Foreword: Evaluating the Work of the New Libertarian Supreme Court

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Introduction

Another Term of the Supreme Court has come and gone, leaving few surprises in its wake. As with most recent Terms, one could have guessed in advance the topics, outcomes, and voting divisions for most of the cases: racial minority groups will win, but not very much;[1] aliens, illegitimates, and women will win only when laws are shockingly open in their discrimination against them;[2] some procedural protection will be given to those who have a clearly defined liberty or property interest at stake in a government proceeding[3] (but not to others);[4] fundamental rights such as voting or privacy will not be extended,[5] except for a woman's right to an abortion;[6] poor people will

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1. *Compare* Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979) *and* Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979) (transfer of students required to correct earlier de jure segregation in school districts) *with* Milliken v. Bradley, 418 U.S. 717 (1974) (no interdistrict remedy for de jure segregation in city surrounded by suburbs with de facto segregated schools). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

2. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979) (exclusion of aliens from positions as public school teachers upheld); Lalli v. Lalli, 439 U.S. 259 (1978) (requirement of judicial finding of paternity during life of father as prerequisite to inheritance from father by illegitimate child upheld). *Compare* Orr v. Orr, 440 U.S. 268 (1979) (limitation of alimony to wives invalidated) *with* Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282 (1979) (veterans preference in civil service employment upheld despite adverse impact on women).

3. *See, e.g.*, Parham v. J.R., 99 S. Ct. 2493 (1979) (juveniles entitled to informal screening process at time of being committed to state operated mental health care institution by their parents or guardian).

4. *See, e.g.*, Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 99 S. Ct. 2100 (1979) (persons eligible for parole have no interest in fair parole hearing procedure that merits any due process protection).

5. *See, e.g.*, Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) (unincorporated community residents have no right to vote in city elections even though they are subject to some city regulations), Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting to denial of certiorari in a case where lower courts had employed a rational basis

lose;[7] and so will the press[8] (though perhaps not so terribly much).[9] The precise holdings of the cases, of course, are worth noting,[10] but I would suggest that the work of the Court can best be evaluated by the identification of a "historic" Supreme Court rather than the dissection of individual decisions. This is not a really new suggestion for it mirrors the approach of our greatest constitutional scholars from 1900 to 1960; indeed, this foreword may be no more than an update of the analyses of Court activity which were undertaken by McCloskey,[11] Swisher,[12] and Wright.[13]

By a historic Court I do not mean to identify a Supreme Court capable of "making history" but, rather, a period of Court history wherein its decisions reflect the use of a specific political philosophy by the Court. A historic Supreme Court differs from a transitional Court, which exists when the justices do not have an identifiable majority position. A historic Court may not have any particular justice or justices whose leadership causes the Court to follow a particular path. Indeed, the historic Court may not have the ability to issue many majority opinions because there may be different pairings of the nine justices coming together to make the five member majorities in specific cases. What is important in the identification of a historic Court is that the

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test to uphold the dismissal of a librarian and library custodian for having an illegitimate child).

6. Bellotti v. Baird, 99 S. Ct. 3035 (1979).

7. *See, e.g.*, Califano v. Boles, 99 S. Ct. 2767 (1979) (no independent review of Social Security distributions); Scott v. Illinois, 99 S. Ct. 1158 (1979) (no right to appointed counsel for indigent defendants in criminal cases when they do not receive a sentence of imprisonment); New York City Transit Auth. v. Beazer, 440 U.S. 367 (1979) (upholding exclusion of drug users, including persons in a supervised methadone treatment program, from all transit authority employment, including jobs unrelated to the safety of transit authority vehicles and passengers).

8. *See* Herbert v. Lando, 441 U.S. 153 (1979) (members of press subject to civil trial discovery process); Gannett Co., Inc. v. DePasquale, 99 S. Ct. 2898 (1979) (press can be excluded from certain pretrial proceedings); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (press subject to properly issued search warrant).

9. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (no punishment allowed for publication of truthful information regarding confidential judicial disciplinary proceedings).

10. For a digest of all of the constitutional decisions of the Supreme Court during the 1978–79 Term, see the recent supplement to the author's constitutional law treatise: J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (1978 with 1979-80 Supp.) [hereinafter cited as NOWAK, ROTUNDA & YOUNG].

11. R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

12. C. SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES (1946).

13. B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942); *see also*, B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931).

outcome of the cases regarding specific groups or values consistently reflect a particular political philosophy. In these terms, the Warren Court existed from 1963 to 1969, when a majority of the justices engaged in a distinctly "liberal" voting pattern.[14] The Burger Court took shape in the mid–1970's, with the emergence of a "libertarian" voting pattern, not in 1969 when the Chief Justice took office; the 1969–72 Supreme Court represents a transitional Court.

When examining the work of the Supreme Court either to separate historic and transitional Courts or to evaluate a particular Term, one must differentiate questions of values from questions of doctrine. Questions regarding values relate to the substance of decisions (who or what is protected) and focus on the Court's political philosophy. Questions of doctrine relate to the way the Court uses its power and whether the Court employs defensible tests or principles as the basis of its opinions. This differentiation is significant because it is most important to identify the values which the Court selects for protection in order to understand and evaluate its position in the governmental process. On the other hand, the Court's use of doctrine may be more important when one questions whether particular justices can justify and protect the power and role of their historic Court.

Value Selection: Theoretical Framework

The debate over which, if any, values the Supreme Court should protect from the democratic process predates *Marbury v. Madison*.[15] Commentators have taken three distinct positions in the controversy. One group of theorists and judges would require the Court to achieve morally correct results based solely on their conception of morality and the proper ends of government.[16] Whether or not these persons are correct, their theories cannot be evaluated in terms of democratic theory because they proceed from an assertion of "good" rather than an attempt to demonstrate that a particular value has some constitutional

14. *See* notes 58–66 and accompanying text, *infra*, for a discussion of the liberal–libertarian distinction.

15. 5 U.S. (1 Cranch) 137 (1803). *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *see generally*, J. GOEBEL, 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES–ANTECEDENTS AND BEGINNINGS TO 1801 (1971); 1 A.A.L.S. SELECTED ESSAYS ON CONSTITUTIONAL LAW, Ch. 1 (D. Maggs, ed., 1938); Meigs, *The American Doctrine of Judicial Power and Its Early Origin*, 47 AM. L. REV. 683 (1913); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166 (1972); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

16. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW *iv* (1978); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

sanction.[17]

The second group of commentators and judges argue to exclude the Supreme Court from any value-oriented judgment; they claim that the Court can only apply the text of the Constitution in reaching a decision.[18] However, it is hard to believe that anyone takes the position both seriously and nondeceptively. When the Court determines what "speech" is protected, what the criminal procedure clauses mean, what process is due, or even when contracts are impaired, the Court necessarily makes value-oriented decisions. We need not elaborate this point as Professor John Hart Ely has examined in detail the impossibility of honest reliance on interpretivist doctrine.[19]

A third group of theorists confronts the problem of value selection directly. Robert McCloskey most clearly described a dichotomy in American thought concerning our democratic process: Americans are simultaneously dedicated to the theory of representative government and to the theory that the country must be forced to accept the "right" choice concerning basic moral/philosophical questions.[20] Examining this dichotomy and trying to resolve it in terms of court power is a challenge faced by this group of theorists.

No scholar has faced the problem of defining the Court's role more honestly than Alexander Bickel, who believed that the Supreme Court could do little in reviewing the constitutionality of acts of the democratic branches of government due to the justices' inability to justify judicial declarations of absolute values for society.[21] Bickel sug-

17. For a dissection of such value-oriented theories see Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). For a clever and insightful discussion of the problem of judging the rightness or wrongness of systems of morality or value selection, see Leff, Book Review, 29 STAN. L. REV. 879 (1977) (reviewing R. UNGER, KNOWLEDGE AND POLITICS).

18. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The late Justice Hugo Black was the principle exponent in the Supreme Court of such a philosophy. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 507 (1965); Konigsberg v. State Bar of Cal., 366 U.S. 36, 60 (1961) (Black, J., dissenting); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). *See also* Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467 (1967).

19. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); for a rejoinder see Berger, *Government by Judiciary: John Hart Ely's "Invitation"*, 54 IND. L.J. 277 (1979).

20. R. MCCLOSKEY, *supra* note 11, at 12-13, 226-30.

21. For a listing of Bickel's publications see, *Writings of Alexander M. Bickel*, 84 YALE L.J. 201–4 (1974). The commentary on Bickel's theories and writings is voluminous, but for helpful analysis of his work the reader should examine: Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025 (1976); Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. CIV. RTS.—

gested that we turn to a philosophy of consensus based on the political philosophy of Burke; he believed that only a "computing principle" of consensus development could define societal values.[22] Bickel started with the belief that the Supreme Court should protect some fundamental values, but he recognized that it was difficult to reconcile this process with the theory of representative government.[23] His concern with the democratic process and the inability of anyone to define absolute principles led him to assert that the Supreme Court should avoid some cases because a ruling either for or against legislation would affect the political process.[24] Critics attacked this position as unprincipled,[25] but it was quite principled in terms of a Burkean philosophy of consensus, which he later explicitly adopted.[26] The Court should interfere with the democratic process to the least extent possible so that society is free to arrive at another not immutable consensus.

Not inconsistent with his earlier analysis, in his later years Bickel found only a limited role for the Court in the governance process as he doubted whether many fundamental values could be defined properly by any process other than that of democratic consensus. Bickel attacked the Warren Court for its result-orientation and the attempt of some justices to impose their personal values on society.[27] And in his last work he argued that neither scholastics nor justices are able to identify transcendent values for society.[28] Those who demanded a greater role for the Supreme Court in producing a "good" society criticized Bickel, but virtually all such attacks miss the point of Bickel's career and focus only on the critic's definition of "just" results.[29] Bickel saw the vanity and foolishness of those asserting that a few scholars or

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CIV. LIB. L. REV. 521 (1976); Adamany, Book Review, 1977 WISC. L. REV. 271 (reviewing A. BICKEL, THE MORALITY OF CONSENT); Coffin, Book Review, 56 B.U.L. REV. 1029 (1976) (reviewing A. BICKEL, THE MORALITY OF CONSENT); Henkin, Book Review, 70 COLUM. L. REV. 1494 (1970) (reviewing A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS).

22. A. BICKEL, THE MORALITY OF CONSENT 53–54, 87–88, 111, 120–21, 139–42 (1975).

23. A. BICKEL, THE LEAST DANGEROUS BRANCH 27–28, 55–65, 129–33 (1962).

24. *Id.* at 111–99. He first expressed this theory in Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

25. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

26. A. BICKEL, *supra* note 22, at 24.

27. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 98–100, 103–4, 111–13, 177 (1978 Yale ed.).

28. A. BICKEL, *supra* note 22, at 23-24, 26, 105–06, 120–21; A. BICKEL, *supra* note 27, at 4, 96, 175–81.

29. *See, e.g.*, Wright, *supra* note 16; Barron, *The Ambiguity of Judicial Review: A response to Professor Bickel*, 1970 DUKE L.J. 591.

judges could determine the "true" set of values that must bind all members of society, yet he did not leave the Court without a role in the self-governance process. Bickel recognized the need for an institution, such as the Court, to protect some "middle distance" values such as racial equality or the opening of the political process, but not equalization of voting power, to all groups.[30] He agreed with many of the Court's decisions in the area of criminal and civil procedure in light of the need for an agency to insure fair treatment of individuals in an adjudicatory system.[31] Bickel also saw a role for the Court in protecting First Amendment rights, primarily, though not solely, because free speech is the primary tool of consensus development in society.[32] He objected, however, to the Warren Court's attempt to dictate the exact nature and workings of the political process[33] or the manner in which society should deal with the problem of ameliorating the effects of past racial discrimination.[34] In those cases the Court went beyond its proper role of insuring that society be open for consensus development.

Some scholars have argued that consensus analysis need not foreclose the possibility of a greater role for the Court than that to which Bickel would have subscribed. If one allows, as Bickel did not, the justices to determine if governmental acts violate values upon which there is societal consensus and which have some relationship to the types of values that did receive protection in the Constitution or its Amendments, then one finds a role for the Court based on reason and consensus. The most notable attempt to justify Supreme Court value selection on a consensus theory is that of then Professor, now Dean, Wellington, who years earlier had joined with Bickel in an analysis of the justifiability of judicial policy decisions.[35] Wellington believes that the Court should not engage in unrestrained value selection but that it can properly examine the history and traditions of society to determine whether there is a consensus on a fundamental principle which the justices should enforce.[36] In this way, Wellington and other consensus theorists[37] attempt to bridge the gap between democratic theory and

30. A. BICKEL, *supra* note 22, at 25; A. BICKEL, *supra* note 27, at 85, 98–99, 159–60.

31. A. BICKEL, *supra* note 22, at 29, 105; A. BICKEL, *supra* note 27, at 32, 54–57, 75–76.

32. A. BICKEL, *supra* note 22, at 76–88.

33. A. BICKEL, *supra* note 27, at 35, 37, 108–12, 114, 151, 165.

34. A. BICKEL, *supra* note 22, at 33; A. BICKEL, *supra* note 27, at 132–41, 148–51.

35. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

36. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246–47, 265–72, 280, 293, 310–11 (1973).

37. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of*

judicial review.

Professor Ely recently has advanced a position concerning Supreme Court constitutional decision making and value selection which he describes as a "representation reinforcing model" for determining the extent of judicially enforceable principles.[38] Having rejected all "morality" and "consensus" theories that justify the judicial identification and protection of non-textual values,[39] he adopted a model similar to the *Carolene Products* footnote 4[40] justification of in-

Substantive Due Process, 23 U.C.L.A. L. REV. 689 (1976); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261. For a variation of consensus theory which sees the Court as a component in a "dialetic of adjudication" by which consensus is developed, see G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 156, 306 (1978); White, note 300 *infra*.

38. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978). J. ELY, DEMOCRACY AND DISTRUST (1980) was published as this article went to press; it includes the Professor's articles referred to in notes 17, 19, 38. The text does not alter the thesis presented in those articles, but it fixes more precisely the parameters for judicial review under the representation model. While one hates to sound trite, the text is properly described as "must reading" for anyone seriously considering the subject of this article.

39. Ely, note 17 *supra*. The Professor earlier had rejected the impretivist position; Ely, note 19 *supra*.

40. United States v. Carolene Products Co., 304 U.S. 144, 152–53, n.4 (1938):

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. *See* Stromberg v. California, 283 U.S. 359, 369–370; Lovell v. Griffin, 303 U.S. 444, 452.

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–14, 718–720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, *supra*; on interferences with political organizations, see Stromberg v. California, *supra* 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373–378; Herndon v. Lowry, 301 U.S. 242; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365.

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 484, or racial minorities, Nixon v. Herndon, *supra*; Nixon v. Condon, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n.2, and cases cited."

This decision was made in the year following the "switch of 37" when the Court disclaimed any authority to review independently acts of other branches of government under the due process and equal protection clauses. The footnote offered a tentative framework for the

dependent judicial review. Ely's thesis, and that of the *Carolene Products*, is based on the belief that justices should only act: (1) to enforce textual guarantees of the Constitution, (2) to enforce rights regarding the political process or (3) to protect discrete and insular minorities from arbitrary actions and exploitation.[41] Professor Ely claims that this model avoids the value selection and justification problems that Bickel found insoluble, but it would be unfair to attack Ely for this statement because he, at one point, admits that these representation principles involve non-textual values.[42] Ely claims that the nature of the constitutional plan of representation and the text of the Constitution and the Amendments justify these three value determinations. His theory, whether or not correct, is an attempt to reconcile judicial value selection with the democratic process by describing a limited set of values compatible with democratic theory in a way that avoids Bickel's criticism of such attempts. Indeed, a disciple of Bickel would surely attack any claim of outside validation for each of Ely's principles because they go far beyond the Burkean system of free societal consensus. First, the judicial application of "textual provisions" involves selecting values which may go beyond any that have been validated by the democratic process. Professor Ely's approval of the decision in *Griswold v. Connecticut*[43] demonstrates that he is susceptible to some value oriented analysis under the guise of textual interpretation.[44] Similarly, Ely's toleration of First Amendment rulings that go beyond the interpretativist, value–free position of Robert Bork[45] or the political speech thesis of Meikeljohn[46] allows for some protection of values that are not demonstrably based on the history of the First Amendment or the representational system.[47]

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creation of a new role for Supreme Court constitutional adjudication in the post–1937 world. For an overview of the relationship of this footnote to the post –1937 decisions see, NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 404-19.

41. Ely, *supra* note 38, at 454-56.

42. Ely, *supra* note 38, at 454 n.13.

43. 381 U.S. 479 (1965).

44. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928 (1973); Ely, *supra* note 38, at 452 n.7. Ely earlier had rejected interpretivism as "a fake", Ely *supra* note 19, at 412.

45. Bork, *supra* note 18.

46. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF–GOVERNMENT (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Meiklejohn, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

47. Ely, *supra* note 38, at 477. As this article went to press, Professor Ely published a monograph on judicial review which includes a compelling argument for a judicial function–categorization approach to First Amendment adjudication. *See* Ely, *supra* note 38 at 105-16. *See also*, Ely, *infra* note 100. For the exposition of theories which justify independ-

Second, the Constitution does not expressly sanction the protection of the political process principles so as to demonstrably support Ely's justification of judicial review in this area.[48] In *The Supreme Court and The Idea of Progress*, Bickel demonstrated that there was no basis for choosing majoritarian theories of government over a Madisonian factionalism theory.[49] The Madisonian model for democracy may be "wrong" because it will not work in a large modern society, but it is certainly not demonstrably wrong in terms of the history of the Constitution. It is true that many of our constitutional amendments relate to regulating the voting process, but that tends to show that the democratic system is capable of dealing with problems of political access rather than establishing a basis for judicial activity beyond enforcement of the text. In other words, there is no basis for rejecting Bickel's view except by an act of faith in a majoritarian-egalitarian view of the democratic process. Bickel himself claimed that the assertion that the Court was enhancing the democratic process in apportionment and political speech cases was "question begging."[50]

Third, the "discrete and insular minorities" basis for judiical review presents value selection problems both in terms of identifying the groups to be protected and the nature of judicial standards for their protection. Yet it must be admitted that Professor Ely's argument for a limited judicial role in examining the acts of other branches of government on this basis fits his representation model perfectly.[51]

Professor Ely's analysis is the most important attempt in several years to deal with the problem of Supreme Court values as it was analyzed by Alexander Bickel, but not, as Professor Ely suggests in the

ent judicial review under the First Amendment in a manner analogus to representation theory, see Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.E. RES. J. 521; Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979).

48. Bickel, *supra* note 27.

49. *Id.* at 83, 108–15, 166–67. For an overview of competing theories of democracy and representation see R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); NOMOS X: REPRESENTATION (J. Pennock & J. Chapman, eds., 1968).

50. A. BICKEL, *supra* note 27, at 34–35. Ely bases part of his argument for a representation model on the demonstrated concern of our society in the Constitution and especially the Amendments with representation and process. Ely, *supra* note 38, at 470–71, 475, 483–85. No mention is made in this portion of his article of Bickel's challenge to the Warren Court's placing one view of the political process (majoritarianism) above other possible theories (such as Madisonian factionalism), but Ely does discuss why he believes the Madisonian factionalism theory is flawed. *Id.* at 459–63.

51. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978); Ely, *supra* note 38, at ch. 6.

summation of his argument, because Bickel was wrong in framing the question in terms of value selection.[52] Rather, the value of Professor Ely's thesis is that it may provide a workable standard by which to judge the Supreme Court's selection of non-textual values for protection from the democratic process by reference to the democratic process itself.

Even this brief overview of the competing theories regarding the legitimate scope of constitutional decision making should suggest why the Court is unlikely to openly claim a specific role in protecting the principles of a particular political philosophy. Any such attempt would have to answer the charges of illegitimacy made by interpretivists, the demand for justification of choosing among the theories of competing political philosophies made by those of the Bickel-Ely school, and the demand for morally correct results made by the new realists. Yet if these theoretical questions prove too much for the Court, the justices may well choose to ignore them. That is, justices will tend to follow a particular political philosophy in their decision making even if they do not admit that fact in their opinions and even if they are not schooled in the philosophical background of the positions they adopt. This is not to say that the rationale of decision making and opinions is not important, but that evaluation of the Court's work must initially involve identification of the values and political philosophy of the Court.

We must strive to identify each historic Court's value orientation so that we may evaluate the role of the Court and so that the public may understand the activities of the Court at a given point in time. Although constitutional history is unclear and scholars disagree on the Court's role in value selection, the Court has always protected non-textual values. Regardless of whether we talk about the Court's activities in terms of models of adjudication or identification of fundamental values, we must deal with a continual series of historic Courts, separated only by relatively brief transitional periods. Each historic Court has protected identifiable values:[53] the Marshall Court promoted federalist goals; the Taney Court protected states rights; the post civil-war Court protected contract rights; the 1890-1936 Court protected both economic and personal libertarian values. After 1937 the Supreme Court entered a fairly long transitional period, perhaps in response to the adverse reaction to it in 1936 and 1937. In the 1940's Chief Justice Stone, in *Carolene Products*, advanced a theory for a new framework of value

52. Ely, *supra* note 17, at 5, 54–55; Ely, *supra* note 38, at 487.

53. For a complete analysis of Supreme Court activity during these periods see, R. McCLOSKEY, *supra* note 11; C. SWISHER, *supra* note 12; B. WRIGHT, *supra* note 13.

selection and Court activity.[54] During the 1940's and 1950's the Court became more active in the areas of commerce, criminal procedure, and racial desegregation, but it only tentatively looked at other personal liberty questions. In the 1960's the transitional period was over and a new group of justices had come together to form a majority that actively employed the *Carolene Products* rationale.[55] In the 1970's the justices have continued to engage in extensive value selection.

The Supreme Court as a value selecting political institution is a historical reality and, for this reason, McCloskey noted that the issue of the historical legitimacy of judicial review has become virtually an irrelevancy.[56] Yet it is important to identify the nature of judicial value selection to guard against the judicial imposition of the values of a distinct segment of society on the democratic process and society as a whole. The membership of the Court at any given point in time varies quite little in terms of age, economic background, or political philosophy. Scholars have noted, not surprisingly, that the justices hold the values of the economic upper middle class white males of this country.[57] Indeed, one might ask oneself what the popularly held values of educated, relatively wealthy professional men between the ages of 55 and 75 were at any given point in our history, and then find that the answer to that question also identifies the values that the Supreme Court protected during that period.

In order to identify and evaluate the nature of a historic Supreme Court we must examine the nature of the rights or groups that tend consistently to win or lose before the Court. Here it is necessary to go beyond consideration of the principles and assertions set out in specific opinions and consider questions regarding the values reflected in the pattern of Supreme Court decisions. Seen in these terms, I believe that the Burger Court is actively promoting libertarian values and seriously opposing the will of justices against the democratic process. But before turning to an identification of the historic Burger Court we must take a brief look at the Court to which it is most naturally compared—the Warren Court.

54. Note 40 *supra*.

55. John Hart Ely has defined (and defended) the Warren Court as being a *Carolene Products*-representation reinforcing Court. Ely, *supra* note 38, at 451–54.

56. McCloskey, *supra* note 11, at 16–18. *See also*, Dixon, *The "New" Suubstantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U.L. REV. 43.

57. McCloskey, *supra* note 11, at 221–24; Ely, *supra* note 17, at 37–38. *See also*, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46, 60–62.

Warren Court "Liberalism"

The Warren Court is properly labeled a "liberal" court in terms of the modern American use of the word liberal. While the correct, or at least older, use of the word liberal relates to a political philosophy advocating the greatest possible freedom from government regulation, since the time of Franklin Roosevelt, the label "liberal" has been applied to the New Deal variant of earlier Progressive political positions.[58] For our purposes, American liberalism may be said to embody the goals of: (1) increasing federal power to achieve national police power/general welfare ends; (2) egalitarianism, including some wealth redistribution; (3) majoritarianism; (4) regulation of private, as well as public, entities to protect the previous three goals.

Although no political philosopher espoused a philosophy identical to the modern American liberal position, Professor Bickel justly equated the activities of the Warren Court with the philsophy of Rousseau.[59] Instead of engaging in an open appeal to "natural law" the Warren Court, like Rousseau, sought to justify its activities in terms of the social contract,[60] and when the democratic process yielded unacceptable (for the Court) results there was an appeal to a "general will" of the Constitution. In order to update Bickel's point, the Warren Court's activity and modern American liberalism might be compared to the philosophy of Ronald Dworkin.[61] I would avoid the Dworkin analogy, however, because many of Dworkin's most cited writings involve commentary on the construct of current legal principles, or constitutional values, rather than offering a complete political philosophy.[62] Rather, I would suggest that the Warren Court's liberalism was an attempt to employ a philosophy of rights and duties quite

58. *See*, Rotunda, *The "Liberal" Label: Roosevelt's Capture of a Symbol*, in XVII PUBLIC POLICY 377 (J. Montgomery and A. Hirschman, eds. 1968). Professor White contrasts the differences between Progressive and New Deal political positions with the conflict between Sociological Jurisprudence and Realists. This contrast yields additional insights into the "capture" of the liberal label described by Professor Rotunda. G. WHITE, *supra* note 37, at 130-35.

59. A. BICKEL, *supra* note 22, at 7–9, 120–21. Rousseau's major works (to which Bickel is referring) may be found in: J. ROUSSEAU, THE SOCIAL CONTRACT (1762), and DISCOURSE ON THE ORIGIN OF INEQUALITY (1755) (single volume Pocket Book publication, L. Crocker, ed. 1967).

60. Professor Ely has defended the Warren Court approach in terms of protecting the process of constitutional democracy. *See* notes 38, 40, 41, 55, and accompanying text *supra*.

61. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

62. The critiques of Dworkin's work are too numerous for a convenient listing here. However, those interested in an analysis of some of Dworkin's positions in relation to a theory of rights may find Professor Regan's recent analysis of this subject most helpful. *See*, Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 MICH. L. REV. 1213 (1978).

similar to that of John Rawls.[63]

Rawls acknowledges that his attempt to create a political philosophy of duties and rights is largely an elaboration of the social contract theories of Locke, Rousseau, and Kant.[64] Rawls goes beyond Rousseau in developing a theory of general will by hypothesizing a social compact that is made by persons in an "original position," unaware of their exact position in society. Rawls most basic provision for his social compact is that of "justice as fairness." The concept of justice as fairness relates to the fair distribution of goods or services in society as well as the treatment of individuals by the government. Unfortunately, we have time and space in this foreward only to restate his core ideas and related Warren Court decisions. Let us therefore simply repeat John Rawls' own statement of his theory. Summarizing his basic philosophy of the compact he states:

> [T]he persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society. These principles rule out justifying institutions on the grounds that the hardships of some are offset by a greater good in the aggregate. It may be expedient but it is not just that some should have less in order that others may prosper. But there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved.[65]

In his "final statement of the two principles of justice for institutions" Rawls summarizes his principles as follows:

First Principle.

Each person is to have an equal right to the most extensive

63. J. RAWLS, A THEORY OF JUSTICE (1971). Later I will suggest that the political philosophy of the Burger Court can best be equated with the libertarian views of Robert Nozick. See notes 114–19 *infra* and accompanying text. The finest exposition in "legal literature" of the views of Rawls and Nozick is Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 878 (1976). Those readers interested in seeing how the views of Rawls and Nozick translate into legal arguments for or against a constitutional right to subsistence welfare payments should compare Michelman, *On Protecting the Poor Through The Fourteenth Amendment*, 83 HARV. L. REV. 7 (1967) (using Rawls' philosophy to justify claims for minimum wants or needs), with Winter, *Poverty, Economic Equality and the Equal Protection Clause* 1972 SUP. CT. REV. 41 (employing a Nozick-like philosophy in attacking judicial decisions that have any wealth redistributive effect).

64. *Id.* at 11, 215, 251. Thus, my thesis about the philosophical basis of the Warren Court's rulings differs little from that of Alexander Bickel. In fact, Bickel referred to Rawls as a contractarian with whom he disagreed. A. BICKEL, *supra* note 22, at 4, 100.

65. J. RAWLS, *supra* note 63, at 14–15.

total system of basic liberties compatible with a similar system of liberty for all.

Second Principle.

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.[66]

The Warren Court's constitutional rulings are easily understood in terms of the Rawls philosophy. Rawlsian principles apply both to government institutions and to society at large; government institutions should neither approve nor tolerate the existence of private interests which seek to produce unfairness and inequality beyond the principles of the social compact.[67] Thus, the Warren Court found that one could not use any property in public without being subject to the Constitution and Court selected constitutional values; the Constitution applied to shops in public office buildings and privately owned shopping centers as well as to parks.[68]

66. *Id.* at 302. These two principles are to be interpreted and applied according to two priority rules and a general conception for the principles:

"*First Priority Rule* (The Priority of Liberty)

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty.

There are two cases:

(a) a less extensive liberty must strengthen the total system of liberty shared by all;

(b) a less than equal liberty must be acceptable to those with the lesser liberty.

Second Priority Rule (The Priority of Justice over Efficiency and Welfare)

The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those baring this hardship.

General Conception

All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."

Id. at 302–3.

67. Rawls requires a structure of social institutions which will produce fairness and just distributions in society. *Id.* at 10, 54–56, 275–77. He does not establish a system to guide individual decision making or moral choice, although he offers some guidelines for individual action. *Id.* at 54–6, 61, 63, 108–17.

68. The reference is to the state action rulings of the Warren Court. *See, e.g.*, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping centers), *overruled in* Hudgens v. NLRB, 424 U.S. 507 (1976); Evans v. Newton, 382 U.S. 296 (1966) (park); Lombard v. Louisiana, 373 U.S. 267 (1963) (official discriminatory encouragement

The Warren Court's view of the social compact called for an increase in federal power because smaller governmental units could not be allowed to thwart the goals of fairness and equality. The Court increased federal judicial power in matters of civil liberties, "incorporating" the Bill of Rights[69] and extending jurisdictional concepts.[70] Similarly, the justices had little difficulty upholding federal civil rights legislation regardless of whether it governed the actions of private persons or state entities.[71] This position on federal power carried over to the approval of federal regulation of economic activities of state gov-

voiding trespass conviction); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private coffee shop in government owned building). For an analysis of the Warren Court and Burger Court state action rulings in terms of a balancing of competing values, see Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221. For an overview of all the state action decisions see NOWAK, ROTUNDA & YOUNG, *supra* note 10, at ch. 14.

69. The Court had incorporated the basic principles of the Fourth and Eighth Amendments into the concept of liberty prior to the 1960's, but it did not settle the question of whether those principles applied to the states in the same manner as to the federal government. *See* Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment, but not exclusionary rule, applicable to the states); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (cruel and unusual punishment clause applied to states). The Court had applied the provisions of the First Amendment to the states prior to the 1950's. *See* NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 414-15. The modern process of incorporation of the criminal procedure provisions of the Bill of Rights began with Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule applied to states) and Ker v. California, 374 U.S. 23 (1963) (Fourth Amendment standards identical for federal and state cases).

In the 1960's and early 1970's the Court incorporated all of the Bill of Rights provisions related to criminal procedure except for the grand jury clause of the Fifth Amendment, whose incorporation has been rejected since 1884. *See* Hurtado v. California, 110 U.S. 516 (1884).

A basic list of the other incorporation cases is as follows:

Fifth Amendment—Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Griffin v. California, 380 U.S. 609 (1965) (self-incrimination); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination).

Sixth Amendment—Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Irvin v. Dowd, 366 U.S. 717 (1961) (impartial jury); *in re* Oliver, 333 U.S. 257 (1948) (public trial).

Eighth Amendment—Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (assuming application of excessive bail provision to state cases); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment clause); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (cruel and unusual punishment clause).

70. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969) (mootness); Flast v. Cohen, 392 U.S. 83 (1968) (standing); Dombrowski v. Pfister, 380 U.S. 479 (1965) (injunction of state proceedings); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) (ripeness).

71. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

ernments which were unrelated to civil rights.[72]

The justice as fairness principle was central to the Warren Court's rulings on the nature of due process protection to be accorded an individual in both civil[73] and criminal proceedings.[74] This principle was carried over into the area of equal protection, as the Warren Court created a hard line dichotomy between types of legislation which it would review strictly and legislation which it would virtually rubber stamp. The Court was committed to insuring the type of equality which Rawls regarded as a critical part of the social compact. Those equality concerns involved eliminating racial discrimination in public institutions or public activities, implementing majoritarianism, and ensuring that individuals were treated fairly in the distribution of governmental benefits.

In its suspect classification analysis, the Warren Court's only concern was with discrimination on the basis of race or national origin. Indeed the Court pursued the goal of eliminating racial classifications in cases going beyond its equal protection decisions.[75] Many decisions which facially dealt with state action, First Amendment rights and federal jurisdiction in fact were designed to insure that those persons supporting racial integration would win the dispute that was the focus of the litigation.[76] Significantly, the Warren Court did not use the suspect classification analysis except in its examination of racial classifications. It did nothing to protect against discrimination based on alienage[77] or

72. Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. 833 (1976).

73. *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (restrictions on wage garnishments); *In re* Murchison, 349 U.S. 133, 136 (1955) (fair administrative decision maker); *Cf. In re* Gault, 387 U.S. 1 (1967) (juvenile court proceedings).

74. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969) (prisoner access to courts); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at sentencing); Douglas v. California, 372 U.S. 353 (1963) (equal protection right to counsel in first appeal). *See* cases incorporating the Bill of Rights provisions cited in note 69 *supra*. *See generally* Nowak, *Foreword—Due Process Methodology In The Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1979).

75. As to the prohibition of racial classifications, see Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954).

76. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (state action); Dombrowski v. Pfister, 380 U.S. 479 (1965); New York Times v. Sullivan, 376 U.S. 254 (1964) (free speech); Edwards v. South Carolina, 372 U.S. 229 (1963) (free speech and assembly). Significantly, one major decision of the Warren Court that upheld a conviction of civil rights demonstrators involved a refusal by the demonstrators to honor a court order. Walker v. Birmingham, 388 U.S. 307 (1967). *See* note 93 *infra*.

77. The Burger Court, during its transition period, first found alienage classifications to be suspect in Graham v. Richardson, 403 U.S. 365 (1971).

gender.[78] At the close of the Warren Court era the justices placed some limits on the ability of government to use classifications in the definition of wrongful death actions based on legitimacy of birth,[79] but they did not have a chance to explain whether they would actively seek to end the use of such classifications in other settings.

The fundamental rights strand of the Warren Court equal protection decisions also conformed to Rawlsian philosophy and modern American liberalism. Rawls considered the principle of one person–one vote to be the basis of any just constitutional system.[80] The Warren Court reflected this philosophy; its mathematical approach to one person–one vote problems[81] was an attempt to give control of the political process to judges who would be more sympathetic to the goals of the original compact and who were beyond the influence of special economic interests that might influence legislative apportionment.

The Warren Court's other fundamental rights decisions, while not earth shaking, also related to a modern liberal philosophy. In *Griswold v. Connecticut*,[82] the Court held that the government must refrain from interfering with certain aspects of a traditional marriage. The decision, although more "libertarian" than "liberal" in our terminology, was not a great break from traditional views of rights in family relationships.[83] The right to travel decisions of the Warren Court involve very limited rulings designed to implement Rawls' philosophy. The Warren Court

78. Hoyt v. Florida, 368 U.S. 57 (1961) (upholding exemption of females from jury duty unless they request to serve), *overruled in* Taylor v. Louisiana, 419 U.S. 522 (1975).

79. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

80. J. RAWLS, *supra* note 63, at 222-24. Rawls also approved the allowance of private economic interests to influence political parties. *Id.* at 225-26. However he only indirectly attacked the concept of weighted voting even though he demanded a one person one vote rule. *Id.* at 232–34, 247.

81. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964).

82. 381 U.S. 479 (1965).

83. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (freedom of choice in private education). Justice Harlan had made a strong argument for Court recognition of rights in the marital relationship in Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). The majority opinion in *Griswold* asserted a relationship between the right protected in the case and provisions of the Bill of Rights, but four of the seven justices voting in the majority rested their position on assertion of rights in a marriage relationship that were not related to the text of the Constitution or its amendments. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring, joined by Warren, C.J., and Brennan, J.); *Id.* at 500 (Harlan, J., concurring). It is possible to see *Griswold* as a limited holding concerning rights society traditionally has recognized in marriage and which have some arguable relationship to the text of the Bill of Rights. *See* Ely, *supra* note 44.

was not concerned with restrictions on travel[84] but with the problem of distributing goods and services to newly arrived residents of a state. As a result, the Court showed little concern with the right to international travel;[85] it simply did not care about the concept of freedom of movement for itself but only as it related to equality in society. Thus, the concept proved useful when the Court required an equal distribution of goods and services to new residents;[86] recent relocation was irrelevant to a just distribution of those items under a Rawlsian approach to equality in holdings.

In its criminal procedure decisions, the Court employed the Bill of Rights provisions, due process and equal protection to guarantee uniform treatment of economically deprived persons through the use of federal power.[87] The exclusionary rules were designed to prevent the abuse of the rights of economically disadvantaged persons.[88] The Sixth Amendment rulings regarding right to appointed counsel,[89] and the equal protection decisions regarding the provision of transcripts[90] and counsel[91] on appeal, all relate to the liberal, Rawlsian conception of the tolerable degree of inequality between members of society.

The free speech decisions of the Warren Court are best to understand as a reflection of Rawlsian philosophy and modern American liberalism. The Court's most famous and innovative decisions promoted Rawls' position[92] that the social compact must promote equality and must allow for free speech on social issues. At first glance, the many cases dealing with picketing and public speech appear to manifest the Court's concern with an intrinsic value of self–expression and fulfillment of one's personality through public expression, but virtually all of

84. The Court, however, did help to protect true travel rights as it upheld the application of the Civil Rights Act conspiracy provisions to persons who conspired to impede travel by black persons. United States v. Guest, 383 U.S. 745 (1966). Of course, the fact that the decision favored the cause of racial equality makes it difficult to ascertain the extent to which the Court was concerned with a right to travel.

85. *See* Zemel v. Rusk, 381 U.S. 1 (1965) (prohibition of travel to Cuba upheld).

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

87. *See* cases cited in notes 69 and 74, *supra*, and note 91, *infra*.

88. *See* United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); *But cf.*, Terry v. Ohio, 392 U.S. 1 (1968); Nowak, *supra* note 74.

89. Gideon v. Wainwright, 372 U.S. 335 (1963).

90. Gardner v. California, 393 U.S. 367 (1969); Long v. District Court of Iowa, 385 U.S. 192 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

91. Douglas v. California, 372 U.S. 353 (1963). *See also* Smith v. Bennett, 365 U.S. 708 (1961) (appellate court filing fees must be waived for indigent defendants); Burns v. Ohio, 360 U.S. 252 (1959).

92. *See* J. RAWLS, *supra* note 63, at 226.

the Warren Court decisions concerning picketing involve demonstrators protesting alleged acts of racial segregation by public and private entities. With very few exceptions[93] the Court protected these demonstrators.[94]

The Warren Court also sought equality of input into the social–political process. In *Brandenburg v. Ohio*,[95] the Court's most famous and significant decision in the area of political speech, the Court protected Ku Klux Klan members' free speech rights. But *Brandenburg* established a standard for the punishment of advocacy that would be difficult to meet when government sought to punish other unpopular views.[96] The Court also opened the process of self–governance to competing ideas by restricting the ability of government to punish political beliefs in the denial of government employment or licenses.[97] The Warren Court's defamation rulings protected the press from the abusive use of the judicial process by politically powerful groups and thus aided unpopular political causes.[98]

Apart from the equality–political process cases, the Warren Court did little to protect free expression. In *United States v. O'Brien*,[99] Chief Justice Warren quite willingly applied a balancing test, in a fairly loose manner, to punish the symbolic speech of young men who protested the war in Vietnam by burning their draft cards. This ruling is, of course, antithetical to Rawls' philosophy of liberty in the political process,[100]

93. The two notable exceptions are Walker v. Birmingham, 388 U.S. 307 (1967) (disregarding injunction of court with jurisdiction) and Adderly v. Florida, 385 U.S. 39 (1966) (protest on jail grounds).

94. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963).

95. 395 U.S. 444 (1969).

96. *See* Watts v. United States, 394 U.S. 705 (1969). It is difficult to analyze the relationship between *Brandenburg* and the promotion of "liberal" goals by the Warren Court because the decision came at the end of the Warren Court era.

97. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968); United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). *But see* Koningsberg v. State Bar of California, 366 U.S. 36 (1961).

98. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (decided together with Associated Press v. Walker); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times v. Sullivan, 376 U.S. 254 (1964). *Cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967).

99. 391 U.S. 367 (1968).

100. Rawls' positions on civil disobedience and conscientious objection to the application of laws appears to favor the position of the young men, although this is less than clear. *See* J. RAWLS, *supra* note 63, at 361, 368, 374, 378–93. Those passages make it clear that Rawls would not approve of the ease with which the Court found a sufficient "content-neutral" basis for punishing these young men, given the realities of political debate during this time. Professor John Hart Ely, a former clerk for Chief Justice Warren, has done as

but one should remember that the Vietnam war was in large part an enterprise undertaken by "liberal" administrations and not as uniformly condemned in 1968 as it was in the 1970's, once society had more opportunity to observe the conduct of the war.

The Warren Court's lack of concern with the value of self-expression was evidenced in a variety of ways. The Warren Court did not create a strict test for determining what type of speech could be punished as "obscene." In the area of obscenity, the Warren Court never issued a majority opinion following its holding that obscenity was not protected by the First Amendment.[101] A majority of the Warren Court justices always held that obscenity was "unprotected" but they never agreed on the need for a national standard[102] or on the degree of value that would make an arguably obscene work non-punishable.[103] The Court did approve prior restraints in obscenity censorship systems,[104] albeit with some restrictions.[105] Economic self-expression or "commercial speech" was entirely unprotected by the Warren Court;[106] this lack of protection is not surprising because government regulation of commercial speech constitutes, in the liberal's view, a governmental attempt to curtail exploitation of the populace by commercial interests.

Just as the Warren Court had little concern for a true right of self-expression, it had little concern for principles of religious freedom. The Warren Court did not demand the separation of church and state

much as possible to legitimize the Warren opinion in *O'Brien*. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorizing and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). However, it is not the *O'Brien* standard which violates the Rawls principles of liberty and fairness but the manner in which Warren accepted the government's assertion of a legitimate basis for punishing the protesters.

101. Roth v. United States, 354 U.S. 476 (1957). By 1967 the Court gave up the attempt to formulate standards and simply denied certiorari when it agreed with the punishment of an obscene publication, and issued a per curiam reversal of any conviction for distributing materials that five or more justices felt were not obscene. *See* Redrup v. New York, 386 U.S. 767 (1967). The Court did agree to punish particularly offensive (in the Court's view) publishers in Ginzberg v. United States, 383 U.S. 463 (1966), and Mishkin v. New York, 383 U.S. 502 (1966), and those who sold obscene material to children in Ginsburg v. New York, 390 U.S. 629 (1968).

102. *See* Jacobellis v. Ohio, 378 U.S. 184, 199-201 (1964) (Warren, C.J., dissenting).

103. *See* Redrup v. New York, 386 U.S. 767 (1967); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964).

104. Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

105. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Freedman v. Maryland, 380 U.S. 51 (1965).

106. The Court did protect an advertisement in New York Times v. Sullivan, 376 U.S. 254 (1964), but this was an ad soliciting support for a group challenging racial discrimination.

in its parochial school[107] or Sunday closing law decisions.[108] Despite adverse public reaction, the Court's excursions into the area of religious freedom in striking down the use of a religious oath,[109] school prayers,[110] a prohibition of the teaching of evolution[111] and religiously discriminatory unemployment compensation laws[112] represent limited rulings on rather clear principles.

Surprisingly, the Warren Court did not engage in a great deal of activity in terms of selecting a wide variety of areas for judicial review. Instead, the Warren Court concentrated its work on four general concerns: (1) racial desegregation, (2) criminal procedure, (3) reapportionment-political process problems and (4) free speech issues related to desegregation and the political process. Indeed, it is difficult to determine whether the Warren Court helped to shape the 1950's and 60's or whether it merely reflected the mood of the populace during that period. Despite disputes over the specific means of implementing the desegregation cases (and the possibility of finding desegregation violations in the North), the majority of the country clearly agreed with the Court in eliminating active, governmentally enforced racial segregation.[113] The scope of the Court's criminal procedure decisions has been the subject of great debate, but the goal of ending the "third degree" and insuring a fair criminal process no longer seems seriously disputed. In the area of reapportionment, the Court may or may not have been justified in its actions on a theoretical basis but the emerging political importance of cities and suburbs provided a ready basis support for the Court's rulings. In short, the Warren Court does not seem to have challenged the country during the 1960's on a great number of issues; instead, it sought to promote the values of liberal political philosophy through a variety of decisions that were not totally out of step with popular thought.

107. Board of Educ. v. Allen, 392 U.S. 236 (1968).

108. Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

109. Torcaso v. Watkins, 367 U.S. 488 (1961).

110. School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

111. Epperson v. Arkansas, 393 U.S. 97 (1968).

112. Sherbert v. Verner, 374 U.S. 398 (1963).

113. Bickel believed that the presidential campaign of 1960 gave popular validation to the Court's desegregation principle, if not its chosen manner of implementing that principle. A. BICKEL, *supra* note 27, at 93.

Burger Court "Libertarianism"

At first glance it might appear that the Court now is engaged in undirected activism, simultaneously striking federal and state laws in areas never considered by the Warren Court and limiting Warren Court rulings that restricted governmental power. But closer examination of the Court's constitutional rulings in recent Terms will show that the Burger Court, at least since its transition period ended in 1973 or 1974, represents a historic Court which is dedicated to the promotion of a libertarian political philosophy.[114] When I refer to a "libertarian" philosophy I mean to identify a political philosophy which places freedom of the individual above values of egalitarianism or fairness. In such a philosophic system no governmental interference with the liberty of any individual, group of individuals, or economic entity can be justified except by the necessity to insure the respect for human life or property rights. This philosophy is often attributed to John Stuart Mill. Such attribution is correct regarding individual freedom[115] but is incorrect insofar as one attempts to relate Mill's view of personal liberty to the economic system.[116]

The modern libertarian philosophy applies to both economic and non-economic liberty and has its roots in the position of the economist-

114. At the 1980 annual meeting of the Association of American Law Schools, after the completion of this article, I presented the basic thesis of this portion of the article at the Constitutional Law Section meeting. At the plenary session of the annual meeting, Professor William Van Alstyne, my friend and one-time colleague, presented a quite similar analysis of the political philosophy of the Burger Court. While these positions were independently arrived at, they are mutually supportive, and the reader should consult Professor Van Alstyne's article to get a comprehensive analysis of the relationship between the rulings of the Burger Court, the political philosophy of John Locke and modern libertarian political philosophy. See Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, — Law & Contemporary Problems — (1980). This upcoming issue of *Law & Contemporary Problems* will also contain commentary on the Burger Court by: John Frank, Ernest Gellhorn, Paul Gewirtz, Thomas Grey, A.E. Dick Howard, Paul Mishkin, Henry Monaghan and Terrance Sandalow. *See also*, Choper, *The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*, 30 SYRACUSE L. REV. 767 (1979); Dixon, *supra* note 56. Professor Grey's previous examination of "liberal" and "libertarian" political philosophies should be examined by anyone seriously considering this subject. *See* Grey, *supra* note 63.

115. *See* J.S. MILL, ON LIBERTY (1859).

116. Professor Dworkin has a helpful analysis of the Mill's range of application of his liberalism. Dworkin, *supra* note 61, at 258–65. Dworkin states that Mill was a "socialist" who would not apply liberalism to economic exchanges. *Id.* at 264-65. It might be more precise to say that Mill would have preferred a world in which free economic exchange would not produce harmful effects to a discrete class of individuals and that he was ready to accept a government-regulated economy to avoid those harmful effects. *See* J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, BOOKS II, V (1848) (Colonial Press ed. 1900).

jurisprudent Adam Smith.[117] Today the position is often called "conservativism" and associated with economists as often as philosophers.[118] In order to avoid confusion regarding the nature of libertarian philosophy, I would refer to Robert Nozick,[119] the best known critic of John Rawls and modern advocate of libertarian philosophy. My thesis is that the actions of the Burger Court are best understood as a reflection of modern American libertarianism as espoused by Robert Nozick. Thus, the Court's rulings should not be evaluated merely as reactions of varying intensity to aspects of Warren Court decisions but, rather, the advancement of a new set of non–textual values by a new historic, libertarian Court.

As our touchstone for analysis of the Burger Court's rulings, let us use Nozick's own summary of the libertarian position:

> Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, death, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their own good or protection.[120]

The Burger Court has not broken any new ground when considering cases concerning the compatibility of state actions with the dormant commerce clause,[121] but it has broken with tradition by placing a severe

117. *See* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) (Modern Lib. ed. 1937); A. SMITH, LECTURES ON JURISPRUDENCE (Oxford ed. 1978). *See also* E. GINZBERG, THE HOUSE OF ADAM SMITH (1934); Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, 64 CORNELL L. REV. 621 (1979).

The view may in some measure be traced to the political philosophy of John Locke, whose views of the economic implications of government acts were not as sophisticated as those of Smith but who built a more complete philosophy of government upon a conception of the inter–relationship of property rights and liberty. *See* J. Locke, *Second Treatise of Government* (1690) in J. LOCKE, TWO TREATISES OF GOVERNMENT (Mentor ed. 1960). It is possible to equate the Burger Court's rulings on property rights with Locke's conception of property ownership and rights. *See* Van Alstyne, *supra* note 114; *see also* Nozick, *supra* note 119.

118. *See* M. FRIEDMAN, CAPITALISM & FREEDOM (1962); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

119. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

120. *Id.* at *ix.*

121. The Court has taken a strict view of the permissible scope of state regulation of economic activity that creates market inefficiency by restricting the flow of commerce or commercial entities. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Great Atl. & Pac. Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976). However, the Court has upheld "police power" regulations designed to promote

restriction on the commerce power of the federal government. In *National League of Cities v. Usery*[122] the Court held that the commerce power did not extend to certain activities of state governments; its ruling was based more on Tenth Amendment principles than upon an examination of the proper scope of the federal commerce power.[123] The majority opinion, by Justice Rehnquist, found that the Tenth Amendment demonstrated that there was some limitation upon the sovereign functions of the state. Unfortunately, the majority gave no explanation of how one was to differentiate the sovereign functions of a state from a state's private sector activities, which could be governed by all federal commercial regulations. Justice Blackmun, the fifth vote in a 5–4 decision, believed that the decision was based on a judicial balancing of federal and state interests,[124] an interesting opinion if only because of his total failure to justify a judicial power to independently evaluate practical economic concerns. The pre–1937 libertarian Court defended states' rights on the basis that each state had a guaranteed role as sovereign in the federal system and that this guarantee relegated certain areas of possible regulation of the activities of their citizens to state and local governments. The *National League of Cities* defense of states' rights is weaker than the pre–1937 position since it is based only on an economic analysis of the burdens placed on state governments. Yet the Burger Court found this sufficient to overrule a Warren Court decision,[125] perhaps because this "principle" is clearly related to an American conservative variant of libertarianism: the power of the federal government should be severely limited and the states left free to act in their own sphere in so far as possible.[126] The Burger Court has indi-

safety or economic welfare locally which did not seriously burden interstate commerce. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). The Court seems to be employing a balancing test in this area. *See* Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429 (1978). While the Burger Court may be more oriented toward free markets than any court since 1937, the Supreme Court throughout its history has independently reviewed state laws under the dormant commerce clause. *See* NOWAK, ROTUNDA & YOUNG, *supra* note 10, at ch. 9 (1978).

122. National League of Cities v. Usery, 426 U.S. 833 (1976).

123. Although the majority opinion reads as if it would conclude with a ruling that the Tenth Amendment prohibited application of the federal minimum wage law to state and local governments, the opinion concluded that such application was "not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852. Apparently the ruling was designed to leave the Burger Court free to determine whether it should set different restrictions on other federal powers that might affect state government. *Id.* at n.17.

124. *Id.* at 856 (Blackmun, J., concurring).

125. Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. 833 (1976). *See* notes 71–72 and accompanying text *supra*.

126. The desire to limit the powers of the federal government relates to a popular American "conservative" form of libertarianism. However, Nozick describes utopia as a frame-

cated that it will allow the federal government to regulate states, in derogation of otherwise existing Eleventh and Tenth Amendment principles, if the regulation is passed pursuant to Congress' power under the Civil War Amendments.[127] But, like the post–Civil War Supreme Court that sought to restrict the legislative powers of Congress in the civil rights area with Tenth Amendment principles,[128] this Court may yet rule that it will give Congress little deference in deciding what types of regulations may be deemed properly within the Fourteenth Amendment, section 5 power of Congress.

The Burger Court has restricted the jurisdiction of federal courts in a variety of cases related to civil rights matters,[129] although the Court has not significantly restricted the ability of Congress to create causes of action with broad grants of standing.[130] It is interesting to note that the Court has created implied causes of action based on racial and gen-

work system that would allow small communities to establish their own forms of governance. *See* R. NOZICK, *supra* note 119, at 311–12, 320, 329, 332. Professors Michelman and Tribe have argued that a future Supreme Court could use the *National League of Cities* decision to require states to give subsistence welfare benefits (thus creating a Rawlsian World), but these articles, while brilliantly written, seem no more than an exercise in wishful thinking. Yet they may be useful to a future historic "liberal" Supreme Court which seeks to overturn the intended effect of the majority opinion. *See*, Michelman, *States' Rights and States' Roles: Permutations of State "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

127. *See* Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

128. Civil Rights Cases, 109 U.S. 3, 8 (1883). *See* NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 454.

129. *See, e.g.*, Moore v. Sims, 99 S. Ct. 2371 (1979); Wainwright v. Sykes, 433 U.S. 72 (1977); Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974).

130. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). The Court, however, has indicated that it will use the Eleventh Amendment to restrict the ability of Congress to create causes of action against state governments which are enforceable in federal courts unless Congress uses its power under the Fourteenth Amendment to create a cause of action. *See* Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *See generally* Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978). Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978). The Burger Court has limited the power of Congress over state and local governments by its analysis of the Tenth Amendment and the commerce power. *See* notes 122-26 *supra*.

der discrimination.[131] These particular actions did not involve claims against the government that would result in redistribution of income, and the rulings may reflect libertarian philosophy by allowing challenges to affirmative action programs and to constraints on economic liberty based on gender distinctions.

The state action decisions of the Burger Court clearly reflect libertarian philosophy.[132] The issue in such cases is whether the actions of nominally private parties should be subject to constitutional restraints; a libertarian court must cut back the basis of state action in order to leave private actors free from governmental, constitutional regulation. Robert Nozick seems to doubt that company towns should be subjected to constitutional claims;[133] he argues that one person cannot acquire rights in property of others merely by having been allowed to use it. The libertarian Burger Court has reduced government regulation and limitation of property rights by leaving broadcasters free to refuse editorial advertising,[134] private clubs free to discriminate by race,[135] private utilities free to turn off a customer's power,[136] shopping center owners free to exclude picketers and speakers from their property,[137] and creditors free to engage in self-help.[138] At the start of its 1979 Term the Court agreed to hear a claim that the California Supreme Court had violated the property rights of a shopping center owner by

131. Davis v. Passman, 99 S. Ct. 2264 (1979) (implied cause of action under due process clause of Fifth Amendment against congressman alleged to have made gender-biased employment decisions); In Cannon v. University of Chicago, 99 S. Ct. 1946 (1979), the Court implied a private civil cause of action from Title IX of the Education Amendments of 1972 against educational institutions receiving federal funds alleged to have discriminated in their admissions on the basis of race. In so doing, the Court indicated that it would find an implied private cause of action against federally funded institutions that discriminated on the basis of race under Title VI of the Civil Rights Acts (42 U.S.C. § 2000 *et seq*). That Title VI issue had been left open in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

The Burger Court, during its transitional period, also implied a cause of action against federal officers who violated the Fourth Amendment rights of private persons. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The Court has not stepped back from that ruling although it has limited the nature of privacy interests that are protected by the Fourth Amendment; the Court's view of privacy does correspond with a libertarian-property rights philosophy. *See* Nowak, *supra* note 74, at 413-18.

132. For an examination of how the use of different value systems *has* affected Warren Court and Burger Court state action rulings, see Glennon & Nowak, *supra* note 68.

133. R. NOZICK, *supra* note 119, at 269-70.

134. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973).

135. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

136. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

137. Hudgens v. NLRB, 424 U.S. 507 (1976).

138. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).

interpreting the California Constitution so as to allow persons to enter a shopping center to solicit signatures on a petition to government.[139]

The Burger Court's libertarian philosophy also can be seen in its rulings concerning procedural due process.[140] In 1972 the Court told us that some interests of an individual are neither "life" nor "liberty" nor "property" and, therefore, can be deprived by the government for any, or no, reason and with no procedural safeguards. The transitional Court of 1970 had appeared ready to follow the call of Professor Reich to find a right of fair treatment in the distribution of government distributed benefits.[141] In *Goldberg v. Kelly*,[142] the Court, in an opinion written by Justice Brennan and joined by Justices Douglas, Harlan, White, Marshall, and Blackmun, cited Reich and stated: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "[143] However, during the 1970's, the Burger Court has rejected the Reich conception of an entitlement to welfare benefits and used the term entitlement as it is employed by Robert Nozick or other libertarians. According to Nozick a person is entitled to something only if he has reduced it to his possession by his labor, or received it from another person who owned the property interest.[144] Thus, the Burger Court has found that an individual is entitled to the fruits of his labor and no more; he or she will be entitled to fair treatment in the allocation of government distributed benefits only if the other branches of government, within their discretion, choose to give the individual

139. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, *cert. granted*, 48 U.S.L.W. 3319 (1979) (No. 79-289).

140. For a complete analysis of the distinction between procedural and substantive due process, see NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 380–83, 476–517 (1978).

141. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). Professor Van Alstyne then developed a theory of fair treatment of individuals by government agencies by demonstrating the artificiality of attempts to divide rights worthy of due process protection and the role of judges in fashioning a principle of freedom from arbitrary procedures. Van Alstyne, *The Demise of the Right-Privilege Distinction*, 81 HARV. L. REV. 1439 (1968); Van Alstyne, *Cracks in "the New Property": Adjudicative Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

142. 397 U.S. 254 (1970).

143. *Id.* at 262 n.8. Chief Justice Burger and Justices Black and Stewart dissented. *Id.* at 271 (Black, J., dissenting); *id.* at 282 (Burger, C.J., dissenting); *id.* at 285 (Stewart, J., dissenting).

144. R. NOZICK, *supra* note 119, at 150–53, 160. The only restraint on ownership is that a person cannot hold or use property in a manner that makes it impossible for others to maintain a "base line position" (*i.e.* there may be something wrong with capturing the only oasis in a desert and depriving one's neighbors of water). *Id.* at 177–78, 180–81.

Nozick notes that his conception of property rights is built upon that of John Locke. *Id.* at 175. For an examination of the views of Locke on property rights and the rulings of the Burger Court, see Van Alstyne, *supra* notes 114, 117.

such a right by declaring them entitled to the benefit.[145]

Even when the Burger Court has found that a government act deprives someone of life, liberty, or property, it has not created any stringent procedural requirements to guard against arbitrary deprivations. The Court has adopted only a balancing test; it weighs the requested procedure's value in avoiding an erroneous factual determination against the cost to both the government and society from increased administrative complexities.[146] Professor Mashaw examined this balancing test in detail and argued convincingly that, in using it, the Court has failed to consider the due process values of "fairness, individual dignity, and equality."[147] This failure is not surprising because recent Supreme Court cases have involved interests which the Burger Court is not seriously interested in protecting. Thus, school children may have a right to an informal hearing before they are dismissed from school for disciplinary reasons,[148] but failure to give the student a hearing will cost the government nothing unless it has deprived the student of a property interest at the same time.[149] In the last Term, the Burger Court considered several procedural due process issues. The Court imposed serious restrictions on the ability to commit adults to mental institutions;[150] this ruling fits the pattern because freedom of physical restraint is one of the few libertarian rights. But there was no significant restriction on the ability of parents to commit their children to mental institutions;[151] children do not have recognized rights until they reach a stage of maturity that separates them from parental control.[152] Using a pragmatic balancing approach the Court gave some, but not great, protection to those charged with receiving overpayments of wel-

145. *See, e.g.*, Leis v. Flynt, 439 U.S. 438 (1979) (no right of attorney to appear *pro hoc vice* in a state where he has not been admitted to the bar); Bishop v. Wood, 426 U.S. 341 (1976) (government employment); Paul v. Davis, 424 U.S. 693 (1976) (reputation); Board of Regents v. Roth, 408 U.S. 564 (1972) (government employment). *Cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (minimal procedural protection for loss of disability welfare benefits to which persons have previously been entitled).

146. The balancing test was explicitly adopted in Mathews v. Eldridge, 424 U.S. at 335.

147. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors In Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). *See also* Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

148. Goss v. Lopez, 419 U.S. 565 (1975).

149. Carey v. Piphus, 435 U.S. 247 (1978). The Court has also held that a post-secondary school need not provide formal hearings for those who are dismissed for academic failures. Board of Curators v. Horowitz, 435 U.S. 78 (1978).

150. Addington v. Texas, 99 S. Ct. 1804 (1979).

151. Parham v. J.R., 99 S. Ct. 2493 (1979); Secretary of Public Welfare v. Institutionalized Juveniles, 99 S. Ct. 2523 (1979).

152. R. NOZICK, *supra* note 119, at 38, 287–89, 330.

fare benefits,[153] or who were dismissed from a licensed profession.[154] Of course, the Burger Court found no interest worthy of due process safeguards in the claims of prisoners who were being considered for parole.[155] Chief Justice Burger, writing for a majority, stated: "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process."[156]

At this point one might question why the Burger Court would restrict the criminal procedure rulings of the Warren Court, if individual freedom is the basis of libertarian philosophy? The answer is quite simple: in a libertarian philosophy, the state's existence is justified by the need to prevent aggression against individuals and to enforce contract and property rights.[157] A true libertarian court would provide for the punishment of crimes of aggression without using procedures that have wealth redistributive effects. Its emphasis would be on efficient fact determination with little concern for the effect on low income groups; it would avoid ruilngs that provide "free" benefits or procedures to defendants. The recent criminal procedure rulings of the Burger Court fit the libertarian mold:[158] the Court has limited *Miranda v. Arizona*[159] to its facts;[160] it has limited the basis for challenging police

153. Califano v. Yamasaki, 99 S. Ct. 2545 (1979) (interpretation of Social Security Act requirements).

154. Barry v. Barchi, 99 S. Ct. 2642 (1979) (post termination process sufficient for suspension of race horse trainer); *cf.* Mackey v. Montrym, 99 S. Ct. 2612 (1979) (90 days suspension of drivers license for failure to take intoxication test upheld when the state provided a post-suspension hearing to the driver).

155. Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 99 S. Ct. 2100 (1979).

156. *Id.* at 2105. *Cf.* Bell v. Wolfish, 99 S. Ct. 1861 (1979) (minimal protection regarding conditions of imprisonment).

157. R. NOZICK, *supra* note 119, at *iv*, 23, 33.

158. *See* Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & C. 397 (1979).

159. 384 U.S. 436 (1966).

160. The Burger Court has not excluded any testimonial evidence solely on the basis of a *Miranda* violation during the 1970's. *See* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100–01. During the past Term, the Justices were evenly divided on the issue of whether evidence gained as the result of a *Miranda* violation could serve as a basis for establishing probable cause for a search. Massachusetts v. White, 99 S. Ct. 712 (1979) (per curiam). The Court, however, excluded testimony which was gained from a defendant outside of the presence of his attorney after the initiation of formal proceedings and a police agreement with the attorneys to refrain from such questions. Brewer v. Williams, 430 U.S. 387 (1977). This 5-4 decision may only reflect on strong belief in the adversary nature of the pre-trial and trial processes. *See*, Nowak, *supra* note 158 at 412-13. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1978).

practices connected to identification procedures;[161] it has avoided Fourth Amendment issues by finding that several types of government activities which produced evidence do not involve a search or other constitutionally cognizable invasion of privacy.[162] The Burger Court drastically moved away from the Warren Court concern with equality and the right to counsel when it held that an indigent is not entitled to state-paid counsel at a criminal trial if he is not to be incarcerated,[163] not even if he is faced with a complicated charge which he cannot fairly defend against without an attorney. The libertarian cast of all such decisions is clear, but their compatability with due process values is not because the Burger Court has issued its libertarian decisions in opinions that purport to be no more than technical interpretations of Bill of Rights provisions.[164]

When dealing with substantive due process and equal protection the Burger Court, to date, has forsaken meaningful review of "economic and social welfare" legislation.[165] This position seems inconsistent with the libertarian model but two important qualifications must be noted. First, the Burger Court has retained some control over economic legislation. It has limited the federal commerce power insofar as it relates to state governments,[166] and it has engaged in active review of state economic legislation under the commerce clause.[167] Indeed, the Burger Court has gone further than any post–1937 Supreme Court in controlling economic legislation by its use of the contract clause[168] and its development of new commercial speech principles.[169] Second, any indication of an independent judicial role in reviewing economic legislation under the due process and equal protection guarantees would make it difficult for the Court to refuse to review the fairness of social

161. *See* Manson v. Brathwaite, 432 U.S. 98 (1977); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972).

162. *See, e.g.*, Smith v. Maryland, 99 S. Ct. 2577 (1979) (no "search" when pen register device placed a telephone line to record numbers dialed from phone); Rakas v. Illinois, 439 U.S. 128 (1978) (no standing to challenge search of car by one with no ownership interest therein).

163. Scott v. Illinois, 440 U.S. 367 (1979).

164. *See* Nowak, note 158 *supra*.

165. New Orleans v. Dukes, 427 U.S. 297 (1976), *overruling* Morey v. Doud, 354 U.S. 457 (1957).

166. National League of Cities v. Usery, 426 U.S. 833 (1976).

167. *See* note 121 *supra*.

168. Allied Structural Steel Co. v. Spannas, 438 U.S. 234 (1978); U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977). It is noteworthy that the justices are now having difficulty determining the judicial role in reviewing property use restrictions under the takings clause. *See* Pennsylvania Cent. Transp. Co. v. New York, 438 U.S. 104 (1978).

169. *See* notes 283-95 and accompanying text, *infra*.

welfare legislation. In other words, forsaking review in this area costs a libertarian court little for the political process is unlikely to produce highly inefficient economic regulations or wealth redistributive legislation which cannot be examined under the contract or commerce clauses and it gives the Burger Court a ready excuse for its refusal to review claims of rights in the distribution of welfare benefits. Nevertheless, the Burger Court's decision to review the California Supreme Court's finding, under the California Constitution, that persons had a right to go on to a privately owned shopping center to solicit signatures on a petition to the government[170] may indicate that the Supreme Court is willing to take the final step back to the pre–1937 libertarian Court's model of *ad hoc* rulings protecting property rights.[171]

The Court's refusal to find that the impact of legislation on a specific group is sufficient to prove an invidious legislative classification allows it to relegate many laws to the area of nonreviewable "economic and social welfare" legislation,[172] an area containing wealth classifications and welfare distributions. Libertarian philosophy maintains that wealth disparities created by differences in earnings, inheritance, or chance are not wrong; there is no moral claim for redistribution of those benefits. Nozick emphasizes the libertarian belief that government should not attempt to redistribute wealth or income by asserting that taxing a person to benefit others is identical to enslaving him to work for the people the taxes benefit.[173] The Burger Court consistently refuses to review classifications in welfare laws that neither touch upon fundamental rights nor employ classifications based on race, national origin, alienage, illegitimacy or gender.[174] A truly libertarian Supreme

170. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *cert. granted*, 48 U.S.L.W. 3319 (1979) (No. 79-289, Nov. 11, 1979). It is possible that the Supreme Court could decide the *Robins* case on jurisdictional or First Amendment grounds and avoid the due process-property rights issue.

171. The Supreme Court allowed the NLRB to require business property owners to allow some organized labor activities on their property in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). A Supreme Court ruling overturning the California decision would have to be based on a Burger Court determination of the extent of interference it would allow with property rights based on its assessment of the importance of the government regulation. The 1979-80 Term has already given us two rulings on the nature of government activities that constitute compensable "takings" under the Fifth Amendment which appear to rest on *ad hoc* views of the worth of property rights. *Compare*, Andrus v. Allard, 100 U.S. 318 (1979), *with* Kaiser Aetna v. United States, 100 S. Ct. 383 (1979).

172. *See, e.g.*, Personnel Adm'r v. Feeney, — U.S. —, 99 S. Ct. 2282 (1979); New York City Transit Auth. v. Beazer, 430 U.S. 568 (1979); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

173. R. NOZICK, *supra* note 119, at 169, 170, 172, 230–31, 268.

174. *See* Califano v. Boles, 99 S. Ct. 2767 (1979); Mathews v. De Castro, 429 U.S. 181

Court would interpret specific provisions of the Constitution so as to avoid any wealth redistribution that is not absolutely necessary to the application of those provisions in its decisions. The Burger Court has found that while an individual defendant has a Sixth Amendment right to have retained counsel at a misdemeanor trial which does not result in incarceration, or to prepare papers for discretionary review, an indigent has no right to have counsel provided in those situations.[175] Indigents have a right to appointed counsel for trials that result in their imprisonment, but states may be able to recoup the costs of counsel provided those indigents.[176] Women have a right to purchase abortions, but indigent women have no right to state-paid abortions.[177]

The most protected fundamental right in the Burger Court years has been a woman's right to an abortion.[178] Last Term the Court continued to defend this right for all women who could not be determined to be so young and immature that they could not make a decision accurately assessing their own self-interest.[179] The abortion decisions are most interesting because they involve the Court in openly selecting non-textual values to protect; the early decisions concerning a right to make private child rearing decisions come from the pre-1937 libertarian Court.[180] This certainly is a libertarian position; libertarian philosophers find no worth in forcing someone to control their actions so long as those actions do not hurt another, separate person.[181] To a

(1976); Weinberger v. Salfi, 422 U.S. 749 (1975). *Cf.* Vance v. Bradley, 440 U.S. 93 (1979); Harrah Independent School Dist. v. Martin, 440 U.S. 939 (1972) (per curiam).

175. Scott v. Illinois, 440 U.S. 367 (1979) (no right to appointed counsel when trial does not result in sentence of imprisonment); Ross v. Moffitt, 417 U.S. 600 (1974) (no right to counsel in preparing papers for discretionary review process).

176. Fuller v. Oregon, 417 U.S. 40 (1974).

177. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977). These cases dealt only with the refusal to fund discretionary abortions; the Court has not yet determined whether the state may refuse to fund medically necessary abortions but it may resolve that issue during the 1979-80 Term. *See* Williams v. Zbaraz, Quern v. Zbaraz, United States v. Zbaraz, jurisdiction noted, 48 U.S.L.W. 3356 (1979).

178. *See* Bellotti v. Baird (Bellotti II), 99 S. Ct. 3035 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

179. Bellotti v. Baird (Bellotti II), 99 S. Ct. 3035 (1979).

180. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *See also* note 83 *supra*.

181. It is the concept of the separate existence of individual persons that causes a libertarian to support restrictions on individual actions which cause physical harm to other persons. *See* R. NOZICK, *supra* note 119, at 33. It is interesting to note that this position corresponds to the Court's concept of "viability" as a limit on the right to an abortion. *See* Roe v. Wade, 410 U.S. 113 (1973).

libertarian economist the abortion regulations are only means of increasing the price of abortions beyond the market clearing price; the laws cause some doctors to charge not only for their services but for the risk of criminal prosecution.[182] The Burger Court, as we have noted, took a libertarian position when it refused to require government funding for the abortions of indigent women; the libertarian "right" is the ability to secure services without a claim upon the resources of others.

The Burger Court has not been true to libertarian philosophy in other "right to privacy" decisions. It has overturned all of the laws relating to the sale of contraceptives[183] and, thereby, freed the market for such products of artificial government constraints. But the Court has not established any right to engage in sexual activity, except by lawfully married couples. During the Court's transitional period it appeared that the justices might find some constitutionally protected freedom regarding the sexual relations between consenting adults,[184] but that possibility apparently has been rejected by the Burger Court. While the Court has not issued an opinion dealing with a claim of right to engage in consensual sexual activity by adults in private, several of its rulings make it clear that a majority of the justices believe that there is no right to engage in such activity. A majority of the justices have stated that they believe that minor children have no right to engage in sexual activity that is outlawed by the state, even though minors may have a right to buy contraceptives.[185] The justices have summarily af-

182. *See, e.g.*, D. NORTH & R. MILLER, THE ECONOMICS OF PUBLIC ISSUES 8-14 (2d ed. 1973). This point corresponds with the Court's protection of doctors from criminal prosecution for all abortions except those performed on a fetus so clearly viable that the act virtually would constitute the killing of an infant. *See* Colautti v. Franklin, 439 U.S. 379 (1979).

183. Carey v. Population Services Int'l, 431 U.S. 678 (1977) (advertising of contraceptives, sale to minors); Eisenstadt v. Baird, 405 U.S. 438 (1972) (sale to unmarried adults); Griswold v. Connecticut, 381 U.S. 479 (1965) (Warren Court ruling regarding use of contraceptives by married couples). There has been no questioning of the early decision overturning statutes punishing certain criminal activity with involuntary sterilization. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (equal protection decision regarding classifications for sterilization).

184. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court ruled that it was a violation of equal protection to punish unmarried persons for purchasing items that would prevent disease or pregnancy because there was no clear proof that a ban of such purchases in fact would deter persons from committing illegal sexual acts. The *Eisenstadt* majority opinion by Mr. Justice Brennan described the right to privacy as a right to be "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

185. In Carey v. Population Services Int'l, 431 U.S. 678 (1977), the Court invalidated a law which allowed only pharmacists to sell non-medical contraceptive devices to persons over 16 years of age and prohibited the sale of such items to persons under 16. As to the general restriction, there was a majority opinion that the burden on an adult's freedom of choice could only be justified by a compelling interest and that distribution only through

firmed convictions for private homosexual conduct[186] and refused to consider the firing of government employees for illegal homosexual[187] and heterosexual[188] activity. What can be the explanation for these rulings? A good libertarian would find that consenting adults have a right to engage in any mutually acceptable activities as long as they do not harm another person; there can be no distinction based on whether the activity is heterosexual or homosexual, done for mutual pleasure for for the financial profit of one party.[189] Perhaps the problem here is that libertarian values in this area simply have proven too much for the Burger Court. The Court has accepted only what we might term an "American conservative variant" of libertarian political philosophy. This selective blending of libertarian philosophy and personal conservatism would not separate the Burger Court from the pre–1937 libertarian Court. It must be remembered that during the 1900–1937 period the justices approved about as many restrictions on economic freedom as they rejected. They often were persuaded that a particular type of economic regulation was necessary for the protection of a specific po-

pharmacists did not advance such an end. The Court struck the restriction on children without a majority opinion. Writing for four members of the Court, Mr. Justice Brennan implied that even young persons have some rights to freedom of choice in these matters. Two Justices voted to uphold the restriction on sale to minors. *Id.* at 702 (Burger, C.J., dissenting); *id.* at 717 (Rehnquist, J., dissenting). The other three Justices voting to strike the law wanted to avoid any implication of a right of minors to engage in sexual activity. They would allow prohibition of sexual activity, including use of the contraceptives by minors. But, as there has never been any evidence that denial of contraceptives to young persons deterred them from such activities, for the state to require them to assume greater risks of pregnancy and disease if they violated the law was so arbitrary as to violate due process. *Id.* at 702–03 (White, J.); *id.* at 707–08 (Powell, J.); *id.* at 713–16 (Stevens, J.). When these three Justices are combined with the two dissenting Justices, there appears to be a majority that would allow statutes strictly regulating the sexual activity of minors.

186. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three judge court). *See also* Wainwright v. Stone, 414 U.S. 21 (1973). *Cf.* Enslin v. Bean, 436 U.S. 912 (1978) (denial of certiorari).

187. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977), *cert. denied*, 434 U.S. 879 (1978); *Cf.* Gish v. Board of Educ., 145 N.J. Super. 96, 366 A.2d 1337 (1976), *petition denied*, 74 N.J. 251, 377 A.2d 658 (1977), *cert. denied* 434 U.S. 879 (1978).

188. Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem* 578 F.2d 1374 (3d Cir. 1978), *cert. denied*, 99 S. Ct. 734 (1978) (Justice Marshall dissented to the denial of certiorari and wrote a dissenting opinion. Justice Brennan noted his dissent).

189. For an examination of the philosophic basis of right to privacy decisions and the problem of applying them so as to approve these results, see Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); Note, *Due Process Privacy and the Path of Progress*, 1979 U. ILL. L. F. 469; *See also* Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979).

lice power interest which they felt was more important than the concept of economic liberty. Robert McCloskey, after examining the Supreme Court's treatment of some tax and commerce cases during the pre–1937 period, noted:

> As so often in the cases of this era, the Court had been unable to develop an objective formula that would distinguish between acceptable and unacceptable departures from the free enterprise ideal. By their ultimate resort to subjectivism, the judges kept their hands on the reins and retained their freedom of discretion. But they made it harder to convince observers that judicial review was more than another step in the legislative process.[190]

A generalized, substantive right to privacy has never been championed by the Supreme Court as it was not a major concern of the liberal Warren Court and it runs against the conservative variant of libertarianism employed by the Burger Court. Thus, the Burger Court avoided declaring that an individual had a right to control his or her body when it gave women the right to have an abortion.[191] The Court's recent statutory ruling concerning the distribution of laetrile,[192] leads one to believe that the Court is not likely to endorse such a right in the near future.[193]

Marriage may be a fundamental right for the Burger Court, but it will not require any greater amount of wealth redistribution on the part of the government than is necessary to protect this right. The Court has found that the state must waive filing fees for a divorce where the parties cannot affford to pay the fee,[194] and that the right to marry cannot be denied a person for failure to pay his or her previously ordered alimony or child support payments.[195] But the Court will allow the government to employ marriage classifications to distribute welfare benefits so long as the classifications are not also based on gender or legitimacy.[196] The conservative variant of the libertarian position shows itself in the opinions of justices who would hold that direct restrictions on the right to engage in a traditional, heterosexual marriage

190. R. MCCLOSKEY, *supra* note 11, at 144.

191. "In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past." Roe v. Wade, 410 U.S. 113, 154 (1973).

192. United States v. Rutherford, 99 S. Ct. 2470 (1979).

193. For an overview of the arguments for and against a "right to die", *see* NOWAK, ROTUNDA & YOUNG, *supra* note 10, 1979–80 Supp. at 131–32.

194. Boddie v. Connecticut, 401 U.S. 371 (1971).

195. Zablocki v. Redhail, 434 U.S. 374 (1978).

196. Califano v. Jobst, 434 U.S. 47 (1977). *Cf.* Califano v. Boles, 99 S. Ct. 2767 (1979).

will be independently reviewed while traditional restrictions on marriage, relating to age and sex, will be deemed within the police power of the state.[197]

The Burger Court also has taken a libertarian position on the right to interstate travel. Judicial review of residence requirements for welfare programs is inconsistent with the philosophy that would reduce or eliminate government attempts to redistribute wealth.[198] The Court did strike down a one year residency requirement for medical care at public expense; the state need not choose to provide such services but it may not provide them in a way that disfavors those indigent persons who have recently changed their residence to that state.[199] The Burger Court, however, has done no more than strike down significant barriers to residence changes. The Court has upheld differing tuitions at state universities for in-state and out-of-state residents,[200] a one year residence requirement for divorce,[201] and a requirement of continued residence in a city for public employment.[202] The justices also have indicated that the right to travel is not affected by a cut off of welfare benefits for leaving a jurisdiction.[203]

The voting rights rulings of the Burger Court reflect a libertarian view of the political system rather than the majoritarian view of the Warren Court. The Burger Court has struck down those restrictions on voters or candidates which restrain the political market. It has invalidated residency requirements that were not reasonably related to the efficient operation of primary[204] and general elections,[205] the application of filing fee requirements to candidates who could not afford to

197. *See* Zablocki v. Redhail, 434 U.S. 374, 396-97 (1978) (Powell, J., concurring); *id.* at 395 (Stewart, J., concurring).

198. *See* Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41 (arguing that Warren Court review of residency requirements for welfare was an inefficient and unjustifiable attempt to redistribute wealth).

199. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

200. Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D. Minn. 1970). *Starns* was cited with approval in Vlandis v. Kline, 412 U.S. 441, 452-53 n.9 (1973), wherein the Court invalidated an unreasonable definition of state residency for tuition purposes as an "irrebutable presumption" because it precluded a person from becoming a resident of the state for in-state tuition purposes for several years.

201. Sosna v. Iowa, 419 U.S. 393 (1975).

202. McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).

203. *See* Califano v. Gautier Torres, 435 U.S. 1 (1978) (per curiam).

204. *Compare* Kusper v. Pontikes, 414 U.S. 51 (1973) (striking a 23 month limitation on party switching) *with* Rosario v. Rockfeller, 410 U.S. 752 (1973) (upholding an 11 month party registration requirement).

205. *Compare* Marston v. Lewis, 410 U.S. 679 (1973) *and* Burns v. Fortson, 410 U.S. 686 (1973) *with* Dunn v. Blumstein, 405 U.S. 330 (1972). *See also* O'Brien v. Skinner, 414 U.S. 524 (1974).

pay the fee,[206] demonstration of support requirements designed to bar challengers and independent political parties,[207] and judicial interference with party nominating conventions.[208] Yet, the Burger Court has gone no further in promoting egalitarian goals than was absolutely necessary to protect the concept of voter and candidate liberty. The Court narrowly recognized the ability of the government to publicly fund the presidential campaigns, but it simultaneously held that the First Amendment would not tolerate an attempt to equalize citizen voices regarding political campaigns—a clear rejection of the Rawlsian philosophy of equality.[209] Similarly, the Burger Court found that corporations have a First Amendment right to advertise to influence public referenda,[210] although it has left open the question of placing special limits on corporate spending in partisan elections.[211]

The rejection of egalitarian, majoritarian theories of democracy is also evidenced by the Burger Court's rulings on one person, one vote issues. The Burger Court has upheld the use of super majority requirements for referenda,[212] the use of multi-member voting districts (so long as they are not racially gerrymandered),[213] and the limitation of voting for members of specialized, regulatory agencies to directly affected groups.[214] The Burger Court has enforced the one person, one vote principle with strictness only when it has examined congressional districting;[215] it has dramatically loosened the reins controlling districting possibilities for state and local governments.[216] What unites these decisions is the libertarian view of the political process in which each individual or corporation is free to act, spend, or vote in a manner

206. Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

207. *Compare* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), *with* American Party of Tex. v. White, 415 U.S. 767, 779-88 (1974) *and* Storer v. Brown, 415 U.S. 724, 746 (1974).

208. Cousins v. Wigoda, 419 U.S. 477 (1975). *See also* O'Brien v. Brown, 409 U.S. 1 (1972).

209. Buckley v. Valeo, 424 U.S. 1 (1976). The "liberal" Rawls position requires a guarantee of equality in political participation including speech activities. *See* note 92 and accompanying text, *supra*.

210. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

211. *Id.* at 788 n.26.

212. Town of Lockport v. Citizens for Community Action at the Local Level, 430 U.S. 259 - (1977); Gordon v. Lance, 403 U.S. 259 (1971).

213. Whitcomb v. Chavis, 403 U.S. 124 (1971) (upholding multi-member district plan); White v. Regester, 412 U.S. 755 (1973) (striking plan based on racial discrimination). *Cf.* Wise v. Lipscomb, 437 U.S. 535 (1978).

214. Salyer Land Co. v. Tulare Lake Basin Water Dist., 410 U.S. 719 (1973); Associated Enterprises Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973).

215. White v. Weiser, 412 U.S. 783 (1973).

216. Mahan v. Howell, 410 U.S. 315 (1973); White v. Regester, 412 U.S. 755 (1973).

which suits his preferences and abilities. The government must not equalize opportunities for political participation and it need not give persons a guaranteed voice in decisions merely because the decisions affect those persons. Robert Nozick made this point by asking: "Does Thidwick, the Big-Hearted Moose, have to abide by the vote of all of the animals living in his antlers that he not go across the lake to an area in which food is more plentiful?"[217] The Burger Court answered "no" to this question in *Holt Civic Club v. Tuscaloosa*,[218] as the Court held that residents in an unincorporated area, which was partially governed by the City of Tuscaloosa, were not entitled to vote in the Tuscaloosa elections.

The group protection as well as fundamental rights decisions of the Burger Court reflect a libertarian philosophy. In reviewing gender classifications the Court has adopted the "substantial relationship to an important government interest" standard to invalidate all gender classifications that the justices consider unreasonable.[219] The Court may allow some compensation of women as a class for past discrimination,[220] but it will strike any gender based system of welfare payments which the justices do not find closely related to that end.[221] As a libertarian Court it upholds liberty by limiting governmental restrictions on the private sector or private relationships. It will not allow the government to place differing restrictions on the liberty of men or women regarding economic freedom or family rights.[222] Professor Ely has noted that these gender classification decisions cannot be justified by a *Carolene Products* or representation analysis since the Burger Court is not seeking to identify a discrete, insular minority whose interests would not be

217. R. NOZICK, *supra* note 119, at 269. Nozick's reference, which he cites in his footnotes, is to DR. SEUSS, THIDWICK, THE BIG HEARTED MOOSE (1948). Nozick makes this point to demonstrate both the lack of a justifiable guarantee for persons to have a voice in decisions that affect them, and the problem of finding legal constraints on the actions of private persons because their use of property affects others. *See* notes 132, 133 *supra*.

218. 439 U.S. 60 (1978).

219. Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976).

220. Califano v. Webster, 430 U.S. 313 (1977); Kahn v. Shevin, 416 U.S. 351 (1974). *Cf.* Schlesinger v. Ballard, 419 U.S. 498 (1975).

221. Califano v. Westcott, 99 S. Ct. 2655 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

222. Regarding economic freedom *see* Craig v. Boren, 429 U.S. 190 (1976) (ability to purchase alcoholic beverages); Reed v. Reed, 404 U.S. 71 (1971) (ability to be estate administrator). *Cf.* Taylor v. Louisiana, 419 U.S. 522 (1975) (eligibility to serve on jury). Regarding family rights *see* Orr v. Orr, 440 U.S. 268 (1979) (alimony); Stanton v. Stanton, 421 U.S. 7 (1975) (child's eligibility for parental support payments). *Cf.* Caban v. Mohammed, 441 U.S. 380 (1979) (overbroad distinction between adoption "veto" rights of male and female parents of illegitimates).

represented in the democratic process.[223] These Burger Court rulings have saved men from unfavorable treatment as often as women; the cases seem to be a rejection of *Muller*,[224] not *Lochner*.[225] But, like the pre–1937 Court, the Burger Court may permit some classifications with an adverse effect on one gender (usually women) if it believes those classifications are related to some police power–general welfare interest which it considers more important than sexual equality.[226]

The Court echoed libertarian philosophy when it ruled, regarding government treatment of illegitimates, that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[227] In other words, the Court is more concerned with anti–libertarian punishment of illegitimates rather than equal opportunity for illegitimate children.[228] Thus, the Burger Court has refused to impose serious constraints upon the freedom of government to assume that most males wish to leave their property to their legitimate children by upholding a state restriction of inheritance from fathers to legitimate children and illegitimates who have received a judicial order of paternity during the father's lifetime.[229] It is noteworthy that the Court has found it easier to deal with some apparent illegitimacy cases in terms of sexual discrimination rather than discrimination against illegitimates.[230]

223. Ely, *supra* note 19, at 12.

224. Muller v. Oregon, 208 U.S. 412 (1908) (upholding "protective" legislation limiting the maximum hours of work for women).

225. Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hour law applicable to male workers).

226. *See* Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979) (upholding veterans' preference in civil service system despite impact on women). *Compare* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (employment restriction on pregnant teachers is invalid irrebutable presumption) *with* Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of maternity benefits from state operated insurance system upheld). Regarding the selective invalidation of statutes by the pre-1937 Court, *compare* Muller v. Oregon, 208 U.S. 412 (1908) (restriction on women's hours of work upheld) *with* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (minimum wage law for women workers invalid).

227. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

228. The Burger Court has only invalidated illegitimacy classifications that apparently punished the illegitimate. *See* Jemenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

229. Lalli v. Lalli, 439 U.S. 259 (1978). This decision virtually eliminated the impact of Trimble v. Gordon, 430 U.S. 762 (1977), wherein the Court held that a state could not exclude all illegitimates from inheriting from their fathers by intestate succession.

230. The Court used the gender discrimination standard to overturn a state law which gave "veto" rights over the adoption of illegitimate children to all mothers but no fathers of such children. Caban v. Mohammed, 441 U.S. 380 (1979). The Court upheld the limitation of a father's ability to sue for the wrongful death of an illegitimate child to those fathers who

Classifications based on United States citizenship present severe problems for a libertarian court. Resident aliens who have not sought United States citizenship have by their own act, or failure to act, within the terms set by Congress for naturalization, chosen not to be a part of the body politic, but it makes no sense to restrict their actions in the private sector if they have been lawfully admitted into the country. During its transitional period the Court ruled that alienage classifications were "suspect,"[231] but, as the Burger Court's libertarian philosophy matured, the justices have been less concerned with the fair treatment of resident aliens. The Burger Court will restrict a state's ability to classify by United States citizenship in basic welfare benefits,[232] or in private sector employment,[233] but it will not interfere with the dispensation of the government benefit of public employment.[234] Because the federal government has significant interests in the conduct of foreign relations as well as welfare distribution, the Court will tolerate almost any alienage classification used by the federal government.[235]

There are not enough decisions concerning racial equality to resolve the question of how the Burger Court will treat this principle. So far the Court has not questioned the Warren Court prohibition of racial classifications which burden members of a minority race. But there was serious division among the justices last Term when deciding whether to allow habeas corpus challenges to the racial composition of

had legally established their paternity before the child's death. Parham v. Hughes, 441 U.S. 347 (1979). Mothers of an illegitimate must be given the ability to sue for the wrongful death of their child as if the child were legitimate. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

231. Graham v. Richardson, 403 U.S. 365 (1971). For an overview of the Supreme Court's treatment of alienage classifications prior to the 1970's, see NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 589–96.

232. Nyquist v. Mauclet, 432 U.S. 1 (1977) (educational benefits); Graham v. Richardson, 403 U.S. 365 (1971) (subsistence welfare benefits).

233. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (engineers); In re Griffiths, 413 U.S. 717 (1973) (attorneys). States may restrict the employment of illegal aliens, De Canas v. Bica, 424 U.S. 351 (1976).

234. Ambach v. Norwick, 441 U.S. 68 (1979) (limitation of employment as teachers in public schools to citizens upheld); Foley v. Connelie, 435 U.S. 291 (1978) (limitation of state police positions to citizens upheld). The state must make a determination of its need to exclude aliens from specific types of public employment so as to insure that there is a governmental interest in the exclusion. Thus, states may not simply exclude all aliens from all civil service positions. Sugarman v. Dougall, 413 U.S. 634 (1973).

235. *See* Mathews v. Diaz, 426 U.S. 67 (1976). *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (civil service commission lacks statutory basis for exclusion of aliens from federal civil service although Congress might be able to enact such a blanket exclusion).

grand juries,[236] and how to implement school desegregation principles.[237]

The difference between a liberal and a libertarian court should be apparent in rulings on affirmative action programs designed to aid members of minority races, but the Burger Court has yet to issue a constitutional ruling concerning such programs.[238] In *Regents of the University of California v. Bakke*,[239] four of the five justices who reached the constitutional issue would have upheld reasonable affirmative action programs that were designed to assist members of minority races without using absolute quotas or stigmatizing members of a majority race, but three of these four justices were holdovers from the Warren Court.[240] The four who voted to apply literally the Title VI prohibition of racial criteria may or may not have a libertarian opposition to redistributive programs.[241] Justice Powell's deciding vote was truly libertarian in that he refused to allow government supported institutions to have strict categorizations of persons by their race rather than their individual merit, while allowing educational institutions freedom of choice in admissions.[242] Powell's position might help or hurt members of minority races; it is concerned with academic freedom not desegregation. In *United Steel Workers of America v. Weber*,[243] the Court had little difficulty with upholding an affirmative action agreement made as a part of the bargaining process between a union and a private employer; liberals favor the end result of the bargain and liber-

236. Rose v. Mitchell, 99 S. Ct. 2993 (1979).

237. Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979); Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979).

238. For a more complete analysis of these rulings see NOWAK, ROTUNDA & YOUNG, *supra* note 10, 1979–80 Supp. at 84–103. For an excellent and comprehensive analysis of the Supreme Court's treatment of racial classifications and issues during the Warren Court and Burger Court years, see J. WILKINSON, THE SUPREME COURT FROM BROWN TO BAKKE (1979). For a most insightful comment on the relationship between the interests of racial minorities and Supreme Court rulings, see Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

239. 438 U.S. 265 (1978).

240. *Id.* at 355–62 (Brennan, Marshall, Blackmun, & White, J.J., concurring and dissenting).

241. *Id.* at 421 (Stevens, Rehnquist, Stewart, J.J., & Burger, C.J., concurring and dissenting).

242. *Id.* at 287–305, 311–20 (Powell, J.). For a detailed analysis of the Powell opinion and the *Bakke* ruling, see NOWAK, ROTUNDA & YOUNG, *supra* note 10; Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21 (1979); Dixon, *Bakke: A Constitutional Analysis*, 67 CALIF. L. REV. 69 (1979); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. CIV. RTS.—CIV. LIB. L. REV. 7 (1979).

243. 99 S. Ct. 2721 (1979).

tarians do not want to interfere with the private bargaining process. We must await future cases to determine if the Burger Court will take a libertarian stand against the ability of government to deal with the problems of racial minorities by affirmative action and wealth redistribution.[244]

The Burger Court's rulings concerning the freedom of religion have reflected libertarian philosophy in a rather uneven manner. The Court has interpreted the establishment clause so as to virtually eliminate any possible form of meaningful aid to parochial schools.[245] These cases eliminate the conservative–libertarian endorsed proposals for a tuition voucher system,[246] but this is explainable on two bases. First, the justices have given no indication that they realize that their rulings may have the effect of nationalizing education by disadvantaging all private sector school systems.[247] Second, the justices have split into three groups concerning this issue with the most liberal justices seeking to end aid to parochial schools, the more libertarian justices favoring the tuition voucher plan, and the justices casting the decisive votes reflecting no discernible philosophy in these cases.[248]

244. The Court may make that determination this Term, as it has heard arguments regarding the constitutionality of the federal "set aside" of public works funds for businesses owned by members of a racial minority. Fullilove v. Kreps, 584 F.2d 600 (D.C. Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979) (No. 78-1007).

245. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975). Aid to religiously affiliated colleges has not been so restricted, see Roemer v. Board of Pub. Works, 426 U.S. 736 (1976). For an examination of all of the Supreme Court's rulings in this area see NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 851–68. In the 1979-80 Term the Court upheld a state program of reimbursing private schools for grading standardized state examinations and for reporting data about the student, faculty and schools to the state. However, the court did not alter the standards used in previous cases nor did it expand the scope of permissible state aid to religious schools. Committee for Pub. Educ. and Religious Liberty v. Regan, 100 S. Ct. 418 (1979).

246. The voucher system was first suggested in A. SMITH, THE WEALTH OF NATIONS 736–38 (Mod. Lib. ed. 1937) (n.p. 1776). The concept was more fully developed by Professor Friedman. M. FRIEDMAN, *supra* note 118, at 85–107.

247. By offering education subsidies only "in kind" to those persons choosing the public schools, the government drastically reduces the ability of private schools to exist, much less prosper, because of the limitation on the number of persons willing to pay the market price for education. For a more complete analysis of the effect of these decisions *see* Nowak, *The Supreme Court, The Religion Clauses, and the Nationalization of Education*, 70 NW. U. L. REV. 883 (1976).

248. The division of the justices in Meek v. Pittenger, 421 U.S. 349 (1975), provides an excellent example of this relationship. There, Justices Douglas, Brennan and Marshall voted to overrule Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding textbook program), and to allow no aid to parochial schools or their students. Justices Blackmun, Powell and Stewart upheld the textbook program but would allow no more aid to parochial schools than had been approved by previous decisions. Chief Justice Burger and Justice Rehnquist would uphold neutral aid in the form of secular goods and services if they were provided

The Court has been quite receptive to free exercise claims; this is consonant with the libertarian desire to limit the ability of government to control individual freedom. The Burger Court has found that some religious groups can withdraw their children from all formalized education,[249] that members of all sects, and their ministers, must be allowed to participate in the electoral process,[250] and that religious disputes can only be resolved by civil courts if the courts can avoid questioning religious beliefs.[251]

In the area of free speech there has been less difference between the Warren Court and the Burger Court than in the other areas we have examined. The libertarian principle of individual freedom, when applied to the problems of government restraints on speech, is quite close to the liberal value of free expression regarding self-governance issues.[252] Thus, the Burger Court has protected individuals who alter the slogans the government inscribes on automobile license plates,[253] or who refuse to pay for union dues which can be used to further positions on social matters with which the individual disagrees.[254] Similarly, the Court denied government the ability to hire or fire its employees on the basis of their political beliefs[255] or speech.[256] The libertarian justifica-

directly to the students. The one exception to this apparent relationship is Justice White, who would uphold a wider variety of programs than would Chief Justice Burger or Justice Rehnquist. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting). However, if Justice White is an exception, he shows consistency in his position on educational issues. He has perceived the effect of limiting the educational opportunities of low-income children and he consistently votes to increase those opportunities. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (White, J., dissenting). *See also* Ingraham v. Wright, 430 U.S. 651, 683 (1977) (White, J., dissenting to holding that teachers were not subject to constitutional limitations on their use of corporal punishment for students); Goss v. Lopez, 419 U.S. 565 (1975) (majority opinion by Justice White on student disciplinary hearings).

Justice Douglas was replaced by Justice Stevens, who has voted with Justices Brennan and Marshall to eliminate virtually all aid to religious institutions, *see* Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J., concurring in part and dissenting in part).

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

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

251. *Compare* Jones v. Wolf, 99 S. Ct. 3020 (1979), *with* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). *Cf.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

252. We examined some of the Warren Court free speech rulings at notes 93–106, and accompanying text *supra*. For an exposition of a libertarian belief in free speech, see J. MILL, ON LIBERTY ch. II (1st ed. London 1859). For a thoughtful analysis of Mill's position and competing theories, see Wellington, *supra* note 47.

253. Wooley v. Maynard, 430 U.S. 705 (1977).

254. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

255. Elrod v. Burns, 427 U.S. 347 (1976).

256. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

tion for the existence of a state is the need to prevent violent, criminal behavior; it is not surprising that some members of a libertarian court may hesitate when applying the concepts of vagueness or overbreadth to "criminal" conduct.[257] Nevertheless the Burger Court has continued to use the *Brandenburg* test for determining what type of advocacy may be made illegal[258] and it has applied vagueness and overbreadth principles with strictness in all areas[259] except those relating to political campaign acts of government employees[260] and commercial speech.[261]

While one hears a great deal about the Burger Court's restrictive attitude towards obscene publications, its position on the constitutional status of obscenity is, in functional terms, no different than that of the Warren Court.[262] Given the Burger Court's requirement that the judge independently screen a trial record to determine whether or not a reasonable jury could find the challenged material to be obscene,[263] there is very little difference between the *ad hoc* Warren Court obscenity rulings and the fact oriented prurient interest, offensive to community standards, and lack of serious value tests used by the Burger Court.[264]

The Burger Court has allowed the government to regulate some sexually oriented speech that is not obscene. In *Young v. American*

257. Some justices have voiced objections to using these tests to void convictions for "unprotected" criminal activity. *See* Lewis v. New Orleans (Lewis II), 415 U.S. 130, 136 (1974) (Blackmun, J., joined by Burger, C.J. and Rehnquist, J., dissenting); Gooding v. Wilson, 405 U.S. 518, 528, 534 (1972) (Burger, C.J., & Blackmun, J., dissenting).

258. Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).

259. *See, e.g.*, Erznoznik v. Jacksonville, 422 U.S. 205 (1975); Lewis v. New Orleans (Lewis II), 415 U.S. 130 (1974); Smith v. Goguen, 415 U.S. 566 (1974); Eaton v. Tulsa, 415 U.S. 697 (1974); Papish v. Board of Curators, 410 U.S. 667 (1973). The Burger Court has had difficulty in examining the extent to which governmental units may restrict speech activities in areas "owned" by the government. *See* Greer v. Spock, 424 U.S. 828 (1976) (restrictions on campaigning and leafleting on military base upheld), Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (restrictions on advertising accepted by public bus line upheld). Professor Van Alstyne has found that these decisions may be reconciled with other civil liberties decisions of the Burger Court by the fact that they reflect a Lockean view of property rights. *See* Van Alstyne, *supra* note 114.

260. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

261. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462–63 n.20 (1978).

262. *See* notes 101–05 and accompanying text *supra*, regarding the rulings of the Warren Court.

263. Jenkins v. Georgia, 418 U.S. 153 (1974). The Supreme Court will not allow judges or justices to include children in the "community" whose standards are used in the test. *See* Pinkus v. United States, 436 U.S. 293 (1978).

264. This test was adopted by the Court in Miller v. California, 413 U.S. 15 (1973). For an examination of the current tests, see NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 838–47. There is at least an arguable basis for asserting that the new tests have had no effect on the local regulation of "obscenity." Note, *An Empirical Inquiry Into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810 (1977).

Mini-Theaters, Inc.[265] the Court upheld restrictive zoning of adult theaters and, in *FCC v. Pacifica Foundation*,[266] it upheld FCC regulations regarding the times in which certain sexually oriented material could be broadcast. In each of these cases Justice Stevens wrote a plurality opinion that employed analysis similar to the balancing test used in the 1940's and 1950's by Justice Frankfurter.[267] But Stevens was unable to gather a majority for his view. The decisive votes turned on the principle that the government could seek to avoid certain effects of these speech activities: the reduction in the value of property near the theaters,[268] and the exposure of children to the offending broadcasts.[269] While the results in these cases may not be perfect in terms of libertarian political philosophy, they come close: restrictive speech "zoning" is impermissible unless the government can prove a demonstrable connection to the overriding ends of protecting property and children.

In dealing with the problems of the communications media, the Burger Court's libertarian philosophy has been evidenced in a variety of ways. The Court has allowed the electronic media, despite its status as a regulated industry, freedom of choice to reject editorial advertising,[270] and it has precluded the regulation of the content of newspapers

265. 427 U.S. 50 (1976).

266. 438 U.S. 726 (1978).

267. *See* Young v. American Mini-Theatres, Inc., 427 U.S. 50, 52, 70–72 (1976) (Stevens, J., joined by Burger, C.J., White and Rehnquist, JJ.); FCC v. Pacifica Foundation, 438 U.S. 726, 743, 745 (1978) (Stevens, J., joined by Burger, C.J., and Rehnquist, J.). The Stevens opinions reflect his view that the content of speech can be regulated when the regulation is unrelated to the suppression of ideas and is closely related to the achievement of important governmental interests. This balancing of the worth of the speech and loss of First Amendment value caused by the restriction, against the nature of the governmental interest and the relationship of the regulation to that interest, was the essence of the Frankfurter balancing approach. Frankfurter's concurring opinion in American Communications Ass'n v. Douds, 339 U.S. 382, 415 (1950) (Frankfurter, J., concurring in part, dissenting in part), is particularly close to the Stevens plurality opinions. For other examples of the Frankfurter approach, see Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring); Kovacs v. Cooper, 336 U.S. 77, 90–95 (1949) (Frankfurter, J., concurring). Those who favor this test would do well to remember that it led Justice Frankfurter to approve forcing children of the Jehovah Witness faith to salute the American flag. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (majority opinion by Frankfurter, J.), *overruled in* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). While the Stevens balancing approach offers little in the way of a principled definition of First Amendment freedom, it has served as the basis for Professor Farber's recent exposition of a more honest approach to content regulations. *See* Farber, *Content Regulation and The First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).

268. Young v. American Mini-Theatres, Inc., 427 U.S. 50, 73 (1976) (Powell, J., concurring).

269. FCC v. Pacifica Foundation, 438 U.S. 726, 761–62 (1978) (Powell, J., joined by Blackmun, J., concurring).

270. C.B.S. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The Court has upheld FCC

for the purpose of giving persons a right to use newspaper space for replies to newspaper editorials.[271] The Court has prohibited the punishment of the press for the printing of truthful information[272] because everyone should have the liberty to repeat truthful information, absent some compelling, state-justifying reason for the particular punishment or prior restraint. In a true libertarian spirit, the Burger Court has treated the press as any other business. Thus, the press had no special protection from grand jury subpoenas,[273] the execution of search warrants,[274] or civil discovery.[275] Becasue the Burger Court is unwilling to fashion an institutional role for the press in the democratic process, it will declare no special right of the press to gain access to government documents,[276] programs,[277] or pretrial proceedings.[278]

The defamation rulings of the Burger Court are also consonant with this libertarian view of the press. The Court has attempted to fashion constitutional rules to protect the press from being punished for criticizing public officials and public figures while finding nothing wrong with making the press pay for the damage it does to the reputation of a private individual.[279] In other words, the press must assume responsibility for its own actions, but not political reprisals.[280] The

regulations regarding the broadcast of "offensive" material. *See* notes 265–67 *supra*. For an analysis of the constitutional problems of judicial, legislative, or executive regulation of a communications medium, see Van Alstyne, *The Möbius Strip of The First Amendment: Perspectives on Red Lion*, 29 So. Car. L. Rev. 539 (1978).

271. Miami Herald Publishing Co., Inc. v. Tornillo, 418 U.S. 241 (1974).

272. Smith v. Daily Mail Pub. Co., 99 S. Ct. 2667 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); *Cf.* New York Times Co. v. United States, 403 U.S. 713 (1971).

273. Branzburg v. Hayes, 408 U.S. 665 (1972).

274. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

275. Herbert v. Lando, 441 U.S. 153 (1979).

276. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (no right to reproduce Watergate tapes).

277. Houchins v. KQED, Inc., 438 U.S. 1 (1978) (no special right of access to jails); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

278. Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979).

279. *Compare* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) *with* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

280. The public figure or public official must still prove "malice" as well as "falsity" to recover for defamation. A private person must prove negligence by the media to recover actual damages, and malice to recover preserved or punitive damages. *See* note 279 *supra*. The Court has refrained from determining what, if any, restrictions the First Amendment places on the ability of states to allow a civil recovery of damages from a private individual (non-media) defendant for defamation by a private individual plaintiff. As there is less need to protect against punishment of the media in such cases, it is possible that the Court

Court's libertarian philosophy is also evident in its definition of the class of public figures whose reputations may be injured without realistic hope of compensation; there must be individual responsibility or voluntariness found in the acts which are asserted as the basis of the public figure status.[281] Similarly, the libertarian Burger Court refused to allow the press to take a performer's business from him by showing videotapes of his act when the performer had attempted to develop a business of private performances.[282]

The key to understanding the Burger Court's protection of speech connected to economic activity appears in *Buckley v. Valeo*.[283] In that case the Court upheld restrictions on the amount of money that could be contributed to candidates for political office as a necessary means of stopping subtle forms of bribery. But it invalidated, as a violation of the free speech clause, limitations on the campaign spending of the candidates or other individuals promoting the candidacy of another person. These limitations were based on Congressional adoption of a philosophy like that of Rawls, which required equalized political voices to protect the principles of the social compact.[284] The Burger Court held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[285] It was but a short step to the decision holding that economic entities have First Amendment rights; if government cannot equalize the disparity in individual abilities to promote a message, it cannot limit the speech of entities which represent groups of individuals who have pooled their resources in a corporation. In *First National Bank of Boston v. Bellotti*,[286] the Court found that corporations and other economic entities could not be restricted in their spending regarding public issues, whether or not the corporation had some pecuniary interest in the issues.[287] These rulings are perfectly consistent with libertarian philosophy: they remove gov-

would allow plaintiffs in those actions to recover actual damages on a strict liability basis or punitive damages on a standard less strict than the malice standard. However, the Court has noted that it has not resolved this issue. Hutchinson v. Proxmire, 99 S. Ct. 2675, 2687 n.16 (1979).

281. *See* Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979); Wolston v. Reader's Digest Ass'n, 99 S. Ct. 2701 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

282. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

283. 424 U.S. 1 (1976).

284. *See* note 92 and accompanying text *supra*.

285. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

286. 435 U.S. 765 (1978).

287. The Court left open the possibility that it would allow some limitation of spending by economic groups relative to partisan campaigns for public office. 435 U.S. 765, 788 n.26.

ernment restraints on individual liberty and prohibit the Rawls redistributive–egalitarian approach to political speech.

The Court has carried this libertarian philosophy into the area of so–called "commercial speech,"[288] but here it had to overturn the commercial speech exception from First Amendment protection which had been created by earlier Courts to allow the government to regulate those advertising practices which a regulatory agency might consider to be contrary to the public good. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[289] the Court rejected the commercial speech exception from First Amendment protection and overturned a governmental prohibition of truthful price advertising by pharmacists. The majority opinion reads like a primary libertarian economics text; it based its holding on the assertion that it was an improper, "paternalistic" governmental act.[290] According to the Burger Court the restriction on commercial information raised transaction costs in a manner antithetical to First Amendment freedom.[291] Given the libertarian notion of freedom in the marketplace, there appeared to be no restriction of commercial speech beyond the prohibition of demonstrably false or misleading advertising that would be upheld by this libertarian Court. Thus, the Court invalidated restrictions on the placing of for sale signs[292] and the prohibition of advertising of lawful products or services.[293] It sustained the prohibition of in–person solicitation of clients by attorneys only if there were factors to indicate that

288. For three excellent but conflicting views of the basis for, and justifiability of, the Burger Court's commercial speech rulings, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080).

289. 425 U.S. 748 (1976).

290. "[O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.

. . . .

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 769-70.

291. The opinion explains at length that the advertising ban will not produce efficient, high quality pharmacy services but only increase costs by restricting the flow of information (thereby raising transaction costs) and reducing price competition. *Id.* at 762–70.

292. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

293. Carey v. Population Services Int'l, 431 U.S. 678 (1977) (advertising sale of contraceptives); Bates v. State Bar of Ohio, 433 U.S. 350 (1977) (advertising attorney price and service information).

the attorney was acting in a misleading manner.[294] However, during the past Term, the Court pulled back slightly from the pure libertarian model as it upheld a government restriction on the use of trade names. In *Friedman v. Rogers*,[295] it held that the government could prohibit the use of trade names by optometrists because they were essentially non-informational advertising devices with a potential for deception.

It now appears that the Burger Court will use the First Amendment to require the government to treat economic entities in a manner similar to individuals in the area of political or social speech. When individuals or business entities seek to use trade names or engage in advertising practices that employ words or symbols which do not in themselves convey truthful information, the Court will uphold governmental regulation of the activity if the regulation arguably relates to preventing deception of the public. Whenever the regulated commercial speech involves the conveyance of truthful information about a lawful product, the ability of government to restrain the speech will depend on whether the justices believe that the regulation is reasonable in terms of avoiding actual fraud. While the Court has not opened the door to overturning all economic regulations under the guise of First Amendment rulings, it will play a significant, independent role in determining the extent to which the speech activities of commercial interests may be regulated in order to protect the public from deceptive business practices.

Conclusion: Neutral Principles and the Future of Supreme Court Value Selection

In retrospect it should not be surprising to find that the Burger Court has been more active than the Warren Court in reviewing the actions of other institutions of government, because a libertarian court faces more challenges in the modern world than does a liberal court. After all, there are only a relatively small group of goals which a liberal court could hope to define and promote; we saw that the Warren Court rulings were limited to relatively narrow areas. However, the libertarian court finds itself surrounded on all sides by government regulations of individual and group activities which seem to contradict its philosophy of personal and economic liberty.

In examining the work of the historic Warren and Burger Courts, I

294. *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) *with* In re Primus, 436 U.S. 412 (1978).

295. 440 U.S. 1 (1979).

have focused on the results of decisions rather than the reasoning employed by the Courts or individual justices in opinions issued in these cases. This approach does not reflect a belief that the reasoning of the justices is unimportant, but only a belief that it is impossible for citizens, scholars, or judges to evaluate current opinions of the Court unless they have first placed the Court in the historical perspective of its value selection and philosophical orientation. This Term the Burger Court will examine the decision of Congress to set aside funds for minority business[296] and the California Supreme Court's diminution of property rights of shopping center owners through the requirement that they allow speakers on their property.[297] The justices must recognize their value orientation and find a means for internally questioning whether their libertarian principles, with which these programs conflict, can be made into enforceable constitutional doctrines. Only by heeding Herbert Wechsler's call for decision making and opinion writing based upon "neutral principles"[298] is the Court going to be successful in avoiding a serious conflict with other branches of the government and society at large.

I will not attempt to add to the debate concerning Wechsler's conception of neutral principles. The historical and analytical worth of that doctrine and the need for a system of "reasoned elaboration" have been analyzed most ably in recent years by Professors Greenawalt[299] and White.[300] But it is critical to note that Wechsler offered the Supreme Court a means for questioning its role in the selection of the values which restrict the development of a democratic consensus. The use of specific doctrine and neutral principles of adjudication in Supreme Court decisions will serve as an internal institutional check on the exercise of power which cannot be justified in terms of constitutional doctrine but only in terms of the selection of efficient governmental policy. The open specification of doctrine allows the Court to

296. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979). *See* note 244 *supra*.

297. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, *cert. granted*, 48 U.S.L.W. 3319 (1979) (No. 79-289, Nov. 11, 1979).

298. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

299. Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

300. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973). *See also* White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). Both articles are reprinted in G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

interact with society in what Professor White has called a "dialectic of adjudication."[301] An honestly written opinion employing specific doctrine allows members of the public to know why their actions, or the actions of their government, are restricted; it does less damage to the computing principle that is the basis of the democratic process than does a decision which disguises the Court's reasoning or its manner of value selection.

It may seem easier and more efficient for the Supreme Court to simply rule on constitutional issues without attempting to create specific constitutional doctrine or explain its rulings in terms of neutral principles. As we begin the new decade, it may appear to many persons that the Supreme Court's authority is so well accepted that there is no longer a need for internal checks in the value selection process that is a part of constitutional adjudication. However, those who hold this belief would do well to remember that before each of the Supreme Court's major conflicts with society it had for decades ruled on a variety of policy issues and its rulings had been readily accepted by the populace. In the period prior to *Dred Scott v. Sandford*,[302] the Court had become comfortable with the exercise of power in ruling on state commercial cases based upon its view of the competing federal and state interests.[303] Prior to the Court's conflict with the New Deal ad-

301. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, *supra* note 300, at 296.

Recently Professor Owen Fiss has advanced a theory of constitutional decisionmaking that, like Professor White's, rests on the concept of federal judges engaging in a dialectic with society. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). One might claim that Professor Fiss should be grouped with those I have termed "new realists" earlier in this article because he seems to give no standard for judging the outcome of constitutional decisionmaking other than the assertion that justices are to "give meaning to our public values" in a way that neither reflects personal or societal preferences but, instead, gives a correct definition of those values. *Id.* at 9-15. Indeed, Professor Fiss seeks to answer Professor Ely's critique of judicial value selection, *supra* notes 19, 39, by asserting that "there is no discernible connection between majoritarianism and the meaning of a constitutional value" and citing Ely as one of the (presumably mislead) "promoters of footnote four." *Id.* at 15 n. 33. It would be unfair to attack Professor Fiss as being only a realist because he finds the basis of judicial legitimacy to be society's acceptance of a system of government which has developed a judiciary with a special competence for considering questions of "structural reform" and which needs that entity to examine problems of structural justice. Fiss thus differs from consensus theorists by justifying the judicial role in terms of society acceptance of institutions rather than specific values. Justification of a judicial role in terms of society's establishment of institutions that interact to define constitutional values, and promote the public good, is the core of Professor White's concept of a dialectic of adjudication.

302. 60 U.S. (19 How.) 393 (1857). For an analysis of the decision in terms of the Supreme Court's treatment of slavery and racial issues, see NOWAK, ROTUNDA & YOUNG, *supra* note 10, at 535–40.

303. For an analysis of the Court's rulings during this period, see R. MCCLOSKEY, *supra*

ministration, it had for over thirty years approved or disapproved regulations of individual and economic liberty without specifying a constitutional doctrine that separated acceptable from unacceptable deviations from libertarian principles.[304] I do not claim that the Court is headed for another such cataclysmic confrontation with society. But it is noteworthy that the libertarian Burger Court has moved away from the use of enunciated constitutional doctrine to the use of balancing or fact related tests in ruling on the nature of the federal commerce power,[305] the meaning of the contract clause,[306] the nature of the procedural due process guarantees,[307] equal protection theories regarding both group discrimination[308] and fundamental rights,[309] and the meaning of the free speech guarantee.[310] Unless the Burger Court makes some effort to heed Wechsler's call for the use of neutral principles of adjudication in its decision making and opinion writing, it may well become too comfortable with the exercise of power for its own or society's good.

note 11, at 81–97; B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 55–77 (1942).

304. For an analysis of the Court's rulings during this period, see R. MCCLOSKEY, *supra* note 11, at 136–79; B. WRIGHT, *supra* note 303, at 109–36, 153–79.

305. National League of Cities v. Usery, 426 U.S. 833 (1976).

306. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The Court appears to be taking a similar approach to interpretation of the taking clause, *compare* Andrus v. Allard, 100 S. Ct. 318 (1979) *with* Kaiser Aetna v. United States, 100 S. Ct. 383 (1979).

307. Mathews v. Eldridge, 424 U.S. 319 (1976). *See* notes 140–56 and accompanying text *supra*.

308. *Compare* Ambach v. Norwick, 441 U.S. 68 (1979) *with* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage cases). *Compare* Lalli v. Lalli, 439 U.S. 259 (1978) *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimacy). *Compare* Craig v. Boren, 429 U.S. 190 (1976) *with* Califano v. Webster, 430 U.S. 313 (1977) (gender).

309. *See, e.g.*, Holt Civil Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (voting); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (privacy-contraception). *Compare* Sosna v. Iowa, 419 U.S. 393 (1975) (travel) *with* Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage) *with* Califano v. Jobst, 434 U.S. 47 (1977).

310. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (regulation of broadcast of "offensive" speech); *In re* Primus, 436 U.S. 412 (1978) (attorney solicitation); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (defamation-public figures).