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The Burger Court

As the Supreme Court's present term draws to a close, the most sensational news will surely be the Court's decision in the presidential tapes case. Important as the tapes case is for defining the respective powers of the President and the courts, however, it should not obscure the more mundane decisions the Court has been handing down—decisions that may help shape the course of American society for years to come.

The Court, under Chief Justice Warren Burger, has often been called a "conservative" or "strict constructionist" Court. What that means has never been really clear. What is clear is that some major trends from the era of the late Earl Warren have not been reversed but instead continued and extended.

Twenty years ago, with the desegregation decisions, the Supreme Court began a great constitutional revolution. Its effect has been to spread the concept of equality into dusty corners. Although the impetus for this revolution came from the area of race relations, its impact has not been confined to that area. Distinctions among classes of people and categories of all kinds have been examined for their fairness and rationality. Many such distinctions have been found wanting.

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There has been no real retreat from this revolution in the years since Chief Justice Burger took office. The Court has struck down a "suspect classification" here, invalidated an "invidious discrimination" there, and in general forced legislatures to think about the sense and coherence of the distinctions they write into law every hour.

It is a measure of the accomplishment of this revolution that it is now down to the nitty-gritty. This term, the Court struck down a New York election law that allowed absentee voting by qualified voters who were unable to appear at the polls because of illness, job responsibilities, or vacation. The law did not extend the privilege to inmates confined in a county jail and not otherwise disqualified from voting. Writing the opinion, the Chief Justice found this to be a denial of the equal protection of the laws.

The Court also invalidated the provisions of two local school systems regarding maternity leave. One required teachers to leave their classrooms after four months of pregnancy, the other after five. The Court found these to be arbitrary cutoff dates which did not sufficiently take into account individual differences in the ability of pregnant teachers to carry on their duties much further into their pregnancies. These rules of administrative convenience were characterized by the Court as penalties for exercising the constitutionally protected right to bear children.

The same day, the Court, without dissent, read the 1964 Civil Rights Act to require the San Francisco schools to take action to redress the language deficiencies of Chinese students who do not speak English. That this result could be brought about by a law merely forbidding *discrimination* on grounds of race or national origin is a mark of how far the equality revolution has gone.

While the Burger Court has been extending and fine-tuning the work of the Warren Court in the area of collective rights, it has been undoing some of it in the area of individual rights.

The right to privacy has taken a particularly bad beating in the Court this term. In the maternity leave cases, for example, the majority brushed off the benefits of fixed cutoff dates which avoid the need for individual determinations of fitness to teach, without even an acknowledgment that many teachers might prefer to keep the details of their pregnancies between them and their physicians.

More serious has been the cavalier treatment accorded the protections of the Fourth Amendment. That amendment, which forbids "unreasonable searches and seizures," is the bulwark of privacy.

Last term, the Court decided that an individual could effectively consent to a search of his home without a warrant even if he were not advised of his right to refuse to consent to such a search.

This term, the Court showed again it had no great aversion to searches without warrants. In one case, it allowed the consent of one occupant of a house to bind another occupant. In another case, it found a seizure of clothing without a warrant to be lawful because it was "incident to" a valid arrest, even though the seizure took place some 10 hours after the arrest.

The decision that will perhaps have the greatest effects was handed down in the *Calandra* case. *Calandra* casts into doubt the Court's attitude toward the rule that excludes from criminal proceedings evidence obtained in violation of the Fourth Amendment. In *Calandra*, a majority of the Court held that this "exclusionary rule" was not applicable to evidence submitted to grand juries.

One rationale for the exclusionary rule has been the desire to discourage the police from using illegal methods to obtain evidence. By excluding illegally obtained evidence from the criminal trial, the police will be deterred from invading the privacy of suspects. Excluding it from grand jury proceedings will not add to the deterrence gained as a result of excluding it from the trial, whereas it will make the work of grand juries more difficult and complicated. This was the essence of the Court's reasoning.

Warren Burger

To this there is a simple answer: *What trial?* Depending on the jurisdiction, the vast majority (often as many as 90 per cent) of all those indicted plead guilty to some offense and hence are punished without ever going to trial. For them, indictment is conviction, and thus there is a very strong incentive, indeed, for the police to obtain evidence illegally which can be used in grand jury proceedings.

If the exclusionary rule is completely abandoned—and there are hints in *Calandra* that it may eventually be abandoned—the right to privacy will be gravely imperiled. This is not because the police are necessarily deterred by the rule, but because the stamp of official approval will be put on their transgressions.

Some interesting things have been happening in the Supreme Court. As distinctions among people have been broken down, so have the doors that separate individuals from officials. It may be a rather flat and compartmentless society toward which the Court is gently pushing us—one with less arbitrariness in the classification of people but more arbitrariness in the way *all* people can be treated.

It may be inevitable that collective rights are faring better than individual rights, but it is surely curious that this should happen at the hands of a "conservative" Court.