A Comment on the Burger Court and "Judicial Activism"

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A COMMENT ON THE BURGER COURT AND "JUDICIAL ACTIVISM"

BY ROBERT F. NAGEL

Four members of the present Supreme Court, including the Chief Justice, were nominated in reaction to the belief that "some of our judges have gone too far in assuming unto themselves a mandate . . . to put their social and economic ideas into their decisions."1 It is perplexing, therefore, that heavy reliance on the judiciary for social and political decision-making has not moderated in the post-Warren Court years. Indeed, dependence on judicial power has become more pervasive and more routine in recent years.2 Judges are widely engaged in reforming schools, mental hospitals, prisons, adoption laws, and, now, even the census.3 They decide that homosexual

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1. While campaigning in 1968, President Nixon said, "I think some of our judges have gone too far in assuming unto themselves a mandate . . . to put their social and economic ideas into their decisions . . . [and he promised to appoint men] who will interpret the Constitution strictly and fairly and objectively." N.Y. Times, May 22, 1969, at 36, col. 1. When Chief Justice Burger was nominated, the New York Times noted that "off the bench, [Burger] has spoken against the liberal activist trend of the Warren Court." Id. at 1, col. 8. Six days before President Nixon nominated Justice Blackmun, the President said that his nominee must be a "strict constructionist," which he defined as a man who interprets the Constitution cautiously and narrowly. N.Y. Times, April 15, 1970, at 34, col. 3. When the President nominated Judge Blackmun, Mr. Nixon's press secretary said that the President "considers Judge Blackmun to be a strict constructionist." Id. at 1, col. 1. President Nixon announced the nominations of Justices Powell and Rehnquist in an address to a nationwide television and radio audience. In that address, Mr. Nixon, in describing his criteria for selecting nominees, said that a nominee "should not twist or bend the Constitution in order to perpetuate his personal, political and social views." N.Y. Times, Oct. 22, 1971, at 24, col. 3. Mr. Nixon labeled his nominees "conservatives," but he qualified the term: "But [they are "conservatives"] only in a judicial, not in a political sense." Id. at col. 4.

2. See generally Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949 (1978); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). Even those who claim to see similarities between traditional judicial functions and the modern functions of federal courts do not claim that similar governmental duties have long been assumed by the federal courts. See, e.g., Eisenberg & Yeazel, The Ordinary and Extra-ordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980).

3. For cases relating to schools, mental hospitals, and prisons, see Mishkin and Chayes, supra note 2. As to the census, see, e.g., Young v. Klutznick, 49 U.S.L.W. 2235 (E.D. Mich. 1980). As to adoption, see, e.g., Caban v. Mohammed, 441 U.S. 380 (1979).
partners must be permitted to attend high school dances, the kind of treatment that is appropriate for mental patients, where students should attend school even when the effect is to increase racial segregation, that every fifteen prisoners must have one foot of urinal trough, and so on. Like sleepwalkers following some internal vision, lower federal judges and litigants continue to use judicial power expansively.

One possible explanation for the growth and consolidation of judicial power is that the changes in the membership of the Court simply did not achieve the announced purpose, that the Supreme Court remains committed to judicial activism. And, at least on occasion,

8. I use the terms "activism" and "restraint" somewhat reluctantly. Professor Gunther once referred to "one more dreary round of vacuous if not mischievous talk about self-restraint and activism . . . ." The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964) (distinguishing A. BICKEL, THE LEAST DANGEROUS BRANCH (1962)). Although often used to hide imprecision, the term "judicial activism" does capture some quality that is — judging from its persistence — important in describing reliance on judicial decision-making. In this comment, I use "judicial activism" to indicate a mode of constitutional interpretation that tends to lead to discretionary, detailed, and pervasive regulation by the judiciary. This is no doubt different from some other uses of the phrase. "Activism" is sometimes used to suggest political liberalism. Cf. J. ELY, DEMOCRACY AND DISTRUST 1 (1980). My use is different since the "liberal" position — as, for example, on the reach of Congress's power under the Commerce Clause — might call for reducing dependence on judicial decision-making. Nor do I mean "noninterpretivism," as Ely and others use the phrase, for it is possible to import into the Constitution a concept (such as states' rights) that also reduces dependence on federal judicial power. Some have used "activism" to describe the "vigorous" definition of individual rights. But, if articulated and justified clearly enough to have some principled limit, such a use of judicial power would not fall within my meaning. See C. BLACK, THE PEOPLE AND THE COURT — JUDICIAL REVIEW IN A DEMOCRACY 100 (1960). Others use the word to describe "aggressive" policy-making by the courts. My use is not limited in this way since part of my point is that caution itself can increase dependence on judicial policy-making. See H. ABRAHAM, THE JUDICIARY — THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 145-46 (3d ed. 1973). I focus partly on whether the decision rests on some convincing authoritative norm but also on whether the decision itself is capable of generating some norm that can bind in future cases. See Greenawalt, Discretion and Judicial Decisions: The Elusive Quest for the Fetters that Bind Judges, 75 COLUM. L. REV. 359 (1975). My use of the phrase accords with general understanding in that it focuses on the imaginative or unfettered quality of activist decisions. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1-2 (1979 Supplement). It also emphasizes the connection between such decisions and the relative centrality of judicial decision-making in our political system.
the Court has been astonishingly bold in its use of power. But a substantial number of all the Justices have expressed doubts, if not antipathy, about forms of judicial activism, and these expressions cannot be dismissed as hypocrisy. In fact, on its whole record, the Burger Court has attained a general reputation for being at least

9. This boldness has been directly evident in some constitutional interpretations; see, e.g., Elrod v. Burns, 427 U.S. 347 (1976); National League of Cities v. Usery, 426 U.S. 833 (1973). It is also evident across a broad range of issues where the Court has demonstrated strong partiality to judicial decision-making. Even while minimizing the importance within prisons of such important constitutional rights as free speech, the Court has created a new right for prisoners to have "access" to the courts — a rather plain statement that it is judicial supervision, not constitutional content, that is primary. Bounds v. Smith, 430 U.S. 817 (1977). (For a more general and similar argument, see Mishkin, supra note 2). The Court has held that judges, unlike almost all state and federal executive officers, are immune from civil rights liability even for intentional or malicious deprivation of citizens' constitutional rights. Stump v. Sparkman, 435 U.S. 349 (1978). See also Butz v. Economy, 438 U.S. 478 (1978); O'Connor v. Donaldson, 422 U.S. 563 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). In effect, the Court held that the uninhibited exercise of the judicial function was so important that in this important respect judges must be above the fundamental law of the land. See Nagel, Judicial Immunity and Sovereignty, 6 HASTINGS CONST. L. Q. 237 (1979). While construing the Civil Rights Act narrowly to exclude civil liability for judges, the Court greatly expanded its scope when the effect was to subject a greater range of officials or of behavior to judicial supervision. For example, § 1983 was extended to include municipalities in Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978); as defendants, they are without even qualified immunity. Owen v. City of Independence, Mo., 100 S. Ct. 1398 (1980), reh. denied, 100 S. Ct. 2979 (1980). The reach of § 1983 was extended to include violations of federal statutory rights in Maine v. Thiboutot, 100 S. Ct. 2502 (1980). These cases cannot be explained merely as judicial deference to the will of Congress. The historical support for these statutory interpretations is questionable. Maine v. Thiboutot, 100 S. Ct. 2502, 2507-21 (1980) (Powell, J., dissenting); Owen v. City of Independence, Mo., 100 S. Ct. 1398, 1428 (1980) (Powell, J., dissenting); Monell v. New York City Dep't of Social Services, 436 U.S. 658, 719-24 (1978) (Rehnquist, J., dissenting). Furthermore, the Court has also expanded its authority to impose monetary remedies for civil rights violations even in the absence of any statutory authorization at all. See, e.g., Davis v. Passman, 442 U.S. 228 (1979); cf. Roadway Exp., Inc. v. Piper, 100 S. Ct. 2455 (1980) (inherent power of courts to assess attorneys' fees against opposing counsel). The inference is inescapable that in these cases and in others the Court perceived the need for broad judicial authority over the conduct of other governmental officials. E.g., U.S. v. Nixon, 418 U.S. 683, 704 (1974) (asserting that the power to construe the Constitution cannot be shared with executive branch). Such evidence, however, does not fully explain the growth of dependence on judicial decision-making under the Burger Court. It does indicate, unsurprisingly, that the Supreme Court is inclined to favor judicial decision-making and to view its own function as central in the constitutional system. But a vital, even central, role for the judiciary is not inconsistent with restraint and circumspection in the use of power.

moderately conservative in its use of power. Moreover, even when 
the Court sets itself unequivocally against the expansive use of judi-
cial power in a particular area, litigants calmly return to the courts 
and often prevail. For example, in *Bell v. Wolfish*, the Supreme 
Court stated emphatically and repeatedly that the administration of 
jails was for jailers not judges. Even body cavity searches were held 
to be a matter within the discretion of jail administrators. Almost 
immediately after *Bell*, a district court struck down restrictions on 
visitations to jail inmates by their children. The lower court did 
nod to the Supreme Court — "The ambit of the administrators' dis-
cretion . . . may be wide" — but then walked on insistently through 
the dark — "but it is not unbounded . . . . The final judgment as to 
what is reasonable or not lies here." 

The extent to which the judiciary continues to be used to solve 
all manner of social and political problems is, in short, surprising 
and must cause some consternation among the Justices themselves. No 
doubt there are many explanations. Perhaps, for administrative 
or political reasons, the Supreme Court has lost control of the lower 
courts. Perhaps, the evident morality in many judicial reforms — 
the desegregation of schools, the reforms of prisons — legitimizes 
and encourages the use of judicial power. It may be that reliance on 
the judiciary is simply habitual after centuries of traditionally high 
American regard for the judicial process and after years of Warren 
Court activism. Possibly, the great issues raised by the Warren 

13. Id. at 559-60.
15. Id. at 301.
16. E.g., Estes v. Metropolitan Branches of Dallas NAACP, 100 S. Ct. 716, 720-21 (1980) (Powell, J., dissenting) ("It is puzzling that many trial and appellate courts continue to misapply *Green* and largely to ignore more recent statements on this issue." Id.).
17. That is, control by the Supreme Court might have been reduced by the size of the workload or by the number of appointments of lower court judges by President Carter.
Court linger in a way that makes judicial restraint impossible. Or it may be that the intellectual assumptions underlying a restrained role were devastated by legal realism.

But here I wish to examine how certain widely-noted characteristics of constitutional adjudication under the Burger Court have, when taken in combination, the natural consequence of encouraging dependence on judicial decision-making. These characteristics, which I will illustrate in later sections, are: first, a tendency to be cautious and "traditional" in style; and, second, a tendency to be indecisive, confused, and inconsistent in the use of doctrine. In short, my theme is that, paradoxically, some of the characteristics of the Burger Court that are most responsible for its conservative image and for its poor professional reputation have the effect of encouraging pervasive regulation by the judiciary and ever-increasing dependence on the courts.

**SOME CONSEQUENCES OF CAUTION**

The Burger Court's reputation for restraint is based partly on some conservative civil rights decisions and partly on a series of decisions that fortified procedural obstacles to bringing suit in federal court.

It is also based on the Court's relatively cautious and "traditional" style of opinion-writing. The Court often produces narrow decisions that are closely confined by elaborate attention to the facts of the case, and its "technical" explanations often emphasize such matters as burden of proof or the procedural posture of the

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Caution and restraint in the use of power by the Supreme Court can, of course, liberate lower federal courts to use power with more abandon. For example, in contrast to the Warren Court, which was often inclined to exercise moral leadership by the "landmark" decision, the Burger Court is sometimes content to allow the law to develop from below. Some eighteen states now are subject to lower court orders dramatically restructuring their prisons. These orders are based on a novel interpretation of the eighth amendment to the effect that an institution as a whole can violate the prohibition against cruel and unusual punishment. Reform has been allowed to proceed across the country without any authoritative ruling by the Supreme Court on the correctness of this interpretation or of the accompanying remedial orders.

More importantly, the Burger Court's cautious approach may have had the effect of discouraging, or postponing, the political checks that can confine judicial power. A Supreme Court that is openly aggressive in its use of power provokes responses from the public or from other institutions of government. The Warren Court, of course, elicited rumblings about impeachment and various propos-
als to limit the jurisdiction of the federal courts. Such political responses, whether or not carried to completion, can create some sense of a need for limits even in a court that accepts activism in principle. The Burger Court decisions, however, may have had the effect of deflating some potential opposition by convincing other institutions that the Court is at least reasonably committed to the restrained use of power. The Court’s desegregation decisions are worth examining because they suggest how the style and substance of judicial restraint can give way, after disarming potential opposition, to relatively unrestrained judicial power.

Until 1974, the Burger Court had generally continued the War-
ren Court's support for broad lower court authority to fashion desegregation remedies.\(^7\) Between 1974 and 1977, Congress actively considered a large number of anti-busing measures — by one count, twenty-five bills and twenty-nine constitutional amendments in 1975 alone.\(^8\) During this same period the Court's decisions demonstrated


\(^28\) Kirp, School Desegregation and the Limits of Legalism, 47 The Public Interest 101, 117 (1977). On August 7, 1974, Congress passed amendments to the Elementary and Secondary Education Act of 1965, Education Amendments Act of 1974, Pub. L. 93-380, 88 Stat. 484 (amending 20 U.S.C. §§ 236-41). The busing amendments of the bill provided the most controversy during the Senate-House conference. The House had adopted an amendment which flatly prohibited the busing of any child beyond the school closest to his home and which allowed all previous court busing orders to be reopened and brought into compliance with that prohibition. When it sent the bill to conference, and twice during the conference, the House instructed its conferees to insist on the House busing provisions. Furthermore, President Nixon had threatened to veto a bill without the House busing restriction. The Senate, however, had rejected an amendment identical to the House provision by only one vote. The Senate passed an amendment declaring that no child should be bused beyond the school closest to his home, but allowed courts to order more extensive busing if it were required to guarantee a student's civil rights. The House-Senate conferees finally settled on provisions similar to the Senate version. See 1974 Cong. Q. Almanac 441.

The other major legislative activity involving school busing in 1974 occurred when Congress passed the bill making fiscal year 1975 appropriations for the Department of Labor and for the Department of Health, Education and Welfare. Appropriations — Labor and Health, Education and Welfare Departments, Pub. L. No. 93-517, 88 Stat. 1634 (1974). On November 26, 1974, Congress passed the bill, which contained provisions prohibiting the expenditure of federal funds for the purpose of busing students to achieve racial desegregation. The amendments prohibited the use of, or the withholding of, federal funds to force any school district already desegregated (1) to bus school children; (2) to abolish schools; or (3) to require students to attend any school against the wishes of their parents. See 1974 Cong. Q. Almanac 97.

On September 23, 1975, the House adopted an anti-busing amendment for the Energy Conservation and Oil Policy Act of 1975, Pub. L. 94-163, 88 Stat. 871. The amendment was phrased in terms of conserving fuel by preventing unnecessary transportation; and it prohibited the use of any gasoline or diesel-powered vehicle to transport children, other than one's own, to a public school farther from his home than the appropriate grade school within his school district. In conference, however, the anti-busing amendment was deleted from the final version of the bill. See 1975 Cong. Q. Almanac 239.

Also in 1975, Senator Robert Byrd of West Virginia introduced a new anti-busing amendment to the Labor and Health, Education and Welfare Departments appropriations bill (H.R. 8069, 94th Cong., 1st Sess. (1975)) which barred HEW from ordering that any student be bused beyond his neighborhood school. The amendment, which passed both houses, is significant because its passage marked the first time that the Senate joined the House and the President in opposing busing. Id. at 641.

Further major activity over the issue of busing occurred before Congress passed the second supplemental appropriations bill for fiscal year 1975 (Second Supplemental Appropriations Act of 1975, Pub. L. No. 94-32, 89 Stat. 173). By a voice vote, the House passed an amendment to prohibit any funds in the bill from being used either to transfer teachers or to bus school children against the wishes of the student's parents, as a condition for receiving federal funds, or to overcome racial imbalance or carry out a desegregation plan. Id. at 771.
substantial concern about the implications of applying nationwide the judicial remedies developed during the desegregation struggle in the south. In *Milliken v. Bradley*, the Court disapproved an interdistrict busing remedy despite the lower court's finding that omitting the suburbs from the desegregation plan would "lead directly to a single segregated school district [in Detroit] overwhelmingly black in all of its schools." This aspect of the *Milliken* opinion raised the radical prospect that federal judicial power would be limited — out of concern for local control over schools — to something less than might be necessary to redress constitutional violations fully.

Later opinions, although always ambiguous, buttressed this possibility. In *Pasadena v. Spangler*, the Court held that judicial power over a school district ended when appropriate racial balance was achieved, even if the district was in danger of re-segregating.

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30. Id. at 743.
31. Id. But see id. at 744-45.
Again, the Court relied on the need not to displace local decision-makers unnecessarily. In a 1977 case, *Dayton Board of Education v. Brinkman,* the Court held that a court could not order a system-wide desegregation remedy within an urban boundary unless it found that the incremental segregative effects of the official misconduct were system-wide. The Court reasoned that allowing a lower court to control vital education programs merely because such control might be helpful in redressing a constitutional violation could improperly impair the authority of state and local governments. The Court acknowledged the traditional power of courts to redress constitutional violations by arguing that the threat to local authority would be kept within acceptable limits if judicial remedies corrected only the segregation actually caused by the official segregative acts. Thus the Court seized on the need to prove causality—the amount of segregation caused by the constitutional violation—as the effective limit on the authority of lower courts to control local education.

Although its desegregation decisions did not invariably restrain the power of lower courts, the Court’s concern through 1977 was unmistakable: federal judicial power should be limited by some concern for the authority of state and local governments. From 1977, the year of the last of the restrictive Burger Court decisions, until the 1980 presidential election, Congress presented a much less immediate threat to judicial power over desegregation. The number of anti-busing bills introduced dropped sharply and none passed.
course, it is difficult to know the precise extent to which the Court's restrictive decisions contributed to this decline in legislative activity. It is suggestive that *Milliken v. Bradley* was apparently a "key factor" in defeating the anti-busing position on at least one early bill.\(^3\) Aside from the effect of the decisions on specific legislative outcomes, it does not seem unlikely that the restrained position of the Supreme Court might have been indirectly influential by reducing the intensity or effectiveness of public opposition to busing.\(^4\)

Whatever the extent of judicial influence, at least one major congressional opponent of busing had conceded by 1979 that the issue was dead until after the presidential election.\(^4\) In that same year, the Supreme Court broke a lengthy silence on desegregation by issuing two important desegregation opinions. Both substantially undercut the restrictions that the Court had earlier announced in its effort to protect local governments from overreaching by federal district courts. In a second *Dayton* decision\(^5\) and in *Columbus Board*

amendment to the Department of Education Organization Act, Pub. L. 96-88, 93 Stat. 688 (1979). The amendment (H.R.J. Res. 129, 96th Cong., 1st Sess. (1979)) would have barred the department from requiring a school district, as a condition of receiving federal funds, to bus students to achieve racial balance. *Id.* at 471. On June 11, 1979 the provision was adopted by the House after a 227-135 vote, but was dropped in conference. *Id.* at 465, 471.

Busing opponents did succeed in bringing an anti-busing constitutional amendment (H.R.J. Res. 74, 96th Cong., 1st Sess. (1979)) to a vote on the House floor for the first time. *Id.* at 482-84. The amendment not only fell short of the required two-thirds majority of members present and voting, but it failed to win the approval of even a simple majority of the House. *Id.* at 482. The vote was 209 for the amendment, and 216 against. *Id.* Ronald M. Mottl, D-Ohio, who led the amendment drive, conceded that the defeat meant that the issue was dead — at least until after the 1980 election. The next Congress might be "more conducive" to an amendment drive, he speculated. *Id.* at 483.

Neither chamber of Congress entertained anti-busing proposals during early 1980. See [1979-1980] 1-2 CONGRESSIONAL INDEX (CCH). It appears likely, of course, that anti-busing measures will be revived in 1981. My point here is merely that the Court's position on desegregation through 1977 appears to have decreased political opposition between 1977 and 1980. See note 39 infra.

39. During the debate over the final version of The Elementary and Secondary Education Act of 1965 (see note 28 supra), Congress discussed *Milliken*. Busing opponents believed that the decision might persuade "many members . . . to vote for [the weaker restrictions in] this Conference Report" and argued that *Milliken* did not go far enough to restrict forced busing. 120 CONG. REC. 26114-15 (1974). Congressman Landgrebe even argued that the Supreme Court's timing suggested an intention to influence the deliberations in the House. *Id.* The House, which before *Milliken* had approved a strict anti-busing provision, voted 323 to 83 after *Milliken* to accept the less restrictive Senate version. Congressional observers described the Court's decision as a "key factor" in dissipating opposition to the conference agreement on school busing. 1976 CONG. Q. ALMANAC 473. See 120 CONG. REC. 26103-28 (1974).


41. See note 38 supra.

of Education v. Penick the Court upheld lower court orders that required the reassignment of almost half of a district's 96,000 students, the busing of 15,000 students, the massive reassignment of teachers and administrators, the reorganization of grade structures, and the closing of thirty-three schools. As a dissenter remarked, "Local and state legislative and administrative authorities have been supplanted or relegated to initiative-stifling roles as minions of the courts." More unusual than these intrusions into local self-government was the Supreme Court's obscure but far-reaching explanation. The Court justified the remedies essentially on the basis of the failure of school officials affirmatively to achieve racial balance after 1954, and not on the need to redress the effects of their segregative acts. This justification is obscure partly because the Court insisted that it was not in fact breaking any new ground. It ostensibly based its decisions on the fact that officials had engaged in recent acts that had system-wide segregative impact. But these "acts" consisted mainly of the failure of school officials to take affirmative steps to achieve racial balance—a failure that could not have been illegal itself since officials are not under a duty to achieve racial balance unless they caused the imbalance to begin with.

The Court's effort to appear consistent with prior cases led it to approve findings that strain credibility to the limit. In one of the cases, school officials had been found to have segregated four elementary schools and one junior high school prior to 1954. Twenty-five years later, the school system consisted of 172 schools, most of which had not existed at the time of these initial segregative acts. Nevertheless, the Supreme Court traced current racial imbalance throughout the system to the initial segregation of those five schools. The Court explained this remarkable causal nexus by creating legal "presumptions" and by shifting the burden of proof. The use of these devices makes it difficult to know whether the Court was altogether abandoning the requirement that desegregation remedies compensate only for the racial imbalance shown to have been caused by segregative acts. But this requirement, so recently and painfully constructed in an effort to protect local authority over edu-

44. Id. at 487 (Powell, J., dissenting).
45. Id. at 461-67.
46. Id. at 502-04 (Rehnquist, J., dissenting).
47. Id. at 505-06 (Rehnquist, J., dissenting).
48. Id. at 467-68.
cation, was certainly rendered inconsequential in these cases.

The contrast to the overt assertions of moral authority common in the famous Warren Court decisions is stark. The potentially sweeping nature of these Burger Court decisions is not readily apparent and not altogether certain. Complex explanations earnestly claim consistency with prior case law. Legalistic style which suggests traditional judicial caution is used to approve potentially large increments in judicial power. At least in comparison to more sweeping, Warrenesque pronouncements, the style of these two most recent decisions will add less to the intensity of the political opposition to the continued involvement of the judiciary in local education.

Although those not privy to the Court deliberations cannot be certain, these confusing but potentially far-reaching decisions may have been prompted in part by the Justices' perception that congressional opposition to busing had fallen off and was unlikely to be effective in the immediate future. If the Justices were not aware of legislative activity, they ignored "an appropriate and important way for the political branches to register disagreement with the [Court]." On the other hand, if the Justices did feel somewhat freer by 1979 to delegate enhanced power to lower federal courts, they were responding to their own influence to the extent that their earlier, restrictive decisions had been a factor in reducing congressional concern. Thus the Supreme Court's cautious style and conservative reputation can have—at least temporarily—the effect of protecting and enhancing the autonomy and power of the lower courts.

49. Justice Marshall, at least, suggested that the intense anti-busing pressures that existed in 1974 influenced the Court to restrict lower court authority in Milliken v. Bradley, 418 U.S. 717, 812-15 (1974) (Marshall, J., dissenting). It is no less plausible that an easing of this pressure might have had the opposite effect on the Court.


51. This effect is not necessarily confined by some special concern for the issue of school desegregation. Recently, in an effort to protect Indian treaty rights, the Court approved a plenary effort by a lower court to regulate salmon fishing in Washington State. There was no serious consideration of the preservation of local decision-making, the issue that just two years earlier had tormented the Court's desegregation decisions. See Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979). In its brief discussion of the issue, the Court labeled as "absurd" the argument that the district court might not have power to take over the state administrative operations. Id. at 695. "The federal court unquestionably has the power . . . to displace local enforcement . . . ." Id. (Emphasis added.)
The recent desegregation cases demonstrate more consensus on the need to delegate substantial power to lower courts than on the nature of the underlying constitutional right at stake. In other areas as well, the Burger Court has been uncertain in its interpretations of the Constitution. Indeed, the reputation of the Court within the legal profession is miserable. Lawyers, judges, and scholars point sarcastically and sometimes hopelessly to the bewildering proliferation of concurring and dissenting opinions and to the apparently inexplicable reversals of tone and reasoning.

Despair over the Court’s performance seems to be shared by the Justices themselves, who use extreme rhetoric and invective to accuse each other of all manner of sins.


56. In his dissent in Bell v. Wolfish, 441 U.S. 520, 579, Justice Marshall described the majority opinion as “bankrupt” and “unthinking.” In University of Cal. Regents v. Bakke, 438 U.S. at 408 n.1, Justice Stevens wrote: “Four members of the Court have undertaken to announce [in an opinion that concurs in part and dissents in part] the legal and constitutional effect of this Court’s judgment. . . . It is hardly necessary to state that only a majority can speak for the Court or determine what is the ‘central meaning’ of any judgment of the Court.”
The Burger Court is not, of course, the first court to vacillate in its constitutional interpretations. And some commentators go to great lengths to find harmony under the cacophony.\(^7\) I am not concerned here with the extent to which the apparent inconsistencies in Burger Court decisions are ultimately unprincipled or unjustifiable. I note the fractured and uncertain quality of its constitutional interpretation only to focus on the effects of doctrinal confusion on the exercise of judicial power. The Court's inability to maintain agreement about constitutional meaning does not, as one might expect,\(^8\) reduce judicial influence. In important ways, the uncertainty and inconsistency have enhanced judicial power.

An obvious consequence of doctrinal inconsistency is to reduce the Supreme Court's capacity to control lower courts. Aware that even emphatic language in one decision might be distinguished or disregarded in the next, lower courts are encouraged to ignore whatever suggestions of restraint might emerge from the Supreme Court. The first time that both the *Detroit* and *Dayton* desegregation cases reached it, the Burger Court issued stern instructions on the need to respect the need for local control over education.\(^9\) In both cities, lower courts persevered. The second time these cases reached the Court, they resulted in expansive language approving broad judicial control over city schools.\(^6\)

More fundamentally, inconsistency in the use of principle discourages efforts to formulate principles. In 1968, the Court ruled that discrimination against illegitimates would be subject to "careful judicial scrutiny," a test that requires that state statutes be struck down unless they can be justified by a "compelling state interest."\(^8\) In 1971, it switched to the "rational basis" test, which requires that the statute be upheld unless it can be shown to be unrelated to any legitimate state interest.\(^9\) In 1972, it moved back to the "strict scru-
tiny" standard for judging discrimination against illegitimates. In 1977, the Court settled on a "middle-level" of review, the nature of which was somewhat mysterious except that it was described as "not toothless."

This pattern is not unique. The same inconsistency and the same eventual adoption of a middle level of review can be found in other areas, notably discrimination by gender. The progression is perfectly understandable, for inconsistencies in the use of doctrine are an embarrassment. Therefore, the inconsistent use of doctrine encourages the substitution of a less specific "test" that can always be used and avoids the appearance of inconsistency. Such a test does not emphasize categorical judgments based on principle but the highly contextual evaluation of facts: the importance of the specific governmental purpose asserted, the empirical justification for the policy, and the degree of harm to the class discriminated against.

Thus, the Court turns comfortably from disagreements about principle to narrow agreement based on situationally-defined values. The Court cannot tell in general whether women should be given the same degree of protection as blacks under the equal protection clause. But it can agree on the amount of empirical data required to justify a state's judgments that young men present a greater danger of drunk driving than do young women. The Court cannot agree on the principles to be applied in evaluating the use of racial preference in educational admission programs. Hence, in its later consideration of the use of racial preference in the Public Works Employment Act, a plurality of the Court explicitly denied relying...

on any of the "formulas of analysis articulated in such cases as . . . Bakke."70 Instead, apparently exhausted with the painful search for principle, the plurality emphasized a close evaluation of the specifics of the Act. Values are sought in the situation when they cannot be found in the Constitution.

The Burger Court is not unique because it devotes close attention to facts, for, indeed, it is difficult to conceive of a useful role for judges that excludes such attention. Nor is it the first Supreme Court to “explain” a result by assessing (or “balancing”) the factors involved.71 And the Court has not abandoned doctrine altogether; all are on notice, for example, that sex discrimination must be justified by an “important” rather than “compelling” governmental interest.72 But the doctrines chosen increasingly emphasize close attention to facts and the explanations offered frequently do little more than state the Court’s assessments of those facts.

This tendency, so readily apparent in equal protection cases, is becoming widespread. Consider, for example, two separation of powers cases, United States v. Nixon (Nixon I)73 and Nixon v. Administrator of General Services (Nixon II).74 In 1974, in Nixon I, the Court recognized a constitutionally based presidential privilege to withhold records of private conversations from the judiciary. The privilege was inferred from the nature and function of the office,75 and a presidential claim for confidentiality was held to be presumptively valid.76 The presumption was overcome only by the judiciary’s need for a limited number of itemized conversations relevant to a criminal trial. In 1977, in Nixon II, the Court upheld a statute that provided for the storage and screening of huge quantities of presidential conversations by an archivist and for the eventual promulgation of regulations for the release of the information to the public.77 In Nixon II, the Court denied that the congressional regulation of the presidential records even presumptively conflicted with executive functions. Instead, the Court required a factual demonstration of ac-

72. See note 67 supra.
75. 418 U.S. at 714-16.
76. Id. at 708.
77. There were forty-two million pages of documents and 880 tape recordings. 433 U.S. at 430.
tual "potential for disruption" before engaging in a weighing of the two interests. Moreover, the weighing process in *Nixon II* emphasized not a competing institutional interest, but the Court's assessment of the "importance" and "substantiality" of the public interest served by the statute (described as "the American people's ability to reconstruct and come to terms with their history"). While both cases used a balancing test, the approach taken in *Nixon II* was less structured; the Court described it as a "pragmatic, flexible approach." The author of *Nixon I* dissented, finding it "very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation."

There are other significant indications that the Burger Court is increasingly willing to substitute the evaluation of facts for constitutional meaning. When does the first amendment permit patronage dismissals? When a specific inquiry convinces a court that "party affiliation is an appropriate requirement for effective performance of the public office." When is the death penalty not cruel and unusual punishment? As Justice Burger himself recently wrote, when "on a case-by-case basis [the Court decides] a defendant's conduct is egregious enough to warrant a death sentence." When do anti-picketing statutes not violate the Equal Protection Clause? When "there is an appropriate governmental interest suitably furthered by the differential treatment."

If, as a matter of degree, the Burger Court's doctrinal inconsistencies and disagreements are pushing the Court towards greater reliance on the analysis and evaluation of facts, the consequence for the exercise of judicial power is to increase discretion. To the extent that opinions turn on descriptions of the specific facts of the case or on weighing multiple factors, they tend not to "reach out beyond the...

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78. The Court first asserted that there was no conflict with presidential power since the General Services Administration was within the executive branch. 433 U.S. at 441. The Court then argued that, "in any event," the President was required to show a potential for disruption. *Id.* at 441-43. Given the extensive records involved, it is hard to imagine what the Court meant to require. Compare United States v. Nixon, 418 U.S. 683, 713, where the Court described the material to be disclosed as "precisely identified" and "a limited number of conversations."

79. 433 U.S. at 452-53.
80. *Id.* at 442.
narrow circumstances of the case . . . [and] the reasoning gives little or no guidance as to how related situations would be treated.”

In short, judges are permitted to assess situations but are not required to announce principles. Cautious, narrowly-based opinions are liberating judges from the constraint of formulating and applying meaning derived from some source other than the facts of the case.

The inconsistent use of doctrine and the resulting increment in judicial discretion encourage litigants of all types to try their hand at constitutional adjudication. When a court holds to a clear principle — even if that principle allows for the exercise of great power within its limits — at least some claims are discouraged because it is obvious to all that they do not fall within that principle. But if the Court's judgment as to what triggers heightened solicitude is always changing or if almost every case is resolved by an ad hoc assessment of "reasonableness," no certain message is ever conveyed. All groups and interests are encouraged by the unconfined potential for judicial action to commit their resources to judicial resolution of their problems.

**DISCRETION AND REGULATION**

Although narrow holdings based on specific facts fit well with the Court's apparently cautious and traditional style, the consequence for the substance of judicial work is to expand judicial power. The use of situationally-defined values to provide constitutional meaning not only increases judicial discretion, but also results in a "constitution" that is both highly detailed and pervasive. A vast range of subjects tends to become subject to judicial regulation.

The cumulative effect of many limited decisions is code-like detail. The tendency for the Court to write such codes is illustrated by a series of cases dealing with the right to trial by jury. In *Williams v. Florida,* the Court went out of its way to avoid a clear-cut, decisive method for determining whether a jury must contain twelve members. It rejected the clear historical meaning of the word "jury" to hold that reducing the traditional membership of twelve to six was permissible in state felony trials. The Court asserted that the proper inquiry was whether any particular number of jurors could be

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87. The majority conceded that the "usual" expectation of the framers might have been that juries would consist of twelve individuals, *id.* at 98, and that this meaning had been entrenched since the fourteenth century. *Id.* at 89.
shown empirically to be essential to the functioning of a jury. Having committed the constitutional definition of "jury" to the evaluation of specific data on jury functioning, the Court soon had to determine whether unanimous verdicts were "essential" to that functioning. Then, of course, the Court had to face the issue whether unanimous verdicts were essential to the operation of six-member juries, and, inevitably, whether five-member juries were permissible.

Similarly, the Court's enunciation of a constitutional right of privacy in the famous abortion case depended upon a situationally-defined accommodation between the specific interests of the state and individual. The importance of the state's interest in protecting potential human life, for example, depended on the specific trimester of pregnancy in which that interest was asserted. The variable nature of the "right" meant that the state might control its exercise in an indeterminate range of potential situations. Consequently, the Court had to assess whether the state could require that abortions be performed in specially accredited hospitals and whether states could require the approval of a special committee or the concurrence of two physicians. Then the Court had to face the question whether a state could require the written consent of the woman undergoing the abortion. Were record-keeping requirements consistent with the right to privacy, and, if so, what sort of records? Was the prohibition of saline abortions constitutional? Was a parental consent statute for girls under the age of eighteen constitutional? If not, could parental consent be required at any age? Could minor girls be required to notify or consult with a parent before going to court to prove knowing consent to an abortion?

The ad hoc evaluation of facts not only increases the detail of

88. Id. at 86, 99-103.
93. Id. at 164-65.
96. Id.
97. Id.
99. The answer, apparently, like so many answers of the Burger Court, is that the proper age can be decided only by courts on a case-by-case basis. Id. at 643 n.23.
100. Id.
judicial regulation, but also enlarges the range of issues to which the Constitution is thought to apply.\textsuperscript{101} This is because, perversely, the values that emerge from \textit{ad hoc} assessments of factual circumstances tend to be highly generalized. Without the organizing structure that previously announced principles can provide, the judicial perception of facts is full and rich. The richer the description, the more generalized must be the word used to capture it. Consider, for example, the Burger Court's statement of the plight of women who are unable to obtain abortions:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty \ldots or \ldots in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, with the unwanted child \ldots . In other cases \ldots the additional difficulties and continuing stigma of unwed motherhood may be involved.\textsuperscript{102}

The constitutional value "privacy" announced in \textit{Roe v. Wade} emerged from this statement of facts; it did not organize the statement of those facts. It is as suggestive as the Court's statement was sensitive and detailed. No wonder that the word "privacy" might be

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\textsuperscript{101.} The example used here, the right to privacy, has notoriously little if any relationship to constitutional text. But the argument applies to some degree whether or not the Court attempts to tie its decision to constitutional text. When the Warren Court attempted to define "state action" by close and full attention to the actual circumstances under which a semi-public restaurant operated, it succeeded only in exploding the meaning of "state action." \textit{Burton v. Wilmington Parking Authority}, 365 U.S. 715 (1961). See the discussion in Greenewalt, \textit{The Enduring Significance of Neutral Principles}, 78 COLUM. L. REV. 982, 988 (1978). When a lower court defined "cruel and unusual punishment" by describing in horrible detail all of the inadequacies of an Arkansas prison, the result was a greatly expanded and uncertain meaning for that term. See note 23 supra. See generally Robbins & Buser, \textit{Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment}, 29 STAN. L. REV. 893 (1977). There are, of course, other reasons for the tendency of constitutional values to take on expansive meanings. See Nagel, Book Review, 127 U. PA. L. REV. 1174 (1979).
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thought relevant to the harms visited upon minors who are unable to obtain contraceptives or to the many harms and benefits controlled by the institution of marriage. Indeed, the term, as used by the Court, might be thought relevant wherever personal anguish can be found.

Once begun, the expansion of constitutional meaning is cumulative. As the meaning of one constitutional term becomes vague, the context provided by that term for defining other constitutional words is diminished. The term “procedural due process,” for example, was once relatively certain across a broad range of situations. The phrase referred to an adversary model of decision-making and required such traditional protections as adequate notice of charges, the opportunity to confront witnesses and to present evidence, a decision based on the evidence presented, and so forth. The specifics might vary — counsel might not always be required, for instance — but the basic contours of an adversary hearing remained fairly clear. The effect of this relatively certain meaning for the phrase “due process” was that the Court could not require “due process” for every governmental decision. Some discretionary decisions, being inappropriate for adversary hearings, had to be exempted from the requirements of due process. This was achieved by holding that some interests did not come within the concepts of “liberty” or “property,” the deprivation of which trigger due process requirements.

More recently, the Court has defined “due process” contextually. Its meaning varies depending upon “the private interest that will be affected . . . the risk of an erroneous deprivation . . . the probable value, if any, of additional . . . procedural safeguards; and . . . the [nature of the state’s] interest . . . .” In short, “due process” means a minimally adequate decision-making process under the circumstances, or, as the Court phrases it, “such procedural protections as the particular situation demands.” It does not include the right to cross-examine witnesses in the context of a prison disciplinary hearing. In a school, it might amount merely to an “informal give-and-take” between student and principal. To permit the

106. E.g., Board of Regents v. Roth, 408 U.S. 564 (1972).
108. Id. at 334.
shutting off of gas or electricity by a public utility, due process is satisfied by notice reasonably designed to tell customers where they can complain.111

Since “due process” has lost its denotive meaning, it is now potentially relevant to any type of governmental decision.112 It might apply to parole decisions that are largely discretionary,113 to expulsion from medical school on academic grounds,114 or to the decision of a parent to commit his child to a mental health facility.115 Any decision-making process can be evaluated to determine what “the situation demands.” And, of course, a court will do the evaluating.

CONCLUSION

Given the political and moral complexity of many of the issues that the Burger Court has faced, the character of its constitutional adjudication is not surprising. Indeed, narrow, apparently inconsistent decisions might be viewed as a largely unavoidable by-product of the Justices’ generally sensible approach to decision-making: pragmatic, flexible, and incremental. However, this cautious and uncertain use of doctrine tends to mitigate external political constraints on the judiciary and — by shifting attention from principle to facts — to reduce internal intellectual constraints. The consequence is constitutional interpretation that increases both the detail and generality of judicial regulation, thereby plunging the judiciary ever more deeply into the kinds of intractable issues that yield so poorly to sustained agreement or to clear explanation. The style and rhetoric of moderation are thus pushing the nation toward more pervasive reliance on judicial decision-making.

112. In recent due process cases, the Court has even evaluated the adequacy of the decision-making procedure without first determining whether a “liberty” or “property” interest was at stake. See notes 113-15 infra. The Court avoided the task of defining these constitutional terms by finding that the procedures were reasonable under the circumstances. At some point, if the meaning of one term becomes sufficiently vague, it makes no difference at all what related terms might mean.