4-1-1978

The burger court and the Black community

Stedman Simpson Southall

Atlanta University

Follow this and additional works at: http://digitalcommons.auctr.edu/dissertations

Part of the Political Science Commons

Recommended Citation

THE BURGER COURT AND THE BLACK COMMUNITY

A THESIS
SUBMITTED TO THE FACULTY OF ATLANTA UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF ARTS

BY

STEEDMAN SIMPSON SOUTHALL

DEPARTMENT OF POLITICAL SCIENCE

ATLANTA, GEORGIA
APRIL 1978
DEDICATION

Dedicated to
My mother and grandmother
in recognition of
Their constant encouragement and inspiration,
and to
Dr. Lawrence Noble
in recognition of
His guidance and patience.

S.S.S.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEDICATION.</td>
<td>ii</td>
</tr>
<tr>
<td>I. INTRODUCTION.</td>
<td></td>
</tr>
<tr>
<td>The Role of The U. S. Supreme Court</td>
<td>1</td>
</tr>
<tr>
<td>The Political Significance of the U. S. Supreme Court</td>
<td>1</td>
</tr>
<tr>
<td>The Personnel of The U. S. Supreme Court</td>
<td>6</td>
</tr>
<tr>
<td>II. THE WARREN COURT.</td>
<td>17</td>
</tr>
<tr>
<td>The Historical Milieu of the Warren Court</td>
<td>17</td>
</tr>
<tr>
<td>The Warren Court's Most Significant Rulings Concerning the Black Community</td>
<td>21</td>
</tr>
<tr>
<td>Conclusions of the Warren Court's Impact on the Black Community</td>
<td>38</td>
</tr>
<tr>
<td>III. THE BURGER COURT.</td>
<td>43</td>
</tr>
<tr>
<td>The Political Climate at Appointment</td>
<td>43</td>
</tr>
<tr>
<td>IV. PRINCIPAL DECISIONS OF THE BURGER COURT CONCERNING THE BLACK COMMUNITY</td>
<td>57</td>
</tr>
<tr>
<td>Social Welfare Issues</td>
<td>57</td>
</tr>
<tr>
<td>School Desegregation</td>
<td>77</td>
</tr>
<tr>
<td>Rights of Criminal Defendants</td>
<td>86</td>
</tr>
<tr>
<td>V. THE IMPLICATIONS OF THE BURGER COURT'S DECISIONS FOR THE BLACK COMMUNITY</td>
<td>106</td>
</tr>
<tr>
<td>BIBLIOGRAPHY.</td>
<td>128</td>
</tr>
<tr>
<td>APPENDIX.</td>
<td>136</td>
</tr>
</tbody>
</table>
CHAPTER I

INTRODUCTION

The Role of the U. S. Supreme Court

The U. S. federal judiciary was constructed from the top downward, with the Supreme Court being actually established by the U. S. Constitution while the other levels of the federal judiciary were established later by various acts of Congress. The U. S. Supreme Court is the only court actually spoken of in the U. S. Constitution. In Article III, Section I of the Constitution, it is stated that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.¹ At the top of the American judicial system sits the U. S. Supreme Court, the most powerful tribunernal in the nation, a body whose case decisions can alter national patterns of activity. The Supreme Court of this century has assumed a role which is vastly expanded from the original views of the founding fathers. When the makers of the Constitution provided for the national government, the legislature was created first, then the executive, and the judiciary last since it was supposedly the least dangerous. It appears that the founding fathers may have forgotten that "Many that are first shall be last; and the last shall be first."²

¹ U. S. Const. art. III, sec. 1.

As the nation's top court, the U. S. Supreme Court has both official and unofficial roles delegated to it. In the area of officially delegated duties, Sections II and III of Article III of the U. S. Constitution define the Supreme Court's activities. The U. S. Supreme Court has original jurisdiction in actions or controversies; between the U. S. and a state: between two or more states: involving foreign ambassadors: other foreign public ministers, and foreign consuls, or their domestic servants, not inconsistent with the law of nations: commences by a state against citizens of another state or aliens or against a foreign country. The Supreme Court being the final determiner of what the Constitution says, serves its prime role as a body of last appeal in legal actions. The Supreme Court's appellate jurisdiction is composed of cases which spring from two sources: 1) all lower federal constitutional courts, and 2) the highest state courts having jurisdiction when a "substantial federal question" is involved. Cases from the two sources of appeal make their way to the Supreme Court by means of either: a writ of appeal as a matter of right; a writ of certiorari as a matter of court discretion; or by certification. Even though the Supreme Court is at the top of the judicial heap, its decisions concerning cases appealed from state courts are not necessarily final. A party can win in the Supreme Court


2 Ibid., p. 146.

3 Ibid., p. 159.
and still lose when the case is remanded to the state court. In effect, the Supreme Court has no power to make a final determination in any case in which it reviews state court judgments. All it can do in these instances is to decide the federal issue and remand it to the state court below for final judgment. Since the state courts possess the power to raise new issues after they receive the case back from above, they are provided with an opportunity to evade the substantive effects of the reversal by the Supreme Court in a number of ways. And once a new issue is raised, the ultimate disposition of the case may of course go either way.  

Certainly the most controversial and at the same time the most fascinating power of the U. S. courts in general, and the Supreme Court in particular is the exercise of the power of judicial review. Judicial review is the power of the court to hold unconstitutional and hence unenforceable any law, any official action based upon that questioned law, and any illegal action by a public official that it deems to be in conflict with the Basic Law in the U. S. Constitution.  

The power of judicial review is an undefined and unofficial role of activity which the Supreme Court has created for itself through case interpretation, there being no mention of this power in the Constitution. Through the use of judicial review of congressional and presidential acts, the nine justices become a type of superlegislature who are not elected by the public and who serve for life.

---

1 Ibid., p. 204.

2 Ibid., p. 251.
Through the act of either finding a questionable activity constitutional or unconstitutional, the Supreme Court has passed the bounds of simple adjudication and entered the area of legislation. Critics have often attacked the Supreme Court as being a non-accountable legislature. The justices themselves have had to come to grips with the issue. Justices both past and present, have generally admitted that they do legislate. Justice Oliver Wendell Holmes believed that justices without hesitation do and must legislate but that they can do so only on the smallest scale.¹ Some contention can be taken with the idea of whether the justices' legislative acts have been on a small scale or not.

The power of judicial review which inadvertently accords the Supreme Court the power and role of a super legislature has been argued both favorably and negatively. In the negative sphere, the cry for judicial restraint has been loudly shouted. It is argued that the Supreme Court should confine itself to strictly judicial matters and not attempt social legislation because: 1) it is illegitimate for the Supreme Court to act in this manner, 2) it adversely affects the democratic process when the Supreme Courtlegislates, and 3) the Supreme Court lacks the ability to legislate well. As a counterargument, it can be shown that the president who is elected by a national majority selects the justices. The justices are not blind to the national political climate. The Supreme Court's reviewing function can be seen as an attempt to keep the community true to its own fundamental principles, which it has a tendency to forget.

Judicial activity is greatly needed in matters such as race relations,

¹ Southern Pacific Co. v. Jensen, 244 U.S. 205 (1916), at 221.
where the political process often proves inadequate because of political neglect and not lack of legislative power.¹

The U. S. Supreme Court has played various roles as it either sought to support or suppress different national activities over the nation's history. The Supreme Court's relation to the Black struggle for freedom has until the relatively recent past been one of neglect or opposition. The Supreme Court as an institution historically has not served an especially beneficial role in the lives of Blacks. The Supreme Court like all other major institutions in America, has reflected much of the overall racism of the society at large.²

In the post Civil War years, the Supreme Court led the nation away from the Reconstruction Congress' program for full citizenship for Blacks. Congress passed five civil rights acts between 1866 and 1875. The 1875 Act contained some strong public accommodation sections that forbade racial discrimination in inns, public conveyances, theatres and other places of public amusement. When the act was first tested in the Supreme Court eight years later, the public accommodations sections were found to be unconstitutional. The opinion completely ignored the intent of Congress in passing the act and in proposing to the states the Thirteenth and Fourteenth Amendments. The Supreme Court thus opened the door for the passage of Jim Crow legislation.

In 1896, the Supreme Court endorsed the establishment of a quasi-slave

---


caste system by ruling that the states could require the segregation of public facilities as long as Blacks were provided equal accommodations.\footnote{Leonard W. Levy, \textit{The Supreme Court Under Earl Warren} (New York, New York: Quadrangle Books, 1972), pp. 83-84.}

During the years that Earl Warren served as Chief Justice of the Supreme Court (1953-1969), it is generally held but much debated that the Supreme Court for the first time used its super legislative power in a beneficial role for Blacks, as it overturned many past symbols of American racism.

\textbf{The Political Significance of the U. S. Supreme Court}

As relates to the political arena, the U. S. Supreme Court performs two overlapping roles in American political life. The first is to maintain and enunciate a political-legal order through formal adjudication. The second is to preserve the social-political bands of the nation. The legal function is in its nature exclusive to the judiciary. The social function is widely shared with other governmental and non-governmental institutions. Both functions require the qualifying and mediating term political because the Supreme Court's overriding task in both cases is to provide constitutional political continuity.\footnote{Charles A. Miller, \textit{The Supreme Court and the Uses of History} (Cambridge, Massachusetts: Harvard University Press, 1969), p. 189.}

The political significance of the Supreme Court can be seen in the power it has exerted to aid certain policies which the Supreme Court at that time believed to be in the nation's best interest, on the reverse side it can be imagined how powerful the Supreme Court appeared to those who sought to oppose these policies. The Supreme Court's development can
be divided into roughly five historical/political periods which could be
characterized by its special concerns or preoccupations. The first period
was from 1789 - 1860 in which the primary concern was with nation building
and nation-state relationships. The second period was from 1865 - 1937 in
which the primary concern was with business-government relations, protec-
ting business and property interests by generously applying the Fourteenth
Amendment to them and neglecting and frustrating Black interests. The
third period was from 1937 - 1953 in which the Supreme Court reversed its
pro-business stances as relates to the federal and state governments and
began haltingly to champion some civil rights and unevenly to protect
civil liberties. The fourth period was from 1953 - 1969 in which the
Supreme Court embarked upon a golden era of responsiveness to human rights
and civil liberties, which often placed the Supreme Court in bitter oppo-
sition with the public and with the other levels of government. The fifth
period constitutes a time span from 1969 to the present. Its political
character and implications shall be determined in this paper.

Since the days of slavery, Blacks have received the butt end of
justice because they have been and still are politically powerless, and
justice is a political commodity. It is awarded or denied according to
the political clout that the target of law enforcement can muster. Whether
a person or a group, a target's vulnerability to abuse by law enforcement
officials is determined by its position on the totem pole of political
power. Blacks are the historic occupants of the lowest rung. They still

---

1 K. S. Tollett, "The Viability and Reliability of The U. S. Supreme
Court as An Institution for Social Change and Progress Beneficial to Blacks
are abused lawfully.¹ The Black quest for freedom has until recently known the power of the Supreme Court only in a negative sense. It has been felt by Blacks that the American system had exploited and neglected them, the U. S. Constitution is for White people, it is now and always has been. In 200 years a few promises have been made to Blacks, but little has been delivered; neither the Supreme Court nor the American people have done much to alter the pervasive racial inequality of this society.² The Warren Court demonstrated at least a surface desire to guide the nation along the principles of equality and freedom which it so proudly enunciated but never really practiced. For the first time in nearly 200 years the power of the Supreme Court became a political ally of the Black struggle. The Warren Court did more than define and legitimate basic political decisions which were made by the dominant majority coalition rooted in the political branches and ultimately in the electorate. The Warren Court fashioned decisions of its own. There was division among political elites on the issues involved, and the resulting Supreme Court rulings favoring Blacks did put the Supreme Court's authority and prestige on the line. However, in these decisions the Warren Court illuminated a role for the Supreme Court that was somewhat different from the past. The Supreme Court used an opportunity to lead rather than restrain the nation on matters that seemingly went to the heart of the democratic creed, and forged a really unique and necessary role for the Supreme Court in the


political system.¹

The Black political struggle for rights in recent years has centered on the gaining and effective use of the vote, which has been a prolonged exercise marked by many battles. Through court and legislative battles, Blacks have eliminated White primaries,² eliminated poll taxes in state elections,³ and gained the establishment of the 1965 Voting Rights Act which sought to erase past patterns of discrimination by suspending literacy tests and other discriminatory devices employed in any federal, state, local, general or primary elections in designated states and counties.⁴ In the effort to win the right to vote and determine how many of the nation's central cities will be run, it must be determined if a true victory has been won or only a hollow prize been grabbed. While more active political participation such as voting and holding public office appears desirable, only reasonable expectations should be assigned it. Reliance on political participation as the primary way to rectify basic social and legal problems must be tempered by the limitations inherent in American electoral politics. More than emergent Black political majorities and elected officials in the nation's central cities may be needed for Blacks to receive the full benefits of American society.


authority and resources which cities need to deal with the problem involved makes them greatly dependent, as the system presently operates, upon institutions beyond their control such as state and federal legislatures. The unique role and powers of the American judiciary, symbolized by the Supreme Court, can prove determinative in the campaign for Black political power.\(^1\) By the use of its unique powers of judicial review and a positive view of egalitarian democracy for all, the Supreme Court can be seen as a tool for instituting social change and progress beneficial to Blacks. In view of the Supreme Court's past history and present composition, the Supreme Court can be seen by Blacks as being a viable but not a reliable tool for change beneficial to Blacks.\(^2\)

**The Personnel of The U. S. Supreme Court**

In America all federal judges are appointed by the president, subject to confirmation by simple majority vote of the Senate, on a more or less political basis. At the federal level all judges of the constitutional courts are judges appointed under provisions of Article III of the Constitution, hold their positions during good behavior,\(^3\) which in essence is for life, and their salaries can not be diminished during their continuance in office,\(^4\) without a constitutional amendment, but their salaries

---


can be raised. The involuntary removal of federal judges is possible only by the process of impeachment and conviction for treason, bribery, or other high crimes and misdemeanors.¹

There is no mention in the Constitution of any requirements as to training or ability to be held by persons who sit on the Supreme Court, thus technically speaking a president could name anyone to the Supreme Court regardless of his professional background. Even though technically there are no professional requirements, in reality any aspirant would need an LL.B. or J.D. degree. Though not required, the absence of such degree would veto anyone for judicial service at the federal level.² Though most persons who have reached the bench of the Supreme Court have been lawyers, a great many were not deeply schooled in the art of being a judge. This general lack of judicial background has not marred the basic view of the excellence of the Supreme Court's work. Even though not all the justices were judges before they entered the Supreme Court they were active, civic minded persons, supposedly attuned to the needs of the nation. Justice Felix Frankfurter pointed out that one is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero.³

---

¹ U. S. Const. art. II, sec. 4.


The Constitution does not mention how many justices the Supreme Court is to consist of, as a result of which the number of justices has varied over the nation's history. The present Supreme Court is composed of nine justices, one chief justice and eight associate justices. It has held this composition since 1869, but nine has not always been the number. At its founding, the Supreme Court was composed of six members, a chief justice and five associate justices. Subsequent changes were to nine in 1837, ten in 1863, and seven in 1866.

The power to appoint justices to the Supreme Court is one of a president's most highly regarded powers and always a tool of great political value. Through means of the power of appointment a president can project the impact and attitude of his presidency far beyond the term of his administration because Supreme Court justices serve for life. History suggests that American Presidents have been most attentive to the work and personnel of the Supreme Court in periods of extreme national tension, when the U. S. has faced political, social or economic crisis on a broad scale, presidents have felt a greater compulsion to control the Supreme Court than in calmer times. Presidents have been boldest when they believed that the public supported their view that the Supreme Court exacerbated a national crisis or was likely to do so in the future. In attempting to either humble an antagonistic Supreme Court or bolster a friendly one, a president in selecting justices will probably consider factors for appointment such as: objective merit; political availability of the designee; his ideological appropriateness; personal factors; and geographical, religious,

and other equitable considerations.¹

The Supreme Court is headed by a Chief Justice whose name that court is publicly known by during his tenure in office. Though each term of court carries the name of the Chief Justice, he is just the first among equals as relates to his associate justices. The Chief Justice holds only the most tenuous reins of official leadership. He presides at decision conferences, states the facts of the case and assigns the opinions when he is in the majority. For the extraordinary chief justice, even those meager duties afford him the subtle instruments for leadership. More often than not in American constitutional history, chief justices have found the tools inadequate to lead their eight fiercely independent colleagues, and thus have settled for being the national judicial custodian, the Supreme Court's calendar keeper, supervisor of printing decisions and figurehead of the federal judiciary.²

Throughout the nation's history the Supreme Court has been conservative in character and in actions taken. The Supreme Court has been conservative and thus basically anti-Black because its justices have been conservative and basically anti-Black. Blacks could expect little constant support from the Supreme Court when a composite of its justices reveals that justices are: native born (there have been six exceptions, the last, Austrian born Felix Frankfurter); White (the first nonwhite, Thurgood Marshall, was appointed in 1967); male (there have been no women


² Simon, In His Own Image: The Supreme Court In Richard Nixon's America, p. 51.
to date); generally protestant (six Roman Catholic and five Jewish Justices); fifty to fifty-five years of age at the time of appointment; Anglo-Saxon ethnic stock (all except six); upper-middle to high social status; reared in an urban environment; member of a civic minded, politically active economically comfortable family; B.A. and LL.B. degrees (usually from prestigious institutions); service in public office. In a group as small as nine, the change in just a few members can have a profound effect upon the direction of the body. Richard Nixon was given the golden opportunity to drastically leave his mark upon the Supreme Court and the nation, when he appointed four justices to positions in the nine man body.

In this study I will examine the legal effects of the Burger Court upon the Black struggle for rights, and also note the larger implications of these legal effects upon the future form and character of the continued Black struggle in America. My contention is that the Burger Court evidences a legal conservatism of the type which existed prior to the seating of the Warren Court, a legal conservatism which disdained great activity in the areas of civil liberties and human rights. This legal conservatism began with the seating of the Burger Court in the late 1960's and has extended into the 1970's. The seating of the Burger Court was preceded by a very different national period in which the Warren Court sat. The 1960's which witnessed many of the Warren Court's most momentous decisions was a time of spirited activism which probably occurred because of national economic abundance, greater social consciousness of the young, and an unpopular foreign war abroad. As the 1960's came to a close, a nation exhausted by

---

foreign and domestic upheavals sought to gain a state of normalcy in which riots at home would cease, Vietnam would fade away, and minorities would be put in their places. President Nixon during his term of office filled four vacancies on the Supreme Court. President Nixon sought justices for the Supreme Court who would be strict constructionists of the Constitution and not liberal freewheelers of the Warren Court brand. When he declared that he wanted strict constructionists he meant he wanted judges who would strictly and objectively interpret the meaning of the Constitution, who were less active and reform minded than the Warren Court, and who would leave legislator's laws alone even if they thought them unwise. President Nixon realized the political potency of the "strict constructionite" term. To minorities and White liberals, it was a subtle denunciation of the Warren Court's expansive reading of individual rights, while a rallying point for conservatives who believed the Warren Court was too permissive in social areas. Warren Burger was President Nixon's choice to head the Supreme Court as the nation sought a rest from a turbulent decade. My belief is that the Burger Court by the use of certain legal maneuvers such as refusing certiorari, distinguishing cases, overturning prior decisions and deciding cases on narrow issues, is retreating to the supposed proper confines of court activity which existed prior to the seating of the Warren Court, supposed proper confines which did not consider sensitivity to the disadvantaged as court concerns.

The principal research tools in this study will consist of works by court scholars and historians, Supreme Court cases, law reviews and

journal articles and popular periodicals. With these tools, I will attempt to assess the Supreme Court's immediate past and determine its implications by examining what the justices have said and what legal scholars say of the Supreme Court.
The Historical Milieu of the Warren Court

The humanism of the Warren Court of the 1950's and 1960's (1953-1969) did not spring spontaneous with the seating of Earl Warren as Chief Justice in 1953, but had its beginnings in the periods which immediately preceded. The Supreme Court until the elections of President Franklin Roosevelt had been basically property oriented in legal emphasis and conservative in nature. In attempting to guide the nation upon what seemed to be radical New Deal paths to national recovery from its economic depression, President Roosevelt was often stymied by the Supreme Court. In order to bend the Supreme Court to his will, he attempted to increase the numbers of justices with the additional justices to be persons loyal to him. This court packing tactic failed. Time by means of death or retirement removed a number of justices from the Supreme Court, allowing President Roosevelt to make his own appointments. These Roosevelt appointments were the beginning of Supreme Court receptiveness to social needs on a broad scale. The Supreme Court changeover during these years turned out to be more than just a reform movement. It was a revolution in which hallowed precedents were overthrown one after the other as the Supreme Court began to entertain matters other than those concerned primarily with protection of free enterprise.¹ The Supreme Court stopped vetoing economic and social laws, it

started cracking down on laws that restricted civil liberties, the belief being that civil liberties deserved great scrutiny because victims of oppressive acts had a greater need for the Supreme Court's protection, since they might be unable to protect themselves by normal political means. The New Deal Court felt that civil liberties needed the protection of the courts along with other national interests. The Supreme Court during President Roosevelt's administration guided the nation along a relatively liberal path during the 1930's-1940's.

In the late 1940's and early 1950's, the nation entered a suspicion fraught period which was dominated by the belief that a "Cold War" existed between the U. S. and Russia. The belief abounded that Communism must be contained abroad, while at home loyalty was the watchword. Against this background, the attention stealing occurrences of McCarthyism, the Alger Hiss trial, and the Korean War spent themselves.¹ Faced with a new war and the mass hysteria over Communism, the Supreme Court backed away from its support of civil liberties in these matters, although it remained relatively liberal in other areas such as religious freedom, equal rights for Blacks, and criminal justice. The prime national issue was political freedom, and on this point the Supreme Court was quite conservative. This shift toward the conservative view might have happened even without the furor over Communism, because by 1950, President Truman had named four new Supreme Court justices, enough to change the slant of the Supreme Court.²


² Habenstreit, Changing America and The Supreme Court, p. 142.
Against this background of national trauma with Communism, the Black struggle was gaining momentum for the flowering it would later have in the Warren Court era. Momentum was being gained by the Supreme Court decisions which sprung small leaks in the dike of racist separatism. The Supreme Court ruled that official power could not be used to enforce racially restrictive covenants in property deeds, and that a state must allow Blacks to enter White state graduate schools in a state if there are no Black graduate schools of equal quality in that state. In another case concerning denial of Black admission to a state graduate professional school, the court held that a state practice of denying qualified Blacks admittance to the only existing law school maintained by the state because of race was unconstitutional. The Supreme Court reasoned that the equal protection clause of the Fourteenth Amendment requires a state maintaining a law school for White students to provide legal education for a Black applicant, and to do so as soon as it does for applicants of any other group. The Supreme Court also reasoned that it was inadequate for Oklahoma to require a Black to either elect out of state aid or demand that a new institution be erected for them.

In President Eisenhower's election in 1952 and the subsequent ending of the Korean War, the nation breathed a sigh of relief and sought a much needed period of rest. President Eisenhower, who lacked any burning

---

desire to reshape American society, was content to let it rest. All of this meant that the confusion and apprehension which had restrained judicial leadership from asserting itself in previous years were, if not eliminated, considerably reduced. In this new climate, the judicial impulse to expand civil rights could be given freer rein; confidence in the judiciary's capacity to play an active governmental role could find room for growth.

The election of John F. Kennedy as president in 1960 opened what President Kennedy was to term the New frontier of greatness as the nation sought to realize its promise. President Kennedy spoke much of racial equality and seemed to capture the imagination of Blacks, but when he finely analyzed it can be found that he actually did little to correct racist patterns.1 The relative indecisiveness of the Kennedy years was almost inversely reflected by the greater activity of the Supreme Court. The Eisenhower and Kennedy years witnessed greater Supreme Court intervention, which was probably occasioned by inactivity on the part of other governmental branches. President Eisenhower seemed disinclined on principle to lead America any faster than it was already inclined to go, which was not very fast. President Kennedy's aspirations were more dynamic, but for all the talk about getting America moving he was for various reasons unable to move it much during his three years in office. Meanwhile Congress was as usual incapable of acting independently as a source of initiative. It is possible that the Supreme Court can be thought of as filling a vacuum left by the other branches of government,

or that the judiciary has a tendency to enlarge its own role in public affairs when the normal machinery is inert or deadlocked. ¹

Lyndon B. Johnson, probably one of the most effective politicians of this century succeeded to the presidency upon President Kennedy's tragic assassination. President Johnson in the attempt to construct the Great Society which he envisioned for America, got much more accomplished than President Kennedy. President Johnson was a strong advocate and skillful maneuverer of civil rights legislation. The pity of the Johnson years is that they were marred by civil strife generated over American misadventures in southeast Asia. Coupled with turmoil over foreign blunders, the nation was literally inflamed by Black protests and riots in urban centers which demanded freedom immediately.² During the fluid years of the 1960's, the Supreme Court which came to be known as the Warren Court blazed a new path of innovative social justice which was cheered by its supporters and reviled by its critics.

The Warren Court's Most Significant Rulings Concerning the Black Community

The Supreme Court is a functioning body of nine men who have as their only avenue of group speech the writing of opinions which explain why a justice voted in the manner which he did in a case decision. Through the deciding of cases and the writing of opinions, each court weaves the fabric of the garment it will wear before the public, whether the court


will be termed liberal or conservative on the issues posed before it.

Earl Warren served as Chief Justice of the Supreme Court for sixteen years (1953-1969), during those sixteen years he headed a Supreme Court on which sat seventeen justices who rendered some of the most momentous decisions in the nation's history. In the sixteen years which Warren served, countless cases were heard and decided, many of these decisions had great impact on Blacks. Sometimes the impact of a case decision was clearly discernible because a Black was a named party, but more often than not a Black may not have been a named party, but the decision nevertheless had great repercussions on the Black community.

Over a sixteen year period, the Supreme Court appeared to be a constant ally of the Black struggle for the rights which had been promised long before. In order to maintain a consistent course of action among a nine man body which had seventeen men enter and leave over a sixteen year period, there must have been at least four out of the nine who could constantly be termed as being favorably disposed to the civil liberties issues, these four would generally be joined by one or two moderately conservative justices who would swing over on various votes to make a majority. In 1953, when Chief Justice Warren, former Governor of California and aspirant to the Republican nomination for president came to the Supreme Court, he joined five of Franklin Roosevelt's appointees (Black, Reed, Frankfurter, Douglas, and Jackson) and three of Harry Truman's (Clark, Burton and Minton). Only the Chief Justice himself and the durable justices Black and Douglas sat during the entire sixteen years. The others were succeeded by four men of generally liberal persuasion (Brennan, Goldberg, Fortas and Marshall), two who can not even roughly be classified as
conservative or liberal (Stewart and White), and only two who could with approximate fairness be described as conservative (Harlan and Whittaker). Among the justices who made up the dominant core of the Warren Court in addition to the Chief Justice himself, were the two old time liberals Black and Douglas, Abe Fortas the Washington Lawyer who replaced the like-minded Goldberg when the latter resigned from the bench to become the U. N. Ambassador, and Brennan, an Eisenhower appointee, and Thurgood Marshall the first Black justice. Generally speaking these justices made up a fairly consistent pro civil liberties bloc. The more conservative bloc on the Supreme Court had been headed by Justice Frankfurter until his retirement in 1962. His theme of judicial self-restraint was carried forward by justices Harlan and Stewart, both Eisenhower appointees, and also quite often by Byron White a Kennedy appointee. This group was generally less inclined to find that government action infringed on civil liberties. However, this division was not hard and fast. There were many switches, depending on what type of issue was involved.

In commenting upon what he believed were the Supreme Court’s most important cases during his sixteen years in office, Warren cited three areas of case decisions as the most important. The most important were the voting rights cases which sought to achieve proportionate representation in voting districts as a means of obtaining greater equal protection under the Fourteenth Amendment. The second most important area of


case decisions were those pertaining to race relations. The third most
important area was centered on the extension and upgrading of prisoner's
rights.¹ I believe that an additional area of importance was the Warren
Court's work in the realm of the First Amendment rights which were often
merged with the preceding three areas.

Chief Justice Warren believes that the Supreme Court's activity in
the area of equal protection of voting rights was his most significant
labor and that Baker v. Carr² was the most significant case decision. For
some time American liberals had bitterly indicted malapportionment as one
of the major cases for the failure of this country's governmental machinery
to adapt itself to the demands of a rapidly changing society. Were it not
for the disproportionate power possessed by legislators from rural areas
and the smaller towns, the problems and fiscal needs of the big cities
would have received more sympathetic consideration and treatment. There
were many specific charges. When it came to the distribution of statewide
revenues in order to aid schools, highways, streets, mass transit, air
pollution or welfare programs, malapportioned legislatures devised ingenuous
formulas that shortchanged their urban constituents. Rural and urban rate
of tax assessment and tax burden were found inequitable and discriminatory.
Necessary structural changes in government to permit a metropolitan
approach to metropolitan problems were resisted. Malapportionment was not
restricted to state bodies, but was found to exist in Congressional dis-
tricting as well. It was shown that prior to reapportionment decisions,

² 369 U.S. 186 (1962).
it was not at all unusual for three-quarters of the committee chairmen in Congress to represent the least populous districts while representatives from the most populous districts had to be satisfied with one-quarter of such chairmanships.¹

In Baker v. Carr, Tennessee petitioners brought suit alleging deprivation of equal protection under the Fourteenth Amendment, as a result of Tennessee's failure to redistrict for sixty years even though the state's population pattern had greatly shifted which made some votes worth more than others. Baker argued that arbitrary and irrational state action in districting left them in a constitutionally unjustified, unequal position to voters in favored counties, and that this impaired rights granted under the equal protection clause of the Fourteenth Amendment, which constituted a personal loss. The Supreme Court ruled that Baker as a voter and taxpayer had a right to bring suit challenging the constitutionality of the state apportionment law and that the courts could decide the issue and order the legislature to be reapportioned if they so wished.

The impact of Baker is that much greater when it is realized that the Supreme Court had to reverse itself on a prior decision rendered in the Colegrove v. Green.² In Colegrove the Supreme Court refused to rule on an Illinois petition challenging population disparity in congressional districts, because the court believed this to be a political question. The Supreme Court as a rule does not hear political questions, it avoids the

² 328 U.S. 549 (1946).
political thicket.

Baker was followed by numerous cases which sought to achieve a more equitable apportionment of voters strength to the size of election districts. In Gray v. Sanders, the Georgia County Unit System of electing officers to the U. S. Senate and to statewide offices was invalidated because it served to dilute the power of the urban electorate by assigning preferential weights to votes from smaller rural counties. The Supreme Court stated that the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing one person, one vote. Gray was followed by Wesberry v. Sanders, which ruled that Georgia's Fifth Congressional District boundaries had to be rearranged in a manner to reduce the effect of wide population disparities in that state's congressional districts. Wesberry was followed by Reynolds v. Sims, which ruled that the Alabama state legislative districts had to be arranged in a manner more likely to insure the eventuality of realizing the principle of one man one vote. In Gomillion v. Lighfoot, which


2 Mitau, Decade of Decision, p. 94.

3 376 U.S. 1 (1964).


preceded Baker, the Supreme Court invalidated a redistricting act which had resulted in an odd shaped voting district, where a uniform one had existed previously. The act also had the effect of removing most Black voters beyond city limits. The Supreme Court saw this as a crude form of gerrymandering, with the purpose being to isolate and deprive a recognizable segment of the population of their right to vote and the power of their ballots.

An essential for the establishment of a democratic government and the founding of political justice is that each citizen's vote must be equal in weight to every other citizen's vote. The reapportionment voting cases which were represented by Baker, were of extreme importance to the Black struggle. The cases were important to Blacks, because they posed the second phase of a two phase hurdle which Blacks had to cross in their fight for political rights. In the first phase of the hurdle, the Blacks had to gain the right to vote. In the important second phase of the hurdle, the Black's votes had to be weighed fairly. Prior to Baker, votes in certain areas weighed more than votes in other areas which could be seen as a partial denial of the right to vote or a denial of a property interest. Although the Supreme Court aided the Black struggle indirectly in Baker and related decisions, it must always be remembered that the Black campaign for the right of the ballot had been waged in serious earnest long before the seating of the Warren Court.  

1  

On May 17, 1954, in *Brown v. Board of Education*, the Supreme Court ruled unanimously that segregation of public schools solely on the basis of race, denied Black children equal educational opportunities even though physical facilities are equal. Schools represent a microcosm of a larger world which is both multiracial and racially interdependent. An education which seeks to prepare young people to live effective lives in a contemporary America could no longer be obtained in segregated schools. Through the rendering of this judgment the Supreme Court set a match to the powder keg of Black expectant emotions which resulted in a continued blast of civil rights activities. As revolutionary as this ruling was it did have a braking device attached. The Supreme Court stated that integration was to proceed with all deliberate speed, which was used by many states as a means not to integrate, while other states instituted protracted court suits as a means of eluding the ruling.

The Black struggle had existed long before the eruption of *Brown* and continued after it with the N.A.A.C.P. being the principal spear carrier both before and after. Since the N.A.A.C.P. prompted many of the cases which reached the Supreme Court, the N.A.A.C.P. itself subsequently came under attack and was rescued by the Supreme Court. In *N.A.A.C.P. v State of Alabama*, Alabama sought to force the Alabama Chapter of the N.A.A.C.P. to disclose its membership. The N.A.A.C.P. resisted because disclosure of membership lists would subject present members to abuse and have a

---


chilling effect on the joining of any prospective members. The Supreme Court ruled that the lists need not be disclosed because it would violate the right to freely associate and that the state had not made out a case of such compelling strength to demand disclosure. In *N.A.A.C.P. v. Button*, a Virginia statute that forbade the prompting of legal action unless the prompting party had an interest in the case was attacked. The N.A.A.C.P. opposed the statute because in having no direct legal interests in the cases they brought, would stymie their civil rights activities. The Supreme Court found for the N.A.A.C.P. on the basis that the bringing of suits by the N.A.A.C.P. was a form of political expression.

The seeds of the Brown decision fell to earth and flowered into a garden of sit-ins and demonstrations in the South, as Blacks sought to destroy the badge of inferiority which was represented by separate facilities in public places. In *City of Greenville v. Peterson*, Blacks who requested service at a Whites-only lunch counter and didn't leave when requested to were arrested and convicted for violating an ordinance forbidding multiracial service at the same counter. The Supreme Court reversed the convictions on the ground that the City as the states agent, through the enacting of the ordinance had significantly involved the state in an unconstitutional act of discrimination. In *Lombard v. Louisiana*,

---


Blacks seeking service in a McCrory's store were refused service and then arrested when requested to leave. There was no ordinance specifying arrest for not leaving when ordered. There was no ordinance, but it had been stated by the Mayor and Police Chief that sit-ins were not in the community interest and that city laws would be enforced against them. The Supreme Court reversed the convictions on the grounds that the Mayor's and Police Chief's statements were the voice of the state and had the tendency to continue segregated activity.

In 1964, a Civil Rights Act was passed, the public accommodations sector of which was bolstered by subsequent Supreme Court rulings. In Heart of Atlanta Motel, Inc. v. United States,\(^1\) it was ruled that a privately owned motel near a interstate highway could not refuse Blacks service, for that would burden the flow of interstate commerce. In Katzenbach v. McClung,\(^2\) it was ruled that a privately owned restaurant catering to solely intrastate patrons could not deny Blacks service. The Supreme Court reasoned that although only intrastate business was done, the restaurant purchased supplies through interstate channels, which when considered in addition with other intrastate restaurants, it in reality exerted great consequence on interstate commerce.

In attempting to enforce integration of educational facilities, the Supreme Court encountered many delaying strategies. In Bradley v. School Board,\(^3\) the Supreme Court had to rule on the plan for desegregation of the

---


3 382 U.S. 103 (1965).
public school systems of two cities in which the petitioners claimed that faculty allocations on an alleged racial basis rendered the plans inadequate. The decision stated that it was improper for a lower court to approve school desegregation plans without considering at full evidentiary hearings, the impact on those plans of faculty allocation on an alleged racial basis, there being no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of desegregation plans is entirely speculative, and there is no reason for postponing such hearings where the plans have been in operation for at least one academic year. In Green v. County School Board, the County initiated a freedom of choice plan in which a student could choose which of two schools he desired to attend, the two schools in question had under the segregated system been one White, while the other Black. The Supreme Court ruled against the County plan, because on closer examination it was found that it was not an appropriate step toward a unitary system since not one White had chosen to attend the Black school, while a number of Blacks had chosen the White school. On further study it was revealed that 85 percent of the Black children in the system still attended the Black school.

Chief Justice Warren believed that the third most significant area of Supreme Court activity during his tenure of office was in the area of defendant's rights in criminal proceedings. This area of judicial activity was of extreme importance to Blacks because they were usually the targets of questionable law enforcement measures.

1 391 U.S. 430 (1968).
The sixteen years of the Warren Court saw the constant expansion of defendant's rights by what was usually a sharply divided court. In *Gideon v. Wainwright*,¹ it was ruled that an indigent defendant must be given opportunity to have the advice of legal counsel, which meant the court had to furnish attorney for the poor. In *Miranda v. Arizona*,² it was ruled that a prosecutor cannot use in a trial any admissions or confessions made by a suspect while in custody unless it first is proven that the police complied with detailed safeguards to protect the defendant's rights against self-incrimination. In *Escobedo v. Illinois*,³ it was reasoned that when a criminal investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the assistance of counsel in violation of the Constitution and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. In *United States v. Wade*,⁴ it was stated that suspects had a right to legal counsel when they appeared in police lineups, and that lineup

⁴ 388 U.S. 218 (1967).
identifications were not admissible unless this right had been granted. In Mallory v. United States, it was said that a confession was inadmissible if it had been obtained during an unreasonable period of detention but that once a suspect was arrested he must be quickly brought before the appropriate legal officer to be appraised of the charges and his rights. In Massiah v. United States, it was held that police are permitted to continue the investigation of a defendant after an indictment, even by means of electronic eavesdropping. They can employ the information garnered to start other investigations but information thus gained can not be used at the defendant's trial. In Mapp v. Ohio, the Supreme Court extended the Fourth Amendment's guarantee against unreasonable search and seizure to the states, making the fruits of an illegal search as excludable as evidence in a state trial as it would be in a federal one. In Aguilar v. Texas, the qualitative standard of information offered by the police when desiring a search warrant from a judge was raised to that of information which the judge could make an independent decision on granting the warrant. In Duncan v. Louisiana, it was held that the right to a trial by jury is so fundamental in criminal prosecutions that it is incorporated by the Fourteenth

---

1 354 U.S. 499 (1957).
Amendment due process clause, and hence is required in all state criminal trials. In *Robinson v. California*, the Supreme Court reasoned that the Eighth Amendment bar to cruel and inhuman punishment had been incorporated in the Fourteenth Amendment due process clause. In *Terry v. Ohio*, it was held that a police officer may be constitutionally privileged to stop and frisk a citizen under the condition that the officer reasonably concludes that the person may be armed and dangerous and that preventive action to protect himself or others is called for, such a search is constitutionally privileged even though the officer does not have probable cause to effect an arrest. In *Swain v. Alabama*, it was held that if the prosecutors in a state systematically use their peremptory challenges to exclude members of a racial group from all juries in all cases, there is a violation of equal protection. The long neglected area of juvenile rights in proceedings was given attention in *In Re Gault*, in which the Supreme Court extended some of the Fourteenth Amendment rights accorded adults to juveniles when charged with crimes.

In retrospect, the Warren Court's greatest service to the nation in the area of defendant rights was the incorporation of many of the federal constitutional safeguards into state proceedings. Prior to the Warren Court there was little uniformity in the defendant's rights area and in many states the federal constitutional safeguards were not observed.

---

Chief Justice Warren in his review of his court's activities pointed out three areas as being the most significant, I believe that a fourth area should be added, the area of protection of the First Amendment rights. The Warren Court's support of freedom of speech, press, assemblage, and petition was of significance in the civil rights struggle which followed Brown. Along with the guardian support rendered the First Amendment, there was an expansive reading given the Fourteenth Amendment's equal protection and due process clauses. In Shapiro v. Thompson,¹ it was held that although there is no constitutional right to receive welfare, state residency requirements which disqualify persons from receiving welfare simply because they have not been residents of the state for a prescribed period are invalid because they impair a citizen's constitutional right of interstate travel while not serving any compelling state interest. In Loving v. Virginia,² that state's laws barring interracial marriages was held unconstitutional. In Thompson v. Louisville,³ it was held that the Supreme Court has the inherent power to review by certiorari any state court conviction, to determine whether the defendant's constitutional rights have been abridged, and this is true even though the state provides no right of appeal as to said convictions. Specifically, petitioner was found guilty in the Police Court of Louisville, of two offenses-loitering and disorderly conduct. The question was whether there was any evidence at all upon which to base the charges. The Supreme Court ruled that there was no evidentiary

---


² 388 U.S. 1 (1967).

basis for the charges. The significance of the ruling was that it served to bar groundless charges which were often used as harassment techniques by the authorities. In Jones v. Alfred Mayer,¹ it was held that a federal statute barring racial discrimination, private as well as public, in the sale or rental of property, has been upheld as a valid exercise of Congress' power under the Thirteenth Amendment, on the basis that such discrimination is a badge or incidence of slavery. In Brown v. Louisiana,² Blacks refused to leave the reading room of a public library which was operated on a racially segregated basis, after having been directed by a sheriff to do so. The Supreme Court reversed their convictions for breach of the peace. Their conduct was not disruptive; rather it was a reasonable and limited exercised of their right to protest unconstitutional segregation in a public facility. In Johnson v. Avery,³ the Supreme Court ruled that it was permissible for prisoners (Jailhouse lawyers) to aid other prisoners in the preparation of appeal papers. In Dombrowski v. Pfister,⁴ it was held that a state statute which made it a felony to participate in any subversive organization, as defined in the statute, was unconstitutionally vague, and was employed as a means of intentionally those seeking to aid Black rights. The definition of subversive as advocating the overthrow of the constitutional form of state government was held overly broad.

¹ 392 U.S. 409 (1968).
⁴ 380 U.S. 479 (1965).
in view of the important rights of free speech and assembly affected by the statute. The organization in question in Dombrowski had been active in supporting the rights of Blacks to vote. The true significance of the case lay in the fact that the Supreme Court decided to hear the case even though it had not reached final determination in the state court system, because ordinarily federal courts avoid pre-conviction intervention in state proceedings, while relying on Supreme Court review and post-conviction habeas corpus as remedies. Dombrowski had far reaching impact because it allowed easier access to federal court than had previously existed. In U. S. v. Price, the Supreme Court held that the rights of due process had been violated when three civil rights workers were murdered by law officers and private citizens. It was also found that when private individuals wilfully engage in a jointly activity with state officials to infringe the civil rights of others, the private individuals as well as the state officers are subject to sanctions under federal law. In Edwards v. South Carolina, Cox v. Louisiana, and Adderley v. Florida, the Supreme Court reversed convictions of Black demonstrators on the basis of either the ordinances they were convicted under were overly vague as to defining what was a breach of the peace or that the demonstrators were actually orderly when arrested.

Conclusions of the Warren Court's Impact on the Black Community

As with all matters of great importance and historical impact, it takes time for the furor surrounding the issues to subside in order to assign an issue its true significance. This is the situation which presents itself in attempting to determine the impact of the Warren Court's rulings on issues concerning the Black community. The Warren Court's rulings undoubtedly had great impact on the Black community since they scrapped many of the government enforced public forms of discrimination and racism. The Warren Court because of its rulings which generally favored desegregation positions, encountered fierce resistance and abuse from the pro-segregation sectors of the society at the time the rulings were rendered, but were highly praised by the Black community and its constituents.

The hallmark case of Brown v. Board of Education, which began the era of great desegregation decisions, has come under greater negative scrutiny by Blacks than when initially rendered. Some Black scholars believe that the euphoria of Brown has been misplaced. They believe that the measure of justice under is the equal treatment of Blacks on the basis of White standards and values, not Black ones. Equality between Blacks and Whites can never be achieved in this oversimplified manner, which hypothesizes a mystical racial peer group, toward which all other races must be lifted. The equality to which Blacks are entitled can only be attained by dealing affirmatively with Black people on the basis of their manifest need. Blacks are different from all other races and minority groups in America. Blacks alone bear the scars and still festering sores of chattel slavery. No other groups in America has ever been legally relegated to nonhuman
status of a chattel. Thus to the extent that the concept of equality found in Brown is based upon mere racial parity, Brown is but the modern analogue of "separate but equal" philosophy which had existed under the past segregated system.¹

The experiment in integration that began with the Brown decision and was generally regarded favorably by the Black community at the time, has later been subjected to a more negative interpretation. The class nature of the integration movement made it an inadequate instrument for the liberation of a people whose relations to the productive forces approximate those found among colonized peoples. Integration is a way of siphoning off qualified Blacks into White America and exploiting their labor. It gives rise to the phenomenon of tokenism, invariably strengthening White America as it weakens and confuses Black America.² Thus a debate continues as to whether integration that was sought as a means of achieving equality in America, is really of a beneficial or a detrimental nature. Regardless which path the debate takes, the Warren Court must be granted its due credit for finally taking a stand to bring about the freedom and equality for all its citizens which the nation so proudly boasts of. Much of the problem found with the Warren Court's decisions focus on the point of the sweeping rhetoric which clothed the decisions as opposed to the rather narrow path of implementation which they took. Brown and the cases which followed it promised more than they could give, and therefore


² Ibid., p. 59.
contributed to Black alienation and bitterness, to a loss of confidence in White institutions, and to the growing racial polarity of our society. This bitterness generated by unrealized hopes can not in any true sense be said to be the responsibility of the Warren Court. Few in the country in 1954 understood that racial segregation was merely a symptom, not the disease, that the real sickness is that our society in all of its manifestations is geared to the maintenance of White superiority.¹

Having opened a Pandora's Box, in attempting to achieve an egalitarian society by destroying segregation symbols, the Warren Court was left for a long time to handle the momentous problem alone. It is to its credit that the Warren Court did not falter in its resolve or turn away from its commitment to cut away all governmental support for discrimination.²

As with all things, there must come an ending, and so it was with the Warren Court. Earl Warren retired from the high court in 1969, but just prior to his retirement, a golden opportunity was missed by President Johnson to extend the liberal activist trend of the Supreme Court. In 1968 in the midst of the presidential campaign, Warren announced his retirement as soon as a replacement could be found. President Johnson placed the name of his old friend and advisor, Associate Justice of the Supreme Court Abe Fortas in nomination. Fortas who had joined the Supreme Court in 1965, had aligned himself with the liberal bloc and seemed the

---

² Ibid., p. 248.
logical inheritor of Warren's liberal legacy. Fortas, a Washington super-
lawyer had long been a close personal friend of President Johnson. The
nomination of Fortas for Chief Justice meant that another nominee would
be needed to fill Fortas' vacant seat, which meant if all went well, President Johnson could appoint two Supreme Court Justices and thus leave
his mark on the judiciary. All did not go well. Richard Nixon, the
Republican presidential candidate attacked the appropriateness of the
appointments stating that they should be delayed until after the election
so that the new president could chose his own appointees. The Fortas
appointment met stiff opposition in committee hearings and was withdrawn
after a hint of impropriety was raised about the compensation accorded.
Fortas for instructing a series of educational seminars. Fortas' opportu-
tunity to succeed Warren as Chief Justice was lost, but worse than this,
Fortas was forced to resign from the Supreme Court when a few months later
he was enveloped in a great cloud of supposed professional impropriety.
It was found that Fortas had entered into a retainer arrangement with the
troubled financier Louis Wolfson, who was fighting conviction. It was
feared that operating as a minor operative for Wolfson enterprises, that
Fortas might be called upon to use his great Washington influence im-
properly.¹

President Johnson was not able to appoint justices to the Supreme
Court vacancies before the national elections. In the elections of that
year, Richard Nixon was elected president and began his promise of bring-
ing a nation together that was deeply divided over national policies, both

¹ Robert Shogan, *A Question of Judgment* (Indianapolis, New York: Bobbs-
domestic and foreign. President Nixon eyed the Supreme Court vacancies as prime opportunities to get the nation off the Warren track and on to one strict construction of the Constitution, in which the Supreme Court would serve the vast majority not a few pampered malcontents, or at least not make a nuisance of itself.
CHAPTER III

THE BURGER COURT

The Political Climate at Appointment

On June 23, 1969, Warren E. Burger was sworn in as Chief Justice of the Supreme Court by retiring Chief Justice Earl Warren, as President Richard Nixon watched. President Nixon in his remarks after the swearing in ceremony, praised Chief Justice Warren for his dynamic leadership of the Supreme Court and service to the nation. By the swearing in of Chief Justice Burger, President Nixon began the task of remaking the Supreme Court into an instrument of his own liking. President Nixon sought to forge a new Supreme Court by appointing justices which he believed would construe the Constitution strictly and not venture into areas of social legislation as the Warren Court had done. In a November 3, 1968 speech, candidate Nixon made known the qualities which he would demand of any Supreme Court appointment. He would require his appointments to: 1) be experienced or have great knowledge in the field of criminal justice, 2) have an understanding of the role some of the decisions of the high court have played in weakening the peace forces in our society in recent years, 3) have an abiding feeling for the rights of the abused as well as the accused, 4) be strict constructionists of the Constitution who saw their duty as interpreting the law and not making the law and see themselves on duty as caretakers of the Constitution and servants of the people and not superlegislators with a free hand to impose their social and political
viewpoints upon the American people. President Nixon believed that the excesses of the Warren Court had aided in the deterioration of American society, a deterioration he had been elected to arrest and reverse.

Richard Nixon by winning the 1968 presidential election, became the president of a divided and confused America, a nation that longed for forceful leadership. In the election of 1968, the campaigns for the presidency had no shortage of campaign topics. The nation was losing the war in Vietnam and not winning at the Paris Peace Talks. The nation's urban areas were racked by race riots which were typified by Watts, Detroit, and Newark. Three national leaders in the persons of John F. Kennedy, Martin Luther King, and Robert Kennedy were assassinated within a few short years of each other. Prestigious universities such as Columbia which were supposedly seats of higher learning, flared into revolutionary battlefields of protests between students and administrators. In the spiritual realm, radical theologians questioned the continuation of religion itself. The very fabric of American society seemed to be coming unwoven. By his campaign for the presidency, for middle American Richard Nixon had become the unlikeliest of romantic symbols: the antihero. No flash, no profile, no uplifting rhetoric. Nixon honored the past and invited Americans to step ever cautiously into the future. He told the blue and white collars that they were right, that America's institutions had worked and would work again if the nation would resolve to correct present excesses.


In 1968, the nation faced many problems but the greatest problem was lack of confidence in itself. Richard Nixon realized the tense national mood and suspected that the public was willing to have the Supreme Court share part of the blame for the national mess. By campaign time, Nixon was sure that the Supreme Court was politically vulnerable and acted accordingly. Increasingly, Nixon utilized the Supreme Court as a target in his "What's Wrong With America" program of attacks. Seizing upon the most easily flammable material, Nixon often harangued the Warren Court's expansion of criminal suspect's rights and said this was a contributor to the triumph of the crime forces over the nation's law enforcement agencies. On a less emotional level, Nixon viewed the Supreme Court as a fourth branch of government which could make profound changes in American society but was beyond accounting to any person or agency.

Richard Nixon won the 1968 presidential election which can be seen in essence as saying that the nation did want a change from what it was then experiencing, although it isn't certain the nation knew exactly what it wanted. By electing Nixon it may inferentially be said that the nation rejected the Warren Court's activities, which would lead to the question as to why the Warren Court was shunned at this time. Why did the Supreme Court fall out of favor in its last years? The answer probably comes from reading history as much as law. By the end of the sixties, Americans had come full circle since the early fifties days of the Warren Court. Chief Justice Warren began his duties with a nation that had lost confidence in itself and left with an electorate in much the same state of mind. But in between, the Warren Court and the American people did important work.
President Nixon in appointing Warren E. Burger to become Chief Justice of the Supreme Court was the beginning of his attempt to put the judiciary on a strict constructionist basis, by starting with the body's leader. Warren Burger prior to his Supreme Court appointment, served on the U. S. Court of Appeals for the District of Columbia. While serving as lower federal court judge, Burger distinguished himself as being tough on criminal law matters, but flexible on other legal areas. A sampling of Burger's stance on criminal rights in relation to the right to safety of the majority can be seen in his statement that governments exist to foster the rights and interests of their citizens - to protect their homes and property, their persons and their lives. If a government fails in this basic duty, it is not redeemed by providing even the most perfect system for the protection of the rights of defendants in the criminal courts.  

President Nixon's initial appointment of Burger as Chief Justice, followed by the three more appointments which Nixon was to make during his presidency signaled a profound change which was occurring in American politics in the late 1960's and early 1970's. This profound change was that the White majority had ended its support of the civil rights movement and became hostile to further Black demands. While the Burger Court was to continue the previous court practice of disallowing blatant racial discrimination by government agencies, no new constitutional rights have been

---

1 
Ibid., p. 50.

2 
Ibid., p. 74.
created to aid in the Black struggle while subtle techniques of erosion have been employed by the Burger Court to blunt some of the weapons forged by the Warren Court.¹

**Background of Justices**

Richard Nixon, who had colored himself as a law and order candidate and the representative of middle America in his presidential campaign, was allowed to place four justices on the Supreme Court. This opportunity of placing four justices was an excellent chance for President Nixon to project the character of his administration far beyond his own term of office. In suit with his political program it would serve to reason that the four men who were actually seated and those who were rejected would reflect the president's own desire to establish a strict constructionist court which would leave social legislation to others. President Nixon in picking his appointments attempted to nominate justices who would take the court out of non-legal areas and return it to proper concerns.

Richard Nixon was successful in appointing four justices to the Supreme Court: Warren E. Burger who became Chief Justice and replaced the retiring Earl Warren; Harry A. Blackmun who replaced Abe Fortas; and William H. Rehnquist and Lewis F. Powell who succeeded Hugo Black and John Marshall Harlan. These four Nixon appointees joined William O. Douglas, a Roosevelt appointee; Potter Stewart, an Eisenhower appointee; William J. Brennan, Jr., an Eisenhower appointee; Byron R. White, a Kennedy appointee; and Thurgood Marshall, a Johnson appointee. These four appointees were successfully confirmed by the Senate and seated, but Nixon had tried to appoint others

who had failed confirmation. After the seating of Burger, Nixon nominated Chief Judge Clement Haynsworth, Jr. of the U. S. Court of Appeals of the Fourth Circuit to succeed Abe Fortas. It was believed that Nixon was attempting to please the southern part of the nation by appointing a southerner. Haynsworth was the product of a distinguished old South Carolina family. The Haynsworth nomination failed due to protests from civil rights sources who questioned the judge's record on civil rights, labor sources who questioned the judge's record on labor cases, and the possible impropriety of the judge having had interests in some of the cases he had decided. Next Nixon nominated Judge G. Harrold Carswell of Florida. Carswell was a southerner, but possessed mediocre credentials and was immediately attacked by civil rights groups for his past rulings. The crucial factor in Carswell's defeat was the unearthing of past anti-Black statements and activities. Both Haynsworth and Carswell were defeated by an aroused Senate that demanded pure, qualified nominees. It could be seen as poetic justice that Nixon's defeats with Haynsworth and Carswell were occasioned by an aroused Senate, which he had originally awakened to defeat the Fortas nomination.

In assessing the backgrounds of each justice of the Burger Court in order to determine how each justice was perceived when nominated by President Nixon. It would probably be best to work from the first successful appointment downward. Warren Earl Burger was born in 1907 to a Presbyterian family of Swiss-German stock. His father was a traveling salesman who sold weighing scales and had to struggle to support his seven children. The family lived in St. Paul, Minnesota, where the future Chief Justice worked his way through the University of Minnesota and the St. Paul College
of Law. He had to go to school at night while working full time to support himself. After obtaining his degree, Burger joined a leading St. Paul law firm. Eventually he became a partner, and argued many cases before the Supreme Court. The turning point in his career came in 1952 when he was a delegate to the Republican nominating convention. Although he started out by supporting his state's governor, Harold Stassen, he soon switched to Eisenhower. His successful efforts earned him a job in the new administration as an assistant Attorney General in the Justice Department. In 1956, Eisenhower put him on the U. S. Court of Appeals for the District of Columbia. President Nixon elevated him to the Supreme Court mainly because Burger's views on law and order and the proper role of the judiciary were so close to his own.1

Harry A. Blackmun grew up in St. Paul, Minnesota. His father was a small grocery and hardware store owner. Beginning in early childhood, one of Blackmun's best friends was Warren Burger, who lived a short distance away. This friendship has continued throughout their lives. Blackmun was the best man at Burger's wedding. Blackmun entered Harvard on a tuition grant which he supplemented by doing odd jobs about the campus. Blackmun graduated summa cum laude with a major in math. From Harvard College he entered Harvard Law School. After graduation from law school Blackmun obtained a judicial clerkship in the U. S. Court of Appeals for the Eighth Circuit. Next Blackmun joined a large Minneapolis law firm at which he spent sixteen years during which time he rose to the top of the firm. In 1959, Blackmun was appointed to the U. S. Court of Appeals for

---

the Eighth Circuit. As a judge, Blackmun showed himself to be conservative on criminal procedure matters, moderate on civil rights matters, and generally flexible on most issues.¹

William H. Rehnquist, who was born in Wisconsin, was educated at Stanford where he received his B.A., M.A., and law degree. He also has an M.A. from Harvard. After receiving his law degree Rehnquist gained a Supreme Court clerkship where he distinguished himself as a conservative. After leaving the clerkship, he opened a law practice in Phoenix, Arizona. In Phoenix Rehnquist spoke out against the Warren Court in articles he submitted to local publications and opposed local desegregation activities while championing freedom of choice alternatives. In 1964, Rehnquist had become an active member of the Young Republicans and succeeded in leading the organization into the Goldwater camp. Under the Nixon administration he joined the Justice Department as an Assistant Attorney General, where he effectively supported many of the Nixon administration's strong crime fighting proposals and distinguished himself as a loyal team player. Rehnquist when questioned during his confirmation hearing as to previous Arizona desegregation stances, said that his thoughts on those matters had changed since he had come into contact with more minority persons and had learned to appreciate their plight. Rehnquist in his public positions and strong arguments for administration positions was seen as a strong conservative who was tough on law and order and grudging on civil rights.²


² Ibid., pp. 229-240.
Lewis F. Powell, Jr. was born in Suffolk, Virginia, in 1907. Powell's education was received at fashionable southern schools. He attended Washington and Lee where he received his bachelor's degree and his initial law degree from Washington and Lee's Law School. Next Powell attended Harvard where he received his second law degree of Master of Jurisprudence. He distinguished himself as a top student at both schools. Powell has deep roots in the South and traces a long family history on these shores, his family retains membership in the Society of Cincinnati, an organization open to descendants of officers of the Revolutionary War. As a child, Powell had known that he wanted to practice law, his history books suggested that the nation's great policy makers were either military men or lawyers. After graduation from Harvard he joined Richmond's most prestigious law firm. Powell became a community power and headed the school board of Richmond, and later the state board of education. While heading the Richmond schools he had to struggle with following court guidelines for integration. Powell basically followed a moderate go-slow policy which did keep the schools open when many segregationists wanted to close them, but civil rights groups thought he delayed too much. Powell was President of the American Bar Association 1964-65, and a member of the President's National Commission on Law Enforcement and the Administration of Justice 1965-67. Powell is viewed as being opposed to civil disobedience but not a stark reactionary, on a whole he is moderately conservative but given to liberal swings.¹

Byron R. White, a Kennedy appointee, was born in Wellington, Colorado.

¹ Ibid., pp. 241-251.
He had a hard childhood as he worked in the fields of that farming community to aid his family. White graduated first in his high school class which entitled him to a scholarship to the state university. At the University of Colorado, he distinguished himself as a scholar and football hero. He graduated, became a Rhodes Scholar at Oxford and signed with a professional football team. From Oxford he entered the Yale Law School, but the second world war interrupted his studies. While a naval officer in the pacific, he became well acquainted with John Kennedy who he had previously known in England. At the conclusion of the war White finished Yale Law School with top honors and then clerked for the Supreme Court. From the clerkship, White established a law firm in Denver, Colorado. White began working for the election of Kennedy in 1959 because of the past acquaintance. As a reward, Kennedy when elected appointed White Deputy Attorney General of the U. S. Upon appointment to the Supreme Court, White proved to be conservative on obscenity and criminal procedure matters, while liberal on racial issues.¹

Potter Stewart, an Eisenhower appointee, lead a comfortable childhood being born into a wealthy Republican family in Cincinnati, Ohio. His father was politically active, serving as Mayor of Cincinnati and then sitting on the Ohio Supreme Court. Stewart had a fashionable education, he studied at Yale, Cambridge, and then Yale Law School, being accorded honors at each institution. Upon graduating from law school he went to work for a Wall Street law firm. During the second world war he served in

the navy. Returning from the war, Stewart set up private practice in Cincinnati. In 1954, Eisenhower placed him on the U. S. Court of Appeals for the Sixth Circuit. In 1958, Eisenhower appointed him to the Supreme Court. On the Supreme Court Stewart is seen as a liberal on First Amendment rights, and racial and sex discrimination, while conservative on law enforcement matters.\(^1\)

William O. Douglas, a Roosevelt appointee, was born in poverty in Washington State. Douglas' life was a constant battle as he raised himself from poverty, defeated childhood polio and gained an education. He worked his way through college in Washington and then through Columbia Law School. After Columbia he joined a Wall Street Law firm, then taught law at Yale. Roosevelt placed him on the Securities and Exchange Commission in 1934, which Douglas was to head in three years. In 1939, Douglas was appointed to the Supreme Court. On the bench, Douglas became a strong New Deal advocate, wrote greatly, and traveled widely. Douglas was never a conformist and often his unbriddled independence of thought and action drew criticism from Congress and the public, he was once threatened with impeachment. On the Warren Court he along with Black was seen as the heart of the activist liberal bloc on the bench.\(^2\)

Thurgood Marshall, a Johnson appointee, was born on July 2, 1918, in Baltimore, Maryland. Marshall was the great grandson of a slave and was taught Black pride from an early age by his parents. Growing up in

\(^1\) Ibid., pp. 2921-2944.

Baltimore, Marshall led a relatively comfortable life for a Black child of his time. Marshall entered Lincoln University in Chester, Pennsylvania, where his parents sacrificed to send him and he helped himself through by working part time as a grocery clerk and waiter. He graduated cum laude, and in 1931 he entered law school at Howard University in Washington, D. C., where he led his class. Upon graduation, Marshall practiced law in Maryland and served as counsel to the N.A.A.C.P's Baltimore branch from 1933-1938. He was made director of the N.A.A.C.P.'s Legal Defense Fund from 1940-1962, during which time he argued and won many of the landmark desegregation cases. Marshall was appointed to the U. S. Court of Appeals, Second Circuit, 1962-1965, Solicitor General of U. S., 1965-1967. In 1967, he was seated on the Supreme Court. While on the high court, Marshall has distinguished himself as liberal on most issues. Marshall is the first Black to sit on the high bench.

William J. Brennan, Jr., was a Eisenhower appointee. Brennan was a Democrat plucked by Eisenhower from the New Jersey Supreme Court. Brennan's father came to the U. S. from Ireland in 1880, shoveled coal in a brewery, joined a union and later became its business agent. The son maintained the family interest in the labor movement and, after graduation from the Harvard Law School, made labor his specialty in legal practice. Brennan held several posts in the New Jersey judiciary system before being appointed to the Supreme Court in 1956. Once on the high court, Brennan showed himself to be liberal on most issues including civil rights, freedom

---

1 Friedman and Israel, The Justices of The United States Supreme Court: Their Lives and Major Opinions, pp. 3063-3093.
of speech and press and obscenity.¹

In attempting to draw some directional learnings from the composite profile of the Burger Court, some notable facts can be discerned. The average age at appointment is 52.3 years. The race is White (Marshall is the only Black). There are no females. The religious preference is protestant (Brennan is the only Catholic). Legal education was had at prestigious eastern law schools (Brennan, Blackmun, Powell-Harvard; Stewart, White-Yale; Douglas-Columbia), while Burger attended St. Paul College of Law in Minnesota, Marshall-Howard, Rehnquist-Stanford. In terms of geography you have three midwesterners (Burger-Minnesota, Stewart-Ohio, Blackmun-Minnesota), one westerner (Rehnquist-Arizona), three easterners (Douglas-Connecticut, Brennan-New Jersey, Marshall-New York), and one southerner (Powell-Virginia). The justices' early lives were spent in basically lower middle to upper class comfort (only Douglas and White could be said to have had hard childhoods). In observing what appears to be the Supreme Court's conservatism on civil liberties matters it is not surprising when realizing that the average justice is White, protestant, mid-westerner, eastern educated and middle aged at appointment.

The Burger Court can be seen to be a court consisting of three wings. One wing is the Burger wing composed of Burger himself, Blackmun, Rehnquist and Powell, they though not always in unity, do tend toward the conservative side in civil liberties issues. A second wing composed of Byron White and Potter Stewart can be termed as the moderate to conservative wing on civil liberties issues. A third wing is composed of Douglas, Marshall, and

Brennan, who are holdovers from the activist core of the Warren Court. The Burger wing is the largest of the three wings and usually has a good chance to prevail on issues if it maintains its unity and can swing either White or Stewart to its position.

In 1975, President Gerald Ford was allowed to make an appointment to the Supreme Court when he appointed Judge John Paul Stevens to replace the ailing William O. Douglas, who stepped down after a long and distinguished career. Stevens, a republican from Illinois was 55 years old at appointment. He had been a Supreme Court Law Clerk 1947-1948, practiced law in Chicago 1948-1970, served as a counsel for a House subcommittee studying monopoly power and as a member of a National Committee to Study Antitrust Laws, and was Judge of U. S. Court of Appeals of Seventh Circuit since 1970. Stevens' record on the lower court casts him in the light of a moderate conservative, thus his addition would only add to the conservative-moderate majority of Burger, Blackmun, Rehnquist, Powell, Stewart and White, while reducing the liberal ranks to two (Brennan and Marshall). It must be noted that this paper's study of the Burger Court will span from Burger's seating in 1969 till the 1975-1976 court term which greatly excludes Justice Stevens' presence because of his late appointment. Thus even though Stevens occupies Douglas' seat, Douglas is of greater importance in this study.
CHAPTER IV

PRINCIPAL DECISIONS OF THE BURGER COURT CONCERNING
THE BLACK COMMUNITY

Once seated, the Supreme Court dominated by the Nixon justices began to make their presence felt in the decisions which followed. The Supreme Court slowly broke with its liberal trend and was steered on to the path of conservatism as originally promised by Nixon. In the cases which follow, I have attempted to highlight those cases which will serve as signposts of where the Supreme Court and inferentially where the nation is headed. I have divided the cases into what I believe are the three most significant areas of legal activity for Blacks. The three areas are Social Welfare Issues which includes welfare benefits, housing, and political power; School Desegregation; and Criminal Defendant Rights.

Social Welfare Issues

Beginning with the presidency of Franklin Roosevelt and reaching a high point during the attempted Great Society of the Johnson years, the nation has experimented with numerous social welfare programs. These welfare programs which were funded by assessed contributions from national and state governments, sought to lend support to the most downtrodden members of the society. From the beginning these programs were controversial and often prime targets for attacks by conservatives.¹ Recently, the

Burger Court has shown some signs of its stance toward welfare issues. In speaking of welfare issues I included more than income support programs, but also housing and voting rights cases.

In Dandridge v. Williams, the Supreme Court upheld a Maryland law that limited the maximum amount which a family could receive regardless of how many children had to be supported, which meant that some poor children in large families received little or nothing in terms of allotted benefits. The Supreme Court reasoned that the equal protection clause of the Fourteenth Amendment was not violated by the maximum grant limit because Maryland had a reasonable basis for this action in attempting to equitably dispense limited funds, that the law encouraged incentive to work, and that it served not to discourage the working poor. The Supreme Court also reasoned that since the Maryland did not invidiously discriminate against any group it would only look to the reasonableness of the state action, which it found to be reasonable.

In Jefferson v. Hackney, Texas in seeking to adequately distribute its limited welfare funds had adopted a system which made grants to Aid To Families With Dependent Children (AFDC) lower than those to other groups. Petitioners sought to challenge this as a violation of equal protection since the proportion of AFDC recipients who were Black or Mexican American was higher than the proportion of the aged, blind or disabled welfare recipients who fell within these minority groups. The Supreme Court

---


upheld the Texas action because it found no discrimination and believed the Texas plan a reasonable means of distributing limited funds.

In *Wyman v. James*, the Supreme Court ruled that if an AFDC recipient refused a home visit by a caseworker, the recipient may risk termination of benefits. The line of reasoning was that periodic home visits allowed the welfare agency to determine if a child were properly supported, aided to rehabilitate the recipient, was not unreasonable, and was not a criminal investigation. The Department of Health, Education and Welfare through later procedural changes greatly mollified the harshness of this ruling by allowing interviews to be held in places other than the home.

In *Lavine v. Milne*, a New York welfare statute disqualified from receipt of welfare benefits for 75 days anyone who voluntarily terminates his employment or reduces his earning capacity for the purpose of qualifying for Home Relief or Aid to Families With Dependent Children. A further provision stated that a person who applies for assistance within 75 days after voluntarily terminating his employment or reducing his earning capacity shall be "deemed" to have done so "for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." *Milne*, an applicant for Home Relief brought suit believing the provision to be a violation of due process. A federal district court agreed with *Milne*. The Supreme

1 400 U. S. 309 (1971).

2 45 C.F.R. 206.10 (10).

Court reversed. The Supreme Court did not see that the provision placed such an onerous burden on aid seeking applicants by making them give proof, because they had to give sufficient proof eventually to gain the aid anyway. The Supreme Court reasoned that the New York system may be imperfect, but you are not guaranteed a perfect system.

In the highly emotional area of abortion cases the Supreme Court has surprisingly shown itself to be quite liberal and imaginative. In the cases of *Roe v. Wade*¹ and *Doe v. Bolton*,² the Court dealt with state abortion laws that made it a crime to procure an abortion except by medical advice for the purpose of saving the life of the mother. Justice Blackmun delivering the Court's opinion struck down these laws as state invasion of an individual's right to privacy. This as a noteworthy opinion because the Constitution does not explicitly mention any right of privacy, but on occasion the Supreme Court does recognize this right for certain areas or zones of personal activity such as the issue of pregnancy in these cases. Justice Blackmun concluded that the right of personal privacy includes the abortion cases, but that this right is not unqualified and must be considered against important state interests in regulating health and life standards. Any state law which would regulate a fundamental right such as that of privacy must be based on a compelling state interest and the legislative enactments that carry out this state interest must be narrowly drawn to express only the most legitimate state interests at stake.

¹ 410 U.S. 113 (1973).

The Supreme Court has shown itself to be reluctant in rulings which would give greater access to better housing for the poor.\(^1\) In *James v. Valtierra*,\(^2\) the Supreme Court upheld a California action requiring the approval of a majority of citizens in a community before a subsidized low-cost housing project could be built in the locality. This ruling deprives poor of shelter and keeps them in their place in the inner-city. A further extension of this type of reasoning can be seen in *Warth v. Seldin*,\(^3\) in which the Supreme Court denied standing to the plaintiff, refusing to entertain challenges to exclusionary zoning ordinances that keep low income people out of the suburbs by drastically limiting the erection of apartment buildings and requiring that the purchase and sale price of homes be above certain minimum levels. In *City of Eastlake v. Forest City Enterprises, Inc.*,\(^4\) there was a municipal charter requirement that all proposed zoning changes be submitted for final approval to a citywide referendum in which fifty-five percent favorable vote was required. A developer challenged the requirement as an unconstitutional delegation of legislative power to the people and consequently, as a violation of due process. The Ohio Supreme Court invalidated the mandatory referendum. The U. S. Supreme Court reversed, upholding the referendum process as a basic instrument of democratic government which did not in itself violate due process.

---


\(^3\) 422 U.S. 490 (1975).

when applied to zoning ordinances. The Supreme Court explained its acquiescence by labelling the referendum a legislative act since the proposed development would probably entail expanded municipal services and affect Eastlake's future economic expansion by diminishing land available for industrial use. This issue was deemed appropriate for public control through local referenda. These three cases can be seen as a departure from a Warren Court ruling in the case of Reitman v. Mulkey.¹ In Reitman The Supreme Court invalidated a state constitutional provision which in effect had authorized private individuals to discriminate in the sale or lease of their property. The provision in question had repealed all existing state laws banning such discrimination and prohibited reenactment of such laws. The Supreme Court viewed the provisions as state action which had the effect of affirmatively facilitating, encouraging, and authorizing acts of discrimination by its citizens, which is not constitutionally permissible. The Burger Court exhibits an enigmatic pattern, when after Valtierra and Seldin it rendered an apparently beneficial housing judgment in Hills v. Gautreaux.² In Gautreaux, extended litigation began in 1966 when Black respondents who were tenants in public housing in Chicago brought suit against the Chicago Housing Authority (CHA) and HUD, claiming that substantially all sites chosen for public housing were in or near the Black ghetto, that this was done deliberately. The Black respondents argued that the whole area of metropolitan Chicago should be available

¹ 387 U.S. 369 (1957).

for public housing and that by restricting them to the inner-city this
was a violation of the Fourteenth Amendment and federal statutes. The
Supreme Court held that metropolitan area remedy in this case is not im-
permissible as a matter of law. A remedial order against HUD affecting
its conduct in the area beyond Chicago's geographic boundaries but within
the housing market relevant to the respondent's housing options is war-
ranted here because HUD, in contrast to the suburban school districts in
Milliken v. Bradley, committed violations of the Constitution and federal
statutes. The pity of Gatreaux is the Supreme Court declined to use this
line of reasoning in the matter of inner-city school desegregation as seen
in the case of Milliken v. Bradley which will be discussed later.

The Warren Court constantly sought to end state supported discrimi-
nation and sought to equalize opportunities for all races to enjoy public
facilities. The Burger Court has shown itself to have blurred vision
when these matters are encountered. In Burton v. Wilmington Parking
Authority, the Warren Court ruled that a restaurant that rented space in
a state-built structure could not refuse service to Blacks, as this could
be interpreted as a form of state supported discrimination. The refusal
of the Burger Court to scratch beneath the thin veneer that covered a
racist base was demonstrated in the case of Moose Lodge 107 v. Irvis, here a private club which did not allow Blacks into the membership was
granted a liquor license. Petitioners claimed that this was state action

which encouraged discrimination. The final holding was that the granting of a liquor license, or providing essential services such as police and fire protection to a private club which imposes racial restrictions on its members and guests is not enough to constitute state action. It was further said that by themselves, these benefits from the state do not significantly involve the state with the private club's racial policies. The Burger Court has demonstrated a tendency to do away with an object rather than to take a progressive stand and integrate it. In *Evans v. Abney*, with Douglas and Brennan dissenting and Marshall not taking part in the decision, the Supreme Court expressed this new trend. By his 1911 will Senator Bacon conveyed a tract of land in Macon, Georgia to the city for the creation of a park for the exclusive use of White people. The Supreme Court under Earl Warren in *Evans v. Newton*, held that the park could not continue to be operated on a racially discriminatory basis. The Georgia Supreme Court then held "that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated," and remanded the case to the trial court which held the doctrine of cy-pres to be inapplicable since the park's segregated character was an essential and inseparable part of the testator's plan. The trial court ruled that the trust failed and that the property reverted to Senator Bacon's heirs, and the Georgia Supreme Court affirmed. The U. S. Supreme Court upheld Georgia, saying that the termination of the trust was not the

---


imposition of a drastic penalty. The forfeiture of the park merely because of the city's compliance with the earlier cases was the result of legally complying with the will. This is a case where the racial restrictions were solely the products of the testator's social philosophy, not that of the state or its agents. The decision eliminated discrimination against Blacks in the park by eliminating the park, a loss which the Supreme Court said was fair because it was equally shared by both races. Here a public facility was closed to avoid a duty to desegregate that facility. In Palmer v. Thompson, the Supreme Court refused to force the city of Jackson, Mississippi, to reopen its municipal swimming pools after the city closed them following a district court's determination that operating them on a racially segregated basis was unconstitutional. The decision was based on evidence that the city had closed the pools because they could not be economically or safely operated on an integrated basis.

The Burger Court has stirred ill winds for the future of Black political efforts. In Whitcomb v. Chavis, Blacks alleged that the Indiana statutes that established Marion County (Indianapolis) as a multi-member district for the election of state senators and representatives, deprived them of a realistic opportunity to win elections. Specifically it was charged that the laws invidiously diluted their votes in the predominately Black inner-city areas of Indianapolis. A three judge federal district

1 403 U.S. 217 (1971).

2 403 U.S. 126 (1971).
court agreed with them. The Supreme Court overturned the lower court decision saying that the multi-member district was not operated as a purposeful device to further racial or economic discrimination and that the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built in bias against Blacks. In Beer v. United States,¹ again the Burger Court showed its disinterest in looking deeply into the elaborate schemes which state and local governments devised to dilute the Black ballot. The 1954 New Orleans city charter provides for a seven member city council, with one member being elected from each of five councilmanic districts, and two being elected by the voters of the city at large. In 1961 the council, as it was required to do after each decennial census, redistricted the city based on the 1960 census so that in one councilmanic district, Blacks constituted a majority of the population but only about half of the registered voters, and in the other four districts Whites outnumbered Blacks. No Black was elected to the council from 1960 to 1970. After the 1970 census the council devised a reapportionment plan, under which there would be Black population majorities in two councilmanic districts and a Black voter majority in one. Section 5 of the Voting Rights Act of 1965 prohibits a change in political sub-divisions unless approved by the District Court of The District of Columbia. The District Court denied approval, on appeal to the Supreme Court, the District Court was overruled. The Supreme Court reasoned that since the two at-large city councilmanic seats, having existed since 1954, could not be reviewed in a

¹ 425 U.S. 130 (1976).
proceeding to obtain approval for the reapportionment plan under Section 5 of the Voting Rights Act, the plan could not be rejected solely because it did not eliminate the two at-large seats, and the plan did not have the effect of denying or abridging the right to vote on account of race or color under Section 5 since under the prior plan none of the five councilmanic districts had a clear Black voter majority and no Blacks had been elected to the city council, but under the plan for which approval had been sought, Blacks would constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them, making it predictable that at least one and perhaps two Blacks could be elected to the city council. Justice Marshall in his dissent reasoned that the plan served to underrepresent the Black voting population. The District Court properly considered whether Blacks were excluded from full participation in the political processes in New Orleans. The District Court found considerable evidence of both past and present exclusion which the Supreme Court ignored. Given New Orleans's long history of racial bloc voting, Blacks can expect no more than one seat (14 percent of the council), if that, in a city with a 34.5 percent Black voting population.

The Burger Court has not demonstrated the type of diligence which is necessary to guard the strength of hard-won Black voting rights. An example of this is the refusal to vigorously attack ploys which are used to dilute Black voting strength and a lack of creative enforcement of voters rights legislation. The Voting Rights Act of 1965 prohibits a city to which it applies from instituting any change in voting qualifications or practices unless the Attorney General assents or the city
proves in federal court that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The Supreme Court held in *Perkins v. Matthews*,\(^1\) that municipal annexations are changes in voting practices within the scope of the Voting Rights Act because of their capacity to dilute the strength of Black votes within the annexing city and because of the opportunities they present for racial gerrymandering. In 1962, in accordance with state law, the city of Richmond began court proceedings to expand its boundaries. In 1969, city officials negotiated a settlement in which the city gained from adjacent Chesterfield County, 23 square miles of land and 47,262 people, of whom about 97 percent were White. As a result of this the Black population of the city decreased from 52 percent to 42 percent. After the annexation had been completed and the 1972 councilmanic elections had taken place, the city then submitted the annexation to the Attorney General for approval; when he repeatedly refused to approve the annexation, the city sought declaratory relief in federal court. A three judge district court found that White officials of Richmond, concerned that the Black community would be able to elect a majority of the city council, had undertaken the annexation with the purpose and effect of diluting Black voting strength. The District Court further found that there were no economic or administrative reasons for permitting the city to retain the annexed area. The case was brought before the Supreme Court as the City of Richmond v. United States,\(^2\) the resulting 5-3 decision was in the

\(^1\) 400 U.S. 379 (1971).

\(^2\) 422 U.S. 358 (1975).
favor of the city. Justice White's majority opinion subjected the Richmond annexation to two inquiries: first, into its effects, and second, into its purposes. The Supreme Court held that the annexation did not have the effect of denying minority voting rights, because the city's single-member ward system fairly reflected the racial minority's political strength in the new enlarged city, it being held in mind that under the system after annexation, Blacks had population majorities in only four of the nine councilmanic districts. Justice White reasoned that if annexations reducing minority voting strength were held to have an impermissible effect, federal courts would have either to invalidate all such annexations or to require as the price for approval that the Black community be over-represented in city government.

The present Supreme Court had balked at opportunities to encourage affirmative action programs in job hiring situations, which has harmed Black attempts to enter White business areas. In Washington v. Davis, the Supreme Court held that official action that has a racially disproportionate impact is not a denial of equal protection unless discriminatorily motivated. It thereby drew sharp contrast between the constitutional standard and that of Title VII of the Civil Rights Act of 1964. As interpreted in Griggs v. Duke Power Co., Title VII prohibits employers from using tests or other preconditions of employment that operate to exclude Blacks at a substantially higher rate than Whites, unless

---


validated by a showing of a demonstrable relationship to job performance. In Washington, two unsuccessful Black candidates for positions in the District of Columbia Police Department alleged that some of the Department's recruiting practices, including a written verbal ability test that Blacks failed at a rate roughly four times as high as that of Whites, discriminated against Blacks. Plaintiffs did not charge discriminatory intent, but argued that, because of its disproportionate impact, the test violated the guarantee of equal protection implicit in the Fifth Amendment due process clause, the Civil Rights Act of 1870, and a District of Columbia Code provision. No claim was made under Title VII, which was inapplicable to federal government employment when the complaint was filed. Both sides moved for summary judgment, the plaintiffs pressing only their constitutional claim. The District Court resolved both the constitutional and statutory issues against the Black applicants, but the court of appeals reversed. In a 7-2 decision, the Supreme Court reinstated the district court's judgment. Justice White's majority opinion rejected the proposition that the constitutional validity of the test should be determined by reference to Title VII standards. The Supreme Court reasoned that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. Disproportionate impact as may be seen by high Black failure rates might be relevant evidence from which discriminatory purpose may be inferred, but would not alone trigger strict scrutiny of facially neutral classifications. The Supreme Court flatly rejected the plaintiff's argument that the higher failure rate of Blacks made out an equal protection claim, reasoning individual Blacks who failed the test had no greater
claim to relief than their unsuccessful White counterparts. Justice White then found that the test was facially neutral and rationally related to the constitutionally permissible government interest in upgrading the literacy of the police force. Moreover, the Supreme Court explained that any inference of discriminatory purpose suggested by the showing of disproportionate impact was negated by evidence of the Department's affirmative action program, the changing racial composition of the recruit classes, and by the fact that the test was a reliable predictor of success in the training program. Finally, Justice White expressed concern that strict scrutiny of all legislative classifications that in practice burden one race more than another would jeopardize a whole range of tax, welfare, public service, regulatory, and licensing statutes. Washington clearly establishes that a showing of discriminatory motivation is required to trigger strict scrutiny on a constitutional claim, which dims the hopes of future Black cases in this area because where the effects of a discriminatory motive may be easily found, the motive itself is often difficult to expose.

A dark shadow is being cast by the Supreme Court's reluctance to actively support civil liberties issues, issues which greatly affect the lives of American Blacks. The Supreme Court in the best legal manner has blunted civil liberties initiatives by denying standing to bring suits, making public sector sponsored suits difficult, limiting extension of federal intervention which raises the old spectre of states rights, and tacitly condoning governmental harassment and surveillance of the individual.

In order to bring a case, a party must demonstrate that he has
standing. Standing means that the person is actually involved in the controversy of if not directly involved, he does stand to be deeply affected by the outcome of the case. A prime court tactic for turning down a case is to find that a party lacks standing, which is often the situation when a large group of the poor or disadvantaged join forces to attack injustice.

In *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*, plaintiffs sued the Secretary of the Treasury and the Commissioner of Internal Revenue in an effort to overturn a revenue ruling changing the standards under which private hospitals qualify for tax-exempt "charitable" status. Plaintiffs, all of whom had been denied or represented those who had been denied free hospital care, claimed that the new ruling impermissibly encouraged hospitals to reduce services to indigents. They challenged the changes as inconsistent with the legislative intent of the Internal Revenue Code and as improperly promulgated under the Administrative Procedure Act (APA). The first contention prevailed in the district court, but was rejected along with the APA claim, by the United States Court of Appeals for the District of Columbia Circuit. Both lower courts rejected the government's argument that plaintiff's lacked standing. The Supreme Court citing the constitutional limitation of federal court jurisdiction to actual cases or controversies, held 8-0, that plaintiffs lacked standing to bring suit. Justice Powell, writing for the Supreme Court, accepted for purposes of analysis plaintiff's allegation of injury in fact and their contention that the new ruling "encouraged" hospitals to reduce charitable services. Even so, he found the complaint insufficient

---

to support standing, because it was "purely speculative" whether the injury was caused by that encouragement or by decisions made by the hospitals without regard to tax implications. Furthermore, the majority reasoned, there was no assurance that action by the courts would produce more hospital care for plaintiffs. Justice Brennan, joined by Justice Marshall, dissented in part from the Supreme Court's standing analysis. According to the dissent, once the Supreme Court assumed that the new policy had encouraged hospitals to deny care, standing should have been granted on the basis of prior cases controlling suits brought under the APA.

A devise that can be used to bring public sector suits before the courts can be by use of a class action suit brought by what may be termed as a private attorney general. In these suits an attorney initiates an action to protect the rights of members of a defineable class. The private attorney general if successful can usually collect his attorney fees, which encourages attorneys to handle some public interest cases. The Supreme Court has lately throttled this type of creative legal activity by making fee recovery questionable. In *Alyeska Pipeline Service Co. v. the Wilderness Society*, the plaintiff, environmental citizens organizations, prevailed in the Court of Appeals for the District of Columbia Circuit in litigation instituted by them for the purpose of preventing the issuance by the Secretary of Interior, of permits for the construction of the trans-Alaska oil pipeline. Subsequently the litigation was effectively terminated by congressional legislation which

---

1 421 U.S. 240 (1975).
allowed the granting of permits sought by an intervening pipeline corporation. Thereupon the plaintiffs requested the Court of Appeals to award them expenses and attorney's fees related to the litigation. The Court of Appeals held that an award of attorney's fees against the pipeline company was appropriate. Noting that there was no statutory authority for such an award, the court applied a judicial exception to the general American rule that the prevailing party may not in the absence of statutory authority recover attorney's fees, the private attorney general theory under which attorney's fees may be recovered by a prevailing plaintiff who acted as a private attorney general vindicating important statutory rights of all citizens. On certiorari, the Supreme Court reversed. In an opinion by Justice White, expressing the view of five members of the Supreme Court, the far reaching exception made by the Court of Appeals to the American rule was disapproved. The Supreme Court held that it would be inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent approved by the Court of Appeals.

In Paul v. Davis, the Burger Court demonstrated a lack of interest in extending entrance to the federal courts to those with grievances against governmental activities. In Paul, in an effort to warn merchants of the threat of shoplifting and who might be doing the shoplifting, the efforts of two police officials were pooled which resulted in a book being sent to merchants which contained photographs of arrested shoplifters. Davis who had been arrested for shoplifting was pictured, but

---

his guilt or innocence of that offense had never been resolved. Shortly after releasing the book, the charge against Davis was finally dismissed. It became known to Davis' employer that he had been arrested and pictured in the book. He was not fired, but was cautioned to maintain lawful behavior. Davis brought suit against Paul who was Chief of the Louisville Police, claiming that constitutional rights had been violated by the dispensing of the book. Davis' due process claim was grounded upon his assertion that the book and in particular the phase "Active Shoplifters" appearing at the head of the page upon which his name and photograph appeared impermissibly deprived him of liberty, protected by the Fourteenth Amendment. Davis felt that he had been unjustly stigmatized. The Supreme Court believed that he might have had grounds for suit in state court but could find no recovery under federal laws. The Supreme Court stated the words liberty and property as used in the Fourteenth Amendment do not single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While the Supreme Court in a number of prior cases pointed out the frequently drastic effect of the stigma which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either liberty or property by itself sufficient to invoke the procedural protection of the Due Process Clause.

In Rizzo v. Goode,1 two suits permitted to proceed as class actions were brought in district court by respondents, individuals and organizations, against petitioners, the Mayor of Philadelphia, the Police

Commissioner and others alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in particular and Philadelphia residents in general. The petitioners were charged with misconduct ranging from express authorization or encouragement of the mistreatment or failure to act in such a way as to avoid recurrence. The Supreme Court by a 5-3 decision set aside the district court decision, finding in the favor of the Mayor and the Police Commissioner. Justice Rehnquist delivered the opinion of the Supreme Court. The grounds on which Rehnquist overruled the lower courts erect insuperable barriers to efforts by civil rights groups to force police departments to take complaints seriously. Rehnquist's judgment that the evidence did not establish the existence of any department policy to disregard constitutional rights apparently means that police departments are to be immune unless they declare openly that they oppose the Constitution. Most frightening of all is the Supreme Court's response to the finding by the lower courts of a pattern of constitutional violations: "There was no showing that the behavior of the Philadelphia police was different in kind or degree from the which exists elsewhere, the problems disclosed are fairly typical of police departments in major urban areas." This means that until plaintiffs can prove that the situation is worse in Philadelphia than in New York or Chicago, there can be no judicial relief. Whenever a suit is brought, the plaintiff will have to show that the defendant department is worse than most. The scope of the trial is impossibly broadened. The purpose and effect are clear, to slam the door of the federal court in the face of citizens groups seeking to bring police department procedures into line with the U. S. Constitution. If police administration is thus
to be immunized from judicial inquiry, why not prison administration, school administration, welfare administration? All recent progress in the law governing these fields is thrown into doubt.¹

The Supreme Court in *Rizzo* extended a conservative pro-government harassment stance which it had exhibited earlier in *Laird v. Tatum*,² in which it condoned government surveillance of private groups. In *Laird*, prior to its being called upon in 1967 to assist local authorities in the quelling of civil disorders in Detroit, Michigan, the Department of the Army had developed only a general contingency plan in connection with its limited domestic mission. In response to the Army’s experience in the various civil disorders it was called upon to help control during 1967 and 1968, Army Intelligence established a data-gathering system, which respondents describe as involving the surveillance of lawful civilian political activity. The Supreme Court held that respondent’s claim that their First Amendment rights are chilled, due to the mere existence of this data gathering system, does not constitute a justiciable controversy on the basis of the record in this case, disclosing as it does no showing of objective harm or threat of specific future harm.

**School Desegregation**

In the wake of the Warren Court’s work subsequent to the *Brown v. School Board* case, it has fallen to the Burger Court to contend with the

---


² 408 U.S. 1 (1971).
further implementation of Brown. The Burger Court has had to come to grips with what the Brown decision means to it. Does it mean: 1) desegregation but not integration, which would be the ending of the dual system but not the active backing of race mixing; 2) equal educational opportunity in tangibles and intangibles which would basically still allow a dual system as long as facilities were equal; or 3) diversity of association for school children through the meeting of other races in the classroom. In the cases which follow it appears as though the Burger Court has taken a position opposed to the integration spirit of Brown.

In Swann v. Charlotte-Mecklenburg Board of Education,¹ the Burger Court appeared to support integration and busing to achieve it. Here suit was brought to halt a North Carolina County School Board from maintaining a dual public school system. The district court and court of appeals both approved a desegregation plan which called for faculty desegregation and secondary school rezoning and busing. On certiorari, the Supreme Court affirmed the lower courts. On the surface the decision appeared quite liberal, but in reality it was not. It limited Brown to state imposed or intentional discrimination and focused only on removing dual school districts. The busing holding was nebulous at best, for it contained escape clauses which allowed elusion on the grounds of student health or impairment of educational processes.

In Wright v. Council of City of Emporia,² Emporia Town in Virginia

¹ 402 U.S. 1 (1971).

decided to become a separate political entity after the district court ordered implementation of desegregation plans. By becoming a city, Emporia Town could elude the district court's mandate to integrate. The Supreme Court's majority saw through this attempted circumvention of the dismantling of the existing dual school system and prevention of integration. The minority which included dissenters Burger, Blackmun, Powell, and Rehnquist, dissented on the ground that since the record did not support the conclusion that the city's operation of a separate school system would frustrate the dismantling of the dual school system which had existed, and that the district court abused its discretion in preventing the city from exercising its lawful right to provide for the education of its own children. The majority disagreed with the Nixon justices narrow path of reasoning and found the city's strategy to be improper.

In *San Antonio Independent School District v. Rodriguez*,¹ it was argued that because of differences in the tax bases of different neighborhoods that children in poor communities were not receiving education equal to those in rich communities which deprived them of equal protection. The Supreme Court rejected the argument, because: 1) wealth is not a suspect criteria which would automatically trigger strict scrutiny of the matter, 2) education is not among the rights that are afforded explicit protection but where a state does undertake to provide education it must do so on equal terms, and 3) the state method of educational financing was seen to be logical although not absolutely equal in distribution and there was

no clearly discernible discrimination against a clearly defined group found.

The decision in *San Antonio Independent School District* assumes great negative significance when it is contrasted to the earlier California case of *Serrano v. Priest*. In *Serrano*, Los Angeles County public school students and their parents brought suit against public officials concerned with financing public education on the ground that the system relied on local property taxes and hence tended to discriminate against poor districts. Petitioners who were in the poorer districts contended that they paid higher taxes than taxpayers in many other school districts in order to obtain for their children the same or a lesser education than parents in more affluent districts. The California Supreme Court held that a public school financing system which relies heavily on local property taxes and causes substantial disparities among individual school districts in amount of revenues available per pupil for the district's educational needs does invidiously discriminate against the poor and violates the equal protection clause of the Fourteenth Amendment. The prior ruling by a lower court in *Serrano* was overlooked by the Burger Court majority when it decided *Rodriquez*. This decided path taken by the Burger Court bodes ill for financing for poor inner-city and rural school districts which are constantly seeking greater funding.

In *Milliken v. Bradley*, the Supreme Court refused to condemn de

1 96 Cal Rptr. 601 (1971).

facto segregation which is greatly prevalent in northern school systems, and reversed a lower court decision which had ordered metropolitan-wide busing across municipal boundary lines. The case specifically concerned the Detroit area school systems. The lower federal court found that inner-city schools were predominately Black while the suburban schools were White, and ordered busing to integrate a system which had come to exist because of racial segregation in inner-city schools and discriminatory housing patterns in the suburbs. The Supreme Court blocked the busing plan because even though purposeful segregation was found in the city schools, none was found in the suburbs, thus integration remedies would be restricted to the areas that had themselves practiced segregation. Burger reasoned that remedies in school desegregation cases are designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of the questioned conduct. Consequently, inner-city Detroit schools became entitled only to have the dual character of their school system dismantled and the system transformed into a unitary one, which in the end will result in inner-city schools becoming Blacker than they are.

The Burger Court has demonstrated a stiff resistance to prompting integration, even when the rulings and machinery to implement it exist. In *Pasadena City Board of Education v. Spangler*, the Supreme Court held that a school board that has initially complied with a court desegregation order specifying the proportion of minority students permitted in each of its schools can not be required to alter attendance zones.

---

annually in response to demographic shifts. The district court, after finding in 1970 that Pasadena's school system was unconstitutionally segregated, ordered the Board of Education to adopt a plan providing among other matters, that "there shall be no school with a majority of any minority students." The judge retained jurisdiction to evaluate the implementation of the plan with regard to staffing, school location, and student assignment. Without appeal, the Board adopted the "Pasadena Plan" which during 1970-71, achieved compliance with the no-majority requirement. By 1974, however, changing residential patterns had caused five of the thirty-two Pasadena schools to have over fifty percent minority enrollment. In January 1974 the Board sought various modifications of the 1970 order, including elimination of the no-majority-of-any-minority requirement. The district court's denial of relief was affirmed by the Ninth Circuit. In a 6-2 decision, the Supreme Court reversed, holding that the Board was entitled to relief from the less than fifty percent minority requirement. Justice Rehnquist's majority opinion observed that the Constitution does not require a particular degree of racial balance, and that school authorities need not make continual adjustments of the racial composition of student bodies once racial discrimination through official action is eliminated from the system. Rehnquist reasoned that by adopting the 1970 plan the Board had established a racially neutral system for student assignment. Having implemented a racially neutral attendance pattern once, the district court had fully performed its function regarding that objective. By attempting to require annual rezoning, it had exceeded its authority. In dissent, Justice Marshall asserted that until a completely unitary school system is established, a district court
should have broad discretionary power.

In *Evans v. Buchanan*, a suit was brought to eliminate de jure segregation in Delaware schools, with the point of attention being the New Castle County and City of Wilmington school systems. Attempts to keep the county and city school systems separate was fought on the grounds that such separation was unconstitutional and disadvantaged Black students by confining them to the Wilmington school system and denying entrance to the suburban New Castle County schools. In terms of background information, the city of Wilmington is located in New Castle County. Since 1950, the suburban population has increased fivefold and the percentage of Black residents living in the suburbs has declined slightly. Wilmington's population, on the other hand, decreased in absolute terms, and its proportionate Black population tripled. The result of these demographic changes is that the Black population of the County is heavily concentrated within the City of Wilmington. As relates to school enrollment during these years, the proportion of Black children attending suburban New Castle County schools remained relatively small. Total enrollment in Wilmington, on the other hand, grew more slowly and eventually declined, but the proportion of Black children in the school population increased threefold. In examining the arguments that the two systems had always operated independently of each other and that neighborhood patterns had developed by chance, the district court found differently. The court found that 1) there was much exchange and joint action between the two systems; 2) governmental policies encouraged White flight to the suburbs.

---

through housing policies and aides to suburban students. The court examined the Educational Advancement Act of 1968 which was adopted by the Delaware legislature, which allowed educational reorganization through school systems consolidation, the Wilmington school system was exempted from the Act. The court found this portion of the Act which exempted Wilmington to be unconstitutional, because it had an unsound basis of passage, the school systems themselves do not rigidly observe the supposed school system borders. The three judge district court which heard the case asked the opponents in the case to submit desegregation plans for Wilmington schools which it would study, the court indicated that it would consider a remedy which crossed school district lines. This case demonstrates in the light of Milliken, in order to gain an inter-system remedy you must show that the systems in question have had dealings with each other and there is little historical and practical basis for separation to be continued.

On a subsequent action concerning Evans, the U. S. Supreme Court denied a rehearing of the district court's actions. In the denial of rehearing, Rehnquist, Powell, and Burger dissented, stating that they would reverse the district court on jurisdictional grounds.

In assessing the Burger Court's stance on school desegregation it can be seen that Milliken and Pasadena will preclude metropolitan area solutions to educational problems, having placed a premium on the independence of suburban school districts. Only if suburban school district boundaries were not initially drawn to exclude minority groups will lower

---

1 423 U.S. 963 (1975).
federal courts be able to subject these districts to remedies designed to cure the problems of the inner-city. In addition, under the holding in San Antonio Independent School District, these same districts are also assured that the federal courts will not interfere with the level of educational expenditures they set for themselves. In short, the suburban school districts are now protected, at least with reference to the federal courts, from the problems of the inner-city. They are not likely to take any steps that might shed this protection.¹

While the appearance of the present Supreme Court's educational decisions seem negative to Blacks, the Burger Court is enigmatic in that it has acted to defeat blatant racism in educational activities, an example of which is the case of Runyon v. McCrary.² As a means of eluding the probability of integration, there sprang up many new private schools which denied admittance to nonwhites. In Runyon, Black parents in Virginia sought admittance for their children to two such schools after they received general mail circulars announcing the schools' existence. Upon application the Blacks were rejected on the stated reason that only Whites were admitted. Upon presentation before the Supreme Court, a 7-2 decision in the favor of the Black parents was rendered. Justice Stewart's majority opinion found that since section 1981 U.S.C. insures to all persons the same right to make and enforce contracts as is enjoyed by White citizens, a Black's contractual rights are violated when a private


offeror refuses to extend to a Negro the same opportunity to enter into contracts as he extends to White offerees. Thus the parents in Runyon were denied the same opportunity to contract for educational services as Whites, were victims of a classic violation of section 1981. Neither the parent's right to direct the education of their children nor the right to privacy were found to exempt private schools from reasonable government regulation. Since section 1981 is a valid exercise of congressional power under the Thirteenth Amendment, intended to eliminate private acts of racial discrimination and ensure equal opportunity, its application to private schools was held to be constitutional. Runyon must be viewed as a minor victory at best, because it is doubtful whether many Black parents would want their children to attend such schools even though they have the right to.

Rights of Criminal Defendants

Richard Nixon constantly stressed that the peace forces of the country must be freed from the technical bonds which had shackled them in their battle against crime. Probably due to this overriding emphasis on upholding the law by a President who in the end had little respect for the law himself, it is not surprising that the Burger Court's greatest retrenchment of Warren activism is in the field of criminal defendant's rights. This is not to say that the Burger Court wiped clean the Warren slate, but it is to say that its case decisions have greatly diverted the liberal Warren path. The Burger Court has in some instances actually expanded criminal defendants' rights. However, upon comparison with the Warren Court it can be seen that the present Court has greatly freed the hands of the law enforcement community. This freeing of peace officers
has been done not by blatant overruling, but more by the subtle devices of distinguishing decisions, ruling on narrow grounds, and by finding any errors made by the authorities to be of a harmless nature.

One important aspect of the Burger Court's activity in the criminal area is its constant eroding of the adversary system which is the hallmark of American justice and the main point which distinguishes our system from many European inquisitorial type systems. In United States v. Ash,\(^1\) it was held that no right to counsel exists during pretrial photographic displays. The Supreme Court reasoned that pretrial photographic displays do not constitute a critical stage of the adversary process, that is, that stage does not emerge as a trial-like confrontation where the defendant is physically present, thus necessitating counsel to preserve the adversary process by compensating for disadvantages of the prosecuting authorities. The logic is erroneous because photographic displays can be highly prejudicial. Harris v. New York,\(^2\) is perhaps the most dramatic example of the Burger Court's reluctance to expand or even implement fully the implicit demands of Miranda v. Arizona. In Harris it was held that an inadmissible confession still may be used to impeach a defendant's credibility. In Barnes v. United States,\(^3\) it was held that a trial court may instruct a jury that an unfavorable inference may be drawn from the defendant's failure to explain possession of stolen property and that

\(^1\) 413 U.S. 300 (1973).

\(^2\) 401 U.S. 222 (1971).

\(^3\) 412 U.S. 837 (1973).
such an instruction did not necessarily infringe upon the privilege against self-incrimination. In *United States v. Calandra*,\(^1\) it was held that while evidence obtained illegally may be excluded from a defendant's trial, a grand jury may nevertheless use the existence of such evidence for the purpose of questioning the same individual. Justice Brennan in dissent observed that for the first time, the Supreme Court had discounted to the point of extinction the vital functions of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct. In *Kirby v. Illinois*,\(^2\) the Wade case which gave the right to have legal counsel present at a lineup was blunted. It happens in *Wade* that the person involved in the lineup, the accused, had in fact been indicted. No one thought the fact of indictment important, but as it turned out in *Kirby*, the Burger Court held that the Wade rule of counsel at police arranged lineups applies only after a formal accusation has taken place and when the lineup is investigatory in character. In *Apodaca v. Oregon*,\(^3\) the Burger Court sustained nonunanimous jury verdicts, reasoning that the essence of jury trial is preserved by a system of trial with a ten-to-two or even a nine-to-three verdict. The dissenters argued that the decision undercut the validity of the jury trial theory, because the minority jurors will not be heard in many instances. In *Milton v. Wainwright*,\(^4\) the defendant who had killed his

\(^1\) 414 U.S. 338 (1974).

\(^2\) 406 U.S. 682 (1972).

\(^3\) 406 U.S. 404 (1972).

wife was held without access to counsel for eighteen days during which time he confessed the crime. The authorities fearing that their activities may prove a weak case took further measures. A plainclothes officer was placed in the defendant's cell posing as a felon. The officer befriended the defendant and cajoled the defendant into confessing his guilt. The Burger Court upheld the police activity and did not find that the defendant's right to counsel had been violated.

Another shocking aspect of the Burger Court's erosion of defendant rights is in the court's constant shrinking of search and seizure protection. In United States v. Robinson,\(^1\) a District of Columbia policeman spotted Robinson driving, he knew Robinson's drivers license had been revoked, he pulled Robinson over and examined his forged temporary driver's permit, then he arrested him. The officer, saying that he did not fear for his safety because he did not think Robinson possessed a weapon, then proceeded to search Robinson, but searched beyond the frisk for weapons that was allowable in Warren's ruling in Terry v. Ohio. In Robinson's breast pocket, the officer found a pack of cigarettes which further examination revealed it contained heroin. Robinson objected to this as an illegal search. The Burger Court ruled against Robinson, saying that a warrantless search incident to arrest has no essential limits. In Cupp v. Murphy,\(^2\) the Burger Court upheld the taking of fingernail scrapings over a defendant's protest and without a warrant.

---

\(^1\) 414 U.S. 218 (1973).

In *Schneckloth v. Bustamonte*,\(^1\) it was held that in requesting permission to conduct a search, officers did not have to establish that the person who consented to the search knew he had a right to refuse the search and the officers do not have to apprise him of the right to refuse the search.

When dealing with the area of search and seizure, the search of automobiles comprises a whole category within itself. Due to unique aspects of an automobile's mobility there is always the need for searches to take place quickly after an incident, but individual rights must also be protected. The present Supreme Court appears to attach more significance to the need to search than the need to protect individual rights.

In *Cady v. Dombroski*,\(^2\) the defendant, a member of the Chicago police department, had a car accident in Wisconsin due to intoxication. His car was towed away and searched the next day. The search revealed several bloody articles. Acting on this, the nearby farm of the defendant's brother was searched, where a body was found. A search warrant was obtained to search a car on the farm which yielded more bloody articles. The defendant objected to the search of both cars. The Supreme Court with the Nixon justices in unison, approved the searches because 1) the warrantless search of the first car was reasonable since it was in custody, was a road hazard, the driver was drunk, and it supposedly contained his police revolver, 2) the search of the second car was done under a properly warranted search. In *Cardwell v. Lewis*,\(^3\) the defendant was a suspect in

\(^1\) 412 U.S. 218 (1973).
\(^2\) 413 U.S. 433 (1973).
\(^3\) 417 U.S. 583 (1974).
a murder case and his car was an object of interest in the case. The defendant was required to appear for questioning and did. The authorities had a warrant for his arrest but delayed using it. The defendant was later arrested. The day after the arrest, his car was searched and found to have been at the scene of the crime. The defendant claimed that the warrantless search of his car violated the Fourth and Fourteenth Amendments, but the Supreme Court with the Nixon justices concurring, disagreed. It was reasoned that the primary object of the Fourth Amendment is the protection of privacy and that less stringent warrant requirements are applied to vehicles than to homes or offices. The search was reasonable on the basis of probable cause. The Supreme Court, in South Dakota v. Opperman, held that routine inventory searches of a defendant's locked automobile, which had been lawfully impounded for multiple violations of municipal parking ordinances, did not involve an unreasonable search in violation of the Fourth Amendment, especially since the inventory search was prompted by the presence in plain view of a number of valuables inside the vehicle and there was no suggestion that the procedure utilized which is standard in the United States was a pretext concealing an investigatory police motive. The officer was lawfully in the vehicle as he sought to secure the personal property within, and it was not unreasonable for him to look into the glove compartment where he found the marijuana.

In United States v. Watson, acting on information from a reliable

---

informer that the defendant was in possession of stolen credit cards, and acting on a prearranged signal from the informer, who had arranged a meeting with the defendant, postal inspectors arrested the defendant in a restaurant without first obtaining an arrest warrant. After being removed from the restaurant to the street, the defendant was given Miranda warnings and then consented to a search of his nearby car, which revealed two stolen credit cards that formed the basis of his conviction. The defendant later questioned the propriety of his warrantless arrest and not being told he could refuse the search of his car. The Burger Court ruled against the defendant. The Court held; 1) consistent with the rule at common law, the Fourth Amendment was not violated by the warrantless felony arrest of the defendant in a public place during daytime by officer acting on expressed authority, since there was probable cause for arrest, it being immaterial that there were no exigent circumstances and that the officers could have obtained a warrant, and 2) in the totality of the circumstances, the admission in evidence of the stolen credit cards did not violate the Fourth Amendment on the ground that the defendant's consent to the search was coerced, the absence of proof that the defendant knew that he could withhold his consent, though a factor for consideration, not being of controlling significance in determining the voluntariness of the defendant's consent.

In the case of Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, observers of the Supreme Court were given a chance to clearly see the type of criminal justice system which Chief Justice Burger desires,

1 403 U.S. 388 (1971).
one which is in style similar to Warren but different in temperament. In

Bivens, petitioners' complaint alleged that respondent agents of the Federal Bureau of Narcotics acting under color of federal authority made a warrantless entry of his apartment, searched the apartment, and arrested him on narcotics charges. He alleged that the agents acted without probable cause and sought damages. The Supreme Court with Burger and Blackmun in dissent, held for petitioner, stating that his complaint stated a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from the agents' violation of the amendment. Burger wrote one of his more spirited dissents in this case. Burger said that by allowing damages recovery, the judiciary was encroaching upon legislative prerogatives, that the court was freeing the guilty, that the exclusionary rule which is unique in the United States is a poor experiment in jurisprudence which should be ended. Burger set forth an outline of how he would handle this situation, an outline which stirs memories of Miranda warnings. He would have Congress enact a statute that would provide for: 1) a waiver of sovereign immunity as to illegal acts of law enforcement officials committed in the performance of assigned duties, 2) the creation of a cause of action for damages sustained by any person aggrieved by official conduct of government agents in violation of the Fourth Amendment or statutes regulating official conduct, 3) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the U.S. Court of Claims, to adjudicate all claims under the statute, 4) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment, and 5) a provision directing that no evidence
otherwise admissible shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

One disheartening activity of the present Supreme Court is its penchant for either overlooking or dismissing questionable governmental actions. In *Hampton v. United States*, the defendant who had sold narcotics to undercover federal agents pursuant to arrangements made by a government informant, was convicted of a federal narcotics offense upon trial in the U.S. District Court for the Eastern District of Missouri, the trial court having refused to give the defendant's requested instruction that if it was found, as contended by the defendant that the narcotics had been supplied to him by the informant the defendant must be acquitted as a matter of law, regardless of any predisposition of the defendant to commit the offense charged. On appeal, the lower court was affirmed, rejecting the argument of the defendant who conceded that he was predisposed to commit the offense, but if the jury found that the narcotics had been supplied by the informant, the defendant should have been acquitted. On certiorari, the Supreme Court affirmed. Rehnquist announced the judgment, expressing the view that when a criminal defendant acting in concert with government agents was predisposed to commit the crime, there could be no violation of the defendant's due process rights, nor could the defense of entrapment be asserted. Justices Brennan, Marshall and Stewart dissented, believing that; 1) an entrapped defendant should not be convicted if methods employed on the government's behalf should not be countenanced regardless of the propensities and

\[1\] 425 U.S. 484 (1976).
predispositions of the defendant, and 2) conviction should be barred as a matter of law where the subject of the criminal charge was the sale of contraband provided to the defendant by a government agent.

Cries for help originating from within prison walls have been met with as deaf an ear from the present Supreme Court as cries from outside of the walls. In *Meachum v. Fano*,¹ inmates at a minimum security Massachusetts correctional institution who had been transferred to other institutions in the state (a maximum security institution and an institution having both maximum and medium security facilities) brought a civil rights action in the district court against various state prison officials, alleging deprivation of liberty without due process of law in that they had been ordered transferred to less favorable institutions without an adequate factfinding hearing. Holding that the inmates were entitled to notice and hearing and that the notices and hearings provided to the inmates were constitutionally inadequate, the district court ordered the inmates returned to the general prison population at the medium security institution until transferred after proper notices and hearings. The court of appeals affirmed. The Supreme Court reversed, expressing the view that the transfer of the inmates from the medium security institution to the other institutions did not infringe or violate a liberty interest within the meaning of the due process clause of the Fourteenth Amendment and thus the due process clause did not entitle the state prisoners to a hearing, there being no state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.

Justices Stevens, Marshall and Brennan dissented, believing that a prison inmate retained an unalienable interest in liberty protected by the due process clause, and that the transfer involved in the case at hand was sufficiently serious to involve the protection of the Constitution.

The Burger Court has along with its narrowing of criminal defendant's rights also somewhat blunted the Warren Court's progressive action in the juvenile area. In *McKeiver v. Pennsylvania*, the consolidated cases of juvenile defendants who were charged with felonies sought the having of jury trials which the Supreme Court denied. It was questioned whether the due process clause of the Fourteenth Amendment assured the right to trial by jury in the adjudicative phase of a state juvenile delinquency proceeding. The Supreme Court said no, by reasoning that juvenile court proceedings had not yet been held to be a "criminal prosecution" within the meaning of the Sixth Amendment and it would delay process and lead to public trial.

Another area in which the Supreme Court's work has signaled a retrenchment in attitude is that of capital punishment. The Burger Court in the revolutionary *Furman v. Georgia*, consideration was accorded the question of whether statutes permitting the state to impose the death penalty for certain crimes violated the Eighth Amendment's prohibition against cruel and unusual punishments. The 5-4 decision presented a unique observational chance. The four Nixon justices dissented, while

---

1 403 U.S. 528 (1971).

2 408 U.S. 238 (1972).
the majority agreed that Georgia's imposition of the death penalty in the instant situation was unconstitutional, the primary rationale being the infrequent application of the penalty. The common denominator of the four Nixon appointee's dissent was the theme of judicial restraint, all indicated that the holding usurped the legislative function. In Furman, it was held that capital punishment imposed under state statutes which leave imposition to the untrammeled discretion of a jury to be violative of the Eighth and Fourteenth Amendments, as a result of this ruling many states changed their procedures for capital cases so to avoid difficulty from the Furman decision.

In Gregg v. Georgia, petitioner was charged with committing armed robbery and murder on the basis of evidence that he had killed and robbed two men. At the trial stage of Georgia's bifurcated procedure, the jury found petitioner guilty of two counts of armed robbery and two counts of murder. At the penalty stage, the judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count: that the jury was free to consider mitigating or aggravating circumstances, if any, as presented by the parties; and that the jury would not be authorized to consider imposing the death penalty unless it first found beyond a reasonable doubt that the murder was committed while in the commission of other felonies, that he committed the murder for the purpose of receiving the victims' money or automobile, or that the murder was outrageously vile, inhuman and horrible and involved the depravity of the mind of the perpetrator. The jury found the first and second of

---

these aggravating circumstances and returned a sentence of death. The Georgia Supreme Court affirmed the convictions. After reviewing the trial transcript and record and comparing the evidence and sentence in similar cases the court upheld the death sentences for the murders, concluding that they had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases, but vacated the armed robbery sentences on the ground that the death penalty had rarely been imposed in Georgia for that offense.

On Appeal to the U. S. Supreme Court, the judgment was affirmed. The Supreme Court reasoned that the punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments. The Eighth, which has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency forbids the use of punishment that is excessive either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime. Though a legislature may not impose excessive punishment, it is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment. The existence of capital punishment was accepted by the Framers of the Constitution, and for nearly two centuries this Supreme Court has recognized that capital punishment for the crime of murder is not invalid as such.

The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides
for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information. The Supreme Court found that the procedure in Gregg was proper. The Georgia statutory system under which petitioner was sentenced to death is constitutional. The new procedures which were incorporated since Furman, on their face satisfy the concerns of Furman, since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the state supreme court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. Petitioner's contention that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by Furman are without merit.

After Gregg, the Supreme Court again displayed its enigmatic character by striking down a somewhat similar capital punishment statute in Roberts v. Louisiana.1 In Roberts, petitioner was found guilty of first degree murder and sentenced to death under amended Louisiana statutes enacted after the Supreme Court's decision in Furman v. Georgia. The Louisiana Supreme Court affirmed, rejecting petitioner's contention that the new procedure for imposing the death penalty is unconstitutional. The post-Furman legislation mandates imposition of the death penalty whenever, with respect to five categories of homicide, in the instant

---

case killing during the perpetration of an armed robbery, the jury finds
the defendant had a specific intent to kill or to inflict great bodily
harm. If a verdict of guilty of first degree murder is returned, death
is mandated regardless of any mercy recommendation. Every jury is in-
structed on the crimes of second degree murder and manslaughter and per-
mitted to consider those verdicts even if no evidence supports the lesser
verdicts, and if a lesser verdict is returned it is treated as an acquisi-
tion of all greater charges. The U. S. Supreme Court reversed and re-
manded the case on appeal. The U. S. Supreme Court reasoned that the
imposition of the death penalty is not as such cruel and unusual punish-
ment violative of the Eighth and Fourteenth Amendments, but that Louisiana's
mandatory death penalty statute violates these amendments. Though Louisiana
claimed that it had adopted satisfactory procedures to comply with Furman's
requirement that standardless jury discretion be replaced by procedures
that safeguard against the arbitrary and capricious imposition of death
sentences, that objective has not been realized, since the responsive
verdict procedure not only lacks standards to guide the jury in selecting
among first degree murderers, but it plainly invites the jurors to dis-
regard their oaths and choose a verdict for a lesser offense whenever
they feel that the death penalty is inappropriate.

At the present time capital punishment is a confused area of the
law. In The Burger Court has greatly stirred this confusion, it rendered

1

Bruce J. Meagher, "Capital Punishment: A Review Of Recent Supreme

Michael D. Rhoads, "Resurrection Of Capital Punishment-The 1976
a striking decision in Furman which caused some states to change their trial procedures which leaves the Supreme Court a wide range of decision when it rules on appeals based on the specifics of each state's own trial procedure.

The total fabric of the Burger Court's criminal rulings should not be thought of as repressive, for the Supreme Court has rendered some rather liberal rulings. In Argersinger v. Hamlin, it was ruled that the right to counsel extended to indigents on trial for misdemeanors where punishment by imprisonment is possible. In Strunk v. United States, it was held that dismissal is the only possible remedy for the denial of the right to a speedy trial and reversed a decision of a lower court to the effect that a reduction of sentence can compensate for denial. Test v. United States, presented the situation where prior to his trial and conviction on a felony drug charge, the district court had denied the defendant's petition to inspect the jury lists in connection with his challenge to the grand and petit juries selection procedures. The Supreme Court vacated the court of appeals' judgment affirming conviction, and remanded the case so that the defendant may attempt to show irregularities in jury selection. In Davis v. Georgia, the Supreme Court reversed a murder conviction because a prospective juryman was excluded because of

---

his general objection to the death penalty. In Connally v. Georgia,\textsuperscript{1} a drug conviction was reversed because it was found that the justice of the peace was not a neutral and detached magistrate because he gained a fee of $5 for each warrant issued and nothing for those warrant requests denied. The defendant argued that the search warrant that was issued by the magistrate was invalid because of this process, this was affirmed by the Burger Court.

In the area of border search matters, the Supreme Court has demonstrated a surprising liberalism. In United States v. Brignoni-Ponce,\textsuperscript{2} defendant was convicted of the knowing transport of illegal immigrants into this country. It happened that the Border Patrol stopped the defendant's car near the border only because it noticed that the passengers appeared to be of Mexican descent. Upon questioning, it was found that the passengers had illegally entered the country. The defendant attempted to quash his conviction on the grounds that the Border Patrol violated his Fourth Amendment rights. The Supreme Court held that although probable cause to arrest or search was not required by the Border Patrol for questioning, officers on roving patrol could stop vehicles only if they were aware of specific articulable factors, together with rational inferences from these facts that reasonably warranted suspicion that the vehicles contained aliens who might be illegally in the country. It was further reasoned that although the apparent ancestry of a vehicle's occupants was

\textsuperscript{1} 429 U.S. 245 (1977).

\textsuperscript{2} 422 U.S. 873 (1975).
one of the factors that could properly be considered by Border Patrol officers, it was not sufficient standing alone to justify stopping a vehicle. In United States v. Ortiz,¹ the defendant was convicted of knowingly transporting illegal aliens. The Border Patrol at a place which was removed from the border or its functional equivalent, stopped defendant's car and searched it for no apparent reason. In the trunk the aliens were found. On the matter of the reasonableness of the search, the Supreme Court ruled that under the Fourteenth Amendment's requirements, warrantless vehicle searches by the Border Patrol at traffic checkpoints must be based on consent or probable cause and not on an at random basis, thus the search in question was invalid since the Border Patrol had no reason for believing the car contained the aliens.

Probably the most beneficial aspect of the Warren Court was its tendency to allow greater appeal to the high bench. This allowed Blacks to sidestep often hostile local and state authorities. Once allowed to appeal to the Court, Blacks could expect receptiveness from the bench. Now the Burger Court has set about the task of greatly restricting the avenues of appeal and poses itself as being unresponsive when Black rights cases are brought before it. In Stone v. Powell,² state prisoners sought habeas corpus relief, which was granted by lower courts, but denied by the Supreme Court. The Supreme Court held that where the state had provided an opportunity for full litigation of a Fourth Amendment

¹ 422 U.S. 891 (1975).
claim, a state prisoner could not be granted habeas corpus relief on the
ground that evidence obtained through an unconstitutional search and
seizure was introduced at his trial, in that, in this context, the con-
tribution of the exclusionary rule, if any to the effectiveness of the
Fourth Amendment was minimal as compared to the substantial societal
costs of applying the rule. In Boyle v. Landry,\(^1\) seven groups of Black
residents of Chicago, Illinois made complaint challenging as invalid the
Illinois statutes prohibiting mob action, resisting arrest, aggravated
battery and intimidation. The Blacks saw these statutes as harassment
devices which were employed to make them forego their First Amendment
rights. The federal district court agreed with the Black challengers
that the Illinois statutes were invalid because they were too broad in
scope and thus leading to a chilling of First Amendment rights. The
Supreme Court with Burger in the majority reversed the district court.
The Majority reasoned that since no Blacks had suffered or were threatened
with great and immediate irreparable injury and the future application
of the statute to any Black was merely speculative, the district court
was not warranted in interfering with state law enforcement by the issuance
of an injunction or declaratory judgment. In Younger v. Harris,\(^2\) Harris
was being prosecuted for violating the California Criminal Syndicalism
Act. Harris sought to stop prosecution by appealing to the federal dis-
trict court on the grounds that the state act was unconstitutional on its
face and inhibited him in exercising his rights of free speech. Harris

\(^{1}\) 401 U.S. 77 (1971).

was joined by others who although not involved in the actual suit, believed that in the future they might run afoul of the law. The federal district court relying on *Dombrowski v. Pfister* agreed with *Harris*, finding the irreparable injury would ensue unless injunction were granted. The state act was found to be void for vagueness and overbreadth. On appeal to the Supreme Court the federal district court was overturned. The majority which included Burger found that there was no basis for equitable jurisdiction based on the allegations of appellants other than *Harris*, who have not been indicted, arrested, or threatened with prosecution, and that the normal course of a state criminal prosecution cannot be blocked on the basis of fears of prosecutions that are merely speculative. The majority also stated that federal courts will not enjoin pending state criminal prosecutions, except under extraordinary circumstances where the danger of irreparable loss is both great and immediate in that there is a threat to the plaintiff's federally protected right that cannot be eliminated by his defense against a single prosecution. The decision in *Dombrowski*, which involved alleged bad faith harassment and is factually distinguishable from this case does not substantially broaden the availability of injunctions against state criminal prosecutions.
CHAPTER V

THE IMPLICATIONS OF THE BURGER COURT’S DECISIONS FOR THE BLACK COMMUNITY

An astute observer of the American scene, Alexis de Tocqueville, made an assessment of the impact that the Supreme Court could have on the nation. He believed that the President, who exercised a limited power may err without causing mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originates may cause it to retract its decisions by changing its members. But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war.\(^1\) The present Supreme Court which is dominated by four justices which were placed there by President Nixon are not imprudent or bad men, but men who bring with them a certain view of what America should be. That view greatly differs from that of the Warren Court which preceded them. The impact of the Nixon justices’ views are in a sense greater than those of the President or Congress, because the justices serve for life, which means that echoes of the Nixon ideology of a conservative America will sound forth for many years to come. The certainty that the Nixon imprint will remain on the high bench can be presumed, even though justices once appointed act as they please, Nixon placed great emphasis on the judiciary during his presidential campaign and said what type of justices he would appoint,

basically those that agreed with his ideas. President Nixon even coined the term "strict constructionist" to typify the kind of justices he desired, the kind who would strictly construe the Constitution, by leaving social justice matters to the executive and legislative branches where they can be quietly forgotten. In his determination to steer this nation back onto the conservative track, President Nixon was allowed to appoint four replacement justices to the total nine man body. The Nixon appointees were Warren E. Burger as Chief Justice, Harry A. Blackmun, Lewis Powell, and William H. Rehnquist. These four justices when joined with Byron R. White and Potter Stewart, who are considered moderate, gives the Nixon faction a functioning majority over the remnants of the previous Warren court.¹ In terms of the Black struggle for rights, the present Supreme Court which is headed by and typified by Warren E. Burger, seems intent on the program of slowing down the activist trend of the Warren Court, and either ignoring or reversing some of the court gains which Blacks had acquired. This is not to say that the Burger Court is anti-Black or bent on Black repression, but when dealing with the long struggle for Black rights, if you are not actively supporting them then you are part of the problem.

There are very few absolutes. Most things are relative to something else. So it is when assessing the direction and impact of a Supreme Court. Courts and justices are accorded labels of liberal or conservative, but labels are often misleading because people are not liberal or conservative in all instances but vary according to the particular circumstance. The

Burger Court has been characterized as being conservative, and when compared to the Warren Court which preceded it it is quite conservative, but when compared with the Vinson Court which preceded the Warren Court it can be seen that the Burger Court is slightly more liberal than it appears.

The relative conservatism or liberalism of the three Supreme Courts can be based on their rulings in criminal defendant cases, it being held in mind that a Supreme Court's trend on the treatment of criminal defendants often signals its general attitude on civil liberties. In the Vinson Court (1947-1952), 36.8 percent of all criminal cases decided were decided in favor of the defendant, the Warren Court (1953-1968) decided 67.7 percent of all criminal cases in favor of the defendant,\(^1\) and the Burger Court (1971-1976) decided 55.2 percent of all criminal cases in favor of the defendant. The label of a Supreme Court's trend is also determined by the times in which it functions. The Burger Court through the election of the self-styled conservative Richard Nixon was in essentials given a mandate to undo the social-activist legal exuberance of the John Kennedy-Lyndon Johnson-Earl Warren era, and this they have set about doing. In seeking to reverse the believed excesses of the Warren era, the Burger Court is presenting grave implications for the future course of activity for the Black community, a Black community which had artfully used the Supreme Court as a means of achieving gains while skirting non-responsive state and national legislatures and the often motionless

A Supreme Court distinguishes itself by the rulings which it delivers. When those rulings are studied over a period of time, often directions of the court and general predictions as to future holdings can be made. The distinguishing of court directions and prediction of future holdings is at best a hazardous undertaking because on any particular case the court can arrive at any conclusion. As non-exact an activity as it is, the study of court voting records does discern past and current patterns among the justices, which when viewed in relation to specific cases may aid in predicting decisions. The Burger Court has indeed left its tracks by the decisions it has made. In analyzing any court's voting records, notice must be taken of the time period studied, the cases examined, and the justices who sat for those decisions.

When examining the Burger Court's record, notice must be made that the Court sat at a time which saw the end of the tumultuous nineteen-sixties and the arrival of the more somber nineteen-seventies. Also, it must be noted that twelve men have sat in the nine man body, due to exit of some members because of retirement, and due to illness and other absences of those who sat. Such changes hinder a truly concise analysis of voting patterns, but even in light of the different personnel there are discernible blocs among the justices. Using the sixty-one cases which were deemed most significant in the preceding chapter it was found that when they did sit on the same cases, that the four Nixon appointees (Burger, Blackmun, Powell, and Rehnquist) voted together 84 percent of

---

the time. The Chief Justice was in the majority 91 percent of the time for all cases. The remnants of the Warren Court (Douglas, Brennan and Marshall) voted together 57 percent of the time on all cases, it being held in mind that toward the end of his court career Justice Douglas missed many votes due to illness. Justices Brennan and Marshall who remained relatively healthy and remained after Douglas' retirement voted together 94 percent of the time in all cases. Justices Brennan and Marshall were also in the minority of 62 percent of all cases considered. The Chief Justice was in the majority most of the time and he commanded a four vote bloc that when joined by any one of the other justices gave a majority. This bodes ill for the remaining Warren Court justices which until the departure of Justice Douglas numbered three but now is reduced to two (Marshall and Brennan).¹

The determination of whether a justice was favorable or opposed to Black interests was not a totally automatic decision in all of the cases considered. In many of the cases which had a Black as a primary party the determination of a justice's view of the matter at question was relatively simple to ascertain. In the cases where a Black may not have been the named party then other determining criteria had to be utilized. In cases where no Black was a principal party the determination of a justice's leaning was based on whether he took a stance which the writer deemed as conservative, strictly constructionist and legally unimaginative. In the area of social welfare issues a justice was deemed opposed to Black interests if he took a stance which hampered access to public

¹The voting records of the justices on the 61 cases involved are found in the Appendix.
facilities, and aid programs, and shielded legal machinery from wider uses by the public. In the confused area of school desegregation where Blacks disagree among themselves as to the proper solution if a justice did not endorse equal school funding, busing across boundary lines, and close court scrutiny of desegregation plans, then he was considered as opposing Black interests. In the area of criminal defendant rights, if a justice voted for loosened restraints on official enforcement bodies, favored harsh punishments, and narrowed areas of appeal then he was considered as opposing Black interests.

In analyzing the voting records of the justices when interests affecting Blacks were present in cases concerning social welfare issues, education and criminal defendant rights, a dismal picture is presented. (See Table 1) The picture presented displays certain alignments among the justices. In terms of resistance to Black interests the Supreme Court appears to be a three tiered structure, the most conservative tier consists of Rehnquist, Burger, and Blackmun. The next tier which is a little less conservative consists of Stewart, Powell, and White. The final tier is composed of the strongly liberal Douglas, Marshall, and Brennan. Justice Stevens, the newest member of the Court, has not truly shown his stance on the issues considered in this study, because of the small number of cases in which he has taken part. A projection as to Steven's possible future court role will be included with discussions of each of the justices.

In focusing attention upon each justice, working from the most conservative to the liberal justices, attention would first be directed to Justice Rehnquist. Justice Rehnquist is most conservative in the area
TABLE 1

VOTING RECORDS OF BURGER COURT JUSTICES ON 61 CASES
WITH FAVORABLE VOTING DESIGNATED BY (+) AND
NON-FAVORABLE VOTING DESIGNATED BY (-)

<table>
<thead>
<tr>
<th>Justices</th>
<th>Social Welfare Issues</th>
<th>Education</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehnquist</td>
<td>87-</td>
<td>83-</td>
<td>80-</td>
</tr>
<tr>
<td>Burger</td>
<td>75-</td>
<td>66-</td>
<td>74-</td>
</tr>
<tr>
<td>Blackmun</td>
<td>58-</td>
<td>66-</td>
<td>74-</td>
</tr>
<tr>
<td>Stewart</td>
<td>66-</td>
<td>50-</td>
<td>42-</td>
</tr>
<tr>
<td>Powell</td>
<td>56-</td>
<td>66-</td>
<td>50-</td>
</tr>
<tr>
<td>White</td>
<td>58-</td>
<td>33-</td>
<td>50-</td>
</tr>
<tr>
<td>Douglass</td>
<td>66+</td>
<td>66+</td>
<td>64+</td>
</tr>
<tr>
<td>Marshall</td>
<td>86+</td>
<td>100+</td>
<td>90+</td>
</tr>
<tr>
<td>Brennan</td>
<td>91+</td>
<td>100+</td>
<td>93+</td>
</tr>
</tbody>
</table>

of social welfare issues. He has a tendency not to find state action constituting discrimination, he usually supports reasonable basis tests which he says are not violative of the equal protection requirements, he believes that purposeful, racial and economic discrimination must be shown before action can be taken, and he does not favor affirmative action programs. Rehnquist does not believe in imaginative legal thinking which would extend standing to bring suits and would allow relief where a more conservative form of legal thinking would not hold as such. He favors referendum actions which can be used to the disadvantage of the political minority. Rehnquist was the most conservative on school issues. He appeared to support busing but allowed loopholes which aided noncompliance
on the part of school systems which did not desire to comply. He has a
tendency toward leniency for local school systems which devise schemes to
elude true desegregation. He believes that desegregation remedies should
be confined to the offending districts. He does not support equal funding
for all school districts. He does not vigorously attack discrimination
but will allow that discrimination to continue if it can be arguably sup-
ported. As concerns criminal defendant rights, Rehnquist favors expansion
of search and seizure powers of enforcement authorities. He support the
use of the finding of harmless error when officials overstep their author-
ity. He believes that the death penalty is not cruel and unusual in every
situation. Rehnquist's greatest liberalism is in the area of the pro-
priety of border searches.

Chief Justice Burger has distinguished himself as being slightly less
conservative than Rehnquist. Burger in the area of social welfare issues
has shown a certain willingness to use legal tools imaginatively as re-
flected by his support of the right to privacy found in Roe v. Wade and
Doe v. Bolton. Though he supported right to privacy in these cases which
is a rather liberal step, he displays this type of liberalism very seldom.
The subject of criminal defendant rights finds Burger staunchly con-
servative, but he does exhibit some liberalism. He, as does Rehnquist,
believes that border searches must be done properly. He has voted for
what would appear to be rather liberal decisions in cases such as Arger-
singer v. Hamlin, Strunk v. United States, and Test v. United States, but
in these cases the Supreme Court acted unanimously which does not cast
Burger as having strong liberal leanings as an individual. On the matter
of school desegregation Burger has shown a willingness to strike obvious
acts of discrimination as in Runyon v. McCrary, but has not demonstrated any true liberal zeal.

Justice Blackmun for the most part follows the path of Rehnquist and Burger in education and criminal cases but demonstrates a tendency for rather shocking swings into the liberal sphere in social welfare issues. Justice Blackmun wrote the opinion in the abortion cases which exhibits some rather free minded thinking on a topic which had been handled conservatively until then. Blackmun in his dissent in Rizzo v. Goode demonstrated that he will on occasion look straight to the core of oppressive official activity and oppose it. Of the three justices in the most conservative tier (Rehnquist, Burger, and Blackmun) Blackmun has shown himself as the most likely to adopt a favorable Black position.

Justice Stewart displays rather liberal sways in social and educational spheres. He favors protection of voting rights as was at issue in Whitcomb v. Chavis, he favors equality in distribution of limited welfare funds, and he favors greater availability of public housing as in Hills v. Gautreaux. Stewart will act to end flagrant acts of discrimination, he will look through local schemes that attempt to circumvent desegregation, and does not oppose busing on limited scale. As concerns criminal areas, Steward believes that border searches must be properly done; he frowns on official misconduct as found in Bivens v. Six Unknown F.B.I. Agents, he favors maintaining the integrity of the unanimous jury-verdict system as was argued in Apodaca v. Oregon and he stressed right to counsel as in United States v. Ash.

Justice Powell has shown himself as voting in favor of Black interests when the Burger Court does so as a whole body. He will act to discourage
flagrant discrimination but do little beyond that. He believes in vig- 
orously protecting the right to counsel.

Justice White in the area of social welfare supports equal access to 
public facilities as seen in Palmer v. Thompson and Hills v. Gautreaux, 
and the protection of voting rights as seen in Beer v. United States and 
Perkins v. Matthews. It must be noted that White voted with Rehnquist 
against the holdings of the abortions. As concerns education and criminal 
areas, White follows a fairly liberal path.

Justices Brennan, Marshall, and Douglass have shown themselves to be 
strongly liberal on the cases presented in this study and have exhibited 
a strong tendency to vote together which preserves a small liberal bloc. 
Even though these three justices are the prime supporters of Black in-
terests in all fields, they do not always agree on all points and do on 
occasion vote differently, but this is usually on cases which are finely 
debatable as to what is best for civil liberties interests, such as in 
City of Eastlake v. Forest City Enterprises Inc.

Justice Stevens who replaced Justice Douglas has not had sufficient 
time to compile enough decisions to clearly indicate his direction. But 
in assessing the few decisions he has made, he appears to be a recruit 
for the middle tier of Stewart, White, and Powell. Stevens in Washington 
v. Davis displayed a willingness to view official action that has a 
racially disproportionate impact can be a denial of equal protection; he 
also opposes blatant educational discrimination.

In this study, the writer has attempted to determine approximately 
where the justices stand on certain broad legal issues. This study has 
shown the justices' general disposition but has not attempted exact
pinpointing because the cases considered cover wide legal areas. In addition analysis was made more difficult by the fact that all of the justices did not sit on all the cases nor the same number of cases, and that often justices did not take part in decisions or in some instances a justice both concurred and dissented in the same decision.

In terms of legal matters confronting Black interests, the area of education received the most beneficial treatment, criminal defendant rights fared less well, while social welfare issues did least well. When viewed with the future in mind the middle tier of Powell, Stewart, and White, loom of great importance because their disposition to a case will determine its final outcome. The pity of the matter in respect to Black interests is that the solidly conservative tier of Burger, Rehnquist, and Blackmun usually succeed in gaining the two votes necessary for a majority out of the less conservative second tier, this leaves the third tier of Brennan and Marshall doomed to defeat on all but the most shocking cases which time the whole Burger Court will usually join them, but that is seldom. The best that Brennan and Marshall can do is to remain vigilant and write the most effective dissenting opinions possible with the hope that at a future time, with different personnel the Supreme Court will use their opinions as the basis for majority opinions which will benefit Blacks.

The four Nixon appointees of the Burger Court through their general unity of decision seem to be harbingers of a conservative mood which the nation may experience for a good period of time. Richard Nixon seems to have succeed in selecting justices who agree with his point of view and have continued that agreement after being confirmed. Often presidents
have appointed justices to support their views and later suffered the
dismay of having those justices often oppose them. This has not occurred
with the Nixon justices. They have displayed two aspects of unity which
casts shadows over future gains in the areas of civil liberties. The
Nixon justices have since appointment shown a great tendency to vote
together and against the remaining liberal justices when a striking civil
liberties case is at hand. The Nixon appointees have also demonstrated a
great propensity to vote in favor of the government and against the de-
defendant in criminal and non-criminal cases. When it is realized that the
Nixon appointees presently control the Supreme Court, the trend of the
Burger Court is not likely to be stopped or greatly diverted.

When Earl Warren retired and the Burger era began there was some
talk among Supreme Court observers that the Burger Court would immediately
begin to dismantle the Warren past. One observer wrote that there was no
need to worry, that the Warren Court past would not likely be overruled
even if the Supreme Court came to be dominated by Nixon appointees; he
believed that the Warren decisions would not be overruled nor distin-
guished out of existence in the near future. This observer was right
and wrong. The Burger Court has not sought to overrule the Warren past
but to subtly erode it. In the art of judging, a proper regard for
appearances counts. One must seem to appreciate the values of coherence,
stability, and continuity with the past. Judges, especially judges who
are reputedly conservative, ought to avoid sudden, radical shifts in con-
stitutional doctrine. Any person who reaches the highest court is

---

1 Inez Smith Reid, "Cast Aside By The Burger Court; Blacks In Quest
sophisticated enough to appreciate the strategic and political values of achieving desired objectives by indirection. Overruling is a device of last resort, employed when other alternatives have failed. The Burger Court has raised the use of alternative routes to a high art by relying on more subtle means than overruling in order to alter the course of the law. It reinterprets precedents, distinguishes them away, blunts them, ignores them, and makes new law without the need of overruling or being bound by the past. It nourishes the impression that it is a standpat court, which merely refuses further expansions of the rights of the criminally accused and socially disadvantaged.1

The Supreme Court, depending upon how it is composed, can serve as an ally or antagonist to the Black struggle for rights. For most of the nation's history, the Supreme Court had either ignored or been hostile to the Black movement. The Warren Court which sat at a very fluid period in our nation's history, came to be viewed as an ally of the Black movement. The Burger Court which was ushered in on a wave of confused reactionism, has in the general trend of cases concerning Black interests shown itself to be a disinterested observer at best. In the areas of education where integration would upgrade inner-city school systems, in the area of criminal defendant rights where many Blacks find themselves abused, and the general Black activist front, the Burger Court has shown a lack of positive initiative.

The surge which the Brown v. Board of Education decision gave to

Black educational goals has been befuddled by the Burger Court. It must be admitted that there is some valid difference of opinion as to what Brown meant should be done, but regardless of the difference of opinion, the present Supreme Court lacks the spirit of bringing about truly integrated schools. In Swann v. Charlotte-Mecklenburg, the Burger Court appeared to back busing, which is probably the only means of bringing about integration between the impoverished inner-city and affluent suburban school systems. The Burger Court in Milliken v. Bradley refused to act beyond the offending school system to remedy segregation. In San Antonio Independent School District v. Rodriguez, a bar was placed against adequately financing inner-city and poor rural schools. Due to the trend shown by the bench on school decisions, some possible shifts in Black attack strategies may be necessary. In the wake of recent decisions it may be necessary to: 1) reconsider whether future desegregation efforts should be made within central cities such as Detroit, 2) reconsider the fact that since federal courts are confined by the limitations of the high bench then greater legislative effort may be deemed desirable, and 3) move the legal battle into the state courts to seek relief under state laws or under state constitutions.1

The criminal defendant rights area provides probably the clearest dividing line of the bench's liberal and conservative factions. Although the Burger Court has not immediately demolished the Warren Court's strides in this area, they have carried out their appointer's intention of freeing the peace forces from procedural restraints. Chief Justice Burger, as

the first Nixon appointee and head of the Nixon faction, has since pre-
appointment days made known his belief that the American adversarial
criminal system is impractical and cumbersome. As can be gleamed from
his writings, public addresses, and official actions, Burger holds that:
1) the presumption of innocence is a fanciful invention, 2) juries are
not needed and only slow the trial process, 3) lawyers are often over-
zealous in defending clients, 4) there is too much traffic between the
appellate courts and the Supreme Court, and 5) the exclusionary rule is
counter productive. Critics of the present Supreme Court believe that
Burger's thoughts on the proper functioning of a legal system lend them-
selves more to the European Inquisitorial type trials which are less
cumbersome thus speeding conviction and then rehabilitation.1

The Warren Court attempted to construct a framework of criminal
justice consistent with the demands of the Constitution and democratic
equality. They sought to encourage convictions of the guilty by methods
that commend themselves to a progressive and self-confident society. The
totality of the Warren Court's procedural constructs has been described
as the "due process model." Under this model the integrity of the process
is considered separate and more important than factual determination of
guilt. The Burger Court in contrast has shown itself to be switching to
another track. The bulk of the present Supreme Court's decisions in
criminal areas, evidences: 1) a lessing of requirements relative to prob-
able cause for arrest and search, 2) a growth of the harmless error doc-
trine--a practice allowing a conviction to stand even though officers

1
A Scheingold, "The Burger Court: Undermining Adversary Justice,"
Nation, September 1975, pp. 231-233.
acted wrongly if it was found that the faulty act did not alone cause conviction, 3) greater trust in the honesty of institutions, officials, and government, and 4) curtailment of Fourth Amendment collateral attack.¹

As relates to the overall Black movement, the Burger Court has shown itself to be unreceptive to the recognition of Black goals and a legitimate Black struggle. The present Supreme Court has shown itself to be less inclined to apply or extend judicial policies supporting racial justice, has shown less support for Blacks and others who wish to use litigation to achieve objectives which they can not attain in political forums, and has given less judicial support for individuals or group claims as against governmental authority. This bodes ill for the future of the Black struggle. The present stance of the Burger Court could cause certain disadvantages in the legal battle for rights: 1) lower courts may become more selective in the cases they submit to the Supreme Court; 2) interest groups such as the A.C.L.U. and N.A.A.C.P. which litigate greatly may want to keep some cases from the courts in the belief that no decision is better than an adverse one, and 3) interest groups may forsake the courts and apply greater pressure on administrative agencies. The losing of the Supreme Court as an ally of the Black struggle will mean that other avenues of operation will have to be used that will themselves affect the form of future activities. There may be a future rise in the use of coalition politics in which Blacks join with other segments of the population to gain certain goals. Blacks may also seek to gain greater control of city governments. Both coalition politics

and city control have their shortcomings. As concerns coalition politics, Blacks would have to blunt their original desires to accommodate those of the partner party. As concerns city control, this may be beneficial only to a limited degree if the state and national governments are unconcerned or hostile.¹

In attempting to circumvent what may be adverse rulings by the present Supreme Court, the participants of the Black struggle must be as artful as possible and be prepared to work harder for results. Greater attention must be focused on state legislatures and state courts, which means looking to state constitutions and statutes for adequate and independent state grounds for state court decisions which will be unreviewable by the Supreme Court. This approach behooves the election to state offices of those who will be sympathetic to the Black struggle, which means greater political activity on the part of the Black electorate. In the legislative field, new statutes on the state and federal levels are needed. To obtain these statutes different legislators and Congressmen will be needed or a new understanding by those presently in office will be necessary.²

The manner in which cases are presented must be tailored in such a style as to avoid negative Supreme Court reaction. Civil liberties groups should seek court decisions based upon the unique facts of the specific cases if a liberal ruling is based on a sweeping principle of law and


appears to govern many other cases, the Supreme Court would be tempted to
take the case and reverse. But if it appears to be a decision that is
based on the specific facts of the individual case, it might not seem to
the Supreme Court to be worthwhile to use its limited time to read briefs,
hear arguments, and write the necessary opinions. It is possible that
the Burger Court is using its new negative civil liberties image as a
means of reducing the large court calendar which faces the federal judi-
ciary. It is also possible that the present Supreme Court may take a
breather on civil liberties issues and turn its attention to other legal
areas.¹

The Warren Court and the Burger Court are of historical significance
because respectively they represent a revolution and a counter-revolution
as relates to the Supreme Court taking an active role in leading the
nation to its promise. Idealistically the Supreme Court should use the
concept of human dignity as a guide in race relation cases. By reading
into the Constitution values similar to those expressed in the Universal
Declaration of Human Rights, which includes economic and social rights in
addition to civil and political rights, the Supreme Court should lead
American society toward a more humane goal. By expanding the scope of
equality, and by moving beyond the traditional concern for political and
civil rights, the Court could make the concept of human dignity a meaning-
ful reality. The role of the Supreme Court must be that of an active par-
ticipant in government, assisting in furthering the democratic ideal.
Acting as a national conscience, the Supreme Court should help articulate

¹ Nathan Lewin, "Avoiding The Supreme Court," New York Times Magazine,
17 October 1976, p. 31.
in broad principles the goals of American society. There is now an urgent need for a jurisprudence of human dignity. Such a jurisprudence would openly espouse the economic and social right to work, the right to an adequate standard of living, and the right to an adequate education.\(^1\)

Realistically speaking the Burger Court does not appear inclined toward any great social experiments.

The question poses itself of what type of Supreme Court would be most beneficial to Blacks. A Supreme Court which ruled totally in favor of Black issues would be ideal, but unrealistic. In a more sensible light, a more beneficial Supreme Court would be one composed of judges of more diverse backgrounds, which would include representatives of more racial groups, and women. A more beneficial Supreme Court would be one on which the judges did not sit for life but were appointed for ten year terms. On this basis there would be constant change in personnel and thus in attitude of the high bench which would aid in preventing the permanent entrenchment of any one program of thought. This type of Supreme Court would probably show greater sensitivity to social issues than earlier courts. Even without a drastic change in personnel, the high bench could become more beneficial to Blacks by truly implementing the fairness and equality that the nation proudly boasts, a Supreme Court that will realize the fabled American dream for all its citizens.

An interesting historical drama is presented by the Burger Court.

The interest of the drama lies in the fact that four of the Supreme Court's

---

justices were appointed by a President who preached "law and order" but did the opposite in his actions. This President used these court appointments as a political tool to build his desired America. Now that President has been driven from office by the same popular unrest that had originally placed him in the presidency. But though Nixon is gone, his Supreme Court under Burger's leadership lives on in a Supreme Court which has as its basis of appointment a diseased idea of what this nation should be. This diseased idea was hallmarked by aberrant terms such as "strict constructionist" and "judicial restraint."

The Nixon Court is as activist as was the Warren Court; sometimes it is even more cavalier in overruling precedent. The difference lies in the direction of the activism. The Nixon Court's activism has been basically of an anti-civil liberties nature, which can be seen in numerous manifestations. First, it has become much harder to get into court. Judge-made procedural rules governing access have been tightened. Class action lawsuits, in which one person sues in the name of and for many others, a "class" have become more difficult. Secondly, the long buried conservative rallying point of states rights has been resurrected to bar federal lawsuits in civil rights cases. Thirdly, the rights of criminal defendants have been eroded. Furthermore, in constitutional terms, the principle embedded in the "equal protection of the laws" clause of the Fourteenth Amendment is being narrowed. The Supreme Court is now upholding governmental classifications under that clause which a few years ago have been outlawed. It may be considered that the Burger Court is attempting to lighten its caseload burden by acting in this manner. One need not be cynical to note that it is precisely in the areas of civil liberties and
rights that the justices have by their own action eliminated cases from their caseload. Furthermore, they are inordinately slow in getting their work done.¹

As concerns the internal workings of the Burger Court itself, there is an erratic character to the Court's decision-making that while perhaps explicable is confusing and undesirable. Basically, the Burger Court seems to be struggling mightily to develop a new majority that can grapple consistently with the variety of complex questions that are pressed on it for decision. And it has yet to succeed, at least in any comprehensive way, in this effort. Thus, one sees a number of cases in which there is no majority opinion; one justice delivers an opinion announcing the Supreme Court's judgment in which several others join, a few other justices concur on separate grounds, and a few dissent. The precedential value of such decisions is at best difficult to assess. Another theme that is noticeable is the wavering of several of the justices especially holdovers from the Warren Court years who were not a consistent part of the Warren Court majority, such as Justices Stewart and White. Sometimes they adhere to Warren Court precedents, even though they might have dissented at the time. More frequently they join with the four Nixon appointees, or at least three of them, on a position that occasionally is squarely at odds with a Warren Court decision, but more often involves a refusal to extend the underlying rationale of such a case to related situations. One also finds more discussion of deference to legislative judgment and more extensive application of threshold procedural concepts,

such as mootness, standing, and the like, as a way of avoiding decision in particular cases. And sees the Burger Court talking more frequently about federalism concerns.¹

The Supreme Court as presently headed by Chief Justice Burger and dominated by conservative Nixon appointees and moderate justices appears to serve as a national towncrier who carries a message that White America has decided that enough was done during the 1960's to bring about social justice and that now a rest and look-see period is in order. The problem with this attitude is that the socially disadvantaged do not believe that enough has been done. In assessing the plight of Blacks, it is likely that the Burger Court will act to prevent flagrant acts of discrimination, but beyond that do little to aid or actually recognize the Black struggle. The negative attitude of the top federal court will be reflected in the lower federal courts, thus removing the federal judiciary as a viable tool of assistance. This means shifting the emphasis of struggle activities to other institutions whose decisions do not bring as swift a result as a single court decision can. Unless a number of the present justices have a change of heart as to what is best for the nation, the remainder of the Burger Court years will probably be a time of continued slow civil rights gains and new set backs.

BIBLIOGRAPHY

Books


Cases


Colegrove v. Green, 328 U.S. 549 (1946).
In Re Gault, 387 U.S. 1 (1967).


Southern Pacific Co. v. Jensen, 244 U.S. 205 (1916).


United States v. Ortiz, 422 U.S. 891 (1975).

Constitution and Statutes

Code of Federal Regulations, Title 45, Part 206, 10 (10).


*New York Times*, 3 November 1968, p. 79.


The table in this section consists of the voting records of the 12 justices who have sat on the Burger Court. The cases represented in the table are 61 cases which I deemed to be most significant in determining Supreme Court trends as related to the areas of social welfare issues, school desegregation, and criminal defendant rights. The cases are arranged by topic area in chronological order.
### TABLE 1

VOTING RECORDS OF THE 12 JUSTICES WHO HAVE SAT ON THE BURGER COURT

<table>
<thead>
<tr>
<th>Justices</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
<th>13</th>
<th>14</th>
<th>15</th>
<th>16</th>
<th>17</th>
<th>18</th>
<th>19</th>
<th>20</th>
<th>21</th>
<th>22</th>
<th>23</th>
<th>24</th>
<th>25</th>
<th>26</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Harlan</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+/-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Burger</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Blackmun</td>
<td>C/A</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>A/J</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Powell</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>A/J</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>White</td>
<td>-</td>
<td>C/A</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Stewart</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+/-</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Brennan</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+/-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Marshall</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+/-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Douglas</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+/-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Steven</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+/-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

* + Favorable to Black Interests
* - Opposing Black Interests
* +/- Concurred and/or dissented in part
* C/A Certiorari Affirmed
* A/J All Joined
<p>| Justices  | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 |
|-----------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Black     | +  | +  | +  | -  | +  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Harlan    | +  | +  | -  | -  | +  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |
| Burger    | -  | -  | +  | +  | +  | -  | -  | -  | -  | -  | -  | -  | -  | +/ | -  | -  | -  | -  | -  | -  | +  | -  | +  | +  | +  |
| Rehnquist | -  | -  | -  | -  | +/ | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  |
| Blackmun  | -  | -  | +  | +  | +  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  |
| Powell    | -  | -  | -  | +  | +/ | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  |
| White     | +  | +  | -  | -  | +  | +  | -  | -  | -  | +  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | -  | A/J  | P/C  | -  |
| Stewart   | -  | -  | -  | +  | +  | -  | -  | -  | +  | +  | +  | -  | -  | -  | -  | +  | -  | +  | -  | +  | -  | +  | -  | +  | +  |
| Brennan   | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  |
| Marshall  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  |
| Douglas   | +  | +  | -  | -  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  | +  |
| Steven    | +  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |</p>
<table>
<thead>
<tr>
<th>Justices</th>
<th>51</th>
<th>52</th>
<th>53</th>
<th>54</th>
<th>55</th>
<th>56</th>
<th>57</th>
<th>58</th>
<th>59</th>
<th>60</th>
<th>61</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Harlan</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burger</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Blackmun</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Powell</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>White</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Stewart</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>P/C</td>
<td>P/C</td>
</tr>
<tr>
<td>Brennan</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marshall</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Douglas</td>
<td>+</td>
<td>+</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stevens</td>
<td></td>
<td></td>
<td>-</td>
<td></td>
<td>+</td>
<td>-</td>
<td>+</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

141