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Is the Burger Court Really Like the Warren Court?

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THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T. Edited by *Vincent Blasi*. New Haven and London: Yale University Press. 1983. Pp. xiv, 326. $25.

The Burger Court: The Counter-Revolution That Wasn't (a book sponsored by the Society of American Law Teachers) is a collection of eleven essays about the Supreme Court written by prominent academic commentators. Ten of the contributions are from law teachers; one is by a political scientist. The first nine essays deal with separate substantive aspects of Supreme Court jurisprudence; most of these focus to a large extent on how Burger Court decisions in particular subject-matter areas compare with doctrines and decisions of the Warren Court on the same topics. Thus, Thomas Emerson (of Yale) writes about the Burger Court and freedom of the press; Norman Dorsen (NYU) and Joel Gora (Brooklyn) about free speech and the Burger Court; Robert W. Bennett (Northwestern) about the Burger Court and poverty law; Yale Kamisar (Michigan) about Burger Court decisions relating to police practices; Robert A. Burt (Yale) about family law and children's rights; Paul Brest (Stanford) about racial discrimination; Ruth Bader Ginsburg (of Columbia, but since appointed to the United States Court of Appeals for the District of Columbia Circuit) about sex discrimination; Theodore J. St. Antoine (Michigan) about labor law; and R.S. Markovits (Texas) about the Burger Court and antitrust law.

The final two essays deal with topics of a more general nature. The book's editor, Vincent Blasi (Columbia), compares the degrees of "activism" of the Burger and Warren Courts. And the sole nonlawyer in the group, Martin Shapiro (a professor of jurisprudence and social policy at Berkeley), considers changes in the character of scholarly commentary about the Court — specifically, how the current generation of academic critics now focuses its attention, not on the Court's apparent lack of self-restraint (as commentators did during the Warren Court years), but on the Court's value choices, taking a high level of judicial "activism" for granted. Professor Blasi provides a brief Preface; an equally brief Foreword is contributed by

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New York Times columnist Anthony Lewis, who was once that paper's distinguished Supreme Court correspondent. There are, in addition, short profiles of the Justices who have sat on the Court during the Burger years, a brief chronology of important Burger Court appointments and decisions, and a Burger Court bibliography.

The subtitle of this book is, as I have already noted, "The Counter-Revolution That Wasn't." This theme — that despite widely prevalent fears (or hopes, depending upon one's point of view) that the Burger Court would undo much of the "revolutionary" work of the Warren Court in individual rights and related areas, those changes have not, in fact, occurred — is repeated in both the Foreword and the Preface. Thus, Mr. Lewis asserts that, although six members of the Warren Court have so far been replaced by nominees of Republican presidents, "there has been nothing like a counter- revolution" (p. vii). In Professor Blasi's similar view, "[t]he story of the Burger Court to date, whatever else it may be, is not a tale of a conservative counter-revolution, at least not one of epic proportions or obvious import" (p. xii).

I would like very much to believe that there hasn't been "anything like" a conservative counter-revolution in the Supreme Court in the past dozen or so years. As one who generally agreed with the energy and direction of the Warren Court's individual rights decisions — and with the way those decisions appeared to increase the receptivity of lower courts (especially lower federal courts) to individual rights claims — it would be good to know that, despite large changes in the Court's membership since 1968 through appointments by presidents ideologically opposed to many Warren Court developments, the level of recognition and protection of rights has not significantly decreased. And it would be even more comforting to know that the counter-revolution truly "wasn't" — that, insofar as "controversial Warren Court doctrines" have survived so far, they have become so "securely rooted"[1] that the time of danger is past.

It is my sad duty to report, however, that the substantive essays that constitute the main contents of this book simply do not support this optimistic theme. And I am even sorrier to report that, given the lack of specific and separate attention in the book to some important subjects — such as diminished access to federal courts, the revived "state action" doctrine, the use of the death penalty, and the impact of Supreme Court trends and certiorari policy on lower court attitudes and decisions — the reality of just how much erosion has taken place is perhaps not even fully reflected in those contents. For, whether or not one characterizes them as "epic" or "obvious," there have surely been very substantial changes in the Supreme Court over the last fifteen years. That is true, I think, if one merely considers

1. The observation is Mr. Lewis's. P. vii.

the chances of winning most civil liberties, civil rights, welfare rights, prisoners' rights, police practices or similar cases now, as compared with the chances of winning such cases in 1969. It is even more clearly true, I think, if one compares the current situation with where things probably *would have been* today had Warren Court developments continued in the direction in which they seemed to be headed when Richard Nixon became President in 1969.

Consider, for example, that Justice Brennan, as editor Blasi correctly recognizes, operated "at the center of the Court's divisions . . . during the heyday of the Warren Court." Justice Brennan, however, is clearly (again in Blasi's words) a "dissenter on the left" today (p. 211). The reason for this shift, I think all would agree, is the Court's substantial movement to the "right" rather than any noticeable shift by Justice Brennan in the other direction. And as for the use of the past tense in the book's subtitle, any sense of relief that the reader might momentarily experience in this regard will quickly disappear, I venture, when one later comes upon Professor Blasi's depressing speculation that Justice Rehnquist may, in time, have the chance to serve as a "coalition builder" "operating at *the center* of the Court's divisions" (p. 211, emphasis added). If there has not yet been a "counter-revolution" on a Court where Brennan has moved from center to extreme left, it will be difficult (to say the least) to avoid the use of that or a similar term to describe changes through which Justice Rehnquist (who even now remains on the extreme right) comes to be a Court "moderate."

Whether there has been a Burger Court "counter-revolution" turns, of course, upon just what one means by that term in the context of changing trends in Supreme Court decisionmaking. In the area of politics and government generally, "counter-revolution" suggests a sudden, indeed cataclysmic, change of major proportions — new and dramatically different personnel quickly accomplishing comprehensive and fundamental reversals of basic principles and objectives. There has not, of course, been a Burger Court counter-revolution in that sense. But, absent mass murder, war, epidemic or natural disaster, the whole membership of the Supreme Court simply does not change in a week or two, in a year or two, or even in a decade. Supreme Court Justices do after all, unlike politicians, hold office during good behavior.

President Nixon, the initiator of the Burger Court, thus inherited a Court with few (if any) members whom Nixon himself would have appointed. Nixon, it is true, had a relatively large number of vacancies to fill within a short time after assuming the presidency in 1969. By 1972 he was able to appoint four Justices (Burger, Blackmun, Powell and Rehnquist, replacing, respectively, Warren, Fortas, Black and Harlan). All of these appointments appeared at the time

to be strongly influenced by ideological considerations. But, even so, Warren Court holdovers (Justices Douglas, Brennan, Stewart, White and Marshall) still comprised the majority of the Court after the four Nixon appointments. President Nixon had no additional opportunities to make Court appointments before resigning in 1974. The next appointment to the Court (Justice Stevens, appointed by President Ford to replace Justice Douglas) was not strongly ideological in nature. Thus, it was not until President Reagan's 1981 appointment of Justice O'Connor (to replace Justice Stewart) — an appointment made after most parts of the present book were written — that a majority of the Court could be expected to harbor serious counter-revolutionary tendencies. And by that time at least one of the Nixon appointees (Justice Blackmun) had lost some of the counter-revolutionary fervor he may once have possessed.[2] It should come as no surprise, therefore, that the 1970's — and even the early 1980's — saw no Supreme Court "counter-revolution" worthy of the name in the ordinary political sense.

Two additional factors must be considered when judging the scope of a judicial counter-revolution (as compared with an ordinary political *coup*). One is the doctrine of stare decisis, which political revolutionaries seldom take seriously. Even the most radical (in either direction) new Justice will ordinarily be very reluctant to depart from established precedent in a sudden and wholesale manner. This respect for the past, moreover, is perhaps most apt to be found in judges, like those appointed by Nixon and Reagan, who have been selected in large part for their supposed inclinations toward "self-restraint" or "nonactivism." Thus, the Warren Court "revolution" (being a movement generally oriented toward increased judicial activism) could have been expected to be even more revolutionary in nature than its Burger Court counterpart.

The Warren Court certainly appeared to start with a bang when *Brown v. Board of Education*[3] overruled the separate-but-equal doctrine of *Plessy v. Ferguson*[4] within a year of Chief Justice Warren's appointment. This, however, was not a sudden "revolutionary" development by any means. *Plessy*, itself more than fifty years old, had been steadily eroded by the Court over a substantial period of time;[5] the question in 1954 was no longer over the fact, but rather over the timing, the explicitness, the breadth, and the forum (Congress or the courts) of its ultimate demise. And, as is well known, while *Brown*

2. Life tenure judicial appointees are not always known quantities. On the Warren Court, for example, it is likely that Justices Warren and Brennan, and in some respects perhaps Justice Harlan, turned out differently from what President Eisenhower and his advisors had expected.

3. 347 U.S. 483 (1954).

4. 163 U.S. 537 (1896).

5. *E.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

eliminated separate-but-equal schools in principle, meaningful Warren Court enforcement (and hence, much meaningful lower court enforcement) was long delayed.[6] Subsequent prominent Warren Court doctrinal developments were not nearly so quick in coming, nor, outside the area of criminal procedure, were overruling decisions terribly numerous. For example, it was not until 1961 that *Mapp v. Ohio*[7] overruled *Wolf v. Colorado*[8] (thus imposing the exclusionary rule upon the states as a constitutional requirement), although the opportunity to do so must have been present at every Term of Court after Justices Warren and Brennan joined the Court. The small torrent of other overruling or ground-breaking criminal procedure decisions[9] arrived only ten years after Chief Justice Warren was appointed and, indeed, only after Justice Goldberg had replaced Justice Frankfurter (who took a very different view on such issues) in 1962. Moreover, most of these criminal procedure cases were manifestations of the Court's ultimate adoption of the doctrine of selective "incorporation" of Bill of Rights guarantees into the fourteenth amendment, a slowly developing approach that Justice Frankfurter had staunchly opposed, with decreasing success, throughout his career on the bench, but that had been consistently urged in dissent for many years by Justices Black and Douglas.[10] The Goldberg appointment tipped the balance here, and once tipped, a solid "incorporationist" majority emerged.[11]

My point is that just as the Warren Court did not make "epic" changes overnight, it would have been completely unrealistic to have anticipated any dramatic counter-revolutionary rightist *coup* on the Supreme Court immediately upon the appointment of Justices Burger and Blackmun in 1969 and 1970, or even upon the appointment of Justices Powell and Rehnquist in 1972. Such changes became plausible only with the appointment of Justice O'Connor in 1981, at the very end of the period covered by this book. Even then, such changes could generally be expected (given ordinary attitudes about stare decisis) only where some groundwork had been laid either in a pattern of dissents of increasing strength, through majority decisions

6. The delay was attributable to some extent to the "all deliberate speed" (rather than immediate desegregation) approach taken in the *Brown* implementation decision. Brown v. Board of Educ., 349 U.S. 294 (1955).

7. 367 U.S. 643 (1961).

8. 338 U.S. 25 (1949).

9. *E.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963); Malloy v. Hogan, 378 U.S. 1 (1964).

10. *E.g.,* Adamson v. California, 332 U.S. 46 (1947).

11. *See, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968). Only Justices Harlan and Stewart dissented in *Duncan*. Justices Black and Douglas had argued for total incorporation rather than the much more limited approach of Palko v. Connecticut, 302 U.S. 319 (1937) and Adamson v. California, 332 U.S. 46 (1947). The Warren Court ultimately adopted a compromise — selective incorporation —that has, in practice, been quite close to the Black-Douglas view.

that consistently eroded the substance of existing doctrines while (for the time at least) preserving their form, or both. And, indeed, we now find the Court, after Justice O'Connor's appointment, explicitly turning its attention, for example, to the broad modification of the *Mapp* exclusionary rule,[12] a Warren Court doctrine that has been steadily eroded during the Burger Court years and has been the target of consistent criticism in dissent by some of the Burger Court Justices.[13]

A second factor that should be borne in mind in appraising the "counter-revolutionary" nature of the Burger Court changes is the nature of the Warren Court "revolution" that is under attack. The Warren Court, it should be remembered, did not invent the principles embodied in the first, fourth, fifth or sixth amendments, or even the theoretical applicability to the States of at least the "core" of their provisions.[14] The Warren Court did not invent the right to travel,[15] the constitutional prohibition against racism,[16] or even the potential use of the equal protection clause to nonracial forms of fundamentally unfair discrimination.[17] Warren Court changes in substantive constitutional doctrine were, more often than not, incremental in nature. More importantly, many of that Court's most important developments had to do with making rights that had previously been recognized in theory actually enforceable and meaningful, especially for the disadvantaged. Perhaps the most significant single Warren Court accomplishment was the enormous expansion of the justiciability of, and availability of remedies for, individual rights claims, particularly in the lower federal courts.[18] A spirit of reform in this regard was set loose in the lower courts and in the country as a whole.

An effective revisionist movement negating this spirit and these

12. *See* Illinois v. Gates, 103 S. Ct. 2317 (1983). After first hearing argument on probable cause issues, the Court then set the case for reargument regarding "[w]hether the rule requiring the exclusion at a criminal trial of evidence offered in violation of the Fourth Amendment, . . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." 103 S. Ct. at 2321. After reargument the Court declined to reach the question of modifying the exclusionary rule, on the ground that the issue had not been raised in the state courts below. The Court thereafter granted certiorari in three cases in which the issue of a good faith exception had been considered (and rejected) below. Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983); Colorado v. Quintero, 103 S. Ct. 3535, *dismissed as moot*, 52 U.S.L.W. 3460 (U.S. Dec. 13, 1983); United States v. Leon, 103 S. Ct. 3535 (1983).

13. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting).

14. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949).

15. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941).

16. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

17. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

18. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Fay v. Noia, 372 U.S. 391 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

developments need not have the "obvious" or "epic" quality found lacking by Professor Blasi and Mr. Lewis. That negation can be accomplished to quite a significant extent by an explicit halt to further development, by the subtle (and often not so subtle) erosion of existing doctrines (even though few are overruled outright), by indications in Supreme Court opinions of new and different directions and priorities, by the selective use of the Court's discretionary jurisdiction to review lower court decisions that continue in the old spirit (while leaving undisturbed those that respond to the new signals), and, most of all, by closing down access to federal courts and to prophylactic remedies needed to make many rights meaningful. When we look at the substantive chapters of the present book with these realistic counter-revolutionary possibilities in mind (and when we contemplate what lies ahead in light of the changes in Court membership that must, inevitably, take place in the not too distant future, given the fact that five of the current Justices are seventy-five or older), we find a panorama substantially less in keeping with the maintenance of Warren Court values than "the counter-revolution that wasn't" theme suggests.

In examining the Burger Court decisions on the freedom of the press, for example, Professor Emerson concludes that, while it is an overstatement to say (as some in the press have) that the Burger Court has created an "atmosphere of intimidation," there is nevertheless "cause for serious concern. The press no longer receives the vigorous support given it by the Warren Court. . . . [T]he Burger Court has taken a 'crabbed view' of the First Amendment and has exhibited a 'disturbing insensitivity' to the role of the press. In doing so it has significantly reduced the protections afforded the press by the First Amendment. And its methods of dealing with First Amendment problems bode ill for the future" (p. 25). The Burger Court "has either forgotten or ignored the most fundamental tenet of First Amendment theory, namely, that freedom of expression occupies a special status in our constitutional structure" (p. 26). There has been "a consistent deterioration of First Amendment doctrine," a "lack of realism" that will foster an increasing gap "between the rights of the press as laid down in the marble halls of the Supreme Court and its rights under workaday conditions" (p. 26). Emerson's conclusions are based on (among other things) the Court's narrowing of the protection afforded by the Warren Court against libel actions in public interest and public figure cases;[19] the Burger Court's "unsympathetic and largely negative" (p. 25) attitude toward the right to gather news;[20] and the Court's refusal even to "acknowledge that

19. *See, e.g.,* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

20. *See, e.g.,* Branzburg v. Hayes, 408 U.S. 665 (1972).

any substantial First Amendment issue was at stake" (p. 14) in the CIA's successful attempts at prior censorship of its former employees' publications.[21]

Writing on the Burger Court and freedom of speech, Professors Dorsen and Gora reach a similarly bleak conclusion:

> A major theme emerging from a decade of Burger Court jurisprudence is a reemergence of an older concept that the primary office of civil liberties is to safeguard property and contract . . . .
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> . . . [T]he Court has been suspicious of free speech when it has appeared to conflict with traditional proprietary rights . . . . [F]ree speech has been treated as simply one factor to be weighed in the balance, with no recognition that speech should be first among equals in the pantheon of liberty. [P. 44].

The Burger Court thus has a vision of society as "orderly, stable and rational" — a vision leading to lessened protection of "risky" speech (p. 45). For examples of those developments, Dorsen and Gora point to Burger Court decisions expanding the speech rights of corporations,[22] commercial advertisers,[23] and the rich,[24] while contracting the public forum in which speech may take place (especially with regard to "private" property such as large suburban shopping centers),[25] and broadening the permissible scope of obscenity and related laws.[26] They might also have noted the Burger Court's substantial contraction of the doctrines of unconstitutional vagueness and overbreadth,[27] leaving citizens who wish to engage in public speech much more at the mercy of police and other official discretion than was true in the latter Warren Court days.

The area of free expression (despite the foregoing) is one in which most civil libertarians tend to think that the Burger Court has done relatively well. What of other areas — poverty law, police practices, and equal protection, for example — where the Burger Court generally gets lower marks from those who remember the Warren Court with affection? In this connection Professor Bennett notes, among other things, the enormous change of Supreme Court attitude in the area of poverty law indicated by comparing *Shapiro v. Thompson*,[28] one of the last important decisions in which Chief Jus-

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21. The case referred to is Snepp v. United States, 444 U.S. 507 (1980).

22. *E.g.,* Bellotti v. Baird, 443 U.S. 622 (1979).

23. *E.g.,* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557 (1980).

24. *E.g.,* Buckley v. Valeo, 424 U.S. 1 (1976).

25. *E.g.,* Hudgens v. NLRB, 424 U.S. 507 (1976).

26. *E.g.,* FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Young v. American Mini Theatres, 427 U.S. 50 (1976); Miller v. California, 413 U.S. 15 (1973).

27. *E.g.,* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

28. 394 U.S. 618 (1969).

tice Warren participated, with *Dandridge v. Williams*[29] one of the earliest welfare law decisions after Burger replaced Warren. Bennett describes how *Shapiro* had raised hopes among welfare rights advocates that the Court was beginning to engage in strict scrutiny of welfare classifications whenever " 'the very means to subsist — food, shelter and other necessities of life' "[30] were at stake. *Dandridge* quickly dashed those hopes. The Court there "returned to an extreme form of pre-*Shapiro* judicial deference to government decisions" in welfare cases even while acknowledging "that welfare 'involved the most basic economic needs of impoverished human beings' " (p. 48). Thus, *Dandridge* — quite unlike *Shapiro* — likened equal protection claims in welfare cases to similar claims in "business regulation cases" (p. 48), where the Court had long since abandoned meaningful review. Although Bennett does not directly examine the repercussive effects of this attitudinal change within the lower federal courts, those courts (and welfare rights lawyers) have certainly received the message; there is no question that some cases that would have been won had the spirit of *Shapiro* persisted are often not even litigated today. Bennett also expresses concern about the Burger Court's limitations on the poor's access to the courts to assert rights that, in form at least, they still retain. Citing examples that he variously describes as "mischievous," "strained," and of "Catch-22" quality, he notes (in what may strike the reader as somewhat generous understatement) that the Court "has been rather insensitive to the importance of litigation as a vehicle by which the rule of law is made available to the poor population" (pp. 58-60). As he properly observes, even constitutional law "that explicitly and sympathetically incorporates problems of poverty" is "useless to the poor if they do not have the ability to invoke it" (p. 60).

In writing about police practices, Professor Kamisar appears to try more valiantly than most of the other *Burger Court* authors to give support to the counter-revolution-that-wasn't theme. He ventures that, while "[o]f course, Warren Court developments in the police practices area have by no means escaped unscathed," nevertheless "the fears that the Burger Court would dismantle the work of the Warren Court (or the Bill of Rights itself), and the reports that such dismantling was well underway, seem to have been considerably exaggerated" (p. 68). But consider the following evidence, also from Professor Kamisar's essay, that might suggest a somewhat different conclusion. In 1972, says Kamisar, the Burger Court, in *Kirby v. Illinois*,[31] "gutted the Warren Court's 'line-up de-

29. 397 U.S. 471 (1970).

30. P. 48. The quotation is from the *Shapiro* opinion, 394 U.S. at 627.

31. 406 U.S. 682 (1972).

cisions' " (p. 68).[32] *Kirby* and its progeny may well be "the saddest chapter in modern American criminal procedure" (p. 72). These decisions were "not in keeping with a judicial system bent on dealing with the realities of the criminal process rather than its labels" (pp. 69-70). Moreover, lower courts were undoubtedly "watching for signals from the 'new Court' "; these Burger Court rulings "could only encourage them to commence, or to intensify, efforts to 'contain' (or worse) the [Warren Court line-up decisions] in other respects, or for that matter to give other landmark Warren Court decisions similar treatment. The new Court had showed them how" (p. 70). A Court determined to effectuate rights, Kamisar notes, must be, "as the Warren Court often was, strong on follow-through, on closing loopholes and blocking police-prosecution end-runs. . . . [A] Supreme Court may do considerable damage simply by doing nothing." In the pretrial identification area "the Burger Court did more damage than that" (pp. 71-72).

Consider as well Kamisar's appraisal of *Stone v. Powell*,[33] in which the Burger Court held that fourth amendment exclusionary rule claims are not ordinarily available to defendants bringing federal *habeas corpus* proceedings. *Stone*, says Kamisar, illustrates "the tendency of the Burger Court to 'narrow the thrust' of the exclusionary rule," while preserving the rule in principle (p. 73). Thus, exclusionary rule standing requirements have been stiffened,[34] the fruit-of-the-poisonous-tree doctrine restricted,[35] the exclusionary rule held inapplicable outside the criminal trial itself,[36] and so on. And "[e]ven more disquieting" is the way in which the Court has "narrowed the substantive protection provided by the Fourth Amendment" "[b]y taking a crabbed view of what constitutes a 'search' or 'seizure,' " by "stretching the concept of 'consent,' " and by expanding exceptions to the warrant requirement: "That the Burger Court delivered some heavy blows to the Fourth Amendment, there can be no denying" (pp. 74-78).[37] The blows have continued since Kamisar's chapter was written; witness, for example, the recent overruling of two Warren Court decisions closely restricting the use of

32. *See* United States v. Wade, 388 U.S. 218 (1967).

33. 428 U.S. 465 (1976).

34. *E.g.*, Rakas v. Illinois, 439 U.S. 128 (1978).

35. *E.g.*, United States v. Ceccolini, 435 U.S. 268 (1978).

36. *E.g.*, United States v. Calandra, 414 U.S. 338 (1974).

37. Kamisar does make the point that there has not been retreat "on all search and seizure fronts." P. 78. Ominously, one of the main indications of this for Kamisar is the fact that "the Burger Court has not abolished [or interposed a "good faith" exception to] the exclusionary rule" itself. P. 81. Why "ominously"? Because, after Kamisar wrote his chapter, and after Justice O'Connor's appointment, the Court expressly proposed — and is presently considering — just such a modification. *See* note 12 *supra*.

informant evidence as the basis for probable cause.[38] Kamisar tells much the same story about Burger Court decisions regarding police interrogation and confessions: For a decade the Court treated *Miranda* "unkindly" in a number of cases; perhaps even more significantly, "its general hostility toward *Miranda* thundered louder than its specific holdings"[39] — a thunder, one might suppose, not likely to be lost on state and lower federal courts.

The remaining substantive chapters provide similar evidence of enormously significant changes in doctrine, in remedies, in access and in overall direction and atmosphere. With regard to the Burger Court and labor law, for example, Professor St. Antoine sees as a "bombshell" the Court's 1977 ruling[40] — contrary to uniform lower court precedents and clear legislative understandings — that Title VII of the 1964 Civil Rights Act does not invalidate "bona fide" employment seniority systems that perpetuate the effects of prior racial and gender discrimination (p. 159). The Court thus "set the clock back to 1964" (p. 160); it favored "the long-term, organized, predominantly white worker" over "the black newcomer to the workplace" (p. 161). In union-management relations cases generally, the Burger Court "expressly overruled two of the Warren Court's major prounion decisions and significantly cut back or undermined three others," thus demonstrating "greater solicitude . . . for conservative values, such as an employer's property rights and managerial prerogatives" (p. 166). And in the antitrust field, Professor Markovits, while believing that the Burger Court has, by and large, adopted the correct approach to the antitrust laws — an approach under which those laws "should be interpreted to contain a purely economic test of legality" (p. 181) — nevertheless recognizes that large changes have, indeed, occurred. He notes a change in philosophy (not unrelated, I suspect, to Burger Court attitudes about individual rights issues) in which "[n]oneconomic values" have been replaced with "an antitrust brew with an exclusively economic flavor" (p. 183).

In writing about family law, Professor Burt does not focus specifically on the differences between Warren and Burger Court decisions (probably because there were, in fact, relatively few Warren Court precedents to compare). He does, however, detect a clear difference on the present court between "liberal" and "conservative" blocs: "While the conservatives assess the legitimacy of particular [parental

38. Illinois v. Gates, 103 S. Ct. 2317 (1983), overruling Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

39. P. 85. Although Kamisar also notes that the Burger Court's hostility to Warren Court doctrine in this area seemed "to have subsided" in the late 1970's, p. 91, one wonders, in view of the current explicit attack on the exclusionary rule, *see* note 12 *supra*, about the permanence of this truce as well.

40. Teamsters v. United States, 431 U.S. 324 (1977).

or societal] claims to authority [over family matters] by reference to traditional conceptions of social order, the liberals see legitimacy only for authority that can justify itself by giving reasons, prodded by adversarial questioning" (p. 105). The views of Burt's current "liberal" bloc, I would think, bear a close resemblance to those that would have been held by the Warren Court, were it still sitting; his "conservatives" likely represent the Burger Court's emerging approach. If so, we are likely to see (and are in fact seeing) fewer decisions like those Warren Court rulings that held that school authorities had acted unconstitutionally in prohibiting students from wearing black armbands in class in protest against the Vietnam War,[41] and that gave children relatively strong procedural due process rights in juvenile delinquency proceedings;[42] and more decisions like those of the new Burger Court rejecting constitutional objections to the summary administration of corporal punishment in public schools,[43] and holding that parents and judges together may, by withholding consent, prevent children from obtaining legal abortions.[44]

The chapters on gender and race discrimination also concentrate less than do most others on differences between Warren and Burger Court attitudes. This is understandable where gender is concerned for, as Judge Ginsburg observes, sex discrimination was "not on the agenda of the Warren Court" or, indeed, of any prior Court (p. 132). Burger Court gender discrimination doctrine thus had only one available direction in which to proceed. And, in fact, this is one of the two major areas — aspects of the right of privacy being the other — where the Burger Court clearly seems to have enlarged the scope of individual rights principles. It seems fair to assume, however, that, had the Warren Court continued into the 1970's, its agenda would also have come to include gender questions. If so, those issues might have been addressed with considerably more vigor and effectiveness than we see today. The Burger Court, for example, has rejected full "strict" scrutiny for gender classifications, opting instead for a more flexible "intermediate" approach.[45] In 1973, however, a plurality of four members of the Court, all holdovers from the Warren era, urged just such strict scrutiny in gender cases.[46] The chances are great, it seems to me, that, from among Justices Warren, Fortas, Black and Harlan (all of whom had by then left the Court), at least

41. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969).

42. *In re* Gault, 387 U.S. 1 (1967).

43. Ingraham v. Wright, 430 U.S. 651 (1977).

44. Bellotti v. Baird, 443 U.S. 622 (1979).

45. Craig v. Boren, 429 U.S. 190 (1976).

46. Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (opinion of Brennan, Douglas, White and Marshall, JJ.).

one vote would have been forthcoming so as to turn this plurality into a majority. What Judge Ginsburg thus describes as "a near great leap forward" (p. 135) would actually have come to pass.

To take some other Burger Court developments that Judge Ginsburg deplores (albeit with characteristic mildness of tone), the Warren Court might also have decided to treat pregnancy classifications as gender-related. The Burger Court did not see the connection, over the dissents of three Warren Court holdovers.[47] It might have held that *de jure* gender segregation in public education, like *de jure* race segregation, violated equal protection. An equally divided Burger Court affirmed the contrary result in 1977.[48] It might have struck down Congress' for-males-only draft registration (upheld by the Burger Court in 1981).[49] It might even have detected gender discrimination problems in Massachusetts's veterans preference scheme for state civil service employment — a system that had the effect, given the tiny percentage of female veterans (a percentage itself resulting, in part, from deliberate discrimination), of almost completely excluding qualified women from many upper-level positions. The Burger Court found the system — despite its undeniable discriminatory effect — to be gender "neutral."[50] And the Warren Court might possibly have found a way to hold that governmental funding of childbirth, but not abortion, for the indigent violated the essential principle of the 1973 abortion decisions. The Burger Court, as we know, has held that funding discriminations do not affect freedom of choice in the constitutional sense.[51]

The opening theme of Professor Brest's essay on race discrimination is that "[t]he Warren Court really had it pretty easy" (p. 113). Race discrimination cases of the 1950's and 1960's, he observes, involved discrimination of an "egregious nature"; discrimination against blacks "for no other reason than that they were black"; discrimination that was "widely perceived as a national moral disaster" (p. 113). The Burger Court, however, has had to deal with more difficult questions: the desegregation of schools in the North as well as in the South (including attempts to desegregate across city-suburban boundaries); the constitutionality of racially discriminatory effects (rather than consciously discriminatory purposes); and the constitutionality of race-conscious affirmative action.

47. Geduldig v. Aiello, 417 U.S. 484 (1974) (the dissenters were Brennan, Douglas and Marshall, JJ.).

48. Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977).

49. Rostker v. Goldberg, 453 U.S. 57 (1981). Justices Brennan, White and Marshall, all Warren Court holdovers, dissented.

50. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Justices Brennan and Marshall dissented.

51. Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). Justices Brennan and Marshall were among the dissenters in both cases.

Professor Brest may, I think, be relying somewhat too heavily on hindsight in characterizing the Warren Court's task in cases like *Brown v. Board of Education*[52] and *Loving v. Virginia* (striking down a Virginia miscegenation law)[53] as "easy." That certainly was not the common perception at the time; nor were those broad opinions greeted with unanimous approval and good will, even by enormously distinguished commentators.[54] The important point for present purposes, however, is that the Warren Court, after much too long a delay (another indication, perhaps, that things were not that "easy") had, by 1968, finally committed itself to eliminating the effects of previous *de jure* school segregation "root and branch."[55] It also showed a degree of creativity in other areas, such as in reducing the negative impact of the state action doctrine on civil rights enforcement,[56] and in its "surprising" revitalization of the 1866 Civil Rights Act (p. 113).[57]

It seems relevant to ask, in assessing whether and to what extent things have changed, how the Warren Court would have addressed and solved the racial issues of the 1970's had it continued with the same membership or same basic attitudes. And, as with gender discrimination, it seems plausible that things would, in that event, have been substantially different. Is it clear, for example, that the Warren Court would have held (as the Burger Court did)[58] that desegregation orders can almost never cross school district boundaries, thus making meaningful integration of public schools practically impossible in some areas? The decision was, in fact, five to four, all four dissents coming from Warren Court holdovers. Would the Warren Court, perhaps, also have adopted the constitutional position of Justices Brennan, White, Marshall and Blackmun (three of the four being Warren Court holdovers) in the *Bakke* case?[59] That position was much more favorable to effectuation of meaningful affirmative action programs than was Justice Powell's prevailing vote — a vote based on an analysis that properly strikes Professor Brest as "nonsense" (p. 127) and that, in all events, leaves "[t]he status of benign race-consciousness . . . unclear" (p. 128).

Most importantly, would the Warren Court, which based its deci-

52. 347 U.S. 483 (1954).

53. 388 U.S. 1 (1967). The Warren Court had appeared to be enormously reluctant to decide this issue. *See* Naim v. Naim, 350 U.S. 891 (1955), 350 U.S. 985 (1956).

54. *See, e.g.,* L. HAND, THE BILL OF RIGHTS 54-55 (1958); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

55. Green v. New Kent County School Bd., 391 U.S. 430, 438 (1968).

56. *See, e.g.,* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

57. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

58. Milliken v. Bradley, 418 U.S. 717 (1974). Justices Douglas, Brennan, White and Marshall dissented.

59. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

sion in *Brown v. Board of Education* entirely upon the *impact* of racial segregation on the educational opportunities of black children and which *never, not once*, alluded in that unanimous opinion (or in any other opinion) to the need to find a discriminatory "purpose" as a predicate to judicial intervention, have adopted the rule of *Washington v. Davis*[60] that discriminatory racial impacts, even those resulting from "built-in headwinds,"[61] have no constitutional significance whatever in the absence of a discriminatory governmental purpose? Numerous lower court decisions that were expressly repudiated in *Davis* had given independent significance to pervasively discriminatory impacts. Those courts, at least, thought that Warren Court decisions pointed in a different direction; thought, that is, that they were authorized to deal not only with form and motive, but also with the often devastating realities of disadvantage caused to minorities by facially "neutral" governmental actions brigaded with generations of public and private racism. Finally, would the Warren Court conceivably have held, as the Burger Court did in 1980[62] (over the dissents of Warren Court holdovers Brennan, White, and Marshall) that evidence that a southern city's voting procedures "so diluted the power of black voters that, though they constituted thirty-five percent of the population, no black had ever been elected to the city commission" nevertheless "did not state a constitutional claim" (p. 124)?

It is impossible to focus on all important topics in a book like this. In evaluating the extent of the Burger Court "counter-revolution" one nevertheless would have wished for some separate focused consideration in the present volume upon the numerous Burger Court decisions that have foreclosed access to federal courts for large and important classes of individual rights claimants. Many commentators[63] have considered this group of door-closing decisions one of the most dramatic of all Burger Court developments — one that significantly reduces the practical effectiveness of rights that, in the abstract, the Burger Court may have left untouched. Thus, the Burger Court has seriously eroded the deterrent and prophylactic effectiveness of the fourth and fifth amendment exclusionary rules by making the fourth amendment rule unavailable in most circum-

60. 426 U.S. 229 (1976).

61. The phrase is from Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The *Davis* opinion refused to apply *Griggs*, which had given significance to nonpurposeful impacts in Title VII cases, to constitutional claims.

62. City of Mobile v. Bolden, 446 U.S. 55 (1980).

63. Including the Society of American Law Teachers (the sponsor of this book) itself. *See* STATEMENT OF THE BOARD OF GOVERNORS OF SALT, SUPREME COURT DENIAL OF CITIZENS ACCESS TO FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTIONS: THE RECORD OF THE BURGER COURT (1976).

stances in federal habeas corpus proceedings,[64] and by departing from a leading Warren Court decision[65] in order to re-establish strict principles of "waiver" of constitutional claims in state criminal trials.[66] In *Younger v. Harris*[67] and its expanding progeny[68] the Burger Court (once again overruling the essence of a Warren Court doctrine)[69] has created a new principle of federal court abstention that withdraws many attacks on unconstitutional legislation — especially in the areas of free expression, assembly and association — from the original jurisdiction of the lower federal courts. Doctrines such as standing, ripeness and immunity from suit have been used to insulate unconstitutional behavior from judicial review.[70] At times the Burger Court has even seemed, contrary to the landmark Warren Court ruling in *Monroe v. Pape*,[71] to foreclose federal constitutional claims because of the possible availability of a state law remedy.[72] A general rule to that effect, which may well be imminent,[73] would have enormous consequences to litigants. In a related area, the Burger Court has seemed distinctly less willing than one supposes the Warren Court would have been to recognize constitutionally protected liberty and property interests in some areas,[74] or to permit damages for constitutional violations that are recognized.[75]

A chapter on the expanding limitations of the state action doctrine would also have been welcome here. It once seemed, at the height of the Warren Court, that the realities of government support for "private" racial discrimination had caused the line between private and governmental action to have almost disappeared.[76] In this area, perhaps more than in any other, Justice Rehnquist's much more formal and narrow approach to the effective scope of constitutional rights has captured the imagination and votes of the Burger

64. Stone v. Powell, 428 U.S. 465 (1976).

65. Fay v. Noia, 327 U.S. 391 (1963).

66. Wainwright v. Sykes, 433 U.S. 72 (1977).

67. 401 U.S. 37 (1971).

68. *E.g.,* Hicks v. Miranda, 422 U.S. 332 (1975); Fair Assesment in Real Estate Assn. v. McNary, 454 U.S. 100 (1981).

69. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965).

70. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Laird v. Tatum, 408 U.S. 1 (1972); *see also* Los Angeles v. Lyons, 103 S. Ct. 1660 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); Edelman v. Jordan, 415 U.S. 651 (1974).

71. 365 U.S. 167 (1961).

72. *E.g.,* Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976).

73. *See* Pennhurst State School and Hosp. v. Halderman, 52 U.S.L.W. 4155 (U.S. Jan. 24, 1984).

74. *E.g.,* Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976).

75. *E.g.,* Carey v. Piphus, 435 U.S. 247 (1978).

76. *E.g.,* Reitman v. Mulkey, 387 U.S. 369 (1967); Bell v. Maryland, 378 U.S. 226 (1964).

Court.[77] Separate attention might have been given, as well, to the fact that the Burger Court has almost completely stripped vitality from the "fundamental rights" branch of the equal protection clause.[78] That emerging doctrine of the late Warren Court era was, perhaps, laying the groundwork for a set of affirmative constitutional entitlements for Americans such that, as Professor Shapiro notes, "[i]f some members of the Warren faction had had their way, Americans today would have a constitutional right to acquire the basic economic necessities from government" (p. 220). Finally, given the Burger Court's comprehensive relegation of so many constitutional issues to initial consideration by state courts, an examination of the Burger Court's use of its certiorari discretion in reviewing those courts would potentially have been revealing. Except in death penalty cases, it is almost unheard of these days for the Court to grant certiorari in a state criminal case at the petition of a defendant; petitions are frequently (it sometimes appears almost automatically) granted, on the other hand, when a state court rules against the prosecution on a fourth, fifth, or sixth amendment claim.[79] The Warren Court's practice was almost precisely the opposite.

Professor Blasi has written a penultimate chapter on "The Rootless Activism of the Burger Court." Its main point is that the Burger Court, like the Warren Court, "has been very much an activist court" (p. 217). One can readily agree, although I confess to being somewhat startled by the first reason Blasi offers for this conclusion, namely, the Burger Court's "failure to overrule the precedents of the Warren era" (p. 199). Insofar as there has been such a failure to date (especially on the part of Justices who would not have joined with those precedents to begin with) that would seem to me to indicate a certain degree of restraint rather than activism. Nonetheless, the Burger Court, as Blasi notes, has been willing both to invalidate acts of Congress and "to step into the breach of a constitutional crisis."[80] Nor has it been shy about "broadening the impact of judicial review" by deciding a relatively large number of cases dealing with issues concerning constitutional separation of powers (p. 201), and by being much more active than the Warren Court in playing "the role of umpire of the federal system" (p. 202). Nor can anyone, as Blasi observes, "accuse the Burger Court of failing to recognize important new rights" (p. 204); *Roe v. Wade*,[81] the landmark abortion

77. *E.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

78. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Plyler v. Doe, 457 U.S. 202 (1982), may justify the "almost" in the text.

79. *E.g.*, Illinois v. Gates, 103 S. Ct. 2317 (1983).

80. P. 201. The Watergate tapes case, United States v. Nixon, 418 U.S. 683 (1974), is Professor Blasi's primary evidence of this inclination.

81. 410 U.S. 113 (1973).

decision, is the prime example here. Blasi also invokes the gender discrimination cases; the extension of first amendment protection to commercial advertisements; the recognition of "a major federal constitutional limitation on the traditional exercise of jurisdiction by state courts in cases involving intangible assets" (p. 204); recognition of the "right of a newspaper to control its own pages" and "to be free from . . . requirements of 'balanced' news coverage" (p. 204); and the Burger Court's numerous "activist" decisions in the area of "government financial aid to sectarian schools" (p. 205).

There has not, then, been any Burger Court "counter-revolution" with regard to the willingness to engage in judicial activism. Indeed, although Professor Blasi considers the division between activists and "restraintists" (his term) one that "has been at the heart of constitutional discourse for at least the last fifty years" (p. 198), and one that is likely to remain important, I tend to agree more with Professor Shapiro, who suggests that activism versus restraint is, for now at least, a dead issue: "In the heyday of the Warren Court, the Court was activist and the commentators were not. In the day of the Burger Court, the Court is activist and so are the commentators" (p. 236). The important question, given the announced theme of this book, involves the *direction* and objectives of the Burger Court's activism. Here, despite his subtitle, Blasi does detect an immensely important shift: "[T]he Warren Court was fired by a vision of the equal dignity of man[82] — the equal dignity of white student and black student, of urban voter and rural voter, of sophisticated, wealthy criminal suspect and ignorant, indigent suspect" (p. 212). By contrast, the activism of the Burger Court is "rootless"; its doctrinal product "has none of the generative quality or moral force of the Warren Court's legacy" (p. 216).

Professor Blasi attributes this difference primarily to what he perceives as the intellectual dominance of the "center," rather than the "extremes," of the Burger Court: "[T]he hallmark of the Burger Court has been strength in the center and weakness on the wings" (p. 211). In his view, the swing votes on the Burger Court represent its strength: "Seldom, if ever, in the Court's history has there been a period when the pivotal Justices were as intelligent, open-minded, and dedicated as Potter Stewart, Byron White, Harry Blackmun,

82. I do not wish to carp, and would not comment on the gratuitous use of the male gender here, or in Professor Shapiro's unnecessary (and inaccurate) reference to the Warren Court's "one *man*-one vote" "slogan", p. 225 (the governing principle of Reynolds v. Sims, 377 U.S. 533, 560-61 (1964) is "one of equal representation for equal numbers of *people*" (emphasis added)), or in Professor Brest's and Professor Shapiro's repeated references to good and bad "guys," pp. 113, 218, were it not for the jarring title of Professor Shapiro's final chapter: *"Fathers* and *Sons*: The Court, The Commentators, and the Search for Values." I am not entirely clear about the identity of Professor Shapiro's "fathers" or "sons," but if they are, respectively, the Court and the commentators, one of the "fathers" is, after all, now a mother, and at least a few of the "sons" are daughters (one of whom has even written a chapter for this book).

Lewis Powell, and John Paul Stevens" (p. 210). Where "the Burger Court has been weak compared with previous courts," on the other hand, "is at the ideological extremes." Justices Brennan and Marshall are "pragmatic men, more clever than profound." They lack "elemental force and vision." And "[t]he same holds true on the right." Chief Justice Burger "is a man of limited capacity and no discernible coherent philosophy." It is too early to tell about Justice O'Connor, although she has displayed a "sharp intellect" and "an unexpected [why, one wonders, unexpected?] tendency to think in ideological terms." Justice Rehnquist, although possessing "energy, charm and a very conservative judicial philosophy" is nevertheless "more a debater than a thinker, more a lawyer than a statesman" (p. 211).

This is not the place to quarrel, as I surely do in part, with this remarkable range of individual assessments, except to say that I, for one, detect no generally greater intellectual power or coherence in the center than at "the wings" of the current Court. If anything, the opposite seems true. I would have thought, for example, that the opinions of Justices Brennan and Marshall, on the one hand, and Rehnquist and O'Connor, on the other, are by and large at least equals in "force and vision" of those of more centrist Justices. To the extent that there is a "rootlessness" in the Burger Court so far, it seems to me that the primary reason is that, with the Court's shifting membership, solid majorities for epic or obvious doctrinal changes have been hard to come by, just as they were hard to come by on the Warren Court until Justice Goldberg replaced Justice Frankfurter in 1962. Between that time (especially after Justice Marshall replaced Justice Clark in 1967) and 1969, the Warren Court enjoyed its "heyday." The Burger Court's heyday, given another ideological appointment or two by the present Administration, may be about to commence. And we are not lacking in clues about where that Court, if it ever gets up sufficient steam, seems headed. One need only contemplate the opinions of Justices Burger, Rehnquist, Powell (sometimes), and O'Connor regarding fundamental issues such as states rights versus individual rights, property rights versus personal rights, middle-class rights versus the rights of the disadvantaged, the rights of "criminals" versus the rights of the "peace forces," the lack of need for access to federal courts or for prophylactic rules and doctrines, the deference due official and legislative judgments, the death penalty, and so on. It appears that the 1984 presidential election will be an enormously important one in the history of the Supreme Court. It would be a shame if the subtitle of this book gave anyone a different impression.

As the present Burger Court volume is published, another, of similar format and on the same general subject, is in preparation under the sponsorship of the American Civil Liberties Union. The

descriptive contents of that volume, I suspect, will be similar in many respects to what we find here. (The books share Professor Emerson as a contributor; Professor Dorsen, a co-contributor here, is the editor there.) The ACLU book is entitled "Our Endangered Rights."[83] That appellation, I regret to say, seems to capture the spirit of the current Supreme Court with substantially more accuracy than "The Counter-Revolution That Wasn't."

83. To be published by Pantheon Press in 1984. In the interests of full disclosure, I must reveal that I have also contributed a chapter (on rights of privacy) to the ACLU book.