THE BURGER COURT—THE FIRST TEN YEARS*

JOHN P. FRANK†

CONTENTS

The *New Yorker* has a section on conversations we doubt ever took place, and I would put the one I am about to narrate in that category. However, Monrad Paulsen says that it occurred and has published to that effect, and who can doubt Professor Paulsen? The time was May 1969. The place was the splendid home of the Society of The Cincinnatus in Washington, D.C. The occasion, a party given by the Washington firm of Wilmer, Cutler & Pickering for guests at the meeting of the American Law Institute. President Nixon was to announce a new Chief Justice and our hosts had thoughtfully obtained a television so that their audience could know the identity of the nominee.

---

* This paper emerges from a "seminar" in my law office in the summer of 1979. I have been aided by Patricia K. Norris, an attorney in this office, and our eleven second-year summer clerks, who have divided the case reading. They are Thomas Campbell, University of California (Hastings); Scott DeWald, University of Chicago; Eileen Dietrich, University of Virginia; Brett Dunkelmann, University of Arizona; Kathleen Foster, University of Virginia; Michael Holden, Duke University; John Iurino, University of Virginia; Michelle Matiski, Northwestern University; David Mayer, University of Michigan; Beth Schermer, Harvard University; and David Titterington, Arizona State University. We have used extensively (and may have plagiarized a little) the annual reviews of the Supreme Court published in the HARVARD LAW REVIEW.

† Partner, Lewis and Roca, Phoenix, Arizona.

We found out when the screen showed the President with Warren Burger, of the District of Columbia Court of Appeals, sitting next to him. I was standing with Judge J. Skelly Wright of that same court, who, as one of America's ablest and most solidly dedicated liberal judges, had often disagreed with his colleague Burger. For years, Justice Black had wanted his successor on the Supreme Court to be Judge Wright, and if the old Justice's comprehension of mortality had been up to his wisdom on all other points, Judge Wright would have been Justice Wright on that very day; but, alas, it was not to be. In any case, according to Professor Paulsen, I put a consoling arm around Judge Wright's shoulders and said, "Do not grieve, Skelly. You are not losing a brother, you are gaining a father."

This observation, if it ever took place, symbolized the shift President Nixon had made in the Court. When Chief Justice Warren stepped down, the liberal judges of the country and, indeed, the liberal movement in the law, lost a strong leader. The replacement was a figure who would often be called upon to take different stands than his great predecessor.

Let me begin with my conclusion. The event we were seeing was, in a democracy, the event we should have been seeing. The liberal movement in America, and with it the jurisprudes at its fringe, had lost an election. The Supreme Court and its conduct had been an issue in that election. President Nixon had made commitments;[1] in view of the tightness of his election, they may have made a difference. He was keeping them. If democracy is to have meaning, his action was proper. The low repute into which that President fell in later days has no bearing on the validity of his judicial appointments and it is taking a cheap shot to claim otherwise. It is demonstrably so because the Nixon Supreme Court appointees, on a memorable day, voted against President Nixon concerning disclosure of the Watergate tapes and precipitated his fall from power. It is so routine for judges to decide from conviction that not much should be made of this either, but so far as objectivity is concerned, the votes of the three Nixon appointees (Justice Rehnquist disqualified himself) on the tapes are suggestive of Justice David Davis, President Lincoln's friend, campaign manager and executor, invalidating the martial law which Lincoln as President thought essential.

What I am suggesting in these preliminary observations is that the effort of President Nixon to turn the Supreme Court in new directions by his numerous appointments was a legitimate consequence of the election process, one which those of us of different persuasions do not have to like, but must respect. Our task today is not to decry this shift, but to describe it and seek to understand it.

1. A 1969 Gallup poll shows 33 percent of the public giving the Supreme Court a good or excellent rating, 54 percent fair or poor, and the rest, no opinion; from Gallup poll release, July 29, 1973.

We begin with the realization that no matter what President Nixon may have intended, it would have been remarkable if the Court had simply and clearly turned right. Appointing authorities frequently err in their expectations. Moreover, demonstrably, neither President Nixon nor his Attorney General, John Mitchell, were in fact altogether knowledgeable of what they were doing. The American Bar Association's resistance to Herschel Friday, a consideree but not a nominee, and the Senate's resistance to Judge Harold Carswell blocked the President on the poorest of his efforts. In the case of Justice Rehnquist, who in the long run may prove to be the most significant of the Nixon appointees, it is documented that the President did not even know his name. From the standpoint of those who desired an extreme turn to the right, the short answer is that it simply did not happen. This is in part the country's good luck and in part the President's bad management in an area in which he was not very knowledgeable.

Nonetheless, changes have occurred in the Court, not merely changes in personnel, but changes in judicial philosophy. We turn to these changes first considering modifications in the law; second, changes in the Supreme Court as an institution from two different standpoints, its method of operation and its relation to American society as a whole; and third, since these changes coincide with the ten years on the Court of Chief Justice Burger, we have some observations on the role of the Chief Justice in the area of special concern to him, judicial administration.

I

THE TIMES AND THE CASES, 1969-1979

There are cases and cases. A major function of "the courts" generally is the settlement of disputes, but this is a relatively minor part of the role played by the Supreme Court. "A's" quarrel against "B" over money is important to the parties, important to the country that there be a means of deciding the question, and important to the state and federal courts that these disputes be decided justly and quickly. Yet, it is old knowledge that this is not the function of the Supreme Court, which, with its ability to decide only a hundred or so cases of the millions filed in the United States every year, can settle disputes only when the function is resolving disputes plus something else. That something else is an element of unique importance which makes those cases worthy of the Supreme Court.

Even so, there are gradations of importance. In general, the run of Supreme Court cases are important without being earthshaking. Pamphlet 14 of Volume 99 of the Supreme Court Reports (May 15, 1979) shows fourteen cases. One concerns the problems of interstate transportation of wild game,[2] another concerns how counsel is to be waived during police interrogation,[3]

2. Hughes v. Oklahoma, 99 S. Ct. 1727 (1979).
3. North Carolina v. Butler, 99 S. Ct. 1755 (1979).

another concerns the question of whether certain organizations have the right to give blanket licenses to perform copyrighted music,[4] a fourth involves the definition of "displaced persons" for certain relocation assistance benefits,[5] and another presents the question of when a father with an illegitimate child can sue for wrongful death benefits.[6] All of these cases are interesting, all useful, but none of them are capable of doing much to the fabric of the country, no matter how they are decided. As it happens, I was involved in one of the cases reported in this pamphlet; it has to do with the validity of a state tax on the generation and transmission of electrical energy.[7] It involved considerable money, but minor statutory tinkering clearly could alter the result reached by the Court.

Along with these relatively minor matters are a fairly substantial number of cases of real, general consequence. There are also many fewer decisions of stupendous consequence to large numbers of people or even to the country as a whole.[8] We can swiftly summarize the role of cases in both these categories for the ten years of the Burger Court. In so doing, we also summarize the major national and international events occurring when these cases were decided because the Court's role in our society cannot be viewed by isolating the Court from the society which created its tasks.

A. The 1969 Term

In this year the dominant events in America, apart from the Court, were related to the continuance of the Vietnam War. The major single story was the My Lai massacre. The protest over the war began to include a cross section of the country. President Nixon ordered a gradual slowdown in the war. Students, stirred by the war, conducted protests on a broad front and went on violent rampages: a major confrontation occurred at the University of California at Santa Barbara when students burned down a branch of the Bank of America.

There were more creative aspects to the year. Neal Armstrong walked on the moon. The major legislative controversy was the President's victory by a one vote margin in Congress to deploy the antiballistic missile system. Calamities included the murders of Sharon Tate and her friends by the Manson gang and the tragedy of Senator Kennedy going off a bridge at Chappaquidick. The major "cultural" event, at least from the standpoint of publicity, was the Woodstock Rock Festival. The great rags to riches story was

4. Broadcast Music, Inc. v. Columbia Broadcasting, 99 S. Ct. 1551 (1979).
5. Alexander v. United States Dep't of Housing & Urban Development, 99 S. Ct. 1572 (1979).
6. Parham v. Hughes, 99 S. Ct. 1742 (1979).
7. Arizona Public Service Co. v. Snead, 99 S. Ct. 1629 (1979).
8. I adapt for this purpose the classification system I used in writing on the Terms of the Supreme Court from 1946 to 1954 in the University of Chicago Law Review. *E.g.*, J. Frank, *The United States Supreme Court: 1946-47*, 15 U. CHI. L. REV. 1 (1947).

the victory of the New York Mets in the World Series. On the political scene for the Supreme Court, the battle over the Harold Carswell appointment and its withdrawal led to the appointment of Justice Blackmun. This mild and unobtrusive-appearing man has, after a slow beginning, become a real power on the new Court.

Meanwhile, the Supreme Court was on the job. In *Goldberg v. Kelly*,[9] which may end up as the most important opinion of that year, the Court, with the Chief Justice dissenting, held that due process requires states to grant a welfare recipient an evidentiary hearing before terminating or suspending welfare payments. The Court voiced its awareness that much of the wealth of the country takes the form of entitlements, such as welfare, social security and pensions.

In another welfare case, the State of Maryland limited the total amount of welfare assistance to any one family unit to $250 a month regardless of the size of family, the result being that very large families received far less than their needs.[10] Those families challenged this limitation under the equal protection clause of the fourteenth amendment. The Court, in an opinion by Justice Stewart, held that the statute did not violate the equal protection clause. The important point was the refusal to extend "strict scrutiny" under the equal protection clause into the economic area. Chief Justice Burger began his crusade for improved judicial administration with a concurring opinion in *Williams v. Florida*,[16] a case which upheld the six-person jury in all criminal noncapital cases and a statute requiring a defendant to give advance notice of an alibi defense. Justice Burger endorsed the statute as one which "will serve important functions by way of disposing of cases without trial in appropriate circumstances—a matter of considerable importance when courts, prosecution offices, and legal aid and defender agencies are vastly overworked."[12]

A few other cases decided by the Court can be noted briefly: the Vietnam War added enormously to the number of conscientious objectors on philosophical grounds: the Court held that a man deeply and sincerely holding moral and ethical beliefs might be qualified for exemption from the draft regardless of his formal religious convictions.[13] In a case declaring the standard of proof necessary to convict for juvenile delinquency, the Court upheld the reasonable doubt standard while Chief Justice Burger dissented in favor of a preponderance of the evidence test. He declared that the states should be given breathing room rather than face "the repeated assaults of this Court."[14]

9. 397 U.S. 254, (1970).
10. Dandridge v. Williams, 397 U.S. 471 (1970).
11. 399 U.S. 78 (1970).
12. *Id.* at 105.
13. Welsh v. United States, 398 U.S. 333 (1970).
14. In re Winship, 397 U.S. 358, 376 (1970).

In yet another case, the Court considerably broadened the concept of standing to challenge administrative action,[15] and in the labor law case of *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[16] the Court upheld injunctions against strikes where the strike was in violation of a specific contract to arbitrate. The Court also sought to put an end to shilly-shallying over desegregation of schools, in a unanimous summary order which was something of a triumph for Justice Black,[17] and it responded to courtroom disorder by defendants by providing that, despite the confrontation clause, they could be removed from the courtroom if their conduct warranted it.[18]

If we turn to the proportion of things, clearly *Goldberg v. Kelly* is the case of the year. How shall we equate it to the general march of events in America? The standards are so nonexistent that one can only express a mood. It cannot be compared with the Vietnam disturbances or the man on the moon. Its most striking quality is its benchmark element. There are only two or three truly major expansions of individual rights in relation to the power of government during the Burger decade. This is one of them.

B. The 1970 Term

This was a year of tremendous social and political upheaval resulting from poor race relations, the escalating Vietnam War, and intense dissatisfaction, particularly among the young, with society as a whole. Campus violence, urban race riots, and individual acts of violence were rampant. The repercussions of Kent State included closed universities, bombed buildings, and protest marches. There was civil war in the Middle East, hijackings in the air, and fighting in Northern Ireland. Lieutenant Calley was convicted of murder in connection with My Lai, debate began on the National Health Insurance plan advocated by Senator Kennedy, and Jimmy Carter became Governor of Georgia. The United Nations' twenty-fifth birthday passed as uneventfully as most of its existence. The self-centered "me society" began with weekend encounters to which Americans went to find out who they were.

The most controversial and widely publicized case of the year was *New York Times Co. v. United States*,[19] or the Pentagon Papers case. It was directly related to the resistance against the war in Vietnam. The case was litigated and decided in eighteen days, proving that there are ways to circumvent the law's delays. Because of this enormous speed, because it symbolized hostility to the war, because it involved great newspapers capable of publicizing their concerns, and because the government position was extreme, the case was

15. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).
16. 398 U.S. 235 (1970).
17. Alexander v. Holmes County Board of Educ., 396 U.S. 1218, 1219 (1969).
18. Illinois v. Allen, 397 U.S. 337 (1970).
19. 403 U.S. 713 (1971).

treated as a prodigy of consequence. Whether in retrospect this will prove to be true, I am honestly uncertain.

The 1970 Term produced 122 decisions and 238 opinions. By this year Justice Blackmun had joined Chief Justice Burger, and the two agreed 113 of 119 times. Justices Brennan, Douglas, and Marshall emerged as the core of the old Warren Court. Justice Black frequently joined them, but also, in a striking number of instances joined Chief Justice Burger. In a major decision, *Swann v. Charlotte-Mecklenburg Board of Education*, Chief Justice Burger emphasized the Court's long-standing commitment to school desegregation and upheld the requirement that school authorities make an affirmative showing that the existence of a one-race school is not the result of discrimination.[20]

The Court, as it was beginning to be newly constituted, began to circumscribe the distribution of pornographic materials,[21] a development which would come to a later culmination with a new standard of determining what materials are pornographic. A colorful development was the holding that an indigent must not be barred from the divorce courts for inability to pay court fees and costs.[22] The dramatic impact of the Chief Justice was demonstrated in the criminal cases. As a dissenter, he began his attack on the exclusionary rule under the fourth amendment,[23] and in *United States v. Harris*, in a plurality opinion, he seriously cut into the trend of the Warren Court criminal procedure cases by holding that a search warrant could be granted upon a police affidavit based largely on an informer's tip.[24]

C. The 1971 Term

In the Fall of 1971, the Burger Court took semi-final shape with Justices Rehnquist and Powell replacing Justices Black and Harlan. On the national scene, eighteen-year olds gained the right to vote. Buses were burned in Michigan, buried in Memphis, and overturned in South Carolina as the nation moved toward its goal of desegregation with "all deliberate speed."[25] Wage and price controls were imposed to curb inflation while the Vietnam War dragged on, with troop withdrawals and increased bombing being the significant events. President Nixon proposed a moratorium on the use of busing to achieve racial integration and proposed upgrading neighborhood schools. In a major diplomatic coup, the President visited China. An era passed as J. Edgar Hoover died, and a new one began with the publication of *Ms.* magazine in December 1971. Double knits captured the American clothing scene.

---

20. 402 U.S. 1 (1971).
21. United States v. Thirty-seven Photographs, 402 U.S. 363 (1971).
22. Boddie v. Connecticut, 401 U.S. 371 (1971).
23. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
24. 403 U.S. 573 (1971).
25. Brown v. Board of Education, 349 U.S. 294, 301 (1955).

In the Court, three blocs emerged. The three Nixon appointees, Blackmun, Rehnquist and Powell, joined together and regularly voted with the Chief Justice; if there was a difference of opinion Justices Brennan, Douglas and Marshall were on the other side. Consequently, Justices White and Stewart decided the cases.

This may suggest a partial stability which was not always there. In *Furman v. Georgia*, where the Court invalidated the death penalty, a majority of five wrote five separate opinions.[26] Chief Justice Burger authored the dissent, and pointed out that a large segment of the population supported the death penalty (51 percent according to one 1969 poll), and that any change in this punishment should be legislative. Six opinions and 231 pages were required by the Court to conclude that jury-imposed death penalties were unconstitutional.

The major school desegregation case of the Term was *Wright v. Council of the City of Emporia*.[27] Until 1965, assignment to Greensville County schools, including Emporia, Kansas, was based on race. The white students attended Emporia schools, the black students the county schools. A freedom of choice plan was instituted which had no practical effect on this, and subsequently a federal court directed a real mingling of white and black students. Thereupon Emporia withdrew from the county school system and a suit was filed to enjoin the secession. A majority of the Court upheld the injunction. The Chief Justice, dissenting, believed that the city "as an independent government entity" was entitled to operate its own system.[28] In a second race relations case, *Moose Lodge No. 107 v. Irvis*, the right of a private organization to discriminate was upheld, unimpaired by the circumstance that the club held a state liquor license.[29]

Three other cases of the year attracted substantial attention. In one, the Court held that a newsman could not refuse to reveal to a grand jury information gathered from confidential sources.[30] In another, the Court, in an opinion by the Chief Justice, held that surveillance of demonstrations by army intelligence did not have so chilling an effect on freedom of speech as to warrant an injunction.[31] The Court, in *Lloyd Corporation, Ltd. v. Tanner*, also barred the distribution of handbills in the interior mall area of a large, privately owned shopping center.[32] This opinion is difficult to correlate with *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[33] which had upheld a constitutional right to distribute handbills in a shopping center, leading Justice Marshall, in dissent in *Lloyd Corporation* to say, "[T]he vote in

26. 408 U.S. 238 (1972).
27. 407 U.S. 451 (1972).
28. *Id.* at 478.
29. 407 U.S. 163 (1972).
30. Branzburg v. Hayes, 408 U.S. 665 (1972).
31. Laird v. Tatum, 408 U.S. 1 (1972).
32. 407 U.S. 551 (1972).
33. 391 U.S. 308 (1968).

Logan Valley was 6-3, and that decision is only four years old. But, I am aware that the composition of this Court has radically changed in four years. . . . There is no valid distinction between that case and this one. . . ."[34]

D. The 1972 Term

The year was historically momentous. The last American troops were withdrawn from Vietnam and the cease-fire was signed in January 1973. The P.O.W.s returned, and veterans became conspicuous for their reluctance to discuss the war and for their unemployment. With the war's end, the protests and the political solidarity of the young ended, as did the art and culture that grew out of that solidarity. However, hijacking and assassinations continued, with the grimmest illustration being the murder of the Israeli Olympians at Munich by Palestinian guerrillas. On June 17, the Watergate break-in occurred and in November, President Nixon was overwhelmingly reelected. Lavish corporate contributions led to enactment of the Federal Election Campaign Act.

Meanwhile, the Supreme Court had its full quota of excitement. In the best known case of the year, *Roe v. Wade*, Justice Blackmun, speaking for the Court, upheld the right to procure an abortion as an aspect of the right to privacy.[35] *Roe v. Wade* is also one of the two or three decisions of the Burger decade to have the broadest social consequence and to arouse the most general social concern. *Frontiero v. Richardson*[36] held that a married military employee was entitled to increased housing assistance and medical benefits for his or her spouse. A female military employee was eligible only upon proof that she was the source of over one-half of her husband's living expenses, while her male counterpart faced no such requirement. The Court's holding that the statute violated the equal protection clause, had it gone a little farther, might have made the Equal Rights Amendment (ERA) unnecessary; however, it did not go farther because Justice Brennan was able to obtain only a plurality. Hence, the controversy over the ERA continued, complicated by endless arguments before the ratifying bodies as to just what *Frontiero* meant.

The year's decision which might have been a blockbuster but was not was *San Antonio Independent School District v. Rodriguez*.[37] There, the Court held that a state is not required to equalize educational opportunity in the lower schools, but may maintain a system in which wealthy taxpayers, clustered together in districts, have economically sufficient and thereby better schools while persons in slums, with a lower tax base, have poorer schools. Justices Brennan, White, Douglas, and Marshall dissented illustrating, perhaps more dramatically than in any other decision of the decade, the change in the Court's outlook between the sixties and the seventies.

34. 407 U.S. at 584.
35. 410 U.S. 113 (1973).
36. 411 U.S. 677 (1973).
37. 411 U.S. 1 (1973).

Another dramatic illustration of this shift was *Miller v. California*,[38] in which the Court through Chief Justice Burger essentially adopted what had been the dissenting criteria of obscenity during the Warren period. In the *Fanny Hill* case, a majority of the Warren Court held that before materials could be prohibited as obscene that they must be found to be "utterly without redeeming social value."[39] Justice White dissented. In *Miller*, dealing with such publications as *Sex Orgies Illustrated*, the Court discarded that element and substituted the criterion of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[40] By this criterion, *Orgies* did not have a chance. Whether the *practice* in the distribution of obscene material changed is something else again (considered later), but the law undoubtedly changed.

Also of consequence was the invalidation of the "man in the house" rule as applied to food stamps. Under a federal statute, a household otherwise eligible for food stamps became ineligible if it contained unrelated individuals. In *United States Department of Agriculture v. Moreno*,[41] Justice Brennan found the statute unconstitutional because it was not a rational means of protecting against the abuse feared. This, at least superficially, pulled equal protection out of its customary racial orbit although anyone dealing with the subject realized that black living habits were at the heart of the dispute.

Equal protection did not fare as well when applied to voting districts, where the Court retreated from the Warren Court's formula enunciated in *Reynolds v. Sims* that legislative districts must be "as nearly as equal in population as is practicable."[42] Instead, the Burger Court accepted election districts in Connecticut and Texas with what appeared to be clearly unnecessary deviations from equality.[43] In both instances, lower courts that felt they were following *Reynolds* were reversed.

E. The 1973 Term

The 1973 Term was action-packed in the world, the country, and the Court. War broke out in the Middle East, and in the midst of it, the Arabs discovered the full political and economic potential of their mineral resource by reducing oil production, quickly forcing American citizens into long lines at the gas pumps and into prices of $.50 a gallon.

As an alternate to driving for entertainment, there were the Watergate hearings. On August 29, District Judge John Sirica ordered President Nixon

38. 413 U.S. 15 (1973).
39. A Book Named *John Cleland's Memoirs of a Woman of Pleasure* v. Attorney General, 383 U.S. 413 (1966).
40. 413 U.S. at 24.
41. 413 U.S. 528 (1973).
42. 377 U.S. 533, 577 (1964).
43. Gaffney v. Cummings, 412 U.S. 735 (1973).

to produce certain taped conversations. Nixon fired Archibald Cox, Deputy Attorney General William Ruckelshaus, and accepted the resignation of Attorney General Elliot Richardson. The House Judiciary Committee began to consider impeachment proceedings. Spiro Agnew resigned as Vice President because he clearly was a crook. President Nixon, on the other hand, declared, "I am not a crook."

There were other, more isolated, but dramatic events. Billie Jean King beat Bobby Riggs. Skylab 3, man's longest mission in space, ended after 84 days. Alexander Solzhenitsyn was banished to the West, and eleven women were ordained as priests in the Episcopal Church. This was also the year that brought streaking to the American scene. But, quick as a flash, it was gone.

In *United States v. Nixon*, its great case of the Term, the Supreme Court required President Nixon to produce the Watergate tapes.[44] Disclosure of the information contained in the tapes contributed to the President's resignation. The great intellectual question in the tapes case was whether the courts could make this demand on the President personally. The opinion, by Chief Justice Burger, held that the President's privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial."[45]

There were two other important cases, one that was major and another that might have been. In the first, *Milliken v. Bradley*, the Detroit segregation case, Chief Justice Burger held that the courts, in establishing desegregation, could not treat a largely black, urban school district and the largely white, suburban districts as a single unit; white flight was safe.[46] The majority was composed of the four Nixon appointees plus Justice Stewart, and the dissenters were comprised of the four relics of the Warren Court.

The second case, *DeFunis v. Odegaard*,[47] possessed the potential for determining the validity of reverse discrimination in the admissions program of a professional school. While the Nixon appointees and Justice Stewart found the case moot, the remaining justices disagreed, and the issue awaited another day.

Other cases also presented significant issues. In a different and remarkable interpretation of the equal protection clause, California had a disability insurance system for private employees temporarily disabled from working. The principal exception was for pregnancies. The Court held that this was not discrimination "based upon gender" because "[t]here is no risk from which men are protected and women are not."[48] The dissenters, on the other hand, found discrimination where an exclusion applied to "disabilities suffered only

44. 418 U.S. 683 (1974).
45. *Id.* at 713.
46. 418 U.S. 717 (1974).
47. 416 U.S. 312 (1974).
48. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

by women" believing that the state cannot single out "for less favorable treatment a gender-linked disability peculiar to women. . . ."[49]

Judicial administration can also make a fair claim as one of the country's most pressing social problems. The Court very sharply confined class actions by holding that in a class action for damages, individual notice must be sent to all class members.[50] This relegated the superlarge, small claim classes, in which no one will make much except the lawyers, into oblivion. The Court also reaffirmed its earlier decision that class actions brought in diversity require the jurisdictional amount for each claimant, once again eliminating any possibility of class actions for small claims in diversity.[51]

Emerging by the end of the 1973 Term was a very solid bloc of justices with the Chief Justice. Justice Rehnquist voted with the Chief Justice 90 percent of the time, Justice Blackmun 84 percent, and Justice Powell 81 percent. Justices Marshall, Brennan and Douglas voted with the Chief Justice approximately 42 percent of the time.

F. The 1974 Term

The 1974 Supreme Court Term began with the conclusion of the Watergate nightmare. On August 9, 1974, President Richard Nixon resigned and not long after, he was pardoned by President Ford. The Watergate trials continued, resulting in the convictions of Mitchell, Haldeman, Ehrlichman and top Nixon aides. Inflation went up, employment went down, and President Ford expressed disagreement with a federal court busing order in Boston.

On the international front North Vietnam conquered the South after the Americans left Vietnam. The United States experienced a spasm of pride when President Ford ordered the recapture of an American merchant vessel after Cambodian gunboats fired on it and detained it. The Rockefeller Commission issued its report documenting "plainly unlawful" domestic activities including the opening of private mail and the surveillance of American citizens.

At the Supreme Court, the 1974 Term was fundamentally placid, but with three new developments of some social consequence:

> 1. Children were held to have a constitutional right to due process before being suspended from school. They were entitled to either oral or written notice of the charges, an explanation of the evidence, and an opportunity to present their side of the story.[52] The "entitlement doctrine," which had begun during the Burger years with a requirement of fair play in welfare suspension, thus spread into fair

49. *Id.* at 500, 501.
50. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
51. Zahn v. International Paper Co., 414 U.S. 291 (1973).
52. Goss v. Lopez, 419 U.S. 565 (1975).

play in educational exclusion. Also in the area of individual liberty, the Court held that a harmless, mentally ill person cannot be locked up indefinitely and involuntarily if he or she is dangerous to no one and can live safely in freedom.[53] The two cases are illustrative of our important caveat to the general view that the Burger years are a giant backslide from the Warren period in terms of individual liberty. The cases illustrate that progress has not altogether stopped.

2. The exemption of women from jury service unless they desired to serve, an exemption based on a presumed role of women in the home, was invalidated.[54] The decision is less a vindication of the position of women than a recognition of the requirement of a fair cross section of the community for the composition of a jury. In another case, the attitude of the Court was more paternal than egalitarian. The Court upheld a system where women were given a longer period of time in the Navy to obtain a promotion before they could be mandatorily discharged, relying on the theory that women had fewer opportunities for promotion than men.[55]

3. Finally, the Court started down what Justice Rehnquist was later to describe as the "slippery slope" of overruling contrary precedents, and extended first amendment protection to commercial speech.[56] In this case, the appellant was held to have the right to publish in Virginia the availability of abortions in New York. The Court held that commercial advertisements were entitled to "a degree" of protection under the first amendment.

By the end of the 1974 Term, the problem of scattering among the judges, a subject which will be discussed later, was clearly demonstrated. Three-quarters of the opinions were not unanimous. As before, the four Nixon appointees were largely in agreement, Justices Marshall and Brennan were largely in disagreement, and Justice Douglas, in a last dreary year of ill health, was moving into an isolated position of his own.

G. The 1975 Term

On the general scene, New York City was rescued from default. President Nixon testified before the Watergate special prosecutor marking the first occasion in which a president or an ex-president had testified in person under oath before a grand jury. American and Russian space vehicles docked in space. Justice Douglas resigned and Judge John Paul Stevens of the Seventh Circuit Court of Appeals replaced him.

It was a year of violence and criminality. Jimmy Hoffa disappeared,

53. O'Connor v. Donaldson, 422 U.S. 563 (1975).
54. Taylor v. Louisiana, 419 U.S. 522 (1975).
55. Schlesinger v. Ballard, 419 U.S. 498 (1975).
56. Bigelow v. Virginia, 421 U.S. 809 (1975).

Squeaky Fromme and Sara Jane Moore attempted to assassinate President Ford, Patty Hearst was apprehended, Howard Hughes died, a bomb exploded at the La Guardia Airport, and the Senate Select Committee on Intelligence published a two volume report on the abuses of the United States intelligence agencies. There was great violence in Boston over the busing of school children and South Boston High School was ultimately placed in a federal receivership.

At the Supreme Court, money was allowed to talk, though with a muted voice, on the political scene. The post-Watergate Federal Election Campaign Act had restricted both contributions to candidates and the use of candidates' own funds. In *Buckley v. Valeo*, the Court upheld the statute as to contributions, but Chief Justice Burger, speaking for the Court, also held that a candidate might spend as much of his own money as he desired.[57] The practical result was to give a long edge to super-rich senatorial aspirants. A further significant opinion by Justice Blackmun found a constitutional right for pharmacists to advertise the price of pills.[58]

In the criminal field, the Court continued to whittle away at the exclusionary rule developed in the Warren period for violation of the fourth amendment. A majority opinion by Justice Powell held that where a state had provided an opportunity for full and fair litigation of a fourth amendment claim, the federal courts would not accept on habeas corpus a challenge that the evidence had been admitted in violation of the exclusionary rule.[59] Justice Burger, concurring, emphasized his deep-seated opposition to the exclusionary rule in its entirety as a "discredited device."[60]

In a group of death sentence cases, the Court retreated somewhat from its earlier decision seeming to invalidate the death sentence and upheld several state statutes when they appeared to provide an adequate opportunity for the consideration of mitigating circumstances before imposing the ultimate penalty.[61]

In two other decisions the Court notably pulled back from entry into state decision-making. In one, the plaintiff suing under the federal civil rights act, § 1983, contended that a Kentucky police chief had defamed him by including his picture in a circular of active shoplifters. The Court held that while this was state action, it amounted to simple defamation and would be regarded as a private tort rather than a deprivation of liberty or property under the fourteenth amendment.[62] In another case, a discharged policeman

57. 424 U.S. 1 (1976).
58. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
59. Stone v. Powell, 428 U.S. 465 (1976).
60. *Id.* at 500.
61. A leading case in this group is *Gregg v. Georgia*, 428 U.S. 153 (1976).
62. Paul v. Davis, 424 U.S. 693 (1976).

contended he was entitled to due process protection in keeping his job. The Court accepted the view that under state law the policeman held his job only at the pleasure of the city and therefore had no property interest entitlement which would extend to a due process right.[63] The latter holding is indeed difficult to square with earlier entitlement decisions.

H. The 1976 Term

In this year the country celebrated the Bicentennial, elected President Carter over President Ford in a squeaker, and endured a terrible winter with resultant energy problems. The Viking landing on Mars was the principal event in the sky and the 126 inches of snow at Buffalo was the principal invasion from space to earth. President Carter had an energy conference and the Alaska pipeline opened. The principal entertainment on television during the year was "Roots."

On the legal front away from the Supreme Court, Gary Gilmore was executed in Utah, the first execution in nine years, as an aftermath of the Supreme Court decisions of the preceding year. The Governor of Maryland was prosecuted for bribery, a conviction at first set aside and some years later upheld. The Tax Reform Act of 1976 was adopted, and Rose Bird was appointed to the California Supreme Court as Chief Justice.

It was a year of memorable quotations. President Ford said, "[t]here is no Soviet domination of Eastern Europe and there never will be under a Ford Administration." Pope Paul said, "Christ was and remains a man." Secretary of Agriculture Earl Butz lost his place in the Cabinet for publicly making an extraordinarily racist remark.

The year saw a swirl of cases about sex discrimination and sex-related activities. In an opinion remarkable only because it was not unanimous, Justice Brennan for the Court invalidated an Oklahoma statute which established different ages for the sale of beer to women than to men.[64] The majority opinion required establishment of "important governmental objectives" to warrant discrimination based on sex.[65] Justices Rehnquist and Burger dissented, criticizing this stiff standard, on the grounds that it treated gender discrimination as a "talisman" which created, in effect, a heavier burden of judicial review without regard to the rights of persons affected.[66] By a five-to-four vote, the Court, Chief Justice Burger dissenting, invalidated an Illinois statute which allowed illegitimate children to inherit by intestate succession from their mothers but not from their fathers.[67]

Abortion continued to embroil the Court in controversy. The Court held

63. Bishop v. Wood, 426 U.S. 341 (1976).
64. Craig v. Boren, 429 U.S. 190 (1976).
65. *Id.* at 197.
66. *Id.* at 220.
67. Trimble v. Gordon, 430 U.S. 762 (1977).

that a state participating in the Medicaid program was not required to pay expenses incident to non-therapeutic abortion even though it paid for expenses incident to child birth.[68] Justice Powell, for the majority, declared that there is no fundamental right to an abortion, but that only a fundamental right of privacy existed which protected a woman from "unduly burdensome" interference with her freedom.[69] Justice Blackmun, in an unusual dissent, criticized the majority opinion as reminiscent of a "let them eat cake" attitude towards the poor.[70] In another decision, the Court held that a state may not prohibit the distribution of non-hazardous contraceptives to adults by others than pharmacists.[71] The majority, through Justice Brennan, found that a state statute which as a practical matter limited one's capacity to decide whether or not to bear a child was subject to the same scrutiny as a statute which blocked such an individual decision entirely.

The cases just cited all involved familial relations, an area which can also arise in zoning. In a zoning plan, East Cleveland defined a family to include a couple, their parents, and their dependent children, but no more than one child with dependent children, thus effectively excluding extended families. The Court invalidated this plan as "slicing deeply into the family itself."[72] The case intellectually will have far more importance than its facts, for it revives the doctrine of substantive due process as the basis of constitutional protection of family life choices. The Court also declined to invalidate the determination of a Chicago suburb barring multifamily dwellings through its zoning power.[73] In the schools, the right of authorities to apply corporal punishment was upheld against a challenge that it violated the cruel and unusual punishment clause of the eighth amendment.[74]

Two other cases decided by the Court had great social consequence. The Court, relying on the commercial speech cases of the preceding two years, held that a state might not preclude truthful advertising of routine legal services.[75] The Court also held unconstitutional the death penalty for rape,[76] stating that society may not take the life of a defendant who has not taken the life of his victim. Chief Justice Burger, dissenting, chastised the majority for its "eye for eye" approach, contending that a punishment more severe than the crime may have the best deterrent approach.[77]

---

68. Maher v. Roe, 432 U.S. 464 (1977).
69. *Id.* at 473.
70. *Id.* at 483.
71. Carey v. Population Services International, 431 U.S. 678 (1977).
72. Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977).
73. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).
74. Ingraham v. Wright, 430 U.S. 651 (1977).
75. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).
76. Coker v. Georgia, 433 U.S. 584 (1977).
77. *Id.* at 620 (Burger, C.J., dissenting).

I. The 1977 Term

In this year, Egypt's Prime Minister Sadat went to Israel to begin the Israeli-Egyptian peace negotiations. The Panama Canal Treaty was ratified. A 110 day United Mine Workers strike, the longest in that industry's history, seemed to foretell the decline and fall of one of America's most established unions. President Carter ran into his first setbacks as President: the resignation of Bert Lance and Congress' rejection of his proposed energy program. The most spectacular criminal event was the arrest and conviction of the "Son of Sam" murderer David Berkowitz. Leon Jaworski was appointed to head a special inquiry into Korean influence-buying on Capitol Hill.

In the Supreme Court, four cases overshadowed the rest. Clearly the case of the year was *Regents of the University of California v. Bakke*.[78] The question which had been sidestepped a few years earlier in *DeFunis*[79] as moot was now before the Court, which had to confront the permissibility of reverse discrimination. Bakke was a qualified applicant for admission into the Davis, California Medical School but was not admitted. He contended that the school's special admission program, which reserved 16 seats in a class of 100 for minority students, violated his rights under the equal protection clause and Title VI of the Civil Rights Act of 1964. By objective criteria, Bakke was better qualified than at least some of the minority students admitted under this program.

The case clearly cannot be taken simply as a legal dispute, because one of the most serious social questions in the United States was squarely before the Supreme Court. The Court, hip-deep in amicus briefs and confronted with a Solicitor General who had been badgered unmercifully by the contending forces to take one extreme stand or another, managed miraculously to satisfy the country. With four votes going one way and four another, the controlling opinion was that of Justice Powell who held that diversity in professional education was a desirable first amendment value and that a university might achieve such diversification but could not establish, as Davis had done, fixed quotas.[80] Compared to the unanimous decision in *Brown v. Board of Education*,[81] invalidating segregation in the schools some twenty-four years earlier, *Bakke* (with its six separate opinions) must be regarded as less than an institutional triumph. However, it was unquestionably a triumph for Justice Powell and it accomplished the task of defusing tension in a country which had become taut with anticipation.

A case with smaller immediate impact but vast potential was *Zurcher v. Stanford Daily*, in which the Court held that the police could use a warrant to

78. 438 U.S. 265 (1978).
79. DeFunis v. Odegaard, 416 U.S. 312 (1974).
80. 438 U.S. at 269.
81. 347 U.S. 483 (1954).

search a newspaper office to find photographs of a campus demonstration.[82] The practice can clearly extend into doctors' records and lawyers' files and the need for subpoena statutes, in which there could be a motion to quash, has become evident.

In the wandering tale of the death sentence, the Court in *Lockett v. Ohio*, reconsidered its earlier death penalty cases and held that death penalty statutes must permit the sentencer to consider *any* pertinent mitigating factor offered by the defendant.[83] The path of the Court on the death sentence is as wavering as on the question of obscenity. *Lockett* undercuts the earlier cases because the grant of broad discretion can clearly result in the same arbitrary use of the death penalty which was one ground for objection in the first place.

A final case of long range significance is the decision invalidating the Massachusetts statute which prohibited the use of corporate funds to influence votes on referendums.[84] Justice Powell for the majority held that the proposed speech dealt with matters of public interest "indispensable to decisionmaking in a democracy" and concluded that the corporate identity of the speaker did not deprive the speech of its first amendment status.[85] The issue places the right to communicate against the overpowering wealth that could be used to make all other communication vain. For illustration, the decision permits a power company desiring to win a referendum on nuclear energy to spend whatever it wants and place the cost into the rate base so that even the dissenters must pay. Here, Chief Justice Burger concurring developed his own proposition that the first amendment "belongs to all who exercise its freedoms" and is not more the prerogative of individuals or newspapers than anyone else.[86]

J. The 1978 Term

In this year, Louise Brown, the first "test tube" baby was born on July 25, 1978 in England. The Shah of Iran was overthrown, and the concomitant Islamic revolution led to short supplies and increased prices of oil in the United States. The youngest Pope in 132 years and the first non-Italian in 455 years, assumed the Papacy; the United States recognized Communist China; and the Mideast Peace Agreement was signed between Egypt and Israel, as was the Strategic Arms Limitation Treaty II (SALT II).

There were death-dealing misfortunes galore. A bizarre mass suicide occurred at Jonestown, Guyana, and the Three-Mile Island Nuclear Reactor accident caused a momentary slowdown in nuclear development.

82. 436 U.S. 547 (1978).
83. 438 U.S. 586 (1978).
84. First National Bank v. Bellotti, 435 U.S. 765 (1978).
85. *Id.* at 777.
86. *Id.* at 802.

Meanwhile at the Supreme Court, two cases were treated by the press as the major decisions of the year and one of them was. The other, *Herbert v. Lando*, held that when a member of the press is sued for libel and an effort is made to prove actual malice a court may permit inquiry into the state of the newsman's mind.[87] Since this involved the press, it received prodigious attention and was treated somehow as evidencing antipress hostility. If the actual malice test is to be applied, it is difficult to see what other holding could have been reached, and as a practical matter of trial practice, the number of times this will come to anything will be negligible.

The other "major" decision involved a *Baake*-type claim of reverse discrimination. However, the one discriminating here, unlike in *Baake*, was in the private sector that had adopted remedial measures for past discrimination. Kaiser Aluminum had an affirmative action plan requiring that one minority applicant be admitted to its craft training program for every nonminority applicant until certain percentages were reached. Weber, a caucasian, applied for the program and was excluded in favor of others with less seniority.

By a five-to-two majority, the Court in *United Steelworkers of America v. Weber*,[88] held that the statutory prohibition against racial discrimination in employment does not forbid private employers and unions from voluntarily agreeing upon bonafide affirmative action plans that afford racial preference. Obviously these plans do not come on the wings of a good fairy, and anyone familiar with the field knows that such a "voluntary" plan is one which, as a practical matter, has been fostered and pushed by the Federal Contract Compliance Office. The Court interpreted Section 703(j) of Title VII of the Civil Rights Act, which provides that, "[n]othing contained in this subchapter shall be interpreted to *require* any employer . . . to grant preferential treatment to any individual or to any group because of the race" (emphasis added) as somehow authorizing this program. Justice Blackmun concurred with the author of the majority opinion, Justice Brennan, on the ground that fairness and equity required such a result. Chief Justice Burger believed that the result, however desirable, required legislative authorization. Justice Rehnquist won the biting sentence of the year award in his dissent, declaring that the decision was reminiscent "not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini. . . ."[89] The decision will, predictably, revolutionize the labor force working in the vast area of government contracts.

The 1978 Term also dealt repeatedly with the special problems of women. One decision held that there was an implied private right of action under Title IX of the Civil Rights Act which prohibits discrimination on the basis of

87. 99 S. Ct. 1635 (1979).
88. 47 U.S.L.W. 4851 (1979).
89. *Id.* at 4859.

sex in educational programs receiving federal assistance.[90] Another decision upheld the right of a female employee to sue her congressman-employer for sex discrimination.[91] The Court held unconstitutional an Alabama statute which provided that husbands, but not wives, might be required to pay alimony upon divorce.[92] The holding is that gender may not be used as a test for need. The Court invalidated a New York law which permitted an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding her consent.[93] On the same day, however, the Court by a five-to-four vote upheld a Georgia statute which permitted the mother of an illegitimate child to sue for wrongful death, but precluded suit by a father if he had not legitimated the child.[94] The Court recognized that while the identity of the father of an illegitimate child is often in doubt, this is rarely true for the mother.

A case with considerable gender consequence was a holding that the absolute veteran preferance in eligibility for state jobs is not a violation of the equal protection clause despite the fact that women historically were not given the same opportunity as men to get into the veteran class.[95] The Court held that the claimed discrimination was not even factually present since an enormous number of men as well as women were nonveterans.

What I would respectfully describe as the oddest decision of the year was the conclusion that an employee of the State of Nevada, injured in an auto accident, who would have been barred from suing his own state at home, could sue it in a California state court.[96] The Court held that though a sovereign may not be sued in its own courts without its consent, this rule affords no support for a claim of immunity in the courts of another sovereign. The dissenters, Blackmun, Rehnquist and Burger, argued that the policy behind the eleventh amendment and cooperative federalism barred this result; I certainly would have supposed they were right.

II

THE WARREN YEARS

Chief Justice Earl Warren served from 1953 to 1968. In terms of ultimate major significance, the two foremost decisions of those years are the school desegregation case, *Brown v. Board of Education*,[97] and *Baker v. Carr*,[98] holding that legislative bodies must be fairly apportioned so that all citizens have es-

90. Cannon v. University of Chicago, 99 S. Ct. 1946 (1979).
91. Davis v. Passman, 47 U.S.L.W. 4673 (1979).
92. Orr v. Orr, 99 S. Ct. 1102 (1979).
93. Caban v. Mohammed, 99 S. Ct. 1760 (1979).
94. Parham v. Hughes, 99 S. Ct. 1742 (1979).
95. Personnel Administrator of Massachusetts v. Feeney, 47 U.S.L.W. 4650 (1979).
96. Nevada v. Hall, 99 S. Ct. 1182 (1979).
97. 347 U.S. 483 (1954).
98. 369 U.S. 186 (1962).

sentially equal representation. These colossal rulings caused the remaking of America.

Standing slightly behind those colossi were an endless parade of major figures in the "Warren Pantheon." To demonstrate my point without needlessly encumbering this text, I attach as an Appendix a list of forty-five considerable decisions of the Warren years.

For immediate purposes, let me go to the conclusion: for the years of the Warren Chief Justiceship, the Supreme Court was at the storm center of creativity in American life. After the Court achieved its full number of new appointees, it became, for better or for worse, the most consistently dynamic force in American government. From the sheer standpoint of making waves, one must go back to the Hughes Court of 1934 to 1938 for comparison, and prior to that era there is no comparable age of explosiveness in the Supreme Court in this century.

III

THE BURGER AND WARREN COURTS RELATIVELY CONSIDERED

Chief Justice Burger is the first holder of that office to become deeply, almost obsessively, concerned with the operation of America's legal system as a whole. He is keenly aware that his Court is not the only one swamped with volume. He is enormously aware of the problems of cost, congestion, and delay. He has turned the chief justiceship into something much more than the chairmanship of a court of nine; he has made it into a leadership point for the functioning of the legal system of the country as a whole.[99] I review this from two standpoints: first, narrowly, in terms of the functioning of the Court itself, and the almost mechanical ways in which it was doing its job; and second, in terms of the functioning of the Court in relation to the total government of the United States, particularly in comparison to its predecessor.

A. The Court Operationally Considered

The most striking aspect of the Burger Court is that the tremendous number of cases with which it must deal is radically altering its entire procedure. In 1935, essentially during the middle of the Hughes period, the number of paid cases filed was 924, the number of in forma cases was 59, and the total was 983. In the middle of the Stone period, 1943, that total number had risen to 997 with a marked diminution of the number of paid cases. In the middle of the Vinson period, 1950, the number was 659 paid cases and 522 in formas, for a total of 1,181. In the middle of the Warren period, 1960, there were 842 paid cases and 1,098 in formas, or a total of 1,940.[100]

---

99. Dennis, *An Unheralded Toiler*, Boston Sunday Globe, Sept. 16, 1979, makes the point of this difference between Chief Justices Warren and Burger.

100. The figures are taken from *Report on the Study Group on the Case Load of the Supreme Court*, A2 (1972), commonly referred to as the Freund Report.

Fifteen years later, in the middle of the Burger period, 1975, the number of in formas was 2,395, the number of paid cases 2,352, the number of original cases 14, totalling 4,761 cases. This number remained relatively consistent for 1976 and 1977.[101] In short, the case load from the middle of the Warren years (1960) is less than half the number of cases in the middle of the Burger years.

This has perfectly prodigious consequences. The weight of this, however, can easily be exaggerated because the number of cases disposed of with written opinions has not been subject to parallel radical increase. In 1935, that number was 145; in 1945, it was 134; in 1950 it was 91 (in the Vinson period the Court almost went out of business); and in 1960, the number was 110. There is some ambiguity in the numbers because cases may be consolidated, so that in 1960 the 110 opinions covered 125 cases. In the last Warren year, the 1968 Term, the number of opinions was 99, the number of cases disposed of by opinion was 105.[102]

In 1975, 1976 and 1977, these numbers were 160, 154 and 153, respectively.[103] This means that the total number of cases had doubled; the number of written opinions as compared with the Warren period has increased by some 50 percent.

Having noted the increase, one dramatic fact of nonincrease also needs to be observed. While the Burger Court is doing 50 percent more cases disposed of by signed opinion than the Warren Court, it is doing fewer cases by signed opinion than either the Hughes or Stone Court. For example, there were 187 cases disposed of by signed opinions in 1935, which is considerably more than in any of the Burger years. On the other hand, cases are not fungible, and the contemporary Court may be getting more difficult matters.

This warrants the following conclusions and observations:

> 1. The intake and sifting job is incredibly larger than it was at any time in the past fifty years. When I was a clerk for Justice Black in 1942, the Justice's practice was to have his clerks begin the year with certiorari memos until they understood what they were to do, but when he was busy and really wanted a clerk's assistance, he would dispose of the petitions by himself. There was a maximum of twenty-five petitions a week, and this permitted him to release the clerk for other duties. With the present volume, no judge and law clerk could possibly review and digest all these materials. As former

---

101. *Report of the Proceeding of the Judicial Conference of the United States and the Annual Report of the Director of the Administrative Office of the U.S. Courts for 1978*, 292 (1978) [hereinafter cited as *Proceeding of the Judicial Conference*].

102. Warren Report, at A7.

103. *Proceeding on the Judicial Conference*, *supra* note 101, at 292.

Judge Hufstedler of the Ninth Circuit has put it, "the time used in deciding not to decide" would eat up all the decision time.[104]

2. The Court is publishing more. The opinions and orders of the first Warren year, the 1953 Term, covered 880 pages. The same figure for the 1975 Term is 3,225 pages. We isolate the 1975 Term for this because the volume has become so impossible that the printers cannot keep up with it. As these paragraphs are written, only half the 1976 Term and none of the 1977 or 1978 are in hard cover.[105]

3. A Court handling twice as many intake cases as a few years ago and four times as many as fifty years ago needs more staff. The Court has consequently grown. When I was a clerk, each justice had one clerk and the Chief Justice had two. The number has grown to at least three and often four each and there are informal arrangements for central staff to pass on applications.

4. The work style has radically changed, and the changes are, for the most part, regrettable. The armies of clerks, at once useful, are also counterproductive. I am informally advised that the practice of justices doing the first drafts of their own opinions has now greatly diminished. When I was a law clerk, Justice Black, as a little reward if the clerk had been useful, would permit a clerk to try a first draft of something toward the end of the year. Mine was a lone dissent on a point of statutory construction which, happily, has not been heard of since. These present conditions do not exist because of a decline of ability; for example, to put it bluntly, this Court is far more capable than the Vinson Court. These conditions exist because life is short and there is too much to do.

The recently published book, *The Brethren*, contains broad indication that the clerk system has gotten utterly out of hand. The volume at least gives a picture of Byzantine manipulation which, if true, is disreputable.[106] It probably is grossly exaggerated.

5. There are other ill consequences. In other days, the Court could be effectively and fully prepared for oral argument. Contrast this to the rare situation today where it is prepared as well as it was in the past and it becomes painfully apparent to the audience that it is no longer practical to read the briefs closely before the arguments.

6. Partly, the flood of pages is due to clerks turning in law review

104. S. Hufstedler, *Comity etc.*, 47 N.Y.U.L. REV. 841, 850 (1972).

105. Partly this is due to primitive equipment. When Burger became Chief Justice, the Court did not have a xerox machine. It is now installing the most advanced word processing equipment available.

106. B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979). I develop this theme in some detail in 66 AM. BAR ASS'N J. 160 (Feb. 1980).

> articles to their superiors, but the rain of concurrences and dissents is also due to the absence of time to reason together. I remember well Justice Black's notes to colleagues, his quick pace down the hall as he went to see another colleague, and the conferences in his chambers when someone else came to see him. Minor accommodations were made to avoid disagreements and particularly concurrences. That opportunity is gone and it becomes easier to publish than to talk. We lose what Justice Frankfurter called, though too rarely practiced, the "fruitful interchange of minds which is indispensable to thoughtful, unhurried decision. . . ."[107]

The result of all this padding, publishing, and individualism is destructive of the effectiveness of the Court.[108] There will be times when, for some good reason, the Court cannot speak with one voice. Justice Black served as senior justice on the majority side in the *Pentagon Papers* case,[109] and everyone on the Court wrote an opinion. In an earlier crisis case, the steel seizure case during the Vinson period,[110] Justice Black was also the senior associate, and the majority spoke with one opinion. The difference was not the desirability of the thing, but that by the time of the *Pentagon Papers* case Justice Black's health had become so poor that it was all he could do to get out his own opinion—a grand final flareup for the dwindling fire—without having the capacity to counsel with anyone else. Chief Justice Burger achieved the triumph of a single voice in the Nixon tapes case, as did Chief Justice Warren in the great desegregation case, but the number of divisions is enormous.

This is bad for the influence of the Court because, no matter what it does, the Court can only decide a handful of the country's disputes. It has the mixed power to compel, to teach, and to lead. In its teaching and leading capacities before an audience of well over 200,000,000 people, it does better when clarity is up and cacophony is down.

These have been years of cacophony. This is no fault of the Chief Justice nor any member of the Court. It is the byproduct of a bad situation. From the beginning, Chief Justice Burger has pushed for some method of reducing the Supreme Court's work load. He has had a partial sucess, strongly striven for, in the reduction of three judge court jurisdiction. He will hopefully succeed in his effort to eliminate any compulsory jurisdiction on appeals to the Supreme Court. He has also been giving sound leadership in the exploration

---

107. Dick v. New York Life Ins. Co., 359 U.S. 437, 459 (1959) (Frankfurter, J., dissenting).

108. From 65 to 85 percent of the bar, depending on the precise wording of the question, regard the Court's opinions as too long and unclear; U.S. NEWS AND WORLD REPORT, Mar. 7, 1977, at 58. Chief Justice Burger on the whole is briefer than many of the others. He specially concurs rarely and then almost always briefly.

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

110. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

of some other national court which can handle a portion of the surplus work of this Court. By some miracle, despite the volume, the Court finishes, after whatever fashion, its overwhelming work load each year. That work load needs to be cut down so that our justices may be wise men reaching contemplative and well informed decisions.

B. The Institution in Relation to the Country

A comparison of the Burger with the Warren Court illuminates functional as well as doctrinal differences.

The doctrinal differences, while not radical, are clear enough. The Warren Court was moving toward a stronger enforcement of the criminal defenses available to American citizens charged with crime. As crime rises in America to an unendurable degree, the popular sentiment loses its regard for some protections and demagogues hold sway with charges that the courts are soft on criminals. The Nixon appointees were consciously chosen with an eye to different views than their predecessors on some of these questions, and this is reflected particularly in the erosion of the *Miranda* rights against self incrimination and the right to counsel and in the softening of concern with the fourth amendment and its ban on unreasonable searches and seizures. To a limited extent, the Burger Court has turned its back on the Warren Court in both these areas.

The Warren Court was under intense pressure to respond to the McCarthyite mood and movement, and it did, with the great succession of first amendment cases. The demands on the Burger Court as to free speech have been so minor that movement as to political speech has very nearly stopped. In any case, the whole intellectual approach changes with the people. Justice Holmes, Brandeis, Hughes, Stone, Frankfurter, Black and Douglas had genuine philosophies of free speech, fully worthy of that name. I doubt if any of the existing justices really do, with the possible exception of Justice Rehnquist, the philosopher of this court, who doubtless has clearly integrated and developed conceptions about free speech, though he may, on balance, be against it.

There have been, in the Burger years, two other major shifts in relation to the first amendment. In each, the Burger Court has blazed new trails without being as effective as it might have hoped. First, in respect to obscenity, the Chief Justice has very definitely changed the standards to permit states and municipalities greater control of obscene materials. So far as doctrine is concerned, the Warren Court's approach of virtually unlimited publication has been overruled. As a practical matter, it is hard to see a difference; the country is awash with pornography and the decisional shift appears to have very little consequence. The second very special free speech area of the Burger years is in the reversal of the earlier view that commercial speech is

not protected by the Constitution. In the primitive days of Justice Cardozo and Chief Justice Hughes, selling hair brushes was somehow thought to be radically different from selling ideas.

That distinction has been substantially eroded by this Court. In the field of legal advertising, for example, truthful advertising of routine services is now permitted. Again, legal advertising is, in fact, not at all restricted to routine services, and no institution ever checks to determine whether it is truthful.[111]

On another aspect of the first amendment, the Court has had its difficulties. On the right of the individual to practice his religion as he sees fit, the Court has been very firm. It invalidated the Wisconsin requirement which would have compelled Amish children to go to high school, the Chief Justice speaking with some eloquence of the individual liberty involved.[112] It invalidated a Tennessee statute barring ministers from membership in the state legislature, concluding that eighteenth and nineteenth century fears that this would lead to an establishment of religion were outmoded by time.[113] It gave a Buddhist his day in court to prove that prison authorities were discriminating against him in precluding Buddhist religious exercises in the prison.[114] The Court reaffirmed its traditional stand that where a hierarchical church has, by its duly established legal authorities, made a determination which may involve considerable property interest, such a conclusion is very nearly beyond judicial review.[115]

Where public funds were involved, the Court had its difficulties. It held in various ways that funds could not be provided for primary or secondary parochial schools directly or indirectly, by, for example, subsidizing tuitions or giving tax deductions.[116] But there is a considerable "on the other hand," as the Court concluded to settle the law of grants to educational institutions by a horizontal slice. As noted, grants directly or indirectly to the lower schools are impermissible, but nonsectarian grants for nonsectarian purposes to religious colleges for the construction of libraries, are upheld.[117]

Dissenting justices in one or another of these cases include Justices Black,

---

111. This may be the galled jade wincing. I was losing counsel in the lawyer advertising case.

112. Wisconsin v. Yoder, 406 U.S. 205 (1972).

113. McDaniel v. Paty, 435 U.S. 618 (1978).

114. Cruz v. Beto, 405 U.S. 319 (1972).

115. Serbian Eastern Orthodox Etc. v. Milivojevich, 426 U.S. 696 (1976).

116. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975) (textbooks may be supplied to all children, which is sole learning; but professional staff and supportive materials, equipment and personnel may not be supplied for numerous remedial or accelerated instruction services). Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (maintenance or repair grants, tuition reimbursement grants, and income tax benefits to parents or children attending New York nonpublic schools are unconstitutional). A Rhode Island statute providing for salary supplement for teachers in nonpublic schools teaching only courses offered in the public schools, using only materials used in the public schools, and not teaching courses in religion. Held invalid; Lemon v. Kurtzman, 403 U.S. 602 (1971).

117. Tilton v. Richardson, 403 U.S. 672 (1971); Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973).

Douglas, Brennen, Marshall, and, in one instance, Justice Stewart. These college cases must be recognized as a flat departure from earlier doctrine. They develop a standard of "primary purpose," a recent invention. As Justice Douglas pointed out in his *Tilton* dissent, up to this time the Court had permitted only general aid to students applicable to all students whether they were attending public or private schools. Examples included textbooks or bus rides, that were held to be more in the nature of poor relief than a religous subsidy. The decisions until this point had totally barred aid to religous institutions. These decisions must, therefore, be regarded as a truly major departure from earlier law.

The race relations field has changed because this Court must now interpret the civil rights acts passed in the Johnson administration. The women's revolution has brought a flood of matters into the Court and there is no ready comparison with the Warren years when there were fewer such cases. The decisions remind the feminists that they still need the ERA. The principal antitrust difference is that there have been fewer cases.

Although the doctrinal talk of the seventies is not greatly or radically different from the fifties and sixties, it is, however, from the institutional standpoint, totally misleading. In the institutional sense, the relation of the Court to American life, the Burger Court is 180 degrees opposite from its predecessor.

The Warren Court was at the center of American life. In terms of vitality and impact, it was the liveliest branch of the government. On desegregation, on one-man, one-vote, in the combat with Congress leading to the ultimate overthrow of McCarthyism, in granting the right to counsel for indigents, in controlling the abuses of constitutional rights of criminal suspects as exemplified by *Miranda*, in the church-state cases, and in the expansion of the antitrust laws, the everlasting dynamism of the era illustrate by the listing of salient Warren Court cases earlier—all were a dramatic movement of a Court which was at stage center.

What the Burger Court has done is stop that movement, subdue that dynamism, and retreat to the stage margins. There are any number of Burger Court cases which are not involved in a conflict with earlier decisions, but they do illustrate the curtailment of this movement. For illustration, no one can say that the Burger Court's decision not to permit the integration of the City of Detroit and its surrounding environs conflicts with anything decided by the Warren Court;[118] but one can say that the Warren Court, dedicated to drive and movement, probably would have decided that issue as an initial proposition the opposite way. This is also true of the decision refusing to equalize school funding.[119]

---

118. Milliken v. Bradley, 418 U.S. 717 (1974).
119. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

This curtailment has consequences on the total institution of government. In the past twenty-five years the Congress and the President, have been bogged down by the volume of decisions. The Warren Court was the most dynamic portion of the entire government. In the succeeding decade, as the problems become larger and more insoluble, all three branches have dragged to a walk.

This is not to say that there have not been prodigious decisions in the Burger years, and radical ones, too. The Nixon tapes case is an example, and a monument to the integrity of the Court, for a president who had appointed almost half the judges fell by their votes. The abortion decision is a stupendous matter in terms of the deep moral values, pro and con, of much of the country. *Goldberg v. Kelly* and the death sentence case are important cases in American life by any standard.

Bakke and *Weber*, the two major affirmative action cases, may well loom large in American life for the rest of this century. They clearly start us on a major new path. Perhaps I am underestimating the *Pentagon Papers*, though I think the problem of stolen, classified and unpublished papers will be minimal.

There are two key points with which to conclude this discussion. The list of Burger cases of great social impact, relative to the Warren list, is a short one. The second is that the national spirit, as typified by the Warren Court leadership, lost an election. Probably a majority of the country had had enough of judicial dynamism. It was ready for a little less judicially-imposed leadership, a little less drive, a little less push from the lifetime-appointed judges of bygone administrations. The Burger Court has, I would suspect, pretty well done the job it was hired to do, which is to plane down Court leadership of the country. Depending on one's outlook, one may regret this event, particularly since the leadership limitations of the government may on occasion leave us with a concerned feeling that no one is keeping the store. Nonetheless, the people cannot complain if they got more or less what they voted for.[120]

Mark Cannon, Administrative Assistant to the Chief Justice, catches the spirit of my conclusion. Speaking of the role of the Court in relation to federalism, Cannon said: "There have not been many reversals however of the Warren Court in this regard, but rather a refusal to go much further than that Court had already done."[121] The same matter can be measured from another perspective, the dissenting opinions of the Warren Court holdover jus-

120. The Court majority takes comfort from the view that "a judge is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness," B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). On the other hand, the minority doubtless believe that they are operating within this tradition.

121. Unpublished Statement of Mr. Cannon to the bar associations of Santiago, Chile, and Montevideo, Uruguay, at the Second Judicial Reform Conference, Sept., 1978.

tices. These justices carry forward in the tradition of Chief Justice Warren and give us not a certainty but a hint as to the difference had the former Court continued. For example, in the Texas school desegregation case in which the Court, by a five-to-four vote, held that school equalization throughout a state was not constitutionally required, Justices Brennan, White, Douglas, and Marshall, holdovers from an earlier day, dissented illustrating perhaps more dramatically than in any other decision of the decade, the change in the Court outlook between the sixties and the seventies.[122] Similarly in the Detroit segregation case, the four Warren holdovers dissented from the decision that the urban and the suburban school districts could not be considered as a single unit for desegregation purposes. Had these two cases been decided the other way, the general social consequences to life in this country would have been great.[123]

IV

THE CHIEF JUSTICE AND JUDICIAL ADMINISTRATION

Chief Justice Burger is not the first Chief Justice to be concerned with the entire judicial administration of the country. Chief Justice Warren also was concerned; however, he had two advantages: first, the administrative problems were not as great, the law explosion is occurring now; second, Warren had Justice Tom Clark, a one-man army of law administration reform. Clark retired from the Court when Burger was appointed and moved to the Federal Judicial Center; his relationship with Burger was pleasant enough, but never the same for Clark as in the Warren years. Burger has had to become his own Tom Clark.

Burger began with a bang. He induced President Nixon to join in the Williamsburg, Virginia, Conference, the most impressive gathering ever of judges, professors and practitioners concerned with court administration. They called for a State Court Center, to parallel the very successful Federal Center, and they got it.[124] The State Center has become Burger's greatest single success. The heavy weight of research, publication, and thinking comes from the two Centers, and the Chief Justice keeps a firm interest in both.

Burger has proved to be a great starter and pusher. He has personally backed critical rule changes in the areas of civil, criminal, tax, bankruptcy, and evidence laws. He is directly responsible for the Institute for Court Management in Denver. He supported the bill to reduce three-judge courts. He takes the Judicial Conference of the United States seriously and had the Circuit ex-

122. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

123. Milliken v. Bradley, 418 U.S. 717 (1974).

124. Justice Clark deserves credit for the necessary follow through. A small submeeting chaired by him at Williamsburg made the program really go.

ecutives authorized for each Circuit; he helped create the state-federal judicial councils in forty-three states. He secured enactment of a law creating an administrative assistant to the Chief Justice. He supported practical improvements and improved jury utilization, increased the omnibus hearings, and accelerated compliance with the Speedy Trial Act.

The Chief Justice backed the "Pound Conference" in Saint Paul in 1976, a national updating of proposals for improvement. He supported the establishment of educational programs through the Federal Center for the horde of new judges appointed in recent years and currently. He is backing expansion of the powers of federal magistrates and has had an important hand in the revision of the Canons of Judicial Ethics through the commission led by Judge Traynor. He faithfully gives time to the Institute for Judicial Administration, and in his spare moments, he began and developed the Supreme Court Historical Society and the exhibits on the ground floor of the Court.

I will stop listing to avoid writing a catalog, but there is a catalog. The list of the Chief Justice's speeches on these themes runs eleven pages.

Most of the Chief Justice's hard-driving proposals have seemed, to this audience of one, altogether constructive. My personal favorite is that of a judicial impact study of legislation. We shall never bail out the sea of cases if Congress and the legislatures endlessly and headlessly pour more in. I confess that there are times when, in his enthusiasm or under the extreme emotional and time pressures he has seemed to me a little like a locomotive headed for a canyon. His quick encouragement of some preliminary discovery proposals last year is a case in point; his own committees and counsellors have since pulled away from most of them. He has had bar support for most of his proposals. The Chief Justice is correct on the need for improving the bar, but the dual notions of having the bar admission personnel superintend law school curriculums and of creating a special federal court bar do not seem constructive to me; he later moved to a pilot program approach which was adopted. On the other hand, his drive to improve the quality of legal performance by education and peer review is necessary; he has, for instance, taken an active interest in a program to improve appellate advocacy.

The Chief Justice of the United States is an institution. Like the President, he is expressly named in the Constitution. He is the chief officer of the legal system of the country. The country is doing miserably at finding ways of securing speedy, economical, and just resolution of the disputes of its people.

In the years of the Burger Court, we have experienced the unrestrained and unparalleled drive of the institution of the Chief Justiceship to repair these deficiencies. There is force in the view of legal historian William F. Swindler that the Chief Justice is "the only agency able to develop and maintain the needed momentum" for judicial modernization.[125] It does not much

125. M. Cannon, *The Federal Judicial System*, 12 CRIMINOLOGY 10, 12 (1974).

matter whether all efforts are for the good—it certainly does not matter whether you or I individually disagree as to this or that. In reform of judicial administration there are bound to be mistakes, lots of them.

What is important is that the Chief Justice of the United States is putting the full force of his office into improvement.

APPENDIX

Major Decisions of the Warren Court Apart From School Desegregation and One-Man, One-Vote

1. *Irvine v. People of State of California*,[1] a decision reaffirming the Court's holding in *Wolf v. Colorado* that the fourteenth amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure in a state court criminal prosecution.[2] What is important about this case, a five-to-four decision, is that it was the last case exempting a state from the coverage of the fourth amendment.

2. The early Warren years coincided with the peak of the McCarthy period of lynching through congressional inquiry. In a group of three cases, the Supreme Court called a sharp halt to McCarthyism by upholding the right of witnesses to refuse to answer questions based on their fifth amendment privilege against self-incrimination.[3]

3. The Court, over the objection of the Solicitor General, held that under the supremacy clause, state statutes dealing with sedition were invalid because of the existence of federal statutes covering the same area.[4]

4. A corollary of McCarthyism was the loyalty program of the government. The Court held illegal summary suspensions on loyalty grounds.[5]

5. Indigent criminal defendants were given the right to appeal without prepayment of costs.[6]

6. Defendants were given access to government reports on which charges against them were based, a decision which led to a statute regularizing this practice and applying it generally in criminal cases.[7]

7. In a group of cases, the Court again called a halt to McCarthyism and loyalty programs. In one, the Court limited the investigative powers of Congress and suggested that these powers were also limited by the first amendment.[8] In another, it upheld the rights of a guest lecturer at a state university to decline to testify before state authorities on the subject of his lecture;[9] and in a third, the Court reversed the conviction of fourteen admitted Communists under the Smith Act on the ground that advocacy of action and not "advocacy of abstract doctrine" was required for convic-

1. 347 U.S. 128 (1954).
2. 338 U.S. 25 (1949).
3. Bart v. United States, 349 U.S. 219 (1955); Emspack v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).
4. Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956).
5. Cole v. Young, 351 U.S. 536 (1956).
6. Griffin v. Illinois, 351 U.S. 12 (1956).
7. Jencks v. United States, 353 U.S. 657 (1957).
8. Watkins v. United States, 354 U.S. 178 (1957).
9. Sweezy v. State of New Hampshire, 354 U.S. 234 (1957).

tion.[10] Additionally, the Court held that the State Department could not withhold passports because of an applicant's alleged Communist beliefs or associations.[11]

8. In the antitrust field, the Court found a violation in the holding by DuPont of 23 percent of General Motors stock.[12]

9. The Court held that a state could not require the NAACP to disclose its membership lists.[13]

10. In conflict with the drift of its other McCarthy-period decisions, the Court held that a college professor testifying before the House Un-American Activities Committee could not refuse to answer questions about his affiliation with the Communist Party.[14] The case gains its recurrent fame from the dissent of Justice Black, perhaps his most eloquent exposition of free speech principles, which ultimately has been adopted by the Court.

11. The Court enforced desegregation in Little Rock, Arkansas in the face of public hostility to desegregation.[15]

12. The Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial."[16] This eliminated the so-called "silver platter" doctrine, which had allowed a prosecutor in a federal criminal trial to use evidence seized unlawfully by the state officials.[17]

13. Held, that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.[18] This "legitimately on the premises" test was modified in the most recent term of the Burger Court.[19]

14. The Court upheld the conviction of an active member of the Communist Party.[20] This case, and a series of other cases in this mid-Warren period, involving the rights of individuals during Congressional investigations, were largely eroded before Chief Justice Warren left the Court.[21]

15. In the most important fourth amendment case of the period, the Court extended the federal exclusionary rule to the states, holding that evidence seized in violation of the fourth amendment was protected by due process under the fourteenth amendment.[22]

16. Evidence procured by electronic eavesdropping was held to violate the fourth amendment.[23]

---

10. Yates v. United States, 354 U.S. 298 (1957).
11. Kent v. Dulles, 357 U.S. 116 (1958).
12. United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 (1957).
13. NAACP v. State of Alabama, 357 U.S. 499 (1958).
14. Barenblatt v. United States, 360 U.S. 109 (1959).
15. Cooper v. Aaron, 358 U.S. 1 (1958).
16. Elkins v. United States, 364 U.S. 206, 223 (1960).
17. Byars v. United States, 273 U.S. 28 (1927).
18. Jones v. United States, 362 U.S. 257 (1960).
19. Rakas v. Illinois, 439 U.S. 128 (1978).
20. Scales v. United States, 367 U.S. 203 (1961).
21. See, as parallel cases Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961); Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In Re Anastaplo, 366 U.S. 82 (1961); Cohen v. Hurley, 366 U.S. 117 (1961).
22. Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949).
23. Silverman v. United States, 365 U.S. 505 (1961).

17. The Court found that a state official acting contrary to state law was acting under the color of a state statute and was thus subject to action under § 1983.[24]

18. The status of being a narcotic user cannot be made a criminal offense.[25]

19. A merger between the third and eighth largest shoe companies in the country was found to violate the Clayton Act.[26] The Act, which prohibits mergers which may tend substantially to lessen competition was interpreted to apply to probable effects, not quantitative tests.

20. In one of the most far-reaching decisions of the Warren period, the Court held that an indigent defendant in a non-capital felony case was entitled to have counsel appointed in his behalf.[27]

21. In a case which was to cause the filing of thousands of state cases in federal courts, the Court held that a state prisoner did not forfeit access to federal courts to relitigate claims of Constitutional error by failing to appeal his conviction in a state court.[28]

22. The Court found school religious exercises, including school prayers, a violation of the first amendment.[29]

23. The law of libel was revolutionized with a holding that a public official may recover damages "for a defamatory falsehood relating to his official conduct" only if he "proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[30]

24. An incriminating statement, the Court held, was inadmissible when the defendant was not advised at any time during interrogation of his right to remain silent, nor was he permitted to consult with his lawyer despite repeated requests.[31]

25. The Court found the closing of all public schools in a county, coupled with state support of segregated private schools, constituted a denial of equal protection.[32]

26. The rule of *Baker v. Carr* was extended to state senates. "One-man, one-vote" was firmly in the saddle.[33]

27. The Court invalidated state law prohibiting the use of contraceptives as a violation of a right of marital privacy.[34]

28. The Court sustained the equal accommodation provisions of the Civil Rights Act of 1964 under the commerce clause[35] and held that the effect of the statute was to abate all pending state trespass prosecutions for sit-ins and other peaceful assertions of rights protected by that Act.[36]

---

24. Monroe v. Pape, 365 U.S. 167 (1961).

25. Robinson v. State of California, 370 U.S. 660 (1962).

26. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

27. Gideon v. Wainwright, 372 U.S. 335 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942).

28. Fay v. Noia, 372 U.S. 391 (1963). For far more restrictive interpretations of the habeas corpus right see the Burger Court decisions of Stone v. Powell, 428 U.S. 465 (1976) and Estelle v. Williams, 425 U.S. 501 (1976).

29. School District v. Schempp, 374 U.S. 303 (1963).

30. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

31. Escobedo v. State of Illinois, 378 U.S. 478 (1964). See also Massiah v. United States, 377 U.S. 201 (1964) to the effect that the introduction of incriminating statements elicited by federal agents after indictment and in the absense of counsel violated the fifth and sixth amendments.

32. Griffin v. County School Bd., 377 U.S. 218 (1964).

33. Reynolds, v. Sims, 377 U.S. 533 (1964).

34. Griswold v. Connecticut, 381 U.S. 479 (1965).

35. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)

36. Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

29. The Court reversed convictions of student protestors who had sung, prayed, and listened to speeches near a state courthouse on the ground that they had been entrapped and told that they could do this.[37]

30. In a cluster of cases, the Court effectively enforced the rights of blacks to vote.[38]

31. This was a period of great resistance to the Vietnam War with resultant protests and refusal to serve. The Court broadened the exemption for conscientious objectors to cover sincere and meaningful faiths whether or not they involved an orthodox belief in God.[39]

32. The Court continued to enforce rigorously the voting rights laws[40] and invalidated the poll tax.[41]

33. In the lead opinion of the Warren Court on protection against pretrial interrogation, the Court held that the fifth amendment privilege against self-incrimination applies to custodial interrogation and that statements obtained from a suspect during such interrogation are inadmissible in the absence of certain procedural safeguards, now known as the "*Miranda* Warnings."[42]

34. The Court established its broadest test for freeing books or films from charges of obscenity, making it as a practical matter virtually impossible to find anything obscene.[43]

35. In its continuing battle with the relics of McCarthyism, the Court held unconstitutional the provision of the Subversive Activities Control Act of 1950 requiring the registration of individuals.[44] Additionally, it also held unconstitutional a state statute requiring employees to take a loyalty oath finding that it interfered with their freedom of association.[45]

36. A California Constitutional provision had been adopted to prohibit the state from denying the right of any person to refuse to sell, lease or rent his property to anyone other than the person he chose. The Court held this unconstitutional on the ground that it was intended to authorize racial discrimination in housing and thus involved the state in private discrimination.[46]

37. At the 1966 Term there were eleven decisions dealing with searches and seizures. However, no very clear pattern emerges from all these cases and they must be regarded as inconclusive as a matter of basic philosophy or approach.

38. States must grant jury trials in all cases in which the sixth amendment would require jury trials for analagous federal crimes.[47]

---

37. Cox v. State of Louisiana, 379 U.S. 536 (1965).

38. In United States v. Mississippi, 380 U.S. 128 (1965), the Court upheld a federal statute which authorized the federal government to sue states to enforce the voting rights of blacks. In Louisiana v. United States, 380 U.S. 145 (1965), the Court found that the state literacy test requirement for voters violated the fourteenth and fifteenth amendments, since it had been used to prevent blacks from voting. In Harman v. Forssenius, 390 U.S. 528 (1965), the Court found that Virginia's poll tax violated the twenty-fourth amendment.

39. United States v. Seeger, 380 U.S. 163 (1965).

40. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966).

41. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).

42. Miranda v. Arizona, 384 U.S. 436 (1966).

43. A Book Named *John Cleland's Memoirs of a Woman of Pleasure* v. Attorney General, 383 U.S. 413 (1966).

44. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

45. Elfbrandt v. Russell, 384 U.S. 11 (1966).

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

47. Duncan v. State of Louisiana, 391 U.S. 145 (1968).

39. The Court held that an electronic eavesdropping device attached to a telephone booth constituted an impermissible search and seizure in that it violated the individual's justifiable expectation of privacy.[48] In so holding, the Court overruled the earlier decision that there must be an intrusion or trespass into a protected area.[49]

40. In a marked broadening of the concept of standing, a taxpayer was given the power to challenge the constitutionality of federal expenditures.[50]

41. 42 U.S. § 1982 was held to prohibit private discrimination in the sale or rental of property. The section was said to encompass "every racially motivated refusal to sell or rent. . . ."[51]

42. The Court held that a state may not prohibit peaceful picketing in a place generally open to the public, in this case a shopping mall.[52]

43. Again addressing the scope of the fourth amendment, the Court held that a warrantless search of a defendant's entire house occurring incident to a lawful arrest was unconstitutional; a police officer, the Court held, may only search the person arrested and the area within the person's immediate control, defined as one from which he might obtain possession of a weapon or destroy evidence.[53]

44. Residency requirements for welfare benefits were held unconstitutional as a violation, among other things, of the right to travel.[54]

45. The Court placed limits on the power of Congress to exclude members, their power being restricted to members whose age, citizenship or residency failed to meet the standards established in the Constitution.[55]

---

48. Katz v. United States, 389 U.S. 347 (1967).

49. *E.g.*, Goldman v. United States, 316 U.S. 129 (1942).

50. Flast v. Cohen, 392 U.S. 83 (1968).

51. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

52. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). To the contrary see the later decision of the Burger Court, Lloyd Ltd. v. Tanner, 407 U.S. 551 (1972).

53. Chimel v. California, 395 U.S. 752 (1969).

54. Shapiro v. Thompson, 394 U.S. 618 (1969).

55. Powell v. McCormack, 395 U.S. 486 (1969).