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THE BURGER COURT: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*

Jesse H. Choper**

What are the bases for what I believe to be two important misperceptions about the Burger Court: first, that it would scrupulously adhere to the principle of judicial restraint, and second, that it is grossly insensitive to individual rights?

I. THE PROMISE OF "JUDICIAL RESTRAINT"

The story begins during the national presidential campaign of 1968. It was then that Richard Nixon, the Republican nominee, urged that the Warren Court had "gone too far" in injecting its own "social and economic ideas" into its opinions and in "weakening the peace forces as against the criminal forces in this country." Both before and after his election, Mr. Nixon promised, in various speeches, to appoint Supreme Court Justices who would be "conservative," and "practitioners of judicial restraint," and who would "interpret the Constitution strictly and fairly."

The themes of "strict construction" and "judicial restraint" dominated the Senate confirmation hearings of President Nixon's first nominee, Judge Warren E. Burger of the Court of Appeals for the District of Columbia. For example, when Senator Eastland asked whether "the Supreme Court has the power to amend the Constitution of the United States by judicial interpretation," Judge Burger replied, "No; clearly no. It has no power to amend the Constitution." Chairman Eastland followed with the question:

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* Copyright ©1979 by Jesse H. Choper. This article, as slightly modified, was delivered as the first Ralph E. Kharas Visiting Scholar's Lecture, Syracuse University College of Law, March 26, 1979. It speaks of that date, except for note 50 infra. A part of this article will be included as a section of one chapter of a book to be published by the University of Chicago Press in 1980.

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5. Id.
"Does the Supreme Court have the power to legislate judicial interpretations?" Judge Burger responded that "clearly it has no such power. No court has that power." Finally, Senator Eastland asked "one more question": "Is it your philosophy that the Constitution of the United States has a fixed, definite meaning, that it does not change but stays there until it is amended as the Constitution provides that it be amended?" The future Chief Justice answered:

I recall . . . Mr. Justice Black's unique interview on TV some months ago in which he carried the dog-eared copy of the Constitution as he does in his pocket and in being interviewed said in substance: "Here is what the words say, and they are very plain words, and I take them for what they are." I think I would subscribe to the views of Mr. Justice Black.9

Afterward, President Nixon became the first president since Grover Cleveland10 to have two successive Supreme Court nominees, Judges Clement F. Haynsworth, Jr. of the Fourth Circuit and G. Harrold Carswell of the Fifth Circuit, rejected by the Senate. President Nixon then nominated Judge Harry A. Blackmun of the Court of Appeals for the Eighth Circuit. The White House emphasized that President Nixon considered the future Justice Blackmun to be a "strict constructionist."11 In his Senate confirmation hearings, Judge Blackmun gave only faint hint that he might not be. Thus, he testified that he personally felt "that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideas and philosophy, but would attempt to construe that instrument in the light of what I feel is its definite and determined meaning."12 Then came the hint: "Of course, many times this is obscure."13 In response to a question from Senator Ervin, Judge Blackmun said that "I personally feel . . . [that 'the judicial attribute of self-restraint'] is very impor-

6. Id.
7. Id.
8. Id. at 7.
9. Id.
11. Hearings on Nomination of Harry A. Blackmun, of Minn., to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 4 (1970).
12. Id. at 33.
13. Id.
tant in a Federal judge. And I would hope that in the future . . . I would continue in that vein."

Finally, on the subject of judicial restraint, in 1971, when nominating Lewis F. Powell, Jr. and William H. Rehnquist, President Nixon reaffirmed his belief that a judge "should . . . not twist or bend the Constitution to perpetuate his personal, political, and social views." The President proclaimed that Messrs. Powell and Rehnquist met his philosophical criteria of strict constructionism and judicial conservatism "to an exceptional degree."

To substantiate this judgment, Mr. Powell, in summarizing his thoughts about the role of the Supreme Court at his Senate confirmation hearing, stated as follows. First, "[h]aving studied under then Professor Frankfurter, I believe in the importance of judicial restraint, especially at the Supreme Court level." Second, "[a]s a lawyer I have a deep respect for precedent. . . . This is not to say that every decision is immutable but there is normally a strong presumption in favor of established precedent." Finally, "[i]n deciding each case, the judge must make a conscious and determined effort to put aside his own political and economic views and his own predilections and to the extent possible to put aside whatever subtle influences may exist from his own background and experience." Mr. Rehnquist voiced essentially similar views, especially as to the "great weight" to be accorded to "precedent." Thus, we have the foundation and many of the building blocks for the Burger Court's alleged philosophy of judicial restraint.

II. THE ESTABLISHMENT OF THE "BURGER COURT"

At this point, it is helpful to trace the evolution from the conceded judicially activist Warren Court to its supposedly judicially restrained successor. In other words, when did the "Burger Court" really come into being?

In 1969, when President Nixon took office, six of the seats on

14. Id. at 34.
16. Id.
17. Hearings on Nominations of William H. Rehnquist, of Ariz., and Lewis F. Powell, Jr., of Va., to be Associate Justices of the Supreme Court of the United States Before the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 219 (1971).
18. Id. at 138.
19. Id.
20. Id.
the Warren Court were occupied by "liberals," at least in the sense of those loose terms we often use to describe the judicial philosophies of Supreme Court Justices. They were Earl Warren, Hugo L. Black, William O. Douglas, William J. Brennan, Jr., Abe Fortas, and Thurgood Marshall. By the beginning of the October 1969 term, however, Mr. Justice Fortas had resigned and Mr. Chief Justice Warren had retired. Mr. Chief Justice Burger replaced Mr. Chief Justice Warren, but the Senate refused to consent to a successor to Mr. Justice Fortas. Thus, the Court sat during that term with only eight members.

Mr. Justice Blackmun was finally confirmed in the spring of 1970. He took the oath of office on June 9, 1970. This was three weeks before the end of the term, and therefore, he did not participate in any opinions. Thus, the earliest, and probably the most accurate, point from which to date the Burger Court would be when the Justices convened in October of 1970. At that time, only four Warren Court "liberals" remained: Justices Black, Douglas, Brennan, and Marshall. They were joined by three other Warren Court members: Justices John M. Harlan, Potter Stewart, and Byron R. White, who were generally thought of as either "moderate" or "conservative." Finally, the Court included the new Chief Justice and Mr. Justice Blackmun.

In 1972, after the deaths of Justices Black and Harlan, President Nixon completed his appointments with Justices Powell and Rehnquist who, as we have noted, were widely heralded as being "conservative, strict constructionist practitioners of judicial restraint." This left three "liberals" on the Court: Justices Douglas, Brennan, and Marshall. To bring the matter completely up to date, in 1975, President Ford appointed, as the successor to Mr. Justice Douglas, Judge John Paul Stevens of the Court of Appeals for the Seventh Circuit. Although I have not undertaken to document the matter, I would say that Mr. Justice Stevens, although plainly not as consistently "liberal" as the two continuing Warren Court "activists" (Justices Brennan and Marshall), has nonetheless voted with them more often than have any of his brethren.
III. The Record as to Judicial Restraint and Adherence to Precedent

Having identified the inception of the Burger Court in 1970, as solidified in 1972, to what extent has it been faithful to the principle of judicial restraint and adhered to previously established precedent? These matters, one should recall, are what President Nixon emphasized at the time of his appointments, and they highlighted the confirmation hearings of his nominees.

I wish to suggest that the Burger Court's record on both these matters, judicial restraint and adherence to precedent, reveals that it has not performed as advertised. First, let us examine the Burger Court's record as to judicial restraint. In no decision did the Warren Court—nor, for that matter, did any Supreme Court since the mid-1930's—hold that an act of Congress was invalid on the ground that the lawmaking branch had exceeded its delegated powers and invaded ground reserved to the States by the tenth amendment. The Burger Court has done so twice: in 1970 in Oregon v. Mitchell,22 joined in by both Mr. Chief Justice Burger and Mr. Justice Blackmun, holding that Congress had no power to lower the voting age to eighteen in state and local elections; and in 1976 in National League of Cities v. Usery,23 written by Mr. Justice Rehnquist and joined in by the other three Nixon appointees, holding that Congress had no power to apply the wage and hour provisions of the Fair Labor Standards Act24 to state and local employees.

In no decision did the Warren Court—nor, for that matter, did any Supreme Court for a period of over thirty-five years—hold any state law in violation of the contract clause of the Constitution.25 In the last two years, the Burger Court has done so twice: in United States Trust Co. v. New Jersey,26 written by Mr. Justice Blackmun and joined by the Chief Justice and Mr. Justice Rehnquist (Mr. Justice Powell did not participate), invalidating a repeal of a covenant in state bonds by the New York and New Jersey Port Authority; and in Allied Structural Steel Co. v. Spannaus,27 joined by all four Nixon appointees, invalidating a Minnesota statute that al-

tered certain contractual pension obligations that employers had to their employees.

In no decision did the Warren Court—or, for that matter, did any Supreme Court in nearly twenty-five years—invalidate an act of Congress or an act of the President on the ground that it usurped the other branch’s constitutional powers. Yet in 1976, in Buckley v. Valeo, all four Nixon appointees held that a provision of the Federal Election Campaign Act, a statute passed by Congress and signed by the President, infringed the President’s appointment power because it provided that certain members of the Federal Election Commission be appointed by designated House and Senate leaders rather than by the President himself.

I therefore suggest that neither this record nor that yet to be examined in respect to individual rights evidences a powerful commitment to judicial restraint on the part of the Burger Court.

Second, let us examine the Burger Court’s record as to adherence to precedent. Without representing it to be a complete catalogue, I would like to point to at least ten instances in which the Burger Court, during its relatively brief tenure, has either specifically or effectively overruled a decision of its predecessors. In Michelin Tire Corp. v. Wages, the Court, with all four Nixon appointees concurring, overruled the 1872 decision of Low v. Austin, thereby striking down the so-called “original package doctrine,” which immunized imported goods from taxation. In a series of cases, principally written by Mr. Justice Blackmun, sometimes joined by Mr. Chief Justice Burger and usually with the agreement of Mr. Justice Powell, the Court overruled the 1942 decision in Valentine v. Chrestensen, which held commercial advertising to be

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31. 80 U.S. (13 Wall.) 29 (1872).
33. 316 U.S. 52 (1942).
outside the protection of the first amendment. In Complete Auto Transit, Inc. v. Brady,34 written by Mr. Justice Blackmun and joined in by all the Justices appointed by President Nixon, the Court overturned the 1951 ruling in Spector Motor Service, Inc. v. O'Connor,35 which forbade states from imposing a privilege tax on businesses engaged exclusively in interstate commerce. In New Orleans v. Dukes,36 the Court unanimously overruled the 1957 decision in Morey v. Doud,37 which involved economic regulations and equal protection. In an opinion that I have already mentioned, National League of Cities v. Usery,38 authored by Mr. Justice Rehnquist and agreed to by all the Nixon appointees, the Court overruled the decision only eight years earlier in Maryland v. Wirtz.39

Furthermore, in Hudgens v. NLRB,40 all four Nixon appointees joined the Court to overturn the 1968 ruling in Amalgamated Food Employees Union v. Logan Valley Plaza,41 which applied the concept of "state action" to first amendment freedoms within a privately owned shopping center. In Wainwright v. Sykes,42 written by Mr. Justice Rehnquist and joined in by all the other Nixon appointees, the Court rejected the essence of the 1963 holding in Fay v. Noia,43 which concerned whether the failure to follow a particular state procedural rule at a criminal trial was a bar to federal habeas corpus. In Miller v. California,44 written by Mr. Chief Justice Burger and again joined by all the Nixon appointees, the Court plainly abandoned a series of Warren Court pronouncements on the definition of obscenity.45 In Kirby v. Illinois,46 all four Nixon appointees joined in eviscerating the Warren Court's 1967 decision in United
States v. Wade,\textsuperscript{47} which guaranteed a suspect the right to counsel at lineups. Finally, just in the 1978 term, in Rakas v. Illinois,\textsuperscript{48} written by Mr. Justice Rehnquist and again joined by all the Nixon appointees, the Court repudiated the 1960 holding in Jones v. United States,\textsuperscript{49} which permitted any person legitimately on the premises when an unlawful search occurred to object to the admissibility as evidence against him of the fruits of that unlawful search and seizure.\textsuperscript{50}

My intent is surely not to contend that the Burger Court has been less faithful to precedent than its predecessor. Nor do I mean to indicate disagreement with the results reached in the cases just listed; indeed, I believe that a number of them pronounce eminently sensible constitutional doctrine. Rather, my point is that so far as adherence to the principle of stare decisis is concerned, this is not the kind of Court promised by President Nixon at the time of his judicial appointments nor the course of action to which President Nixon’s nominees subscribed at the time of their confirmations. Although it was not unreasonable to expect that the reconstituted Court, given the political backdrop, would depart from the path of the Warren Court by rescinding some of its “liberal” utterances, nonetheless, only half of the overrulings reported above fairly conform to that description.

IV. THE RECORD AS TO INDIVIDUAL RIGHTS

Let us now turn to the second part of our examination of the Burger Court. It has become relatively commonplace to hear that judicial protection of personal liberties, which concededly blossomed under Earl Warren, withered rapidly in 1969 with the seating of his successor and died completely by 1972 when all four of President Nixon’s appointees had been finally confirmed. Commenting on the Burger Court’s 1972-1973 decisions, Norman Dorsen, then General Counsel of the American Civil Liberties Union and Presi-

\textsuperscript{47} 388 U.S. 218 (1967).
\textsuperscript{49} 362 U.S. 257 (1960).
\textsuperscript{50} See also, since this lecture was given, Hughes v. Oklahoma, 441 U.S. 322 (1979), in which the Court, joined by Justices Blackmun and Powell, overruled the 1896 decision in Geer v. Connecticut, 161 U.S. 519 (1896), by holding that a state statute that restricted the out-of-state sale of fish and game that were procured within the state, while placing no limits on in-state disposition, violates the commerce clause by discriminating against interstate commerce.
dent of the Society of American Law Teachers, observed that "[a]n entire generation of young Americans has come of age accustomed to looking to the Supreme Court to protect individual rights," but that "the first full year of the Burger Court, reveals quite distinctly that this period has ended."51 Similarly, in the preface to his influential treatise, published in 1978, Laurence Tribe declared

that the course of the Burger Court, at least in its first years, will eventually be marked not as the end of an era of exaggerated activism on behalf of individuals and minorities, but as a sad period of often opposite activism, cloaked in the worn-out if well-meant disguise of judicial restraint.52

More harshly, in 1974, Leonard Levy complained that a majority of the Justices "vote for the rights of the criminally accused about as often as snarks are sighted alighting on the roof of the Supreme Court building."53 Finally, in 1978, Henry Steele Commager, echoing his criticism of nearly thirty years earlier, "condemned the current Supreme Court for what he called a 'tragic' lack of protection of individual rights."54

Although it cannot be denied that overall the Burger Court has been markedly less sympathetic than its predecessor to claims of infringement of constitutionally secured personal liberties, an objective appraisal of its record must be less pessimistic than the portrayals quoted above. After all, no Supreme Court in our history has been as protective of individual freedoms as that of Earl Warren. While this is not the place for a thorough examination or evaluation of the matter, a somewhat detailed overview is called for, especially because of the frequently articulated view that the present Court is hostile to individual rights.

A. Retreats

It is true that in respect to some personal liberties there is substantial evidence for the deprecatory soundings that have been heard. The most obvious concerns the rights of the accused, particularly the *Miranda* rule,55 the prohibition against unreasonable
searches and seizures,\textsuperscript{58} and the right of an accused to counsel (at least at lineups and for discretionary appeals).\textsuperscript{57} But, as shall be specifically illustrated a bit more fully below, even though it may not be unfair to characterize the net product of the Burger Court's criminal procedure decisions as a retreat, a significant number of protective rulings clearly demonstrate that the Burger Court has pulled up far short of a total surrender.\textsuperscript{59} Examples of this include such search and seizure holdings as \textit{Mincey v. Arizona},\textsuperscript{59} \textit{Michigan v. Tyler},\textsuperscript{60} \textit{United States v. Chadwick},\textsuperscript{61} \textit{Connally v. Georgia},\textsuperscript{62} criminal tax investigation held admissible in a criminal tax fraud prosecution although no \textit{Miranda} warnings given; \textit{Michigan v. Mosley}, 423 U.S. 96 (1975) (following arrest and refusal to answer during questioning, defendant's inculpatory statement during questioning on unrelated charges held admissible); \textit{Oregon v. Hass}, 420 U.S. 714 (1975) (inculpatory information provided by suspect in custody after requesting counsel held admissible for impeachment purposes); \textit{Michigan v. Tucker}, 417 U.S. 433 (1974) (statement by defendant not advised of his rights held not subject to exclusionary rule because statement was given prior to \textit{Miranda} decision); \textit{Harris v. New York}, 401 U.S. 222 (1971) (statement inadmissible under \textit{Miranda} held admissible for impeachment purposes if it is shown to be trustworthy).

\textsuperscript{56} See, e.g., \textit{Rakas v. Illinois}, 439 U.S. 128 (1978) (automobile passengers having no property or possessory interest in articles searched or seized failed to show expectation of privacy and are not entitled to challenge search); \textit{Zurcher v. Stanford Daily}, 436 U.S. 547 (1978) (fourth and fourteenth amendments do not prohibit the issuance of a search warrant even where the owner or possessor of a place is not reasonably suspected of criminal involvement); \textit{United States v. Ceccolini}, 435 U.S. 268 (1978) (degree of attenuation between police officer's illegal search and its "fruit," the testimony of a live witness, held sufficient to dissipate connection between illegality and testimony); \textit{Stone v. Powell}, 428 U.S. 465 (1976) (state prisoner shall not be granted federal habeas relief on ground that evidence obtained in illegal search was admitted at his trial when the state has provided opportunity for full and fair litigation of the claim); \textit{United States v. Janis}, 428 U.S. 433 (1976) (evidence illegally seized for criminal prosecution held admissible for purposes of tax assessment); \textit{United States v. Calandra}, 414 U.S. 338 (1974) (grand jury questions based on evidence from an unlawful search held not to abridge fourth amendment rights); \textit{United States v. Robinson}, 414 U.S. 218 (1974) (full search of a person following a lawful custodial arrest held to be reasonable); \textit{Schneckloth v. Bustamonte}, 412 U.S. 218 (1973) (evidence resulting from a consent search held admissible irrespective of whether the person giving consent knew of his right to withhold his consent).

\textsuperscript{57} See \textit{Ross v. Moffitt}, 417 U.S. 600 (1974) (fourteenth amendment held not to require that counsel be provided for a discretionary appeal); \textit{Kirby v. Illinois}, 406 U.S. 682 (1972) (plurality opinion) (counsel held not to be required at identification before indictment or other formal charges).

\textsuperscript{58} For fuller exploration, see Israel, \textit{Criminal Procedure, the Burger Court, and the Legacy of the Warren Court}, 75 Mich. L. Rev. 1319 (1977).

\textsuperscript{59} 437 U.S. 385 (1978) (Burger, C.J., Blackmun, Powell & Rehnquist, J.J.) (warrantless search at homicide scene held to violate fourth amendment).

\textsuperscript{60} 436 U.S. 499 (1978) (Burger, C.J., Blackmun & Powell, J.J.) (investigation of a fire held to require adherence to warrant procedures of fourth amendment).

\textsuperscript{61} 433 U.S. 1 (1977) (Burger, C.J. & Powell, J.) (warrantless search of luggage in exclusive control of federal agents held unreasonable under fourth amendment).

\textsuperscript{62} 429 U.S. 245 (1977) (per curiam) (unanimous) (justice of the peace having a pecuni-
Gerstein v. Pugh,63 and United States v. United States District Court;64 the hospitable application of Miranda in Doyle v. Ohio;65 and such extensions of the right to counsel as Holloway v. Arkansas,66 Faretta v. California,67 Gagnon v. Scarpelli,68 Morrissey v. Brewer,69 Argersinger v. Hamlin,70 as well as several other favorable holdings for this "most pervasive right"71 of an accused.72

Other areas of net retrenchment from the Warren era include state action,73 voting rights,74 obscenity,75 and the delineation of

ary interest in the issuance of search warrants held not to be neutral and detached magistrate as required by fourth and fourteenth amendments). 63. 420 U.S. 103 (1975) (Powell, J.) (unanimous) (arrest without a warrant and subsequent restraint pending trial without a hearing for a probable cause determination held to violate fourth amendment).

64. 407 U.S. 297 (1972) (Powell, J.) (Burger, C.J. & Blackmun, J., concurring) (fourth amendment held to require prior judicial approval for domestic security surveillance).


66. 435 U.S. 475 (1978) (Burger, C.J.) (sixth amendment held to require appointment of separate counsel for codefendant where there is a potential conflict of interest).

67. 422 U.S. 806 (1975) (Powell, J.) (sixth amendment held to guarantee that a defendant in a state criminal trial has a right to self-representation).


69. 408 U.S. 471 (1972) (Burger, C.J.) (unanimous) (due process held to require hearing before parole may be terminated).

70. 407 U.S. 25 (1972) (Burger, C.J., Blackmun, Powell & Rehnquist, J.J., concurring) (sixth amendment right to counsel held to apply in any prosecution of indigents that could lead to imprisonment).


72. See, e.g., Brewer v. Williams, 430 U.S. 387 (1977) (following arrest, speech that was tantamount to interrogation leading to incriminating statements held to require assistance of counsel); Geders v. United States, 425 U.S. 80 (1976) (court order preventing defendant from consulting with counsel during overnight recess held to deny assistance of counsel guaranteed by sixth amendment); Herring v. New York, 422 U.S. 853 (1975) (statute granting judge in a nonjury criminal trial the power to deny summation before rendition of judgment held to deny the assistance of counsel).

73. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's proposed sale of goods entrusted to him for storage, as permitted by statute, held not to constitute state action); Hudgens v. NLRB, 424 U.S. 507 (1976) (exclusion of pickets from shopping center held not to constitute state action abridging first amendment); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (termination of service by privately owned public utility held not to constitute state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (liquor licensing held insufficient to implicate state in discriminatory practices of licensees); Evans v. Abney, 396 U.S. 435 (1970) (state principles of construction to determine testator's true intent held not to violate fourteenth amendment where applied without racial animus).

74. See Richardson v. Ramirez, 418 U.S. 24 (1974) (disenfranchisement of felons held not to violate fourteenth amendment); Gaffney v. Cummings, 412 U.S. 735 (1973) (deviations
those personal property interests that cannot be denied by govern-
ment without some form of notice and hearing. Again, however, at
least in regard to most of these issues, more than a few decisions
reveal that the Burger Court's record has not been uniformly un-
responsive to those who have suffered injury at the hands of the
majority. For example, *White v. Weiser,*77 *White v. Regester,*78 and
*O'Brien v. Skinner*79 continued the Warren Court's quest to ensure

from mathematical equality among state legislative districts held insufficient to constitute
discrimination under fourteenth amendment); *Salyer Land Co. v. Tulare Lake Basin Water
Storage Dist.,* 410 U.S. 719 (1973) (restricting voting to landowners for purposes of distribut-
ing water held not to violate fourteenth amendment); *Mahan v. Howell,* 410 U.S. 315 (1973)
(reapportionment of electoral districts to preserve the integrity of political subdivision lines
held not to violate fourteenth amendment); *Abate v. Mundt,* 403 U.S. 182 (1971) (court-
ordered reapportionment due to population growth held not to violate fourteenth amend-
ment); *Whitcomb v. Chavis,* 403 U.S. 124 (1971) (multi-member districts for county in state
elections held not to violate fourteenth amendment); *Gordon v. Lance,* 403 U.S. 1 (1971)
(state requirement that political subdivisions may not incur bond indebtedness or increase
tax rates beyond limits established by state constitution without approval of 60% of the voters
held not to violate fourteenth amendment).

75. See *Ward v. Illinois,* 431 U.S. 767 (1977) (statute held not to be unconstitutionally
vague for failing to give notice that materials depicting certain sexual conduct could not be
legally sold in the state); *Smith v. United States,* 431 U.S. 291 (1977) (absence of state law
forbidding dissemination of obscene materials to adults held not to control community stan-
ards for federal obscenity prosecution); *Young v. American Mini Theatres,* 427 U.S. 50
(1976) (zoning ordinance restricting location of adult theaters held not to have demonstrably
significant effect on the exhibition of films protected by first amendment); *United States v.
12,200 Foot Reels of Super 8 MM. Film,* 413 U.S. 123 (1973) (Congress under the commerce
clause held empowered to proscribe importation of obscene matter); *Paris Adult Theatre v.
Slaton,* 413 U.S. 49 (1973) (exhibition of obscene material in public theaters held not to be
speech entitled to first amendment protection); *Miller v. California,* 413 U.S. 15 (1973)
(redefining what constitutes obscenity); *United States v. Thirty-Seven Photographs,* 402 U.S.
363 (1971) (plurality opinion) (forbidding importation of obscene materials for commercial
distribution); *United States v. Reidel,* 402 U.S. 351 (1971) (right of a person to possess
obscene materials in privacy of home held not to confer on another first amendment right to
sell such material).

76. See *Bishop v. Wood,* 426 U.S. 341 (1976) (termination of policeman's employment
without a hearing held not a deprivation of a protected property interest where neither state
law nor contract provided a right to continued employment); *Paul v. Davis,* 424 U.S. 693
(1976) (injury to reputation held not to implicate any liberty interest sufficient to invoke
procedural protection).

77. *412 U.S. 783 (1973)* (variances in congressional redistricting held not justifiable by
state's attempt to avoid fragmenting political subdivisions). The Court's decision was joined
in by Mr. Justice Blackmun and concurred in—albeit reluctantly—by Mr. Chief Justice
Burger and Justices Powell and Rehnquist.

78. *412 U.S. 755 (1973)* (unanimous) (legislative reapportionment held to discriminate
invidiously against minorities).

ballots by accused persons being held for trial held to violate equal protection clause of
fourteenth amendment).

The support of the incumbent Justices has also been diminished, relative to the Warren Court, by several lines of cases, concerning habeas corpus, 88 standing, 89 and enjoining state proceed-

80. Compare Kusper v. Pontikes, 414 U.S. 51 (1973) (statute that prohibits a person from voting in the primary election of a political party if that person has voted in the primary of any other party within the preceding 23 months held to prohibit freedom of political association), with Rosario v. Rockefeller, 410 U.S. 752 (1973) (statute that requires a voter to enroll in the party of his choice at least 30 days before the general election in order to vote in next party primary held not to prohibit the right of political association). See also Chapman v. Meir, 420 U.S. 1 (1975) (unanimous) (population variance of 20% in a court-ordered reapportionment plan held to be constitutionally impermissible absent significant state policies); Phoenix v. Koldziejski, 399 U.S. 204 (1970) (equal protection clause held not to permit a state to restrict voting to real property taxpayers in elections to approve issuance of general obligation bonds); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (one person-one vote rule held applicable to school district elections).

81. 408 U.S. 229 (1972) (per curiam) (unanimous) (poetry recounting sexual intercourse published in a newspaper held not to create a dominant theme appealing to prurient interests).


83. 422 U.S. 205 (1975) (Powell & Blackmun, JJ.) (ordinance that prohibits drive-in-theater from showing films containing nudity held to infringe first amendment rights).

84. 420 U.S. 546 (1975) (Blackmun & Powell, JJ.) (municipal theater’s refusal to permit performance of musical “Hair” held to be prior restraint).

85. 424 U.S. 669 (1976) (Rehnquist, J.) (unanimous) (procedures in criminal prosecution that prohibit a defendant from litigating the obscenity vel non of the magazine that was the basis of the prosecution held to violate first and fourteenth amendments).

86. 419 U.S. 565 (1975) (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., dissenting) (students facing suspension from public schools held to have an interest qualifying for protection under fourteenth amendment).

87. 436 U.S. 1 (1978) (Powell & Blackmun, JJ.) (municipal utility’s termination of service without notice and a hearing held to constitute a deprivation of an interest in property without due process of law). See also Bell v. Burson, 402 U.S. 535 (1971) (held that prior to revocation of driver’s license for failure to post security after accident, procedural due process requires hearing to determine potential for liability).

88. See Wainwright v. Sykes, 433 U.S. 72 (1977) (failure to make timely objection to admission of evidence in state court, absent a showing of cause for noncompliance and showing of actual prejudice, held to bar habeas corpus review); Francis v. Henderson, 425 U.S. 536 (1976) (habeas corpus review held to require showing of cause for failure to challenge grand jury composition as well as showing of actual prejudice); Stone v. Powell, 428 U.S. 465 (1976) (state prisoner shall not be granted federal habeas relief on ground that evidence obtained in illegal search was admitted at his trial when the state has provided opportunity for full and fair litigation of the claim).
ings that have prevented individuals from obtaining hearings before federal courts in respect to alleged violations of their personal liberties. But once more, at least in respect to the latter two subjects, the Burger Court’s results have not been wholly regressive.\textsuperscript{91}

B. Vacillations

In other areas of individual rights, the decisions of the Burger Court may be fairly described as mixed. For example, on the matter of racial equality, although the Court has made it clear that government action which results in a disproportionate disadvantage for

\textsuperscript{89} See Warth v. Seldin, 422 U.S. 490 (1975) (petitioners without plans to build held to lack standing to challenge zoning ordinance that excluded low-income housing); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (citizens held to lack standing to challenge the Reserve membership of members of Congress because their failure to comply with faithful discharge of legislative duties implicates only the general interest of all citizens); United States v. Richardson, 418 U.S. 166 (1974) (taxpayer held to lack standing to challenge statutes regulating accounting and reporting procedures of Central Intelligence Agency); O’Shea v. Littleton, 414 U.S. 488 (1974) (requirements of article III of United States Constitution are not met by general allegations that fail to allege injury or unconstitutionality of a statute); Laird v. Tatum, 408 U.S. 1 (1972) (allegation that a data-gathering system has a chilling effect on first amendment rights held not to present a controversy).

\textsuperscript{90} See Trainor v. Hernandez, 431 U.S. 434 (1977) (refusal to enjoin civil fraud action brought by state); Judice v. Vail, 430 U.S. 327 (1977) (refusal to enjoin state civil contempt proceedings); Hicks v. Miranda, 422 U.S. 332 (1975) (refusal to enjoin state criminal prosecution commenced after federal complaint is filed but before any substantial proceedings have taken place in federal court); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (refusal to enjoin state quasi-criminal proceedings); Younger v. Harris, 401 U.S. 37 (1971) (refusal to enjoin pending state criminal prosecutions).

\textsuperscript{91} As to standing, see Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (standing found to exist to challenge limitation of liability for nuclear accidents when immediate adverse effects of construction were found to harm appellees); Carey v. Population Servs. Int’l, 431 U.S. 678 (1977) (standing found to exist for mail-order sales company of contraceptives to challenge state statute that prohibits the sale of contraceptives by anyone other than a licensed pharmacist); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (developers’ contract that was contingent upon securing rezoning for low-income housing held to provide standing requirements to challenge zoning ordinance); Singleton v. Wolff, 428 U.S. 106 (1976) (plurality opinion) (physicians held to have standing to maintain suit against statute that excludes abortions from Medicaid benefits); Doe v. Bolton, 410 U.S. 179 (1973) (physicians held to have standing to challenge state abortion statute). As to enjoining state proceedings, see Wooley v. Maynard, 430 U.S. 705 (1977) (threat of repeated prosecutions and the effect of such threats held sufficient to enjoin further prosecution under statute requiring license plates to be embossed with state motto); cf. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (federal plaintiff seeking declaratory judgment against municipal ordinance held entitled to preliminary injunction against prosecution, pending final resolution of federal action, because no state proceedings had commenced); Steffel v. Thompson, 415 U.S. 452 (1974) (unanimous) (federal declaratory relief held not precluded when a prosecution based upon an assertedly unconstitutional statute has been threatened but not commenced).
racial minorities will not be subject to judicial scrutiny unless it is shown to be intentional rather than merely adventitious, it was unnecessary to make a finding of invidious discrimination. There was no well-grounded indication that the Warren Court would have held otherwise. On the other hand, the Burger Court explicitly abandoned the doctrine—that its predecessor periodically invoked—that prohibited federal judges from inquiring into the motives behind such government action. While the present Court has shown an unmistakable aversion to judicially ordered wide-scale busing as a cure for deliberate school segregation, especially if the transportation extends beyond the district lines of the offending school board, it was a unanimous decision written by Mr. Chief Justice Burger that initially endorsed the use of this tool under proper conditions. Additional cases have affirmed other expansive evidentiary rules and remedial devices for the problem of school desegregation.


93. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968) (government regulation prohibiting destruction of draft cards held sufficiently justified irrespective of congressional motive). But see, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964) (closing of public schools while at the same time giving tuition grants and tax concessions to assist white children in private segregated schools held to be predicated upon impermissible racial discrimination).


96. See Milliken v. Bradley, 418 U.S. 717 (1974) (held that before a cross-district remedy may be imposed, it must be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another).

97. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (unanimous) (held that upon failure of school authorities to meet affirmative obligation to proffer acceptable remedies, district courts have broad powers to fashion remedies assuring unitary school systems).

98. See Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (Blackmun, J.) (Burger, C.J. & Powell, J., concurring) (held that where a policy of intentional segregation has been proved
desegregation in the North as well as in the South. Furthermore, where the Court has found deliberate segregation in housing, it has ordered an interdistrict remedy.\textsuperscript{100} Similarly, although the Burger Court has declined to invalidate all state laws or practices that operate to the disadvantage of the poor,\textsuperscript{101} it has struck down statutory fees that prevented indigents from getting a divorce,\textsuperscript{102} obtaining a position on a primary election ballot,\textsuperscript{103} avoiding imprisonment because of inability to pay a fine,\textsuperscript{104} and appealing a judgment of eviction from rented premises.\textsuperscript{105}

The Burger Court's imprint in regard to first amendment freedoms has similarly been undulatory.\textsuperscript{106} It has indisputably reduced, but by no means eliminated, the availability of the vagueness and overbreadth doctrines as weapons to challenge the application of broadly phrased laws to expressive activity.\textsuperscript{107} But it has also vindi-

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\textsuperscript{99.} See Milliken v. Bradley, 433 U.S. 267 (1977) (Burger, C.J.) (unanimous) (held that if the record warrants, a desegregation decree may order compensatory or remedial educational programs for pupils subject to past de jure segregation); Norwood v. Harrison, 413 U.S. 455 (1973) (Burger, C.J.) (unanimous) (held that state's constitutional obligation requires it to avoid providing tangible aid to schools that practice racial discrimination); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972) (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., concurring) (held that criterion to be used to scrutinize desegregation of dual school system is whether the process of dismantling the dual system is furthered or hindered, and that a proposal impeding this process may be enjoined).


\textsuperscript{101.} See Maher v. Roe, 432 U.S. 464 (1977) (state's choice not to pay for nontherapeutic abortions, even though it does pay for childbirth, held not to violate equal protection); Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (filing fee required by state court for review of denial of welfare benefits held not to violate equal protection); Hurtado v. United States, 410 U.S. 578 (1973) (lower per diem payment to a material witness who is incarcerated due to inability to post bond than payment to a material witness posting bond held not to violate equal protection); United States v. Kras, 409 U.S. 434 (1973) (filing fee requirement for bankruptcy held not to violate equal protection).


\textsuperscript{105.} See Lindsey v. Normet, 405 U.S. 56 (1972) (unanimous on this issue).


\textsuperscript{107.} See, e.g., Arnett v. Kennedy, 416 U.S. 134 (1974) (statutory standard of employment protection held not impermissibly vague or overbroad in regulating federal employees' speech); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (state statute proscribing political activities that gives adequate warnings and explicit standards held not impermissibly vague);
icated the rights of a substantial number of political dissidents despite their public use of vulgar language, their philosophy of violence and disruption, and their openly communicated contempt (at least by majoritarian standards) for patriotic symbols. Further, the Burger Court has forbidden the discharge of non-civil-service public employees because they have fallen into political disfavor, preserved the rights of individuals and corporations to

Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (regulations specifying various prohibited activities in terms that ordinary person exercising ordinary common sense can sufficiently understand held not impermissibly vague or substantially overbroad); Cole v. Richardson, 405 U.S. 676 (1972) (oath of public employees that "I will oppose the overthrow of the government" held not to be void for vagueness). But see Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (company held to have standing to challenge a "topless" ordinance as being overbroad in its application to protected activities at places that do not serve liquor as well as those that do); Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (ordinance prohibiting drive-in theater to exhibit films that show nudity held to be overbroad); Smith v. Goguen, 415 U.S. 566 (1974) (ordinance subjecting persons to criminal liability for treating the flag of the United States contemptuously held void for vagueness); Lewis v. New Orleans, 415 U.S. 130 (1974) (ordinance making it unlawful to use opprobrious language toward police officer while in performance of duty held to be overbroad); Gooding v. Wilson, 405 U.S. 518 (1972) (ordinance providing that persons using opprobrious language towards another, tending to cause a breach of peace, held to be unconstitutionally vague and overbroad); Papachristou v. Jacksonville, 405 U.S. 156 (1972) (vagrancy statute held void for vagueness for failure to give fair notice of prohibited conduct).


109. See Healy v. James, 408 U.S. 169 (1972) (Powell, J.) (unanimous) (organization having philosophy of disruption and violence held to have cognizable first amendment rights in furthering personal beliefs).

110. See Wooley v. Maynard, 430 U.S. 705 (1977) (Burger, C.J. & Powell, J.) (state statute forcing individuals to have automobiles bear state motto on license plates held to violate first amendment); Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (Powell, J.) (Blackmun, J., concurring) (prosecution for attaching peace symbol to flag held impermissibly to infringe upon freedom of protected expression); Smith v. Goguen, 415 U.S. 566 (1975) (Powell, J.) (statute subjecting persons to criminal liability for treating flag contemptuously held to be vague because it is capable of reaching expression sheltered by first amendment).


expend funds in political campaigns, secured the liberty of clergymen to hold political office, and safeguarded the beliefs of religious nonconformists in respect to education of their children. As for freedom of the press, the Court has, on the one hand, refused to grant the media a special privilege to withhold information from investigative agencies or to obtain information under government control. On the other hand, the Justices have afforded the press a most spacious immunity, despite powerful countervailing public interests, from government restraints against publishing data revealing highly sensitive national policies, describing critical evidence obtained by the police for subsequent introduction at a criminal trial, and divulging what transpired at confidential proceedings of an administrative agency. In addition, the Court has shielded the editorial judgments of newspapers by invalidating state right-of-reply laws.

115. See Wisconsin v. Yoder, 406 U.S. 205 (1972) (Burger, C.J. & Blackmun, J.) (interrelationship of religious beliefs and mode of life held sufficient to support claim that enforcement of compulsory formal education after the eighth grade would endanger free exercise of religious beliefs).
116. See Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment held not to relieve newspaper reporter of the obligation that all citizens have to respond to grand jury subpoena and answer questions relevant to criminal investigation).
117. See Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality opinion) (first amendment held not to guarantee a right of information within government control); Pell v. Procunier, 417 U.S. 817 (1974) (first amendment held not to guarantee the press a constitutional right of special access to information not available to the public generally).
119. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (Burger, C.J.) (unanimous) (court order that prohibited reporting of evidence revealed at open preliminary hearing held to be an unconstitutional prior restraint on the press). See also Oklahoma Publishing Co. v. District Ct., 430 U.S. 308 (1977) (per curiam) (unanimous) (pretrial order enjoining news media from publishing the name or picture of a minor in juvenile proceeding for murder held to abridge freedom of press in violation of first amendment).
120. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (Burger, C.J.) (unanimous) (first amendment held not to permit criminal prosecution for publication of truthful information regarding confidential proceedings of state judicial review commission). See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (Blackmun, J.) (Burger, C.J. & Powell J., concurring) (freedom of the press held to bar civil liability against newsman for identifying deceased rape victim).
121. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (Burger, C.J.) (unanimous) (state statute that grants a political candidate a right to equal space to answer
C. Advances

As we have observed, although the Burger Court has often upheld the claims of those alleging popular disregard of their constitutionally secured individual rights, its record suffers in comparison to the extraordinarily sensitive stance of the Warren Court. But it must also be recognized that, in the process, the Burger Court "has nullified more national laws on first amendment and equal protection grounds than any predecessor," and, indeed, on several issues, has moved well beyond the lines established in 1969.

The most prominent advance concerns the "right of privacy." Although its seeds were planted under the stewardship of Mr. Chief Justice Stone, and its sprouts appeared in 1965, it only reached full bloom in such Burger Court rulings as Roe v. Wade and its several progeny, Eisenstadt v. Baird, Carey v. Population Services International, Moore v. East Cleveland, Zablocki v. criticism of politician's record held to violate guarantee of free press). See also Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Burger, C.J.) (Blackmun, Powell & Rehnquist, JJ., concurring) (neither first amendment nor statute requires broadcasters to accept paid political advertisements).


123. See Skinner v. Oklahoma, 316 U.S. 535 (1942) (Oklahoma statute providing for sterilization of habitual criminals held to violate equal protection clause of the fourteenth amendment).

124. See Griswold v. Connecticut, 381 U.S. 479 (1965) (statute forbidding the use of contraceptives held to be unwarranted governmental intrusion into the zone of individual privacy, which is protected by the penumbras emanating from the guarantees in the Bill of Rights).

125. Roe v. Wade, 410 U.S. 113 (1973) (Blackmun & Powell, JJ.) (Burger, C.J., concurring) (fourteenth amendment held to protect woman's right to abortion). See also Colautti v. Franklin, 439 U.S. 379 (1979) (Blackmun & Powell, JJ.) (statute imposing standard of care on person performing abortion where fetus is viable held to be impermissibly vague); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (Blackmun & Powell, JJ.) (requirement of spousal consent or parental consent for minors for abortion, imposition of standard of care on physicians to preserve life of fetus, and outright ban on saline injections held unconstitutional); Doe v. Bolton, 410 U.S. 179 (1973) (Blackmun, Powell, JJ. & Burger, C.J.) (statute requiring that abortions be performed in an accredited hospital, be approved by hospital committee, and performing physician's judgment be confirmed by two licensed physicians held unconstitutional).

126. 405 U.S. 438 (1972) (Blackmun, J., concurring) (statute providing for dissimilar treatment of married and unmarried people for access to contraceptives held unconstitutional).

127. 431 U.S. 678 (1977) (Blackmun, J.) (Powell, J., concurring) (held that minors may be denied access to contraceptives only where compelling state interests exist).

128. 431 U.S. 494 (1977) (plurality opinion) (Powell & Blackmun, JJ.) (right of related persons to live together in same dwelling).
The Burger Court has also expanded the "suspect" classifications branch of equal protection doctrine to encompass most state discriminations against aliens, and has approached this position quite closely for government disabilities imposed on the basis of sex or illegitimate birth. The Justices have additionally rejected

129. 434 U.S. 374 (1978) (Burger, C.J. & Blackmun, J.) (Powell, J., concurring) (statute requiring court approval for marriage between persons who are obligated to provide child support held to violate fourteenth amendment).

130. 422 U.S. 563 (1975) (unanimous) (held that states may not constitutionally confine a nondangerous individual, who is capable of surviving safely, without ample evidence to the contrary).

131. See Nyquist v. Mauclet, 432 U.S. 1 (1977) (Blackmun, J.) (limitation on state financial assistance for education to only those resident aliens who have either applied for United States citizenship or filed a statement of intent held to violate equal protection clause); Examining Bd. v. DeOtero, 426 U.S. 572 (1976) (Blackmun, Powell, J.J. & Burger, C.J.) (statute that permits only United States citizens to practice as civil engineers held to violate equal protection clause); In re Griffiths, 413 U.S. 717 (1973) (Powell & Blackmun, J.J.) (exclusion of aliens from the practice of law held to violate equal protection clause); Sugarman v. Dougall, 413 U.S. 634 (1973) (Blackmun, Powell, J.J. & Burger, C.J.) (statute providing that only United States citizens may hold state civil service positions held to violate equal protection clause); Graham v. Richardson, 403 U.S. 365 (1971) (Blackmun, J.) (unanimous) (state statute restricting welfare benefits to resident aliens held to violate equal protection clause). But see Foley v. Connellie, 435 U.S. 291 (1978) (statute prohibiting the appointment of noncitizens as state troopers held not to violate equal protection clause).


The Burger Court

the more limited rule of its precursors and have extended the first amendment's protective umbrella to include commercial advertising. Finally, the present Court's delicate circumscription, if not total abolition, of the death penalty also entered territory beyond the Warren Court's march.

V. Conclusion

In conclusion, I have sought neither to condemn nor applaud the Burger Court. Rather, my aim has been to dispel two major misperceptions that surround it—the belief of its severe critics that it is insensitive to individual rights, and the myth advanced by its sponsors that it is an apostle of judicial restraint. I hope that I have gone at least some distance in offering a more balanced appraisal.

134. See Valentine v. Chrestensen, 316 U.S. 52 (1942) (Constitution imposes no restraint on government regulation of purely commercial advertising).

