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A Look at the Burger Court

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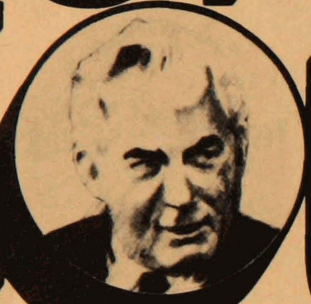
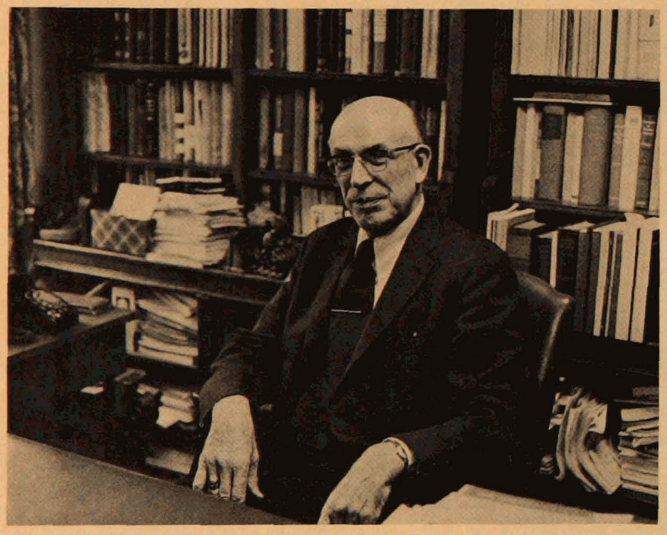
BURGER COURT



A talk delivered at the luncheon in honor of the Law School Committee of Visitors, October 27, 1972.



by Professor Paul G. Kauper

First let me say that the title is somewhat misleading insofar as it refers to the Burger Court. The truth is we do not really have a Burger Court if by that we mean a Court with a majority composed of persons appointed by President Nixon. To date we have four such appointees and if the thought is that this group is going to vote as a bloc or represent some change in constitutional theory, it is premature to speak of it as having a dominant influence. But apart from that I think the attempt to designate the style, tone, or direction of a Court by reference to its chief justice is misleading. This is commonly done. We refer, for instance, to the Marshall Court, the Taney Court, the Waite Court, the Taft Court, and the Hughes Court. The use of the name of the chief justice is a convenient tool to designate a given period in the history of the Supreme Court. In so far as it suggests that the chief justice is a dominant person on the bench it may or may not be accurate. Any person on the Supreme Court may in a sense have a dominant or at least a highly persuasive voice simply because of his intellectual force and not because he is chief justice. I have always supposed that the particular position occupied by Chief Justice Warren was not attributable so much to any great intellectual leadership on his part as it was to qualities of personality which commanded the respect of his colleagues and of the public generally. Chief Justice Warren was aligned in many cases with at least four other justices, constituting a majority, who did fashion a series of constitutional interpretations which we now associate with the Warren Court. It is in this sense that I shall refer to the Warren Court.

Even though it cannot be said that the bloc of President Nixon's appointees constitutes a dominant group on the so-called Burger Court, the Court as reconstituted does warrant examination. Obviously the appointment of four new persons to the bench is an important development and could change the balance within a Court on many questions on which there has been a close division and could be prophetic of the direction in which the Court is or may be moving. Moreover since President Nixon said that he was very much concerned about his appointments to the Supreme Court and indicated a perceptiveness of the Court's role which not all presidents have displayed, and since he said he wanted to appoint strict constructionists to the Court, a close look at possible new directions is particularly relevant. Even this is somewhat premature. Only Chief Justice Burger has completed two terms on the Court, Mr. Justice Blackmun has completed about a term and a half, and both Justices Powell and Rehnquist less than one term. There is some basis, however, in the decisions handed down to date and in opinions written by these appointees to give us at least some insight to their views on basic constitutional questions and, more importantly, the conception they entertain of their judicial role.

Before going on to pinpoint these developments let me say a word about the term that President Nixon has used in describing the kind of persons he wants on the Supreme Court. He has repeatedly used the term "strict constructionists." I think I know what President Nixon

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means but I do not think that his use of the term "strict construction" is a particularly felicitous term or phrase to convey what he has in mind. "Strict construction" is an ambiguous term and I doubt if it can be identified with any particular school of constitutional interpretation at least in recent years. Historically the difference between strict constructionist or liberal constructionist arose during the great controversy in the early part of the last century on the interpretation of the powers of Congress. It is elementary schoolbook learning that John Marshall and Alexander Hamilton represented the school of liberal construction which prevailed of course in *McCulloch v. Maryland* and which on the whole has dominated the Supreme Court's interpretation of congressional powers, a construction supported by the Necessary and Proper Clause of the Constitution. I doubt very much whether President Nixon is interested in reviving that old controversy since it seems to me to be so well settled generally in our American history in favor of the Marshall-Hamiltonian point of view.

There is another theory of strict construction which is often advanced as a standard of constitutional interpretation, although perhaps not always put in those terms. It is equated with a literal construction of the Constitution. It assumes that the Constitution can be interpreted by reference to the words, phrases, the pattern of arrangement of provisions within the four corners of the document, a process of interpretation aided by general principles explicit or implicit in the text of the Constitution and by historically established usage. This theory of interpretation is designed to minimize the subjective aspects of the judicial role in constitutional interpretation. The late Professor Crosskey was an exponent of this theory of strict construction. This theory generally has not been followed either and indeed there are very few on the Supreme Court, at least in the recent years, who have seriously suggested that the results they reach are based entirely on exegetical and historical considerations.

Somewhat related to this is another kind of literalness in construction of the Constitution which says that the words must be taken as they are without any dilution or interpretation which seems to alter their meaning. In this sense Mr. Justice Black was a strict constructionist at least with respect to the First Amendment when he said that since it says Congress shall make *no* law abridging the freedom of speech, it means just that—Congress can make no law. Likewise Mr. Justice Black employed a strict construction theory in support of his general philosophy of legal positivism when he rejected any notion of interpreting the Constitution by what he termed "natural law" considerations which he condemned as an excrescence on the Constitution. In his view there should be no reaching out to give constitutional sanction to values and interests not explicit in the text. Yet it took a good deal of construction on the part of Mr. Justice Black to find that the indeterminate phrases of the Fourteenth Amendment had the effect of amending the First Amendment to read that neither Congress nor the states shall pass any laws. And perhaps a strict construction of "due process of law" by reference to historical usage would have precluded all substantive content. Moreover it is something more than strict construction to say as Mr. Justice Black said that the provisions of Article I of the Constitution providing for popular election of congressmen impliedly incorporated the one-man, one-vote rule. Nor was it strict construction for Justice Black to say as he did in the case involving the federal statute extending the voting right to eighteen-year olds that the power given to Congress to regulate the time, place, and manner of holding elections for congressmen includes the power to prescribe qualifications for those voting for congressmen, even though Article I of the Constitution explicitly recognizes the power of the states to prescribe voting qualifications. Justice Black did not really adhere to a strict construction philosophy. I mention these considerations not to criticize Justice Black, for whom I entertained high respect, or to suggest that exegetical or historical considerations are inappropriate to constitutional interpretation, but simply to suggest that a theory of strict construction based on a literal reading of the Constitution, supported by historical usage of words, affords no exclusive canon of construction and affords no dominant explanation of the history of constitutional interpretation.

I think that what President Nixon intended in using the term "strict constructionist" is something quite different. I think he uses the term to describe a justice who is com-

mitted to a philosophy of self-restraint in the exercise of the power of judicial review. This philosophy, which goes to the heart of judicial review, has characterized a number of justices over the years, most notably Mr. Justice Holmes, Mr. Justice Stone, Mr. Justice Frankfurter, and Mr. Justice Harlan. The philosophy of "judicial abstention" or "self-restraint" or "judicial passivity" stands out in contrast to the "judicial activism" which I think it is fair to say has characterized the Warren Court, although I must enter a caveat here in speaking about the Warren Court since it was not a monolithic body in its views by any means and even it had an uncertain majority on certain kinds of questions. But at least over the period of years when Mr. Chief Justice Warren was at its head the Court did engage in a line of constitutional interpretation which could be said to be distinctive, which could be said to be innovative, which was a departure from precedent and practice, and which represented, I think it fair to say, to the outside observer a value-oriented and policy-directed use of judicial power. This I suppose we can describe as judicial activism. This represents a philosophy of judicial review which accords the maximum power to the Court in fashioning the country's constitutional development on the basis of values, policies, and priorities to which in the view of the Court the constitutional system should be adapted in the context of contemporary American society. It is a conception of judicial review which magnifies the discretionary authority of the judges and opens up a highly subjective element in constitutional interpretation. Indeed to some it is the same as recognizing that the Court sits as a continuing constitutional convention in the reshaping of the constitutional tradition to fit the mood of the day.

Referring again to the Warren Court I think it is more accurate to say that it was this philosophy of judicial review which prevailed as a general rule following the retirement of Mr. Justice Frankfurter and replacement by Mr. Justice Goldberg. It was not fully realized at the time that this was really a watershed in constitutional history. The circumstances of a judge's retirement from the bench was the occasion for a new alignment within the Court which rather drastically altered the course of constitutional construction. It is a commentary indeed on our constitutional system that so much depends on the individual justices on the bench and not so much on their own social and political philosophy as it depends upon the view that a given justice takes as to his role as a member of the Court and the functioning of judicial review in the constitutional system. It is on this latter point that we may more properly speak of liberals and conservatives on the bench. Certainly from that point of view I suppose the greatest conservative on the bench was Mr. Justice Holmes who took a very modest view of judicial power, at least when it came to challenging the authority of the other two departments of the government or the expression of the popular will through duly enacted laws. His most faithful disciples at a later day were Justices Frankfurter and Harlan. I have come to the conclusion that there is nothing inevitable about constitutional interpretation unless we could say that the retirement of Justice Frankfurter was inevitable or that the election of President Nixon or his appointment of four judges whom he terms as strict constructionists was inevitable. Our constitutional interpretation rides in part on the circumstances and accidents of history.

I now propose to examine the main lines of development under the Warren Court which distinguished it as an activist Court.

One development that took place during this period which has had important repercussions particularly on the administration of criminal justice and the increased subordination of the states to federal power and to surveillance by the Supreme Court was the progressive application of the Bill of Rights to the states by means of the Fourteenth Amendment. As distinguished from application of the fundamental fairness theory to which the Court in earlier years, and a decreasing minority spearheaded by Justice Harlan continued to subscribe in more recent years, the majority applied to the states not only the basic idea expressed in the Bill of Rights but the whole crust and gloss of interpretation going with it respecting such matters as right to counsel, freedom from unreasonable search and seizure, the privilege against self-incrimination which I may add was the basic ingredient of the *Miranda* decision, freedom from double jeopardy, the right to jury trial, freedom from cruel and unusual punishment. I do not mean to say this development was wholly new. Even at an earlier time the Court had at least used the language of making the First Amendment apply to the states although this was often simply a rhetorical expression to designate that the rights embodied in the First Amendment were recognized as fundamental rights. But the development whereby not only the freedom but also its crust of interpretation was riveted upon the states in a kind of a strait jacket, thereby leaving the states little room to maneuver, was a distinctive aspect of the constitutional development during the period of the Warren Court. I should add also in this connection that a part of this was the adoption with a vengeance of the exclusionary rule, i.e., that any evidence obtained by unconstitutional means should be precluded from use at the trial later, a rule which as an evidentiary rule followed in federal courts did not originate with the Warren Court but was elevated by it to a constitutional rule binding on the federal government and states alike.

A second significant development was the elevation of the equal protection clause to the same high place once occupied by the due process clause of the Fourteenth Amendment as a means of protecting substantive right. This acquired its original impetus, I am sure, with the Court's decisions in the racial segregation cases, beginning with the *Brown* case, although the Supreme Court was unanimous in those decisions and the unanimity reflected a clear constitutional policy against racial segregation. The really expanded use of equal protection began with its use in the *Reynolds* case to invalidate any scheme of state legislative apportionment which did not correspond with the Court's one-man one-vote doctrine, a doctrine which was spun out of whole cloth in the face of history, precedent, and analogy furnished by the Constitution itself and which marked a departure from the familiar "rational basis" interpretation of the equal protection clause. Fundamental rights thinking emerged again but here in the guise of the equal protection clause rather than that of the due process clause. The Court began to use the equal protection clause as a convenient and useful lever in its hands for challenging legislative classifications of various kinds for which the Court could find no compelling reasons, as viewed through the spectacles of its own lights and understanding. Justice Harlan, often joined by Mr. Justice Black, pointed out in dissent that the Court by subjecting legislative policy determination to the kind of close scrutiny inherent in the compelling interest test was making a radical departure from the traditional interpretation of equal protection, namely, that the legislature had a wide basis for classification and that so long as there were rational grounds to support the classification the Court would not disturb it. The old classical view was clearly an exercise of judicial self-restraint as opposed to the activism which now posits a new standard, namely, that when the legislation is seen to impinge on fundamental rights, the same term used under the due process clause at one time, the Courts must scrutinize closely and invalidate the legislation unless there are compelling reasons to support it. Nothing of course is more reminiscent of the

activism of the Supreme Court in the early days of the New Deal and the preceding years when five members of the Court were using the same judicial technique in the name of the due process clause to condemn various kinds of legislation found to impinge upon fundamental right. The fact that this interpretation has now been shifted to equal protection as distinguished from due process does not serve to disguise the high element of judicial subjectivity involved in the Court's sorting out of legislative motives and considerations and passing judgment on whether they are adequate to support the given classification. The raiment is that of Esau but the voice is still that of Jacob.

The third category of development was in the interpretation of the First Amendment freedoms. The Court by a series of interpretative devices, again not unknown in prior periods of interpretation, has extended the protection of the First Amendment freedoms of speech, press, and assembly so as to minimize the possibility of intrusion on these freedoms by legislative or executive actions at various levels of government. A favorite technique has been to find that certain statutes are either too vague in dealing with First Amendment freedoms or that they are too broad and have a so-called chilling effect on these freedoms. A notable aspect of the development in the First Amendment area was the line of decisions curtailing the power of government to deal with the publication and sale of obscene materials. It all began with the *Roth* case when the Court said that while obscenity was not protected under the Constitution, it should be closely guarded by way of definition so that neither the federal government nor the states could declare just anything to be obscene, since too broad a view would be in conflict with the free press guarantee. But the *Roth* decision has been refined to include the "utterly without redeeming social value" test which as a practical matter has made obscenity legislation unenforceable. There is hardly a book or a film which cannot be found on the basis of expert evidence by some self-styled authority on literature or art to have at least one bare minimum iota of redeeming social value. I am not here arguing for obscentiy laws. The Court might say all obscenity laws are unconstitutional as Justices Black and Douglas contend, or it might say that these laws must be limited to hard-core pornography, as some justices have said, but for the Court to posit a general test and then undermine it by a further criterion which makes the laws unenforceable is to state a self-defeating test. Secondly, the Court has severely curtailed the ordinary law of libel by weaving a considerable web of protection around those who criticize public officers even in statements which by ordinary canons of construction are defamatory and destructive of reputation. In doing so the Court has significantly restricted the law of libel at the expense principally of the power of the states to develop their laws in the interest of protecting reputation and privacy.

Finally I may say that a further development during this period, which parallels the expanded use of the equal protection clause, is the revival of natural right thinking under the Fourteenth Amendment as evidenced in the *Griswold* case. To be sure Mr. Justice Douglas attempted to find support for the newly created constitutional right of privacy in the peripheries and emanations of the freedoms catalogued in the Bill of Rights. Other members of the majority were more explicit in stating that the right of privacy was a fundamental right protected by the liberty clause of the Fourteenth Amendment. The result here and its important implications on many current questions cannot be attributed entirely to the Warren Court since it represents a revival of the thinking of an earlier day which indeed goes back to a main line of interpretation of the Fourteenth Amendment, a line of interpretation shared by many judges and which would have to be put in a category of an activist interpretation as distinguished from the view taken by Mr. Justice Holmes who did not find an adequate basis in language or history for the substantive right interpretation of due process. I might add that this kind of natural right thinking found expression in the opinions of at least two of the justices who constituted a part of the majority which last spring held that capital punishment was cruel and unusual punishment within the meaning of the Eighth Amendment of the Constitution.

Basic to all of these developments I have briefly alluded to are certain general characteristics. First we have an expanded conception of right or freedom and a corresponding denigration and weaking of the legislative power to give expression to conceptions of public interest which restrict the right. Secondly, most of this expansion of the conception of right has resulted in increasing surveillance of the actions of state government at all levels, and represents a corresponding dilution and erosion of federalism. For all practical purposes the Supreme Court has converted the procedural limitations stated in the Bill of Rights as a restriction on the federal government into a constitutional code of criminal procedure for the states and made itself the nation's high court of criminal appeals. Thirdly, this development has been characterized not only by the creation of new rights in the name of interpretation, as in the case of the one-man one-vote rule and in the extension of procedural rights by carryover of the Bill of Rights, but an aggressive and even dogmatic assertion of these rights. Perhaps we have no better illustration than that found in the one-man one-vote cases. After having asserted that the legislative branch must be apportioned on this basis, and this would include not only the lower house but also an upper house, the Court then proceeded to apply the rule to a number of other units of government in a process that reached its climax in the case where the Court held that election of the six-man board of trustees of a community college owned and operated jointly by three communities was unconstitutional because under the statutory apportionment one city had only three trustees whereas under a strict one-man one-vote it should have been 3.6 trustees. Moreover the Court has said there can be no deviation from this except in extraordinary cases so again as to minimize the freedom both of legislatures and of the people who represent the basic constitutional power in the country to order their own affairs.

|**Editor's Note:** *A case decided after this talk was delivered lends support to Prof. Kauper's analysis. In an appeal from Virginia, a 5-3 majority of the Court, per Justice Rehnquist, approved a state legislative reapportionment plan containing a population discrepancy of 16.4 per cent between the state's largest and smallest districts.*|

A further feature which perhaps is not always appreciated but which again inevitably must accompny judicial activism is a weakening of the procedural and remedial devices that have held judicial review in check. Traditionally, in recognition of the fact that judicial review is an institution that finds no explicit recognition in the constitution and continues to be the subject of debate, the Court has said that the exercise of judicial review is a delicate matter and should be exercised in a sparing way and should be used only in aid of the Court's power to dispose of cases or controversies. There is no direct power of review given to the Court as in the cases of some constitutional courts of review in some countries. But the flowering of activism in recent years has highlighted the Court's function in dealing with constitutional matters and more and more of its docket is limited to these matters with the result that other kinds

of cases dealing with interpretation of statutes and the like occupy a diminished part of the Court's docket. In short the Court has converted itself into a court of constitutional review, and its reaching out to get constitutional questions marks a substantial departure from the earlier conceptions which were based on the theory that this is a power that should be exercised lightly, with great caution and with deference to the other branches of the government. Old notions of standing are rapidly being impaired by a broadened recognition of the kind of interest adequate to maintain a suit. Declaratory judgments and injunctions by three-judge federal courts are increasingly common. And in all these cases the disposition of the constitutional issue is not simply incident to a case or controversy but itself is the object of the whole case or controversy.

Basic to all this is an energetic and aggressive exercise of judicial review to sustain a particular and preferred set of values, and a channeling of judicial energy to achieve these values, whether it be to say that First Amendment freedoms are more important than others and are preferred, whether it be to say that protection of rights is more important than the principle of federalism, whether it be to say that ordinarily the rational test rule applies in equal protection but when it comes to dealing with values which a segment of the Court deem particularly important then we must apply a different test, it is the same basic drive and thrust of judicial power asserting itself in support of a particular set of values which the Court thinks important to our contemporary society.

One may ask then what stands in opposition to this kind of judicial philosophy which I think is best expressed in the term judicial activism. The general characteristics of what might be called judicial self-restraint are fairly clear by way of contrast to the identifying characteristics of judicial activism. Judicial self-restraint is marked by a more modest conception of the judicial role in constitutional cases, a greater deference to legislative judgment and discretion in determination of matters of public policy, a greater regard for history and precedent, a skepticism of the Court's role in transforming every one of the great issues of our day into a question of constitutional right, a refusal to convert the justice's moral predilections into constitutional imperatives, and a general sense of reasonableness, moderation and balance whether it be in balancing public interests against private right or in balancing assertion of right against the position of the state in our federal system.

Perhaps all this seems a bit abstract so I want to take some cases decided at the last term of Court when all four of the Nixon appointees took part simply to give some concrete manifestation of the ideas I have been expressing on the distinction between the activist and the self-restraint approaches to constitutional interpretation. I am taking three cases as laboratory cases here to give concreteness to my general observations.

Case One

The *Caldwell* and companion cases related to the validity of subpoenas directed against newspaper reporters requiring them to give information in connection with a grand jury investigation of crime. The Court for the first time dealt with this question at the last term with all nine justices participating. A majority of the Court, consisting of Mr. Justice White, Chief Justice Burger, and Justices Blackmun, Rehnquist, and Powell, held that the claim of privilege based on the First Amendment was offset by the public interest reflected in the need of getting information necessary to administration of the criminal laws. This clearly was a case where the four new appointees of the Court joined by one earlier appointee were using a balancing process in dealing with First Amendment questions and was a departure from either an absoluteness of the Black-Douglas approach or a 75 per cent absoluteness represented by some notion of clear and compelling interest. Here was a return to a method of dealing with constitutional right that has a substantial basis in our whole history of constitutional interpretation and that is the process of balancing competing interests. Whether the Court balanced in the right way may be the subject of debate. The Court refused to get at this matter by absolutizing a journalist's right to get information. It is not inappropriate to point out in the light of the self-serving criticisms of the decision by the press, that the right claimed here was not a right recognized at common law, that it is not generally recognized by statute, that it was not first claimed as a federally protected right before the Supreme Court until 1958, so this is the familiar story evident in recent years of asking the Supreme Court to achieve a change in the law of the land by converting the issue into a constitutional issue. The decision leaves Congress and the state legislatures free to define public policy in this area.

Case Two

The second case was the case dealing with capital punishment. A majority held that capital punishment under the statutes and in the cases before the Court constituted cruel and unusual punishment and therefore was forbidden by the Eighth Amendment. The Court was badly fragmented in the case. While five judges pinned their results formally on the language of the Eighth Amendment, three based their decision on what they considered to be the episodic and capricious applications of capital punishment because of the discretion allowed to juries, a theory which apparently allows for capital punishment if mandated by legislation for certain cases. The four judges who dissented were the four appointees of President Nixon. Their opinion was a clear expression of the theory of judicial self-restraint. In their view there was nothing either in the language of the Eighth Amendment or history or precedent to support the view that the legislature cannot impose capital punishment, and that whatever might be the moral predilections of the judges on this question it was not their business to convert them into constitutional imperatives. This stands in particular contrast to the views expressed by two members of the majority, Justices Brennan and Marshall, whose basic position was that capital punishment was degrading, that it was contrary to the moral sentiment of our day, and that is something that the conscience of the nation should not tolerate. That view perhaps best epitomizes the whole conception of natural right as something transcending the Constitution and the use of the courts as a peculiarly chosen vehicle for expressing the conscience of the nation.

Case Three

The third case is *Wright v. Council of the City of Emporia*, where a majority held that a city would not be allowed to set up a separate school system where the effect of it would be to impede the dismantling of a dual school system which previously had been in effect when the city was part of a county school system. The Court did not say that in this case the larger unit and the local unit should always be taken into account but that under the circumstances of this case the effect of permitting a city to establish itself as an independent school district would be to interfere with the court order which had set up a desegregation plan. Chief Justice Burger dissented in an opinion joined by the three other Nixon appointees and here again the position taken is revealing. The minority did not question the *Brown* case or the whole body of law following that case but refused to extend the theory of these cases to preclude the establishment of a

new school district where, as the minority found, there would be no segregated schools although the ratio of the races might be different from that which the judicial decree had contemplated. Perhaps most interesting was the Chief Justice's observation that the *Brown* case was no warrant for the courts to serve as receivers of the public school systems and that a tolerable degree of local autonomy in the management of schools and discretion of the school boards to fashion schemes was to be recognized. Again it is the tone of moderation and reasonableness in applying established doctrine which is the distinguishing characteristic.

That the Nixon appointments will have a substantial impact on our body of constitutional doctrine is evident from cases I have mentioned, although these four justices will have to be joined by one of the earlier appointees, and this usually will be either Justice Stewart or Justice White, in order to constitute a majority. It is evident already that in the field of criminal procedure the Court is limiting some of the doctrines developed with respect to search and seizure and self-incrimination. It is evident also, I think, that the interpretations of the First Amendment are going to be limited. Over the long run the equal protection clause will recede somewhat in importance although to date there is no indication that most of the Nixon appointees are going to depart in a formal sense from the new standards of the equal protection clause. I do not expect a radical or dramatic course of explicit overrulings of earlier cases. We must remember in this connection that regard for precedent and stability in the law is in itself a substantial element of the judicial self-restraint theory. It is in this regard I think that the new appointees are boxed in because of their inherent dislike of rapid overruling of decisions or rapid change in the law or use of the judicial power to move out in different directions. I suppose this is the reason why Justices Blackmun and Powell in opinions they wrote last term adhered to some of the new standards under the equal protection clause. This may be the reason also why Chief Justice Burger and Justices Blackmun and Rehnquist joined Justice White in the decision upholding a state statute permitting convictions by a five-sixths majority, although the logic of their position should have led them to subscribe to Justice Powell's concurring opinion which was based really on the dissent by Justice Harlan in the case first extending the jury trial right to the states. Mr. Justice Rehnquist in dissenting from a result which had a foundation in prior decisions felt obliged to say why he felt free to disregard precedent which in this case had only two years' standing. In general it may be supposed that, as a matter of judicial technique, the new justices will not register a disregard for precedent except in cases where the issue has been raised and the whole Court has had an opportunity to hear arguments and to decide whether a case should be overruled. It is probably safe to say that right now there is a majority on the Court who, if faced with the question for the first time, would reach a result different from that of the majority in the *Mapp* and *Miranda* cases. But rather than overrule these cases they may move in the direction of limiting these doctrines, refuse to extend them and perhaps over a long period of time cause some erosion as the Warren Court did with respect to prior doctrine. Moreover it is hardly to be expected that a group of new appointees will vote as a solid monolithic bloc on every question. They are all highly intelligent, law-trained persons, and each brings his own individuality to the bench. While there may be a basis for some tentative conclusions on the general framework of thinking in which they operate, experience in the limited period to date confirms that they will not necessarily vote alike in dealing with specific questions.

Decisions before the Court this term should offer some illumination and instruction on the direction in which the Court is moving on certain questions. I wish to call attention to three categories of cases particularly.

First, the obscenity cases. Apparently the Court is going to re-examine again the doctrines respecting obscene publications in the hope perhaps of achieving something rational, coherent, and commanding support of a majority of the court by way of a constitutional definition of what may be classified as obscene. I do not expect the court to adopt the position that all obscene publications are protected under the First Amendment nor do I expect the court to adopt the Harlan position that a different standard applies as between federal and state restraints, although this could be a defensible position. The critical question will be whether or not the Court will abandon the "utterly without redeeming social value criterion" and restore the rule earlier recognized in the *Roth* case which leaves some discretion at least in legislative bodies to deal with the problem. My own guess on this would be, and I realize that it is hazardous to make a prediction, that at least five members of the Court including the four Nixon appointees and Mr. Justice White will take the occasion to prune the doctrines respecting obscenity of some of the growth that has become encrusted upon it particularly in the respect mentioned.

Second, the abortion cases. This line of cases in particular poses before the court the question of balancing a newly fashioned constitutional right of privacy, a right which must essentially rest on natural law considerations, as against the power of the legislature to impose restrictions founded on considerations of health and safety and conceptions of public morality relating to the sanctity of life, also grounded on natural law considerations. I simply suggest at this point that the court is faced with the basic question of whether it will defer to a legislative judgment in regard to the considerations appropriate to the issue or whether it will proceed from a newly formulated conception of right in order thereby to minimize the legislative power to deal with the problem. [**Editor's Note:** *Some months after the talk was given, a 7-2 majority of the Court per Justice Blackmun, struck down most existing abortion laws.*]

Third, and perhaps in some respects the most important question before the court, is what it will do with judicial decrees below dealing with the question of racial segregation in the schools. Will it stretch the concept of de jure segregation so as to include the racial imbalance situation resulting from a combination of housing problems and use of the neighborhood school concept and will it support the actions of lower court judges in extending cross-busing decrees to embrace not only the school district before the court but outlying suburban districts as well. These are problems not of adhering to prior cases but problems of further extending existing doctrine in new directions. It would not be surprising if the Nixon appointees refused to go along with such extensions which would mark further subordination of the public school system to the equitable power of the federal courts.

Conclusion

The Burger Court will not be as innovative in the forging of new constitutional doctrine as the Warren; it will take a more modest view of its powers, accord greater deference to the legislative branch, attach greater respect to precedent and established doctrine, and allow greater freedom to the states in the exercise of their authority. One thing is quite certain: The Burger Court will not be the dramatic, spectacular, and exciting court that the Warren Court was; it will go about its business in a more modest way and without the drama and stirring of attention that accompanies the ploughing of new fields. And perhaps it is well that this should be the case—at least for a while!