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The Court, the Constitution, and Chief Justice Burger

*William F. Swindler**

INTRODUCTION

Although the constitutional crisis of 1973 has not yet demanded a definitive response from the Supreme Court, it obviously has established a landmark in the ultimate history of Warren Burger's Chief Justiceship. While the unprecedented confrontation between executive and judiciary was not carried beyond the Court of Appeals for the District of Columbia, Burger's old court,[1] and although the prospective confrontation between executive and Congress did not—at least in its first round[2]—reach a stage of review on the merits, the questions presented went to the cornerstones of Anglo-American constitutional theory itself.[3] The case of Vice President Agnew raised issues of executive privilege that in their own right invited exhaustive judicial analysis of the nature of the vice-presidential office, but an historic *nolo contendere* plea in a dictrict court scotched that opportunity.[4] Moreover, the stirrings in Congress of proposed impeachment proceedings would, if they compel Senate action, necessarily involve the Chief Justice of the Court.[5]

In this apocalyptic succession of events, it has been necessary to qualify Charles Evans Hughes's famous aphorism that "the Constitution is what the judges say it is,"[6] by observing that the Constitution which the Court interprets must be viewed in the perspective of the age. With issues of such magnitude as those arising from

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1. Nixon v. Sirica, 42 U.S.L.W. 2212 (D.C. Cir., Sept. 19, 1973).

2. Application of Select Comm., 361 F. Supp. 1282 (1973).

3. *See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS (5th ed. 1957); R. NEUSTADT, PRESIDENTIAL POWER (1960); C. ROSSITER, THE AMERICAN PRESIDENCY (1956).

4. Application of Spiro T. Agnew, *In re* Grand Jury Proceeding, Civil Docket No. 73-965 (D. Md., Oct. 10, 1973).

5. It was at least symptomatic of the national uneasiness that 2 studies on the subject should become best sellers of sorts. *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); HOUSE COMM. ON JUDICIARY, IMPEACHMENT: SELECTED MATERIALS, 93rd Cong., 1st Sess., 1973.

6. "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution." Charles Evans Hughes, address at Elmira, N.Y., May 3, 1907.

Watergate, it is manifest that they will affect directly or indirectly the constitutional jurisprudence of the current decade and beyond. This situation is fortuitously part of the essential background of the Burger Court itself; and yet, even if Watergate had never intruded upon national and world affairs, the emerging features of the Burger Court would still have warranted scrutiny and evaluation. For by now, in the course of its fifth term, the Court under this Chief Justice has assumed some distinctive characteristics which lend themselves to analysis.

I. THE FORMATION AND OPERATION OF THE BURGER COURT

"Court watching" is a somewhat self-conscious activity of American political, legal, and journalistic sophisticates. The close in 1969 of the Earl Warren years of broad judicial activism was accompanied by more than the usual flurry of comment and anticipation as Warren Earl Burger assumed the Chief Justiceship.[7] While Court watching has certain built-in hazards of exaggeration and self-delusion, the Warren Court had indeed made some of the most epochal advances in constitutional jurisprudence since the era of John Marshall.[8] Inevitably, the Burger Court would be evaluated, at least at the outset, in terms of the extent to which it followed, qualified, or departed from the Court's categorical pronouncements of the preceding decade.

Apart from the often controversial activism of the Warren era itself, certain political events conspired to bring the High Court before the public eye. In his 1968 campaign for the Presidency, Richard M. Nixon spoke often of his intention to do something about the trend of constitutional decision making in the 1960's. In his second campaign, he occasionally—albeit rather vaguely —referred to what had been "accomplished" on the matter.[9] Even more significant, however, was the fact that from the spring of 1969 through the winter of 1972, the Court was affected to a greater degree than at any time in the present century by the politics of nomination and confirmation. Following a clumsy effort by outgoing President Lyndon B. Johnson to maneuver Justice Abe Fortas into the Chief Justice's chair and the blitzkrieg unleased by

7. *E.g.*, Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, Oct. Term, 1969* 1970 SUP. CT. REV. 1 (1971); Black, *Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970).

8. *See* Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205 (1970).

9. N.Y. Times, Sept. 7, Oct. 12, 1968; Oct. 10, 1972.

incoming Attorney General John Mitchell, which eventually drove Fortas from the bench,[10] President Nixon became the first White House occupant since Grover Cleveland to suffer two successive congressional rejections of his nominees to the Court.[11] Moreover, the devious manner by which the path was prepared for the later nominations of successors to Justices Hugo Black and John M. Harlan also contributed to the malaise in which the Burger Court was obliged to undertake its work.

Nevertheless, the fact remains that within his first term of office President Nixon had the unique opportunity to place four men of his choice on the bench[12] and to shift the Court ineluctably away from the activist orientation of the Warren-Fortas-Black group toward the Frankfurter-Jackson-Harlan pole of judicial restraint. After the Senate debacle involving Judges Clement Haynsworth and G. Harrold Carswell, the appointments of Justices Harry Blackmun and Lewis F. Powell[13] to the seats of Justices Fortas and Black established a new ideological balance, while the addition of Justice William Rehnquist for Justice Harlan further consolidated the shift.

This series of appointments, however, did not lead to an automatic departure from the judicial landmarks of the previous decade. Indeed, many conservatives were jolted in the fall of 1969 by the Court's first major opinion, which affirmed the principle of nondiscrimination in public schooling.[14] The Pentagon papers decision of the following term,[15] while not as unequivocal as many liberals would have wished, evidenced little sympathy for the government's arguments;[16] and the death penalty opinion[17] soon thereafter presented a rationale that the Warren Court had implied but never affirmatively developed.[18] Even in the cases of juries of less than twelve members[19] and nonunanimous verdicts,[20] which purported to declare that sixth amendment standards in these areas were not

10. *See* R. SHAGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT (1972).

11. *See* Swindler, *The Politics of "Advice and Consent"*, 56 A.B.A.J. 553 (1970).

12. *Cf.* Swindler, *The Supreme Court, the President and Congress*, 19 INT. & COMP. L.Q. 671 (1970).

13. For a discussion of Justice Powell's placement on the Court see Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1971).

14. Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969).

15. New York Times Co. v. United States, 403 U.S. 713 (1971).

16. *Id.* at 718-20.

17. Furman v. Georgia, 408 U.S. 238 (1972).

18. *See* United States v. Jackson, 390 U.S. 570 (1968).

19. Williams v. Florida, 399 U.S. 78 (1970).

20. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

controlling on the states, the result was to ignite a spontaneous movement within the federal judiciary towards applying the sixth amendment principles to their own procedure anyway.[21]

Nevertheless, the Burger Court has not escaped some caustic criticism in the course of its still-short tenure,[22] and the Chief Justice's activism in the area of court reform and judicial modernization has disturbed at least one leading scholar.[23] The more pessimistic of the liberals see the Court retreating along a calculated course from the positions that its predecessor established in matters of federally enforced integration, defendants' rights, and electoral equality. The complete incorporation of the Bill of Rights into the fourteenth amendment, all but accomplished during the last years of the Warren Court, is also being mourned, perhaps prematurely, as dying on the vine.[24] Less pessimistically, however, as this study will argue, the Burger Court appears to have chosen to consolidate and to confirm certain basic concepts within these constitutional areas rather than to push ahead in ever-broadening generalities.

William Howard Taft believed that the ultimate test of the effectiveness of a Chief Justice's leadership was his ability to "marshal the Court"—a process that was less a matter of inducing the *unanimity* of colleagues than of guiding the institution itself on a path of *consistency*. Taft himself succeeded in meeting this test, at least in the early part of his term, by citing to the controlling authority of the long years of *laissez-faire* constitutionalism dating back to Melville Fuller's Chief Justiceship and beyond.[25] The majority of his colleagues, including Justices Butler, McReynolds, Sanford, Sutherland, and Van Devanter, shared a similar philosophy and consistently contained the minority composed of Justices Brandeis, Holmes, and Stone. In addition to Taft's ability to set the Court on a consistent path, his leadership of the entire judicial system was demonstrated by his pioneer work in developing the Judicial Conference of the United States and his lobbying for the Judiciary Act of 1925.[26] By this act the Supreme Court gained greater freedom

21. *See* Devitt, *The Six-Man Jury and the Federal Courts*, 53 F.R.D. 273 (1972); Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507 (1973); *The Six-Man Jury: A Discussion Before the Judicial Conference of the Fourth Circuit*, 59 F.R.D. 180 (1973).

22. *E.g.*, Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

23. Kurland, *The Lord Chancellor of the United States*, 7 TRIAL 11 (1971).

24. *See* Daykin, *The Constitutional Doctrine of Incorporation Reexamined*, 5 U. SAN FRAN. L. REV. 61 (1970).

25. *See* W. SWINDLER, THE OLD LEGALITY, 1888-1932, chs. 13, 14, (1969).

26. 28 U.S.C. §§ 291 *et seq.* (1970).

through discretionary (certiorari) powers of review, and the intermediate appellate courts became the courts of final disposition in a proportionately larger number of cases.[27]

Against these dual strengths of Taft's Chief Justiceship, the leadership and administrative effectiveness of his successors may be assessed. The records of Chief Justices Stone and Vinson are for various reasons, negligible under these tests.[28] The records of Hughes and Warren, however, fare somewhat better and, together with Taft's accomplishments, may be taken as the standard of comparison by which to measure the record of the Burger Court to date.

On the basis of leadership and administrative prowess, Hughes scores high among Chief Justices. Administering a bench of drastically changing personalities and adjusting to the ideologies that evolved from the uncompromising last stand of the judicial conservatives in the early New Deal, through the critical Court fight in the winter of 1937, to the beginning of a new constitutional posture in the fall term of that year, his task of Court leadership was far more demanding than Taft's.[29] As for judicial organization and administration, Hughes completed Taft's threefold program of reform when Congress vested authority in the judiciary to draft and promulgate uniform rules of procedure.[30] Moreover, he added a significant contribution in his own name with the establishment of the Administrative Office of the United States Courts.[31] In later years, Justice Warren, finding the Court in shoal waters of congressional confrontation in the wake of the McCarthy era, led the bench from that crisis, for better or wrose, to the far-ranging activism of the 1960's. Equally important to Warren's record of accomplishments, however, was his development of the Judicial Conference of the United States into a fully effective instrument for the systematic study of the whole field of court management and judicial procedure.[32]

One of Chief Justice Burger's major techniques to "marshal the Court" has been to suggest in his opinions legislative alternatives that might change the result reached in a particular case. Through this practice, the Chief Justice attempts to accommodate the daily operations of state and national units without offending the princi-

27. 28 U.S.C. §§ 1252 *et seq.* (1970).

28. *See* Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 SUP. CT. REV. 241, 252-53 (1971).

29. *See* W. SWINDLER, THE NEW LEGALITY, 1932-1968, ch. 4, (1970).

30. 18 U.S.C. § 3772 (1970); 28 U.S.C. § 2072 (1970); 18 U.S.C. §§ 3141, 3288, 3289 (1970).

31. 28 U.S.C. §§ 601 *et seq.* (1970).

32. Swindler, *supra* note 28, at 254.

ples of the Court. For instance, in his dissent in *Bivens v. Six Agents*,[33] the Chief Justice suggested that Congress might effectively set limits to the exclusionary rule consistent with fourth amendment guidelines theretofore established by the courts much as it had defined the boundaries of the immunity rule within the fifth amendment. Burger commented that the constitutional purpose, rather than the automatic application of a judicial rule, was the measure of a defendant's rights, and that "the single monolithic and drastic judicial response to all official violations of legal norms" too often frustrated legitimate criminal procedure.[34] His alternative was a Congressional enactment:

> Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendments rights have been violated. The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy . . . . Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.[35]

In seeking to offset the side effects of automatic and unqualified application of fourteenth amendment equal protection and due process standards to the states—to delimit the incorporation doctrine—the Chief Justice again pointed to the opportunity and, indeed, the responsibility of the legislative branch. Writing for the majority in *Williams v. Illinois*,[36] which set aside a state court sentence imposing additional workhouse time for defendants unable to pay fines, Burger declared that there were "numerous alternatives" that could accommodate constitutional guarantees, and suggested some of them in a footnote.[37] Similarly, in *Furman v. Georgia*,[38] which invalidated most state death penalties, the Chief Justice's dissent urged that legislatures be given an opportunity to bring their laws into compliance with new eighth amendment standards set out in the majority holding. He contended that the legislature, as much as the judiciary, was qualified to translate changing moral values into law.

Such judicial hints to lawmakers may be criticized as disguised advisory opinions or as potentially prejudicial to future adjudica-

33. 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting).

34. *Id.* at 418.

35. *Id.* at 424.

36. 399 U.S. 235 (1970).

37. *Id.* at 236 n.3; see also the appendix to the case, taken substantially from amicus brief of National Legal Aid and Public Defender Ass'n., *id.* at 246.

38. 408 U.S. 238 (1971).

tions of legislative responses that might be made.[39] There also still remains the Court's responsibility of continually identifying the constitutional standards to which legislation must conform. But the larger objective of the Burger Court, and the one which would appear to be gaining both legislative and judicial attention, is to bring legislative and judicial functions into closer harmony by sharing the burden of implementing constitutional objectives. Viewed in such a light, the efforts of the present Chief Justice seem to conform to Taft's ideal of fashioning a consistent and characteristic doctrine, the first indicator of a Chief Justice's leadership. But Burger's image is only now beginning to develop with some clarity. In order to make even short term evaluations of the Chief Justice's success or failure, it is necessary to study his activities as a leader of both the Court and the entire judicial system.

II. CONSTITUTIONAL LAW OF THE BURGER COURT

The Warren Court left as its legacy a series of broad constitutional propositions with which there could be little quarrel. The recurrent review of cases even during the Warren Court tenure, however, belied the appearance that firm practical rules of decision had been developed.[40] Consequently, the practical difficulty of applying these general ideals to routine issues was left largely to the Burger Court. The ringing pronouncements of racial equality, one man-one vote, and indigent's right to counsel had to be reconciled with the realities of custom, economic necessity, and the simple fact that public interest in such matters had its limitations.

Seen in these terms, the recent function of the Burger Court has been less a discarding of the Warren Court principles than a case of attaching metes and bounds to them. This distinction in itself reveals a difference between the respective Courts' view of their functions. While for the Warren Court, in the heyday of judicial activism, the rectification of social injustice became the moral standard and the *sine qua non* of constitutional decision making, the Burger Court attempted a more dispassionate balancing of individual, group, and governmental interests. The Court of Brennan, Black, Douglas, Fortas, Marshall, and Warren increasingly came to regard "injustice" as the issue to be adjudicated, and accordingly the outcome of a particular case was seldom in doubt. The Court of Black-

39. *See* Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (1973).

40. *See* Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1 (1969); Mason, *Judicial Activism, Old and New*, 55 VA. L. REV. 385 (1969).

mun, Burger, Powell, Rehnquist, Stewart, and White, however, adheres more readily to precedent than to predilection and places its primary emphasis upon the practical consequences and rational basis of a decision.

The record under both Chief Justices must be examined in the context of their respective decades—the 1960's punctuated by domestic activism which gave impetus to and received encouragement from the innovative reform attempts of the New Frontier and the Great Society; the 1970's colored indelibly by the American extrication from the bitter Viet Nam experience and overlaid by the specter of corrupt government emanating from the Watergate affair. The setting for the Court in the 1960's may be seen as a climax of the perennial American belief that nothing ever has ultimately proven impossible to attain. For the Court of the present decade, however, there is currently a wave of self-doubt about the indefinite continuance of the American success story. In the Warren years, the first principle of constitutional jurisprudence was the belief in the ability to accord absolute effect to rights guaranteed under the Constitution. On the other hand, the reality today, it may be suggested, is the imperfect attainment, and even imperfect understanding, of these rights.

The present analysis is not intended to be an exhaustive survey of Burger Court business, but rather as an analysis of some of the major constitutional propositions uniquely identified with the Warren years and the treatment of those propositions in opinions of the Burger Court since the fall of 1969. Four major areas of constitutional action developed in the 1960's: desegregation and racial justice; the protection of equal opportunities in the electoral process; the rights of the individual in the criminal process; and the definition of fundamental freedoms under the first amendment. Accordingly, these are the areas on which this section of the article will focus.

A. Desegregation and Racial Justice

The image of the Warren Court in civil rights was fixed in 1954 with its epochal holding in *Brown v. Board of Education*.[41] The principle of desegregation enunciated therein will remain as the identifying feature of the Warren tenure as surely as Watergate, irrespective of any ultimate Supreme Court involvement, will be-

41. 347 U.S. 483 (1954). *Brown* is associated with the Warren Court even though the case was first argued during the tenure of Chief Justice Vinson.

come a dramatic constitutional feature of the Burger years. The wide spectrum of racial litigation, which opened with *Brown*, was still generating issues at the close of the final Warren term and has continued to do so in each term of the Burger Court. If, as suggested above, the policy of the Burger Court is to define the parameters of such issues as they come before the Court, some of these limits in the civil rights area may have become discernible in the aftermath of two school cases in the spring of 1973.

Richmond School Board v. State Board of Education[42] and *Keyes v. School District*[43] presented the question of how far the federal judiciary and the equal protection clause of the fourteenth amendment could be expected ultimately to pursue the matter of educational integration. In the *Richmond* case, the Fourth Circuit had determined that the federal issue ended with conclusive evidence that *state-imposed* segregation had been eliminated; beyond that, there was no federal right to an absolute racial balance.[44] A four-four division of the Supreme Court[45] sustained the Fourth Circuit opinion that, in turn, had reversed a district court ruling that had drawn explosive reactions.[46]

Justice Brennan's majority opinion in *Keyes* continued to rely upon this *de jure-de facto* distinction in evaluating whether there had been a constitutional violation. Originally the Court spelled out the distinction as a possible means of setting metes and bounds for the general issues of integration. In deciding *Swann v. Charlotte-Mecklenburg Board of Education*[47] in 1971, Burger found that the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole,"[48] but only that school authorities had to meet the burden of proof that racial imbalances were not the consequences of a planned policy. In accordnace with this reasoning, the Court in a companion case struck down an anti-busing statute as perpetuating *de jure* or government-enforced segregation.[49] The following year, however, the Chief Justice dissented in a case in which the majority had found that the separation of city

42. 412 U.S. 92 (1973).
43. 413 U.S. 189 (1973).
44. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972).
45. Justice Powell, a onetime member of the Richmond school board, did not participate.
46. Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va. 1972).
47. 402 U.S. 1 (1971).
48. *Id.* at 24.
49. North Carolina State Bd. v. Swann, 402 U.S. 43 (1971).

from county schools, previously joined in a single school system, was prima facie evidence of *de jure* segregation.[50] Such a division, Burger said, might result in *de facto* segregation, but whether it was *de jure* ought to rest clearly on something other than a value judgment of the majority.[51]

Justice Powell's concurring opinion in the *Keyes* case, however, suggested that the limit had been reached in the reliance upon the increasingly complicated distinctions between *de jure* and *de facto* segregation.[52] His statement sounded what may become the death knell for the distinction itself. Powell concluded that the majority was actually seeking a means of recognizing that the "affirmative duty doctrine," presumably established in *Brown*, had been changed by *Swann* into a doctrine of required integration for school systems to effectuate equality in the quality of education itself. This, in Powell's view, made the *de jure-de facto* distinction irrelevant since judicial responsibility lay in the review and confirmation of the bona fides of local efforts—of many variations—to achieve the goal of quality education in terms of an integrated school system.[53]

Both the reasoning used in the school cases and the search for limits on constitutional phrases, were applied in the widely discussed "liquor license" case of 1972, *Moose Lodge No. 107 v. Irvis*.[54] There the Court sought to identify limits to the state action doctrine once so sweepingly applied by the Warren Court. Justice Rehnquist, speaking for a six-three majority, reversed a three-judge district court decision that a private club's racial discrimination could be attacked on fourteenth amendment grounds by finding state action in the continued validation of its liquor license. The majority declared that state action does not extend to every sort of state service or regulation, but that "the state must have 'significantly involved itself with invidious discrimination,' " to be held an essential party to the complaint.[55]

The upshot of the Burger Court activities in the race relations area is that the Court will interfere in private or administrative activities with less predictability than in the previous decade. The unequivocal declaration of the Warren Court had been that separation of functions and facilities was discriminatory and violated the

50. Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).
51. *Id.* at 471 (Burger, C.J., dissenting).
52. 413 U.S. at 217 (Powell, J., concurring).
53. *Id.* at 219-23.
54. 407 U.S. 163 (1972).
55. *Id.* at 173, *citing* Reitman v. Mulkey, 387 U.S. 369 (1967).

equal protection clause when it involved essentially public areas such as public education,[56] public accommodations offered by private parties,[57] private enterprises licensed for public convenience by public authority,[58] and private interests which ultimately looked to state action for their protection.[59] The Burger Court, however, has sought to sharpen the boundary lines for these propositions by distinguishing between *de facto* and *de jure* discrimination or separation.[60] It has also distinguished "affirmative duties" to provide nondiscriminatory or integrated facilities from the option of not providing such facilities at all,[61] and further differentiated a consistent state policy to support a public service from the necessity of a local government policy augmenting the state policy.[62]

B. Repportionment and Electoral Equality

In addition to the racial equality cases, Court watchers have been alert for any apparent departure from the "one man-one vote" doctrine so broadly asserted in *Reynolds v. Sims*.[63] In its closing months, the Warren Court seemed prepared to extend indefinitely the search for mathematical equality at every level of the electoral process; by the spring of 1973, however, the Burger Court appeared instead to be searching for a standard of "fair and effective" representation—again, a policy of seeking metes and bounds.[64]

In the spring of 1969, the Warren Court had apparently settled upon a specific mathematical standard of population variation among representative districts—no more than six percent—and intended to apply this to all levels of the electoral process.[65] It had also specifically rejected congressional districting that sought to "keep regions with distinct interests intact" if such districts could not be brought into a population ratio essentially the same as in other districts.[66] In February 1970 the Burger Court continued the trend in this direction in a six-three majority holding that this standard

56. Brown v. Board of Educ., 347 U.S. 483 (1954).
57. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
58. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).
59. Shelley v. Kraemer, 334 U.S. 1 (1948).
60. Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
61. Palmer v. Thompson, 403 U.S. 217 (1971).
62. San Antonio Indpt. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
63. 377 U.S. 533 (1964).
64. *See* Gordon v. Lance, 403 U.S. 1 (1971); Abate v. Mundt, 403 U.S. 182 (1971); Avery v. Midland County, 390 U.S. 474 (1968).
65. Kirkpatrick v. Preissler, 394 U.S. 526 (1969).
66. Wells v. Rockefeller, 394 U.S. 542 (1969).

could apply to elections for trustees of public junior colleges.[67] The following term, however, the Court, speaking through Justice Marshall, declared that a strict mathematical equality of votes was not to be expected in elections for county governments.[68] This move was followed by a refusal in *Whitcomb v. Chavis*[69] to become involved in qualitative or subjective arguments, such as the question whether multi-member legislative districts over-represented these districts either by block voting in the legislature or by failing to express the divergent viewpoint of minorities within their districts whose own candidates had failed to get elected.

Proof, rather than presumption, of intended discrimination or malapportionment became increasingly emphasized in several 1972 cases.[70] Thus, in *Sixty-seventh Minnesota Assembly v. Beens*,[71] the Court denied the right of a lower federal court to reduce the number of legislative districts and the number of members of each house of a state legislature when the reapportionment plan of the state had not been shown to be discriminatory. The *per curiam* opinion stated that "[w]e know of no federal constitutional principle or requirement that authorizes a federal reapportioning court to go as far as the District Court did and, thus, to bypass the State's formal judgment as to the proper size of legislative bodies."[72] The Court found that none of its decision had gone that far and made it clear that it felt it was unlikely that such a situation would ever arise.[73]

A "fair and effective representation" standard was affirmatively stated in several 1973 cases, in which the Court declared that although gross population variations might constitute prima facie evidence of calculated malapportioment, mathematical equality itself was but one of several factors that state districting plans should take into account.[74] In *White v. Regester*,[75] however, it reaffirmed the principle that districting plans with the effect of disfran-

67. Hadley v. Junior College Dist., 397 U.S. 50 (1970).

68. Abate v. Mundt, 403 U.S. 182 (1971).

69. 403 U.S. 124 (1971).

70. *See* Independent Voters v. Lewis, 406 U.S. 913 (1972); Sixty-seventh Minn. Assembly v. Beens, 406 U.S. 187 (1972).

71. 406 U.S. 187 (1972).

72. *Id.* at 198.

73. At the same time, however, as though to emphasize its continuing commitment to the general principle of reasonable equality of voting districts, the court did approve a reapportionment plan from another state because, as the decision pointed out, the population deviation among districts was less than 2%. Independent Voters v. Lewis, 406 U.S. 913 (1972); Grivetti v. Election Bd., 406 U.S. 913 (1972).

74. Gaffney v. Cummings, 412 U.S. 735 (1973); White v. Weiser, 412 U.S. 783 (1973).

75. 412 U.S. 755 (1973).

chising certain minority groups clearly violated the equal protection clause. While this holding may justify a federal court's dissolution of single-member districts in favor of a multi-member district when the single-member plan had the effect of segregating a particular group of voters, a lower court was forbidden to intervene, without proof of intended discrimination, when there was merely a difference in the apportionment plans for the two houses of a state legislature.[76]

In other dimensions of the electoral process, the Burger Court has also sought to establish the parameters of Warren Court pronouncements. In the mid-1960's, during Warren's tenure, federal equal protection standards had been extended to state laws concerning voting qualifications. In *Carrington v. Rash*,[77] the majority warned that a Texas constitutional provision denying members of the armed forces their right to vote while stationed within the jurisdiction would violate fourteenth amendment standards and would constitute invidious discrimination if it were shown that an individual accordingly was barred from seeking to overcome "the presumption of non-residency."[78] In 1972, the doctrine of *Carrington* was applied to a Tennessee durational residence requirement that, the Court found, curtailed an electoral right and a right to travel without demonstrating an offsetting compelling state interest.[79] On the other hand, in 1973 cases from Arizona[80] and Georgia[81] the Court observed that neither the judiciary nor the state legislatures would be justified in setting arbitrary time periods to qualify for an electoral privilege.

The Warren Court had also questioned the validity of discrimination between electoral qualifications in special or local elections as distinguished from general elections. In 1969, Chief Justice Warren placed the burden of proof upon the state to show a compelling state interest that justified any discrepancy between electoral requirements; and the proof had to go not only to the validity of the interest, but also to the necessity of accomplishing the state purpose by means of the discrimination.[82] If the electoral restriction was irrelevant to the state's objective, the restriction was suspect before

76. Mahan v. Howell, 410 U.S. 315 (1973).

77. 380 U.S. 89 (1965).

78. *Id.*

79. Dunn v. Blumstein, 405 U.S. 330 (1972). It may be noted that this was a 6-1 decision, previous to Justices Powell and Rehnquist joining the Court.

80. Marston v. Lewis, 410 U.S. 679 (1973).

81. Burns v. Fortson, 410 U.S. 686 (1973).

82. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

the Court.[83] By 1973, the Burger Court had stated the converse of the Warren Court rule: when the special purpose of the election is reasonably related to the electoral interest affected, the presumption should be in favor of the validity of the electoral restriction.[84]

In 1971, a unanimous Court distinguished and departed from the widely discussed Warren Court holding in *Williams v. Rhodes*,[85] which had invalidated a state law subjecting minority parties to different requirements as to the number of signatures on their nominating petitions and the time stipulated for filing the petitions. In *Jenness v. Fortson*,[86] a divided majority of the Burger Court held that minority candidates, including, in this instance, candidates who failed to survive the primary voting, may be required to show "a significant modicum of support" before winning a place on the general election ballot.[87] The standards for electoral participation laid down by the Warren Court in 1966 in *Harper v. Board of Elections*,[88] however, were unanimously reaffirmed by the Burger Court in 1972. Since "restrictions on candidates affect voters as well," a filing fee requirement which falls "more heavily on the less affluent segment of the community" invites strict judicial scrutiny.[89] The ultimate test, as both the Warren and Burger Courts have concluded, is whether electoral restrictions "are *necessary* to promote a *compelling* state interest."[90]

The Burger Court's apportionment standards have thus become fairly distinguishable from those of the Warren Court. The "absolute equality" objective continues to be applied in the case of congressional redistricting, but is not necessarily required in all cases of state legislative redistricting: In the former situation, the standard is equality of representation for all citizens of the United States; in the latter, however, there may be valid consideration for the normal function of state and local governments in relation to each other, and the alternative standard of "substantial equality" has emerged.[91] As Justice White observed, it was one thing to attack

83. Cipriano v. Houma, 395 U.S. 701 (1969). *See also* Turner v. Fouche, 396 U.S. 346 (1970); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

84. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); *see* Gordon v. Lance, 403 U.S. 1 (1971).

85. 393 U.S. 23 (1968).

86. 403 U.S. 431 (1971). *See also* Lippitt v. Cipallone, 405 U.S. 1032 (1972).

87. 403 U.S. at 442.

88. 383 U.S. 663 (1966).

89. Bullock v. Carter, 405 U.S. 134, 144 (1972).

90. *See* Rosario v. Rockefeller, 410 U.S. 752, 763-71 (1973) (Powell, J., dissenting).

91. Mahan v. Howell, 410 U.S. at 315 (1973).

enormous discrepancies in representation formulae at any level of government, but quite another thing to "become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so."[92] Despite these variations from the Warren Court position, the Burger Court has continued to accept the responsibility of searching for "suspect" procedures and practices which may, in areas other than apportionment, contribute to a denial of the guarantee of equal enjoyment of the electoral franchise.[93]

C. *Defendants' Rights and Law and Order*

In the third of the Warren Court constitutional doctrines—equality of individuals in the criminal process—the Burger Court's behavior has also come under elaborate scrutiny. It was in the area of so-called "law and order," in fact, that the Warren Court's critics had been most vociferous; the ultimate assertions of defendants' fifth and sixth amendment rights stated in *Miranda v. Arizona*[94] and *Gideon v. Wainwright*[95] were expected to be the first points attacked by the Nixon appointees.[96]

The Burger Court's acceptance of the general practice of plea bargaining due to what Justice White called its "mutuality of advantage" to both prosecution and defense[97] alarmed some of the Court watchers. Its widespread use in some stages of the Watergate prosecutions has been criticized and the Agnew *denouement* is another object lesson for those who decry the practice. Aside from these developments of great public and political interest, considerable emphasis has also been given to *Kastigar v. United States*,[98] upholding the constitutionality of the federal immunity statute. The majority in that case found that immunity under the statute put the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the fifth amendment privilege against self-incrimination. The Court reasoned that since

92. *Id.* at 329.

93. *See id.* at 315; Gaffney v. Cummings, 412 U.S. 735 (1973); White v. Regester, 412 U.S. 755 (1973).

94. 384 U.S. 436 (1966).

95. 372 U.S. 335 (1963).

96. The result may have been an exaggerated importance laid upon Chief Justice Burger's subsequent statements in Harris v. New York, 401 U.S. 222 (1971), in which he declared that "the speculative possibility that impermissible police conduct will be encouraged" should not frustrate a legitimate effort to test a defendant's credibility. *Id.* at 225.

97. Brady v. United States, 397 U.S. 742, 752 (1970).

98. 406 U.S. 441 (1972).

Murphy v. Waterfront Commission[99] had barred the use in any federal court of testimony, as well as evidence derived from testimony, when immunity had been granted in another court, even a state tribunal, the *Kastigar* refinement of *Murphy* accordingly should be extended to the states.[100] It is against the background of the *Kastigar* reasoning that Burger's dissent in *Bivens v. Six Unknown Agents*[101] may be better appreciated. In his dissent, Burger addressed the problem of treating various rules of procedure as synonymous with constitutional guarantees. Thus he believed that the exclusionary rule applied to the states through the fourteenth amendment in *Mapp v. Ohio*,[102] was unrealistically being treated as a "monolithic and drastic judicial response to all official violations."[103] Instead, the current majority suggests plea bargaining as an accommodation of the practical need to get to the facts in a criminal prosecution. The Court has assumed the position that society should not be denied effective means of carrying out its business because of the exclusionary rule, a rule that really should penalize the agents of investigation rather than society as a whole.

Until such time as Congress should enact appropriate legislation defining proper and improper actions by government officers, however, the Court has firmly adhered to the enforcement of the basic provisions of the fourth amendment and reaffirmed their extension to the states through the fourteenth.[104] While the sixth amendment right to counsel as presented in *Gideon* has been criticized as tending toward inflexibility, it too has consistently been upheld.[105] With reference to rights of indigents both to counsel and to transcripts for appeal, the rule in *Griffin v. Illinois*,[106] as progressively extended in *Douglas v. California*,[107] has indeed been extended to nonfelony cases by the Burger Court.[108] For the purposes of evaluating the Burger Court activities in light of the earlier Warren Court decisions, the field of defendants' rights can be broken down into its three main constitutional subheadings.

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99. 378 U.S. 52 (1964).

100. *See* Zicarelli v. Investigation Comm'n., 406 U.S. 472 (1972); Sarno v. Crime Comm'n., 406 U.S. 482 (1972).

101. 403 U.S. 388 (1971).

102. 367 U.S. 643 (1961).

103. 403 U.S. at 421 (Burger, C.J., dissenting).

104. Schneckloth v. Bustamonte, 410 U.S. 218 (1973).

105. Argersinger v. Hamlin, 407 U.S. 25 (1972).

106. 351 U.S. 12 (1956).

107. 372 U.S. 353 (1963).

108. Mayer v. City of Chicago, 404 U.S. 189 (1971).

1. Fourth Amendment Safeguards.—Search and seizure restrictions had been a distinctive doctrine of the Warren Court, from *Mapp v. Ohio*[109] in 1961 to *Chimel v. California*[110] in 1969. Electronic surveillance had been so sternly scrutinized under these and related decisions[111] that Congress had felt compelled to redefine its own understanding of the constitutional issue in 1968.[112] In the process of this shifting of standards, the Court had also emerged with a new statement of "prospective overruling" with particular reference to fourth amendment cases.[113] The Burger Court was expected ultimately to re-evaluate all of these concepts, and to the degree that it has done so to date, it may be said that the Court has sought to clarify rather than to enlarge the rules stated by its predecessor.

Thus the decision in *Bivens v. Six Unknown Agents*[114] affirmed the proposition that violation of a defendant's rights gives rise to a cause of action for damages. Burger's dissent in the case was directed not at that proposition but rather at the impropriety of making the damages action a justification for unqualified application of the *Mapp* exclusionary rule.[115] While the Watergate scandal has made courts suspicious of the government's readiness to "bug" in the name of national security,[116] the reasonable use of electronic surveillance under statutory procedures has been upheld,[117] and the "stop and frisk" standard in *Terry v. Ohio*[118] has been enlarged.[119] Searches of apprehended vehicles that were conducted under reasonable circumstances such as routine custody and resulted in the unexpected discovery of evidence were approved by a five-four majority in the 1972 term[120] and by a six-three vote early in the 1973 term.[121]

2. Double Jeopardy, Self-Incrimination and Fifth Amendment Rights.—One of the last major constitutional decisions of the

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109. 367 U.S. 643 (1961).

110. 395 U.S. 752 (1969).

111. Alderman v. United States, 394 U.S. 165 (1969); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

112. *See* Title III of Crime Control Act of 1968, 18 U.S.C. §§ 2510 *et seq.* (1970). For a Burger Court refinement see United States v. White, 401 U.S. 745 (1971).

113. Linkletter v. Walker, 381 U.S. 618 (1965); *see* Robinson v. Neil, 409 U.S. 505 (1973).

114. 403 U.S. 388 (1971).

115. *Id.* at 412 (Burger, C.J., dissenting).

116. United States v. United States Dist. Ct., 407 U.S. 297 (1972).

117. *See* United States v. White, 401 U.S. 745 (1971).

118. 392 U.S. 1 (1968).

119. Adams v. Williams, 407 U.S. 143 (1972).

120. Cady v. Dombrowski, 413 U.S. 433 (1973).

121. Gustafson v. Florida, ___ U.S. ___, 94 S. Ct. 488 (1973).

Warren Court overruled a twenty-two year old opinion[122] and extended the double jeopardy prohibition to the states through the fourteenth amendment.[123] The Court further expanded the reach of the sixth amendment in the same term by declaring that a double jeopardy defense might properly be asserted when a substantially harsher penalty is imposed on retrial or at a new trial.[124] In 1972, the Burger Court restricted the literal reading of the second of these rulings by holding that a second trial resulting in a more severe penalty did not *ipso facto* raise a double jeopardy question.[125] Nevertheless, the Court reaffirmed the basic rule against double jeopardy as applied to the states and gave it retroactive effect in *Ashe v. Swenson*.[126]

Miranda and the use of confessions, however, were the paramount issues upon which the Court watchers focused their attention. When *Harris v. New York*[127] sanctioned the use of illegally obtained evidence to impeach a defendant's testimony, there was much professional outcry proclaiming a retreat from the earlier Warren Court principle forbidding its use.[128] Chief Justice Burger's majority opinion in *Harris* observed that the privilege against self-incrimination "cannot be construed to include the right to commit perjury" upon a defendant's voluntarily taking the stand.[129] In contrast, Justice Brennan's dissent submitted that an accused should not forfeit his right to prevent the use of prior illegally obtained testimony offered in evidence to impeach his credibility.[130] Since *Harris*, the Court has not addressed itself further to the basic *Miranda* principle, although a prior case had pointed the Court in the direction followed by *Harris*.[131] In the 1971 term, the Court in two divided opinions upheld convictions resulting from the admission in evidence of defendants' confessions. The first held that a judicial determination of admissibility obviated the need to submit the admissibility question to the jury,[132] while the second treated the

122. Palko v. Connecticut, 302 U.S. 319 (1937).
123. Benton v. Maryland, 395 U.S. 784 (1969).
124. North Carolina v. Pearce, 395 U.S. 711 (1969).
125. Colten v. Kentucky, 407 U.S. 104 (1972); *see* Illinois v. Somerville, 410 U.S. 458 (1973).
126. 397 U.S. 436 (1970).
127. 401 U.S. 222 (1971).
128. *See* Notes in 39 GEO. WASH. L. REV. 1241 (1971); 85 HARV. L. REV. 44 (1971); 80 YALE L.J. 1198 (1971).
129. 401 U.S. at 225.
130. *Id.* at 228 (Brennan, J., dissenting).
131. McMann v. Richardson, 397 U.S. 759 (1970).
132. Lego v. Twomey, 404 U.S. 477 (1972).

use of the confession in a record as harmless error because of an otherwise "overwhelming" case against the accused.[133] Moreover, the Court has stated that a guilty plea entered as a means of avoiding a potentially harsher penalty following a jury trial[134] is not coerced within the meaning of the basic *Miranda* principle.

The issue, of compelled testimony, which has been raised in the more recent self-incrimination cases, elicited a criterion of sorts from the Burger Court in its November 1973 decision in *Leftkowitz v. Turley*.[135] Justice White, speaking for a nondissenting though nonunanimous Court, concluded that, while no state interest is so compelling as to require forfeiture of fifth amendment rights, the state's interest in requiring testimony may be effectuated by "supplanting" the constitutional right with an immunity guarantee.[136] Thus *Kastigar*, which in 1972 introduced the general principle of validity in reference to a federal immunity statute,[137] is now consonant with the scope of state immunity guarantees.[138]

3. Sixth Amendment Rights.—The fifth amendment *Miranda* principle complemented and capped a series of sixth amendment right-to-counsel cases that began with *Gideon v. Wainwright*,[139] and continued through *Escobedo v. Illinois*,[140] *United States v. Wade*,[141] and *Gilbert v. California*.[142] These decisions made the assistance of counsel a fundamental right in such preliminary stages of a felony prosecution as police interrogation and identification. Extending the sixth amendment right still further to nonfelony cases, the Burger Court in the 1972 case of *Argersinger v. Hamlin*[143] declared that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."[144] On the other hand, the present Court in a five-four decision declined to apply the right to counsel guarantee to identification

133. Milton v. Wainwright, 407 U.S. 371 (1972); *see* Swenson v. Stidham, 409 U.S. 224 (1972).

134. North Carolina v. Alford, 400 U.S. 25 (1970); *see* Santobello v. New York, 404 U.S. 257 (1971).

135. ___ U.S. ___, 94 S. Ct. 316 (1973).

136. *Id.* at ___, 94 S. Ct. at 326.

137. *See* note 98 *supra*.

138. *See* note 135 *supra*.

139. 372 U.S. 335 (1963).

140. 378 U.S. 478 (1964).

141. 388 U.S. 218 (1967).

142. 388 U.S. 263 (1967).

143. 407 U.S. 25 (1972).

144. *Id.* at 37.

procedures antedating an indictment.[145]

Among the other notable sixth amendment decisions of the Burger Court are the jury trial rulings in *Williams v. Florida*,[146] *Apodaca v. Oregon*,[147] and *Johnson v. Louisiana*,[148] which taken together suggest that such historically sacrosanct institutions as the twelve-person jury and unanimous verdict are not essential constitutional rights. While these decisions initially may have been viewed as signalling a halt to further incorporation of the sixth amendment into the fourteenth, the practical effect, strikingly enough, has been the tendency of federal courts to apply the incorporation doctrine to their own jurisdictions—a kind of reverse incorporation *malgré lui*.[149]

A defendant's right to confront witnesses against him, another sixth amendment principle made applicable to the states by the Warren Court,[150] was circumscribed by *Schneble v. Florida*.[151] Under the earlier Warren Court rule, a conviction based upon the testimony of a codefendant who declines to take the stand at trial contravenes the accused's confrontation right.[152] In *Schneble*, where the codefendant's testimony only indirectly added to the evidence supporting conviction, the Court again invoked the harmless error principle. While critics of the "latitudinarianism" of the Warren Court expressed gratification at this decision,[153] the Burger Court's general confirmation of sixth amendment guarantees[154] belies the claims that Warren Court principles in this area of the Bill of Rights are being neutralized.

The present Court's approach to the methodology of its predecessor is further illustrated in its 1972 opinion in *Furman v. Georgia*.[155] In that case, which virtually outlawed the death penalty under the cruel and unusual punishment clause of the eighth amendment, the Court effectively revitalized the incorporation doctrine. The persuasiveness of the majority opinion in the case is

145. Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Ash, 93 S. Ct. 2568 (1973).
146. 399 U.S. 78 (1970).
147. 406 U.S. 404 (1972).
148. 406 U.S. 356 (1972).
149. *See* note 21 *supra*.
150. Bruton v. United States, 391 U.S. 123 (1968).
151. 405 U.S. 427 (1972).
152. Bruton v. United States, 391 U.S. 123 (1968).
153. *See Supreme Court, 1971 Term: In Search of Evolving Doctrine in a Changing Court*, 86 HARV. L. REV. 1 (1972).
154. *See* Moore v. Arizona, ___ U.S. ___, 93 S. Ct. 188 (1973).
155. 408 U.S. 238 (1972).

weakened by the fact only five of the Justices concluded that capital punishment was unconstitutional under specific circumstances. Moreover, each of the nine Justices wrote his own version of the pros and cons. Apart from the result reached the most significant consensus of opinion was that cruel and unusual punishment, admittedly not contemplated by the eighteenth century framers of the eighth amendment to apply to the death penalty, was susceptible of redefinition in the light of changing social convictions. This construction, if not broad in the Warren Court sense, nevertheless reflects the essence of modern constitutional construction. The majority opinion further intimated that convicted persons are entitled to conditions of imprisonment that do not impinge upon other constitutional rights, such as the freedom of worship,[156] and which do not chill, by threats of retaliation, the exercise of rights, such as the prisoner's right to appeal his conviction.[157]

This discussion of the Burger Court's treatment of defendant's rights, then, indicates that while the activist Warren Court critiqued the constitutionality of each step in the criminal justice system solely by the standard of equal protection, the Burger Court, seeking to define practical boundaries for this principle, has instead inquired whether particular acts of state agents jeopardize specific rights of the defendant. In the area of fourth amendment protection against *unreasonable* searches and seizures, for instance, the Court's current quest is to arrive at the most viable tests for reasonableness.[158] Recognizing that the state's interest in finding the truth must be afforded some alternatives,[159] the present Court is not so quick to conclude that anything casting doubt upon the defendant's version of the facts is a possible infringement of his fifth amendment right against self-incrimination. This same pragmatic approach is reflected in the sixth amendment questions concerning the size of juries and the unanimity of verdicts where, as Justice White stated, "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen" does not depend upon a fixed number of jurors for its effectiveness.[160] Essentially the same

156. *See* Cruz v. Beto, 405 U.S. 319 (1972).

157. Chaffin v. Stynchcombe, 412 U.S. 17 (1973). *See also* Webb v. Texas, 409 U.S. 95 (1972) (repeated threats to criminal defendant's only witness of the consequences of perjury denied him the opportunity to present witnesses in his own defense).

158. *See* W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY 1932-1968, ch. 15 (1970).

159. *See* Harris v. New York, 401 U.S. 222 (1971).

160. Williams v. Florida, 399 U.S. 78, 100 (1970).

reasoning also applied to the nonunanimous verdict.[161] Whether this reasoning—a willingness to substitute contemporary practical standards for historic common-law definitions—may be attributed to the Burger Court on the basis of the rationale in these two cases and the death sentence case[162] needs more thorough analysis. Nevertheless, it is an attitude that one would have found more characteristic of the Warren Court. If the attitude persists in the Burger Court, it may prove a significant clue to intellectual continuity rather than contrast.

D. First Amendment Freedoms

A series of major cases in the field of individual freedoms has enabled the Burger Court to articulate its views of the rights accumulating under the several subheadings of the first amendment. In the 1971 Pentagon Papers Case,[163] a landmark of sorts, the Court's *per curiam* opinion offered minimal insight into the social and legal factors that moved the Court to its decision. The most significant comments offered, to the extent that they existed at all, appeared in the six concurring and three dissenting opinions of the individual justices. Although Justices Black and Douglas merely seized upon the opportunity to restate their concept of first amendment absolutes,[164] Justice Brennan found that the government had simply failed to carry the burden of proof explicitly demanded by the constitutional language.[165] More significantly, Justices Stewart and White rejected the claims of executive privilege for all executive documents absent proof of their bearing upon national security[166]—a strikingly prescient opinion—while Justice Marshall, in a similarly reasoned opinion, pointed to the explicit decision of Congress not to vest in the executive the criminal power that he requested.[167] Following his practice of seeking a means of conciliation, Chief Justice Burger's dissent argued that the media and the government should have sought to agree upon the sort of information that is susceptible of classification.[168]

In a subsequent case,[169] Justice Blackmun asserted that when

161. Apodaca v. Oregon, 406 U.S. 404, 410-11 (1971).
162. Furman v. Georgia, 408 U.S. 238 (1972).
163. New York Times Co. v. United States, 403 U.S. 713 (1971).
164. *Id.* at 714, 720.
165. *Id.* at 727.
166. *Id.* at 730-40.
167. *Id.* at 745-46.
168. *Id.* at 750-51.
169. Kleindienst v. Mandel, 408 U.S. 753 (1972).

executive discretion is based upon a "facially legitimate and bona fide reason,"[170] first amendment rights are narrower in scope. The courts, he added, would "neither look behind the exercise of that discretion nor test it by balancing its justification against the First Amendment interests."[171] Blackmun added, however, that "attacking [the] exercise of discretion for which no justification whatever is advanced" was a different question not then before the Court[172]—a comment which takes on new significance in light of the claims of executive privilege advanced during the Watergate affair. The somewhat ambivalent support afforded first amendment principles against government national security claims in the Pentagon Papers case was stated more positively in another 1971 case, *Rosenbloom v. Metromedia, Inc.*[173] There, the broad privilege to comment on public figures enunciated by the Warren Court in *New York Times v. Sullivan*[174] was extended by the Burger Court to include private participants in an event of public interest.[175]

The reopening of the whole matter of obscenity and the first amendment in the spring of 1973 has been one of the most controversial moves made by the Burger Court to date. The Court clearly and unmistakably indicated a commitment to withdraw from the total permissiveness of the Warren years. This action invited a reexamination of virtually all of the major decisions by the Warren Court in this area, from *Roth v. United States*[176] in 1957 to the sequence of cases between 1966 and 1968.[177] During this period, the first amendment protection had progressively covered "ideas having even the slightest redeeming social importance," "appeals to prurient interest," standards of taste based upon a kind of nationwide composite, and finally reached a rule that the right of privacy protects obscene matter on private premises.

Recapitulating in 1971 what it perceived as the original *Roth* principle, the Burger Court stated that that case "squarely placed obscenity and its distribution outside the reach of the First

170. *Id.* at 770.
171. *Id.*
172. *Id.*
173. 403 U.S. 29 (1971).
174. 376 U.S. 254 (1964).
175. 403 U.S. at 44. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).
176. 354 U.S. 476 (1957).
177. Memoirs v. Massachusetts, 383 U.S. 413 (1966) (Fanny Hill Case); Ginzburg v. United States, 383 U.S. 463 (1966); Ginzberg v. New York, 390 U.S. 629 (1968); Stanley v. Georgia, 394 U.S. 557 (1969).

Amendment . . . ."[178] Pursuing a line of reasoning implicit in its restatement of *Roth*, the Court in 1973 emphasized that the doctrine of privacy formulated in *Stanley v. Georgia*[179] was not applicable to a commercial public theater,[180] and in a companion case declared that a local community standard was the only feasible means of determining what in fact was obscene.[181] Authoring the majority opinion in *Miller v. California*,[182] the Chief Justice clearly indicated that the Court was abandoning the "Fanny Hill" standard which "called on the prosecution to prove a negative—that the material was '*utterly* without redeeming social value.' "[183] He then added that while

> fundamental First Amendment limitations on the power of the states do not vary from community to community, this does not mean that there are or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'[184]

In the religion clause cases arising under the first amendment, the Burger Court continued the general establishment and free exercise doctrines of the Warren Court. Although tax exemptions for properties used solely for religious purposes were upheld in 1970,[185] the Court in 1971 invalidated a Rhode Island statute providing for salary supplements to the faculties of church-related schools because the program required too much state participation.[186] In construing the Higher Education Facilities Act of 1963,[187] the Court found no violation of the establishment clause in federal aid to church-related colleges having broad interdenominational student bodies pursuing secular studies.[188] In 1973, however, New York and Pennsylvania plans to reimburse parents for tuition paid to sectarian schools were held unconstitutional on establishment clause grounds.[189] In the area of free exercise of religion, the most significant case, *Wisconsin v. Yoder*,[190] upheld the right of high school age

178. United States v. Reidel, 402 U.S. 351, 356 (1971).
179. 394 U.S. 557 (1969).
180. Paris Adult Theatre No. 1 v. Slaton, 413 U.S. 49 (1973).
181. Miller v. California, 413 U.S. 15 (1973).
182. *Id.*
183. *Id.* at 22.
184. *Id.* at 30.
185. Walz v. Tax Comm'n, 397 U.S. 664 (1970).
186. Lemon v. Kurtzman, 403 U.S. 602 (1971).
187. 20 U.S.C. §§ 711-21 (1970).
188. Tilton v. Richardson, 403 U.S. 672 (1971).
189. Levitt v. Committee for Pub. Ed. & Religious Liberty, 413 U.S. 472 (1973); *see* Sloan v. Lemon, 413 U.S. 825 (1973).
190. 406 U.S. 205 (1972).

children of a particular sect to be exempt from compulsory school attendance that would conflict directly with their religious tenets.

The rights of assembly and association and the freedom of conscience as qualified by loyalty oath requirements, once burning issues of the early Warren years, left some lingering embers in the period from 1969 to 1973. In *Connell v. Higginbotham*,[191] the Court distinguished a loyalty oath that merely affirmed support of state and national constitutions from one that improperly required a statement of political belief upon which summary dismissal could be based. A slightly different wording of the oath, which required affirmance of opposition to violent overthrow of government, was upheld the following year as being essentially a specific definition of the loyalty affirmation in the basic oath.[192] The bar admission cases of the early Warren years were also restated early in the Burger Court tenure. While it continued to require the state to demonstrate an overriding public interest supporting political affiliation disclosures by candidates for admission to the bar,[193] the Court in *Law Students Research Council, Inc. v. Wadmond*[194] rejected the argument that such questions on bar examination applications had a chilling effect on the free exercise of first amendment rights.

Other than a Burger Court tendency toward stricter definition of limits appearing in the freedom of assembly cases,[195] the greatest degree of continuity discernible in a comparison of the Warren and Burger Courts lies in the freedom of religion cases.[196] A definite dichotomy has developed in the freedom of expression cases,[197] however, with the Pentagon Papers case[198] suggesting a somewhat fortuitious confirmation of first amendment guarantees, and the 1973 obscenity cases[199] more clearly signalling a withdrawal to an early post-*Roth* position. It may be useful to note that the incorporation of the religious freedoms into the fourteenth amendment, as supported by the present Court, may be traced as far back as the late 1930's and early 1940's,[200] and the incorporation of the basic principle of freedom of the press as far back as the mid-1920's.[201] The

191. 403 U.S. 207 (1971).
192. Cole v. Richardson, 405 U.S. 676 (1972).
193. Baird v. State Bar, 401 U.S. 1 (1971). *See also In re* Stolar, 401 U.S. 23 (1971).
194. 401 U.S. 154 (1971).
195. *See* notes 185-90 *supra*.
196. *See* note 193 *supra*.
197. *See* note 175 *supra*.
198. New York Times Co. v. United States, 403 U.S. 713 (1971).
199. *See* notes 180-84 *supra*.
200. *See* Lovell v. City of Griffin, 303 U.S. 444 (1938).
201. *See* Gitlow v. New York, 268 U.S. 652 (1925).

freedom of assembly and association cases, which are now being circumscribed by the Burger Court, and the new construction of obscenity relate to constitutional propositions identified directly with the Warren years.

E. Watergate Envoi

It would be a manifest distortion of the Burger Court history to confine even this limited study to a comparison and contrast with the Warren Court. New vistas of constitutional decision making have confronted the Court since October 1969: environmental issues have reached a stage of final review;[202] the 1973 abortion decisions[203] have precipitated a furor reminiscent of anti-Warren diatribes on other subjects; and some basic opinions in the area of sex discrimination have been handed down.[204] As suggested at the outset, however, the congeries of constitutional issues for which "Watergate" became a catch phrase have sounded the dominant note for the present Court.

There currently appear to be at least two unrelated cases that may contribute guidelines to a prospective judicial review of Watergate-related issues. In the first of these cases, *United States v. United States District Court*,[205] a nondissenting Supreme Court rejected a government claim that national security justified warrantless "bugging" of domestic dissidents. Declaring that Title III of the 1968 Crime Control Act[206] neither added to nor detracted from the constitutional quantum of executive power in this area, the Court, speaking through Justice Powell, noted that "Congress simply left presidential powers where it found them" and that those powers did not impinge upon first or fourth amendment rights.[207] Powell observed that "the danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security,' "[208] and added that "[i]f the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance."[209]

202. *See* United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).
203. *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).
204. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).
205. 407 U.S. 297 (1972).
206. 18 U.S.C. §§ 2510-20 (1970).
207. 407 U.S. at 303.
208. *Id.* at 314, 320.
209. *Id.* at 310, 321.

In the second case, *Environmental Protection Agency v. Mink*,[210] the Court found without merit a claim that executive prerogative sufficed to invoke the statutory exemptions under the Freedom of Information Act of 1966.[211] Commenting in the course of its opinion that no executive officer should be the sole judge of the scope of his own privilege, the Court adopted a rule stated even more affirmatively in another case, significantly enough, by the Court of Appeals of the District of Columbia.[212]

The basic constitutional question raised in the 1973 phase of Watergate concerned the nature and scope of executive privilege itself. Owing primarily to the absence of more definitive authority, *United States v. Burr*[213] was cited repeatedly as the leading case on the liability of the executive to judicial process.[214] The District of Columbia courts did not take refuge in Chief Justice Taney's escape doctrine of "political questions,"[215] but addressed themselves to the issues of the obligation of the executive to produce evidence and the power of the judiciary to compel such production.

Doubtless, the silence of the courts on the doctrine of executive privilege or prerogative can be explained in part by the absence of any reference to that subject in the Constitution itself. As noted elsewhere,[216] the common-law distinctions between the two concepts have tended to be blurred in American usage. The term privilege, as used in the relevant clause of the Constitution,[217] means simply an exemption from legal process under limited conditions. Prerogative, which has been defined only in English constitutional law, is an inherent power of the sovereign—with which, in this instance, the executive branch may be equated—to act free of legislative or judicial restraint.[218] In any event, the definition that the courts ultimately may give to either concept will likely reflect the American historical and political experience.

In the area of foreign relations, the courts have unequivocally recognized the freedom of the executive to act with minimal checks or balances on its discretion.[219] In the domestic area, however, the

210. 410 U.S. 73 (1973).
211. 5 U.S.C. § 552 (1970).
212. Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971).
213. 25 F. Cas. 187 (No. 14, 694) (1807) (C.C.D. Va.).
214. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
215. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).
216. *See* W. SWINDLER, THE MODERN INTERPRETATION 134 (1974).
217. U.S. CONST., Art. I, § 6.
218. *See* H. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW cb. 13 (5th ed., 1973).
219. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

now renowned Watergate tapes subpoenas found the question virtually one of first impression. The district court concluded that it was within the judicial power to compel the executive branch to produce evidence relevant to the proceedings of an investigatory grand jury.[220] In sustaining this holding, the court of appeals declared that "a limited requirement" that the evidence be produced "is required by law, and by the rule that even the Chief Executive is subject to the mandate of the law where he has no valid claim to privilege."[221]

In a related case, however, the district court found that it had no jurisdiction to enforce a subpoena issued by the Senate Select Committee on Presidential Campaign Activities.[222] Congress thereupon enacted a bill which vested such jurisdiction in the district court and which became law without Presidential signature.[223] By the end of 1973, the executive branch had complied with the appellate court's ruling in the case of the grand jury subpoena and had elected not to perfect an appeal to the Supreme Court. Moreover, the Select Committee, which did not appeal the district court dismissal of its subpoena petition, issued new subpoenas for a great number of executive documents on the strength of the new jurisdictional statute.[224]

The unresolved issues of Watergate—with their emphasis upon impeachment and the question of impeachable offenses[225]—have reached no definitive stage at the time of this writing. As suggested early in this study, however, the one indisputable fact is that the constitutional problems generated by Watergate will become an historical landmark of the Supreme Court record of the 1970's.

III. The Chief Justice and Modern Judicial Process

One of the more conspicuous dimensions of the Burger Chief Justiceship has been his active involvement in judicial reform at both federal and state levels.[226] Shortly after taking office in 1969, he assumed leadership of a movement to organize and finance a new service agency, the Institute for Court Management, which initiated a program of selecting and training classes of managerial specialists

220. *In re* Grand Jury Subpoena, 360 F. Supp. 1 (D.D.C. 1973).
221. Nixon v. Sirica, 42 U.S.L.W. 2212 (Sept. 19, 1973).
222. Application of Select Comm., 361 F. Supp. 1282 (1973).
223. Act of Dec. 3, 1973, 87 Stat. 736 (93rd Cong., 1st Sess.).
224. 32 Cong. Quarterly Weekly Rep. 3204 (1973).
225. *See* note 5 *supra*.
226. *See* Swindler, *supra* note 28, at 256.

to handle much of the time-consuming paper work in the federal court system.[227] In 1970, the Chief Justice accepted the invitation of the American Bar Association to deliver an annual "State of the Judiciary" address, and at the A.B.A. convention that year enumerated specific recommendations, including the establishment of state-federal judicial councils,[228] which have since been organized in a majority of states. At the National Conference on the Judiciary held at Williamsburg, Virginia, in March 1971, he delivered the keynote address to an unprecedented convocation of judges, attorneys general, state crime commission agencies, and bar association representatives from every state.[229] Following his second A.B.A. address and participation in a transatlantic conference of British and American bar leaders in London,[230] he returned to Williamsburg in December 1971 to address the first National Conference on Corrections.[231]

The much-debated Freund Committee report[232] on ways and means of alleviating the burgeoning work load of the Supreme Court was the product of a study inspired by the Chief Justice. Chief Justice Burger can also witness with gratification the congressional establishment in 1972 of offices of court administration for each of the federal judicial circuits.[233] Because of the sensitivity of state legal interests, Burger remained in the background during the creation of the National Center for State Courts, a service agency comparable to the Federal Judicial Center in the national court system. Nonetheless, the widespread knowledge of the Chief Justice's interest in the proposed National Center exerted substantial influence over those considering the plan.[234]

The Chief Justice's extraordinary degree of initiative is attributable to his frequently expressed conviction that the judicial machinery of the United States, federal and state, has been increasingly jeopardized by a critical work load. That he has not been alone in this view was evidenced in 1968 by an eloquent call for radical reform made by John P. Frank in lectures at the dedication of the Earl Warren Legal Center at the University of California.[235] More-

227. *See* Burger, *Court Administrators—Where Will We Find Them?*, 55 J. AM. JUD. SOC'Y. 108 (1969).

228. *See* Burger, *State of the Judiciary*, 56 A.B.A.J. 929 (1970).

229. Burger, *Deferred Maintenance*, in JUSTICE IN THE STATES (Swindler ed., 1971).

230. *See* Burger, State of the Judiciary, 57 A.B.A.J. 855 (1971).

231. The proceedings are published under the title, WE HOLD THESE TRUTHS (1972).

232. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

233. 85 Stat. 1907.

234. *See* note 243 *infra*.

over, two University of Chicago authors the following year issued a provocatively-titled commentary on the need for modernization of criminal justice.[236] The problem of providing post-conviction remedies without congesting the federal court system, which was reviewed for the Federal Judicial Center in 1970,[237] and the exhaustive report on drug traffic and addiction[238] sponsored in 1971 by the American Bar Foundation, are more recent examples of studies undertaken with a view to reform.

The Chief Justice seized upon both law and professional concern for decisive action to urge a general program of reform. He informed the National Association of Attorneys General that if the states were to regain jurisdiction over their own criminal justice systems, they must cure the procedural defects in their systems of post-conviction review and search more assiduously for better post-conviction treatment than incarceration without rehabilitation.[239] He called for an examination of alternatives to judicial disposition of cases involving routine automobile injury claims, such as professionally supervised adjustment procedures without recourse to courts.[240] In addition to reform proposals, Burger has urged the bench and bar to take greater advantage of existing technological advances in the areas of electronic data retrieval, closed-circuit television, and computerized and uniform records on the status of docketed cases.[241]

While these activities have not delighted all observers,[242] it is obvious that if both state and federal courts are in the critical situation which so many observers discern, a concerted program of leadership that can come only from the Chief Justice of the United States is needed.[243] The reform and modernization of state judicial processes, as Burger has repeatedly emphasized, is the most effective means of providing relief for the federal judicial process.[244] The

235. J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM (1969).

236. N. MORRIS & C. HAWKINS, THE HONEST POLITICAN'S GUIDE TO CRIME CONTROL (1970).

237. *See State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 149 (1970).

238. *See* R. NIMMER, 2,000,000 UNNECESSARY ARRESTS (1972).

239. Burger, *State Criminal Cases in Federal Courts: Some Proposals for Self-Help and Mutual Aid*. Remarks to the National Ass'n of Attorneys General, Washington, D.C., Feb. 6, 1970.

240. *See* note 224 *supra*.

241. *Id.* at 929.

242. *See* notes 22-23 *supra*.

243. *See* Swindler, *Fifty-One Chief Justices*, 60 KY. L.J. 851 (1972).

244. *See* note 227 *supra*.

first step, he points out, is to utilize devices already proven effective in operation, such as a unified court system achieved by the federal judiciary in 1922;[245] a professional administrative service to relieve judges of nonjudicial work;[246] and a system for discipline or removal of ineffective jurists where an impeachment proceeding is too harsh or cumbersome.[247]

Thus the present Chief Justice has pushed ahead from the pioneering efforts of Taft and Hughes,[248] has continued the work of Warren in converting the Judicial Conference of the United States into a policy-reviewing agency,[249] and has broken much new ground in an effort to expedite the efforts to modernize both the state and federal judiciary in the 1970's. The test, of course, will be the degree to which these goals are are attained in the remainder of the decade; but in initiating the effort itself, Chief Justice Burger has already written a new chapter in judicial administration that may have great importance for the whole American system of justice.

IV. Conclusion

This article has attempted to discuss and evaluate the effect Warren Burger's leadership as Chief Justice has had thus far upon the course taken by the Supreme Court in constitutional jurisprudence and upon the judicial institution generally. In the major constitutional areas pushed vigorously forward by the activist Court of the 1960's, the Burger Court has demonstrated in its first four terms a disposition either to advance more deliberately or to march in place. The most conspicuous instance of retrenchment from the later Warren Court doctrines has been in the matter of obscenity. In race relations, equitable representation, and defendants' rights, the emphasis of the Burger Court, for the most part, has been upon establishing more definite guidelines to the generalities of the Warren Court precedents. The Warren Court had attempted a philosophical balance between the Black-Douglas doctrine of absolutes and the Harlan-Stewart doctrine of absolutes enjoyed within established limits defined by the federal structure and the separation of judicial and legislative functions. It seems clear beyond cavil that the Burger Court generally has pursued the Harlan-Stewart con-

245. 28 U.S.C. §§ 291, 321 (1970).

246. *See* note 31 *supra*.

247. *See, e.g.*, Daynes, The Commission Plan for the Discipline and Retirement of Judges (Publication of American Judicature Society, 1968).

248. *See* notes 25-31 *supra*.

249. *See* note 32 *supra*.

cept. This philosophy has appeared repeatedly in decisions concerning state enforcement of civil rights,[250] the slightly flexible application of the one man-one vote standard,[251] and the validation of criminal immunity statutes.[252]

As the ranking judicial officer of the country, the Chief Justice has been both an outspoken critic of the deficiencies in the present system of justice and an advocate for improvements within the existing structure. Subjecting Burger's performance in both roles to a short-term evaluation, it appears that the present Chief Justice compares well with Taft, Hughes, and Warren, his Twentieth Century predecessors. History's ultimate opinion of Warren Burger, however, will depend to a great extent upon his ability to guide the Court through the treacherous political waters of the era while maintaining the integrity and independence so essential to the judiciary.

250. *See* notes 41-55 *supra* and accompanying text.
251. *See* notes 63-81 *supra* and accompanying text.
252. *See* notes 97-103 *supra* and accompanying text.