and comprehensive statements about its duty in First Amendment cases—statements with which I agree."²⁵ A footnote quotation from *Jacobellis v. Ohio*²⁶ makes it doubly clear that this duty is that of "making

²³ *Id.* at 578-79 n.2.

²⁴ 390 U.S. 629 (1968).

²⁵ *Id.* at 672.

²⁶ 378 U.S. 184, 187-90 (1964).

an independent judgment on the facts of the case as to whether the material involved is constitutionally protected."²⁷ There is no inkling here that Mr. Justice Fortas believes the Court to be backing away from the doctrine of "constitutional fact." Quite the contrary, he asserts his agreement with what he takes to be accepted doctrine and challenges only the Court's disposition of the case on the technical ground that Ginsberg's attorney did not choose to assail the conviction for want of obscenity in the magazines.²⁸ Decided the same day as *Ginsberg* was *Interstate Circuit, Inc. v. City of Dallas*.²⁹ In overturning a motion picture licensing ordinance on grounds of unconstitutional vagueness, Mr. Justice Marshall for the Court made the observation that "to the extent that vague standards do not sufficiently guide the censor, the problem is not cured by affording *de novo* judicial review."³⁰ Although negative in character, there is here a judicial assumption that the doctrine of "constitutional fact" remains intact.

Certainly the remainder of *Pickering's* footnote 2 is clear on the application of the "constitutional fact" doctrine where "the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal."³¹ Clearly rejected is the pertinency of the substantial evidence rule, application of which by the state's highest court led to its affirmance of the administrative dismissal. Even more, the usual phraseology of the "constitutional fact" rule is invigorated by addition of an adverb: the evidence in the case is to be reviewed by the Court "completely independently."³² This emphasis upon complete independence in appraisal of the record in the circumstances of the *Pickering* litigation is reminiscent of the distinction between trial *de novo* and independent factual judgment made in the original Big Four cases of *Ben Avon*,³³ *Fung Ho*,³⁴ *Crowell*,³⁵ and *St. Joseph*.³⁶ The Court is not now suggesting literal trial *de novo* for the *Pickering* type of case, but it is asserting the need for an independent independent judgment by it of the facts controlling con-

²⁷ 390 U.S. at 672-73.

²⁸ *Id.*

²⁹ 390 U.S. 676 (1968).

³⁰ *Id.* at 685.

³¹ 391 U.S. at 579 n.2.

³² *Id.*

³³ *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920).

³⁴ *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

³⁵ *Crowell v. Benson*, 286 U.S. 22 (1932).

³⁶ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936). See Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 249, 272 (1967).

stitutionality. This is only the second instance, *Manual Enterprises v. Day*³⁷ having been the first, wherein the reconstructed Court has fully considered the doctrine of "constitutional fact" in the context of an administrative record.³⁸

However, the Court's remands in *Watts v. Seward School Board*³⁹ and *Puentes v. Board of Education*⁴⁰ for further consideration in light of *Pickering*, together with the distinct possibility that the litigation in *Meehan v. Macy*⁴¹ will ultimately reach the Court, presage for the Court's docket additional cases involving different types of administrative bodies and differing degrees of functional and procedural desiderata in administrative adjudication. A feature of *Watts* is consistent decisions at two administrative levels, local and state, followed by affirmance in two courts, first instance and appellate, on the basis of the substantial evidence supporting the original administrative finding of immoral conduct as defined by Alaska statute.⁴² *Meehan* also involves multiple determination, administrative as well as judicial. The trial court's action was on motion for summary judgment; on appeal, the dissent, stressing the "exceedingly narrow" scope of review "in a case of this type,"⁴³ appears from a reading of the majority opinion to reflect a conflict within that court over the applicability of the substantial evidence test at the judicial stage after reliance upon it at the appellate administrative level. In *Puentes*, a divided New York Court of Appeals expressly rested on the substantial evidence test its affirmance of the appellate division's confirmation, by split vote, of the determination of the local school board that the critical letter addressed to the board by Puentes in his capacity as president of the local federation of teachers was "defamatory, malicious and false."⁴⁴

That in cases such as these the Court will insist upon an independent judgment with respect to facts decisive of constitutionality is attested by the continuing strength of the doctrine of "constitutional fact" disclosed at the 1967 Term.⁴⁵ That strength is such that a current brief by a group

³⁷ 370 U.S. 478 (1962), discussed in Strong, *supra* note 1, at 273-74.

³⁸ Consideration in *Interstate Circuit, Inc. v. City of Dallas*, discussed in the preceding paragraph, was quite tangential.

³⁹ 391 U.S. 592 (1968).

⁴⁰ 88 S.Ct. 2271 (1968).

⁴¹ 392 F.2d 822 (D.C. App. 1968).

⁴² See the lengthy, detailed opinion of the Supreme Court of Alaska, one judge dissenting, in *Watts v. Seward School Bd.*, 421 P.2d 586 (Alas. 1968).

⁴³ 392 F.2d at 839-40 (Tamm, J., dissenting).

⁴⁴ *Puentes v. Board of Education*, 18 N.Y.2d 906, 223 N.E.2d 45, 276 N.Y.S.2d 638 (1966), *motion to amend remittitur granted*, 19 N.Y.2d 809, 226 N.E.2d 701, 279 N.Y.S.2d 967 (1967).

⁴⁵ Beyond the evidence of that strength reviewed in the text are three miscel-

of distinguished lawyers, filed in a United States Court of Appeals, could assert,

Where, as here, constitutional issues of moment emerge from mixed questions of fact and law, the authority of an appellate court to take an independent view of the whole record is plain. Indeed, the Supreme Court of the United States has taken such a view even in cases coming from the state courts, over which the Supreme Court does not have a general superintending power analogous to this court's power over the Court of General Sessions. See, *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Haynes v. Washington*, 373 U.S. 503 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Holt v. Virginia*, 381 U.S. 131 (1965).⁴⁶

The only hint of weakness in the doctrine is to be found in Mr. Justice Harlan's concurrence-dissent in the 1967 Term's obscenity decisions.⁴⁷ There, after pointing to a sharp divergence in the current Court as to the proper application of the standards of *Roth*,⁴⁸ *Memoirs*,⁴⁹ and *Ginzburg v. United States*,⁵⁰ he observed:

There are also differences among us as to how our appellate process should work in reviewing obscenity determinations. One view is that we should simply examine the proceedings below to ascertain whether the lower federal or state courts have made a genuine effort to apply the *Roth-Memoirs-Ginzburg* tests, and that if such is the case, their determinations that the questioned material is obscene should be accepted, much as would any findings of fact. Another view is that the

laneous per curiams in which the Court, upon its own independent examination of the entire record, remanded to one state and two federal courts. *McBride v. Smith*, 390 U.S. 411 (1968); *Jones v. Russell*, 390 U.S. 199 (1968); *Robison v. United States* 390 U.S. 198 (1968). The significance of these actions for the doctrine under consideration may be clouded by the fact that in each instance the Court was moved as well by representations of a legal officer of each prosecuting jurisdiction—the Attorney General of Tennessee and the Solicitor General of the United States. On the other hand, these actions of the Court may signal some expansion of the doctrine; their evaluation is difficult.

⁴⁶ Brief for Appellant at 22, *Kinoy v. District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968), filed by Anthony G. Amsterdam of Philadelphia, Philip J. Hirschkop of Alexandria, Virginia, Albert E. Jenner, Jr., and Thomas P. Sullivan of Chicago, John de J. Pemberton, Jr., of New York City, and Morton Stavis of Newark, New Jersey. This was an appeal by professor and practitioner Kinoy from a conviction under the District's disorderly conduct statute for vigorous professional advocacy in behalf of his client before the House Un-American Activities Committee. The Court of Appeals unanimously reversed.

⁴⁷ *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968), discussed at p. 316 *supra*.

⁴⁸ *Roth v. United States*, 354 U.S. 476 (1957).

⁴⁹ *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966).

⁵⁰ 383 U.S. 463 (1966).

question of whether particular material is obscene inherently entails a constitutional judgment for which the Court has ultimate responsibility, and hence that it is incumbent upon us to judge for ourselves, *de novo* as it were, the obscenity *vel non* of the challenged matter.⁵¹

A reference back to the earlier study will disclose the basis for the Justice's observation.⁵² He is quite correct; the conflict in viewpoint that marked the opinions in *Jacobellis* has not been as definitively resolved in favor of the doctrine as *Whitus* has done for the jury-discrimination cases. Despite this, however, the writer adheres to the view that all but one, possibly two, of the sitting Justices "have recently felt an obligation, however distasteful and frustrating, to make an independent judgment on the facts as to whether challenged materials are within or without the *Roth* test of obscenity."⁵³ Certainly there is no indication that Mr. Justice Harlan himself proposes to abandon his strong support of the doctrine although, concerned about the heavy burden which it imposes upon the Court, he is in search of a solution to the problem thus presented.

NEW OCCASIONS FOR THE DOCTRINE AT THE 1967 TERM

Decisions of the Supreme Court at the 1967 Term disclose continuation of constitutional line-drawing at points and in terms that make economic, physical, psychological, social, and other types of fact necessarily decisive, wholly or in large part, of issues of constitutionality. This is true both in the sense of adherence to pre-established constitutional principle and in that of extensions thereof, as is illustrated by the jury-discrimination and libel decisions reviewed in the first section of this article. Further illustrations abound.

With respect to procedural guarantees, *Fontaine v. California*⁵⁴ and *Johnson v. Florida*⁵⁵ apply recently established constitutional doctrine. The latter invoked the *Thompson v. City of Louisville*⁵⁶ rule that a judgment devoid of evidentiary support violates a basic concept of due process; the former applied the invigorated *Chapman v. California*⁵⁷ standard that constitutional error, to be deemed harmless, must be harmless beyond a reasonable doubt. The decisiveness of a factual judgment in each of these

⁵¹ 390 U.S. at 706-07.

⁵² Strong, *supra* note 1, at 270-79.

⁵³ *Id.* at 279.

⁵⁴ 390 U.S. 593 (1968).

⁵⁵ 391 U.S. 596 (1968).

⁵⁶ 362 U.S. 199 (1960).

⁵⁷ 386 U.S. 18 (1967).

situations is clear. *In re Gault*⁵⁸ constituted the basis, in *In re Whittington*,⁵⁹ for vacation and remand of state court affirmance of a juvenile court determination of delinquency. Whittington's constitutional claims were numerous, including several with respect to which facts would be decisive of constitutionality.⁶⁰

The substantive civil liberty areas of desegregation and picketing not surprisingly continued to present the Court with problems in the application of earlier decisions basic to those respective areas. Toward the end of the term three school programs, two based on "freedom of choice" and one on "free transfer," were held inadequate under *Brown v. Board of Education*.⁶¹ Yet by declining to rule that either of these bases is *ipso facto* invalid, the Court left constitutionality to be determined in each challenged program on its precise and particular facts. Thus in *Monroe v. Board of Commissioners*.⁶²

We do not hold that "free transfer" can have no place in a desegregation plan. But like "freedom of choice," if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable. See *Green v. County School Board*⁶³

The language in *Green* was that

[W]e do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself.⁶⁴

Clearly, under such a view, constitutionality or unconstitutionality will turn on close factual determinations.

Out of the landmark decision in *Thornhill v. Alabama*⁶⁵ has come a

⁵⁸ 387 U.S. 1 (1967).

⁵⁹ 391 U.S. 341 (1968).

⁶⁰ The claim of denial of jury trial anticipated *Duncan v. Louisiana*, 391 U.S. 145 (1968), decided the same day and discussed at p. 323 *infra*. The assertion of lack of an impartial tribunal is grounded in *Tumey v. Ohio*, 273 U.S. 510 (1927). Absence of an adequate standard of proof re-invokes the rule of *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

⁶¹ 347 U.S. 483 (1954). The three programs were held inadequate in: *Green v. County School Bd.*, 391 U.S. 430 (1968) ("freedom of choice"); *Raney v. Board of Educ.*, 391 U.S. 443 (1968) (same); *Monroe v. Board of Comm'rs*, 391 U.S. 450 (1968) ("free transfer").

⁶² 391 U.S. 450 (1968).

⁶³ *Id.* at 459.

⁶⁴ *Green v. County School Bd.*, 391 U.S. 430, 439-40 (1968).

⁶⁵ 310 U.S. 88 (1940).

spate of litigation concerning the extent of constitutional protection of picketing. Among other now-established propositions, the picketing must be peaceful and it must not obstruct general ingress and egress with respect to premises literally or constructively public in character. These propositions were reaffirmed by *Cameron v. Johnson*,⁶⁶ which sustained, against a claim of voidness for overbreadth, a Mississippi statute carefully limited to picketing or mass demonstrations obstructive of access to public buildings or public ways.⁶⁷ Shortly thereafter the Court announced its decision in *Local 590, Amalgamated Food Employees v. Logan Valley Plaza*,⁶⁸ in which it overturned state court enjoinder of peaceful picketing of a shopping center supermarket that "was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto."⁶⁹ For, "[a]lthough some congestion of the parcel pickup area occurred, such congestion was sporadic and infrequent."⁷⁰ The analogy to *Marsh v. Alabama*,⁷¹ on which the majority relied for their premise that the picketed area was public-like in character, received vigorous challenge at the hands of Justices Black and White, the former characterizing the situation before the Court as not within *Marsh* "even by the wildest stretching . . ."⁷² But whether *Amalgamated* represents application of settled or of new constitutional principle, it is clear that a factual judgment controls the issue of validity or invalidity.

The intertwining of speech and conduct that marks picketing is characteristic of much that now crowds for protection under the first amendment. At the 1967 Term the Court faced an emotionally charged facet in determining the constitutionality of the 1965 amendment to the Universal Military Training and Service Act, which subjects to criminal liability the knowing destruction or mutilation of draft cards. In *United States v. O'Brien*,⁷³ with only Mr. Justice Douglas dissenting, the Court refused to bring O'Brien's burning of his draft card within the "symbolic speech" protected by the Constitution. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby

⁶⁶ 390 U.S. 611 (1968).

⁶⁷ Fortas and Douglas, JJ., dissented from the majority's refusal to find *Domkowski v. Pfister*, 380 U.S. 479 (1965), applicable. 390 U.S. at 622.

⁶⁸ 391 U.S. 308 (1968).

⁶⁹ *Id.* at 311.

⁷⁰ *Id.* The footnote to this textual statement is also pertinent. *Id.* at 311 n.2.

⁷¹ 362 U.S. 501 (1946).

⁷² 391 U.S. at 328.

⁷³ 391 U.S. 367 (1968).

to express an idea."⁷⁴ In disentangling in these hybrid situations the protected, communicative from the unprotected, noncommunicative aspects, there is no escape for the Court from factual judgments and determinations essential to a pricking out of the constitutional line separating invalidity from validity.

*Peyton v. Rowe*⁷⁵ provides a transition to decisions of the 1967 Term involving extensions of constitutional principle, although the procedural right in question was assumed rather than announced. The direct issue was the proper interpretation of federal legislation⁷⁶ that specifies that the federal trial courts may issue writs of habeas corpus on behalf of prisoners in custody in violation of the United States Constitution. Both petitioners, incarcerated in the Virginia state penitentiary, sought review of sentences later to be served, on the ground of inadequate representation by trial counsel. The federal district court had followed *McNally v. Hill*,⁷⁷ to hold that this basic section of the federal habeas corpus statutes does not authorize attacks upon future consecutive sentences.⁷⁸ The Supreme Court affirmed the Fourth Circuit Court of Appeals, which had declined to adhere to *McNally*.⁷⁹ During the course of the Chief Justice's opinion for an undivided Court there appears the following:

Of course prejudice to meritorious claims resulting from the kind of delay which *McNally* imposes is not limited to situations involving ineffective assistance of counsel. To name but a few examples, factual determinations are often dispositive of claims of forced confession . . . lack of competency to stand trial . . . and denial of a fair trial . . .⁸⁰

The Court's language is inclusive enough to group with other violations of acknowledged procedural rights the denial of effective assistance of counsel by reason of counsel's own professional inadequacy,⁸¹ and ex-

⁷⁴ *Id.* at 376.

⁷⁵ 391 U.S. 54 (1968).

⁷⁶ 28 U.S.C. § 2241(c)(3) (1964).

⁷⁷ 293 U.S. 131 (1934).

⁷⁸ 391 U.S. at 56-57.

⁷⁹ *Rowe v. Peyton*, 383 F.2d 709, 714 (4th Cir. 1967).

⁸⁰ 391 U.S. at 62 (citations omitted).

⁸¹ The right to effective assistance of counsel, in the sense of protection against inadequacy in federal or state criminal law administration, was first established by *Powell v. Alabama*, 278 U.S. 45 (1932), and *Johnson v. Zerbst*, 304 U.S. 458 (1938). Inadequacy on the part of appointed or retained counsel has been made a basis for reversal by some lower state and federal courts. Note, *Incompetence of Defense Counsel*, 44 N.C.L. REV. 1081 (1966).

pressly recognizes that in resolving constitutional claims of the types of which the cited ones are examples, "factual determinations are often dispositive."⁸²

The Court stated in *Duncan v. Louisiana*⁸³ that

[b]ecause we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.⁸⁴

Companion decisions to *Duncan* expressly include within the guaranty trials of criminal contempt⁸⁵ but exclude petty offenses.⁸⁶ Left for future adjudication is the question whether, to employ a phrase of Justice Fortas, "the tail must go with the hide," *i.e.*, whether this means that the states are bound by the interpretation of the sixth amendment as requiring juries of twelve, unanimous verdicts, and trial superintendence by a judge empowered to advise on the facts as well as to instruct on the law.⁸⁷ Important as are these decreed and potential extensions of constitutional principle, they do not involve a drawing of constitutional lines requiring factual determinations of difficulty. Quite the contrary, however, is true with regard to the extension by *Witherspoon v. Illinois*⁸⁸ of the dimensions of the concept of jury impartiality. The constitutional classifications drawn by the majority, which Mr. Justice Douglas declared he "fail[ed] to see or understand"⁸⁹ and which Justices Black, Harlan and White vigorously rejected,⁹⁰ require for their effective implementation factual determinations of great psychological subtlety and difficulty.

While *Ginsberg v. New York*⁹¹ may be said to have extended the *Roth* principle to the special problem of the juvenile reader and viewer, it did so in the inverse sense of delimiting the scope of the free speech guaranty as contrasted with its reach where adults are involved. With the new constitutional line between adult and juvenile apparently to be determined by age, *Ginsberg* does not of itself present a further problem of any seriousness in fact determination. Yet the establishment of two

⁸² 391 U.S. at 62.

⁸³ 391 U.S. 145 (1968).

⁸⁴ *Id.* at 149.

⁸⁵ *Bloom v. Illinois*, 391 U.S. 194 (1968).

⁸⁶ *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 194 (1968).

⁸⁷ Mr. Justice Fortas makes a strong case for *not* imposing this "bag and baggage" on the States. *Bloom v. Illinois*, 391 U.S. 194, 213-14 (1968).

⁸⁸ 391 U.S. 510 (1968).

⁸⁹ *Id.* at 524.

⁹⁰ *Id.* at 532-42.

⁹¹ 390 U.S. 629 (1968).

broad classifications, with differing constitutional limits, cannot but complicate the already difficult factual determinations that must be made in obscenity cases in order to mark what is within and what is without the guaranty.

Decisions of the 1967 Term included major extensions of the constitutional guaranty against unreasonable searches and seizures. *Katz v. United States*,⁹² overruling *Olmstead v. United States*,⁹³ finally did what the original reconstructed Court was expected but failed to do,⁹⁴ and thereby raised from minority to majority status the views expressed by Mr. Justice Brandeis in one of his greatest dissents. "[T]he Fourth Amendment protects people, not places";⁹⁵ once this is recognized, "it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."⁹⁶ While the new doctrine relieves the Court of finespun factual determinations regarding technical trespass, highlighted by the "spike mike" case,⁹⁷ it surely will entail other decisive questions of fact as the Court delineates its pronouncement that the fourth amendment not only "protects individual privacy against certain kinds of governmental intrusion,"⁹⁸ but also goes further to afford protection in matters that "often have nothing to do with privacy at all."⁹⁹

The "stop and frisk" decisions¹⁰⁰ are illustrative. With the amendment protecting people, not places, petitioner in *Terry v. Ohio*¹⁰¹ was entitled to fourth amendment protection as he walked down a street in Cleveland. Whether a warrantless detention by police is a reasonable search and seizure requires a balancing of public against private interest. Continuing, the Court declared:

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. . . .

⁹² 389 U.S. 347 (1967).

⁹³ 277 U.S. 438 (1928).

⁹⁴ See *Goldman v. United States*, 316 U.S. 129 (1942).

⁹⁵ 389 U.S. at 351.

⁹⁶ *Id.* at 353.

⁹⁷ *Silverman v. United States*, 365 U.S. 505 (1961).

⁹⁸ 389 U.S. at 350.

⁹⁹ *Id.*

¹⁰⁰ *Sibron v. New York*, 392 U.S. 40 (1968); *Peters v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁰¹ 392 U.S. 1 (1968).

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. *These limitations will have to be developed in the concrete factual circumstances of individual cases.* See *Sibron v. New York* . . . decided today.¹⁰²

The "concrete factual circumstances" that the Court proceeded to review in the three cases led to varying results. In *Terry*, the Court concluded that the revolver seized from Terry was properly admitted in evidence against him; in *Sibron*, that the patrolman's testimony revealed no such facts as would bring the self-protective search for weapons within the limited area of validity. In the *Peters* case,¹⁰³ argued and decided with *Sibron*, a close inquiry into the record facts led to the conclusion that the search was constitutionally reasonable. So it will have to be, in future litigation under this new dimension of the fourth amendment, that "constitutional fact" plays a controlling role.

THE RESULTING DILEMMA

Within the Court there were at the 1967 Term two expressions of concern over the burden of continuing adherence to the doctrine of "constitutional fact." Concurring in the *Peters* affirmance but dissenting from the *Sibron* reversal, Mr. Justice Black put much emphasis on the problem:

In appraising the facts as I have I realize that the Court has chosen to draw inferences different from mine and those drawn by the courts below. . . . But this Court is hardly, at this distance from the place and atmosphere of the trial, in a position to overturn the trial and appellate courts on its own independent finding of an unspoken "premise" of the officer's inner thoughts.

In acting upon its own findings and rejecting those of the lower state courts, this Court, sitting in the marble halls of the Supreme Court Building in Washington, D.C., should be most cautious. Due to our holding in *Mapp v. Ohio* . . . we are due to get for review literally thousands of cases raising questions like those before us here. If we are setting ourselves meticulously to review all such findings our task will be endless and many will rue the day when *Mapp* was decided. It is not only wise but imperative that where findings of the facts of reasonableness and probable cause are involved in such cases, we should not overturn state court findings unless on the most extravagant and egregious errors. It seems fantastic to me even to suggest that this is such a case. I would leave these state court holdings alone.¹⁰⁴

¹⁰² *Id.* at 27, 29 (emphasis added).

¹⁰³ *Peters v. New York*, 392 U.S. 40 (1968).

¹⁰⁴ 392 U.S. at 81-82 (citation omitted).

Earlier in the Term, concurring and dissenting in the obscenity cases, Mr. Justice Harlan had followed his earlier-quoted paragraph on the "difference among us . . . in reviewing obscenity determinations"¹⁰⁵ by observing that

[t]he upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment. From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges.¹⁰⁶

The Justice's solution of the situation is not, however, abandonment of independent judgment by the Court.¹⁰⁷ Rather, he proposes modification in substantive constitutional doctrine:

I believe that no improvement in this chaotic state of affairs is likely to come until it is recognized that this whole problem is primarily one of state concern, and that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government. Reiterating the viewpoint that I have expressed in earlier opinions, I would limit federal control of obscene materials to those which all would recognize as what has been called "hard core pornography," and would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish over-zealousness. . . . And in the juvenile field I think that the Constitution is still more tolerant of state policy and its applications. If current doctrinaire views as to the reach of the First Amendment into state affairs are thought to stand in the way of such a functional approach, I would revert to basic constitutional concepts that until recent times have been recognized and respected as the fundamental genius of our federal system, namely the acceptance of wide state autonomy in local affairs.¹⁰⁸

Mr. Justice Harlan's proposal for modification in substantive doctrine in obscenity litigation involving state regulation, as a solution to the

¹⁰⁵ See p. 318 *supra*.

¹⁰⁶ *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 707 (1968).

¹⁰⁷ This view accords with the continuing absence of any criticism of the doctrine by commentators. The explanation of this commentator attitude lies in the fact that since 1937 the doctrine has been applied in civil liberty, rather than economic liberty, litigation. More extensive comment may be found in Strong, *supra* note 1, *passim*.

¹⁰⁸ 390 U.S. at 707-08.

problem of the burden cast on the Court by the doctrine of "constitutional fact," is the first to be made overtly. One wonders, however, whether it represents the first time that this consideration has influenced Justices in advancing proposals for doctrinal change at the substantive constitutional level. At the close of the earlier, detailed analysis of "the persistent doctrine of constitutional fact"¹⁰⁹ the suggestion was ventured that

[a]lthough Justices Black and Douglas, in making their case for an absolute interpretation of the first amendment, primarily stress the historical evidence as to the meaning of that guarantee there is also basis for believing that another string to their judicial bow is the burden on the Court resulting from the combination of a highly fact-controlled constitutional line and felt need for independent judgment as to those facts.¹¹⁰

But beyond this, and of greater significance, is the question whether a majority of the Court has been influenced by the threatened burden in fashioning new substantive constitutional doctrine. The writer's study of the long line of forced confession cases has convinced him that *Escobedo*¹¹¹ and *Miranda*¹¹² are in great part a consequence of the Court's growing concern over the heavy burden of independent review in this class of constitutional litigation.¹¹³ *Quaere* whether the recent extension of *Miranda*, by a divided Court in *Mathis v. United States*,¹¹⁴ casts any additional light on the matter. Certainly Mr. Justice Fortas' powerful dissent, in *Avery v. Midland County*,¹¹⁵ from the Court's extension to local governments of the "one man, one vote" requirement of *Reynolds v. Sims*,¹¹⁶ invites speculation as to whether the burden imposed by the doctrine of "constitutional fact" has figured in Court resolution of the major constitutional issue precipitated by malapportionment in legislative bodies.

Rejecting the Court's "simplistic approach" in the *Avery* case, Mr. Justice Fortas declared it to be his belief

¹⁰⁹ Strong, *supra* note 1.

¹¹⁰ *Id.* at 282-83.

¹¹¹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹¹² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹³ The earlier analysis of the forced confession cases appears in Strong, *supra* note 1, at 249-61.

¹¹⁴ 391 U.S. 1 (1968) (application of *Miranda* requirements to questioning by an Internal Revenue Agent of a person in a state penitentiary after conviction for a crime wholly unrelated to his allegedly fraudulent claims for Federal income tax refunds).

¹¹⁵ 390 U.S. 474, 495 (1968).

¹¹⁶ 377 U.S. 533 (1964).

that in the circumstances of this case equal protection of the laws may be achieved—and perhaps can only be achieved—by a system which takes into account a complex of values and factors, and not merely the arithmetic simplicity of one equals one. *Dusch* and *Sailors* were wisely and prudently decided. They reflect a reasoned, conservative, empirical approach to the intricate problem of applying constitutional principle to the complexities of local government. I know of no reason why we now abandon this reasonable and moderate approach to the problem of local suffrage and adopt an absolute and inflexible formula which is potentially destructive of important political and social values. There is no reason why we should insist that there is and can be only one rule for voters in local government units—that districts for units of local government must be drawn solely on the basis of population. I believe there are powerful reasons why, while insisting upon reasonable regard for the population-suffrage ratio, we should reject a rigid, theoretical, and authoritarian approach to the problems of local government. In this complex and involved area, we should be careful and conservative in our application of constitutional imperatives, for they are powerful.

Constitutional commandments are not surgical instruments. They have a tendency to hack deeply—to amputate. And while I have no doubt that, with the growth of suburbia and exurbia, the problem of allocating local government functions and benefits urgently requires attention, I am persuaded that it does not call for the hatchet of one man, one vote. It is our duty to insist upon due regard for the value of the individual vote but not to ignore realities or to bypass the alternatives that legislative alteration might provide.¹¹⁷

Continuing with his thesis, the Justice registered acceptance of the Court's "one man, one vote rule" of the 1964 Reapportionment Cases:

This rule is appropriate to the selection of members of a State Legislature . . . But the same cannot be said of all local governmental units, and certainly not of the unit involved in this case. Midland County's Commissioners Court has special functions—directed primarily to its rural area and rural population. Its powers are limited and specialized, in light of its missions. Residents of Midland County do not by any means have the same rights and interests at stake in the election of the Commissioners. Equal protection of their rights may certainly take into account the reality of the rights and interests of the various segments of the voting population. It does not require that they all be treated alike, regardless of the stark difference in the impact of the

¹¹⁷ 390 U.S. at 496-97. Two paragraphs earlier Justice Fortas had observed that "we accepted as passing the scrutiny of the Constitution, the less-than-mathematically perfect plans in *Dusch v. Davis*, 387 U.S. 112 (1967), and *Sailors v. Board of Education*, 387 U.S. 105 (1967)." *Id.* at 496. For comment on these cases in a North Carolina context, see Pollitt & Strong, *Constitutional Law, Survey of North Carolina Case Law*, 45 N.C.L. REV. 855, 866-69 (1967).

Commissioners Court upon them. "Equal protection" relates to the substance of citizens' rights and interests. It demands protection adapted to substance; it does not insist upon, or even permit, prescription by arbitrary formula which wrongly assumes that the interests of all citizens in the elected body are the same.

In my judgment, the Court departs from *Reynolds* when it holds, broadly and generally, that "the Fourteenth Amendment . . . forbids the election of local government officials from districts of disparate population." This holding, literally applied as the Court commands, completely ignores the complexities of local government in the United States—complexities which, *Reynolds* itself states, demand latitude of prescription. The simplicity of the Court's ruling today does not comport with the lack of simplicity which characterizes the miscellany which constitutes our local governments.¹¹⁸

Also dissenting in *Avery*, Justice Stewart stated his agreement

with most of what is said in the thorough dissenting opinion of Mr. Justice Fortas. Indeed, I would join that opinion were it not for the author's unquestioning endorsement of the doctrine of *Reynolds v. Sims* . . . I continue to believe that the Court's opinion in that case misapplied the Equal Protection Clause of the Fourteenth Amendment—that the apportionment of the legislative body of a sovereign State, no less than the apportionment of a county government, is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic. My views on that score, set out at length elsewhere, closely parallel those expressed by Mr. Justice Fortas in the present case.¹¹⁹

Justice Stewart's elaboration of his views had occurred in *Lucas v. General Assembly*,¹²⁰ one of the 1964 Reapportionment Cases. General familiarity with that strong dissent, in which Justice Clark joined, necessitates quotation here of only the following telling passage:

Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course, this ideal is approximated in the particular apportionment system of any State by a realistic accommodation of the diverse and often conflicting po-

¹¹⁸ 390 U.S. at 498-99.

¹¹⁹ *Id.* at 510.

¹²⁰ 377 U.S. 713, 744 (1964).

litical forces operating within the State The Court today declines to give any recognition to these considerations and countless others, tangible and intangible, in holding unconstitutional the particular systems of legislative apportionment which these States have chosen. Instead, the Court says that the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.¹²¹

Dissent from the simplistic approach has not been limited to minority Justices. One of the most penetrating has been that of Professor Martin Shapiro, who, although lauding *Baker v. Carr*,¹²² rejects the later reapportionment decisions. "The 'one man, one vote' slogan, in equating the whole of democracy with majority-rule elections represents naive political philosophy, bad political theory, and no political science."¹²³ The reason is that the Reapportionment Cases

fundamentally ignore all that we have learned about group politics. By adopting the most simplistic view of the political process, and particularly of the process of representation, the Court equates the electoral and political processes and thinks to assure each citizen "equal protection of the laws" in the political sphere by giving each citizen a vote equal to every other's. . . . A vision of the political process as no more than the electoral process and of each citizen as exercising his whole political power in the individual act of voting cannot properly serve even the most populist philosophy. For in the complex politics of group bargaining and shifting temporary majorities that we actually have in the United States, inequalities in voting strength may contribute to the overall equality of all participants in the political process as a whole. Blanket and blind enforcement of electoral equality will only decrease the political inequalities in some states at the cost of increasing them in others. The result of the Court's new rulings in terms of real political equality will be largely random. In the end they may achieve somewhat greater over-all equality but only because the sum of new equalities will exceed the sum of new inequalities.¹²⁴

Writing earlier, before the 1964 decisions, Dean Neal was convinced that

[w]hat has been said [his analysis] is enough to show that equality of voting weight is scarcely any guide to the reasonableness or fairness of a state's representation plan. As a standard of performance

¹²¹ *Id.* at 749-50.

¹²² 369 U.S. 186 (1962).

¹²³ M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 250 (1964).

¹²⁴ *Id.* at 249.

it is about as adequate an instrument as would be a ruler for judging a work of sculpture or a metronome a symphony orchestra.¹²⁵

The difficulty is not

the validity of the equal-vote principle but only its insufficiency. This is an important point, however, for its advocates have tended to speak as though all other factors entering into a representation formula are departures—tolerable, perhaps, but only within limits—from the one true principle of equally weighted votes, rather than as reflecting equally important principles with which the assumed principle of equality may have to be accommodated.¹²⁶

It is of course true that other commentators have found the nose-count approach to equality in representation entirely adequate in itself,¹²⁷ and this may well be true of the majority of the Supreme Court. Another interpretation of the Court's reapportionment decisions is, however, possible. This is that the Court, feeling impelled to try its hand with the seemingly intractable problem of fair representation so fundamental to a democratic political system, chose the rule of mathematical equality not for its merits but because its successful implementation appeared to be within the Court's limited capacity for dealing with political problems of these dimensions. In a recent lengthy analysis of the institutional aspects of the Supreme Court and, in considerable part, of the Shapiro volume, Professor Jan Deutsch explains (and justifies) the rule of the Reapportionment Cases on the basis that the symbolic role which the Court plays and the institutional arrangements through which it operates would not permit the degree and extent of inquiry required by "a comprehensive analysis of the distribution of political power throughout the state."¹²⁸ The Deutsch conclusion is that

[i]t will not do, therefore, to approve the decision in *Baker v. Carr* and then to disavow the principle arrived at in the Reapportionment Cases, for the institutional needs of the Court and the interplay between the demands made upon it by its symbolic function and the requirement that decisions be based on evidence contained in

¹²⁵ Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 282.

¹²⁶ *Id.* at 277.

¹²⁷ R. McKay, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION (1965); Auerbach, *The Reapportionment Cases: One Person-One Vote, One Vote-One Value*, 1964 SUP. CT. REV. 1. Cf. R. HANSON, THE POLITICAL THICKET 102-119 (1966); Krastin, *The Implementation of Representative Government in a Democracy*, 48 IOWA L. REV. 549 (1963).

¹²⁸ Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 248 (1968).

the record inevitably resulted in the adoption of a standard that does not require involvement of the judiciary in the spectacle portrayed above—in short, “one man, one vote.” The significant question in the apportionment controversy is the one that both Stewart and Shapiro ignore, the analogue to the question Wechsler must be taken to have answered in the negative in assessing the *Brown* decision: Whether, *given the fact that a “one man, one vote” standard would have to be applied*, the consequences of malapportionments were sufficiently serious that greater injury would have been done to the Court’s prestige by a refusal to deal with them than by the public controversy that application of that standard aroused.¹²⁹

Within these larger, institutional considerations lies, the present writer believes, the downright practical, earthy factor of judicial burden resulting in great part from the doctrine of “constitutional fact.” In looking to its outward image the Court must consider its inner operations, lest an overburdened institution be unable to put its best face forward. It may well be that the inarticulate minor premise of the Reapportionment Cases of 1964 and now of 1968’s *Avery* decision comes to this: If the Court must enter the quagmire of malapportionment in order to save the country for democracy, avoidance of the quicksands of total involvement necessitates satisfaction with an oversimple, yet manageable, measure of constitutionality. In a nutshell, the Court can effectively manage independent review of sixth-grade arithmetic but not of college calculus.

The situation has come to a serious pass if pressure from the “constitutional fact” doctrine colors the Court’s judgment in its central task of drawing the boundaries of constitutionality. Yet abandonment of the doctrine is not the answer to the dilemma. That would free the Court in its determination of constitutional limits only to deny it effective means for implementation of its substantive judgments. Neither Court nor commentator is proposing to jettison in the area of civil, personal, and political liberty, the practice of independent Court judgment with respect to facts decisive of constitutional issues. Quite the contrary, as pointed out in this and the earlier study.¹³⁰ The virulent attack on the doctrine in the 1920’s and 1930’s is not now to be seriously taken as a call for abandonment; in retrospect it appears that that attack was in essence a facet of the buildup against Court protection of economic interests through

¹²⁹ *Id.* at 248-49 (italics in the original). The reference to the “Brown decision” is to *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹³⁰ In accord, on the issue of obscenity, is Comment, *The Scope of Supreme Court Review in Obscenity Cases*, 1965 DUKE L.J. 596.

favorable interpretation of the commerce and due process clauses.¹³¹ There is a compelling inner logic to the doctrine of "constitutional fact" once it is separated from emotional biases respecting the values for which the Court should provide substantive protection.¹³² The writer earlier suggested that reduction in Court burden might be accomplished by adjusting scope of review to "the gravity of the risk of error" in the factual determinations made below.¹³³ Yet the development of adequate standards of measurement of such gravity for different categories of reviewing situations, and the necessity for their continuing evaluation in light of changing circumstances, create doubt as to whether on balance the burden on the Court could be significantly lightened by this method. Some further solution must be found for mitigation of the Court's mounting workload.¹³⁴

¹³¹ Strong, *supra* note 1, at 224-40.

¹³² Strong, *supra* note 36, at 271, 275.

¹³³ Strong, *supra* note 1, at 283.

¹³⁴ In a subsequent article in this *Review* the writer will propose a solution adequate to meet the increasingly critical situation in the Court's burden caused by several developments of which persistence of the "constitutional fact" doctrine is one.