1986

Issue Manipulation by the Burger Court

Suzanna Sherry

Issue Manipulation by the Burger Court: Saving the Community from Itself

Suzanna Sherry*

INTRODUCTION

Questions concerning the proper role of courts in our representative democracy have intrigued constitutional theorists throughout our nation's history. Central to many of these discussions are notions of restraint and activism, notions that focus primarily on the degree to which courts are willing to serve as a countermajoritarian check on an overly zealous legislature. Thus the Warren Court, at least with regard to individual rights, is generally considered to have been an activist court, protecting individual rights even when the constitutional basis was disputable. The Burger Court, in contrast, is often viewed as restrained, deferring to the other branches and interpreting constitutional language narrowly.

To a certain extent, this characterization of the present Court may be accurate. On closer examination, however, the current Court's fidelity to the philosophy of judicial restraint is open to serious question. This Article examines a somewhat disturbing pattern that is emerging from the recent decisions of the conservative bloc of the Court. These conservative justices, who have consistently urged a doctrine of judicial restraint, are at times exhibiting an activism both more subtle and more transformative of the judicial enterprise than any activism practiced by the Warren Court.

Part I of the Article shows that in defining the scope of the issues the Court will decide, these justices in some cases are relying on constitutionally based principles of judicial restraint to deny litigants access to the courts, while in other cases they are implicitly renouncing these principles and reaching out to decide unnecessary, advisory issues. The Article further contends

* Associate Professor, University of Minnesota Law School. I would like to thank Daniel A. Farber, Marcia R. Gelpe, Robert J. Levy, Jonathan R. Macey, and Geoffrey R. Stone for helpful comments on earlier drafts of this article.

that through this selective activism and restraint the Court is not only manipulating the issues it ultimately decides, but also is doing so in a manner that furthers what Professor Geoffrey Stone has called "aggressive majoritarianism":[1] the systematic elimination of the countermajoritarian protection granted by the Constitution to individuals and politically underrepresented groups, including ethnic minorities, women, and criminal defendants.[2]

Part II examines some possible reasons why the Court is pursuing this majoritarian agenda and suggests that this pursuit may stem from a newfound emphasis on community consensus at the expense of individual autonomy. The Article then explains how this communitarian model differs from simple conservatism. In particular, the communitarian model better explains decisions in which the Court narrowly interprets statutes enacted by the majority for the benefit of minorities, thus protecting the majority from its perceived excessive concern for the least fortunate members of society. The Article concludes that the Court's doctrinal shift towards protecting community values may signal the beginning of a fundamental change in the Court's perception of its role in a democratic society.

I. AGGRESSIVE MAJORITARIANISM: EXCISING THE COUNTERMAJORITARIAN PREMISE

A. THE COUNTERMAJORITARIAN PREMISE

Since *Marbury v. Madison*,[3] constitutional theorists have been attempting to reconcile the countermajoritarian practice of judicial review with the majoritarian structure of our representative democracy.[4] Supreme Court invalidation of a state or

---

1. Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15, 15 (1985).

2. This Article focuses primarily on decisions limiting the constitutional and statutory rights of "discrete and insular" minorities as that phrase has come to be understood, *see* authorities cited *infra* note 8. A secondary focus is on the Court's derogation of individual rights that do not necessarily bear any relation to membership in such a group.

The line separating these foci is not always sharp. As developed *infra* notes 167-233 and accompanying text, whether the Court's aggressive majoritarianism in specific cases results in limiting the rights of minorities or limiting more generalized individual rights, the ultimate effect is the same: increased protection of the judicially perceived interests of the community at the expense of individuals.

3. 5 U.S. (1 Cranch) 137 (1803).

4. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (defending noninterpretive judicial review); J. ELY, DEMOC-

federal statute is countermajoritarian in two ways. Initially, the Court itself is neither elected nor directly accountable to any constituency. Further, when the Court invalidates a statute, it is overturning the decision of a popularly elected body; in essence, it is enforcing its own will over that of the electorate. Thus, if the guiding principle of our constitutional structure is government by the consent of the governed, the practice of judicial review offends that structure.

Attempts to reconcile the process of judicial review with pure majoritarianism are doomed to frustration, however, because the tension between majority rule and countermajoritarian protection of individuals and minorities is mandated by the Constitution itself.[5] Although articles I and II of the Constitution establish the principle of majority rule, the Bill of Rights and other protective provisions withdraw from that majoritarian process areas thought to be too dangerous to entrust to the popular will. Justice Jackson recognized this function of the Bill of Rights, stating: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[6] A countermajoritarian premise thus exists in the Constitution itself, and the governmental structure established by the Constitution "contains at least *two* necessary principles—one of majority power, the other of majority constraint."[7]

RACY AND DISTRUST (1980) (defending judicial review to police the representative political process); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) (judicial review is undemocratic, but necessary to protect minority rights); *Constitutional Adjudication and Democratic Theory,* 56 N.Y.U. L. REV. 259 (1981) (symposium on function of judicial review); *Judicial Review versus Democracy,* 42 OHIO ST. L.J. 1 (1981) (symposium on modern theories of judicial review); *Judicial Review and the Constitution—The Text and Beyond,* 8 U. DAYTON L. REV. 443 (1983) (symposium providing critique of noninterpretive judicial review).

5. As Professor Lawrence Sager has noted, "our political tradition contains two components—a commitment to majority rule and a commitment to individual rights—and . . . these two components are often in a state of conflict or tension." Sager, *Rights Skepticism and Process-Based Responses,* 56 N.Y.U. L. REV. 417, 441 (1981).

6. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

7. Bishin, *Judicial Review in Democratic Theory,* 50 S. CAL. L. REV. 1099, 1117 (1977). For other suggestions that the Constitution contains a countermajoritarian premise, see A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 112 (1970); Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory,* 67 CALIF. L. REV. 1049, 1088 (1979); Chemerinsky, *The Price of Asking the Wrong Question: An Essay on*

Recognition of this countermajoritarian premise provides a theoretical justification for judicial review. Some constitutional theorists have focused on the countermajoritarian aspect of the Constitution and have consequently advocated a policy of selective judicial activism. By affording individual and minority rights special judicial protection, these commentators argue that courts can compensate for the inequities inherent in a system of majority rule.[8] Other theorists have emphasized the majoritarian framework of the Constitution to defend a consistent policy of judicial restraint, despite the potentially unjust effect of such a policy on individual and minority rights.[9]

The current Court appears to be embarking on a third

Constitutional Scholarship and Judicial Review, 62 TEX. L. REV. 1207, 1231-32 (1984); Sager, *supra* note 5, at 441; *see also Madison's notes of the Federal Convention, May 31, reprinted in* THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES 84-86 (W. Solberg ed. 1958) (debate over the merits of elite and popular rule in the legislature).

8. *See, e.g.,* J. ELY, *supra* note 4, at 135-79; Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction,* 73 GEO. L.J. 89, 103-14 (1984); *see also* G.E. WHITE, EARL WARREN: A PUBLIC LIFE 356-58 (1982) (suggesting that the Warren Court engaged in this selective activism).

The Warren Court's expansion of the constitutional rights of minorities, criminal defendants, and unconventional or unpopular dissidents exemplifies this approach, emphasizing individual and minority rights, often at the expense of the majority. As explained in Chemerinsky, *supra* note 7, at 1260, the limitations the Constitution places on pure majoritarianism are all designed to protect individual rights of one sort or another. Thus the Warren Court's activism can be viewed as a shift in emphasis toward the individual rights end of the individualism-majoritarianism spectrum, a shift that is being reversed by the present Court. *See also* Sager, *supra* note 5, at 443-45 (noting that the temporary suspension of majority rule, for example, by a commitment to equal rights and worth of individuals, is necessary to maintain majoritarianism's egalitarian appeal).

9. *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH 111-83 (1962); Monaghan, *Constitutional Adjudication: The Who and When,* 82 YALE L.J. 1363, 1392 (1973); Scalia, *The Doctrine of Standing as An Essential Element of the Separation of Powers,* 17 SUFFOLK U.L. REV. 881, 894-97 (1983); Wallace, *The Jurisprudence of Judicial Restraint,* 50 GEO. WASH. L. REV. 1, 1-4, 11-16 (1981). Several scholars have attempted to defend the current Court's restrictive justiciability doctrines against charges of unprincipled decision making. The attempts are ultimately unpersuasive not because the scholars' principles fail, but because the Court, in the cases discussed in the text accompanying *infra* notes 76-166, fails to adhere to them. *See, e.g.,* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement,* 93 HARV. L. REV. 297, 315-21 (1979) (defending justiciability limits as necessary to avoid "premature" decisions, a label fairly applied to the decisions discussed in the text accompanying *infra* notes 76-166); Riggs & Proffitt, *The Judicial Philosophy of Justice Rehnquist,* 16 AKRON L. REV. 555, 599 (1983) (contending that "Justice Rehnquist responds to articulated principles of constitutional adjudication, rather than to an ideological preference").

course, a course that is as yet theoretically unsupported. Although putatively espousing a theory of judicial restraint premised on constitutional arguments, the Court is engaging in an activism that effectively restricts individual and minority rights. This activism appears not only in the Court's substantive decisions,[10] but also in the Court's manipulation of the issues it chooses to decide. This procedural or jurisdiction-defining majoritarianism is particularly illustrative of the Court's new approach and may signal a fundamental shift in the Court's underlying agenda.[11]

---

10. *See, e.g.,* Stone, *supra* note 1, at 19-22. Professor Stone analyzes the Court's "civil liberties" or "individual rights" cases: those involving claims under the first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendments. His analysis shows that between 1978 and 1982, the Court upheld such constitutional claims an average of 39.4% of the time with the yearly percentage ranging from a high of 46% in 1979 to a low of 30% in 1982. In 1983, the Court upheld constitutional claims only 19% of the time. Stone's statistics also bear out the suggestion of a deliberate interventionism by some form of docket manipulation. Between 1978 and 1982, the Court decided 54 or 55 "individual rights" cases each year. In 1983, the Court decided 69 such cases. *Id.* at 17.

11. Professor Vincent Blasi has suggested that the activism of the current Court lacks direction, primarily because the intellectual center of the Court is also the political center. Blasi, *The Rootless Activism of the Burger Court,* in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 210-17 (V. Blasi ed. 1983). This Article, analyzing primarily decisions rendered after Blasi's article, suggests that the Burger Court's activism is beginning to take a disturbing new direction. Blasi's article was written too shortly after Justice O'Connor took office to evaluate the effect of her presence. It is therefore significant that she authored the majority opinion in three of the ten cases discussed in the text and joined the majority in each of the other cases in which she participated. Of the conservative bloc who joined all the opinions, *see infra* note 17, Justice White also wrote three majority opinions (as well as the concurrence in Colorado v. Nunez, 104 S. Ct. 1257 (1984), discussed *infra* note 119), Justice Powell wrote two, Justice Rehnquist one, and Chief Justice Burger no opinions. Justice Blackmun, whose voting pattern in these cases is somewhat unpredictable, *see infra* note 17, wrote the majority opinion in City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). Thus Justice White, identifed by Blasi as a centrist, *see* Blasi, *supra,* at 210, and Justice O'Connor, whose brief tenure prevented Blasi from analyzing her position, may be creating the conservative leadership Blasi identified as missing from the Burger Court. For articles supporting Blasi's thesis that the current Court is not dismantling Warren Court precedents wholesale, see e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 10-20 (1972); Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices,* in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (V. Blasi ed. 1983); Nichol, *An Activism of Ambivalence,* 98 HARV. L. REV. 315, 318-19 (1984); Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts,* 69 GEO. L.J. 151, 153 (1980); *Constitutional Law Conference,* 53 U.S.L.W. 2187, 2187-88 (Oct. 16, 1984) (remarks of Deputy Solicitor General

It is almost a truism that all judges are activists in some areas. Justice Rehnquist imaginatively protects property rights while decrying his colleagues' imaginative protection of privacy rights.[12] When determining both the substance and the sources of constitutional rights, liberals and conservatives generally differ only in result, not methodology. Substantive activism, however, is ordinarily still constrained by jurisdictional notions. Although a substantively activist court may, implicitly or explicitly, seek sources beyond the Constitution to justify its results, in so doing it does not transgress the fundamental nature of the judicial role; even an activist court generally confines its correction of perceived injustices to the cases and controversies before it.[13]

Paul Bator during opening address at United States Law Week's Constitutional Law Conference, Sept. 14-15, 1984). *But see* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies,* 72 GEO. L.J. 185, 193-97 (1983); Chase, *The Burger Court, The Individual, and The Criminal Process: Directions and Misdirections,* 52 N.Y.U. L. REV. 518 (1977).

12. *See, e.g.,* Denvir, *Justice Rehnquist and Constitutional Interpretation,* 34 HASTINGS L.J. 1011, 1020, 1026-27 (1983); Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293, 322-28 (1976); *cf.* Ginsberg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?,* 15 GA. L. REV. 539, 546 (1981) ("calls for judicial intervention, for activist review of legislative and executive decisions, depend less upon the challenger's 'liberal' or 'conservative' ideology, and more on the pragmatic question, whose ox is being gored.").

13. Even Professor Alexander Bickel's critique of the Warren Court's expansion of the dominion of law suggested only that the activist Warren Court made it easier for litigants to bring suit: he noted that the Court "ha[d] not dispensed with the need for a lawsuit; it is still, unlike the President or the Congress, a passive body that must wait for a litigant to move it to action." A. BICKEL, *supra* note 7, at 107 (1970). This Article will suggest that the current Court has gone beyond the passive judicial role, creating for itself not lawsuits, but particular issues.

Moreover, the Warren Court activism, even when it had the effect of expanding the jurisdiction of the Court, is distinguishable on several significant grounds. First, the Warren Court, unlike the present Court, was consistent in its activism; it did not simultaneously issue opinions urging judicial restraint and decisions abandoning principles of restraint. *See generally id.* at 13-16 (the Warren Court adhered to a goal of defending property rights and the freedom of individual enterprise). Second, the jurisdictional decisions of the Warren Court were, by and large, explicit expansions of the power of federal courts to reach substantive questions. Rather than deciding an otherwise nonjusticiable substantive question in dicta without altering the jurisdictional rules—as the present Court frequently does—the Warren Court simply made it easier for litigants to petition the federal judiciary. Opening the federal courts to more litigants is not equivalent to reaching questions unnecessary to a decision. Unlike the present Court, the Warren Court kept separate the spheres of justiciability and substance. *See, e.g.,* Flast v. Cohen, 392 U.S. 83 (1968) (relaxing

A rather different sort of activism has lately been creeping onto the Court. In the past few years, the Court has selectively ignored canons of judicial restraint in defining the very scope of its jurisdiction, engaging in procedural as well as substantive activism. It has often exceeded the boundaries of the cases presented to it, reaching out to decide questions that were not necessary to the resolution of the case. Consideration of some of these unnecessary questions, moreover, offends constitutional principles of federalism or separation of powers, principles the Court uses in other cases to avoid redressing virtually indisputable violations of constitutional and statutory rights. What makes this particular type of activism so dangerous is its potential for damaging the credibility of the judiciary by politicizing it.[14] What makes it so unprincipled is its internal inconsistency. A court that decides property issues in favor of right-seeking plaintiffs and privacy issues in favor of right-infringing defendants is at least candid; moreover, it opens itself to public and academic criticism. This Court, however, hides behind a cloak of nonjusticiability in some cases, defeating criticism on the merits, while in other cases it extends the sweep of its robes, exercising jurisdiction it arguably does not have.[15]

---

taxpayer standing requirements without reaching merits of establishment clause claim); Sanders v. United States, 373 U.S. 1 (1963) (expanding availability of habeas corpus review without reaching the merits of petitioner's habeas corpus petition); Fay v. Noia, 372 U.S. 391 (1963) (same); Baker v. Carr, 369 U.S. 186 (1962) (narrowing political question doctrine without reaching merits of apportionment claim). *But see* Miranda v. Arizona, 384 U.S. 436 (1966) (advisory opinion delineating procedural safeguards for custodial interrogation); Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to states although appellant argued only for narrower grounds for reversal). Of course, the current Court's surreptitious method is necessary in order to preserve the impression of consistent judicial restraint. Finally, the Warren Court used its activism on behalf of individual rights while the present Court uses it almost exclusively against individual rights. The former use of activism is at least theoretically justifiable. *See* authorities cited *supra* note 8.

Justice Rehnquist previously has been accused of reaching questions unnecessary to disposition of the case. *See* Shapiro, *supra* note 12, at 341-49. Many of the opinions discussed by Professor Shapiro, however, were dissents; the trend toward a solid majority of dicta dispensers seems to be a more recent phenomenon. *See supra* note 11.

14. *See* Varat, *Variable Justiciability and the* Duke Power *Case,* 58 TEX. L. REV. 273, 319 (1980). The same argument has been made in the context of the Reagan administration's attempts to turn the Solicitor General's office into a political tool. *See* Stewart & Wermiel, *Family Feud: Reagan Conservatives Assail Solicitor General For His Independence,* Wall St. J., Sept. 6, 1984, at 1, col. 1.

15. The difference between substantive activism and procedural or jurisdiction-defining activism is parallel to the difference Professor Lawrence

This pattern of selective restraint and procedural activism is starkly illustrated by a series of recent cases in the criminal procedure and civil rights areas. Through an examination of several decisions, the basic pattern emerges: principles of judicial restraint are used in some cases to avoid enforcing individual constitutional and statutory rights while procedural activism is employed in other cases when opportunities for aggressively majoritarian decisions present themselves.

B. RENOUNCING JUDICIAL ACTIVISM: SLAMMING THE COURTHOUSE DOOR

The conservative members of the present Court have indicated quite clearly, both in their opinions and in their extra-judicial writings, that they espouse a doctrine of judicial restraint, at least on jurisdiction or justiciability issues.[16] In particular, in a series of four cases denying plaintiffs standing to challenge governmental actions alleged to infringe individual rights, the same five justices[17] outlined a doctrine of judicial restraint

---

Sager has identified between rights skepticism and court skepticism. *See* Sager, *supra* note 5, at 419-20. Rights skepticism suggests judicial restraint based on a view that the Constitution protects only a narrow range of individual rights, and is thus the rejection of substantive activism. Court skepticism is grounded "on the view that primary responsibility for the identification and enforcement of constitutional rights rests with the organs of government that are more representative of the popular will—and possibly better qualified in other institutional ways—than the courts." *Id.* This implicates the separation of powers concerns that seem to underlie the current Court's professed adherence to principles of judicial restraint. Rejection of court skepticism opens the way for the procedural or jurisdiction-defining activism described in the text.

16. In addition to the cases analyzed in this Article, see Burger, *Who Will Watch the Watchman,* 14 AM. U.L. REV. 1, 2, 22-23 (1964) (discussing alternatives to suppression of evidence from search and seizure); Denvir, *supra* note 12; Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693 (1976) (advocating judicial restraint in deference to majority rule); Riggs & Proffitt, *supra* note 9, at 590, 595-97; Jenkins, *The Partisan: A Talk with Justice Rehnquist,* N.Y. Times, Mar. 3, 1985, § 6 (Magazine), at 28; *cf.* Blasi, *supra* note 11, at 206 ("Only with regard to its interpretation of the technical doctrines and statutes that demarcate the jurisdiction of the federal courts can the Burger Court plausibly be said to have abided by the canons of judicial restraint."). One author has suggested that while Justice Rehnquist cannot claim to be a consistent practitioner of judicial restraint, he at least consistently applies his own notion of federalism. Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism,* 91 YALE L.J. 1317, 1360-63 (1982). The problem with this argument is that at least one of the cases discussed *infra* notes 76-166 and accompanying text disregards state autonomy and is thus inconsistent with Justice Rehnquist's advocacy of federalism as well as of restraint. *See, e.g.,* Michigan v. Long, 463 U.S. 1032 (1983).

17. This narrow majority consists of Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor. All five of these justices also joined

grounded on the Constitution itself. In each of these cases the majority rejected plausible constitutional and institutional arguments in favor of granting standing, and denied access to the federal courts. Moreover, in each of the cases it is hard to imagine that even a politically conservative or philosophically passivist court reaching the merits would have been able to avoid ruling for the plaintiffs. Each case involved a patent violation of constitutional or other legal rights governed squarely by precedent politically difficult to overrule.[18] These justices have thus renounced the activist position taken by the Warren Court and have chosen a considerably narrower role for the federal courts in invalidating the actions of the popular branches.[19]

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[20] the plaintiffs challenged the Secretary of Health, Education, and Welfare's conveyance of surplus federal property to Valley Forge Christian College, an admittedly sectarian school in eastern Pennsylvania. The plaintiffs alleged that the conveyance of the $577,500 parcel, at no cost to Valley Forge, violated the establishment clause of the

---

the majority in each of the cases *extending* jurisdiction in other contexts, discussed in the text accompanying *infra* notes 76-166. Justices Brennan and Marshall consistently dissented in both sets of cases, except Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). *See infra* note 152. Justice Blackmun dissented from all the standing cases and joined the majority opinion in all but two (United States v. Place, 462 U.S. 696 (1983), and *Sea Clammers*) of the cases extending jurisdiction. Justice Stevens dissented from all of the standing cases and all but one (*United States v. Place*) of the extension cases. In addition, Justice Stevens has sharply criticized the majority for its resolution of unnecessary issues. *See* Colorado v. Nunez, 104 S. Ct. 1257, 1259 (1984) (Stevens, J., concurring); Grove City College v. Bell, 104 S. Ct. 1211, 1225-26 (1984) (Stevens, J., dissenting); Michigan v. Long, 463 U.S. 1032, 1065-72 (1983) (Stevens, J., dissenting); *see also* L.A. Daily J., Aug. 10, 1982, at 15, col. 3 (Justice Stevens's remark to ABA meeting that the Court engaged in "unnecessary lawmaking").

18. *Cf.* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 664 (1977) (contractions of standing "provid[e] an especially useful approach for the Court when a decision on the merits might overturn settled precedent.").

19. Others have accused the Burger Court of using standing requirements to mask hostility to claims on the merits. *See, e.g.*, Tushnet, *supra* note 18, at 663-64. Until very recently, however, a principled defense of stringent justiciability and standing requirements was possible, although more frequently constructed by academics than by the Court itself. *See* authorities cited *supra* note 9. The crucial change in the last few years is that the Court has maintained its posture of judicial restraint when doing so denies protection to individual rights, while simultaneously expanding its jurisdiction in order to decrease the protection afforded individual rights by Congress and the states. *See infra* text accompanying notes 76-166.

20. 454 U.S. 464 (1982).

first amendment.[21] Justice Rehnquist's opinion for the majority held that the plaintiffs, members of a nonprofit association of taxpayers, lacked standing to challenge the conveyance. The Court rejected the claim that the plaintiffs had standing as taxpayers under the *Flast v. Cohen*[22] doctrine and reversed the Third Circuit's allowance of generalized "citizen standing."

Despite intimations in earlier cases that at least some standing limitations had a prudential rather than a constitutional rationale,[23] Justice Rehnquist explicitly grounded his rejection of the plaintiffs' suit on article III. He began his opinion

21. The transfer of valuable property to a pervasively sectarian school almost certainly would have been held to violate the establishment clause had the Court reached the merits. *See, e.g.,* Meek v. Pittenger, 421 U.S. 349, 364-66 (1975) (invalidating various types of state aid to religious schools); Tilton v. Richardson, 403 U.S. 672, 686-88 (1971) (upholding building grants to sectarian schools, only because buildings were to be used exclusively for secular educational purposes).

22. 392 U.S. 83 (1968). As Justice Brennan argued persuasively in dissent in *Valley Forge*, it is not at all clear that *Flast* required a denial of standing to these plaintiffs. *Valley Forge,* 454 U.S. at 505-13 (Brennan, J., dissenting). Before *Valley Forge*, some scholars had suggested that *Flast* should be interpreted to confer standing on taxpayers seeking to challenge any governmental expenditure as violative of the establishment clause, whether or not it is specifically an exercise of the congressional power to tax and spend. *See, e.g.,* Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 605, 632-33 (1968). The crux of the *Flast* holding seems to be the emphasis on establishment clause challenges. Alleged violations of the establishment clause present a unique standing problem, insofar as that clause protects the rights of all citizens, but violation does not hurt one individual citizen more than any other. Establishment clause violations create a shared individual injury. *See generally* Americans United for Separation of Church and State, Inc. v. HEW, 619 F.2d 252, 264-66 (3d Cir. 1980); Monaghan, *supra* note 9, at 1369; Scalia, *supra* note 9, at 892. The clause protects individual rights, unlike other clauses previously found insufficient to support citizen or taxpayer standing. *See* Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974) (incompatibility clause); United States v. Richardson, 418 U.S. 166 (1974) (statement of accounts clause); Frothingham v. Mellon, 262 U.S. 447 (1923) (tenth amendment). Unlike most of the Bill of Rights provisions, however, the establishment clause does not guarantee specific rights to any particular citizen. Although alleged speech clause violations may be raised by any citizen whose expression is suppressed, and fourth amendment violations by any citizen whose house is searched, the question of whose rights were violated by the transfer of property to a religious institution remains a more problematic issue.

23. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 499-500 (1975); Flast v. Cohen, 392 U.S. 83, 92-94 & nn.6-7, 97 (1968). *Flast* is especially relevant, because the Court there suggested that the limitations on taxpayer standing were in fact prudential rather than constitutionally required. *Flast,* 392 U.S. at 94-101. The majority opinion in *Valley Forge* acknowledged the prudential aspect of the standing requirement, *see* 454 U.S. at 474-75, but chose instead to characterize standing purely as an article III requirement. *See id.* at 475-76.

with a six page excursion into the constitutional basis for the standing requirement,[24] and the link between judicial restraint and the command of the Constitution is illustrated by passage after passage.[25]

The square holding of *Valley Forge* is that the plaintiffs lacked the requisite personal stake to satisfy the minimum requirements of article III: the Court professed itself "unwilling to countenance such a departure from the limits on judicial power contained in Art. III."[26] Thus, in addition to denying standing to particular plaintiffs, *Valley Forge* clarified the constitutional limits on the Court's power. The majority used the case to suggest a diminished role for the courts and a retreat from active interference with the other branches of government.

More recently, the Court elaborated its view that standing requirements are constitutionally based, suggesting that they are mandated by principles of separation of powers. In *Allen v. Wright*,[27] parents of black schoolchildren attending public schools sought to require the Internal Revenue Service to develop effective procedures to enforce the IRS rule against tax exemptions for private schools with racially discriminatory policies. The parents alleged two distinct injuries caused by the agency's allowance of tax-exempt status to discriminatory schools. The first allegation was that the plaintiffs were harmed "directly by the mere fact of Government financial aid to discriminatory private schools."[28] Additionally, they alleged that the exemptions to discriminatory private schools inter-

24. *Valley Forge*, 454 U.S. at 471-76.

25. *See, e.g., id.* at 471, where the Court stated:

> The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. . . .
>
> . . . .
>
> . . . Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

Id. at 471-73.

26. *Id.* at 490.

27. 104 S. Ct. 3315 (1984).

28. *Id.* at 3326.

fered with federal and local officials' efforts to desegregate public schools.[29]

The conservative majority, in an opinion by Justice O'Connor, assumed without deciding that the tax exemptions were the equivalent of government discrimination[30] but found that the plaintiffs lacked standing to raise either of the claimed harms. The Court first rejected any claim based on "citizen standing," or the right to have the government act in a constitutional manner.[31] Justice O'Connor then generously characterized the plaintiffs' first injury as "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race."[32] This injury was held insufficient to create standing because the injury did not result from discrimination against the plaintiffs personally; none of the children had applied to or been rejected by the allegedly segregated private schools.[33] Although the discussion of this first injury is perhaps not very compassionate, it does little violence to earlier precedent.[34]

The Court's treatment of the plaintiffs' second claim—that ineffective IRS enforcement interfered with effective integration of the children's public schools—is more problematic. The Court's analysis of this issue confirmed that the doctrine of standing is both grounded on and illuminated by separation of powers principles. This analysis, the Court noted, is related to the philosophy of judicial restraint, of the necessity for "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[35] Applying these principles to the case at hand, the Court held that although the children's "diminished ability to receive an education in a racially integrated school" was a legally cognizable injury, the injury was "not fairly traceable to the Government conduct [plaintiffs] challenge[d] as unlawful."[36] This conclusion

29. *Id.* at 3322.

30. *Id.* at 3326 n.20.

31. *Id.* at 3326-27. This tracks the *Valley Forge* reasoning.

32. *Id.* at 3326.

33. *Id.* at 3327.

34. For analogous decisions holding that plaintiffs have suffered no individual harm, see Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222-23 (1974); United States v. Richardson, 418 U.S. 166, 176-77 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1972).

35. *Wright,* 104 S. Ct. at 3324 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)).

36. *Id.* at 3328.

is not surprising in light of such cases as *Warth v. Seldin*[37] and *Simon v. Eastern Kentucky Welfare Rights Organization*[38] which suggest that when the harmful effect of governmental action is partly dependent on the actions of independent third parties, the plaintiffs have failed to show sufficient causal connection between their injury and the governmental action.[39]

In *Allen v. Wright*, however, Justice O'Connor declined to rely on this well-established doctrine of independent intervening actors as a bar to standing. Instead, she examined the chain of causation in light of separation of powers considerations[40] and found the links too weak to fulfill the requirements of article III. The crux of her analysis was that federal courts are not a proper forum for "general complaints about the way in which government goes about its business."[41] The limited role of the judiciary, she continued, precludes it from adjudicating broad challenges to executive programs. Thus, when plaintiffs "seek a restructuring of the apparatus established by the Executive

37. 422 U.S. 490 (1975).

38. 426 U.S. 26 (1976). The district court opinion and Supreme Court briefs of both petitioners (treasury officials, and the founder of an exempt private school who had been permitted to intervene in the district court) relied heavily on *Eastern Kentucky* as holding that third party intervention made causation too speculative. *See* Wright v. Miller, 480 F. Supp. 790, 794-95 (D.D.C. 1979); Brief for Petitioner Allen at 21, Allen v. Wright, 104 S. Ct. 3315 (1984); Brief for Federal Petitioners at 32-35, *id.*

39. In *Warth,* allegations that restrictive zoning ordinances prevented the construction of low income housing were insufficient to confer standing on low income families, because the dependence on available builders made causation too speculative. *See Warth,* 422 U.S. at 504-07. In *Eastern Kentucky,* 426 U.S. 26 (1976), a challenge to the federal medical reimbursement structure, which allegedly made it possible for private hospitals to refuse care to low income patients, failed on similar grounds because the plaintiffs could not demonstrate with certainty the hospitals' response to a restructured federal program. *See Eastern Kentucky,* 426 U.S. at 42-45.

40. *See Wright,* 104 S. Ct. at 3329-30. Although the text of the opinion is rather vague about the connection between causation and separation of powers, Justice O'Connor stated in a footnote that "we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement." *Id.* at 3330 n.26. Further, she noted that "[t]he idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS." *Id.* at 3329 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)). Petitioner Allen's brief had made more limited claims for principles of separation of powers: such principles "*underscore* the validity of this Court's refusal to recognize . . . citizen standing." Brief for Petitioner Allen at 26, Allen v. Wright, 104 S. Ct. 3315 (1984) (emphasis added).

41. *Wright,* 104 S. Ct. at 3330.

Branch to fulfill its legal duties," standing is lacking.[42] Instead of merely denying standing under established precedent, the majority used the opportunity to reiterate and elaborate the constitutional basis for its philosophy of restraint.

The asserted link between the role of the judiciary and the question of causation is somewhat puzzling. Justice O'Connor's suggestion that the requested relief would unduly interfere with the duties of the executive branch implies that such relief could never be granted, to *any* plaintiff. Under this view, the issue appears to be one of general justiciability rather than one of standing. The Court has frequently noted, however, that standing "focuses on the party seeking to get his complaint before a federal court *and not on the issues he wishes to have adjudicated.*"[43] Moreover, even if, as the Court suggested, the line between standing and other doctrines of justiciability is not clearly demarcated, this means only that separation of powers principles color the *general* question of standing. It is incomprehensible to assert, as Justice O'Connor explicitly did, that the delineation of the proper role of the courts is uniquely relevant to the specific *causation* inquiry.[44]

Allen v. Wright, moreover, was a singularly inappropriate context for such an excursion into constitutional structure. Initially, the plaintiffs' challenge in *Wright* did not raise an ordinary complaint about the way in which the government goes about its business. Protection of the rights of minorities against the tyranny of the majority has widely been viewed as the most justifiable exercise of the countermajoritarian power of judicial review.[45] Even one of the staunchest defenders of strict stand-

42. *Id.*

43. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 484 (1982) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)) (emphasis added). Several commentators have suggested that standing limitations in general stem not from separation of powers considerations, but from the necessity of allocating scarce judicial resources. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 670-83 (1973); *see also* Flast v. Cohen, 392 U.S. 83, 100-01 (1968) ("The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."); Brilmayer, *supra* note 9, at 301, 306 (justiciability concerns not based on separation of powers).

44. *Wright*, 104 S. Ct. at 3330; *see also supra* note 40.

45. *See, e.g.*, A. BICKEL, *supra* note 9, at 23-28; J. CHOPER, *supra* note 4, at 70-78; J. ELY, *supra* note 4, at 135-80; Brilmayer, *supra* note 9, at 301; Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 135-36 (S. Hampshire ed. 1956).

ing requirements as essential to separation of powers has suggested that

> the law of standing roughly *restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority,* and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.[46]

The plaintiffs in *Wright* sought the aid of the judiciary precisely because racial prejudice had significantly narrowed their access to the political branches. By resorting to constitutional separation of powers arguments to justify its refusal to hear the plaintiffs' constitutional claims, the Court thus reduces the legitimate role of the judiciary to a virtual nullity.

Additionally, there is a sharp contrast between the causal flaw held to implicate separation of powers concerns in *Wright* and the causal flaw actually identified and relied on by the Court. Justice O'Connor's separation of powers rationale related to the weakness in the chain of causation. Her underlying argument was that separation of powers principles dictated that the respondents' injury was not "fairly traceable" to the challenged action because the "links in the chain of causation . . . are far too weak."[47] In a different passage, however, she stated that the required causation could be established "only if there were enough racially discriminating private schools receiving tax exemptions . . . for withdrawal of those exemptions to make an appreciable difference in public-school integration."[48]

---

46. Scalia, *supra* note 9, at 894 (original emphasis altered). The sentiment is not new. James Madison urged adoption of the Bill of Rights on the same theory:

> If [individual rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or the Executive; they will naturally [be] led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 ANNALS OF CONG. 439 (J. Gales ed. 1789).

47. *Wright,* 104 S. Ct. at 3329.

48. *Id.* at 3328. Justice Brennan pointed out in dissent that the plaintiffs had in fact alleged that significant numbers of discriminatory private schools were receiving tax exemptions. *Id.* at 3337-38 & n.5. Plaintiffs alleged generally that "many" racially segregated schools were tax-exempt. Complaint paras. 2, 21-22 (Joint Appendix at 17-18, 24-26), Allen v. Wright, 104 S. Ct. 3315 (1984). Plaintiffs then listed by name 26 tax-exempt schools and three schools which had applied for exemptions located in their communities, characterizing them as "schools which have insubstantial or nonexistent minority enrollments and which are located in or serve desegregating public school districts." Complaint paras. 23, 24-48 (Joint Appendix at 26-38), *id.* These schools were

This statement relates not to the chain of causation, but rather to the *significance* of a direct causation. Even if there had been many more private schools receiving tax exemptions, however, the government's sufficiently "significant" contribution to the plaintiff's ultimate injury still would have been tempered by the actions of several independent entities (for example, the private schools themselves and the parents of white children attending those schools), and thus the links still would be weak. In the final analysis, even if separation of powers considerations constitute a policy limit on the length of an otherwise permissible chain of causation, such considerations should be irrelevant to the question of the significance of the government's contribution to the harm.

Ultimately, the Court's reasoning in *Allen v. Wright* is questionable. Its use of separation of powers principles to explain, rather than merely to justify, standing requirements is a bit like using Kant to explain the Constitution.[49] If any constitutional notion is more amorphous than the concept of standing, it is the concept of separation of powers. Moreover, the inexact and unpersuasive way the Court employed the principles suggests either that the Court's philosophy of restraint merely disguises hostility to the plaintiffs' claims on the merits or that the Court is so committed to the constitutional rationale for judicial restraint that it is willing to expound constitutional doctrine uncritically and indiscriminately.[50]

In *Los Angeles v. Lyons*,[51] the same conservative majority intertwined its denial of standing on article III "case or controversy" grounds with a discussion of principles of federalism. Lyons, a black man, was stopped by two Los Angeles police officers for a traffic violation. His claim alleged that the officers, without provocation, applied a chokehold which rendered him

---

alleged to have a total enrollment of up to 11,547 students. Plaintiffs identified them as merely representative of "thousands of other" similar schools. Complaint paras. 38, 49 (Joint Appendix at 32, 38), *id.* As Justice Brennan noted, the allegations of the complaint need not be proven on the merits in order to withstand a motion to dismiss; moreover, the plaintiffs should have been given an opportunity to amend their complaint. *Id.* at 3337-38 & nn.5-6.

49. *Cf.* D. RICHARDS, THE MORAL CRITICISM OF LAW 44-134 (1977) (applying the moral theories of John Rawls to constitutional questions).

50. Hostility to the merits is the less likely explanation, because Justice O'Connor went out of her way to distinguish, however unpersuasively, earlier cases reaffirming the federal judicial commitment to desegregation efforts. *See Wright*, 104 S. Ct. at 3330-32. In fact, at least one other recent case also suggests that the Court is committed to a strict separation of powers doctrine. *See* INS v. Chadha, 462 U.S. 919, 951-59 (1983).

51. 461 U.S. 95 (1983).

unconscious and damaged his larynx. He brought suit in federal district court under 42 U.S.C. § 1983, seeking both damages and injunctive relief. He requested the court to enjoin the further use of chokeholds absent a risk of death or serious bodily injury to the police officers or others. The district court, finding the chokehold to have been authorized by the Los Angeles Police Department, issued a preliminary injunction[52] and the court of appeals affirmed.[53] In an opinion authored by Justice White, the Supreme Court reversed, holding both that Lyons lacked standing to press claims for injunctive relief and that injunctive relief would be inappropriate even if he did have standing.[54]

The Court first declined to declare the case moot, even though the city had issued a moratorium on the use of chokeholds except under circumstances otherwise authorizing the use of deadly force.[55] The Court next addressed the claim for injunctive relief under alternative analyses. In his first analysis, Justice White did not dispute Lyons's standing to seek damages. Instead, he separated the issue of standing to seek damages from the issue of standing to seek injunctive relief and found the latter to be lacking because Lyons had failed to establish a "real and immediate threat" that he would again be subjected to an unlawful chokehold.[56] Under Justice White's

52. The district court enjoined the use of chokeholds absent a threat of death or serious bodily injury, and ordered an improved police training program and reporting requirements. *See id.* at 100. The preliminary injunction never went into effect as a result of successive stays by both the court of appeals and the Supreme Court. *See id.* at 100 n.3.

53. *Id.* at 100.

54. *Id.* at 110-11.

55. *Id.* at 101. The reason given by the Court was that "the moratorium by its terms is not permanent." *Id.*

56. *Id.* at 105-07 & nn.7-8. The Court suggested that Lyons would have had standing had he alleged that chokeholds without provocation were authorized by city policy, which led to a dispute between the majority and the dissent over the portent of Lyons's allegations. The majority contended that Lyons never alleged that it was official policy to use chokeholds in the absence of any provocation but only that official policy allowed the use of chokeholds in the absence of threat of death or serious bodily injury. *See id.* at 105-06 & n.7. The dissent aptly noted that the complaint alleged *both* that Lyons himself was choked without provocation (confirmed by the district court findings) *and* that he was choked pursuant to an official policy:

> [The complaint] fails to allege *in haec verba* that the city's policy authorizes the choking of suspects without provocation. I am aware of no case decided since the abolition of the old common-law forms of action, and the Court cites none, that in any way supports this crabbed construction of the complaint. A federal court is capable of concluding for itself that two plus two equals four.

alternative analysis, it was assumed that Lyons's damages suit afforded him standing to seek an injunction. The Court found nevertheless that equitable relief was unavailable because Lyons had made no showing of irreparable injury. As under the first analysis, the lack of any real and immediate threat of future injury was dispositive.[57]

The Court's separation of the standing question into two independent questions under the first analysis is peculiar. Initially, the question of standing focuses on the party seeking relief, not on the issues that party wishes to have adjudicated.[58] There was no question that Lyons had the personal stake in the outcome of the controversy required to get him into federal court, because the majority acknowledged his standing to pursue his damages claim. By fragmenting the general standing inquiry into separate inquiries for each of the plaintiff's claims, the Court created for itself a before-the-fact "line item veto" power that may undercut the utility of the broad discretion courts have to fashion appropriate equitable relief.[59]

There is another problem with dividing the standing inquiry. The court of appeals had held that Lyons had standing to seek injunctive relief " 'if only for a period of a few seconds' while the stranglehold was being applied to him" and that the claim avoided mootness because it was " 'capable of repetition [yet evaded] review.' "[60] The Court rejected this argument, on the ground that Lyons's live damage suit ensured that his claim would not evade review. Thus, for the purpose of determining Lyons's standing, the Court separated the damage claim from the injunctive claim, but for the purpose of determining mootness, the Court considered the two claims together.[61]

Because the Court held that Lyons did not have standing to

Id. at 121 (Marshall, J., dissenting) (footnote omitted).

57. *Id.* at 111.

58. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 484 (1982) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)).

59. *Cf.* Los Angeles v. Lyons, 461 U.S. 95, 131 (1983) (Marshall, J., dissenting) (noting that "there are dangers inherent in any doctrine that permits a court to foreclose any consideration of [a] remedy by ruling on the pleadings that the plaintiff lacks standing to seek it.").

60. *See Lyons,* 461 U.S. 95, 109 (1983).

61. The Court also suggested that it was unlikely that Lyons himself would again be subjected to a chokehold and thus that the claim was not "capable of repetition." *Id.* Although this is a reasonable if unpersuasive argument in the context of standing, it is absurd in this context in light of such cases as Roe v. Wade, 410 U.S. 113, 125 (1973), holding that a pregnancy coming to term does not moot a case concerning abortion.

pursue his injunctive claim, one can only wonder why the Court held alternatively that even if Lyons did have standing to pursue the claim, equitable relief would not be available. The answer might lie in Justice White's exposition on the federalism concerns that "counsel[ed] restraint"[62] against such relief. After noting that suits brought under section 1983 are exempt from the ban against issuing injunctions directed at state court proceedings, he argued that this exemption does "not displace the normal principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities."[63] These concerns were underscored in Justice White's concluding paragraph, where he stated that

> the state courts need not impose the same standing or remedial requirements that govern federal court proceedings. The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court absent far more justification than Lyons has proffered in this case.[64]

Because the question of the availability of equitable relief was not even raised in the petition for certiorari,[65] the most logical reason for this discussion is that the Court was eager to expound upon the federalist principles that underly its notions of judicial restraint.

In *Pennhurst State School & Hospital v. Halderman*,[66] the Court also relied on principles of federalism to bar a suit by plaintiffs seeking vindication for undisputed violations of individual rights. Residents and potential residents of Pennhurst, a state institution for the mentally handicapped, brought suit against various state officials, seeking to enjoin institutional conditions that violated state and federal law. After an initial skirmish over the scope of the rights established by federal law, the lower courts found numerous violations of state law and ordered injunctive relief, including the immediate removal of residents from Pennhurst and the appointment of a special master to supervise the orders of the court.[67] The Supreme Court re-

62. Los Angeles v. Lyons, 461 U.S. 95, 112 (1983).
63. *Id.*
64. *Id.* at 113.
65. *See id.* at 132 n.22, 134 (Marshall, J., dissenting).
66. 104 S. Ct. 900 (1984).
67. The district court initially granted the injunction on the basis of violations of the due process clause, the eighth amendment, the equal protection clause, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), and § 201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA.

versed, holding that the eleventh amendment prohibited federal courts from granting injunctive relief ordering state officials to conform their conduct to state law.

The Court's central argument revolved around the fine distinctions drawn in *Ex parte Young*[68] between suits against a state and suits against officials of the state and in *Edelman v. Jordan*[69] between prospective equitable relief and retrospective monetary relief. Had the lower court concluded that conditions at Pennhurst violated *federal* law as well as state law, precedent arguably would have compelled the conclusion that injunctive relief was appropriate.[70] In *Pennhurst*, state officials, and not the state itself, were named as defendants, satisfying the *Ex parte Young* requirement, and only prospective equitable relief was sought, satisfying the *Edelman v. Jordan* requirement. The Supreme Court held, however, that the *Young* "exception" to the eleventh amendment foreclosure of suits against a state, was a "fiction" accepted as necessary to reconcile the competing interests of state sovereignty and the vindication of federal rights.[71] When the right at issue is a state right rather than a federal right such a reconciliation is unnecessary, and respect for state sovereignty compels the federal court to refrain from "instruct[ing] state officials on how to conform their conduct to state law."[72]

In so holding the Court essentially used principles of federalism to eviscerate the protections accorded by a majority of Pennsylvanians to an identifiable minority of their less fortunate citizens. Moreover, it did so under dubious circumstances.

STAT. ANN. tit. 50, § 4201 (Purdon 1969 & Supp. 1985). *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1314-25 (E.D. Pa. 1977). The court of appeals affirmed, grounding plaintiffs' right to rehabilitation in the least restrictive environment solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, (DDABRA), 42 U.S.C. § 6010 (1982) (recodified at 42 U.S.C.A. § 6009 (West Supp. 1985)). *See* Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 95-100, 104-07 (3d Cir. 1979) (en banc). The Supreme Court reversed, holding that DDABRA created no substantive rights, and remanded for consideration of the other bases for the remedial order. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18 (1981). The court of appeals on remand reaffirmed the propriety of the remedial order, basing its decision on state law violations and not reaching the constitutional or other federal questions. *Halderman,* 673 F.2d 647, 651-56 (3rd Cir. 1982) (en banc). This last decision was the one reviewed in the case discussed in the accompanying text.

68. 209 U.S. 123, 159-60 (1908).

69. 415 U.S. 651, 668 (1974).

70. The Court reserved this question, *see Pennhurst,* 104 S. Ct. at 910 n.13.

71. *See id.* at 911.

72. *Id.*

The federalist principles it sought to vindicate were not clearly established, as demonstrated both by Justice Stevens's argument in dissent that the majority tacitly overruled or repudiated at least twenty-eight cases,[73] and by the majority's admission that "there is language in the early cases that advances the [dissent's] authority-stripping theory."[74] Moreover, two years earlier the Supreme Court itself, in its first consideration of this case, had remanded to the lower court to determine "whether state law provides an independent and adequate ground which can support the court's remedial order."[75] Thus, whether the *Pennhurst* decision is ultimately a persuasive interpretation of federalist doctrine or not, it is evidence that, at least in that context, the Court is deeply committed to protecting the states from intrusion by the federal judiciary.

The cases discussed above, each denying relief for claims of individual rights, paint a picture of a Court firmly committed to principles of judicial restraint. Although arguments have been presented that question the soundness of the decisions, they are at least consistent in that in each case the Court grounded its denial of access to the federal courts on constitutional notions. The following discussion shows how these same justices have not only ignored these constitutionally based notions of restraint but also have overreached to restrict further individual rights when the appropriate opportunity was presented.

C. Practicing Judicial Activism: Procedural Expansion

1. Rights of Criminal Defendants

In three cases in which appellate courts had reversed convictions for a trial court failure to exclude evidence obtained in violation of the fourth amendment, the Supreme Court chose to reach the substantive fourth amendment question in disregard of settled principles of justiciability and federalism.[76] In each case, the result was reinstatement of the conviction, the narrowing of the protection afforded by the fourth amendment in

73. *Id.* at 943 & n.50 (Stevens, J., dissenting).

74. *Id.* at 914.

75. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 31 (1981).

76. The cases discussed in the text are meant to be illustrative, not exhaustive. For additional cases in which the same group of justices has decided unnecessary constitutional questions against individual rights in other contexts, see generally Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984); United States v. Hasting, 461 U.S. 499 (1983); Morris v. Slappy, 461 U.S. 1 (1983).

future cases, or both.[77] This course is doubly disingenuous: if a restrained court believes prior precedent to have been incorrectly decided, it ought *first* to await an appropriate case and, *second*, to overrule it with a statement of reasons, not whittle away at it.[78]

In *United States v. Place*,[79] the Court went out of its way to condone the use of trained dogs to detect marijuana in airline travellers' luggage. Approximately ninety minutes after federal narcotics agents seized defendant Place's luggage at New York's LaGuardia airport, the luggage was exposed to a narcotics detection dog at Kennedy airport. The dog reacted positively, agents obtained a search warrant for the luggage, and Place was subsequently convicted on charges of possession of the cocaine discovered in his luggage.[80] The Court of Appeals for the Second Circuit reversed the district court's denial of Place's suppression motion, holding that even if *arguendo* the initial stop was constitutional, the ninety-minute detention of Place's baggage transformed it into an unconstitutional seizure.[81] The Supreme Court affirmed, agreeing with the court of appeals that the length of detention of the luggage alone belied the claim that the seizure was reasonable in the absence of probable cause.[82]

Justice O'Connor, however, writing for a six justice majority, was not content to affirm the reasoning and result of the Second Circuit. Instead, she gratuitously stated that the expo-

77. The Burger Court has previously dealt with Warren Court fifth amendment cases by the same maneuver. *See generally* Dershowitz & Ely, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1204-08 (1971) (a discussion of a case in which the Burger Court reached out to consider a *Miranda* issue and decided the issue contrary to the weight of authority); Stone, *The* Miranda *Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 106-69 (1977) (discussion of decisions in which the Burger Court undermined *Miranda*).

78. Adherents of different judicial philosophies—from the most radical to the most conservative—have endorsed this limitation on judicial behavior. *See, e.g.,* Stone, *supra* note 77, at 168-69 (criticizing Burger Court undermining of *Miranda* as poor craftsmanship); Tushnet, *supra* note 18, at 664 ("Candor requires that the Court overrule cases with which it no longer agrees . . . ."); *cf.* Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings,* 50 GEO. WASH. L. REV. 1, 15 (1981) (suggesting that adherents of judicial restraint should overturn activist decisions only rarely).

79. 462 U.S. 696 (1983).

80. Place pleaded guilty after the district court denied his suppression motion, reserving the right to appeal that denial. *See* United States v. Place, 660 F.2d 44, 45 (2d Cir. 1981).

81. *See id.* at 50-53.

82. United States v. Place, 462 U.S. 696, 709 (1983).

sure of luggage to narcotics detection dogs "[does] not constitute a 'search' within the meaning of the Fourth Amendment."[83] Whether the exposure of luggage to trained dogs is a search was irrelevant to the holding of the case, because it did not occur until after there already had been an unconstitutional seizure. If, as both the Second Circuit and the Supreme Court agreed, taking the luggage from LaGuardia to Kennedy and detaining it for almost two hours was unlawful, then any evidence discovered as a result of the unlawful seizure was fruit of the poisonous tree and therefore inadmissible.[84]

Because there was no reason for the Court to reach the issue of using dogs to sniff luggage, *Place* is a classic example of procedural activism. Further, the effects of this overreaching already are beginning to have their desired impact. As the Ninth Circuit stated in *United States v. Beale*,[85]

> we recognize that [the discussion in *Place* of the constitutionality of warrantless exposure of luggage to trained dogs] is dictum and are aware that the Supreme Court has often remarked that its dicta are not binding. The *Place* dictum, however, is so recent and appears to have been so carefully considered that we feel obliged to apply it to the case at hand.[86]

The *Beale* court was perhaps too kind in its characterization of *Place*. Although technically dictum, such an excursion into unnecessary issues has more the flavor of an advisory opinion. The Court simply took a convenient opportunity to give notice to police, prosecutors, and lower courts that warrantless exposure of luggage to narcotics detection dogs would be upheld. Although such unnecessary detours may in some cases be justified by weighty considerations, such as a desire to avoid difficult constitutional questions,[87] no such considerations were present in *Place*.[88]

---

83. *Id.* at 707.

84. For an explanation of the "fruit of the poisonous tree" doctrine, see W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 9.3-9.4 (1985). As Judge James Hill of the Fifth (now Eleventh) Circuit noted in an analogous context: "Much of what we find it necessary to write in this opinion may be likened unto deciding whether or not a base runner touched third when it is clear that he was thrown out at home plate." Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1242 n.4 (5th Cir. 1980).

85. 731 F.2d 590 (9th Cir. 1983).

86. *Id.* at 593 (citations omitted).

87. *See, e.g.*, Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1241-42 n.4 (5th Cir. 1980) (noting requirement to review potentially dispositive statutory and local law issues before examining constitutional issues); authorities cited *infra* notes 133-134 and accompanying text.

88. The Court attempted to justify its excursion into the constitutionality of using dogs without search warrants by arguing that

In *Michigan v. Long*[89] the Court also limited the substantive protection of the fourth amendment against unreasonable searches in a context that suggests unseemly judicial eagerness to reach issues prematurely. In *Long*, the Michigan Supreme Court reversed a conviction for possession of marijuana because it found the police search of the defendant's car "was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution."[90] The Supreme Court reversed on the merits. It held that the protective search of the passenger compartment of an automobile fell within the ambit of *Terry v. Ohio*,[91] authorizing a limited search on the basis of less than probable cause.[92]

The respondent in *Long* argued that the Supreme Court lacked jurisdiction because the Michigan decision rested on adequate and independent state grounds. The Court rejected this jurisdictional argument because "it [was] not clear from the opinion itself that the state court relied upon an adequate and independent state ground and . . . it fairly appear[ed] that the state court rested its decision primarily on federal law."[93] The majority opinion, again authored by Justice O'Connor, reached

---

> The purpose for which respondent's baggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause.

Place, 462 U.S. at 706 (citations omitted). This explanation is questionable in light of the actual facts of the case. The law enforcement officers stopped Place and seized his luggage not solely for the purpose of subjecting it to a sniff test, but for the more general purpose of determining whether the luggage contained drugs. In fact, other methods of making this determination existed and were attempted. According to the Supreme Court's account, the agents first attempted to discover the contents of the luggage by asking Place's consent to search the luggage, which he refused. *Id.* at 699. The agents then told Place that they were going to use yet another method to determine the contents of his luggage: they told him "they were going to take the luggage to a federal judge to try to obtain a search warrant." *Id.* Thus, the seizure and detention would not automatically have been unlawful, even if the sniff test was an unconstitutional search, because the agents might have seized and detained the luggage to search it with consent or with a valid warrant.

89. 463 U.S. 1032 (1983).

90. People v. Long, 413 Mich. 461, 473, 320 N.W.2d 866, 870 (1982).

91. 392 U.S. 1 (1968).

92. Michigan v. Long, 463 U.S. 1032, 1051-52 (1983).

93. *Id.* at 1042 (citation omitted). *Long* is not the first case in which the Court chose to reverse a state decision protective of the rights of criminal defendants despite the existence of potentially adequate and independent state grounds. *See* Oregon v. Hass, 420 U.S. 714, 726-29 (1975) (Marshall, J., dissenting).

this conclusion on the basis of the state court's use of federal precedent, despite three[94] explicit references to the state constitution. In the future, the majority opinion suggested, any state court that wishes to cite primarily federal precedent but to rest its decision additionally on state grounds must "make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."[95] The plain statement is necessary, according to Justice O'Connor, to ensure that the state court chose its decision freely, and did not feel compelled by federal precedent to reach the result it did.[96]

The insult to state court justices inherent in Justice O'Connor's suggestion is obvious: it suggests that state courts do not recognize their freedom to interpret their own constitutions independent of federal precedent. Such a hypothesis, unlikely in any case, is particularly unpersuasive when, as in *Long*, a concurring state court opinion explicitly acknowledged the disparity between Supreme Court precedent and interpretations by some state courts of their own constitutions.[97] Moreover, the Michigan Supreme Court was well aware that differences may exist between the state and federal constitutions, having frequently interpreted the Michigan Constitution more expansively than the federal Constitution.[98]

---

94. Justice O'Connor stated that the state court cited the Michigan constitution only twice. Michigan v. Long, 463 U.S. 1032, 1036 & n.3 (1983). In fact, in addition to the passages cited by Justice O'Connor, the state court noted the general rule under both state and federal constitutions that a warrantless search or seizure is presumed unreasonable unless it falls within a specific exception. People v. Long, 413 Mich. 461, 472-73 n.8, 320 N.W.2d 866, 870 n.8 (1982). Moreover, Michigan Supreme Court Chief Justice Mary Coleman, dissenting, cited the Michigan constitutional provision and used a telling plural: he would have held that the search "did not violate the constitutional *prohibitions* against unreasonable searches and seizures, U.S. Const., Am. IV; Const. 1963, art. 1, § 11." *Id.* at 473, 320 N.W.2d at 870 (Coleman, C.J., dissenting) (emphasis added). Finally, even the state's brief in the United States Supreme Court listed the Michigan Constitution, art. 1, § 11 among the "Constitutional Provisions Involved." Brief for Petitioner at v., Michigan v. Long, 463 U.S. 1032 (1983).

95. Michigan v. Long, 463 U.S. at 1041 (1983).

96. *Id.* at 1041, 1044.

97. People v. Long, 413 Mich. 461, 482-83 n.4, 320 N.W.2d 866, 874 n.4 (1982) (Moody, J., concurring).

98. *Compare, e.g.*, People v. Cooper, 398 Mich. 450, 459-61, 247 N.W.2d 866, 870 (1976) (double jeopardy precludes retrial by another sovereignty) *with* Bartkus v. Illinois, 359 U.S. 121, 136-37 (1959) (trial by different sovereignties does not violate double jeopardy); *compare* People v. Beavers, 393 Mich. 554,

The decision in *Long* also seems to ignore the separation of powers and federalism concerns that counseled restraint in cases like *Allen v. Wright*, *Los Angeles v. Lyons*, and *Pennhurst State School & Hospital v. Halderman*.[99] The doctrine of adequate and independent state grounds has long been recognized as a necessary element of both the article III prohibition against advisory opinions and the respect due state courts under principles of federalism.[100] Because the Michigan court was free to reinstate its decision on purely state grounds, the Supreme Court's decision on the merits was potentially advisory. Moreover, the extent to which the federal government, including the federal judiciary, should interfere with the operation of state law is a crucial aspect of federalism.[101] To avoid both an advisory opinion and any disrespect to the Michigan court, the Supreme Court ought to have remanded for clarification as to the basis for the lower court's decision. When the source of the state court's decision is unclear, the Court has suggested, "it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended."[102] Yet in *Long*, the Supreme Court did not ask, but told the Michigan court what it had intended. This disrespect was compounded by the Court's suggestion that the state court was unaware of its choices.

Justice O'Connor appropriately criticized prior law on the

563, 227 N.W.2d 511, 514 (warrantless monitoring of telephone conversation by participant violates state constitution), *cert. denied*, 423 U.S. 878 (1975) *with* United States v. White, 401 U.S. 745, 753-54 (1971) (warrantless monitoring of telephone conversation by participant does not violate federal constitution); *compare* People v. Turner, 390 Mich. 7, 22, 210 N.W.2d 336, 342 (1973) (objective test used for entrapment) *with* United States v. Russell, 411 U.S. 423, 436 (1973) (subjective test used for entrapment). *See also* People v. Wallach, 110 Mich. App. 37, 70-71 n.8, 312 N.W.2d 387, 403 (1981) ("Michigan constitutional law in many ways provides more stringent standards to safeguard the rights of the individual accused than do our sister states and the federal system.").

99. *See supra* notes 27-75 and accompanying text.

100. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-28 (1945).

101. In cases such as *Lyons* and *Pennhurst*, the Court adopts a view of state law as primary and federal law as interstitial. Under the *Long* doctrine, however, the Court appears to presume the primacy of federal law, diminishing the significance of state law. *See* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1123-25 (1984). The relative importance of state and federal law is a crucial question in federalism. Indeed, several authors have suggested that this question is central to Justice Rehnquist's doctrine of federalism. *See* Fiss & Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, Mar. 10, 1982, at 14; Powell, *supra* note 16, at 1331-35.

102. Herb v. Pitcairn, 324 U.S. 117, 128 (1945).

doctrine of adequate and independent state grounds as an "ad hoc method,"[103] but it is unclear how much plainer a statement is necessary than those made by the Michigan court. Although a mere perfunctory recitation by the state court that its decision rests on both state and federal grounds—and that much, at least, was present in this case—may not indicate very much, a similar perfunctory statement, in boilerplate language copied from Justice O'Connor's opinion, that the court is using federal cases only for "guidance," adds nothing to the substance of the court's actual basis for decision.[104] Instead, Justice O'Connor's opinion merely changes the obligatory formula.[105] That the

103. Michigan v. Long, 463 U.S. 1032, 1039 (1983).

104. With the increasing use of word processing machines, such boilerplate language could be added to every opinion at the touch of a button. Such language is likely to become as routinely inserted, and thus as virtually meaningless, as the citation in every case in the Supreme Court Reporter to United States v. Detroit Lumber Co., 200 U.S. 321 (1906) (Court's syllabus is not part of the opinion of the Court but is prepared for the reader's convenience). It has apparently already become so in Michigan. *See* Charter Township of Delta v. Dinolfo, 419 Mich. 253, 276-77 n.7, 351 N.W.2d 831, 843 n.7 (1984). The Michigan Supreme Court noted:

> For the benefit of the parties to this case and for any future review, we offer the following "plain statement". As should be clear from our outright rejection of [Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)], our decision here is based solely on the Due Process Clause of the Michigan Constitution, art. 1, § 17, notwithstanding the use of a standard originally developed in the federal system.

Id. For other opinions using similar boilerplate language, see Kenyon v. Hammer, 142 Ariz. 69, 71, 688 P.2d 961, 963 (1984); State v. Binet, 192 Conn. 618, 627 n.9, 473 A.2d 1200, 1205 n.9 (1984); Cannaday v. State, 455 So.2d 713, 722 (Miss. 1984); State v. Coe, 101 Wash. 2d 364, 378, 679 P.2d 353, 361 (1984). Oregon has attempted to finesse the *Michigan v. Long* presumption by announcing a *nunc pro tunc* rule that it is always resting its decision on state grounds. As the Oregon Supreme Court stated in State v. Kennedy, 295 Or. 260, 265, 666 P.2d 1316, 1321 (1983), "[l]est there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." *Id.*

105. There is one other possible justification for Justice O'Connor's insistence on a plain statement. If a state court cites both state and federal law in an ambiguous manner, the decision is potentially less subject to *any* review: the Supreme Court is precluded from review by the adequate and independent state grounds doctrine, and the people of the state are discouraged from attempting to amend the state constitution to change the state court's result because they may believe the decision to be based primarily on unassailable federal grounds. *See* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution,* 6 HASTINGS CONST. L.Q. 975, 996-99 (1979). Even assuming that such an amendment-discouraging effect could be shown, such a justification implies that the Supreme Court is free to intervene in the relationships among a state court, the state constitution, and the people of the state. It is certainly inconsistent with principles of federal-

Court chose to announce the change in a manner that allowed it to restrict the scope of the fourth amendment suggests that law is being made not in an ad hoc fashion, but rather on the basis of a deliberate, activist agenda: to reduce, whenever possible, the protections afforded criminal defendants.

Moreover, the new doctrine announced in *Long* is structured so that it creates a consistent opportunity for the Court to pursue that activist agenda in future cases. The majority adopts a presumption that where it is not clear from the state court opinion whether adequate and independent state grounds exist, such grounds do not exist.[106] As Justice Stevens noted in dissent, the Court has thus adopted a presumption that favors taking jurisdiction rather than the historical presumption against taking jurisdiction.[107]

The Court's creation of this presumption not only betrays the notions of judicial restraint so forcefully urged and applied by the Court in other cases, but also guarantees that the resulting expansion of Supreme Court jurisdiction will work a very one-sided change in the law. When the question of adequate and independent state grounds arises, it arises in one of three situations. First, the Supreme Court's interpretation of the United States Constitution may accord with the state court's interpretation of the state constitution. In this situation, the lower court will always be affirmed and a jurisdictional presumption of any sort will not be relevant. A second possibility is that the Supreme Court could interpret the United States Constitution to protect individual rights to a greater extent than the state court interprets the state constitution to do. As in the first situation, a jurisdictional presumption is irrelevant because the federal Constitution would override the less protective state constitution regardless of the adequacy of state grounds supporting the ruling. Only in the third possible situation, in which the state court adopts a broader protection of individual rights under the state constitution than does the Supreme Court under the federal Constitution, would the presumption in favor of taking jurisdiction have any effect. Thus, a presumption against the existence of adequate independent state grounds adds to the Court's jurisdiction in the criminal procedure context only in those cases in which the Supreme

ism for the Court to engage in such active intervention in state policies in the absence of any federal constitutional interest.

106. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

107. *Id.* at 1066 (Stevens, J., dissenting).

Court is less willing than the state court to protect the rights of the defendant.[108]

108. As Justice Stevens noted, the Supreme Court docket recently has been "swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens." *Id.* at 1070 & n.3 (Stevens, J., dissenting). Since *Long*, the Supreme Court has applied the new adequate and independent state grounds formulation at least four times in criminal cases, declining review only once, *see* Colorado v. Nunez, 104 S. Ct. 1257, 1257 (1984), discussed *infra* note 119. In each of the other cases, the Supreme Court held that it had jurisdiction and reversed state court decisions which had upheld the constitutional rights of criminal defendants. *See* Ohio v. Johnson, 104 S. Ct. 2536, 2543 (1984); Florida v. Meyers, 104 S. Ct. 1852, 1853-54 (1984); Oliver v. United States, 104 S. Ct 1735, 1744 (1984) (reversing lower court decision in companion case *Maine v. Thornton*).

There is one context in which the *Michigan v. Long* formulation might actually work in favor of criminal defendants. The availability of federal habeas corpus review of a state conviction depends on the state court's treatment of the defendant's federal constitutional arguments. If the state court rejects these constitutional claims on the grounds that the defendant failed to comply with state rules of procedure governing the raising of such claims, federal habeas review is foreclosed unless the defendant shows cause for failure to comply with the rules and actual prejudice resulting from the constitutional violations. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977). If the state court does not rely on a procedural default, however, but instead rejects the defendant's constitutional claims on the merits, the cause and prejudice requirements do not apply, and federal review is freely available. *See* Ulster County Court v. Allen, 442 U.S. 140, 154 (1979). A difficult question arises, therefore, when a state court both holds that the defendant forfeited the constitutional claims as a result of a procedural default *and* also rejects the constitutional claims on the merits. The question is analogous to the adequate independent state grounds issue addressed in *Long*: because the state decision seems to rest on two independent bases, it is not clear whether the state court rested its decision on grounds that would limit federal review. In *Long*, the Court seemed to suggest that any ambiguity in the state court's opinion should operate to confer federal jurisdiction rather than to limit it. Thus, in the context of the *Sykes* cause and prejudice standard, which acts to limit the availablilty of federal jurisdiction, the *Long* presumption in favor of jurisdiction suggests that if it is unclear on which grounds the state court rested its decision, the cause and prejudice analysis should not be applied. There is, however, a split in the circuits on this question. The Fifth, Ninth and Eleventh circuits hold that habeas review is governed by the *Sykes* cause and prejudice standard only if the state court relied *exclusively* on the procedural default. *See* Darden v. Wainwright, 699 F.2d 1031, 1033-34 (11th Cir. 1983); Lowery v. Estelle, 696 F.2d 333, 339 (5th Cir. 1983); Bradford v. Stone, 594 F.2d 1294, 1295 n.2 (9th Cir. 1979). The Sixth and Eighth circuits hold that habeas review is governed by the *Sykes* cause and prejudice standard if the state court relied *primarily* on the procedural default. *See* Dietz v. Solem, 640 F.2d 126, 131-33 (8th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 112-15 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). Finally, the Second, Third, and Seventh circuits hold that habeas review is governed by the *Sykes* cause and prejudice standard *whenever* the state court relied on a procedural default. *See* Phillips v. Smith, 717 F.2d 44, 47-51 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 647-48 (7th Cir. 1982);

Perhaps the most far-reaching illustration of the Court's recent activism in constricting the rights of criminal defendants is *United States v. Leon*.[109] In that case, the federal district court had suppressed evidence obtained under a facially valid search warrant on the ground that the warrant was unsupported by probable cause. The warrant in *Leon* was based on a police affidavit that recited information obtained from an unidentified confidential informant. At the time the Ninth Circuit invalidated the search warrant, the issue of whether probable cause could be established on the basis of information supplied by a confidential informant was governed by the two-pronged *Aguilar-Spinelli* test. Under this test, to establish probable cause the government had to prove both the informant's veracity and the basis of the informant's knowledge.[110] The court of appeals concluded that the tip in *Leon* failed both prongs, and thus that the warrant was invalid.[111] After that de-

---

United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 441-43 (3d Cir. 1982). Only one court of appeals has addressed the relationship between *Sykes* and *Long*. *See* Phillips v. Smith, 717 F.2d 44, 50 n.2 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984). The *Phillips* court cited *Long* as an analogous authority and held the *Sykes* cause and prejudice standard applicable. *Id.* at 50. The court found that any explicit statement by the district judge that he was basing his decision on a procedural default triggered the *Sykes* cause and prejudice standard, despite the district judge's alternative holding on the constitutional merits of defendant's claim. *Id.* at 50-51. This seems inconsistent with the result, if not the reasoning of *Long*: in *Long*, an explicit statement that the court was basing its decision on state constitutional grounds was insufficient to eliminate the ambiguity.

In any event, how the Supreme Court resolves this dispute should be some indication of the Court's commitment to an underlying activist agenda. If the Court fails to extend its *Long* presumption of jurisdiction to this analogous context, that will suggest that the Court is in fact motivated primarily by a desire to curtail the rights of criminal defendants, rather than by a principled view of the appropriate contours of federal jurisdiction. An indication that the Court will not extend its presumption of jurisdiction to this context may be found in Ulster County Court v. Allen, 442 U.S. 140 (1979). In that case, the Court conducted a lengthy examination of New York's state procedural rules before concluding that the state decision did not rest on a procedural ground, despite the state court's explicit statement that it was deciding the case on the merits and despite the absence of any mention of procedural default in the state court opinion. *See id.* at 148-52 & nn.8-10. This suggests, as the Second Circuit has noted, that the Supreme Court thinks federal courts should carefully avoid entertaining any habeas claims that might rest on independent state procedural grounds. *See* Phillips v. Smith, 717 F.2d 44, 50-51 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

109. 104 S. Ct. 3405 (1984).

110. *See* Spinelli v. United States, 393 U.S. 410, 415-16 (1969); Aguilar v. Texas, 378 U.S. 108, 114-16 (1964).

111. United States v. Leon, 104 S. Ct. 3405, 3411 (1984).

cision, but before the grant of certiorari in *Leon*, the Supreme Court in *Illinois v. Gates*[112] overruled the *Aguilar-Spinelli* test, and substituted an approach that asked whether the tip was reliable under the "totality of the circumstances."[113]

Thus when *Leon* reached the Supreme Court, the test that had been used in the lower courts was no longer the correct test. Prudence and restraint in such cases counsel a remand for application—by the *lower courts* in the first instance—of the correct test. The Court neither remanded for reconsideration in light of *Gates*, nor applied the *Gates* "totality of the circumstances" test. Instead, the Court, at the behest of the government, assumed that the warrant was invalid and reversed the court of appeals by creating, for the first time, a "good faith" exception to the exclusionary rule.[114] Thus in a case that raised only a straightforward, if recently altered, question of the validity of a search warrant, the Court seized the opportunity to limit the protection afforded by the fourth amendment and the exclusionary rule.[115]

Justice White, writing for the majority, justified this jurisdictional overreaching on the ground that the *Gates* question

---

112. 462 U.S. 213 (1983).

113. *See id.* at 230.

114. *See Leon*, 104 S. Ct. at 3421-23.

115. That the government framed its petition for certiorari to raise the question whether the exclusionary rule ought to be modified, *see id.* at 3412, does not require the Court to decide that issue if narrower grounds for a decision exist. *See* Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Moreover, the government's petition asked that the case "be disposed of as appropriate in light of the Court's decision in Illinois v. Gates." Petition for Certiorari at 10, United States v. Leon, 104 S. Ct. 3405 (1984).

In an ironic twist, one state court has utilized similar judicial maneuvering to avoid the *Gates* rule. In State v. Jackson, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984) (en banc), the Washington Supreme Court held that the Washington Constitution required application of the *Aguilar-Spinelli* test. It is becoming commonplace for state courts to undo the Supreme Court's damage to defendant's rights by finding such rights in state constitutions. *See, e.g.*, State v. Bolt, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (en banc); People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 444, 207 Cal. Rptr. 800, 814 (1984); People v. Brisendine, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1110, 119 Cal. Rptr. 315, 326 (1975); State v. Sidebotham, 124 N.H. 682, 686, 474 A.2d 1377, 1379 (N.H. 1984); State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975); *see also* Barbash, *State Courts Emerge as Protectors of Individual Rights*, Wash. Post, Apr. 16, 1984, at 29, col. 1 (nat'l weekly ed.) (noting that state courts are expanding individual rights and civil liberties at the same time the Supreme Court is limiting them). *Jackson* is unusual, however, in that the court did not need to reject the *Gates* test because the warrant met the requirements of *either* test. *Jackson*, 102 Wash. 2d at 446, 688 P.2d at 144 (Dimmick, J., concurring).

had "not been briefed or argued."[116] The Court's rules, however, allow it to request further briefs on a particular issue. In fact, in *Gates* itself the Court had requested special briefing and a second oral argument to address the specific question of whether a "good faith" exception to the exclusionary rule ought to be created.[117] The Court ultimately declined to decide that issue in *Gates*, "with apologies to all" for framing an issue it chose not to resolve.[118] It is ironic that the Court in *Leon* chose to ignore a technique that had in fact been exercised, albeit improvidently, in *Gates*, to reach the question it had been eager but apparently unable to resolve in *Gates*.[119]

2. Civil Rights

The federal analogue of *Michigan v. Long* is *City of Newport v. Fact Concerts, Inc.*[120] In both cases, a lower court decision resting on alternative grounds was reversed despite the undisputed and indisputable validity, or at least unreviewability, of one ground. Further, in both cases the consequence was the limiting of individual rights protected by the lower court ruling. In *Fact Concerts*, the plaintiff, a musical concert promoter, sued the city of Newport, Rhode Island, its mayor, and six council members under 42 U.S.C. § 1983, alleging violations of various constitutional rights. The court charged the jury, without objection, that it was permitted to award punitive damages against each defendant " 'based on the

116. *See Leon*, 104 S. Ct. at 3412.

117. *See* Illinois v. Gates, 462 U.S. 213, 217 (1983).

118. *See id.*

119. There are some members of the Court, moreover, who are not content simply to expand the Court's jurisdiction whenever possible to deny the rights of criminal defendants. In Colorado v. Nunez, 104 S. Ct. 1257 (1984) (per curiam), the Colorado Supreme Court had suppressed evidence seized pursuant to a search warrant because the state refused to reveal the identity of the informant who provided the information on which the warrant was based. The United States Supreme Court unanimously dismissed the writ of certiorari as improvidently granted, "it appearing that the judgment of the court below rested on independent and adequate state grounds." *Id.* at 1257. Despite their agreement with this holding, Justices White, Burger, and O'Connor felt compelled to "make clear that neither the Federal Constitution nor any decision of this Court requires the result reached by the Colorado Supreme Court." *Id.* (Justice White, concurring, joined by Chief Justice Burger and Justice O'Connor). Thus, in a case in which even *Michigan v. Long* was insufficient to create federal jurisdiction to curtail the constitutional rights of criminal defendants, three Justices issued a purely advisory opinion explaining how they *would* have decided the case had it raised a federal question.

120. 453 U.S. 247 (1981).

degree of culpability of the individual defendant.' "[121] The jury found all defendants liable and awarded both compensatory and punitive damages, including $200,000 in punitive damages against the city. The city moved for a new trial, contending that punitive damages may not be awarded against a municipality under section 1983. The district court denied the motion on the ground that it was untimely under Federal Rule of Civil Procedure 51.[122] The First Circuit affirmed the denial on the same ground, reasoning that the case did not come within the plain error exception to Rule 51 because there was insufficient precedent to make the damage award error, much less plain error.[123]

The Supreme Court, in an opinion authored by Justice Blackmun, reversed on the merits, holding that municipalities cannot be liable for punitive damages under section 1983.[124] The majority dismissed the city's procedural default primarily on the ground that the legal issue at stake was "novel," "important," and "likely to recur," and that "the interest of justice warrant[ed] . . . plenary consideration."[125] The Court analogized its exercise of power to ignore Rule 51 to its discretionary power to decide issues not presented by the parties or not raised below.[126] There is, however, a fundamental difference between the general doctrine precluding review of issues not timely raised by the parties and the precise provisions of Rule

121. *Id.* at 253 (citation omitted).

122. *See id.* at 253. Rule 51 provides, in relevant part: "[N]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." FED. R. CIV. P. 51.

123. *See* Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060, 1067 (1st Cir. 1980).

124. *Fact Concerts,* 453 U.S. at 271.

125. *See Fact Concerts,* 453 U.S. at 257 & n.16 (citation omitted). The Court also relied on the fact that the district court had reached the merits of the punitive damages claim as an alternate holding. *Id.* at 257. As Justice Brennan noted in dissent, however, lower courts frequently rely on alternate holdings, but the correctness of one holding pretermits review of the other. *See id.* at 275-76 & n.6 (Brennan, J., dissenting).

126. *See id.* at 257 n.15. The cases cited to support the Court's decision are distinguished *infra* text accompanying notes 129-134. The Court did not cite, in support of its power to decide issues raised neither in the courts below nor before the Supreme Court, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981), which was decided the day before *Fact Concerts. Sea Clammers* is another example of the Court deciding an unnecessary question in order to restrict the rights of § 1983 plaintiffs and is discussed *infra* text accompanying notes 137-152.

51. Rule 51 deals solely with jury instructions, and thus serves to allow the correction of errors early enough to obviate the necessity of retrial.[127] When the jury is not involved, however, an error by the district court that is corrected at *any* later stage of the proceedings will necessitate a remand. Thus Rule 51, unlike the doctrines cited as analogous by the Court in *Fact Concerts*, conserves judicial resources in addition to ensuring fairness to the parties.[128]

Moreover, the facts of all the cases cited by the Court in *Fact Concerts* serve to highlight, not to justify, the jurisdictional overreaching in *Fact Concerts*. In both *Carlson v. Green*[129] and *Youakim v. Miller*,[130] the opposing party agreed to review of an issue not raised below.[131] In *Fact Concerts*, the respondent vigorously contended that Rule 51 precluded review on the merits.[132] In both *Youakim* and *Wood v. Georgia*,[133] the issue actually reached by the Court was *narrower* than that raised below, in both cases avoiding a decision on the merits of an equal protection claim.[134] In *Fact Concerts*, the Court's holding both reached a broad and controversial substantive conclusion and created an ill-defined and wholly novel exception to Rule 51. The Court's new interpretation of Rule 51, moreover, goes beyond even the arguments pressed by the petitioner. Although the city conceded in its brief that the punitive damages question was reviewable only under a plain error standard,[135] the Court explicitly refused to limit its review to the

127. *See, e.g., Fact Concerts,* 453 U.S. at 274 (Brennan, J., dissenting); Corriz v. Naranjo, 667 F.2d 892, 896 (10th Cir. 1982); Haywood v. Ball, 586 F.2d 996, 1000 (4th Cir. 1978); General Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147, 1152 (7th Cir. 1978); Robinson v. Heilman, 563 F.2d 1304, 1306 (9th Cir. 1977).

128. As Justice Brennan noted, the rule also prevents parties from "making the tactical decision not to object to instructions at trial in order to preserve a ground for appeal," *Fact Concerts,* 453 U.S. at 274 (Brennan J., dissenting), an interest that is not served by the more general doctrines limiting appellate review.

129. 446 U.S. 14 (1980).

130. 425 U.S. 231 (1976).

131. *See Carlson,* 446 U.S. at 17 n.2; *Youakim,* 425 U.S. at 263 n.1.

132. Brief for Respondents at 7-9, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

133. 450 U.S. 261 (1981). It is interesting that Justice White, who joined the majority in *Fact Concerts*, dissented in *Wood* on the ground that the issue decided by the majority had neither been raised below nor suggested in the petition for certiorari. *Wood,* 450 U.S. at 275-81.

134. *See Wood,* 450 U.S. at 262-63; *Youakim,* 425 U.S. at 234.

135. *See* Brief for Petitioner at 27, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

plain error standard, instead resting on general principles of justice.[136]

The Court, by resolving an issue never raised by the parties, further narrowed the scope of plaintiffs' rights under section 1983 in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[137] The plaintiff, an organization whose members harvest fish and shellfish off the coast of New York and New Jersey, sought to enjoin various federal, state, county, and city defendants from polluting New York Harbor, the Hudson River, and the Atlantic Ocean. They relied primarily on the Federal Water Pollution Control Act (FWPCA),[138] the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA),[139] and the federal common law of nuisance.[140] The district court dismissed the entire suit, holding that neither the FWPCA nor the MPRSA created a private cause of action and that a cause of action for nuisance under federal common law is not available to private parties.[141] The Third Circuit reversed as to all three claims.[142] The Supreme Court granted certiorari limited to consideration of three questions:

> (i) whether FWPCA and MPRSA imply a private right of action independent of their citizen-suit provisions, (ii) whether all federal common-law nuisance actions concerning ocean pollution now are preempted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance.[143]

The Court ultimately held that there was no private cause of action under either statute, and that federal nuisance law was fully preempted in the area of ocean pollution.[144]

As the Court explicitly recognized, plaintiffs never relied on section 1983 to support their claims,[145] nor was section 1983

---

136. *See Fact Concerts*, 453 U.S. at 256-57.

137. 453 U.S. 1 (1981).

138. 33 U.S.C. §§ 1251-1376 (1982 & Supp. I 1983).

139. 33 U.S.C.A. §§ 1401-1444 (West 1983 & Supp. 1985).

140. The plaintiffs also based their claims on "§ 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407; the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*; . . . 46 U.S.C. § 740; the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*;" various state statutes; and several federal constitutional provisions. *See Sea Clammers*, 453 U.S. at 5 n.6. None of these claims was considered by the Supreme Court.

141. *Sea Clammers*, 453 U.S. at 6-8.

142. *Id.* at 8-10. The court of appeals also found a cause of action under maritime tort law; that claim was not before the Supreme Court. *See id.* at 8.

143. *Id.* at 10-11.

144. *See id.* at 20-22.

145. *Id.* at 19.

an issue on which certiorari was granted. Nevertheless, the Court chose to address whether a section 1983 suit could be brought for violation of statutory rights created by the FWPCA or the MPRSA.[146] The Court thus created an artificial opportunity to place limitations on section 1983 suits for violations of statutory rights. The Court held section 1983 unavailable to redress statutory violations if "Congress ha[s] foreclosed private enforcement of that statute in the enactment itself, [or if] the statute at issue [is] the kind that [does not create] enforceable 'rights' under § 1983."[147] In support of this "foreclosure of private enforcement" prong of the *Sea Clammers* limitations, Justice Powell cited[148] only *Pennhurst State School & Hospital v. Halderman*,[149] which in turn relied[150] solely on Justice Powell's *dissent* in the case initially extending section 1983 to statutory violations, *Maine v. Thiboutot*.[151] By a combination of sleight of hand and jurisdictional manipulation, the Court thus managed to adopt a dissenting view in *Thiboutot* without distinguishing or overruling any cases.[152]

In *Grove City College v. Bell*,[153] the Court issued a purely advisory opinion in order to restrict the reach of Title IX of the Education Amendments of 1972,[154] which prohibits gender discrimination in "any education program or activity receiving Federal financial assistance."[155] Although the case raised only questions concerning the interpretation of the phrase "Federal financial assistance," the Court chose to interpret "education

146. Suits under § 1983 for violation of statutory, as well as constitutional, rights were first allowed in Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

147. *Sea Clammers*, 453 U.S. at 19 (citation omitted). The Court did not reach the second limitation, because it found that Congress had foreclosed a § 1983 remedy under the FWCPA and the MPRSA. *Id.* at 19-20.

148. *Id.* at 19.

149. 451 U.S. 1 (1981). This is the first *Pennhurst* case. *See supra* note 67. The second *Pennhurst* case is discussed *supra* text accompanying notes 66-75.

150. *Pennhurst*, 451 U.S. at 28.

151. 448 U.S. 1 (1980).

152. Apparently, no member of the Court in *Sea Clammers* was disturbed by either the sleight of hand or the resolution of an unraised issue. Only Justices Stevens and Blackmun declined to join Justice Powell's opinion, and they dissented on other grounds. Perhaps the pattern of jurisdictional maneuvering did not become apparent until the later cases.

153. 104 S. Ct. 1211 (1984).

154. 20 U.S.C. § 1681(a) (1982).

155. *Id.* The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

program or activity" as well.[156] The facts in *Grove City College* were straightforward. On the basis of federal grants to Grove City students, the Department of Education required Grove City, a private college receiving no direct federal financial assistance, to execute an assurance of compliance with the nondiscrimination provisions of Title IX. This assurance of compliance obligated a recipient of federal funds to

> [c]omply, to the extent applicable to it, with Title IX . . . and all applicable requirements imposed by or pursuant to the Department's regulation . . . to the end that . . . no person shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity for which [it] receives or benefits from Federal financial assistance from the Department.[157]

When Grove City refused to execute the assurance on the ground that federal aid to students did not constitute "Federal financial assistance" within the meaning of Title IX, the Department obtained a ruling by an administrative law judge that Grove City students were ineligible for federal grants until Grove City executed the assurance of compliance. Grove City and four of its students then brought suit in federal court to challenge the Department's order terminating the grants. The district court ruled for the college,[158] the Third Circuit reversed,[159] and the Supreme Court affirmed the court of appeals's holding requiring Grove City to execute the assurance or face termination of funding.[160]

The only question necessary to the resolution of the case was whether Grove City was correct in asserting that the student grants did not constitute "Federal financial assistance" under the statute.[161] The Court canvassed the legislative his-

156. *See Grove City College,* 104 S. Ct. at 1225 (Stevens, J., concurring).

157. HEW Form 639A, *quoted in Grove City College,* 104 S. Ct. at 1215 (citing Appeal to Petition for Cert. 126-27).

158. Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980). The district court agreed with the Department that the student grants constituted federal financial assistance under Title IX, but concluded that grants to students could not be terminated merely because of the College's refusal to execute an assurance of compliance, unless actual sex discrimination could be shown. *See id.* at 270.

159. Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).

160. *See Grove City College,* 104 S. Ct. at 1223.

161. The court of appeals had interpreted "education program" in Title IX to include the entire institution that benefited from the financial assistance, and not just the particular narrow program directly receiving federal assistance, in this case, the student financial aid program. *See Grove City College,* 687 F.2d at 696-701. It did so, however, only in response to Grove City's argument that the "program-specific" provisions of Title IX were inconsistent with including student aid within the definition of "Federal financial assistance."

tory and concluded that Title IX did extend to student grants, and thus that Grove City was required to execute the assurance of compliance in order for its students to remain eligible for the grants.[162] The assurance obligated Grove City to comply with Title IX only "to the extent applicable to it." Thus, the Court's ruling on the grant question left open the exact contours of the discrimination proscribed by Title IX, insofar as the language of the assurance of compliance was congruent with *any* interpretation of Title IX.

Because Grove City did not allege that it wished to discriminate on the basis of gender—and in fact maintained throughout the litigation that it did not discriminate, had never discriminated, and did not wish to discriminate, but only that it objected to the federal paternalism underlying the assurance of compliance[163]—there was no need to define the precise contours of Title IX. Had Grove City alleged that it wished to discriminate in, for example, its athletic program, the Court would have been presented with the question of whether the phrase "education program or activity" extended only to the direct recipient, or rather extended to any program that might indirectly benefit from the federal funds. Despite the lack of any allegations that Grove City wished to discriminate in *any* of its programs, and despite the position of the Secretary of Education that execution of the assurance did not proscribe discrimination in other programs of the college,[164] the majority reached the issue of program specificity and limited the scope of Title IX to the narrowest "program" receiving federal aid: it held that the financial aid program was the only program receiving federal financial assistance and thus was the only program subject to Title IX.[165]

Id. at 700 n.28. The court of appeals rejected this argument by concluding that the "program" benefited by federal grants to students was the whole university; the Supreme Court instead rejected the same argument by finding a legislative intent to include student grants within the scope of Title IX regardless of any seemingly inconsistent language in the statute. *See Grove City College,* 104 S. Ct. at 1220.

162. *See Grove City College,* 104 S. Ct. at 1220-23.

163. *See, e.g., id.* at 1223-24 (Powell, J., concurring); *Grove City College,* 687 F.2d at 701 n.29; *Grove City College,* 500 F. Supp. at 259; Petition for Certiorari at 3, Grove City College v. Bell, 104 S. Ct. 1211 (1984).

164. *See Grove City College,* 104 S. Ct. at 1220 n.20; *see also* Brief for Respondents at 16, Grove City College v. Bell, 104 S. Ct. 1211 (1984) (conceding that Title IX applies only to Grove City's financial aid program).

165. *See Grove City College,* 104 S.Ct. at 1222-23. Justice Stevens thought the program-specificity discussion to be "an advisory opinion unnecessary to [the] decision," and refused to join that part of the majority opinion. *Id.* at

Grove City College thus stands as another striking example of the Court's willingness to disregard the constitutionally grounded notions of judicial restraint it expounds in different contexts. The pattern that emerges from this selective restraint and activism is clear: the Court relies on principles of federalism, separation of powers, and article III "case or controversy" requirements to deny relief to rights-seeking plaintiffs, but disregards these same principles when by doing so it can further restrict the scope of constitutional and statutory rights.[166] Perhaps it is unfair to criticize the Court for this inconsistency. For what emerges from this pattern of selective activism and restraint is another, deeper pattern whose ele-

---

1225-26. The majority's only response was to suggest that the existence of a binding court of appeals opinion that the entire college constituted the "program," *see supra* note 161, entitled Grove City to a ruling on the contours of Title IX. *See Grove City College*, 104 S. Ct. at 1220 n.20. A more satisfactory response to the problem would have been to vacate the court of appeals's decision on the merits of the program specificity question as advisory, rather than to issue an equally advisory opinion reversing the decision. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2591 (1983) (O'Connor, J., concurring); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). Respondents and one of the judges below recognized that the Third Circuit's discussion of program specificity constituted nonbinding dicta. *See* Grove City College v. Bell, 687 F.2d 684, 705-06 (3d Cir. 1982); Brief for the United States in Opposition at 4, Grove City College v. Bell, 104 S. Ct. 1211 (1984).

The dissent argued persuasively that Congress did not intend the "program-specific" interpretation reached by the Court, *see Grove City College*, 104 S. Ct. at 1226 (Brennan, J., dissenting). Moreover, the immediate introduction of several bills to reverse the Court's interpretation, *see* H.R. 5011, 98th Cong., 2d Sess. (1984) (introduced Mar. 1, 1984); S. 2363, 98th Cong., 2d Sess. (1984) (introduced Feb. 28, 1984), suggests that the dissent was correct. The Court's interpretation at least arguably allows institutions to circumvent the antidiscrimination purpose of Title IX by supporting a particular program with funds from other programs, replacing the diverted funds with federal aid. Thus, whether or not the Court's interpretation of Title IX is correct, it undeniably significantly narrows the protection afforded against gender-based discrimination. *See generally* Czapanskiy, Grove City College v. Bell: *Touchdown or Touchback?*, 43 MD. L. REV. 379, 382-83 (1984) (arguing that institution-wide enforcement is needed to eliminate discrimination in athletic programs and specific university departments because few such programs receive federal funds earmarked for their use).

166. In at least one case, the Court has combined notions of restraint with procedural activism to restrict the scope of a statutory right. As discussed *supra* text accompanying notes 51-65, in Los Angeles v. Lyons, 461 U.S. 95 (1983) the Court bolstered its conclusion that equitable relief was unavailable to the plaintiff by stating that federalism concerns "counsel[ed] restraint" against granting such relief. *See id.* at 112. Because the Court had already concluded that the plaintiff did not have standing to assert the claim, and because the availability of equitable relief was not an issue raised in the petition, the Court should never have even addressed the issue. *See supra* notes 61-65 and accompanying text.

ments are indeed consistent—a pattern of subordinating the rights of the individual to the perceived interests of the majority.

II. COMMUNITY AND CONSENSUS

Although the pattern of the Court's selective restraint and activism is clear, the underlying causes of this shift in emphasis from protecting individual rights to protecting majority rule are not. The explanation most commonly offered for the Court's current posture is one of simple conservatism,[167] but the pattern of decisions may reveal a deeper focus. In particular, it is difficult to explain the decision in *Hawaii Housing Authority v. Midkiff*,[168] discussed in detail below,[169] with a theory that explains the Court's approach by reference to substantive political conservative values.

An alternative, and perhaps more satisfactory explanation of the Court's procedural aggressive majoritarianism is that it stems from a newfound emphasis on community consensus rather than belief in individual autonomy. One of the values that favoring majority interests may serve is increased cohesiveness in the community unit, at least if that unit is defined to include only members of the majority. The more often members of the majority are permitted to translate their desires into law, unfettered by constitutional or other constraints, the more democratic and unified they will perceive their society to be. Decisions made by the polity are perceived to be the result of general consensus, because, by definition, excluded minorities do not count.[170] A lack of judicial interference, or a judicial stamp of approval,[171] fosters this sense of

167. *See, e.g.*, Dorsen & Gora, *Free Speech, Property and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195, 202-03; Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 58-60 (1984); *see also* Shapiro, *supra* note 12, at 307-28 (discussing Justice Rehnquist's conservative ideological commitments).

168. 104 S. Ct. 2321 (1984).

169. *See infra* notes 176-188 and accompanying text.

170. The Court's present insensitivity to minority rights is primarily centered on the rights of "discrete and insular" minorities, who are by definition outside the political mainstream. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); J. ELY, *supra* note 4, at 135-79; Sherry, *supra* note 3, at 103-05. As one commentator has noted, minorities are "not . . . voiceless but friendless, not politically invisible but politically unmarriageable." Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 315 (1972).

171. *See* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48-51 (1961).

government by consensus. Moreover, the protection of individual rights against the will of the majority has the opposite effect, in two distinct aspects. A legal infrastructure grounded on individual rights encourages citizens to think of themselves more as autonomous individuals than as members of the community. As the judiciary begins protecting individual rights to a lesser degree, that infrastructure may begin to dissolve into one grounded more on values of community and connection than on values of autonomy and independence. Further, it is plausible to argue that protecting individual rights has the effect of splintering society, of making members of the majority feel that they are not part of a cohesive community but simply individuals competing with other individuals for whatever benefits the society has to offer. It is thus possible that the Court's shift towards majoritarianism is in fact grounded in a vision of democracy as communitarian or unified, rather than adversarial.[172]

The Court's jurisdiction-defining approach to majoritarianism—the procedural majoritarianism described above[173]—supports the view that the new aggressive majoritarianism may stem not from simple conservative politics, but rather from a shift in emphasis from the individual to the community. The effect of the cases described above is to lessen individual access to the courts substantially, while increasing the access of those seeking to protect community interests that may have been overlooked or undervalued by the legislature. The Court is thus transforming the judiciary from a countermajoritarian branch dedicated to promoting and protecting individuals into a countermajoritarian branch dedicated to promoting community interests. Just as the Warren Court intervened when it believed that the legislature failed sufficiently to protect minority rights, this Court intervenes when it believes that the legislature has failed sufficiently to protect community interests.[174]

172. *See generally* J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 8-22 (1980) (describing the concept of unitary democracy). Professor Cass Sunstein has suggested that the preference for community benefit over individual rights has its roots in the framers' notion of "civic virtue," and is in fact a unifying theme of the Constitution. *See* Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689, 1691 (1984). For a refutation of this historical premise, see Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication* (forthcoming, 72 VA. L. REV. — (Apr. 1986)).

173. *See supra* notes 76-166 and accompanying text.

174. *See infra* text accompanying notes 221-233. Four members of the Court's conservative bloc may have begun very recently to articulate such a communitarian process theory. In Garcia v. San Antonio Metropolitan Transit

The greater descriptive power of the communitarian model over the conservative model is illustrated by a number of recent decisions. These cases seem to be protecting group or community interests at the expense of traditional individual property rights, and may confirm that the procedural manipulation described above is informed by an emphasis on community rather than conservatism. Although this section focuses only on isolated cases, even the existence of such cases is a relatively new phenomenon, suggesting some kind of transformation.[175]

One of the most puzzling cases to explain with a conservative model is the Court's recent decision in *Hawaii Housing Authority v. Midkiff*.[176] The legislature of Hawaii, in order to break up a pattern of concentrated land ownership that was a virtual oligopoly, enacted legislation that required unconsenting landowners to sell to their tenants if certain specified conditions were met. After the district court upheld the statute,[177] the Ninth Circuit reversed, holding that taking land from one individual for the private use and benefit of another individual could not constitute a public purpose.[178] The court of appeals thus held that the taking—even if adequately compensated—violated the fifth amendment's public use clause[179] as "a naked attempt on the part of the state of Hawaii to take the private

---

Auth., 105 S. Ct. 1005 (1985), the Court reduced the tenth amendment to its former status as a "truism," largely on the theory that the states are sufficiently protected by the political process. Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, in dissent, drew the analogy between protection of individuals and protection of state interests, stating:

> One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights.

Id. at 1025 n.8 (Powell, J., dissenting). Justice Powell also suggested that congressional unresponsiveness to state concerns may be the result of its overconcern with the rights of interest groups or individual constituents. *See id.* at 1025 n.9.

175. The cases also involve shifting configurations of justices. The core majority that forms the focus of Part I of this Article is not as cohesively influential in Part II, but the wavering views of individual justices are still an interesting indication of the direction of the Court.

176. 104 S. Ct. 2321 (1984).

177. Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Hawaii 1979).

178. *See* Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

179. The public use clause provides that "private property [shall not] be taken for public use without just compensation," *see* U.S. CONST. amend. V, cl.4, and is applicable to the states through the fourteenth amendment. *See Midkiff*, 104 S. Ct. at 2327.

property of A and transfer it to B solely for B's private use and benefit."[180] A purer judicial embodiment of a politically conservative approach to land ownership is hard to imagine. Nevertheless, in a brief *unanimous* opinion authored by Justice O'Connor, the Supreme Court reversed.[181]

The Court held that the forced sale to tenants was a rational, constitutional solution to the problems posed by concentrated land ownership, and that breaking up the oligopoly of ownership was a permissible legislative purpose. The sole purpose and effect of the legislation was an alteration only in the ownership, and not in the use, of the land.[182] By thus construing "public purpose" to include intervention designed solely to achieve broader land ownership, the Court essentially approved legislative redistribution of wealth.[183] The decision is thus an example inconsistent with various descriptions of the Court as conservative. For example, the Court's approval of land redistribution is contrary to the philosophy of the conservative-based Chicago School of economics, a primary tenet of which is that only efficiency, and not distributional goals, justifies legislative intervention in the market system.[184] Further, by legiti-

180. *Midkiff*, 702 F.2d 788, 798 (9th Cir. 1983).

181. *See Midkiff*, 104 S. Ct. at 2327.

182. *Midkiff* is therefore distinguishable from Berman v. Parker, 348 U.S. 26 (1954), the condemnation case on which Justice O'Connor primarily relied. In *Berman*, the property was taken for a redevelopment project designed to renovate completely an entire section of the city. *See Berman*, 348 U.S. at 30. In *Midkiff*, however, the disputed property will remain residential and largely unchanged; only title changes. *Midkiff*, 104 S. Ct. at 2325, 2331.

183. Because the landowners did not wish to sell, even the requirement of just compensation did not ensure that wealth would not be redistributed. By definition, the landowners valued their land more highly than the price at which they would be forced to sell, or else it would not be a nonconsensual taking. The fifth amendment anticipates that landowners will have to suffer that loss for the good of the public; the question in *Midkiff* was whether land redistribution *in and of itself* constitutes a permissible public purpose.

184. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 405-07 (1978); H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW §§ 2.1-.2, at 40-45 (1985); R. POSNER, ECONOMIC ANALYSIS OF LAW 110-12 (1977); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-33 (1979); *cf.* Epstein, *Toward A Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 703-05 (1984) (advocating minimal intervention in market economies). Judge Frank Easterbrook has recently suggested that the Court might in fact be moving toward adoption of these conservative economic principles. *See* Easterbrook, *supra* note 167, at 4-5.

Using conservative economic principles alone, the case is also difficult to reconcile with the trend in the antitrust field toward less interference with the market and more tolerance of oligopolies. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (upholding manufacturer's restrictive location agreements); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551,

mating the legislature's conclusion that land oligopoly is an evil in itself, the Court weakened any suggestion that it is committed primarily to protecting property rights.[185] The decision is also inconsistent with suggestions that the Court is basically libertarian,[186] because the case involved active legislative interference with the landowners' decision not to sell.

From an individual rights perspective, the decision seems, inexplicably, to create a right to purchase someone else's land. The result is more easily explained, however, under the communitarian model. The legislature, and the Court, chose to protect the interest of the community rather than the rights of individuals. Justice O'Connor suggested that concentrated land ownership was detrimental to the community itself: "concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[187] Viewed as a choice between protecting the rights of landowners and protecting the rights of potential purchasers, the decision may be characterized as politically liberal, or even radical. Viewed as a choice between protecting individual rights and protecting community interests, the decision is communitarian—and political labels are not easily applied.[188]

Another illustration of the explanatory power of the communitarian model is the odd juxtaposition of two cases involving article I courts: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[189] which held bankruptcy courts un-

1569-76 (1984) (O'Connor, J., concurring) (joined by Chief Justice Burger and Justices Powell and Rehnquist) (holding that medical specialists association's exclusive contracts with hospitals were not per se tying arrangements).

185. For articles suggesting that the Court is primarily committed to protecting property rights, see, e.g., Dorsen & Gora, *supra* note 167, at 1202-03; Shapiro, *supra* note 12, at 322-28. *But see* Nagel, *On Complaining About the Burger Court*, 84 COLUM. L. REV. 2068, 2074-75 & n.16 (1984). It is not simply that other interests are allowed to override property rights; the constitutional value of property ownership itself is questioned. It is as if the Warren Court had said that speech might be restricted because too much speech is itself an evil.

186. *See, e.g.*, Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263 (1980).

187. Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321, 2325 (1984).

188. The suggestion that the decision is the result of a deferential approach to legislative decision making, *see, e.g., Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 231-32 (1984), cannot be squared with the cases discussed *supra* notes 76-166 and accompanying text. The burden of this Article has been to show that it is disingenuous for the Court to suggest that it is merely adopting the deferential stance required by principles of judicial restraint.

189. 458 U.S. 50, 87 (1982).

constitutional, and the more recent *Thomas v. Union Carbide Agricultural Products Co.*,[190] which upheld a delegation of judicial authority to federal mediators. In *Northern Pipeline*, the Court invalidated the jurisdiction provision of the Bankruptcy Act of 1978,[191] which assigned the whole of federal judicial authority over bankruptcy to judges who did not possess the article III protections of lifetime tenure and undiminishable salary. Northern Pipeline had filed for bankruptcy under the Act in a bankruptcy court. Under the Act, that court then had jurisdiction over all other lawsuits involving Northern Pipeline, and the company accordingly filed its state breach of contract claim against Marathon in the bankruptcy court. Marathon sought, and was granted, dismissal of the suit on the ground that the Act unconstitutionally conferred article III jurisdiction on nonarticle III judges. The Supreme Court, on direct appeal, affirmed.[192]

The plurality, composed of Justices Brennan, Marshall, Blackmun, and Stevens, surveyed the complicated and inconsistent precedent on article I courts, and concluded that such courts may be given article III jurisdiction only in three limited circumstances, each defined by "historical consensus."[193] The first exception to the general prohibition on article I courts is the courts of the territories and of the District of Columbia, when Congress is exercising powers analogous to those of state legislatures.[194] The second exception is courts martial, because the constitutional provisions involving the military have "been historically understood as giving the political branches of the Government extraordinary control."[195]

The most important exception involves administrative agency adjudication of "public rights." Public rights, although not well defined, are rights created by the legislature that give rise to disputes that might have been resolved wholly legislatively.[196] Thus, such disputes are not "inherently judicial" and may be resolved by the judiciary, the legislature, or an executive or legislative agency such as an article I court, at Con-

190. 105 S. Ct. 3325 (1985).
191. 28 U.S.C. § 1471 (Supp. IV 1980).
192. *See Northern Pipeline,* 458 U.S. at 57, 87.
193. *See id.* at 70.
194. *Id.* at 64-65.
195. *Id.* at 66.
196. *Id.* at 67-70; *see* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977); Patlex Corp. v. Mossinghoff, 585 F. Supp. 713, 724-25 (E.D. Pa. 1983).

gress's option.[197] The plurality rescued the "public rights" doctrine from near obscurity, citing primarily cases decided between 1855 and 1932.[198] Relying on the statement that "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient" condition for a dispute to involve public rights,[199] Justice Brennan concluded that a state law contract dispute between the debtor and a third party did not fall within the public rights exception to the ban on article I courts.[200] Justices Rehnquist and O'Connor concurred in the judgment, finding only that article I courts were precluded from deciding such state law claims as were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1798."[201]

Three years later, the Court unanimously reached the opposite conclusion in an almost indistinguishable case. The Court in *Thomas v. Union Carbide Agricultural Products Co.*[202] upheld a provision of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[203] that allowed federal mediators to make virtually unreviewable determinations in compensation disputes between two private parties. Under FIFRA, as a precondition for registration of a pesticide, manufacturers must submit research data to the Environmental Protection Agency concerning the product's health, safety and environmental effects. Because much of this data is duplicative, Congress had experimented with various mandatory data-sharing schemes, requiring original submitters of data to allow their data to be used by later, or "follow-on" registrants. A major problem with some of the earlier schemes was that the EPA's responsibility for cataloging the data in terms of whether it constituted protected, undisclosable trade secrets, and the resulting litigation over what constituted trade secrets, bogged down the registration process and ultimately stopped any new pesticide registrations. Congress thus amended FIFRA in 1978,[204] redefining the statute's trade secret exemption so that it did not include most of the submitted data, but requiring "follow-on" registrants to

197. *Northern Pipeline,* 458 U.S. at 68.
198. *See id.*
199. *Id.* at 69 n.23.
200. *See id.* at 71.
201. *Id.* at 90 (Rehnquist, J., concurring).
202. 105 S. Ct. 3325 (1985).
203. 7 U.S.C. § 136 (1982).
204. Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified as amended at 7 U.S.C. §§ 136-136y (1982 & Supp. II 1984)).

obtain permission from the original submitters and to compensate the original submitters for the use of the data.[205] The challenged portion of the 1978 amendments to FIFRA involved the procedure by which the terms of such compensation were to be set. Section 3(c)(1)(D)(ii) of the Act requires the original submitter and the follow-on registrant to negotiate. If no agreement can be reached, the dispute is submitted to binding arbitration, which is reversible by a court only for fraud, misrepresentation, or other misconduct.[206]

This delegation of virtually unreviewable judicial power to a mediator who does not possess the article III salary and tenure protections, and who is clearly subject to a good deal of political control, would seem to be unconstitutional under *Northern Pipeline*. The Court already had held that the property interest in trade secrets arises under state law,[207] and thus the underlying claim in a FIFRA case is essentially a traditional state law claim for compensation for misappropriation of property. Under the *Northern Pipeline* plurality's definition, such a claim is inappropriate for article I court resolution because it does not involve the government as a party; under the approach of the concurrence, it is similarly inappropriate for article I court resolution because it is a traditional state law property rights dispute.[208]

Instead, in largely unconvincing opinions by Justice O'Connor for the Court and Justice Brennan for himself and Justices Marshall and Blackmun, the Court distinguished

205. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

206. *Id.* The mediation portion of the statute provides in relevant part:

> The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such an agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. . . . [T]he findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator.

Id.

207. *See* Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2874 (1984).

208. *See supra* notes 199-201 and accompanying text.

Northern Pipeline and upheld the statute. Justice O'Connor's majority opinion held that the original submitter's property interest in the data as a trade secret arises under FIFRA itself, not under state law.[209] In light of *Monsanto*'s explicit holding to the contrary,[210] this is untenable. Justice Brennan's concurrence in *Thomas* circumvented, by the judicious use of an ellipsis, his earlier statement in *Northern Pipeline* suggesting that the government's presence as a party is a necessary condition for any dispute to be considered within the public rights exception. In *Thomas* he noted that *Northern Pipeline* "made clear that 'the presence of the United States as a proper party to the proceeding is . . . not [a] sufficient means of distinguishing "private rights" from "public rights." ' "[211] Despite tortured attempts by both Justices O'Connor and Brennan, the cases are virtually irreconcilable.

There is, however, one significant difference between the two cases. Although the statutes in each case involved dilution of judicial protection of individual property rights, only in *Thomas* was that dilution justified by community interests: health, safety, and environmental concerns. In *Northern Pipeline*, however, the only countervailing interest was some version of judicial efficiency. Although such a fine distinction admittedly does not lend overwhelming support to the communitarian model, it is nonetheless illuminating. *Thomas* and *Northern Pipeline* can be explained under the model as the handiwork of a transitional Court: although it is still concerned with protecting individual rights to some extent, the Court is

---

209. *See* Thomas v. Union Carbide Agricultural Prods. Co., 105 S. Ct. 3325, 3335 (1985).

210. In *Monsanto*, the Court stated that

> we are mindful of the basic axiom that " '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " . . .
>
> . . . .
>
> We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment.

Monsanto, 104 S. Ct. at 2872-74 (citation and footnote omitted).

211. *Thomas,* 105 S. Ct. at 3343 (Brennan, J., concurring) (all omissions and additions by Brennan, J.). Justice Brennan had actually stated in *Northern Pipeline* that "[i]t is thus clear that the presence of the United States as a proper party to the proceeding *is a necessary* but not sufficient means of distinguishing 'private rights' from 'public rights.' " *Northern Pipeline,* 458 U.S. at 69 n.23 (emphasis added).

willing to allow such rights to be subordinated to the interests of the community at large.

The Court's unusual approach to the problem of illegal alien children in *Plyler v. Doe*[212] also appears to indicate that community plays an increasingly important role in the Court's analyses. In *Plyler*, the State of Texas denied "undocumented" children—those who were in this country illegally—any access to the free public education it offered all other children. The Court, by a narrow majority, held that the Texas scheme violated the Equal Protection Clause.[213] Ordinary equal protection analysis might suggest that the disadvantaged children constituted a suspect or quasi-suspect class, and thus that the Court should subject the scheme to strict or quasi-strict scrutiny.[214] Such an approach would be consistent with a high regard for individual rights, requiring an extraordinary community interest to overcome the detrimental effect on the individual children. The majority in *Plyler*, however, refused to adopt that approach.[215] Instead, the Court applied a rational basis test, a low level of review appropriate for cases involving neither a suspect class nor a fundamental right, and still found the statute defective.[216] The flaw in the Texas scheme, according to the Court, was in its failure to allow the children to develop the skills necessary to become full, functioning members of the community. Justice Brennan stated that

> "as . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." . . . In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. . . .
>
> . . . "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."[217]

Thus the Court chose to invalidate the statute not primarily as

212. 457 U.S. 202 (1982).

213. *See Plyler*, 457 U.S. at 215.

214. *See generally* Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 737-40 (1985) (describing how courts might undertake "legislative mind reading" to identify prejudices entitling a discrete and insular group to constitutional protection); Sherry, *supra* note 3, at 108-14 (examining reasons for heightened scrutiny).

215. *See Plyler*, 457 U.S. at 219 n.19.

216. *Id.* at 223-30.

217. *Id.* at 221-22 (citations omitted).

a deprivation of an ordinary individual right not to be discriminated against, but rather as a deprivation of an individual's right to be a functioning member of a community.[218] This is in stark contrast to the earlier line of cases declaring alienage status to be a suspect classification,[219] which are much closer to a standard individual rights analysis.[220]

In some cases, the Court's concern with community interests is even greater than that objectively evinced by the community itself. When the Court takes a narrow reading of statutes enacted for the benefit of the politically disadvantaged, it engages in a sort of "supermajoritarianism" that goes beyond the expressed community interest in order to save the majority from its own excesses. For example, when Congress enacted Title IX of the Education Amendments of 1972,[221] arguably it did not intend to limit the statute's reach to the specific educational program receiving federal aid,[222] yet that is the result the Court reached in *Grove City College*.[223] Similarly, in *Pennhurst State School & Hospital v. Halderman*,[224] by refusing to entertain the plaintiff's undisputed claim of institutional violations, the Court denied to the mentally handicapped the protection afforded them by a majority of Pennsylvanians.[225]

---

218. For further elaboration of the distinction between ordinary individual rights and individual rights to membership in a community, see Sherry, *supra* note 172.

219. *See* Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

220. Another indication of the Court's emphasis on community interests rather than individual rights is the method by which Justice O'Connor, writing for the majority in Allen v. Wright, 104 S. Ct. 3315 (1984), distinguished Coit v. Green, 404 U.S. 997, *aff'g mem.* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971). Plaintiffs in both cases raised similar challenges to IRS procedures, but the *Coit* plaintiffs were black residents of a single community and the *Wright* plaintiffs were a nationwide group of parents of black schoolchildren. Justice O'Connor distinguished *Coit*, which had upheld plaintiff's standing, partly on that ground. Such a distinction, which the dissent characterized as novel, might suggest that where individual rights are intricately bound up with a cohesive community, the Court is more willing to grant standing.

221. Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681(a) (1982)).

222. *See supra* note 165.

223. 104 S. Ct. 1211 (1984). For a more detailed discussion of *Grove City College*, see *supra* notes 153-165 and accompanying text.

224. 104 S. Ct. 900 (1984).

225. For a more detailed discussion of *Pennhurst*, see *supra* notes 66-75 and accompanying text. An argument can be made that *Pennhurst* is not a supermajoritarian decision because the Court did not hold that the plaintiffs were entitled to *no* relief, but held only that they were not entitled to relief in federal court. Such an argument misses the thrust of this Article. The focus

The Court's decision in *Michigan v. Long*[226] is a more subtle example of the Court's aggressive majoritarianism. Overruling a state court's reversal of a conviction is supermajoritarian in two ways. State court judges are often elected, and are drawn from backgrounds almost as diverse as those of state legislators.[227] Thus, by overruling the decision of an electorally accountable branch of the state government, the Supreme Court is substituting its own perception of majority interests for the expressed will of the majority. Moreover, by adopting a presumption that ambiguous state court decisions rest on federal grounds, the Supreme Court ensures that future majority desires will be more easily translated into action: forcing the state court to commit itself to state grounds allows state citizens to identify the source of the decision and thus to change it by amending the state constitution.[228]

The motivation behind the Court's apparent desire to save the majority from itself in cases like *Grove City College* and *Pennhurst* may be a communitarian version of the *United States v. Carolene Products Co.*[229] concept of lack of access to the legislature. Under such a view, legislators, motivated politically to advance the interests of the most vocal segments of their constituency, inevitably undervalue the interest of the community as a whole. Thus the Court is merely compensating for the anticommunity bias inherent in a scheme in which legislative decisions are influenced by lobbyists and pressure groups.

Professor Bruce Ackerman's insightful critique[230] of the theoretical underpinnings of the *Carolene Products* Court's focus on "discrete and insular" minorities, although leading to a different result,[231] touches on some of the same concerns. Ar-

---

here is on the United States Supreme Court's aggressive majoritarianism and the Court's unwillingness to let federal courts assume the role of vindicators of individual rights. Although the state courts can, and in many cases will, effectively perform this function, it is no answer to say that the federal courts are thereby relieved of their duty in the same regard.

226. 463 U.S. 1032 (1983). For a discussion of *Long*, see *supra* notes 89-108 and accompanying text.

227. *See, e.g.*, M. PERRY, *supra* note 4, at 4 n. 17; Flango & Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures In State Courts of Last Resort*, 5 JUST. SYS. J. 25, 30-33 (1979); Kagan, Infelise & Detlefsen, *American State Supreme Court Justices 1900-1970*, 1984 AM. B. FOUND. RESEARCH J. 371 (1984). The Michigan Supreme Court, whose decision was reversed in *Long*, is indeed elected. *See* Flango & Ducat, *supra*, at 29.

228. *See supra* note 105.

229. 304 U.S. 144, 152 n.4 (1938).

230. *See* Ackerman, *supra* note 214, at 713.

231. To be sure, Professor Ackerman's analysis does not lead to an en-

guing for a "doctrinal reorientation"[232] of the *Carolene Products* Court's concern for the fairness of the pluralist process, Professor Ackerman contends that

> [e]ven when considered as an exercise in symptomatology, *Carolene* is utterly wrongheaded in its diagnosis. Other things being equal, "discreteness and insularity" will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are "anonymous and diffuse" rather than "discrete and insular." It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.[233]

If indeed anonymity and diffuseness work to a group's disadvantage, it is hard to think of a group more disadvantaged than the total community. The Court may be reacting to related concerns when it pursues supermajoritarianism.

CONCLUSION

Members of the dominant faction of the current Supreme Court are apparently trying to have their cake and eat it, too. In some contexts, the Court uses constitutionally grounded notions of judicial restraint to deny rights-seeking plaintiffs access to the federal courts, while at other times the Court disregards these same notions and reaches out to decide unnecessary issues to restrict further individual rights. This Article has attempted to expose the Court's underlying agenda by examining the implications of these inconsistent lines of precedent. That agenda appears to be twofold: to change the Constitution from a document balanced between majoritarian and countermajoritarian premises to one that is primarily

---

dorsement of the aggressive majoritarianism now being practiced by the Court. Rather, he recognizes the relative disadvantage suffered by members of minority groups and remains true to *Carolene Products*'s underlying concern for the fairness of pluralist politics. It is with *Carolene Products*'s focus on discreteness and insularity that Ackerman takes issue. *See id.* at 745 ("We must repudiate the bad political science that allows us to ignore those citizens who have the most serious complaints: the anonymous and diffuse victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization.").

232. *See id.* at 718.

233. *Id.* at 723-24; *accord*, Macey, *Special Interest Groups and Statutory Interpretation*, (forthcoming, 86 COLUM. L. REV. — (Mar. 1986)) (using economic analysis to support thesis that small organized interest groups are more successful at obtaining enactment of legislation).

majoritarian, and to transform the role of the Court from the guardian of individual rights to the guardian of majority rule.

This Article has also suggested one possible philosophical explanation for this doctrinal shift: it may reflect a move away from a jurisprudence of individual rights and toward a more communitarian theory of law. This communitarian theory is particularly apparent in those cases in which the Court limits individual rights created by the majority for the minority's benefit. In these situations, the Court may be acting to compensate perceived weaknesses in the legislative process; insulated from political pressures, the Court can insure that the silent majority is given a voice, albeit in court rather than in the legislature. Given that community-influenced decisions are a relatively recent phenomenon, there may be some dispute about whether this theory is adequate to explain the doctrinal shift. There should be dispute about whether the theory is adequate to justify it.