THE BURGER COURT:
A JUDICIAL NONET PLAYS
THE ENIGMA VARIATIONS*

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Sir Edward Elgar did not write his "Enigma Variations" for a nonet (nine players), but the air of mystery surrounding that comparison will be familiar to students of the judicial process. The various friends whom Elgar portrayed in his fourteen variations have now been identified, but beyond that the variations are "based on a theme which the composer said combined in counterpoint with another, unheard tune with which everybody was familiar; but he refused to the last to divulge the secret."1 Elgar would have been quite at home as an interpreter of the Supreme Court, where counterpoint and unheard but familiar tunes are the order of the day.

Complaining about the Supreme Court is a venerable American pastime. When John Marshall handed down his opinion in *Cohens v. Virginia*, his implacable foe, Spencer Roane, called it "a most monstrous and unexampled decision," which could be accounted for only from "that love of power which all history informs us infects and corrupts all who possess it and from which even the upright and eminent judges are not exempt . . . ."2

A century and a half later, the conservative columnist James Jackson Kilpatrick sought to sum up the legacy of the Warren Court. Kilpatrick found himself walking "a trail of abuses, usurpations, and invasions of power. One pursues the departed Chief Justice along a littered road of fallen landmarks and abandoned precedents. Here every principle of jurisprudence lies discarded. It is as if gypsies had passed through, leaving a bad picnic behind."3 Obviously, the passage of time from the ascendancy of the Marshall Court to that of the Warren Court had not eased the concern of the Court's critics about overreaching by the judiciary.

The Warren Court was, of course, a conspicuous target for criticism. The Court's activism was felt on many fronts—in the quest for racial equality, in the imposition of a one-person, one-vote rule upon state and national legislatures, in the wholesale decree of greater rights for criminal defendants, to name a few leading examples. The Warren bench demonstrated again and

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again a willingness to be an engine of social reform. Professor Philip B. Kurland commented, "If the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time." 4

The Warren Court seemed charged by a leveling urge. Its egalitarianism bore fruit not only in race and reapportionment decisions but also in decisions applying the equal protection clause to economic inequalities. A natural entry into this area lay in criminal justice opinions, in which the Court took important steps to remove the disadvantages suffered by indigent defendants. The more innovative justices looked for ways to use the equal protection clause to strike at other social ills. Justice Douglas was quite candid about the malleability of that constitutional guarantee. The equal protection clause, he said, "is not shackled to the political theory of a particular era . . . . Notions of what constitutes equal treatment" for equal protection purposes "do change." 5

Coupled with the Warren justices' social philosophy was an abiding suspicion that those wielding official power, such as police and prosecutors, were apt to abuse that power. Moreover, in tackling such problems, the Warren Court showed a predeliction for sweeping remedies. Where earlier decisions might have called for a case-by-case, fact-oriented review of attacks upon state procedures or practices, the Warren Court was more likely to lay down broad prophylactic rules. Such decrees assumed the potential for official irregularities, rather than placing the entire burden upon the challenger to prove, on the facts of his case, that his constitutional rights had indeed been violated.

An instructive contrast exists in the Vinson Court's 1942 decision in Betts v. Brady, which required a case-by-case look at attempts to have counsel appointed for indigent criminal defendants, and Gideon v. Wainwright, the Warren Court's 1963 decision laying down a flat rule for assuring counsel in such cases. 6 Gideon was not especially controversial, either on the Court, where all nine justices agreed to the result, or beyond, where the intrinsic fairness of the decision commended itself to most observers. Far more provocative, however, were broad prophylactic rules aimed at police practices in making searches and seizures of evidence or in conducting interrogations of criminal suspects. Mapp v. Ohio, applying to the states the fourth amendment exclusionary rule which had long been applied in federal proceedings, and Miranda v. Arizona, requiring a set of police warnings before interrogating suspects, spread consternation among police officials and lay citizens concerned about rising crime rates. 7

Such activism fueled attacks on the Warren Court and paved the way for

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the Burger Court. Many critics who had no political axes to grind were uneasy about the Warren Court's techniques. Professors Alexander M. Bickel and Harry Wellington were disturbed by instances "of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."

Outside academic circles, most Americans might not lose much sleep over the niceties of legal craftsmanship and judicial reasoning. But people did care about how the Court's opinions might affect their lives. In the 1968 presidential race, Richard M. Nixon capitalized on these concerns. Appealing to "law and order" sentiments, Nixon complained that the justices were weakening the country's "peace forces" and giving too much ground to the "criminal forces." The first civil right of every American, he declared, "is to be free from domestic violence."

During his first term as president, Nixon put four justices on the Court. Rarely has a president been given the opportunity to fill so many vacancies in so short a time. Moreover, one would search the history books in vain to find a president who was more explicit in the political philosophy which inspired his appointments. In nominating Lewis F. Powell, Jr. and William H. Rehnquist (filling the third and fourth vacancies), Nixon recalled his campaign pledge "to nominate to the Supreme Court individuals who shared my judicial philosophy, which is basically a conservative philosophy."

For journalists and other Court watchers, the changing of the guard carried all the elements of high drama. Pundits quickly coined the name, "the Nixon Court." In November 1971, U.S. News and World Report concluded that if the Powell and Rehnquist nominations were approved, "it will be a Nixon Court, dominated by conservatives." With the departures of some of the great names of the Warren years, notably Hugo Black and John Marshall Harlan, predictions for the future were often bleak. Some observers foretold the emergence of a Nixon bloc on the Court, marching in lockstep to undo the work of the Warren Court. Reviewing the 1971 Term, The New Republic lamented that the "single-mindedness of the Nixon team threatens the image of the Court as an independent institution."

A new Supreme Court justice generally goes through a settling-in period, which may last several years. Usually, one cannot predict from a justice's first

12. NEW REPUBLIC, JULY 15, 1972, at 8.
Term what his record is likely to be as he becomes more at home on the Court. Nevertheless, from the start of the Burger Court there was evidence that, with the four Nixon appointees on the bench, a new majority was in the making.

By the end of the 1975 Term, the Burger Court seemed to have come of age. The closing days of that Term were busy. The cases decided in the final week reveal the strength of the new tides that were running in the affairs of the Court. For the first time in forty years, the Court struck down a federal statute on the ground that Congress had exceeded its commerce powers—a startling decision to a generation of law professors accustomed to teaching their students that the tenth amendment was a historical curiosity and that the commerce clause seemed to know no bounds.\(^\text{13}\)

Contrasts with the Warren Court abounded in the decisions of those closing days of the 1975 Term. Continuing a process already underway, the justices whittled away at the rights of criminal defendants, showing particular disfavor for fourth amendment claims. In addition to deciding several cases curtailing the reach of that amendment, the Court closed the doors of federal courts to large numbers of petitioners by holding that a state prisoner who has had a full and fair opportunity to raise a fourth amendment question in the state courts cannot relitigate that question in federal habeas corpus.\(^\text{14}\)

The contrasts with the sixties embraced equal protection—a favorite of the Warren era. In one of a number of Burger Court opinions drawing the line on the so-called “new” equal protection, the Court, upholding a statute mandating retirement at age fifty for state police officers, ruled that age is not a “suspect” classification and therefore that claims of age discrimination do not require that the state law be subject to strict scrutiny. It was enough that the statute satisfy the far less demanding standard of minimum rationality.\(^\text{15}\) Procedural due process, another growth sector in the Warren years, also fared poorly, as the justices limited the opportunity for prison inmates to object to their transfer to other prisons.\(^\text{16}\) Another decision at the close of the Term touched sensitive moral nerves; the Court rejected the argument that capital punishment is inherently unconstitutional.\(^\text{17}\)

\(^{13}\) See National League of Cities v. Usery, 426 U.S. 833 (1976).


\(^{15}\) See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).


As the justices recessed for the summer of 1976, a student of the Court could begin to sketch a portrait of the Burger Court. By then the Nixon appointees had served together over four years and distinct patterns had begun to appear. The Burger Court was proving to be markedly less egalitarian than the Warren bench had been. In 1966, Justice Douglas had sought to establish the proposition that classifications found to rest on economic distinctions should, like those turning on race, be inherently suspect. The justices of the seventies were cold to that notion. The 1971 decision in *United States v. Kras* is eloquent evidence of the difference in attitudes. Writing for a five-man majority, Justice Blackmun rejected an indigent petitioner’s argument that he should be allowed to file for bankruptcy without paying $50 in filing fees. The dissenters were outraged at the idea that some of the poor might find themselves “too poor even to go bankrupt.”

As of 1976 one might be prepared to identify other earmarks of the Burger Court. With decisions like *National League of Cities*, federalism seemed to be in vogue once again. Where the Warren justices were suspicious of government power, the Burger Court was showing a willingness to trust the system, to assume that police officers and other officials generally try to observe constitutional limitations in performing their duties. *Miranda* and the fourth amendment exclusionary rule were under fire although neither had been overruled. In general, the Burger Court appeared to be less willing to supersede the political process in solving social problems. Sensitive to the concerns such as those of Felix Frankfurter about limits on the competence of judges, justices of the Burger era were openly worrying about how far judges ought to go in second-guessing legislative judgments about issues like the death penalty or in taking over the administration of nonjudicial functions such as public education.

As of the summer of 1976 a Burger Court observer might conclude, therefore, that the era of the Warren Court had drawn to a close, and that another, more conservative, less activist Court had taken its place. Yet he would be surprised if he tested his conclusions against the record the Court began to compile in the succeeding Terms. By the close of the seventies, it had become clear that alongside the trends already described, other forces were at work—forces having their roots in the activism of the Warren years. By 1980

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it had become far more difficult to draw clean distinctions between the years of Earl Warren and those of Warren Burger.

Capital punishment cases furnish one example. Some might read the 1976 decision refusing to outlaw the death penalty altogether as evidence of a permissive attitude toward state legislation and perhaps as reflecting a law and order mentality. Yet after 1976 the Court continued, as it had done in previous terms, to place sharp limits on the power of states to impose capital punishment. In June 1977, the justices decided two such cases. In one they invalidated a state law making the death penalty mandatory for the murder of a policeman on duty, and in the other they held capital punishment to be disproportionate as the penalty for rape. The Court has regulated quite closely the procedures by which the death penalty is imposed, striking down a number of statutes in this way. Moreover, the Court has, with the rape case, begun to look at the intrinsic question, no matter how fastidious the procedure, when is death beyond the state's substantive power to impose. When one studies the actual opinions in the death penalty cases, one discovers, whatever the label, a close scrutiny of the verdict of death. These are not cases in which the justices relax in the face of the exercise of state police power. A state may have, in light of the 1976 decision, the theoretical power to take away a defendant's life, but in practice the state has to run a tight gantlet to satisfy the Court. One is reminded of "strict scrutiny" of a kind commonly associated with the Warren Court's approach to equal protection.

The Court's 1978 Term furnished more examples of activist techniques or liberal results. After the indecisive splintering of views in the earlier Bakke case, a firm majority formed in Weber to signal that the justices would not stand in the way of affirmative action to advance blacks in employment. In cases involving access to the federal courts, the Burger Court has gained a reputation for making access more difficult, yet in the 1978 Term the justices seemed to take a more permissive attitude to questions of standing and of access generally. There were eight cases in the 1978 Term which in one way or another involved claims of sex discrimination, and in six of those eight cases the justices voted favorably to the claim, either on the merits or on procedural issues. Even in fourth amendment cases—an area in which many liberal crit-

29. Cases such as Gladstone, Realtors v. Bellwood, 441 U.S. 91 (1979); Orr v. Orr, 440 U.S. 268 (1979); and Duren v. Missouri, 439 U.S. 357 (1979), reflect a willingness to grant increased access to the judicial system.
30. See Califano v. Westcott, 443 U.S. 76 (1979) (striking a section of federal law providing
ics would give the Burger Court the blackest marks—the justices upheld the fourth amendment claim in six of the ten cases that came before them in the 1978 Term.

There were, of course, decisions during the 1978 Term in keeping with the more generally held view of the Burger Court. Once again the talisman of “no legitimate expectation of privacy” was used to limit the reach of the fourth amendment—this time in a holding that the installation of a pen register to record the telephone numbers one has dialed does not constitute a fourth amendment search. Editors and reporters, increasingly nervous about the high court’s press rulings, largely were horrified by the Court’s 1979 ruling in Gannett that the sixth amendment’s “public trial” guarantee does not mean what the press thought it meant, and by the decision in Herbert v. Lando that a libel plaintiff could use pretrial discovery to enquire into a television producer’s thoughts and opinions formed during the editorial process. Women’s groups were outraged when the Court upheld a Massachusetts veterans preference law which gives absolute preference to veterans in state hiring—in a state where fewer than 2 percent of veterans are women. And in a series of procedural due process holdings, the Court showed itself unfavorably disposed to requiring more formal procedures in a variety of settings, ranging from parole hearings to the voluntary commitment of minors.

Small wonder that, in light of such a mixed track record on the part of the Burger Court, Court-watchers find it difficult to agree on just what this Court stands for, what the justices’ values are, and how best to sum up the Burger

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34. See Personnel Adm’r of Massachusetts v. Feeney, 442 U.S. 256 (1979).

years so far. At the close of the 1978 Term, *U.S. News and World Report* found the Court to be "tacking to the left lately on a wide array of issues."³⁶ A few months later, an article in *The New York Times Magazine* painted a different picture: the Burger Court, it was charged, "has changed little from its early days" when the Court was generally viewed as a "conservative bench bent on substantially altering the constitutional jurisprudence on the Warren Court."³⁷

With Warren Burger now into his second decade as Chief Justice, there are many ways in which one might try to take the measure of the Court's record in the post-Warren era. One way would be to assess the Burger Court in terms of the expectations aroused in the early seventies when Nixon appointees were taking their seats on the bench. Partly because Nixon aroused such strong passions, observers were bold to make predictions about the sort of place the Court would become when the new justices made their presence felt.

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Expectations of the Burger Court

A. "Nixon" Court

Many feared that a "Nixon Court" would reflect Nixonian policies. "Only you stand between Richard Nixon and the United States Supreme Court," ran an advertisement placed by Americans for Democratic Action (ADA) in the *New York Times* in October 1972. Declaring that "four more years of Richard Nixon as president" could reduce the nation's judicial bastion of individual liberty "to rubble," the advertisement urged a vote for George McGovern and a contribution to the ADA's "Save the Court Committee."³⁸

Nixon has come and gone, but there is no doubt that his legacy lingers longest in the judicial branch, both in the Supreme Court and in the vast number of federal judges whom he appointed to the lower bench. On the high court, the new directions in judicial doctrine made possible by Nixon's appointees are most visible in criminal justice decisions. The impulses that gave birth in the sixties to *Mapp*'s exclusionary rule, to the *Miranda* decision, and to other decisions helpful to criminal defendants have been muted. Although the Warren Court's leading criminal justice decisions have not been overturned, they have often been limited or qualified. As Nixon's attacks on the Warren Court were concerned above all with its criminal justice decisions, the trends of the seventies confirm the impact of his appointments.

If, however, by predicting the emergence of a "Nixon Court," the Court-watcher of the early seventies supposed that across the board the Court's decisions were likely to reflect Nixonian preferences, that notion was a myth from

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the start. The history of the Court belies the idea that presidents have had a high batting average in predicting how their nominees, once on the Court, would behave.39 One recalls how Teddy Roosevelt, unhappy with Oliver Wendell Holmes' performance, growled that he could "carve out of a banana a judge with more backbone."40 Harry Truman was unhappy with Tom Clark; Dwight Eisenhower came to regret his appointment of Earl Warren as the "biggest damn fool mistake I ever made."41 The record of the Burger Court confirms the limited reach of a president over justices he has named to the bench. Burger Court decisions which conflict with Nixon policies include those vindicating a woman's constitutional right to an abortion,42 aggressively rebuffing efforts to channel public aid to church-related schools,43 curbing presidential efforts to impound funds appropriated by Congress,44 and, of course, requiring Nixon to hand over the Watergate tapes—a decision which carried the name of Nixon's own appointee as Chief Justice and agreed to by his other three nominees.45 One of the happy lessons gleaned from the record of the Burger Court is that while presidents can, in general terms, affect the direction of the Court, the justices operate with a historic sense of purpose quite free of any feeling of indebtedness to the political forces which may have put them in black robes in the first place. Indeed, to the discomfort of presidents from Jefferson to Nixon, the justices advance with fierce pride the claim first fashioned by John Marshall: that it is "emphatically the province and duty of the judicial department to say what the law is"46—a claim enlarged from a simple argument for the power of judicial review to what many would call an assertion of judicial supremacy.47

46. Id. at 703 (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).
B. The Burger Court versus the Warren Court

Another concern some observers voiced, as the Burger Court came into being, was that it would overturn much of the legacy of the Warren Court. If the respective Courts' animating spirits be the test, there is much to distinguish the two eras, for example, a distinct disenchantment in the seventies with the headlong egalitarianism manifest in some of the Warren Court opinions. As a result, the Burger Court has often limited or qualified what it inherited from its predecessor. Here and there one finds direct overruling. In a series of cases raising the issue of the application of the First Amendment to picketing and handbilling in privately-owned shopping centers, in 1972 the Court lamely sought to distinguish a 1968 precedent preferring the rights of expression to the property rights of the owners of the shopping center. In 1976 the justices went all the way and concluded that the earlier decision had not survived. Likewise, when Justice Rehnquist wrote National League of Cities v. Usery in 1976, the view of state sovereignty there expressed brought down an incompatible 1968 decision, Maryland v. Wirtz. There have also been instances of the Burger Court overruling pre-Warren Court decisions.

For the most part, however, the Burger Court prefers to limit or distinguish a precedent, including even those Warren Court decisions found somewhat distasteful. Often the Burger Court will leave the precedent as is but refuse to carry its inherent logic to the next step. Thus, while Miranda has not been overruled—and is not likely to be—the Court has held that statements otherwise inadmissible under Miranda may nonetheless be admitted to impeach the defendant's testimony should he take the stand. Likewise, rather than overturn the Warren Court's 1967 holding that a suspect is entitled to the presence of counsel at a pretrial police lineup, in a 1972 decision the Burger Court seized upon the fact that the earlier ruling had involved a post-indictment lineup. Showing itself to be a master of the fine line, the Court in the later case refused to apply the requirement of counsel to a situation where a lineup had been conducted before the defendant had been indicted or otherwise formally charged.

Significantly, the large body of the Warren Court's work is securely in place. The landmarks of that Court—school desegregation, legislative reapportionment, application of Bill of Rights guarantees to the states by way of

51. See Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), overruling Low v. Austin, 13 Wall. 29 (1871).
the fourteenth amendment—remain. In school cases, the Burger Court has rebuffed the efforts of lower courts to provide remedies for de facto segregation or to require otherwise unoffending suburban school districts to share the burden of desegregating the central city. Yet where de jure segregation is proved, the Burger Court has been altogether supportive of federal judges’ power to fashion effective remedies. In legislative reapportionment cases, the Burger Court has permitted a measure of deviation from mathematical equality in state legislative districting, but the essential requirement remains that representation must be based on population.

In cases involving “incorporation” of the Bill of Rights, Justice Powell, in the spirit of the late Justice Harlan, has argued that due process does not require that all the judicial gloss surrounding a federal guarantee, such as jury trial, necessarily apply in a state proceeding. So far, at least, he has failed to convince a majority of his colleagues to endorse his view. It is a striking testimonial to the way in which innovations become accepted doctrine that the ridicule which Justice Frankfurter heaped upon “incorporation” so recently as 1947 and the even more recent efforts of Justice Harlan have not persuaded a Court which cares about federalism (and about punishing crime) to allow the states freer rein in criminal procedure cases. And it is part of the evidence that, while the justices of the seventies may have rearranged much of the furniture, they have not set about redesigning the basic structure inherited from the Warren Court.

C. Judicial Activism

As of the early seventies, one might well have predicted that the Burger Court would not be an “activist” tribunal—that it would be deferential to legislative judgments and to the political process. Activism and a proclivity to play policy maker had been, after all, among the hallmarks of the Warren Court, and Richard Nixon seemed bent on seeing the Court foreswear such bad habits. Moreover, there was evidence that his nominees understood the

uses of "judicial restraint." At his confirmation hearings before the Senate Ju-
diciary hearing in November 1971, Lewis Powell, in a prepared statement, re-
called the virtues of the canons of restraint urged years before by Louis 
Brandeis, and Powell recalled fondly his Harvard Law School professor, Felix 
Frankfurter, another figure identified with at least one form of judicial 
restraint.61

In the opinions of the Burger Court, there is evidence of a preference, by 
at least some of the justices, for leaving difficult social issues to the political 
process. In rejecting an attack on the Texas system of financing public schools 
through heavy reliance on local property taxes, Justice Powell pointed to state 
decisions about raising and disbursing tax revenues as an area in which the 
Court "has traditionally deferred to state legislatures." Moreover, Powell ar-
gued against judges, ill informed in education matters, being too ready to in-
terfere with "the informed judgments made at the state and local levels."62 In 
the capital punishment cases, both Chief Justice Burger and Justice Rehnquist 
saw a fundamental issue as being the presumption that in a democratic society 
courts ought to be slow to strike down legislative judgments.63 In a third area, 
sex discrimination, four justices, in an opinion by Justice Powell, pointed to 
the country's being in the process of considering the Equal Rights Amend-
ment as a reason for not going along with Justice Brennan's argument that 
gender classifications, like those based on race, should be inherently suspect 
and thus give rise to strict scrutiny.64

Yet, while the Court may have its apostles of restraint, evidence of activism 
is legion. Roe v. Wade, holding that liberty as protected by due process of law 
includes a woman's right to abortion, is surely a paradigm example.65 If activ-
ism means to formulate a right not explicitly nor impliedly given constitu-
tional status, it would be hard to find a more activist opinion than Roe. Its au-
thor, of course, was one of the Nixon appointees, Justice Blackmun.

Roe v. Wade is no sport. In the seventies substantive due process, that habit 
many folks thought judges had kicked after 1937, became respectable again. 
Even in the Warren years, suggestions that a decision might turn on substan-
tive due process were embarrassing to the justices. This unease goes a long way 
toward explaining Justice Douglas's remarkable "emanations from a penum-

61. See Hearings on Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell Jr., of 
Virginia to be Associate Justices of the Supreme Court of the United States. Before the Senate Committee on 
the Judiciary, 92nd Cong., 1st Sess. 219 (1972). See also Howard, Mr. Justice Powell and the Emerging 
argue that the Frankfurter concept of judging was anything but a constraint on the judge's dis-
63. See, e.g., Furman v. Georgia, 408 U.S. 238, 375, 465 (1972) (opinions of Burger, C. J., and 
Rehnquist, J., dissenting).
bra" opinion in *Griswold v. Connecticut.* In 1963, in *Ferguson v. Skrupa,* Justice Black thought he had nailed fast the coffin lid of substantive due process. He was mistaken—at least in noneconomic cases. *Griswold* was simply old-fashioned substantive due process. So was *Roe v. Wade,* as Justice Stewart, a dissenter in *Griswold* but with the majority in *Roe,* conceded. Justice Powell cast his lot openly with the legitimacy of substantive due process in his opinion in *Moore v. East Cleveland,* where he extended strict scrutiny to a local ordinance impinging on the "extended family." Powell sought to make the use of substantive due process appear less free-wheeling by offering the "teachings of history" and the "basic values that underlie our society" as guides. Such arguments, when made by Justice Frankfurter, had never comforted Justice Black, but Black's unbending opposition to substantive due process has not carried the day. It is interesting that, where the Warren Court had skirted the technique with evident discomfort, the Burger Court has openly reestablished substantive due process as a means available to limit governmental power.

Other examples could be supplied. The general conclusion, however, is clear—the Burger Court is no more a stranger to judicial activism than was the Warren Court. A majority of the post-Warren justices may from time to time, as in *Rodriguez,* forebear to use the judicial tools available to them, but they have proved in other cases, for example, in *Roe,* their willingness to use those tools when the occasion seems inviting.

D. The Court's Business

Recalling how the Warren Court was criticized for finding so many new things for judges to do, one might have supposed that the Burger Court would find ways to constrict the breadth and scope of the Court's business—a variation on the expectation that the Court in the seventies would be less activist. Certainly justices who worry about whether judges have the expertise to run school systems or oversee other public activities might be expected to try to narrow the categories of cases which will find their way to the Court's docket.

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66. 381 U.S. 479 (1965).
69. 410 U.S. at 168 (Stewart, J., concurring).
72. In addition to *Roe* and *Moore,* see, e.g., *Carey v. Population Services Int'l,* 431 U.S. 678 (1977) (decision whether or not to beget children is a fundamental right); *Zablocki v. Redhail,* 434 U.S. 374 (1978) (right to marry is fundamental).
There are essentially two ways in which the Court can stay out of areas with which it would rather not deal. One is the use of avoidance techniques such as ripeness and mootness: devices which can be used to get rid of a particular case at bar. The other is to use denials of review, or perhaps summary affirmances, to make it clear that the Court simply has no interest in a given class of cases.

The Burger Court has found a number of ways to make it more difficult for plaintiffs to get into federal courts in the first instance. The justices have tightened the screws in some (but not all) standing rulings,\(^3\) thrown up obstacles to class action suits,\(^4\) created financial barriers by being unsympathetic to efforts to imply a basis for award of attorneys fees from federal statutes,\(^5\) sharply curtailed opportunities for state criminal defendants to seek federal habeas corpus,\(^6\) and curbed federal court injunctions against state judicial proceedings.\(^7\)

Once cases reach the Supreme Court, however, justices of the Burger era appear to have been as inconsistent as their predecessors in using avoidance techniques to circumvent ruling on the merits of a case on the docket. In *DeFunis*, for example, the Court held the case moot because Marco DeFunis was in his final semester in law school and seemed certain to graduate.\(^8\) Thus, with the country poised expectantly for a judicial guidepost to the explosive issue of racial preferences in higher education, the Court ducked. Yet, in *Roe v. Wade*, where by the time the case was heard by the Supreme Court Ms. Roe had obviously either had a baby or an abortion, the Court slid easily by the mootness issue, invoking the familiar "capable of repetition, yet evading review" formula.\(^9\) Again and again, the Court demonstrates how elastic doctrines such as mootness can be. There is certainly no reason to conclude that the Burger Court has sought to use avoidance techniques of whatever kind in any more consistent or self-denying fashion than did the Warren Court.

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74. See, e.g., Zahn v. International Paper Co. 414 U.S. 291 (1973) (requiring each plaintiff in a class action to have $10,000 in controversy to satisfy federal jurisdictional requirement); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (requiring that individual notice be given to all identifiable members of class).


78. 416 U.S. 312 (1974).

79. 410 U.S. at 125.
Avoidance techniques aside, the Court may show its lack of interest in a category of cases through the Court's pattern of granting and denying review. The justices have been pointedly selective in determining which kinds of “personal autonomy” cases they will take. Operating from the doctrinal base of Griswold v. Connecticut and Roe v. Wade, the Court has woven a web of protection around a cluster of intimate sexual and familial decisions—to marry, to beget (or not) a child, to have an abortion, or to divorce.80 Yet the justices show no interest in other claims raised in the name of “autonomy,” for example, school dress code and hair cases. Each of ten judicial circuits has decided school hair cases, and they have divided five-to-five.81 Despite this classic conflict of circuits, the Court has never heard a school hair case,82 nor is it likely to do so. The justices seem to agree with Justice Black’s “don’t bother us with this nonsense” view (expressed in an order denying a stay): “Surely few policies can be thought of that states are more capable of deciding than the length of the hair of schoolboys.”83

Nor, despite all the popular attention to “gay rights,” do the justices appear to have much interest in claims that sexual preferences ought to receive constitutional protection. When a three-judge federal court in Virginia divided two-to-one in rejecting male homosexuals’ challenge to that state’s sodomy law, the Supreme Court summarily affirmed. The Court neither heard argument nor gave reasons for its decision.84 Other efforts to attract the Court’s attention to homosexuality cases—for example, cases in which teachers sought to prevent being fired because of their sexual preferences—have failed.85

Looking at the Burger Court’s record overall, however, one is struck more by the new ground it has ploughed than by the terrain it has chosen to ignore. Areas that were rare or untouched in the Warren years have become a staple of the Court’s docket. In the sixties Justice Goldberg sought in vain to bring up the issue of capital punishment; the Court would not even grant cer-


82. The Court has heard and decided a case involving the length of a policeman’s hair. The majority, applying a rationality test, had no trouble upholding the department’s regulation requiring short hair. See Kelly v. Johnson, 425 U.S. 238 (1976).


Not only did the Burger Court, in *Furman v. Georgia*, decide that capital statutes as then administered were unconstitutional; it has continued to decide death penalty cases with regularity.\(^8\)

Sex discrimination cases have been even more regular fare on the Court's table. In 1961, the Warren Court easily turned aside constitutional challenges to a Florida law making jury services for women completely voluntary.\(^8\) Since that time, the women's movement has become one of the visible facts of the American scene, and Term after Term the Burger Court has decided a stream of sex discrimination cases. Sometimes the challenged law is sustained, more often it is not. The justices have differed on standards, settling in effect for a kind of intermediate scrutiny under the equal protection clause. Yet whatever the test, and whatever the result, the simple fact is that sex discrimination cases—not to mention other cases involving women's rights (such as the abortion cases)—occupy a major part of the Court's attention.\(^9\)

What we are witnessing is the "judicialization" or "constitutionalization" of American life. What blacks accomplished by going to court in the days of the Civil Rights movement inspired others to emulate their example. Prisoners, voters victimized by malapportionment, women, juveniles, inmates of mental institutions—virtually any group or individual failing to get results from the legislative process or from administrators has turned to the courts for relief. Emboldened by experience in desegregating schools and reapportioning legislatures, federal judges (led by such jurists as Frank Johnson and Skelly Wright) began to weave remedies for a variety of ills.

The Burger Court might have been expected to call "halt" to the process of constitutionalization. In some areas, the justices have sought to slow the process. *Rodriguez* represents a victory for a hands-off approach to school finance, and *Rizzo v. Goode* reflects deep doubts about letting judges in effect lay down operational rules for police departments.\(^9\) But such decisions seem to be only moments for catching breath in the expansion of areas in which the judiciary is willing to enquire. The Burger Court may sometimes reach a "liberal" result, sometimes a "conservative" one. It may sometimes lay a restraining hand on federal judges, sometimes be more permissive. All the while, however, the scope of the Supreme Court's docket expands to include wider terrain. In constitutional litigation, there appears to be a kind of ratchet effect: once courts get into an area, they rarely depart. Neither does the Su-


\(^8\) See notes 24-26, supra.


\(^9\) In the 1978 Term alone there were the eight cases listed in note 30, supra.

preme Court depart—no more under Warren Burger than under Earl Warren.footnote{91}

Many of the expectations harbored at the outset of the Burger Court—that it would be a Nixon Court, that it would undo much of the Warren Court’s work, that it would draw back from judicial activism, that it would constrict the scope and breadth of the Court’s business—simply have not become reality. Still other predictions could be examined, and they, too, would likely have to be, at the least, revised or heavily qualified. For example, surely, it was thought, the Burger Court would be a “law and order” court. To be sure, this Court is more sensitive to the needs of law enforcement than was the Warren Court. There is ample evidence of shifts in many dimensions of criminal justice, notably interrogations and search and seizure law.footnote{92} Yet conclusions about “law and order” mentality would have to be qualified by noting such decisions as that extending the Gideon right-to-counsel principle to misdemeanor cases, and the Court’s emphatic reaffirmation of the centrality of the warrant requirement in fourth amendment cases, surprising those observers who thought the Court would somehow slide to a reasonableness standard.footnote{93}

Yet another surmise was that the Burger Court would be a “states’ rights” court, a tribunal which would revive federalism. The best evidence bearing out such an expectation, of course, is National League of Cities v. Usery, a decision resting squarely on assumptions about state sovereignty.footnote{94} There are, as well, decisions in which federalism, or the related value of localism, is at least one of the articulated interests.footnote{95} But save in the rare case like National League of Cities, references to federalism are commonly mixed with other values, such as a concern about economy of judicial effort or about finality of litigation.footnote{96} More to the point, there is ample evidence that, when it comes to umpiring the federal system, the Burger Court does not tilt toward the states and away from federal power. In general there appears to be no tendency to deny to Congress powers to deal with national problems, however local the


impact of the regulation.97 Similarly, where state laws are attacked as impinging upon national interests, as in burden on commerce cases, the Burger Court is no less willing than was the Warren Court to vindicate the national side of the question.98 Whatever one may say about the frequency with which the Warren and Burger Courts respectively have intervened to protect the individual from governmental power generally (state or federal), it seems to stretch the evidence to conclude that the Burger bench has notably preferred the states to the federal government.99

II

Accounting for the Burger Court

In short, one should be slow to put labels on the Burger Court. It remains to enquire, then, what accounts for the Burger Court's mixed record—for the ad hoc, episodic quality of the Court's opinions.

The temperament and habits of the justices play a part. It is easy to imagine justices coming to the conference table with "shopping lists," justices who look over the Court's conference lists with an eye to cases that could become vehicles for doctrinal initiatives. Some observers no doubt see Justice Rehnquist as such an ideologue.100 For the most part, however, this is not an accurate picture of how the justices of this Court do their work. Overall, the present Court is one whose members take the cases as they come. The very fact that the Court must await a "case" or "controversy" is, of course, a force that tends to make the Court reactive rather than initiative. It is likely in any event that the Burger Court justices, by comparison to some of their recent predecessors, find themselves more comfortable working case by case rather than by broad directions.

This tendency is reinforced by the Court's workload pressures. More than one justice, the Chief Justice included, has complained about the burdens thus placed on the Court.101 As of June 1975, it was reported that five justices had gone on record as favoring the concept of a National Court of Appeals to ease the Supreme Court's workload.102 Justice Douglas, to be sure, did not think the Court overworked; he reckoned four days a week enough to keep up with the Court's work.103 Other justices, feeling more pressed, are more

97. See, e.g., Runyon v. McCreary, 427 U.S. 160 (1976). National League of Cities is, again, the exceptional case, but even that opinion leaves no doubt about the reach of Congress' power to use the commerce power to regulate the private sector of the economy. See 426 U.S. at 840.


100. See Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 HARV. L. REV. 293 (1976).

101. Such complaints have been aired both on and off the bench. See, e.g., Allee v. Medrano, 416 U.S. 802, 853 (1974) (Burger, C.J., concurring and dissenting).


likely to wrestle with the cases as they arise, lacking the leisure to philosophize
about some grand design of constitutional interpretation.

The Burger Court also lacks the larger than life figures of the Warren
Court, men like Hugo Black and Felix Frankfurter, around whom issues
tended to polarize. These were justices who developed a theory of judging.
Through their fully evolved doctrines, they put pressure on their colleagues
to think about cases in doctrinal terms. Even Earl Warren, in some senses so
unscholarly, put an ethical pressure on his brethren, as in facing the issue of
racial segregation in the public schools. Sometimes (as with Frankfurter) the
emphasis was on process, sometimes (as with Douglas) on result.104 In either
event, issues had a way of emerging as preordained. In judging, as in politics,
ideology has a way of making questions seem clearer and their answers more
foretold.105

Since the departure of the great ideologues, the justices are under less
pressure to fit individual cases into doctrinal tableaux. No longer preor-
dained, issues are seen to be more complex. Ad hoc results become the order
of the day—a natural consequence when problems refuse to be contained in
the jacket of doctrinal order. Justice Powell came to the Court inclined to
thinking in the pragmatic way of the practicing lawyer, rather than in abstract
document.106 As a justice he has come to be identified with “balancing.” Justice
Black's critics used to scorn him as an “absolutist” (he wore the badge
proudly); no one would be likely to hang that label on Justice Powell.107 Likewise,
Justice Stewart is more comfortable with ad hoc judging than with theory. It is no accident that Powell and Stewart are identified with the cen-
trists on the Court who collectively hold the balance of power in most cases.
All in all, one can argue that the Burger Court is, surprisingly enough, a less
ideological bench than was the Warren Court.

The justices' tendency to ad hoc decisions is reflected in the distaste some
of them show for categorical, per se rules. The Warren Court's fondness for
prophylactic rules, such as Miranda or the Fourth Amendment exclusionary
rule, is not echoed in the Burger Court. This Court may not have gone so far
as to jettison those prophylactic rules, but the justices leave little doubt that
they are more comfortable with fact oriented adjudication than with broader
formulations.

104. On Justice Frankfurter's concern with process, see the paper he read at a meeting of the
American Philosophical Society in 1954, published in 98 PROCEEDINGS OF AMER. PHIL. SOC'Y 223
(1954). As to Douglas, see, e.g., Karst and Van Alstyne, Comment: Sit-ins and State Action—Mr. Jus-
tice Douglas, Concurring, 14 STAN. L. REV. 762 (1962). Justice Douglas was unabashed in his view
that constitutional law should be rewritten by each generation of justices in order to achieve re-
sults required by the times. See Douglas, Stare Decisis, 49 COLUM. L. REV. 735 (1949).
105. I am indebted to Professor G. Edward White for helping me sharpen this idea.
106. See Howard, op. cit. supra note 61, at 449.
107. On Black's "absolutism," see W. MENDELSOHN, JUSTICES BLACK AND FRANKFURTER: CON-
The Burger Court has for some time been characterized by a lack of cohesive voting blocs. On one side are the Chief Justice and Justice Rehnquist; on the other, Justices Brennan and Marshall. Between these wings is a floating middle group. Justice Stevens came to the Court in 1975, and commentators are still trying to label him (the fact that he is often called the Court's "wild card" reflects the pundits' inability to do any better). Stewart and White remain essentially centrists, Powell is ever the careful (and moderate) craftsman. As for Blackmun, it has been a long time since anyone has talked about the "Minnesota Twins." Evidence of the Court's fragmentation may be gleaned from a look at the voting pattern of the four Nixon appointees. In the 1973 Term, they voted together in over three-fourths of all decided cases, in the 1975 Term nearly as often, but by the 1977 Term they agreed in only about half of the cases decided.\textsuperscript{108}

In addition to the inner dynamics of the Court, the nature of the issues before the Burger Court help to account for the mixed character of the Court's record. The Warren Court is well remembered for decisions laying down general principles: \textit{Brown}, \textit{Mapp}, \textit{Miranda}, and \textit{Reynolds v. Sims} are typical Warren Court decisions; all of them paint in broad strokes. \textit{Reynolds} reads more like an essay in political theory than a judicial opinion.\textsuperscript{109} The Warren Court was sometimes more comfortable making policy on the grand level than implementing it. Thus, it was more than a decade after \textit{Brown} before the Warren Court began to attend seriously to the need to oversee the work of the lower courts in desegregation cases. Moreover, many of the major Warren Court decisions date from the later years of that Court, the high water mark being the mid-sixties.

The task of implementing much of what the Warren Court began has fallen, therefore, to the Burger Court. Implementation, by its nature, draws courts into closer judgment calls. It is the difference between writing the National Basketball Association's rulebook and, in the fast breaking action of an actual basketball game, applying those rules. Whereas the Warren Court wrote many of the rules, the Burger Court finds itself refereeing while the game continues. Had the Warren Court survived into the seventies, it might have found implementation as difficult and as splintering as has the Burger Court.

\textsuperscript{108} Compare The Statistics, Voting Alignments, Table I (B) (1), \textit{The Supreme Court, 1973 Term}, 88 Harv. L. Rev. 1, 275 (1974) (Blackmun-Rehnquist: 79.9 percent; Blackmun-Powell: 74.8 percent; Blackmun-Burger: 84 percent; Burger-Rehnquist: 90.3 percent; Burger-Powell: 80.8 percent; Powell-Rehnquist: 82.6 percent) with \textit{The Supreme Court, 1977 Term}, 92 Harv. L. Rev. 328 (1978) The Statistics, Voting Alignments, Table I (B) (1) (Blackmun-Rehnquist: 50.4 percent; Blackmun-Powell: 60.7 percent; Blackmun-Burger: 59.1 percent; Burger-Rehnquist: 75.6 percent; Burger-Powell: 66.2 percent; Powell-Rehnquist: 55.4 percent).

\textsuperscript{109} That was the nub of the dissenters' objections to the result—that it preferred one political doctrine over another, neither of which were fairly grounded in the Constitution. See 377 U.S. 533, 590 (1964) (Harlan, J., dissenting).
One senses that the justices of the Burger era have perceived the issues of the seventies as more complex than was true of litigation in the sixties. This Court may mirror the shift in the mood of the country at large, from the bold enthusiasm of the Kennedy years to doubt and uncertainty about solutions to social issues in the years after the Great Society, Vietnam, and Watergate.

Contrasting Brown and Bakke may be instructive. The central question in Brown, though controversial, was relatively crisp: can state-imposed segregation by race in public schools be squared with the fourteenth amendment? By contrast, the issue of affirmative action is, for most people, more clouded, and as a result persons of sensitive ethical judgment may be found on all sides of the issue. Small wonder, then, that in contrast to Brown's unanimity (which, granted, was not that easy to come by in 1954) stands the fragmentation of the Court in Bakke—six opinions covering 156 pages. Perhaps it is only viewed in retrospect, and with the country far from where it was in 1954, that Brown looks more simple than Bakke. Yet it seems relevant that after a period of bold judicial strokes, Court and country alike might find adjusting boundaries more comfortable than more innovation.

An overview of the Burger Court brings one to the conclusion that this is a Court in which no one ideology or philosophy prevails on a regular basis. It is a Court in which competing forces exist side by side. Nixon's appointees have created a strong force for conservative values. Lessons learned in the sixties, however, are not quickly unlearned. Activist techniques, once employed, are available to be used again. Their use, it should be clear, is not confined to the "liberals" on the Court. The fluid voting patterns emphasize the competition between the voices of caution and the neo-Warren bent for action.

What one sees happening in the Burger Court carries echoes of the lessons of American constitutional history. There has, for example, been an interesting historical interplay between due process and equal protection. From the late nineteenth century until 1937, due process, especially in economic cases, was in the ascendancy; equal protection was quiescent. After 1937, due process had a bad connotation, at least in economic cases, but the Warren Court found new uses for equal protection. The Burger Court has put unmistakable limits on the "new" equal protection but has nursed the renaissance of substantive due process. One can mark similar rises and falls in the use of other clauses, such as the contract clause.110

One thing that such clauses—due process, equal protection, the contract clause—have in common is that each can be the tool of an activist judiciary. Their use raises recurring questions about the proper role of the judiciary in a democracy and about the proper sources of judicial interpretation. From

In the beginning, there has been, in the American constitutional tradition, a dialogue between constitutionalism and natural law. Even before the Revolution, the American colonists, in the tracts and pamphlets they wrote attacking British policies, drew upon more than one source of American rights. The British Constitution, colonial charters, and natural law were woven together.\textsuperscript{111}

This eclecticism became an American habit and an earmark of American constitutional litigation. Threads that could be used to support one another, such as appeals to a written constitution and arguments grounded in natural law, can also be in tension. The forces sometimes reinforce each other, sometimes they compete. Americans (like their English forebears) have typically been less given to efforts at total integration of constitutional theory on an abstract level than their continental counterparts, such as the French. Like the common law, American constitutional law takes on this Anglo-American character of evolution, eclecticism, even a dialectical nature. Americans seem content to abide a fair degree of contradiction and of ad hoc evolution in their law. The Burger Court is heir to this tradition.

\textsuperscript{111} See B. Bailyn, \textit{Pamphlets of the American Revolution} (1965); A. Howard, \textit{The Road from Runnymede} 133-202 (1968).