Failed Pragmatism: Reflections on the Burger Court Commentaries

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The fifteenth Chief Justice of the United States, Warren Burger, held that office for seventeen years, one year longer than his predecessor.1 His service occurred during a period of national malaise, doubt, and reappraisal. In New York Times Co. v. United States,2 the Court, over the Chief Justice’s dissent, denied an injunction against publication of the “Pentagon Papers,” a secret history of governmental decisions that had led America ever deeper into Vietnam. Not long thereafter, Chief Justice Burger wrote the opinion of the Court in United States v. Nixon,3 a decision that led directly to the resignation of the President who had appointed him to office. Both the substance of the “Nixon tapes case” and its authorship by a Nixon appointee bespoke the independence of the judiciary and America’s commitment to the rule of law.

Although cynicism concerning government in general may have colored views of the Supreme Court during the Burger era, the Court itself remained essentially free of the improprieties that contributed to this cynicism.4 Some unprecedented investigative journalism concerning the Court’s internal affairs revealed that Supreme Court justices did not always speak kindly of one another and that some law clerks were dreadful tattletales.5 In the main, however, it depicted a group of concerned jurists who worked hard and served no interest but the public’s.

Burger Court rulings, like landmark decisions of the Warren Court, contributed to important transformations in American life. The Chief Justice authored a decision that approved the use of far-reaching remedies for racial segregation of public schools in the

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1 Comparisons with Earl Warren followed Chief Justice Burger from the beginning. Cf. Remarks of President Nixon at the Swearing In of Warren E. Burger as Chief Justice of the United States, PUB. PAPERS 480, 482 (June 23, 1969) (“[S]ome with a superficial view will describe the last 16 years as the ‘Warren Court’ and will describe the Court that follows it as the ‘Burger Court.’”).

2 403 U.S. 713 (1971).

3 418 U.S. 683 (1974) (requiring the President to comply with a subpoena to produce tape recordings of presidential conversations and rejecting a claim of unqualified presidential privilege).

4 The resignation of Justice Fortas following the disclosure of some questionable financial dealings occurred shortly prior to Chief Justice Burger’s service on the Court and did not cast any noticeable shadow over the institution.

South; and with his concurrence, the Supreme Court brought school integration to the North. Moreover, the Court included in the egalitarian revolution a group whom the Warren Court had left out. Less than a decade before Burger became Chief Justice, the Supreme Court had upheld a state's virtual exclusion of women from jury service with the remark that "woman is still regarded as the center of home and family life." In 1971, the Chief Justice wrote the first Supreme Court opinion holding that a state's discrimination against women violated the equal protection clause. A number of like decisions followed.

Despite the Court's strong performance in times of crisis, its freedom from scandal, and its contribution to important social change, the Burger Court often reflected America's post-Vietnam, post-Watergate sense of drift. Commentators spoke of the Court's "rootless activism," its "themelessness," and its "ambivalence." This Commentary examines the Court's lack of direction and considers some reasons for it. Of course the Chief Justice himself frequently objected to the course of "Burger Court" decisions. The Court's rulings did not follow the path that any single justice would have chosen. This

6 See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding the use of numerical quotas as a "starting point" for school desegregation and approving a plan that required extensive busing in a large urban and suburban school district).


9 See Reed v. Reed, 404 U.S. 71 (1971) (state law preferring men as administrators of decedents' estates violates the equal protection clause).


Commentary will identify some institutional constraints, social circumstances, and intellectual developments that may have contributed to the Court's inconsistent performance.

The Court evidenced its wavering in teachings like these:

—Denying a divorce to a person who is too poor to pay a filing fee violates the due process clause, but requiring a filing fee before permitting an indigent to go bankrupt is consistent with due process.

—Requiring a moment of silence for meditation or prayer in the public schools violates the first amendment's establishment clause, but a city may erect a public creche without violating this clause.

—A trial judge's refusal to question prospective jurors about their possible racial prejudice violates the due process clause when the defendant is a black civil rights worker charged with a drug offense, but the omission of questions concerning racial prejudice is permissible when the defendant is a black charged with robbing, assaulting, and attempting to murder a white security guard.

—Sentencing a person to life imprisonment for obtaining $120.75 by false pretenses does not violate the cruel and unusual punishment clause when this person previously has been convicted of fraudulent use of a credit card and of passing a forged check. Imposing a life sentence upon the writer of a fraudulent $100 check who had previously been convicted of six felonies including three burglaries, however, does violate the cruel and unusual punishment clause when this offender must rely on executive clemency rather than parole to obtain mitigation of his punishment.

—When the issue arises under the equal protection clause, the use of express racial quotas to benefit minorities discriminates impermissibly against whites. When the issue arises under a federal employment discrimination statute, however, the use of express racial quotas is permissible.

23 See United Steelworkers v. Weber, 443 U.S. 193 (1979). Express racial quotas sometimes become permissible under the equal protection clause when they are used to remedy past discrimination. Nevertheless, after finding that an employer has discriminated in violation of title VII, a federal court may not order retroactive seniority for employees who were not themselves the victims of this discrimination. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578–80 (1984). A court may afford other affirmative relief to nonvictims, at least
—A state may cast upon a murder defendant the burden of proving self-defense by a preponderance of the evidence if the state has defined murder as the deliberate, premeditated, and willful killing of a human being. The state may not cast this burden upon the defendant if it has defined murder as the deliberate, premeditated and unlawful killing of a human being.

—The due process clause requires the government to provide hearings before terminating general welfare assistance but not before terminating disability benefits under the Social Security Act.

—Some criminal cases are so serious that defendants have a right to jury trial but no right to counsel; others are so serious that defendants have a right to counsel but no right to jury trial.

—Statutes outlawing abortion prior to the third trimester of pregnancy violate an implied constitutional right to privacy, but statutes outlawing consensual homosexual conduct do not violate this right because they do not involve the decision "whether or not to beget or bear a child."

—A state violates the equal protection clause when it excludes aliens from all civil service positions or from membership in the bar, but it does not violate the equal protection clause when it excludes aliens from employment as police officers, probation officers, or public school teachers.

—When an informant who has been directed not to question a cellmate obtains an incriminating statement by engaging the cellmate in unspecified "conversation," use of the statement against the cellmate

when it does so through a consent decree. See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986).


See Hankerson v. North Carolina, 432 U.S. 233 (1977); see also Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding that a state must prove beyond a reasonable doubt that a criminal defendant charged with murder did not act "in the heat of passion" when this proof is necessary to establish "malice," an element of the crime).


Compare Baldwin v. New York, 399 U.S. 66 (1970) (right to jury trial extends to cases in which imprisonment for longer than six months is authorized by statute but does not extend to cases in which lesser terms of imprisonment are imposed) with Scott v. Illinois, 440 U.S. 367 (1979) (right to counsel extends to all cases in which some imprisonment is imposed but does not extend to all cases in which imprisonment for longer than six months is authorized by statute).


violates his sixth amendment right to counsel. When, however, an informant who has been directed not to question a cellmate secures an incriminating statement by telling the cellmate that his exculpatory story does not "sound too good," the incriminating statement of the cellmate is admissible.

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The exclusion of pregnancy-related disabilities from an otherwise comprehensive disability insurance scheme does not discriminate on the basis of sex; it merely differentiates "pregnant women" from "non-pregnant persons." Nevertheless, charging a woman more than a man for an annuity because she is likely to live longer does discriminate against her on the basis of her gender.

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A state violates the due process clause when it imposes on a defendant a more severe sentence simply because he has exercised his right under state law to appeal a criminal conviction. So long as the state has given notice of its intent to do so, however, it may sentence a defendant more severely because he has exercised the constitutional right to trial.

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A statute that authorizes capital punishment only for defendants convicted at jury trials is unconstitutional because it impermissibly encourages jury waivers and pleas of guilty. Nevertheless, the guilty pleas that it encourages are valid.

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A state does not violate the establishment clause when it lends geography textbooks that contain maps of the United States to parochial school children, but it does violate the establishment clause when it lends unbound maps of the United States for use in geography class.

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43 See Brady v. United States, 397 U.S. 742 (1970). The contrasting cases noted earlier in this series were all Burger Court decisions. The case contrasted with Brady, however, Jackson, supra note 42, was a Warren Court decision that the Burger Court purported to distinguish. The two descriptions that follow also compare Warren Court and Burger Court decisions. Like the earlier comparisons, these comparisons reveal the current, incoherent state of the law and the Burger Court's apparent inability to mark clear boundaries.
45 See Meek v. Pittenger, 421 U.S. 349 (1975). In his dissenting opinion in Wallace v. Jaffree, 472 U.S. 38, 91 (1985), Justice Rehnquist noted the contrast between Allen and Meek and also described a number of other establishment clause decisions concerning governmental aid to church-related schools:

A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend
—When a lawfully arrested person has been removed from an automobile, the police may search the automobile's glove compartment and a jacket on the front seat as an automatic incident of the arrest. 46 When, however, a person has been arrested in a living room, the police may search neither a drawer in this room nor a jacket on the sofa simply as an incident of the arrest. 47

This partial list of anomalies and thin distinctions suggests the Burger Court's reluctance or inability to chart a clear course. The Court provided further evidence of this failing in its treatment of Warren Court decisions concerning the rights of criminal suspects. Although President Nixon had promised to redress Warren Court decisions that had favored the "criminal forces" over the "peace forces," 48 the anticipated Burger Court counterrevolution in criminal procedure never materialized. 49 The Court overruled only one landmark decision of the 1960s due process revolution, 50 and some of its decisions notably expanded defendants' protections in criminal cases. 51


See, e.g., Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (when sanity is at issue, an indigent defendant is entitled to the services of a forensic psychiatrist at government expense); Estelle v. Smith, 451 U.S. 454 (1981) (Burger, C.J.) (the privilege against self-incrimination forbids the admission at a sentencing proceeding of a defendant's statements during a pre-trial psychiatric examination); United States v. Henry, 447 U.S. 264 (1980) (Burger, C.J.) (statements elicited from a defendant by a cellmate, a paid government informant, held inadmissible); Payton v. New York, 445 U.S. 573 (1980) (requiring a warrant to enter a house to make a felony arrest); Delaware v. Prouse, 440 U.S. 648 (1979) (random stop of an automobile to check a driver's license violates the fourth amendment); Lockett v. Ohio, 438 U.S. 586 (1978) (Burger, C.J.) (the eighth amendment prevents a state from limiting the introduction or consideration of mitigating circumstances at a capital sentencing proceeding); Coker v. Georgia, 433 U.S. 584 (1977) (the eighth amendment forbids capital punishment for rape); Furman v. Georgia, 408 U.S. 238 (1972) (holding the death penalty unconstitutional as then administered throughout the United States).
A few rulings in fact seemed to treat police officers rather shabbily.\textsuperscript{52}

In place of the expected counterrevolution, the Burger Court waged a prolonged and rather bloody campaign of guerilla warfare. It typically left the facade of Warren Court decisions standing while it attacked these decisions from the sides and underneath.\textsuperscript{53}

The Court exhibited its backhanded style when it limited the right to representation by counsel at lineups and other identification proceedings. The Burger Court did not overrule the expansive construction of the sixth amendment upon which \textit{United States v. Wade}\textsuperscript{54} had rested.\textsuperscript{55} Instead, the Court held that the right to counsel did not extend to lineups conducted prior to the filing of formal charges.\textsuperscript{56} It thereby excluded most lineups from \textit{Wade}'s protection, encouraged delay in the filing of charges, and drew a line that bore no rational relationship to the need for legal assistance. Moreover, the Court held that the right to counsel did not extend to post-indictment photographic displays or other identification proceedings at which defendants were not present.\textsuperscript{57} It argued that counsel could not provide assistance to a defendant who was not there.\textsuperscript{58}

Similarly, the Burger Court never overruled \textit{Miranda v. Arizona}.\textsuperscript{59} It did, however, create a situation in which a police training manual authored by Justice Holmes' "bad man of the law"\textsuperscript{60} might now offer the following advice:

\begin{quote}
Upon arresting a suspect, do not give him the \textit{Miranda} warnings.
\end{quote}

When the public safety requires it, you may question this suspect

\textsuperscript{52} See \textit{Ybarra v. Illinois}, 444 U.S. 85 (1979) (holding it unlawful to frisk the patrons of a tavern for weapons before executing a warrant to search the premises for narcotics); \textit{Vale v. Louisiana}, 399 U.S. 30 (1970) (holding the warrantless search of a house unconstitutional despite an apparent likelihood that evidence would be destroyed if the search were delayed).


\textsuperscript{54} 388 U.S. 218 (1967).

\textsuperscript{55} Although few criminal justice objectives are more important than reducing the likelihood of erroneous eyewitness identification, see Loftus, \textit{Eyewitness Testimony: Psychological Research and Legal Thought}, 3 CRIME & JUST.: AN ANN. REV. OF RES. 105 (M. Tonry & N. Morris eds. 1981), the role that \textit{Wade} assigned to counsel — essentially that of witnessing lineups — might have been assigned instead to a Boy Scout or Brownie camera.


\textsuperscript{58} See \textit{id.} at 317. If anything, the absence of the defendant seems to increase the danger of improper suggestion and misidentification. Moreover, the Court earlier had extended the right to counsel to situations in which defendants had no right to be present. See \textit{Powell v. Alabama}, 287 U.S. 45, 71 (1932) (counsel must be appointed sufficiently in advance of trial to be able to prepare for trial effectively); Grano, \textit{Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?}, 72 MICH. L. REV. 719, 764-66 (1974).

\textsuperscript{59} 384 U.S. 436 (1966).

\textsuperscript{60} If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

without advising him of his rights, and his answers will be admissible. In the absence of a special public need, however, you should not question an arrested, unwarned suspect. If the suspect does make a statement, it will be a "volunteered" statement of the sort that *Miranda* makes admissible. Moreover, if the suspect remains silent, his silence may be used to impeach any defense that he offers at trial.

After an hour or two (during which your suspect will have provided either a statement or a potentially useful period of silence), you should advise him of his rights. If the suspect waives these rights, his statement will be admissible. If he indicates that he wishes to remain silent or to consult a lawyer, however, continue to interrogate him without a lawyer. Although the prosecutor will be unable to introduce as part of the state's case-in-chief any statement that the suspect makes, the suspect's statement will become admissible to impeach his testimony if he later takes the witness stand to say something different from what he told you. Indeed, if the suspect's testimony on direct examination fails to contradict his earlier statement, the prosecutor may cross-examine him about facts reported in the earlier statement and may introduce the statement if the suspect fails to confirm what he said to you. Do not place too much pressure on the suspect, however. If a court holds his confession involuntary under pre-*Miranda* standards, it will be inadmissible for any purpose. The Supreme Court has said that pre-*Miranda* voluntariness standards are part of the "real" Constitution. *Miranda* is part of the Court's "just pretend" Constitution.

Although the Burger Court overruled neither *Mapp v. Ohio* nor *Weeks v. United States*, it limited the scope of those decisions by holding the fourth amendment exclusionary rule inapplicable to several proceedings other than the criminal trial on the basis of a cost-benefit analysis that no proponent of the rule could have found per-

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65 See Oregon v. Elstad, 105 S. Ct. 1285, 1292 (1985) ("[The Miranda exclusionary rule] may be triggered even in the absence of a Fifth Amendment violation."); New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (*Miranda*'s safeguards are "not themselves rights protected by the Constitution"). In these statements and others concerning the fourth amendment exclusionary rule, the Supreme Court may have reversed a fundamental principle of federalism and asserted a supervisory power over the administration of state criminal justice. Activism by the third branch of government has become so familiar that most of the current generation of law students do not seem at all astonished by this possibility.
67 See 232 U.S. 383 (1914).
Despite what the Court regarded as the exclusionary rule's serious costs, it announced in *Stone v. Powell*\(^6\) that it continued to "adhere to the view that [the rule's benefits] support [its] implementation . . . at trial."\(^7\) At the same time, the Court held in *Stone* that except in unusual circumstances federal habeas corpus proceedings would not be available to review state court failures to apply the rule at trial. The reason was that the Court was unwilling to incur the costs of freeing the guilty — the costs of doing what the Court had said ought to be done.\(^7\) Although federal habeas corpus jurisdiction rests on the view that a federal forum may be necessary to vindicate federal rights, and although the temptation of state court judges to bend federal law must be strongest when this law asks them to free apparent criminals, the Court offered the empirical judgment that "the unsympathetic attitude to federal constitutional claims of some state judges in years past" no longer persists.\(^7\) *Stone* permitted state courts to treat the exclusionary rule as they liked without significant fear of federal correction.

More recently, in *United States v. Leon*,\(^7\) the Court held that the exclusionary rule was designed to influence the conduct only of law enforcement officers and that even a deliberate violation of the fourth amendment did not help the defendant. The opinion in *United States v. Janis*, 428 U.S. 433 (1976), illustrated the Court's approach. The Court recognized that earlier decisions had applied the fourth amendment exclusionary rule both in federal criminal prosecutions in which evidence had been seized by state law enforcement officers and in some civil proceedings. No earlier decision, however, had applied the rule in a federal civil tax proceeding in which critical evidence had been seized unlawfully by a state law enforcement officer. *Janis* declined to "extend" the exclusionary rule to this situation (causing one to wonder whether the Court had ever applied the exclusionary rule to a case in which evidence had been seized unlawfully from a left-handed drug dealer wearing glasses). Although the officer who had made the unlawful seizure in *Janis* testified that he routinely notified federal tax authorities when he discovered a major gambling operation, the Court concluded that tax proceedings "fell outside the offending officer's zone of primary interest."\(^7\) *Id.* at 458. The Court's view seemed to be that vice officers have little interest in bankrupting gamblers through tax proceedings, thereby depriving them of their diamonds and fancy cars. These officers' interest lies primarily in securing $100 fines for illegal gambling in county and municipal courts. See also *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable to deportation proceedings); *United States v. Calandra*, 484 U.S. 338 (1984) (holding the exclusionary rule inapplicable to grand jury proceedings).

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\(^7\) *Id.* at 493.

\(^7\) The issue in *Stone* was not the exclusion of evidence at habeas corpus proceedings themselves. The case concerned the use of habeas corpus to review application of the exclusionary rule at trial — in other words, to determine whether state courts had "freed the guilty" in situations in which *Stone* reaffirmed that they ought to have done so. To withhold review on the ground that the Court was unwilling to "free the guilty" therefore seemed strange. Other rationales for the Court's decision might have been more plausible.

\(^7\) *Id.* at 494 n.35.

\(^7\) 468 U.S. 897 (1984).
amendment by a judge or magistrate would not require the exclusion of evidence. Moreover, "where [a police] officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way.'" Accordingly, when an officer has obtained a judicial warrant before conducting a search, the officer's and the issuing magistrate's violation of the Constitution will lead to exclusion only if the officer had "no reasonable grounds for believing that the warrant was properly issued."

The fourth amendment provides that no warrants shall issue except upon probable cause, and the traditional test of probable cause is whether "facts and circumstances known to the officer warrant a prudent man in believing” that a search will uncover evidence of a crime. One year before Leon, the Supreme Court had held in Illinois v. Gates that the rulings of magistrates are entitled to substantial deference — so much so that a higher court might uphold a search warrant even though a magistrate had lacked probable cause for issuing it. Under Gates, it was enough that the issuing magistrate had "a substantial basis . . . for conclud[ing] that probable cause existed" — literally, that the magistrate had a substantial basis for believing that a reasonable person could conclude that a search would uncover evidence of a crime. Leon attenuated this two-tiered standard of Gates, converting it into a three-tiered standard: Unlawfully seized evidence became admissible when a police officer could have reasonably believed that a magistrate could have reasonably believed that a person could have reasonably believed that a search would uncover evidence of a crime.

The fourth amendment forbids only unreasonable searches, and "objective reasonableness" has been the touchstone of fourth amendment jurisprudence from the beginning. Rather than validate reasonable law enforcement conduct through substantive fourth amendment decisions, however, the Burger Court restricted the exclusionary rule by placing a series of reasonableness standards on top of one another in bewildering overkill.

74 Id. at 919-20 (quoting Stone, 428 U.S. at 539 (White, J., dissenting)).
75 Id. at 923.
76 Although the Supreme Court has used this language only in arrest cases, see, e.g., Henry v. United States, 361 U.S. 98, 102 (1959); Stacey v. Emery, 97 U.S. 642, 645 (1878), the term "probable cause" presumably has the same meaning in search cases, see, e.g., United States v. McEachin, 670 F.2d 1139, 1142 (D.C. Cir. 1981).
78 Id. at 238-39 (1983) (quoting Jones v. United States, 302 U.S. 257, 271 (1960)).
79 A deeper failing of Leon lay in its insulting and unnecessary invocation of crude stereotypical judgments concerning police officers and magistrates as the basis for applying or refusing to apply the exclusionary rule. See Alschuler, "Close Enough for Government Work": The Exclusionary Rule After Leon, 1984 SUP. CT. REV. 309, 346-58. For a post-Burger Court
The Supreme Court's disconcerting treatment of precedent was not confined to earlier cases that had favored criminal defendants. Indeed, when the Court expanded defendants' rights, it treated earlier decisions in much the same way. The Court recently illustrated its proclivity for the manipulation of doctrine in a series of decisions concerning discrimination in jury selection.

In *Hoyt v. Florida*, the Warren Court had permitted the exclusion of women from juries unless they volunteered to serve. When this discriminatory practice was challenged anew in 1975, the Burger Court noted that *Hoyt* had upheld the practice only against an equal protection challenge. Rather than overrule the Warren Court's restrictive interpretation of the equal protection clause, the Court found what it called a "fair cross-section requirement" in the sixth amendment right to trial by an impartial jury. It concluded in *Taylor v. Louisiana* that the practice of drafting men but not women for jury service violated this different constitutional command.

The Court emphasized in *Taylor* that the "fair cross-section requirement" did not require a fair cross-section; the Constitution permitted unrepresentative juries and jury panels when they arose from the luck of the draw. The sixth amendment prohibited only purposeful discrimination against identifiable groups, an evil that the equal protection clause long had condemned. *Taylor* thus avoided a direct confrontation with the past by calling into service an amendment that bore a different number but that, in the context of the case before the Court, had the same meaning.

Another Warren Court decision, *Swain v. Alabama*, had approved within broad limits the racially discriminatory use of peremptory challenges by prosecutors. Again, however, the Court had considered the legality of this practice only under the equal protection clause. A defense attorney, a master of doctrinal chess, apparently concluded that the strategem of *Taylor v. Louisiana* would permit the Supreme Court to avoid overruling *Swain* as it had avoided overruling *Hoyt*. The attorney challenged the discriminatory use of peremptory

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*Illustration of the same nonjudicial "bottom-line collectivist" mentality, see Illinois v. Krull, 55 U.S.L.W. 4291 (U.S. Mar. 9, 1987).*

*Throughout the Burger Court era, strained fourth amendment rulings appeared to reflect the Court's reluctance to apply the exclusionary rule. See, e.g., Rakas v. Illinois, 439 U.S. 128, 137–38 (1978) ("[M]isgivings as to the benefit of enlarging the class of person who may invoke [the exclusionary] rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations."); id. at 157 (White, J., dissenting) ("If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines . . . .").*
challenges under the "fair cross-section requirement" of the sixth amendment.

This time, however, the Court rejected the invitation to sidestep precedent. Over protests that the issue had not been presented by the parties, the Court overruled Swain. In Batson v. Kentucky, relying on the equal protection clause rather than the sixth amendment, the Court held that although a prosecutor could challenge an unspecified number of black prospective jurors without explaining why, he would be required to advance racially neutral reasons for his challenges (reasons relating, perhaps, to the prospective jurors' weight, religion, unpleasant facial expression or gender) when he struck too many.

The apparent explanation for the Court's rejection of the doctrinal dodge of Taylor v. Louisiana was that Taylor had permitted a man to challenge the exclusion of women from a jury (just as an earlier sixth amendment ruling had permitted a white defendant to challenge the exclusion of blacks). For reasons that it did not discuss, the Court indicated in Batson that a defendant could challenge a prosecutor's discriminatory use of peremptory challenges only when the prosecutor had "removed[d] from the venire members of the defendant's race." The Court apparently concluded that it could avoid the thrust of its sixth amendment decisions on standing by turning Taylor upside down and relying once again on the equal protection clause.

Moreover, apparently to ensure that defendants would not have the benefit of its sixth amendment rulings on standing during the later stages of jury selection, the Court held in a related case that the "fair cross-section requirement" extends only to the panels from which juries are selected, not to the juries themselves. The Court explained in Lockhart v. McCree that petit juries might be too small to be truly representative, thus ignoring a fact that it emphasized in the next paragraph of its opinion: The fair cross-section requirement forbids only systematic exclusion — discrimination that can be avoided as easily in the selection of small groups as in the selection of large ones. The Court also disregarded the fair cross-section requirement's grounding on the sixth amendment right to an impartial jury (not to an impartial jury panel). Today, if a state were to include women on its jury panels without discrimination and then, once the prospective jurors reached the courtroom, permit the exclusion for cause of women who had not volunteered to serve, the Court apparently would hold Taylor v. Louisiana inapplicable. It might, however, give the outdated

83 106 S. Ct. 1712 (1986).
85 106 S. Ct. at 1723.
86 106 S. Ct. 1758, 1765 (1986).
decision in Hoyt v. Florida a decent burial by holding that, although the sixth amendment allows the exclusion of women from petit juries, this practice violates the equal protection clause.

In its recent jury-selection decisions, the Court's treatment of precedent was typically overrefined and result oriented. Indeed, the Court may have built a better trap than it knew, for it treated the constitutionality of the discriminatory use of peremptory challenges by defense attorneys as an open question. Prosecutors, however, must have standing either to challenge all unlawful discrimination by defense attorneys or else to challenge none. If a defendant may prevent only the unlawful exclusion of members of his own race, the government, which is neither white nor black, apparently lacks standing to challenge the exclusion of anyone. The Court, in its effort to confine narrowly the right of defendants to object to racially discriminatory challenges, may not have recognized that limiting the standing of defendants would eliminate the standing of prosecutors altogether. Surely permitting prosecutors to resist all discriminatory challenges by defense attorneys while denying defendants the power to resist all discriminatory challenges by prosecutors would be unconscionable.87

In the main, the Burger Court gave America results, not principles.88 As Vincent Blasi noted, the Warren Court, whatever its failures of craftsmanship,89 responded to a vision of equal opportunity that had found expression at the moment of the nation's founding and later, at the end of a wrenching constitutional crisis, in the enactment

87 Because the Constitution affords rights against the government and not in favor of the government, prosecutorial standing to challenge the discriminatory acts of defense attorneys could not rest on the government's right to a fair trial, a right that the Constitution nowhere provides. A theory of "third-party standing," however, might emphasize, first, that defense attorneys perform an essentially governmental function when they select the judges of fact in criminal cases, and second, that the victims of unlawful discrimination by defense attorneys are unable to vindicate their own rights. Consistent application of this theory of third-party standing also would empower defendants to challenge the discriminatory exclusion of prospective jurors whether or not these jurors' races matched those of the defendants themselves.

88 Cf. B. Cardozo, The Nature of the Judicial Process 107 (1921) ("Evil stands the case when it is to be said of a judicial decree as the saying goes in the play of the 'Two Gentlemen of Verona': '... I think him so, because I think him so.'"); id. at 83 ("A constitution states or ought to state not rules for the passing hour, but principles for an expanding future").

89 See Kurland, The Supreme Court, 1963 Term — Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government", 78 HARV. L. REV. 143, 144-45 (1964). A claim that the Burger Court's craftsmanship was inferior to that of the Warren Court may lead to a shouting match, one in which the cry, "Kirby v. Illinois!", is likely to be countered by the cry, "Fay v. Noia!" On rereading Kurland's criticism of the Warren Court, however, one may become nostalgic for a Court whose harshest critics faulted it for such vices as substituting phrases like "one man, one vote" for analysis, see Kurland, supra, at 169-70; insisting that "rulings be carried to their dryly logical extremes," id. at 165; and grounding the ruling in Brown v. Board of Education, 347 U.S. 483 (1954), on insufficiently neutral principles, see Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959).
of the fourteenth amendment. The Warren Court applied the principle of equal opportunity to white students and black students, urban voters and rural voters, wealthy defendants and impoverished defendants.

In Blasi's words, even the Burger Court's most notable exercise in activism, *Roe v. Wade*, "burst upon the constitutional scene with very little in the way of foreshadowing or preparation." Indeed, to many observers, the case seemed less a reasoned decision than an astonishing, expectation-confounding convulsion. *Roe* transformed a profound moral question — a question not susceptible to utilitarian resolution and not plausibly committed to the judiciary by the Constitution — into a pragmatic issue of *ad hoc* balancing to be settled by five or more justices. Illustrating again its cleverness and result orientation, the Court reported that constitutional doctrine broke down neatly into trimesters. Judged solely on a scale of intellectual honesty (which, to be sure, is not the only measure that matters), the Burger Court may have marked the low point in the Supreme Court's not always illustrious history. This Court is likely to be remembered as the Court that talked restraint and decided *Roe v. Wade*.

Institutional failings do not always reflect personal failings, and the Burger Court's inconstancy had many causes. On occasion, changes in the Court's membership accounted for changes in direction. More frequently, a loose cannon or two slid across the deck as more solidly anchored weaponry remained in place on both sides. In addition, in cases in which no single justice's position could command majority support, complex voting patterns sometimes yielded inconsistencies even though individual justices had voted in coherent, principled ways.

Divisions within the Court, however, do not tell the whole story. The Justices of the Burger Court appeared to lack time to reflect seriously on the direction of their decisions and to explain these decisions in direct, well-reasoned ways. The impression from a distance was of justices who devoted long hours to their tasks yet found it necessary to delegate an increasing portion of their work to law clerks and other staff members. Both the number of cases that the Court

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90 See Blasi, *supra* note 11, at 212.
91 See id.
92 410 U.S. 113 (1973).
93 Blasi, *supra* note 11, at 212.
decided on the merits and the number of cases that it screened for full review increased substantially during Chief Justice Burger's tenure. A doubling in the number of law clerks during Burger's service contributed to an uneasy sense that Supreme Court Justices were becoming more managers than craftsmen.

Overworked justices are likely to be wavering justices, unsure of their positions. Issues like affirmative action, preventive detention, busing, the exclusionary rule, aid to church-related schools, drug testing, comparable worth, and the death penalty are difficult and affect countless lives. The sound resolution of these issues requires time, study, and reflection. Although the function of the Court is to settle disputes, overworked justices may hesitate to settle. Too burdened by the rush of decisions to take a long-range view, they may move from one side of an issue to the other, keeping large issues open until these issues are resolved by drift and default. When the justices hesitate too much, they fail to perform the essential role of the Court, contributing to uncertainty and malaise. Observers realize that this year's case is likely to lead only to next year's thin distinction. A reluctance to settle issues also contributes to increased litigation as lawyers and litigants conclude that everything important remains up for grabs. Judicial wavering may lead to more work, and more work to more wavering.

Although Chief Justice Burger and other Justices have proposed the creation of a new court to relieve the Supreme Court's workload, the Court currently has the power to reduce the number of cases that it decides and to afford the justices the time they need. An overworked Court can require better reasons for hearing cases than that they present interesting, unsettled issues or that lower courts appear to have decided them erroneously. Indeed, the Supreme Court need not rush to hear even important issues, a course that often requires hasty backtracking. Important issues do not go away; and although law clerks have an interest in bringing challenging issues to

97 During the October 1969 Term, Chief Justice Burger's first on the Court, the Court issued 94 written opinions and disposed of 3357 cases altogether. See The Supreme Court, 1969 Term — Leading Cases, 84 HARV. L. REV. 32, 248 table I (1970). During the October 1985 Term, Chief Justice Burger's last on the Court, the Court issued 159 written opinions and disposed of 4289 cases altogether. See The Supreme Court, 1985 Term — Leading Cases, 100 HARV. L. REV. 100, 308 table II (1986).

98 See R. Posner, supra note 96, at 102–03.

99 Cf. Code Civ. (Fr.) art. 4 ("The judge who shall refuse to give judgment under the pretext of the silence, of the obscurity, or of the inadequacy of the law, shall be subject to prosecution as guilty of a denial of justice.").


the Court before their service ends, the public's interest frequently lies in allowing lower courts to offer their wisdom and make their mistakes so that the Supreme Court need not do the initial fumbling itself. A motto of our times declares that less is more. Perhaps the Court should take firmer control of its case-selection process and reduce substantially the number of cases that it decides.  

The Supreme Court's product also may have suffered because legal scholars offered the Court little help. A few of these scholars wafted away on wisps of Continental philosophy, worrying that nothingness was the worm at the heart of their beings. These scholars and others talked deconstruction, demystification, moral philosophy, interpretivism, public values, public choice, republicanism, feminism, critical legal studies, hermeneutics, semiotics, and the transformation of consciousness. Fewer and fewer scholars, however, especially scholars in the field of constitutional law and especially those at the nation's most respected law schools, talked cases. Indeed, the most radical scholars appeared linked in an uneasy alliance with the "establishment" Supreme Court. The scholars argued that legal doctrine was a mask. The Supreme Court seemed repeatedly to prove it. A conventional scholar who faulted the Supreme Court's craftsmanship usually seemed to make a trivial point, one that might not gain him tenure. Scholars found it disheartening to struggle with doctrine when the Supreme Court appeared to treat doctrine as superstructure. Again things may have moved in a circle. The Court's faltering performance may have contributed to the decline of doctrinal scholarship, and the decline of doctrinal scholarship may have contributed in a marginal way to the Court's faltering performance.

Many of the scholars who did "talk cases" simply criticized the Court for ruling against women, blacks, environmentalists, political protestors, or criminal defendants, apparently having drawn from the Warren Court experience only the sterile lesson that tilting toward particular groups was a fine idea. As writers and institutional litigants

102 The Supreme Court currently affords a case full review whenever four justices favor this review. See Leiman, The Rule of Four, 57 COLUM. L. REV. 975 (1957). Only the justices can know how many cases (and which cases) would be denied review if the Court substituted a "rule of five" for its current "rule of four." Nevertheless, the selection of cases by a majority of the Court might not cause it to leave many issues of national importance unresolved.


105 Cf. Posner, The Constitution as Mirror: Tribe's Constitutional Choices (Book Review), 84 MICH. L. REV. 551, 555 (1986) ("[T]he majority opinions of the Supreme Court are such large targets for technical criticisms that the sense of decency that restrains a sportsman from shooting fish in a barrel should restrain the critic from attacking the Court as fiercely as [Laurence] Tribe does.").
took sides, the Supreme Court mostly played things down the middle — but only by calling a case for one side and then a nearly identical case for the other. Just principles that might transcend today's causes appeared to elude both the Court and the academy, perhaps because many Americans had lost faith that these principles could be more than twilight illusions or disguises for selfish interests.

The inconstancy of Burger Court opinions also may have been attributable in part to the reluctance of some justices to overrule Warren Court precedents with which they disagreed. The practice of limiting earlier decisions to their facts and of restricting disfavored precedents in arbitrary and disingenuous ways has a venerable history, and some justices may have regarded limitation by fiat as less destructive of the rule of law than the forthright abandonment of disfavored decisions. In *Tennessee Valley Authority v. Hill*, Chief Justice Burger quoted lines that Robert Bolt had ascribed to Sir Thomas More: "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal." The Burger Court's version of stare decisis, however, offered a parody of the law. A court's central obligation is to provide fair, straightforward judicial interpretations of the law and principled resolutions of disputes. Litigants and the larger audience of bystanders are entitled to honest and coherent statements of reasons. When a court must choose either to abandon a prior ruling or to limit this ruling in a way that makes the law an ass, the time usually has come for abandonment.

There are, to be sure, plausible objections to this view. The Supreme Court has a larger constituency than purist law professors — a constituency that knows little of the Court's dubious doctrinal distinctions. When two-thirds of a prior decision disappears slowly in half a dozen small bites, the public's perception of the Supreme Court will have been altered.

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106 Arthur Sutherland once wrote of a Vermont justice of the peace who, upon trying a defendant for stealing a black horse, remarked that his law book contained only cases involving bay horses and roans and that the defendant must be discharged. See Sutherland, *Prologue to an Introduction*, in *Harvard Law Review, An Introduction to Law* at ix (1968). Sutherland doubted that the justice's announced ground of decision had been his real one, and so it may have been with Burger Court decisions that declined to "extend" Warren Court precedents. 107 *37 U.S. 153 (1978).* 108 *Id. at 195 (quoting R. Bolt, *A Man for All Seasons*, in *Three Plays* 147 (1967)).* The Chief Justice quoted further:

I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round you — where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast — Man's laws, not God's — and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the devil benefit of law, for my own safety's sake.

*Id.*
Court may not change very much. Were the Court to swallow the disfavored precedent in a gulp, however, the impression that constitutional law is no more than the preference of five justices might grow stronger.109

The danger of doctrinal instability could easily be exaggerated, however. A constitutional reinterpretation by a unanimous or nearly unanimous Court — a Brown v. Board of Education110 or a Gideon v. Wainwright111 — is likely to appear impregnable from the beginning. Even a doctrinally questionable decision by a divided Court — a Reynolds v. Sims112 — is likely to move beyond controversy when people widely perceive it as fair. For the most part, only a decision by a divided Court that remains controversial — a Roe v. Wade,113 Mapp v. Ohio,114 or Miranda v. Arizona115 — is likely to seem vulnerable to change. Moreover, even rulings on debatable, controversial issues are unlikely to disappear and reappear with great frequency. Most presidents serve longer than one term, and few are afforded the opportunity to remake the Supreme Court. Sudden vacillations in doctrine would not become common if the Court attacked disfavored precedent forthrightly rather than through indirection.

More importantly, the Supreme Court's authority does not depend on the myth that it discovers constitutional law through methods that admit of only one answer. The public surely understands that many issues of constitutional interpretation are debatable — so much so that it may fail to recognize that the judicial role is or ought to be significantly constrained.116 The open disapproval of past precedents might

109 David Shapiro has noted "overtones of both paternalism and elitism" in this objection to forthright overruling. See Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731, 745 (1987); see also id. at 736–37 ("[L]ack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker.").

A measure of disrespect also seems implicit in a separate objection to forthright overruling — the claim that overruling some decisions (those broadening the rights of criminal suspects, for example) might symbolize a lesser concern for constitutional protections and might be misinterpreted as a license for improper conduct. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420–21 (1971) (Burger, C.J., dissenting); Schulhofer, Confessions and the Court (Book Review), 79 MICH. L. REV. 865, 892–93 (1981).

113 410 U.S. 113 (1973).
116 Consider, for example, recent newspaper editorials condemning the Court's refusal to extend constitutional protection to consensual homosexual conduct, editorials that did not treat the issue primarily as one of judicial activism or restraint. See, e.g., Crime in the Bedroom, N.Y. Times, July 2, 1986, at 30, col. 1; Muddying the Picture on Rights of Privacy, St. Paul Dispatch & Pioneer Press, July 3, 1986, at 12, col. 1; Your Bedroom and the Court, Denver Post, July 2, 1986, at 8B, col. 1.; cf. Shapiro, supra note 109, at 740 ("I suspect that the public
in fact undermine the Court's position in American life less than the repeated invocation of disingenuous distinctions. Journalists report the Court's work, and even newspaper readers may sense that this year's decision came out differently from last year's on the same subject for reasons that they cannot fathom. In addition, groups affected by the Supreme Court's decisions examine these decisions with care. Doctrinal transgressions that initially seem to diminish the Court's esteem only marginally and only within specialized groups ultimately may have a larger effect.  

Finally, even if the Justices of the Burger Court had not been divided, overworked, inadequately served by legal scholars, and constrained by unfortunate notions of stare decisis, one cannot be confident that the Court would have performed much differently. In an era of failing faith, many individual justices appeared to waver. An existential leap now and then might produce a *Roe v. Wade*, but the Court's erratic activism neither concealed nor compensated for its essential lack of vision and commitment.

The work of the Burger Court reflected not only the troubled uncertainty of post-Vietnam America but also an accelerating belief in the contingency of legal rules — a belief that has characterized twentieth-century American jurisprudence from Oliver Wendell Holmes through Jerome Frank and the Conference on Critical Legal Studies. Many Americans appear to have rejected the notion that law can be more than a flexible device for solving human problems. Some in fact have maintained that even the pragmatic vision of law claims too much. Law is a matter of who gets what, and rights are the bones over which people fight.  

Cost-benefit analysis and rule skepticism have eclipsed the notion of principles which can assure members of a society that they participate in a common civilization and that they play by the same rules.

Changed conceptions of law have yielded changed conceptions of the judiciary. The rise of "public interest litigation" has brought a

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117 See Shapiro, supra note 109, at 737 ("Lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.").

A further cause of inconstancy may also merit mention. Paul Freund remarked to his constitutional law class twenty-three years ago that the literary quality of Chief Justice Marshall's opinions could be attributed partly to the fact that they were not burdened with citations; Marshall could begin with the constitutional text and cite little more. As law has grown more complicated and precedents have multiplied, both the potential for inconstancy and the need to draw careful distinctions have increased. In general, Supreme Court opinions probably tend to become longer, more complicated, and less satisfying as rhetoric the more the accretion of precedent grows and the more involved the issues presented to the Court become.

118 Justice Holmes recognized that people would fight for their rights; but then, he said, "A dog will fight for his bone." Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).
sense that courts are little different from legislatures and that the measure of a judicial decision is how much it affects the entire world for good or ill. As courts have abandoned traditional limitations of the judicial role, they have become less able to provide the service that differentiates their work from that of other public agencies — assuring individuals that their claims of injustice will be heard, considered, and judged on their merits. When judges come to view litigants mostly as trimmings for their rulings, the sense of individual worth and individual entitlement that differentiates our culture from some others may diminish.

In the end, the Burger Court may have provided a glimpse of the emptiness to which unguided pragmatism, legal realism, and empiricism are likely to lead. Without a core vision of society or the ability to foretell consequences, some judges have found themselves either trapped in indecision or reduced to acts of will.

When issues of principle came before the Burger Court — issues like the propriety of affirmative action, the legitimacy of the death penalty, the justice of using unlawfully obtained evidence, and the appropriateness of public aid for the nonreligious activities of church-related schools — the Court’s first impulse was usually to seek a middle ground. The Supreme Court resolved few great issues decisively.¹¹⁹ The Justices' decisions apparently bespoke their general distrust of principle and their belief that people live by the bottom line. In the main, the Court's nonideological approach to judging succeeded in avoiding excess. At the same time, the Court's pragmatism was inherently incapable of offering the leadership, inspiration, and guidance that the American judiciary at its best has provided.

Chief Justice Burger was less responsible for the frequently wavering performance of the Burger Court than some of its other members.¹²⁰ Alone among the Justices, for example, Burger argued for a forthright overruling of the decision in *Mapp v. Ohio*.¹²¹ Perhaps the worst that can be said of the Chief Justice's judicial performance is that he was a person of his times — the best, that he was less captured by his times than most others.

When Chief Justice Burger left the Supreme Court to devote his energies to planning the celebration of the 200th anniversary of the

¹¹⁹ The abortion cases provide the most notable exception, but even these cases exhibit some tendency toward confusing compromise. *See* Maher v. Roe, 432 U.S. 464, 478 (1977) (upholding a state's funding of maternal care but not of abortions and declaring that "[t]he State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth'" (quoting *Beal v. Doe*, 432 U.S. 438, 446 (1977))).

¹²⁰ The Burger Court Justices whose votes seemed most inconstant were Harry Blackmun and Lewis Powell; the Justices who offered disingenuous arguments most frequently and most unblushingly were probably William Rehnquist and Byron White.

Constitution, some thought it odd that he had abandoned a position of great power for a ceremonial role. Nevertheless, Burger's current work is important. The authors of the Constitution were confident people of strong convictions. Many of their views now appear wise and farseeing; more than a few, seriously misguided. Although the framers often compromised, they usually compromised in comprehensible ways. There are lessons for our times in their optimism, their conviction that human beings can live by principles, and their faith that the struggle for justice may yield a more civilized nation, something greater than the satisfaction of transient desires.

122 The framers' strong distrust of majoritarianism revealed limits to their optimism, but they did not doubt their capacity to establish a substantially more just, tolerant, peaceful, and democratic society in the New World than their forebears had known in the Old.