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# BLACK AMERICANS AND THE BURGER COURT: IMPLICATIONS FOR THE POLITICAL SYSTEM

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In recent years there has been considerable commentary on the posture of the Burger Court toward black Americans and civil rights interests.[1] During the Warren Court era, the Supreme Court was generally pictured as supporting these interests.[2] Under Chief Justice Burger, however, this image of the Court seems to be fading; President Nixon's 1968 campaign pledge to reverse the decisional tenden-

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1. For general commentary on the Warren and Burger Courts, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Kalven, *The Supreme Court, 1970 Term—Foreword: Even When a Nation Is at War—*, 85 HARV. L. REV. 3 (1971); Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265. For specific attention to the relation to blacks of the transition on the Court, see McGee, *Blacks, Due Process, and Efficiency in the Clash of Values as the Supreme Court Moves to the Right*, 2 BLACK L.J. 220 (1972); Tollett, *The Viability and Reliability of the Supreme Court as an Institution for Social Change and Progress Beneficial to Blacks*, 2 BLACK L.J. 197 (1972).

2. Analysis of the Warren Court in this respect is voluminous. For balanced yet sympathetic views of the Court, see A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 24-50, 114-34 (1968); R. SAYLER, THE WARREN COURT 1-31, 46-57, 152-61 (1969). For a thoughtful discussion of the sensitivity of the Warren Court to the relation of first amendment freedoms to the goals of black Americans, see Greenberg, *The Supreme Court, Civil Rights, and Civil Dissonance*, 77 YALE L.J. 1520 (1968).



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cies of the Warren Court by appointing "strict constructionists"[3] appears to be meeting with some success. After less than three years in office, the President had the rare opportunity to fill four vacancies on the nine-man Court, including the position of Chief Justice.[4] The protracted confirmation battles that attended several of the President's nominations, plus the decisions of the Nixon appointees once on the Court, demonstrate that some changes in the decisional output of the Court were anticipated and are indeed occurring.

My purpose here is to examine these changes in the broader context of the role of the Supreme Court in the efforts of blacks to achieve objectives within the political system as it presently operates. Specifically, this Article will attempt to describe the posture of the Burger Court, as reflected in its decisions,[5] relative to racial justice and the quality of life for black Americans, and to consider the implications of this posture in terms of the capability of the political system to deal with civil rights problems.

The Article is divided into three parts. Part I discusses the position of the Burger Court in cases relating directly to racial justice. Part II discusses the general stance of the Court with respect to the developing areas of "poverty law," or rights of the poor, and the rights of persons accused of crime. That policies in these two areas are on the surface non-racial should not obscure their practical and often critical influence in the everyday lives of black Americans.[6] Part III discusses the implications that the transition from the Warren Court to the Burger Court holds for blacks and the political system.

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3. *See* Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. OF BOOKS, May 4, 1972, at 27-35.

4. In examining the history of the Court, Robert Dahl has found that a President can expect to appoint one new Justice about every twenty-one months, or about two new Justices during one term of office. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 58 (1957).

5. Two comments are in order here. First, in this Article, I intend to look at the Court from a macroanalytic or institutional, rather than from a microanalytic or individual, viewpoint. Hence, I shall refer to either the Warren Court or the Burger Court without attempting, except in a few instances, to engage in more particularistic analysis of the behavior of the various Justices. Secondly, while my discussion of decisions of the Burger Court is not intended to be exhaustive, I hope the cases discussed are representative of the decisions in various areas.

6. Derrick Bell's comment seems especially appropriate: "A hardening of attitudes toward the poor equals a more difficult time for blacks, even though race is never mentioned." Bell, *Black Faith in a Racist Land*, 20 J. PUB. L. 409 (1971).

I

Generally, the Burger Court has tempered the trend and tone of the Warren Court in combatting racial segregation and discrimination. To be certain, the Court has continued to pursue the command of *Brown v. Board of Education*[7] to eliminate racial segregation in public schools. In 1969, for example, the Court unanimously held against the attempts of the Justice Department to delay implementation of integration plans in certain Mississippi school districts.[8] In so doing the Court reiterated the formula established late in the Warren Court era[9] that integration of public schools must begin "at once," eliminating any apprehensions of a return to the "all deliberate speed" guideline of *Brown*. Further, in *Swann v. Charlotte-Mecklenburg Board of Education*[10] the Court approved busing as a judicial tool in integrating public school districts where officials had deliberately created or enforced a "dual" system on racial lines. *Swann* granted federal judges wide discretion to establish remedial measures in combatting state-enforced segregation. At the same time, however, *Swann* may be construed by lower courts to lessen judicial presence in this area, especially if in their view a unitary school system has been achieved.[11]

In *Keyes v. School District No. 1, Denver, Colorado*,[12] a recent desegregation case, the Court declined to build on the "activism" of the Warren Court's desegregation decisions by continuing to recognize the distinction between de facto and de jure segregation. *Keyes* did put northern school districts on notice that where intentional segregation occurred in particular units within a school district, those units must be desegregated, and that the burden of proving that a policy of intentional segregation in that unit did not demonstrate a segregative intent with respect to the entire district rested on the defendant school board. But, while *Keyes* portends important legal support for improving the quality of education for minority school children in northern areas, one cannot help but note the apparent incrementalism of the Court in adjudicating constitutional rights of black and other

7. 347 U.S. 483 (1954).
8. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam).
9. Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. School Bd., 377 U.S. 218 (1964).
10. 402 U.S. 1 (1971), *on remand*, 362 F. Supp. 1223 (W.D.N.C. 1973).
11. *Id.* at 31-32 (Burger, C.J.).
12. 413 U.S. 189 (1973).

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minority children. Specifically, the Court's reluctance to abandon the de jure/de facto distinction in determining the constitutional rights of minority school children and the obligations of school districts seriously retards meaningful adjustments of racial balances in the North. The Court continues to be unwilling to deal squarely with the inequities faced by minorites in de facto segregated school systems, although their effects on minorities are identical to those of de jure segregation. As a consequence, the Court places on blacks and other minorities the "initial tortuous effort" of showing segregative intent before constitutional guarantees come into play.[13]

Two other decisions of the Burger Court may be viewed as supporting the interests of black Americans. In *Griggs v. Duke Power Co.*[14] a unanimous Court declared invalid under Title VII of the Civil Rights Act of 1964[15] a standardized intelligence test the practical effect of which was to bar a disproportionate number of blacks from employment. Although the test was "neutral," or not intended to discriminate against blacks, it was not "directed or intended to measure the ability to learn to perform a particular job or category of jobs."[16] Without a "demonstrable relationship" to job performance, concluded the Court, any "artificial, arbitrary, and unnecessary barriers to employment [which] operate invidiously to discriminate" cannot stand.[17] And in *Griffin v. Breckenridge*[18] a unanimous Court construed an earlier civil rights statute[19] to permit suits for damages for racially motivated private conspiracies to commit violence in deprivation of civil rights, despite an earlier decision[20] restricting the statute to conspiracies under color of state law.[21]

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13. *Id.* at 224 (Powell, J., concurring in part and dissenting in part). *See id.* at 215-16 (Douglas, J., concurring).

14. 401 U.S. 424 (1971).

15. 42 U.S.C. §§ 2000e to e-15 (1970, Supp. II, 1972).

16. 401 U.S. at 428.

17. *Id.* at 431. Although since 1965 the employer in *Griggs* had ceased discriminating against blacks, the intelligence test had the consequence of freezing blacks in the same departments. The employer's argument that tests are expressly permitted under § 703(h) of the Act, 42 U.S.C. § 2000e-2(h) (1970), was rejected on the ground that § 703(h) excepted tests "used" to discriminate. The Court thus emphasized that the standard was to be a practical one: "Congress diverted the thrust of the Act to the *consequences* of employment practices, not simply the motivation." 401 U.S. at 432 (emphasis original).

18. 403 U.S. 88 (1971).

19. 42 U.S.C. § 1985(3) (1970), *formerly* ch. 22, § 2, 17 Stat. 13 (1871).

20. Collins v. Hardyman, 341 U.S. 651 (1950).

21. At the same time the Court upheld the constitutionality of the statute on the

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When considered in context, however, the promise of these decisions has been clouded by other actions of the Burger Court. Indeed, despite these decisions judicial policies toward racial justice generally appear to have taken on a negative, or at least a more restraining, tone. For example, Chief Justice Burger himself, in denying a stay of a lower court desegregation order, somewhat blurred the effect of the Court's busing decision.[22] In an unusual ten-page memorandum, he interpreted what the Court had held in *Swann*. He thought *Swann* was being misinterpreted by lower courts which read the decision as requiring a fixed racial balance or quota. But whatever his intention, it seems clear that Chief Justice Burger's memorandum softened the impact of the Court's decision that busing may be used to effect public school integration. In addition, the Court's attempt to decide the "city-suburbs" busing issue was left essentially unresolved by a 4-4 deadlock.[23]

Still other actions of the Burger Court give credence to its apparent trend away from the strong support given blacks by the Warren Court. For example, in *Whitcomb v. Chavis*[24] the Burger Court rebuffed the efforts of blacks to gain political representation in the Indiana Legislature. Blacks had alleged that the Indiana statutes[25] that established Marion County (Indianapolis) as a multi-member district for the election of state senators and representatives deprived them of a realistic opportunity to win elections. Specifically, they charged that the laws invidiously diluted their votes in the predominantly black inner-city areas of Indianapolis. A three-judge federal district court agreed with this position.[26] But the Supreme Court overturned the lower court decision, 6-3, with Chief Justice Burger and Justice Blackmun voting with the majority. Justice White, who wrote for the Court, said there was no suggestion that the multi-member district in Marion County or similar districts in the state were "conceived or operated as purposeful devices to further racial or economic discrimination."[27] Justice

basis of the thirteenth amendment and the congressional power to protect the "right of interstate travel." 403 U.S. at 104-06.

22. *See* N.Y. Times, Sept. 1, 1971, at 1, col. 1.

23. School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973), *aff'g by an equally divided Court* 462 F.2d 1058 (4th Cir. 1972).

24. 403 U.S. 126 (1971). *See also* Connor v. Johnson, 402 U.S. 690 (1971).

25. IND. ANN. STAT. §§ 34-102, -104 (1969).

26. Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969) (three-judge court).

27. 403 U.S. at 150.

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White maintained that "the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes."[28] He specifically disagreed with the trial court's view that inner-city voters could not be adequately or equally represented unless some of Marion County's general assembly seats were reserved for such residents serving the interests of the inner-city majority. "The mere fact," said Justice White, "that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system."[29] Furthermore, reasoned Justice White, to uphold the position of one racial group would make it difficult to reject claims of any other groups—for example, Republicans, Democrats, or organized labor—who find themselves similarly disadvantaged.[30]

But Justice Douglas, joined by Justices Brennan and Marshall, filed a strong dissenting opinion in *Whitcomb*. Justice Douglas supported the position of the district court that "a showing of racial motivation is not necessary when dealing with multi-member districts."[31] Justice Douglas maintained that the test of constitutionality for multi-member districts is whether there are "invidious effects," and that in this case the test was met by a showing of (1) an identifiable voting group; (2) discrepancies of representation between middle and lower class townships; (3) the "pervasive influence of the county organizations of the political parties;" and (4) the "undifferentiated positions" of legislators on political issues.[32] Justice Douglas compared multi-

28. *Id.* at 153.

29. *Id.* at 154-55. In Fortson v. Dorsey, 379 U.S. 433 (1965), the Court had indicated that multi-member districts are not per se unconstitutional. In Burns v. Richardson, 384 U.S. 73 (1966), the Court stated that multi-member districts must "minimize or cancel out the voting strength of racial or political elements of the voting population," *id.* at 88, to violate the equal protection clause. Despite *Burns*, and the majority's recognition in *Whitcomb* that multi-member districts have a "tendency to submerge minorities," 403 U.S. at 159, the Court found multi-member districting no more inherently unfair than single-member districting.

30. 403 U.S. at 154-55. *See generally* Banzhaf, *Multi-Member Electoral Districts —Do They Violate the "One Man, One Vote" Principle?*, 75 YALE L.J. 1309 (1966); Hamilton, *Legislative Constituencies: Single-Member Districts, Multi-Member Districts, and Floterial Districts*, 20 W. POL. Q. 321 (1967).

31. 403 U.S. at 178 (Douglas, J., dissenting).

32. *Id.* at 179.

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member districting to gerrymandering in that both "dilute" or "surround" the minority vote, causing the requisite segregative effect. He concluded, "Our cases since *Baker v. Carr* have never intimated that 'one man, one vote' meant 'one white man, one vote.' "[33]

Further evidence of eroding judicial support for civil rights interests was reflected by the Burger Court in *Palmer v. Thompson*.[34] By a 5-4 vote, the Court refused to force the city of Jackson, Mississippi to reopen its municipal swimming pools after the city closed them following a district court's determination that operating them on a racially segregated basis was unconstitutional.[35] The Court based its decision on evidence that the city had closed the pools because they could not be economically or safely operated on an integrated basis. The dissenting opinion of Justice White deserves particular mention.[36] Justice White made specific reference to the fact that though he had spoken for the majority only a week earlier in *Whitcomb*[37] he now found himself at odds with four of the Justices[38] who supported his opinion in that case. To Justice White, the closing of swimming pools in Jackson, unlike the multi-member district scheme in Indiana, was an obvious attempt to perpetuate racial segregation.[39] However, it was left to Justice Thurgood Marshall, the only black ever to serve on the Court, to put the matter in sharp perspective: "By effectively removing publicly owned swimming pools from the protection of the Four-

33. *Id.* at 180. *See* Gray v. Sanders, 372 U.S. 368 (1966); Gomillion v. Lightfoot, 364 U.S. 339 (1964). Justice Douglas met the argument that correcting the Indiana system would require the curing of the gerrymandering of any special interest group, by pointing out that the "Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be 'abridged' on account of 'race, color, or previous condition of servitude.'" 403 U.S. at 180.

34. 403 U.S. 217 (1971).

35. Clark v. Thompson, 206 F. Supp. 539 (E.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963).

36. 403 U.S. at 240 (White, J., dissenting).

37. *See* notes 24-33 *supra* and accompanying text.

38. Chief Justice Burger and Justices Black, Stewart, and Blackmun.

39. 403 U.S. at 240-41 (White, J., dissenting):

> [T]he city is adhering to an unconstitutional policy and is implementing it by abandoning the facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike because both are denied use of public services. The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying.

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teenth Amendment . . . the majority and concurring opinions turn the clock back 17 years [to the situation prior to *Brown*]."[40]

Some of the strongest clues of the increasingly negative judicial posture toward civil rights are provided in two 1972 decisions in which all four Nixon appointees participated. In *Wright v. Council of City of Emporia*[41] a bare 5-4 majority followed the strong pro-civil rights stance of the Warren Court. But perhaps most significant is that the entire five-man majority consisted of holdovers from the Warren Court while the four dissenters—Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist—were Nixon appointees. This marked the first dissent from a majority ruling on school desegregation since the 1954 *Brown* decision.[42] In *Wright* the "holdover" majority enjoined a city from setting up a separate school system in a context where the separation might adversely affect an existing desegregation order from a federal court to dismantle a dual school system on a county-wide basis. "Only when it became clear," said Justice Stewart for the majority, "that segregation in the county system was finally to be abolished did Emporia attempt to take its children out of the county system."[43] The majority focused again on the practical effect of the city's withdrawal on the overall desegregation plan, rather than on the specific intent of the city.[44]

Chief Justice Burger wrote for the four dissenters. His focus concerned the limits of judicial power and the discretion that must be left to local authorities. "A local school board plan," wrote the Chief Justice, "that will eliminate dual schools, stop discrimination and improve the quality of education ought not to be cast aside because a judge can evolve some other plan that accomplishes the same result or what he considers a preferable result . . . . Such an approach gives controlling weight to sociological theories [but] not constitutional doctrine."[45]

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40. *Id.* at 272 (Marshall, J., dissenting).

41. 407 U.S. 451 (1972).

42. *See* Graham, *4 Nixon Appointees End Court's School Unanimity*, N.Y. Times, June 23, 1972, at 1, col. 6.

43. 407 U.S. at 459.

44. This emphasis was in contrast to lower federal courts' examination of purpose in determining whether local authorities have acted permissibly in desegregation cases. *E.g.*, Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971); Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961).

45. 407 U.S. at 477 (Burger, C.J., dissenting).

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The other 1972 ruling that suggests the emerging posture of the Burger Court toward civil rights is *Moose Lodge No. 107 v. Irvis,*[46] in which the Court majority, including all four Nixon appointees, construed the "state action" doctrine so as to uphold a private club's refusal to serve blacks despite state issuance of a liquor license to the club. The decision broke the trend of the Warren years by limiting the application of the "state action" doctrine, under which the equal protection clause of the fourteenth amendment may not be invoked without a sufficient level of state activity in the alleged denial of equal protection of the laws.[47] While it could have found the requisite state involvement in the state's discretionary control over liquor licensees,[48] the majority chose to emphasize that the state did not influence the club's policies on serving guests and therefore did not encourage the club's discrimination.

Justices Douglas, Brennan, and Marshall thought otherwise. To Justice Brennan, for example, the liquor licensing laws involve the state in such detail with the licensee's business that "when Moose Lodge obtains its liquor license, the State of Pennsylvania becomes an active participant in the operation of the Lodge Bar." This involvement was especially disturbing to Justice Brennan since to him "something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination."[49]

## II

The Burger Court has also rendered decisions in the areas of pov-

46. 407 U.S. 163 (1972).

47. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Turner v. City of Memphis, 369 U.S. 350 (1962); Burton v. Wilmington Parking Author., 365 U.S. 715 (1961). *See generally* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

48. This was the holding of the district court. Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970) (three-judge court). The question is one of degree; as Justice Rehnquist, writing for the six-man majority, pointed out,

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct . . . .

407 U.S. at 173. The Court distinguished earlier "state action" cases as reflecting state involvement in the ostensibly private discriminatory practice under attack, and found insufficient or "neutral" state activity in *Moose Lodge*.

49. 407 U.S. at 184-85 (Brennan, J., dissenting).

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erty and criminal law which have significant impact on black Americans.[50] In general, these decisions indicate that the Burger Court is not disposed to break new ground in what had been areas of expanding rights for minorities. The issue in *James v. Valtierra*,[51] for example, was whether an amendment to the California constitution[52] which provided for mandatory popular referenda on low-rent housing proposals, violated the equal protection clause of the Federal Constitution. A three-judge district court[53] had enjoined enforcement of the amendment, relying chiefly on *Hunter v. Erickson*,[54] in which the Court held that a referendum law violated equal protection by requiring that any ordinance which regulated real property on the basis of race, color, religion, or national origin must be approved by a majority of qualified voters. The Burger Court distinguished *Hunter* on the ground that California's referendum provision did not rest on "distinctions based on race;"[55] instead, the amendment "requires referendum approval for any low rent housing project, not only for projects which will be occupied by a racial minority."[56] Further, wrote Justice Black for the majority, the record "would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."[57]

Justice Marshall dissented, joined by Justice Brennan and, interestingly, by one of the then-two Nixon appointees, Justice Blackmun. To Justice Marshall, the California amendment created an invidious distinction between rich and poor which, particularly since it should be subject to "closer scrutiny" as a "suspect classification,"[58] violated

50. *See generally* E. TUCKER, ADJUDICATION OF SOCIAL ISSUES (1971).

51. 402 U.S. 137 (1971). *See also* Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

52. CAL. CONST. art. XXXIV, § 1 provides:

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

53. Valtierra v. James, 313 F. Supp. 1 (N.D. Cal. 1970) (three-judge court).

54. 393 U.S. 385 (1969).

55. 402 U.S. at 141.

56. *Id.*

57. *Id.*

58. *Id.* at 144-45 (Marshall, J., dissenting), *citing* McDonald v. Board of Election, 394 U.S. 802 (1969), Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), *and* Douglas v. California, 372 U.S. 353 (1963). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969).

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equal protection. The distinction which troubled Justice Marhsall was that only projects for persons "of low income" must obtain prior approval. And, while none of the Justices discussed the possibility, California's scheme of involving local judgment in the location of federally assisted housing may permit racial majorities to maintain patterns of racial housing—patterns which make meaningful "equal protection" extremely unlikely.

The poor did not fare any better in *San Antonio Independent School District v. Rodriguez,*[59] a 1973 decision. In *Rodriguez* the Court rejected challenges to the local property tax system that provides a significant part of public school finances in forty-nine of the fifty states. The contention was that the Texas system of supplementing state aid to school districts by means of an ad valorem tax on property within the jurisdiction of the individual school district violated the equal protection clause. Rodriguez, whose children attended schools in a district with lower per pupil expenditures but higher property tax rates than in other area districts, argued that substantial differences in per pupil expenditures among the districts resulted from differences in the value of property taxed within each district. Speaking for a 5-4 majority, Justice Powell said that the financing system, although not perfect, "abundantly satisfies" the constitutional standard for equal protection since the system "rationally furthers a legitimate state purpose or interest,"[60] namely, the maintenance of local control of public education. Justice Powell applied the traditional equal protection standard since "the Texas system does not operate to the peculiar disadvantage of any suspect class,"[61] and since education, although an important state service, is not a "fundamental" right because it is not "explicitly or implicitly guaranteed by the Constitution."[62]

59. 411 U.S. 1 (1973).

60. *Id.* at 50.

61. *Id.* at 22. This conclusion was based on the inconclusiveness of evidence that there was a correlation between the property tax base in absence of proof that the quality of education was deficient even where expenditures were lowest. *Id.* at 20-24. As Justice Marshall pointed out in dissent, *id.* at 95, however, "it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws."

62. *Id.* at 36. While education is not explicitly guaranteed in the Federal Constitution, it is so guaranteed by many state constitutions. These provisions have provided the basis for relief against inequitable property tax assessments and expenditures in several states. *See, e.g.,* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972).

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Justices Brennan, White, Douglas, and Marshall dissented. Justice Marshall's dissent was especially strong. He called the Court's decision "a retreat from our historic commitment to equality of educational opportunity" and an "unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[63] He emphasized the disparities in per pupil expenditures and tax rates among the districts involved. In addition, he sharply attacked the majority's attempt "to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests."[64] "By so doing," said Justice Marshall, "the majority singles this case out for treatment at odds with what seems to me to be the clear trend of recent decisions . . . and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than lenient scrutiny of the Texas financing scheme which the majority pursues."[65] Justice Marshall insisted that if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification involved, the unconstitutionality of the scheme is "unmistakable."[66]

*Rodriguez,* while not posed in racial terms, has a direct impact on equality of opportunity for racial minorities, which tend to be concentrated in areas where property values are lower and where consequently, regardless of the willingness in some of these areas to pay a substantial *rate* of tax for education, less money can be made available for educational services.[67]

The Burger Court has also considered the protections afforded welfare recipients. At issue before the Court in *Wyman v. James,*[68] for example, was whether a welfare recipient must permit a social worker to visit her home as a condition of eligibility for benefits under the

63. 411 U.S. at 97.

64. *Id.* at 98. Justice Marshall has long been a critic of the Court's "rigidified" two-tier system of analyzing equal protection arguments. *See* Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

65. 411 U.S. at 99.

66. *Id.* at 101.

67. *See* L. Fox & G. Hurd, Finances of Large-City School Systems: A Comparative Analysis 1-35 (1971); U.S. President's Comm'n on School Finance, Final Report, Schools, People, and Money: The Need for Educational Reform 40-46 (1972).

68. 400 U.S. 309 (1971).

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program of Aid to Families of Dependent Children.[69] On the basis of past decisions,[70] chances appeared good that the Court would knock down home visit requirements. But Justice Blackmun, who spoke for the Court majority, viewed home visits by social workers as a "reasonable administrative tool" that served a valid purpose and did not unconstitutionally infringe on the right of privacy or any other rights guaranteed by the fourth amendment.[71] "The caseworker," said Justice Blackmun, "is not a sleuth but rather, we trust, is a friend to one in need."[72]

The dissenters—Justices Marshall, Brennan, and Douglas—reacted sharply. Justice Marshall, joined by Justice Brennan, charged the majority with ignoring an "unbroken line of cases," and said he could not understand "why a commercial warehouse deserves more protection than does this poor woman's home."[73] "This Court," observed Marshall, "has occasionally pushed beyond established constitutional contours to protect the vulnerable and to further basic human values." He concluded, "I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor."[74] Justice Douglas' dissent was equally sharp: "Is the search of [the welfare recipient's] home without a warrant made 'reasonable' merely because she is dependent on government largesse? . . . [C]onstitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the affluence of the beneficiary. It is the precincts of the *home* that the Fourth Amendment protects, and their privacy is as important to the lowly as to the mighty."[75] The majority and dissenting Justices thus revealed a basic difference in attitude about the role of constitutional protections in the lives of the poor.

The Burger Court rendered several other decisions with respect to welfare recipients. For example, the Court held that welfare benefits are a matter of statutory entitlement that may not be terminated without procedural due process.[76] On the other hand, in *Dandridge v. Williams*[77] the Court upheld a Maryland statute which limited welfare

69. 42 U.S.C. §§ 601-06 (1970).
70. *E.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).
71. 400 U.S. at 326.
72. *Id.* at 323.
73. *Id.* at 347 (Marshall, J., dissenting).
74. *Id.*
75. *Id.* at 331-32 (Douglas, J., dissenting) (emphasis original).
76. Goldberg v. Kelly, 397 U.S. 254 (1970).
77. 397 U.S. 471 (1970). *See also* Wyman v. James, 400 U.S. 309 (1971).

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payments to a single family unit to a maximum of $250 per month regardless of the size of the family. In general, however, the thrust of the activity of the Burger Court appears to counter what looms as the key issue in this developing area of the law, that is, whether poor people are, or should be, entitled to some minimal level of protection, as a matter of right, against economic deprivation.[78]

Still other decisions of the Burger Court relate to the access of poor people to courts in civil litigation. In *Boddie v. Connecticut*,[79] for example, the Court held that states cannot deny access to their courts to persons seeking divorce solely because of inability to pay court costs.[80] But in *United States v. Kras*[81] the Court held that *Boddie* was inapplicable as precedent when the issue involved the inability of an unemployed indigent to pay a $50 filing fee in a federal bankruptcy petition. Writing for the majority, Justice Blackmun interpreted *Boddie* as requiring both that the interest sought to be protected must be "fundamental," and that there be no effective alternative available to the prospective litigant. Since one seeking bankruptcy seeks no "fundamental" right, and may have his debts discharged without judicial assistance, due process is not violated by charging a filing fee as a condition to an adjudication of bankruptcy.[82]

78. This thrust comes through with particular force in Justice Powell's discussion in *Rodriguez* of *Dandridge* and Lindsey v. Normet, 405 U.S. 56 (1972), in which he concludes: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." 411 U.S. at 26. *See* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 42 (1969); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Ryan, *Decent Housing as a Constitutional Right*, 14 HOWARD L.J. 338 (1968). *See also* Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973).

79. 401 U.S. 371 (1971).

80. The Court found that since Connecticut law required a judicial proceeding to terminate a marriage, its "refusal to admit [those incapable of paying fees] to its courts . . . must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process." *Id.* at 380-81.

81. 409 U.S. 434 (1973).

82. Justice Marshall, dissenting, indicated that *Boddie* established access to the courts itself as a fundamental right which cannot be denied on the basis of poverty. *Id.* at 457 (Marshall, J., dissenting). Justice Stewart's dissent argued that while *Boddie* did not open the courts to indigents under all circumstances, neither did it require that the interest be "fundamental" for the indigent to gain free access to the judicial process. *Id.* at 455-57 (Stewart, J., dissenting). Justice Douglas argued that all filing fees cre-

The *Kras* majority's reading of *Boddie* will likely have the effect of preventing any expansion of the *Boddie* rationale to any but a few classes of litigation and, as a practical matter, will prevent a significant number of poor black Americans from initiating judicial proceedings to vindicate their rights.[83]

The Burger Court has also blunted the thrust of Warren Court decisions with respect to the rights of persons accused of crime. In *Harris v. New York*[84] the Court, Chief Justice Burger writing for a 5-4 majority, held that statements of an accused obtained by police in violation of *Miranda* rules,[85] provided the statements were made voluntarily, could be used to attack the credibility of a defendant if he took the stand, although they were not admissible as evidence of the defendant's guilt. Indeed, wrote Chief Justice Burger, once he has taken the witness stand, the defendant has an obligation to tell the truth, and "the prosecution . . . did no more than utilize the traditional truth-testing devices of the adversary process. . . . The shield provided by *Miranda*," concluded Burger, "cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent utterances."[86] But Justice Brennan, joined by Justices Douglas and Marshall, thought the Court had "ser-

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ate a classification based on wealth which violates equal protection. *Id.* at 457-58 (Douglas, J., dissenting).

83. To illustrate, in another 1973 case, Ortwein v. Schwab, 410 U.S. 656 (1973), the Court upheld the imposition of a $25 filing fee as a condition of obtaining review of administrative action affecting welfare recipients in Oregon, and cited *Kras* rather than *Boddie* as authority. The Court, as it had in *Kras*, weighed the constitutional significance of the interest of the prospective litigant, and found that it was not "fundamental." On the second issue of available alternatives, the Court cited the welfare recipients' opportunities for administrative hearings. *Id.* at 660.

The *Kras* dissenters again dissented in *Ortwein*. As Justice Douglas put it, the majority's decision simply "broadens and fortifies the 'private preserve' for the affluent [by upholding] a scheme of judicial review whereby justice remains a luxury for the wealthy." *Id.* at 663 (Douglas, J., dissenting).

The uncertainty of the effect of *Kras* and *Ortwein* on the *Boddie* rationale is augmented by two other Burger Court decisions, in which pre-judgment garnishment procedures, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), and the seizure of property of defaulting debtors without notice and hearing, Fuentes v. Shevin, 407 U.S. 67 (1972), were declared unconstitutional as denials of due process. *See generally* D. CAPLOVITZ, THE POOR PAY MORE (1967).

84. 401 U.S. 222 (1971).

85. In Miranda v. Arizona, 384 U.S. 436 (1966), the Warren Court held that statements elicited from an accused who has not been advised of his rights to remain silent and to an attorney are inadmissible against him at trial to establish guilt.

86. 401 U.S. at 225-26.

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iously undermined" *Miranda*. "The Court today," wrote Justice Brennan, "tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* can't be used on the state's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution."[87]

Other criminal cases illustrate the Court's support of President Nixon's pledge to strengthen society's "peace forces" against the "criminal forces." For example, even though the Court found capital punishment unconstitutional,[88] it should be noted that all four Nixon appointees dissented. Moreover, though a unanimous Court expanded the right to counsel to apply to misdemeanor cases,[89] it also shored up the discretion of authorities before indictment or formal charges are brought. And it is at this stage—after arrest but prior to formal charges—that blacks and others can experience their greatest difficulties with law enforcement officers. For example, the Court held that a suspect in a police lineup is not entitled to counsel if he has not been formally indicted.[90] Also, the Court approved the right of a policeman to stop and frisk a suspect even if the officer's suspicion is based on information supplied by an unnamed informant.[91] Still further, the Court allowed an unconstitutional pretrial confession to be admitted against a criminal defendant as evidence, brushing aside the unconstitutional taint as "harmless error" on the ground that the jury had independent and sufficient evidence to convict.[92] In each of these cases all four Nixon appointees were included in the majority.

In addition, *Johnson v. Louisiana*,[93] one of the 1972 non-unanimous jury verdict cases, illustrates vividly the implications of the Burger Court's "law and order" decisions for blacks and other identifiable minorities. In *Johnson* the Court, with all Nixon appointees in agree-

87. *Id.* at 232 (Brennan, J., dissenting).

88. Furman v. Georgia, 408 U.S. 238 (1972). The failure of any two of the concurring Justices to agree on a rationale in *Furman* leaves the future of capital punishment in doubt, for example, where, unlike *Furman*, its imposition is not discretionary.

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

90. Kirby v. Illinois, 406 U.S. 682 (1972).

91. Adams v. Williams, 407 U.S. 143 (1972). *Cf.* Terry v. Ohio, 392 U.S. 1 (1968). *See also* United States v. Robinson, 94 S. Ct. 467 (1973).

92. Milton v. Wainwright, 407 U.S. 371 (1972).

93. 406 U.S. 356 (1972).

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ment, upheld non-unanimous jury verdicts in criminal cases. The Court held that a verdict of guilty or not guilty returned by nine of twelve jurors did not deprive the defendant of due process or equal protection.[94] The basis of the majority's holding was that permitting non-unanimous convictions serves the valid state objective of " 'Facilitat[ing], expedit[ing], and reduc[ing] expense in the administration of criminal justice . . . .' "[95] However, four of the remaining five Warren Court Justices—Brennan, Douglas, Stewart, and Marshall—dissented. Questioning whether the decision amounted to a "watered down" version of the Bill of Rights, Justice Douglas observed that "these civil rights—whether they concern speech, searches and seizures, self-incrimination, criminal prosecution, bail, or cruel and unusual punishment—extend of course to everyone, but in cold reality touch mostly the lower castes in our society. I refer of course," said Justice Douglas, "to the blacks, the Chicanos, the one-mule farmers, the agricultural workers, the off beat students, the victims of the ghetto."[96] In a similar vein, Justice Brennan observed:

> When verdicts must be unanimous, no member of the jury may be ignored by the others. When less then unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace. In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it.[97]

On the other side of the ledger, certain Burger Court decisions have served to bolster rights of indigents in the criminal justice system. In the main, however, these decisions support the rights of indigents *after* conviction. For example, the Court ruled that a state could not sentence an indigent to jail for failure to pay a fine or court costs in a lump sum if the consequent time in jail would exceed the maximum jail term set by statute for the particular crime.[98] Indigents must be offered some alternative to lump sum payment of fines, such as installment payments. Still further, the Court held that in view of the equal

94. In another case decided the same day, the Court upheld a ten-to-two jury conviction as not violating the sixth amendment. Apodaca v. Oregon, 406 U.S. 404 (1972).

95. 406 U.S. at 364, *quoting* State v. Lewis, 129 La. 800, 804, 56 So. 893, 894 (1911).

96. *Id.* at 387 (Douglas, J., dissenting).

97. *Id.* at 396 (Brennan, J., dissenting).

98. Williams v. Illinois, 399 U.S. 235 (1970).

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protection clause of the fourteenth amendment an indigent cannot be compelled to "work out" traffic fines by spending time in jail.[99]

Generally, the decisional output of the Burger Court has been mixed; while there is some continuity between Warren Court policies and those of the Burger Court—for example, on school desegregation—there are also increasing signs of toning down and departing from these and other policies. With respect to criminal procedures, for example, the Burger Court is apparently disposed to minimize or reduce the rights of those interacting with administrative bureaucracies (police) until litigation is initiated, at which time the Court will apparently uphold traditional constitutional values such as the right to counsel. The practical consequences of this trend, if it continues, are obvious, for it is this daily interaction with bureaucracies that determines the quality of life (repressive or less so) for many persons, especially blacks. Of course, at this early stage of comparison, there are certain organizational and functional characteristics of the Court, such as continuing input by holdover Justices from the Warren Court and allegiance to precedent, that tend to blunt any abrupt policy changes. Nonetheless, even at this stage some change is evident.

## III

This review of judicial policies indicates a discernible change in substance and tone between the decisional output of the Warren Court and that of the Burger Court. Indeed, Professor Kurland's intended pun that "the [Court's] shift has not been . . . a simple change from black to white"[100] seems to have already lost its punch. Changes in Court personnel are certainly bringing about a change in the judicial stance toward the constitutional rights of blacks. This is not to say that the Warren Court was the great "white savior" of black Americans;[101] that would overstate what that Court did or what any Court actually could do. Nor is it to say that the Burger Court has not supported certain rights of blacks. In some instances the Court has done so. But it is to say that what the Burger Court has done thus far, when considered in context, indicates that the legal fate of problems confronting black Americans is much more uncertain than it was dur-

99. Tate v. Short, 401 U.S. 395 (1971).

100. Kurland, *supra* note 1, at 265.

101. *See* Steele, *Nine Men in Black Who Think White*, N.Y. Times, Oct. 13, 1968, § 5 (Magazine), at 56-57, 112-22.

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ing the Warren Court. What we have observed here indicates that we may expect: (1) less inclination on the part of the Court to apply or to expand judicial policies supporting racial justice; (2) less support for blacks and others who wish to use litigation to achieve objectives which they cannot attain in political forums; and (3) less judicial support for individual or group claims as against governmental authority. These directions, if continued, could hold important implications for blacks and the political system.

First, a perpetuation and extension of certain decisional outputs of the Burger Court could weaken one of the most vital points of access that blacks have to the political system. Indeed, one of the chief functions assumed by the Warren Court was to articulate and respond to certain key demands of those who were unpopular, unrepresented, or underrepresented in the political system.[102] The characteristics of the American judiciary, as opposed to Congress and the Presidency, seem unique to this function. Particularly, the insulation of the federal judiciary from the pressures of conforming to majority will makes judges more likely to protect minority rights. It seems much too late in the day to argue whether the judiciary *should* respond to minority demands. The fact is that judges are a part of the political process "not by choice, but by function."[103]

In any event, the problems that affect blacks and press the governmental system for solution are anything but frivolous. They are the great issues of our time, which, as De Tocqueville observed long ago, sooner or later are resolved into judicial issues.[104] The American political system, as it has evolved, demonstrates an enormous proclivity to translate economic and social conflicts into legal conflicts. This propensity of the American system, it seems, accounts for the unique significance of the Supreme Court. Consider the kinds of major issues that occupied the Warren Court: (1) how to overcome problems of racial injustice; (2) how to strengthen and extend political democracy, for example, fair and effective systems of representation; (3) how to ensure fairness to all persons in the administration of criminal justice; (4) how to safeguard the rights of the poor in the distribution of legal, political, and economic benefits; and (5) how to give maximum pro-

102. *See* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 5-45 (1966).

103. J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 3 (1955).

104. *See id.* at 1.

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tection to individual freedoms.[105]

As to all these problems, it seems quite obvious that the prevailing, dominant interests are unlikely to be in the vanguard of change. Hence, those who are the victims of these problems—the politically disadvantaged—would quite naturally turn to the judicial system where numbers, social status, wealth, and influence presumably have less bearing on decisional outcomes.[106] In short, one of the important contributions of the Warren Court is that it was in a position to place items important to such groups on its institutional agenda,[107] and deal with them. Among the consequences of these actions was the placement of the symbol of constitutionalism and law on the side of such interests.

As a result, blacks were able initially to circumvent many of the defects of coalition-building and isolationism that so often characterize minority group politics. Coalition politics, for example, would appear to be necessary for a minority group to achieve favorable policies in the majority-rule-oriented electoral system. But to gain coalition support a minority more often than not must temper its original objectives, since failure to do so lessens the possibilities of success in coalition-building. Alternatively, a minority may hold to its original objectives but find itself isolated without the support necessary to achieve success. Then again, the minority group may subscribe to general, ambiguous,[108] though favorable policies which either postpone the specific goals or shift their realization to another arena. This is the more plausible course for a minority group such as blacks to follow in elective-political arenas, since its objectives are more likely to involve matters that affect the very self-esteem and dignity of individuals and the group itself. Hence, it would be most difficult for the group to temper

105. For a discussion of basic issues facing the Warren Court as well as a generally sympathetic commentary on that Court, see A. Cox, *supra* note 2, at 1-23.

106. But in too many instances this presumption defies hard evidence. *See, e.g.*, Broeder, *The Negro in Court*, 1965 DUKE L.J. 19; Burns, *Can A Black Man Get a Fair Trial in This Country?*, N.Y. Times, July 12, 1970, § 6 (Magazine), at 5; Crockett, *Racism in the Courts*, 20 J. PUB. L. 385 (1971); Nagel, *The Tipped Scales of American Justice*, TRANSACTION MAG. 1, 3-9 (May-June 1966); Sellin, *Race Prejudices in the Administration of Justice*, 41 AM. J. SOC. 212 (1935).

107. *See generally* R. COBB & C. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (1972).

108. *See generally* E. KELLEY & M. LEISERSON, THE STUDY OF COALITION BEHAVIOR (1970); Brams, *Positive Coalition Theory: The Relationship Between Postulated Goals and Derived Behavior*, in POLITICAL SCIENCE ANNUAL 3 (C. Cotter ed. 1973); Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 550, 555-59, 567-68 (1972).

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its original objectives, and equally difficult for the group to hold to its original objectives in isolation without any viable chance of even limited success.

The judicial process potentially offers a minority group a way to overcome certain limitations inherent in the elective-political process.[109] In the judicial process a minority group may push its objectives undiluted to obtain the fullness of specific constitutional-legal guarantees. Moreover, the entire judicial drama, though not aloof from politics, is carried on in a strictly "non-political" manner, in a language that addresses outcomes in terms of what the Constitution—and justice and fairness—"command." "Reasoned argument" and "legal principles" replace hortatory language and majority rule as the "critical" determinants. The "myth"[110] and structure of the judicial forum, as opposed to the practice and structure of elective-political forums like Congress, enhance minority group chances of success. In addition, since courts also serve important functions for political elites and the political system generally—for example, resolution of conflict in terms of "law and order"—a victory for a minority group in the judicial system takes on added significance. Specifically, favorable court action may serve to increase and constitutionalize (legitimize) pressures on and in elective-political institutions to deal with the issues involved. Indeed, the minority group may now, as a result of victory in the courts, seek to implement constitutional-legal rights, not mere interest group objectives. This, in large measure, is what happened during the Warren Court.

Today, however, the situation is different. The Supreme Court's leadership and strong support for civil rights and civil liberties no longer exist. Whereas decisions of the Warren Court embodied a creative use and application of law to stimulate basic policy changes, the Burger Court shows no such inclination. An off-the-bench comment by Chief Justice Burger is suggestive of this shift in the direction of the Court.[111] "Those [young people] who decide to go into law primarily on the theory that they can change the world by litigation in the courts," cautioned the Chief Justice, "may be in for some dis-

109. Of course, there is some evidence of coalition activity in judicial decision-making, but the resources needed to forge winning coalitions appear to be different. *See generally* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

110. *See* Skogan, *Judicial Myth and Judicial Reality*, 1971 WASH. U.L.Q. 309, 314-21.

111. N.Y. Times, July 4, 1971, at 24, col. 6.

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appointments."[112] Litigation, he said, is not "the route by which basic changes in a country like ours should be made. That is a legislative and policy process, part of the political process," he continued, "and there is a very limited role for courts in this respect."[113]

Already it appears that the character of this "limited role" is being charted by decisions of the Burger Court. Where the law seems "well-settled" the Court is likely to base its decisions on existing principles with marginal discretion for change (in either direction), for example, in school desegregation where state action (or inaction) is manifest. On the other hand, where the law seems "unsettled," the Court is likely to opt for "judicial restraint" or "non-involvement," for example, in cases that turn on the "state action"-"private action" distinction, and in litigation seeking new legal supports to strengthen and expand the constitutional rights of blacks and the poor. If this posture of the Burger Court continues, the problem for blacks will not be how to forge new changes through litigation, but rather how to prevent the "chipping away" of legal supports already gained.

Secondly, given the nature of the political system, it seems unlikely that leadership with respect to civil rights and related problems can be expected from elective-political institutions.[114] This observation finds strong support in Professor Dawson's study of 1968 and 1970 Survey Research Center public opinion data relative to governmental action in certain policy areas.[115] Dawson argues that "increased intensity and polarization of opinions regarding government race relation policies, the relatively small proportion of blacks in the population, and the increasing divisions within the Democratic Party over race related issues make it increasingly difficult to deal with the issues of racial equality and integration through the normal electoral system and policy making processes."[116] Put another way, elective-political institutions, in large measure, respond to constituencies that have the re-

112. *Id.*

113. *Id.*

114. For commentary on the inability of the political system to deal with these problems, see J. BURNS, UNCOMMON SENSE (1972); T. LOWI, THE END OF LIBERALISM (1969). *See also* W. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRING OF AMERICAN POLITICS 91-193 (1970). For an intriguing discussion of reforms geared to the black community, see Zangrando & Zangrando, *Law, the American Value System, and the Black Community*, 3 RUTGERS-CAMDEN L.J. 32, 39-44 (1971).

115. R. DAWSON, PUBLIC OPINION AND CONTEMPORARY DISARRAY 116-24, 154-202 (1973).

116. *Id.*

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sources necessary to win elections. These resources include votes, financial wealth, support from influential groups, and so on. The only resource that blacks have in potentially adequate supply is votes. However, even if blacks should achieve maximum voting strength, this would not be enough to balance the scale, much less assure favorable action from elective-political institutions.

While more active political participation such as voting and holding public office appears desirable, I do not think we ought to build expectations about such activity beyond what we might reasonably expect. Reliance on political participation as the primary way to rectify basic socio-political and legal problems must be tempered by the limitations inherent in American electoral politics. This latter point, as well as the overall efficacy of elective-political institutions in dealing with racial problems, is illuminated vividly in a study by Professor Mack Jones on black officeholders in the South.[117] "While voting and holding office are necessary conditions," writes Jones, "they are not sufficient ones for realization of the democratic creed."[118] This suggests, for example, that more than emergent black political majorities and elected officials in the nation's central cities may be needed for blacks to receive the full benefits of American society.[119] The authority and resources which cities need to deal with the problems involved make them greatly dependent, as the system presently operates, upon institutions beyond their control, such as state and federal legislatures. This situation has led one scholar to conclude that future control of central cities appears to offer blacks "very limited" opportunities for gains and may well prove a "hollow prize."[120] But this need not be the case. The unique role and powers of the judiciary, symbolized by the Supreme Court during the Warren era, could prove determinative in these circumstances.

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117. M. Jones, Black Officeholders in Local Governments of the South: An Overview (paper prepared for delivery at the Annual Meeting of the American Political Science Association, 1970).

118. *Id.* at 38.

119. For an incisive commentary on the problems and prospects facing black elected officials in dealing with urban problems, see Friesema, *Black Control of Central Cities: The Hollow Prize,* 35 J. AM. INST. PLANNERS 75 (1969). For searing commentary on the problems which face a black mayor (and in many ways, problems common to elected executives generally), see C. STOKES, PROMISES OF POWER: A POLITICAL AUTOBIOGRAPHY 118-20 (1973).

120. *See* Friesema, *supra* note 119.

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It could very well be that given the nature and operation of the American political system, strong judicial support[121]—similar to and even more than that given by the Warren Court—is one of the *necessary* conditions for the full realization of the "democratic creed" by minority groups such as blacks. The Court has had a long history of impeding and retarding the constitutional rights of blacks, even when faced with strong congressional support of that objective.[122] Even in relatively recent times, decisions of the Court offered only marginal support for black interests.[123] As long as the Court impeded black interests or supported them only marginally, nothing much was done to improve the status of blacks. But once the Court began rendering decisions that strongly supported and expanded the constitutional rights of blacks, the situation began to change. Impetus was given to the civil rights movement, support for its objectives was broadened, and Congress and the President began to take action to deal with the problems of racial injustice. Initiatives taken by the Warren Court stand out as crucial in the stimulation and development of policies designed to overcome these problems.

Viewed from an overall perspective, the decisions of the Warren Court suggest that safeguarding constitutional rights of a minority group such as blacks requires the Court to do more than just police the *process* by which public policies are made;[124] it must also judge the *output* of that process.[125] The basic need for such judicial action

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121. Of course, there may be other types of non-elective institutions that could provide such support:

> We might find . . . that certain issues simply do not lend themselves to fair resolution by elective-political institutions no matter how much we tell ourselves that they do. The alternative, in such situations, is not necessarily a total reliance upon the judiciary. Independent administrative commissions, for example, might prove highly satisfactory in arriving at fair and equitable solutions.

Barker, *Third Parties in Litigation: A Systematic View of the Judicial Function*, 29 J. POLITICS 41, 66 (1967).

122. *E.g.*, Civil Rights Cases, 109 U.S. 3 (1883). For a popular and searing commentary on this negative posture of the Court, see Steele, *supra* note 101, at 56-57, 112-22. For a scholarly and meticulous documentation of the Court's historical posture toward blacks, see D. BELL, RACE, RACISM AND THE LAW (1973).

123. *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Smith v. Allwright, 321 U.S. 649 (1944); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

124. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

125. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

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is classically expressed in Justice Stone's dissent in the first "flag-salute" case:

> I am not persuaded that we should refrain from passing upon the legislative judgment "as long as the remedial channels of the democratic process remain open and unobstructed." This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. . . . And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected.[126]

What Justice Stone identified here legally or juridically remains the chief Achilles heel of the much-celebrated American elective-political process. The fundamental issues are nowhere more clearly etched than in the repeal by the California electorate of that state's fair housing laws and the Warren Court's subsequent decision overturning the vote of the electorate.[127] But so far at least, the Burger Court, unlike the Warren Court, does not seem disposed to address these issues so as to overcome weaknesses of the elective-political process.[128] Even so, this apparent trend of the Burger Court has not yet lessened the fact that at least in recent times[129] blacks, far more than whites, place more confidence and trust in the Supreme Court "to do what's right" than in any other governmental institution. Consider, for example, the following data:[130]

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126. Minersville School Dist. v. Gobitis, 310 U.S. 586, 605-06 (1940).

127. Reitman v. Mulkey, 387 U.S. 369 (1967).

128. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Palmer v. Thompson, 403 U.S. 217 (1971); Whitcomb v. Chavis, 403 U.S. 124 (1971). For an excellent discussion of the Court's different application of "equal protection" in the context of legislative districting cases originating in the North and South, see Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383.

129. *See* Hirsch & Donohew, *A Note on Negro-White Differences in Attitudes Toward the Supreme Court*, in BLACKS IN THE UNITED STATES 99 (N. Glenn & C. Bonjean eds. 1969). The study is based on data from the Survey Research Center of the University of Michigan's post-election study of the 1964 presidential election.

130. Taken from Table 3 of illustrative materials given out at a lecture by Arthur H. Miller, Center for Political Studies, University of Michigan, delivered at Washington University, Department of Political Science, March 8, 1974.

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Table

Which part of the government on the list do you most often trust to do what's right?

| | 1972 | | | 1973 | | |
|---|---|---|---|---|---|---|
| | Total | Whites | Blacks | Total | Whites | Blacks |
| Congress | 31.7% | 32.7% | 22.1% | 35.8% | 36.0% | 33.3% |
| Supreme Court | 25.5 | 23.1 | 50.0 | 39.2 | 38.0 | 52.5 |
| President | 41.4 | 43.0 | 25.6 | 23.7 | 24.5 | 14.1 |
| Political Parties | 1.4 | 1.3 | 2.3 | 1.3 | 1.4 | 0.0 |
| | 100% | 100% | 100% | 100% | 100% | 100% |

While these data lend support to the general view expressed in this Article, they also raise other interesting observations. Compare, for example, the significant increase in white trust in the Supreme Court from 1972 to 1973, to the only marginal increase in black trust in the Court. Among the explanations that could be offered are: (1) whites, more than blacks, approve of decisions of the Burger Court that reflect a reversal or toning down of the policies of the Warren Court; (2) blacks, more than whites, while recognizing the less favorable posture of the Burger Court toward their interests, still posit more trust and hope in the Court than in other political institutions; and (3) the significant increase in trust in the Court by whites and the marginal increase in trust by blacks reflect a shift from trust in the President to other political institutions. Insofar as whites are concerned, the Court has profited from this lack of trust in the President, while on balance the Congress has gained trust from blacks. However, whether these explanations are plausible or will survive more precise empirical analysis is not of consequence here. What is important is that blacks still apparently place more trust and hope in the Supreme Court than in any other institution in the political system.

Thirdly, cutting off the Court as a viable point of access for politically disadvantaged groups could bring the appearance and the reality of increased rigidity into the political system.[131] This would certainly make for a more closed system. It could also sharpen and broaden existing cleavages. Generally, the Warren Court supported politically disadvantaged groups and provided a legal environment and stimulus

131. Of course, excessive rigidity is not the hallmark of democratic regimes. As the *New York Times* put it editorially: "While those who have attacked the Warren Court charge that excessive concern with reform is responsible for disorder and crime, history offers ample evidence that democracy has far more to fear from excessive rigidity." N.Y. Times, Oct. 24, 1971, § E, at 14, col. 1.

in which they and others, including Congress and the President, could act. Should the Court now becloud or change the legal environment, it would certainly impede civil rights progress and lessen the pressure on Congress, the President, and others to continue to deal with these problems. What then is the recourse open to disadvantaged groups?

One recourse has been the use of direct action: peaceful demonstration, civil disobedience, and violence. Unfortunately, the history of the civil rights movement demonstrates all too vividly that "only crisis can normally greatly speed the incremental process of change in America."[132] Consider the civil rights movement over the past two decades. First, the Supreme Court acted, rendering revolutionary changes in the constitutional law affecting black Americans.[133] But, though changes occurred in the law (obviously important), very few changes occurred in practice (obviously more important). Court decisions were followed by demonstrations, riots, and violence that forced crisis situations on the political system. Only then did the President and Congress pass significant civil rights legislation.[134] But here again, as a report of the United States Commission on Civil Rights clearly documents,[135] the far-reaching changes embodied in such legislation have not produced commensurate changes in practice. This, of course, illustrates quite clearly that benefits emanating from Congress, just as those coming from the judiciary, will remain primarily symbolic unless potential beneficiaries have the necessary resources to convert them into actual benefits. This does not mean that increased voting and office-holding on the part of blacks is unimportant. As mentioned earlier, they are of some, albeit limited, importance. Nor does this mean that symbolic benefits, such as favorable court decisions, serve no important function. They do;[136] indeed, we cannot discount the "symbolic reassurance" function that courts can serve in the political system.

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132. H. RODGERS & C. BULLOCK, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 212 (1972).

133. Brown v. Board of Educ., 347 U.S. 483 (1954).

134. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, *as amended*, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-6 (1970); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, *as amended*, 42 U.S.C. §§ 1971, 1973-73p (1970).

135. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1970). *See also* U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER (1971).

136. For a seminal work on the importance of symbols in politics, see M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).

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Decisions of the Warren Court served to quiet fears, to offer hope to blacks, and in so doing, acted as a "safety valve," allowing more time for the political system to deal with the issues involved. In any event, the Court performed these functions and provided symbolic reassurance to "threatened" groups such as blacks and the poor. But while symbolic benefits serve important functions, the rate and extent of their conversion to actual benefits may well determine the future of crisis situations. Thus, whether direct action is a necessary resource in order for the political system to respond to black grievances remains very much in the balance. It also remains very much a dilemma for both black and white Americans.

Fourthly, should the Burger Court continue to make uncertain, to narrow, or to negate the policies and posture of the Warren Court, we might expect still other indirect consequences on other courts and organizations. We might expect that such actions will have an important impact on lower federal[137] and state courts. These courts, after all, perform very crucial functions. They exercise a "gate-keeping" function to determine what issues enter the judicial arena. They determine, in large measure, how the few major issues that do finally reach the Supreme Court are phrased for determination by that body. Lower courts also implement Supreme Court mandates.[138] Moreover, decisions of lower courts are final in most cases. How lower courts exercise these functions may be determined largely by what they perceive to be, and what is, the actual posture of the Supreme Court. The same holds true for other governmental institutions and officials, including, for example, state legislators, school superintendents, and policemen.

In addition, the Burger Court could affect the operation of interest groups, such as the American Civil Liberties Union and the National Association for the Advancement of Colored People, that use litigation

137. Though not as dramatic or well-publicized as Supreme Court appointments, appointments to lower federal courts must also be considered. In this connection, see the useful data compiled in Goldman, *Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives*, 34 J. POLITICS 934 (1972).

138. For a detailed and interesting account of lower-court implementation of the school desegregation cases, see J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961). A more recent study of lower court implementation of federal law is found in C. HAMILTON, THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS (1973). *See also* Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

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as a chief tactic for achieving policy objectives.[139] For one thing, litigation strategies must be considered in terms of the changed posture of the Court. Among the available strategies may be an attempt to keep certain cases from the Supreme Court and selectively to direct them to sympathetic lower federal and state courts. "If victory is achieved at these levels," as one commentator put it, "the role of the civil liberties lawyer (and an uncharacteristic one) will be to try to persuade the Supreme Court to practice 'judicial restraint'—to refuse to review the decisions of lower courts."[140]

In general, "litigation retreat" may well be practiced by such groups since "no Supreme Court decision is often better than an adverse one."[141] This is especially true, for example, in situations such as that presented in *DeFunis v. Odegaard*,[142] which the Supreme Court has accepted for determination. Here, the Washington Supreme Court held that the University of Washington School of Law could, consistent with the equal protection provisions of both state and federal constitutions, take into account racial and ethnic background as a positive factor in the selection and admission of students. An adverse or qualified decision of the Supreme Court in *DeFunis* could hold serious consequences for blacks and for affirmative action programs in general.

Moreover, civil rights and civil liberties groups might attempt to achieve objectives through other forums, especially administrative agencies. The theory here is that legislative policies of the 1960's must now be implemented through strong administrative policies in the 1970's. But, as mentioned previously, detailed reports of the Civil Rights Commission vividly show that this alternative, though appealing, does not appear to be very promising.[143]

Finally, the importance and relationship of policy shifts in the Warren and Burger Courts to the overall political system are more fully understood when viewed in the broader political context in which judicial change is occurring. Some years ago Robert Dahl, in a celebrated article,[144] presented a formulation about the constituent role of the

139. *See* N.Y. Times, Dec. 19, 1971, § 4, at 8, col. 1 (commentary of Harvard Law Professor Allan Dershowitz).

140. *Id.*

141. *Id.*

142. 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 94 S. Ct. 538 (1973).

143. *See* note 135 *supra*.

144. *See* Dahl, *supra* note 4.

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Supreme Court. Dahl argued essentially that the Court both defines and legitimates the basic political decisions which are made by dominant majority coalitions rooted in the political branches and, ultimately, in the electorate. The Warren Court, as Dahl himself recognized, does not fit this formulation. The Warren Court did more than "define and legitimate" basic decisions made elsewhere; it fashioned decisions of its own. True, as Dahl explains, there was division among political elites on the issues involved, and the resulting decisions did put the Court's authority and prestige on the line. However, in these decisions the Warren Court illumined a role for the Court that was somewhat different from the past. The Court used an opportunity to lead rather than retard the nation on matters that seemingly went to the heart of the "democratic creed," and forged a really unique, and perhaps necessary, role for the Court in the political system.

However, on the basis of our discussion here the Burger Court does not seem disposed to assume this role by safeguarding, and perhaps expanding, policies that emanated from the Warren Court. Ironically, but in a real sense, the Burger Court appears to be "following the election returns" more than it is following the decisions of the Warren Court. Indeed, even though recent presidential elections[145] have not yet brought about a critical realignment or a new dominant majority coalition, they have nevertheless mirrored a current of opinion with respect to the problems of race, crime, and poverty.[146] The policies of the Burger Court are becoming increasingly congruent with this current of opinion. Consequently, whether viewed as "legitimating" or "capitulating" to current political majorities,[147] the thrust of Dahl's formulation about the constituent role of the Court retains its validity in light of present trends in judicial policy. However, it is this role that now contributes to the exacerbation of current problems and to the capability of the political system to deal with them.

This suggests that the somewhat negative and uncertain posture of the Burger Court toward civil rights, including "new" civil rights areas such as rights of the poor, could jeopardize advances already made. The persistence over a significant period of time of a strong judicial posture on civil rights can go far toward *institutionalizing* these civil

145. *See* W. BURNHAM, *supra* note 114.

146. *See* R. DAWSON, *supra* note 115.

147. *See* Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 842.

rights concepts as part of the basic socio-legal structure of the political system.[148] This is the prime example of the *educative* function that the Court can serve in a democratic government. On the other hand, the actual or apparent vacillation and uncertainty coming from the nation's highest court could easily provide the cover or excuse for many to return to pre-1954 racial practices in schools, in politics, in the administration of justice, and in daily life generally.

Moreover, while other political institutions have crucial roles to play, judicial abstinence or ambivalence on issues of racial justice could seriously weaken the capability of the political system successfully to overcome these problems. As I have written elsewhere:

> It might be that there are some issues on which the judiciary must act as a safety valve for the elected political branches, providing leadership when it is reasonably ascertained that elected institutions are either unwilling or unable to act. This does not mean that in every instance where elected institutions fail to act, the court must step in. Such a notion simplifies too much, both the delicate operation of our governing system as well as the role of the court in that system. On the contrary, by deciding and fashioning policy on such issues, the court gives to the governing system that necessary viability and capacity needed to survive.[119]

The issues discussed in this Article are of such importance that the Court in resolving them is faced with perhaps its highest duty under the Constitution: to lead the way in the protection of minority rights against majority abuses. This duty is especially appropriate for the Supreme Court since it commands some "additional reverence because of the American devotion to 'law' and to the Constitution."[150]

148. In an important sense, this raises the more general questions of the impact of and compliance with court decisions. *See generally* S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970). For a review of some of the recent literature on the consequences of laws, with specific reference to court decisions, see Rodgers, *Law as an Instrument of Public Policy*, 17 AM. J. POL. SCI. 638 (1973).

149. Barker, *supra* note 121, at 64-65.

150. Adamany, *supra* note 147, at 844.

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