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OF MYTHS, MOTIVES, MOTIVATIONS, AND MORALITY: SOME OBSERVATIONS ON THE BURGER COURT'S RECORD ON CIVIL RIGHTS AND LIBERTIES

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I. Misleading Characterization

It is a measure both of the fascination it holds for America's citizenry, and the enigmatic and unpredictable nature of many of its most significant decisions, that the work of the Supreme Court of the United States indubitably lends itself to a plethora of interpretations and characterizations. The 1975-1976 term which, for want of a better terminological embrace, is usually referred to as the "Burger Court" was no exception. Professional as well as nonprofessional commentary abounds with labels, categorizing the Court and its Justices with a wide variety of unhelpful descriptions, which range from "reactionary" to "radical," "liberal" to "conservative," or from "judicial activists" to "judicial self-restrainers." The characterizations generally depend upon the commitment of the observer, or, in Al Smith's timeless and felicitous phrase, upon "whose ox is gored." Yet to employ an inspired Philip Kurland designation, such a "tyranny of labels"[1] is not only unenlightening in any quest for a genuine comprehension of the Court's labors, but also misleads and renders a distinct disservice to any bona fide appreciation of the nature of the judicial process. The latter is already complex without these artificial encumbrances, however human they may be.

One of the distinct disservices rendered to readers and listeners by students of the Court, as well as by those directly involved with its decision-making process, is the tiresomely repeated charge that the Burger Court is a "conservative" tribunal which, allegedly, is engaged in the process of dismantling the work of the "liberal" Warren Court.[2] Any endeavor to define those two adjectives may result in reaching quite diverse conclusions (*e.g.*, Mr. Justice Brennan's quick response to the question of why he always votes with the Court's liberals was simply: "That is because I am a conservative; you see, I am committed to the preservation of the Bill of Rights").[3] But eschewing games, what is generally meant by the charge is that the Burger Court is more inclined to favor societal rights whereas the Warren Court was more inclined to favor individual rights. Accepting, for the sake of discussion, the message of that proffered dichotomy, is it accurate?

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1 P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

2 *See, e.g., Supreme Court Accused of "Dangerous" Trend in Curbs on Judicial Protection,* N.Y. Times, April 7, 1976 at 11, col. 1; *Setbacks Feared For Civil Rights,* N.Y. Times, May 23, 1976 at 30, col. 1; *Ford, Congress Are Said to Try to Repeat Civil Rights Gains,* Washington Post, May 26, 1976; *Burger Court Closing Doors,* CIVIL LIBERTIES, June 1976, at 312; *The Court Turns Back the Clock,* THE PROGRESSIVE, October, 1972 at 22; *Avoiding the Supreme Court,* N.Y. Times (Magazine) Oct. 17, 1976, at 31.

3 University of Pennsylvania, October 15, 1968.

In the main it is not. It is true that the record of the first seven years (1969-1976) of the Burger Court is devoid of such diverse landmark decisions of the first decade of the Warren Court as *Brown v. Board of Education of Topeka,*[4] *Baker v. Carr,*[5] *Gideon v. Wainwright,*[6] and *New York Times v. Sullivan,*[7] veritable revolutionary hallmarks in the annals of civil libertarian triumphs. The Burger Court rulings, however, on such line drawing libertarian fronts as *U.S. v. U.S. District Court for the Eastern District of Michigan,*[8] *Roe v. Wade,*[9] *Doe v. Bolton*[10] and *Planned Parenthood of Cent. Mo. v. Danforth,*[11] *O'Connor v. Donaldson,*[12] and *Runyon v. McCrary*[13] are not precisely slouches in the developmental constellation of human rights. It may be entirely accurate to conclude that the Burger Court has not been as broadly innovative as the Warren Court, or that the Chief Justice of the former is neither the same dynamic leader nor possesses the same magnetic, appealing personality that his predecessor manifested. Yet many members of the Burger Court have not been without initiative. Witness the reaction to such holdings as *Swann*[14] (forced busing and racial quotas), *Virginia Pharmacy Board v. Virginia Consumer Council*[15] (constitutionally protected "commercial speech"), and the string of suspect and/or close scrutiny classification decisions involving race,[16] sex,[17] alienage and national origin.[18] Admittedly, one can argue the relative comparative significance of these several illustrations, yet even the most severe critic of the present Court would have to acknowledge the advancement of libertarian principles inherent in decisions such as those mentioned, entirely irrespective of one's views of the activist position their holdings demonstrate. While the Burger Court may have retrenched in some areas, such as in the realm of criminal justice and, to a lesser extent, in that of state (but not congressional) redistricting, on balance it has expanded rather than contracted much of the libertarian work of the Warren Court.

Moreover, the Burger Court may be subjected to charges of judicial legislating or judicial activism similar to those flung with abandon at the Warren Court. It is thus not at all astonishing that Mr. Chief Justice Burger has gone to considerable lengths to defend his Court's record. At an unusual meeting with the press in April 1976, he responded to recent public criticism of the Court, and in particular to criticism made by several civil rights and consumer groups, which accused the Court of limiting access to the federal judicial system, especially for citizens complaining of rights violated by local officials. The Chief

4 349 U.S. 294 (1954).
5 369 U.S. 186 (1962).
6 372 U.S. 335 (1963).
7 376 U.S. 254 (1964).
8 407 U.S. 297 (1972).
9 410 U.S. 113 (1973).
10 410 U.S. 179 (1973).
11 96 S. Ct. 2831 (1976).
12 422 U.S. 563 (1975).
13 96 S. Ct. 2586 (1976).
14 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
15 96 S. Ct. 1817 (1976).
16 *See, e.g.,* Norwood v. Harrison, 413 U.S. 455 (1973).
17 *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973) (sex is not yet classified as a suspect category).
18 *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971).

Justice referred to statistics showing the increased caseload at all levels of the federal courts to demonstrate that more people than ever were getting into the courts. He also pointed out that the Supreme Court's own decisions on the rights of prisoners had opened up a whole new field of civil rights litigation.[19] The Chief Justice did not then embark upon a minute analysis or discussion of individual cases. Had he done so, he might well have buttressed his contentions with specific references to his Court's record in the area of civil rights and liberties.

II. Survey of Some Specific Cases

A. *The First Amendment's Religion Clauses*

The "free exercise" realm, which has witnessed very little litigation since the draft or conscription cases of the late 1960's and early 1970's, remains as securely libertarian today as it was when Earl Warren retired in 1969. In fact, the new Chief Justice's generous opinion for the Court on behalf of Wisconsin's Amish community in its successful battle against compulsory school attendance beyond the eighth grade,[20] in which only Mr. Justice Douglas partially dissented, represents a distinct enhancement of individual rights. With the possible exception of the 1976 ruling which narrowly upheld Maryland's programs of direct general financial grants to a number of church related colleges[21] and which, in the eyes of some observers, created a small crack in the wall between church and state (to which wall no Justice referred in the case), the Burger Court has maintained the rather consistently tough separationist record of its predecessor.[22] This remains true notwithstanding the continued willingness of Justices White and Rehnquist to lower the bars and the recent partial conversion of the Chief Justice to that permissive posture.

B. *The First Amendment's Free Expression Guarantees*

Vocal and visual expression and assembly, both in their advocative and symbolic tenets, would appear to be at least as free as they were prior to the advent of the Burger Court, as, with duly noted exceptions, the "street language" and "street assembly" cases of 1971 to 1976 conclusively indicate.[23] The Burger Court even found a first amendment protection against patronage related dismissals of below policy level government workers,[24] and also against attempted statutory limits of expenditures by and for a candidate for federal elective office.[25]

19 N.Y. Times, April 11, 1976.
20 Wisconsin v. Yoder, 406 U.S. 205 (1975).
21 Roemer v. Maryland Public Works Bd., 96 S. Ct. 2337 (1976).
22 *See* Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Public Educ., 413 U.S. 472 (1973); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).
23 *See, e.g.*, Hudgens v. NLRB, 96 S. Ct. 1029 (1976).
24 Elrod v. Burns, 96 S. Ct. 2673 (1976).
25 Buckley v. Valeo, 424 U.S. 1 (1976).

One exception may well be that eternally confused and confusing realm of libel and slander, in which the Court has not been a model of either clarity or consistency,[26] and in which it seems to have almost as much difficulty in arriving at viable lines as it has in the area of obscenity litigation. That latter syndrome, of course, is another exception to the otherwise justly hallowed first amendment libertarian record. But the obscenity area represents a corner of constitutional law that is probably insoluble, absent a highly unlikely judicial embrace of that sensible posture consistently propounded by Mr. Justice Brennan which he recently reiterated in dissent in the Court's rather embarrassing *Miller-Adult Theatre* series of 1973 obscenity decisions.[27]

On the other hand, certainly not all rulings in this sphere have been "pro-society" as opposed to "pro-individual" choice, as is demonstrated by the 1975 decision which extended the constitutional protection against censorship and related prohibitions which have been long enjoyed by newspapers, books, movies, theatrical productions[28] and "risque" drive-in movies.[29]

In addition to defamation and obscenity, what loomed like a third exception to the generally advanced libertarian freedom of expression record of the Burger Court, namely freedom of the press, would appear to have turned a highly important corner with the Court's ruling in *Nebraska Press Association v. Judge Stuart*,[30] a truly landmark decision which was handed down during the waning June days of 1976. There it was held that judges may generally not gag the press in criminal cases. Coupled with the 1971 *New York Times* and *Washington Press* rulings,[31] it gives a veritable green light to the reporting of facts and events as perceived and procured by the press. It does not, however, extend to a newsgatherer's personal refusal to identify his or her confidential sources of information.[32]

C. *The Criminal Justice Sector*

As already acknowledged, some retrenchment has unquestionably taken place in the Court's treatment of the criminal justice sector. Indeed, this is the one area in which the Burger Court is predictable. The benefit of the doubt has, by and large, been accorded to society as against the individual. This has been particularly true in the realms of search and seizure,[33] confessions,[34] self-incrimination,[35] and the rigid application of the exclusionary rule.[36] Yet there have been

26 *See, cf.*, Paul v. Davis, 96 S. Ct. 1155 (1976); Time, Inc. v. Firestone, 96 S. Ct. 958 (1976); Gertz v. Welch, 418 U.S. 323 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971).
27 Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).
28 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
29 Erznoznik v. Jacksonville, 422 U.S. 205 (1975).
30 96 S. Ct. 2791 (1976).
31 New York Times v. United States, 403 U.S. 713 (1971).
32 Branzburg v. Hayes, 408 U.S. 665 (1972).
33 *See* United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).
34 *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
35 *See* Michigan v. Tucker, 417 U.S. 433 (1974); Oregon v. Hass, 420 U.S. 714 (1975).
36 *See* Stone v. Powell, 96 S. Ct. 3037 (1976).

decisions which may benefit an accused, as well as decisions which may work to an accused person's detriment: to wit, the extension of the right to counsel in criminal cases to all imprisonable misdemeanors;[37] the crucial, although somewhat mixed capital punishment decisions of 1972[38] and 1976;[39] and the recent "right to silence" *Miranda* confirmation.[40] However, there is assuredly little doubt that if there is any area of constitutional law in which the Burger Court has followed the proverbial "flag," at least in considerable measure, it is that of criminal justice and procedure.

D. *Questions of Race and Due Process*

As will also be outlined later in discussing the equal protection of the law syndrome, it is in the racial field that the Burger Court has gone far beyond the Warren Court's quest for a libertarian response, embracing areas of adjudication that the latter never tackled. Among these are such contentious, emotion-charged cases such as *Swann,*[41] which involved forced busing in aid of racial integration based on the utilization of racial quotas; *Morgan,* which entailed the takeover of a school system;[42] the so styled "good faith" desegregation plans;[43] the outlawing of de facto as well as de jure segregation;[44] retroactive awards of seniority;[45] the compelling of governmental construction of low-income housing;[46] various forms of affirmative action and preferential treatment;[47] and, perhaps most contentious of all, the rejection of the right of private non-sectarian schools to deny admission on the basis of race.[48]

Recognizing that the erstwhile unanimity of the highest Court in racial matters ceased to exist as of the 1971 term, after two decades of consistent, full bench agreement on the subject, the 1976 term of the Burger Court produced certain decisions in the racial realm which might conceivably, but far from certainly, herald a slowing down of expansionist decisions in this sphere.[49] But that is hardly astonishing given the headlong judicial rush, particularly in the lower federal courts, toward approval of reverse discrimination. Witness the remarkable dissenting opinion by the Court's leading civil libertarian, Mr. Justice Douglas, in the Washington Law School admission reverse discrimination case of *De Funis v. Odegaard.*[50]

In the due process of law quicksand sector, the Burger Court has indeed been enterprisingly expansionist, more so than the Warren Court. Whatever

37 Argersinger v. Hamlin, 407 U.S. 25 (1972).
38 Furman v. Georgia, 408 U.S. 238 (1972).
39 Gregg v. Georgia 96 S. Ct. 2909 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976).
40 Doyle v. Ohio, 96 S. Ct. 2240 (1976).
41 Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra* note 14.
42 White v. Morgan, -F.2d-(1st Cir.), *cert. denied,* 96 S. Ct. 2648 (1976).
43 Wright v. Emporia, 407 U.S. 451 (1972).
44 Keyes v. School Dist., 413 U.S. 189 (1973).
45 Franks v. Bowman Trans. Co., 96 S. Ct. 1251 (1976).
46 Hills v. Gautreaux, 96 S. Ct. 1538 (1976).
47 Contractors Ass'n. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).
48 Runyon v. McCrary, 96 S. Ct. 2586 (1976).
49 *See, e.g.,* Washington v. Davis, 96 S. Ct. 2040 (1976); McDonald v. Santa Fe Transp. Co., 96 S. Ct. 2574 (1976); Tyler v. Vickery, 96 S. Ct. 2660 (1976).
50 416 U.S. 312, 320 (1974).

its rationale and justification, it has plowed deep, new, and not untreacherous furrows, none of which is beyond serious reservation and challenge. These due process fields include school discipline,[51] capital punishments,[52] involuntary commitment of the harmless mentally ill,[53] divorce proceedings,[54] and prisoners' rights.[55] Due process, in all its manifestations and ramifications, remains constitutionally both Nirvana and morass.

F. *Egalitarianism*

That area of Supreme Court adjudication *cum* policy-making, which has undergone in the Burger court the most extensive, ambitious, and controversial pioneering or judicial legislating, is that of egalitarianism. Egalitarianism personifies and synthesizes the ongoing struggle between the competing constitutional claims of liberty and equality. It is here that the above alluded to close scrutiny and/or suspect category classifications developed by the Burger Court are particularly apposite, be it in matters of race, sex, alienage or national origin, as the earlier illustrations delineated.

Contemporarily labelled the "new" equal protection, it features a significant pioneering modification of the more traditional double standard which grew out of the famed Stone footnote in *Carolene Products*.[56] In effect, strict judicial scrutiny will be applied to certain types of equal protection and due process cases, depending on the type of statutory classification under attack.

Thus, for the economic-proprietarian cases involving taxation or general regulatory powers, the Court still uses the traditional equal protection test of examining whether the legislature had a reasonable or rational basis for making its statutory classification. Yet ever since the 1937 "switch-in-time-that-saved-nine," the basic civil rights and liberties issues have been subject to closer examination by the Court. Demonstration of a legislative classification which affects so-called fundamental interests (*e.g.*, voting rights,[57] or the right to interstate travel[58]), touches a suspect category (*e.g.*, race,[59] national origin or alienage,[60] and, as of 1968, but apparently no longer after mid-1976, illegitimacy[61]), or deals with the special area of sex discrimination,[62] now results in an

51 *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Baker v. Owen, 395 F. Supp. 294 (M.D. N.C. 1975), *affirmed*, 96 S. Ct. 210 (1976).

52 *See, e.g.*, Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Gregg v. Georgia 96 S. Ct. 2909 (1976); Furman V. Georgia 408 U.S. 238 (1972).

53 *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975).

54 *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971).

55 *See, e.g.*, Meachum v. Fano, 96 S. Ct. 2532 (1976); Montayne v. Haymes, 96 S. Ct. 2543 (1976); Estelle v. Justice, 96 S. Ct. 2637 (1976); Procunier v. Martinez, 416 U.S. 396 (1974).

56 United States v. Caroline Products Co., 304 U.S. 144 (1938).

57 *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

58 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

59 *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973); Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967).

60 *See, e.g.*, Hampton v. Mow Sun Wong, 96 S. Ct. 260 (1976); Graham v. Richardson, 403 U.S. 365 (1971).

61 *See, e.g.*, Mathews v. Lucas, 96 S. Ct. 2755 (1976); Norton v. Mathews, 96 S. Ct. 2771 (1976); Weber v. Aetna Cas. & Ins. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

62 *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971), *with* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

even higher level of Court scrutiny. Hence, once an issue has been placed on that level of scrutiny, the Court in effect shifts the burden of proof of its constitutionality to the government and requires that it demonstrate a compelling state interest for its legislative classification. Once the fundamental interest, suspect category, or impermissible sexual differentiation classification is proven in a case, the strict judicial scrutiny which thereby results leads to considerably greater judicial protection of these rights. In essence, we see the Court using a complicated double standard within a double standard to accomplish this contemporary task.[63] Unquestionably an advanced manifestation of judicial activism or judicial legislating, the suspect category—strict judicial scrutiny concept is indeed a controversial judicial posture, one that is both disturbing and fascinating.[64]

As the Supreme Court concluded its 1975-76 term in July, the longest in its history, the old but never out of fashion issue of judicial self-restraint versus judicial activism gave ample promise of newly developing controversy on the front of basic freedoms and civil rights and liberties. It represents controversy, both troubling and exciting, nurtured by the clearly emergent central issue of how to resolve conflicting constitutional rights, privileges, and demands between liberty and equality, both of which are specifically guaranteed against non-due process infringement by the letter as well as the spirit of the fifth and 14th amendments, and now also widely viewed as inherent in the first and ninth amendments.

III. The Human Nature and Role of the Supreme Court[65]

It matters, of course, who is on the Court at a particular time, an issue poignantly contemporary with the exit of the Warren Court and the entrance of the Burger Court. Men and women as justices and judges are, in their professional commitments, justices and judges; but they are also men and women, not "disembodied spirits." As human beings, Mr. Justice Frankfurter recognized, "they respond to human situations." They do not reside in a vacuum. They neither are nor can be, "amorphous dummies, unspotted by human emotions," nor "monks or scientists;"[66] they are, as Mr. Chief Justice Warren described, "participants in the living stream of our national life, steering the law between

63 For two excellent treatments of this vexatious and complicated issue, *see* Gunther, *The Supreme Court; 1971 Term; In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Wilkinson, III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VIR. L. REV. 945 (1975).

64 In addition, or peripheral thereto, are such highly contentious equal protection Burger Court decisions as the 1973 and 1976 abortion cases. *See* Planned Parenthood of Cent. Mo. v. Danford, 96 S. Ct. 2831 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). There is also a veritable host of landmark holdings in the social welfare sector. *See, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974).

65 Substantial segments of Section III were adapted from my bicentennial address to the Allegheny County Bar Association, Freedom Under the Law, January 7, 1976, Pittsburgh, Pa. (Delivered under the auspices of Pennsylvania State University.)

66 *See* H. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS, 137 (3d ed. 1973).

the dangers of rigidity on the one hand and formlessness on the other."[67] If this be legislating rather than judging, then like other elements in the process of governing, the interpretation of the law may at times be necessarily based at least in part on what Francis Biddle, following his master Holmes, so well viewed as the "can't helps."

Still, there are the obvious limitations on the judicial process alluded to earlier, and whereas, as Mr. Justice Holmes was frank to admit, "without hesitation," that judges "do and must legislate," he admonished us all that they can do so "only interstitially; they are confined from molar to molecular motions."[68] In the magnificent language of the Court's finest literary stylist, Benjamin Cardozo, "[t]he greatest tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges idly by."[69] It is also a fact of judicial life that a member of the bench:

> is not to innovate at pleasure. He is not knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life.[70]

The two hallowed and all too often oversimplified concepts of judicial self-restraint and judicial activism, vis-à-vis actions by the executive and legislative branches—concepts that are directly related to judicial judging and judicial legislating, respectively—are not incompatible. No matter how an observer may label a jurist, he is never the complete deferrer or the complete innovator, although, to a considerable degree, a good overall case could be made for associating such well-known Justices as Frankfurter and the second Harlan with the first and Justices Murphy and Douglas with the second jurisprudential concept. The Court may well have the last say at a particular moment in history in a case at bar; but potentially it has the last say only for a time, unless it can convince the other participants in the governmental process, as well as the people, that its short-run judgment and leadership are entitled to long-run adoption. For the Court may be reversed in a host of ways, and this has frequently been done. If not without toil and trouble, the other forces of the body politic may override even the highest judicial pronouncements. Witness Congress' speedy countermanding of the Supreme Court's 1970 decision in the 18-year-old state voting rights case.[71] Well aware of this fact of governmental life, the Court thus endeavors to ascertain that it can make its decisions stick only by winning a persuasive victory in the short run, by making its case clear at the point of initial impact; for, in the long run, non-accepted Court rulings will simply not survive. Hence, the judiciary's educational process is an essential one, and, by and large, the Court has done an excellent job in its role as arbitrator

67 FORTUNE, November 1955, at 106.
68 Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1916).
69 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 168 (1921).
70 *Id.* at 141.
71 Oregon v. Mitchell, 400 U.S. 112 (1970).

cum educator, as a teacher in what E. V. Rostow termed, but John Mitchell pointedly rejected, a vital [eternal] national seminar.[72]

Although the Court must indeed "respect the social forces that determine elections and other major political settlements,"[73] it has not and it should not shy away from acting as the "instrument of national moral values that have not been able to find other governmental expression,"[74] provided always, however, that constitutional bases for such action exist. Thus, in tackling such major areas of public law as desegregation, reapportionment, and criminal justice, three great preoccupations of the Warren Court, the Supreme Court of the United States lived up to its role as the natural forum in our society for the individual and for the small group. Even at the risk of pleading *mea culpa* to a double standard, it thus has proved itself to be the greatest institutional safeguard we possess.

It is to this tribunal, and to the judicial legal process it represents, that the would-be violent, the would-be lawbreaker, and the constitutionally despairing turn, for it represents the essence and the ultimate of the enunciator and arbiter of liberty, under law, in our democratic polity. The road is a long and sometimes a serpentine one, but, in the final analysis, there is not only the hope and the promise but the real chance for justice under law, even for such occupants of the nether stratum society as the famous or infamous Messrs. Palko, Mallory, Gideon, Escobedo, and Miranda of contemporary criminal justice fame. In Mr. Justice Frankfurter's often-quoted words, "it is a fair summary of history to say that safeguards of liberty have frequently been forged in controversies involving not very nice people."[75]

The Court's essential function, as Mr. Chief Justice Earl Warren consistently viewed it, is "to act as the final arbiter of minority rights";[76] and minority rights, often admittedly coupled with minority demands, are what so much of the constitutional crises of our day are essentially all about. Yet it should be candidly recognized that, at times, both the demands and their response have begun to go well beyond the pale of justification. Thus, it is quite understandable that many a seasoned observer of the judicial role has been disturbed by the Burger Court's now well-advanced development of so-called suspect criteria categories of legislation and ordinances under contemporary egalitarian interpretations of the Constitution's 14th amendment. A considerable number of these developments are administering a rather disturbing beating not only to 14th amendment's libertarian guarantees, but also to the first amendment, which contains explicit, fundamental, indeed sacred safeguards against governmental intrusion. As Mr. Justice Stewart asked in his dissent in the *Pittsburgh Press Case*,[77] should the first amendment "be subordinated to other socially desirable interests . . . ?"

When does a category become suspect? Does it perhaps depend, as Mr.

72 Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).
73 W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 75-76 (1961).
74 N.Y. Times, June 17, 1962 (Magazine) at 38.
75 United States v. Rabinowitz, 334 U.S. 56 (1950) (Frankfurter, J., dissenting).
76 As quoted in Philadelphia Inquirer, October 4, 1968.
77 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 403 (1973) (Stewart, J., dissenting).

Justice Marshall has frankly admitted, upon a "sliding scale" of values?[78] It would seem that that is exactly what a majority of the Burger Court has been doing. And, if that sliding scale approach has indeed become Court policy, does it not, as Gerald Gunther correctly asks, "create too great a risk of ad hoc, unprincipled judicial intervention?"[79] It was precisely that latter charge which the Burger Court faced after its June 1976, decision which held that the contractual rights found in the Civil Rights Act of 1866, as applied to the exclusion of applicants to private secondary schools on the basis of race, vitiated constitutional rights of privacy, freedom of association, and parental choice.[80]

The Supreme Court must resolutely shun the temptation to become a prescriptive policymaker, absent genuine constitutional commands, no matter how worthy, noble, or moral the issue at hand may be. As the ultimate constitutional guardian and interpreter, it must always be alert to the often quoted 1964 admonition by the second Mr. Justice Harlan that: "The Constitution is not a panacea for every blot upon the public welfare; nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."[81] It may thus well be questioned, on grounds of both wisdom and authority, whether the Court should be involved, as it has increasingly become, in such realms as economic equality as distinct from public morality. Although law does and should play a role in social reform, our courts must not be viewed as baskets of social problems. Social problems present legislative obligations. In the words of Mr. Justice Stewart in announcing the judgment of the Court in the capital punishment case of *Gregg v. Georgia*, ". . . while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators."[82] The task of our judiciary is to hold aloft the proud banner of constitutional fundamentals.

78 *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting).
79 G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 755 (1975).
80 Runyon v. McCrary, 96 S. Ct. 2586 (1976).
81 *See* Reynolds v. Sims, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).
82 96 S. Ct. 2909, 2926 (1976).