BOOK REVIEW

CONSTITUTIONAL PERILS—REAL AND OTHERWISE

OUR ENDANGERED RIGHTS—THE ACLU REPORT ON CIVIL LIBERTIES TODAY. Edited with an Introduction by Norman Dorsen. Pantheon Books, New York, N.Y., 1984. pp. 333. $22.50.

*Reviewed by Gene R. Nichol, Jr.**

What is the state of individual freedom in the United States today? How fully have the majestic promises of the Declaration of Independence been realized? No doubt Americans have experienced vast changes in the relationship between the individual and government over the past half century. The compassionate energy of Franklin Roosevelt, the terrors of cold war McCarthyism, the call to progress of the Kemiedy brothers, the moral force of Martin Luther King Jr., the activisin of the Warren Court and the Great Society, the abuses of Richard Nixon, the ambivalence of the Burger Court, and a first term of Ronald Reagan all have left their marks. By any standard, guarantees of liberty and equality have undergone major expansions. Yet constitutional protection is hardly a static process. New problems arise,[1] old ones are resurrected.[2] Even in the Orwellian year of 1984, all of our constitutional crises cannot be considered behind us.

Our Endangered Rights: The ACLU Report on Civil Liberties Today[3] offers both an assessment of the present status of American freedom and an examination of perceived future battlegrounds over individual liberties. Edited by Norman Dorsen, the book is a collection of essays by noted constitutional authorities and civil liberties experts measuring the vitality of various constitutional guarantees. It offers a glimpse not only of the broad panoply of the rights we do enjoy, but

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1. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (minority set-aside provision in public contracts).

2. *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (resurrection of the contracts clause).

3. OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY (N. Dorsen ed. 1984) [hereinafter cited as OUR ENDANGERED RIGHTS].

also what Dorsen calls the "darker side"[4] of the human rights equation in this country. Authors characterize the birthright of freedom for all Americans as "continually under siege,"[5] and the title of the work is said to sum up well the present situation. Past civil liberties victories are now "endangered" and future technological developments pose unforeseen perils to individual autonomy. The social agenda of the New Right, the use of executive authority by the Reagan administration, and continuing economic scarcity threaten traditional movements towards toleration and equality. In short, progress on the civil liberties front cannot be assured. As we approach the close of the twentieth century, efforts to secure fundamental freedoms in both legislative and judicial arenas must, if anything, be redoubled.

There is much that is good in *Our Endangered Rights.* In particular, Professor Emerson's chapter on academic freedom outlines significant applications of constitutional law to protect the rights of faculty members and students and, more recently, to assure a measure of curricular diversity.[6] More importantly, he argues that government attempts to control information on national security grounds and the commercial exploitation of academic research constitute threats to true academic liberty that are at least as great as more direct means of control.[7] The former serves to diminish the information needed by the public to participate in decision making, and the latter is at odds with the academic community's traditional commitment to the free and unskewed pursuit of knowledge. Norman Redlich carefully examines the mounting pressures placed on Madison's wall separating church and state in an era of renewed religious fundamentalism[8]—pressures that have hardly decreased since publication of the book.[9] Stanley N. Katz's concluding chapter lends a refreshing historical perspective to civil liberties struggles which, by their very fervor, tend to eschew relativism.[10] By reminding us that future civil rights battles must be conducted without the support of a unified traditional New Deal political coalition, Katz makes clear that the issues of the eighties are not the

4. Dorsen, *Introduction,* in OUR ENDANGERED RIGHTS, *supra* note 3, at *ix, ix.*

5. *Id.*

6. Emerson, *Academic Freedom,* in OUR ENDANGERED RIGHTS, *supra* note 3, at 179, 179.

7. *Id.* at 194-200.

8. Redlich, *Religious Liberty,* in OUR ENDANGERED RIGHTS, *supra* note 3, at 259, 259.

9. Since publication, the Supreme Court upheld the constitutionality of a municipality's Christmas creche in Lynch v. Donnelly, 104 S. Ct. 1355 (1984). The United States Senate also considered, and rejected, a "school prayer" amendment to the Constitution. *See* S.J. Res. 73, 98th Cong., 2d Sess., 130 CONG. REC. S2425 (daily ed. March 8, 1984) (proposing an amendment relating to voluntary school prayer).

10. Katz, *An Historical Perspective on Crises in Civil Liberties,* in OUR ENDANGERED RIGHTS, *supra* note 3, at 311, 311.

issues of the sixties. Accordingly, his chapter proves to be an effective counterweight to the often unbalanced tone of other selections.

The book, in a variety of ways, documents both the logical inconsistency[11] and general undesirability[12] of recent attempts to roll back long established constitutional guarantees. Measures to withdraw the jurisdiction of the federal courts or to legalize orchestrated school prayer, for example, get ample attention. But perhaps the strongest single feature of *Our Endangered Rights* is its effort to signal flash points of future constitutional controversy that existing bodies of law are ill-suited to handle.

Professor Bender, for example, argues that although the Constitution has been interpreted to protect individual privacy in some particulars, "meaningful protection of informational privacy rights at present . . . largely depends upon the good faith and vigilance . . . of governmental and private agencies. . . ."[13] Given the virtual explosion of technologies available to obtain and compile information, constitutional silence will become increasingly difficult to maintain. Further, as Morton Halperin argues, the traditional judicial deference accorded to presidential claims of national security may well insulate much mischief.[14] Recent executive branch efforts to limit foreign travel, to bar foreign visitors, to stigmatize various publications, and to censor former government officials bode ill for a robust national debate on foreign affairs.[15] John Shattuck makes an analogous point concerning executive authority and domestic affairs.[16] Reagan administration moves to curtail civil rights enforcement and to alter existing civil rights policies through executive order have proven relatively impervious to attack.[17] Finally, in a perceptive essay, Sylvia Law demonstrates

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11. Shattuck, *Congress and the Legislative Process*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 46, 53. Shattuck criticizes the Reagan administration's position in City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983) (calling for deference to local governments in abortion cases) as inconsistent with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

12. Shattuck similarly discusses jurisdiction-stripping legislation, antibusing legislation, antiabortion legislation, and acts to abolish the exclusionary rule and limit habeas corpus review. Shattuck, *Congress and the Legislative Process*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 46, 46-67.

13. Bender, *Privacy*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 237, 251.

14. Halperin, *National Security*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 281, 286-92.

15. *Id.* at 290-92.

16. Shattuck, *Congress and the Legislative Process*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 46, 60-67.

17. *Id.* at 65-67. *See, e.g.*, Exec. Order No. 12,333, 3 C.F.R. 200 (1982) (granting CIA new authority to conduct surveillance inside the United States); Exec. Order 12,356, 3 C.F.R. 166 (1983) (classifying information held by executive agencies); Civil Rights Enforcement for Federal Contractors, 47 Fed. Reg. 17,770 (1982) (to be codified at 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-30) (cutting back affirmative action guidelines for federal coutractors). *But see* Bob Jones Univ. v.

the inseparability of civil liberties and economic justice. Once fusion of the two concepts is accomplished, the need to recognize not only certain claims for subsistence but, at the other end of the spectrum, to render concentrations of economic power democratically accountable becomes clear.[18] Law's arguments remind us of the continuing validity of Franklin Roosevelt's assertion that political equality can all too easily be rendered "meaningless in the face of economic inequality."[19] None of these flash points is apt to be brought under the umbrella of constitutional protection overnight. Each author, however, makes a strong case that presently asserted constitutional values cannot be indefinitely maintained if such important areas of friction are ignored.

Despite these strengths, however, *Our Endangered Rights* ultimately provides something less than its advertised claim: "a lucid review of the state of American freedom."[20] In no small part its shortcomings result from defects common to much liberal discourse. Accordingly, they merit attention.

I. ON LIBERAL HYPERBOLE

It is not uncommon in constitutional scholarship to attempt to make things more complicated than they are.[21] It is not uncommon in politics to attempt to make things more simple than they are. Much of *Our Endangered Rights*, although under the rubric of constitutional analysis, follows the latter theme.

Consider a few examples. Much has been written[22]—no doubt too much[23]—concerning the antidemocratic nature of judicial review. However one feels about that debate, it is difficult to deny, for example, that the judicial enforcement of nontextual substantive rights against popularly elected branches of government is at odds with democratic theory. Professor Neuborne, nevertheless, dismisses such claims by arguing that "allowing judges to check . . . a powerful transient minority in the name of an existing consensus concerning individual rights is

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United States, 103 S. Ct. 2017 (1983) (affirming IRS decision denying tax exemptions to racially discriminatory private schools).

18. Law, *Economic Justice*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 134, 134-59.

19. Address before the Democratic Convention (June 27, 1936).

20. This claim appeared on the cover of the paperback edition.

21. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY, *passim* (1978) (discussing the philosophies of individual rights, and criticizing the "ruling theory of law" as espoused by Jeremy Bentham).

22. *See generally, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704-06 (1976).

23. *See generally* Nichol, *Giving Substance Its Due* (Book Review), 93 YALE L.J. 171 (1983).

hardly a serious challenge to democratic political theory."[24] One could, of course, counter Neuborne's claim by pointing to persuasive arguments that either there is no discernible consensus on individual rights to instruct the bulk of modern constitutional decisions, or that the judiciary is particularly ill-suited to discover it.[25] It is perhaps simpler, however, to point out a subsequent paragraph of Professor Neuborne's: "We turn to judges to define and enforce individual rights not because no real choices are necessary, but precisely because hard choices cannot be avoided."[26] True enough. But choices are hard precisely because they are not rooted in societal consensus. Further, it is my guess that Neuborne would be among the last to advocate that the judiciary wait for broad popular agreement before protecting, for example, the rights of Nazis to march in Skokie or poor women to obtain government funding for abortions. Rather, arguments for an activist modern judiciary based upon perceived consensus boil down to the unrealistic and ethnocentric claim that the bulk of the country sees the world through the eyes of the political left.

Professors Estrich and Kerr's attack on the gender cases, on the other hand, is overblown. *Michael M. v. Superior Court*,[27] sustaining the constitutionality of a California gender-biased statutory rape law, is indeed a regrettable step backwards in the Supreme Court's treatment of sex discrimination. The decision's shortcoming is surely not that "the non-physiological consequences of pregnancy—the 'punishment' of pregnancy itself as well as the additional constraints that punishment may place on female sexuality—are socially created, as much the product of governmental action as the criminal sanction imposed on Michael M."[28] There may be a multitude of causes leading to a teenage girl's fear of pregnancy, but government is not on the list. Nor does it further the understanding of privacy analysis to characterize the

24. Neuborne, *The Supreme Court and the Judicial Process*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 27, 28.

25. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 63-69 (1980).

26. Neuborne, *The Supreme Court and the Judicial Process*, in OUR ENDANGERED RIGHTS *supra* note 3, at 27, 41.

27. 450 U.S. 464 (1981).

28. Estrich & Kerr, *Sexual Justice*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 98, 115. Estrich and Kerr correctly recognize that Rostker v. Goldberg, 453 U.S. 57 (1981) (male-only draft registration), Michael M. v. Superior Court, 450 U.S. 464 (1981) (affirming California statutory rape law which imposed criminal liability only on men), and Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding state disability scheme excluding pregnancy coverage), reflect a lingering judicial acceptance of separate spheres for male and female. Surprisingly, however, they criticize cases denying custody to lesbian parents because such rulings "devalue the importance and difficulty of the nurturing activity that has been assigned to women." Estrich & Kerr, *supra*, at 127. Lingerings are apparently widespread.

troubling case of *Harris v. McRae*[29] as granting to states the power "to assert control over the reproductive lives" of poor women.[30] Labelling sensitive human rights disputes as something other than what they are may indeed ease the decisionmaking process. I doubt, however, that it leads to better results. Unfortunately, *Our Endangered Rights* is replete with such hyperbole.[31]

In a perhaps similar vein, the book too often treats difficult constitutional crises as if they were merely problems of motivation. Constitutional cases would be easily decided and civil liberties easily protected if we just all believed in freedom and progress, or so the theory goes. In short, you are either for the Constitution or against it.

This theme is reflected in a number of ways. First, the book frequently succumbs to a we/they world view. Ira Glasser, for example, argues that the future of civil liberties depends not on "what *they* do; what counts is what *we* do in response."[32] The New Right is consistently pictured as a modern-day version of Niebuhr's "children of darkness."[33] That temptation may be compelling, but it also probably misreads the appeal of Reaganism to the American people. No doubt traditionally respected characteristics such as reliance on individual virtue and industry, fear of centralized government, and belief in the moral progress of society have much to do with the "new" conservatism. It ill serves liberalism to disregard completely such broadly shared sentiments.

Nor is it useful to ignore the genuine *absence* of consensus on many of the perplexing constitutional issues of the day. Persons of profound integrity and compassionate outlook can reasonably disagree, for example, on the propriety of "benign" racial preference or the exclusion of evidence obtained in violation of the fourth amendment albeit in good faith. Nor, in a broader sense, is it possible to maintain a clearly agreed-upon civil liberties agenda amid rising expectations of

29. 448 U.S. 297 (1980). *Harris* upheld the Hyde amendment which restricted funding for medically necessary abortions. The Court subjected the statute, the impact of which fell exclusively on indigent pregnant women, to no more rigorous scrutiny than had been applied in cases presenting distinctions between economic interests.

30. Estrich & Kerr, *Sexual Justice*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 98, 122-23.

31. I will limit myself to a single example: "By late 1980, [the New Right] had achieved substantial political power. Suddenly, no freedom seemed safe. Book banning became epidemic. Women's rights were threatened. Homosexuals were attacked. Voting rights were endangered. And ominous new laws to weaken the federal courts and to breach the separation of church and state were widely proposed." Glasser, *Making Constitutional Rights Work*, OUR ENDANGERED RIGHTS, *supra* note 3, at 3, 17.

32. *Id.* at 25 (emphasis added).

33. *See generally* R. NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS (1944).

civil and economic rights in an era of shrinking available resources.[34] The explosion of constitutional protection ushered in by the Warren Court—through its very success—has rendered future progress in the guarantee of civil liberties a more formidable enterprise. On the one hand, a sizeable portion of American society has come to see itself as the victim of the Supreme Court. On the other hand, early victories often lead to subtler, more persistent problems. It was, for example, perhaps easier to announce *Brown v. Board of Education*[35] than to bring its promises to fruition. Brushing such problems aside, *Our Endangered Rights* too often suggests that if we would all stop being bigots everything would be fine. In reality, of course, most of our present constitutional problems are sufficiently tenacious that they would likely remain even if bigotry and ill will were to depart suddenly. Forging human rights strategies despite these difficulties is the challenge of the next decade. Painting over complexities does little to further that process.

II. CONSTITUTIONAL CROSSROADS

Our Endangered Rights claims in major part to be an examination of "where we seem to be heading"[36] in terms of civil liberties protection in the United States. Despite its often strident tone, an argument can be made that the book actually understates the extent to which we face a major constitutional crossroads in the remainder of this decade. One way or the other, the role of the United States Supreme Court in the protection of civil liberties is apt soon to undergo a substantial transformation. The impact of such a shift in judicial perspective on the rights we enjoy may well be significant.

Recent Supreme Court history bears this out. The Warren Court accomplished a significant change in the direction of constitutional decisionmaking. Landmark decisions such as *Brown*,[37] *Reynolds v. Sims*,[38] *Engel v. Vitale*,[39] and *Miranda v. Arizona*[40] in effect resurrected an institution previously rendered silent by its battles with the New Deal and the revelations of legal realism. The reemergence was accomplished primarily on behalf of egalitarianism. Although its vision was not always articulated, the Warren Court at least behaved as if it

34. Professor Katz makes this observation in the concluding chapter. Katz, *An Historical Perspective on Crises in Civil Liberties*, OUR ENDANGERED RIGHTS *supra* note 3, at 311, 321-23.

35. 347 U.S. 483 (1954).

36. Dorsen, *Introduction*, in OUR ENDANGERED RIGHTS, *supra* note 3, at *ix*, *ix*.

37. 347 U.S. 483 (1954).

38. 377 U.S. 533 (1964).

39. 370 U.S. 421 (1962).

40. 384 U.S. 436 (1966).

had a clear view of its role in our system of government. Substantially broadening the participatory base of our democracy, the Warren Court shook the dust from old tools of judicial activism in an effort to accomplish more fully the goal of equal dignity for all. The result, in no small degree, was the development of an institution that viewed its primary responsibility as the protection of individual liberties against majority intrusion.

The Burger Court has been less predictable.[41] Its decisions have hardly reflected the levelling fervor of those of its predecessor. Still, its record is far from passive. The cornerstones of the Warren Court jurisprudence remain firmly in place.[42] New nontextual rights have been recognized.[43] The electoral process has been aggressively supervised,[44] and the Court has shown a surprising willingness to measure the powers of the legislative and executive branches.[45] In short, the Burger Court has placed itself firmly within the activist tradition more commonly associated with its predecessor.

But its activism cannot be as readily ascribed to any particular view of the Constitution or of judicial authority. Unlike the Warren Court, the present Court is dominated by centrists. Neither William Rehnquist and Warren Burger on the one hand, nor William Brennan and Thurgood Marshall on the other can be considered the heart of the Burger Court. No particular ideology consistently prevails. The result has been a marked ambivalence in the civil liberties arena. The "rootlessness"[46] has manifested itself in two principal ways. First, the Court has repeatedly been unable to fashion majority opinions in major human rights cases.[47] Second, when it has spoken, the Justices often

41. *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

42. Blasi, *The Rootless Activism of the Burger Court* in *id.* at 198, 198-217.

43. *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); *In re* Griffiths, 413 U.S. 717 (1973) (rights of aliens); Roe v. Wade, 410 U.S. 113 (1973) (abortion rights).

44. *See, e.g.,* First National Bank v. Bellotti, 435 U.S. 765 (1978) (protecting, on first amendment grounds, a corporation's right to make expenditures for the purpose of influencing referendum voting); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (striking down various sections of the Federal Election Campaign Act of 1971, as amended in 1974, as violative of the first amendment).

45. *See, e.g.,* INS v. Chadha, 103 S. Ct. 2764 (1983) (striking down provision of Immigration and Nationality Act that authorized one house of Congress to veto executive's decision to suspend deportation of an alien); National League of Cities v. Usery, 426 U.S. 833 (1976) (prohibiting the imposition of federal minimum wage provisions on state entities as being violative of the tenth amendment); Oregon v. Mitchell, 400 U.S. 112 (1970) (striking provisions of the Voting Rights Act Amendments of 1970 establishing the 18-year-old vote in state and local elections).

46. Blasi, *The Rootless Activism of the Burger Court,* in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, supra note 37, at 198, 210.

47. *See, e.g.,* Board of Education v. Pico, 457 U.S. 853 (1982) (three Justices on opinion of the Court and three concurring Justices) (removal of books from public school libraries); Clements v.

have tended to construct compromise doctrines rather than make the fundamental value choices necessitated by the dispute.[48] The Court's decisions concerning the establishment clause,[49] affirmative action,[50] the rights of aliens,[51] the right to privacy,[52] and desegregation remedies[53] provide fertile examples. Though the Court apparently has a strong concept of its power—witness the decision in *INS v. Chadha*[54]—it has been unsure of its posture on civil liberties. Thus the Burger

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Fashing, 457 U.S. 957 (1982) (four Justices on the opinion of the Court, one Justice concurring) (Texas resign-to-run election provisions); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (four Justices formed the opinion of the Court, one Justice concurred, and one concurred in part and dissented in part) (commercial speech case); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (five separate concurrences on a first amendment claim); Fullilove v. Klutznick, 448 U.S. 448 (1980) (three Justices on the opinion of the Court, three Justices concurring in a separate opinion) (minority set-asides for government contracts); City of Mobile v. Bolden, 446 U.S. 55 (1980) (four Justices on the opinion of the Court, two separate concurrences) (voting rights); Lalli v. Lalli, 439 U.S. 259 (1978) (three Justices on the opinion of the Court, one of whom filed a concurrence, two separate concurrences) (inheritance rights of illegitimate children); Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (a four-one-four split with Powell, J. as the swing vote and delivering the opinion of the Court) (minority quotas for medical school admission); McDaniel v. Paty, 435 U.S. 618 (1978) (four Justices on the opinion of the Court, four Justices split among three concurrences) (exclusion of ministers as state legislators); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (three Justices on the opinion of the Court, two Justices concurring in a separate opinion) (state aid to sectarian colleges); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (four Justices on the opinion of the Court, three Justices on two concurrences) (housing ordinance defining family to exclude certain extended relatives); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (four Justices on the opinion of the Court, one separate concurrence) (political advertising).

48. Blasi, *supra* note 41 at 198, 216. *See generally also* Nichol, *On Ambivalent Activism* (Book Review), 98 HARV. L. REV. — (forthcoming 1984).

49. *Cf.* Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (allowing the city to construct a Christian nativity scene); Stone v. Graham, 449 U.S. 39 (1980) (prohibiting the posting of the Ten Commandments in public schools); Meek v. Pittinger, 421 U.S. 349 (1975) (prohibiting state provision of auxiliary services to nonpublic schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (prohibiting a state salary supplement to teachers of secular subjects in nonpublic schools as involving excessive entanglement).

50. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448 (1980) (allowing minority set asides on government contracts); Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (disallowing racial quotas in admission policies when mandated by only the faculty of the school).

51. *See, e.g.,* Ambach v. Norwick, 441 U.S. 68 (1979) (upholding requirement of United States citizenship for public school teacher certification); Graham v. Richardson, 403 U.S. 365 (1971) (striking down a durational residency requirement before an alien may qualify for welfare).

52. *See* Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem.,* 578 F.2d 1374 (3rd Cir. 1978), *cert. denied,* 439 U.S. 1052 (1978) (upholding employer's right to dismiss employees living in open adultery); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (upholding sodomy statute regarding homosexual males), *aff'd mem.,* 425 U.S. 901 (1976).

53. *See, e.g.,* Independent School District v. United States, 429 U.S. 990 (1977) (remanding for further inquiry a multi-district desegregation plan); Milliken v. Bradley, 418 U.S. 717 (1974) (disallowing a multi-district school desegregation plan).

54. 103 S. Ct. 2764 (1983) (holding a portion of the Immigration and Nationality Act unconstitutional).

Court has produced a strong activist record without promoting a clear vision of the role of the Supreme Court in protecting human rights.

The Burger Court era, however, rapidly draws to a close. Five members of the Court are in their late seventies. A major change of personnel almost surely awaits the next president. Moreover, it seems quite unlikely that the next series of justices will be ambivalent about the role of the Supreme Court in American government. Battle lines are clearly drawn. A Democratic president, following on the heels of six Republican appointees, would have felt heavy pressure to select justices in the egalitarian-activist tradition. For such a court, issues of economic justice, individual autonomy, racial and sexual discrimination, and constitutional accountability of the executive branch might have provided a fruitful agenda.

President Reagan's reelection seems to assure a quite different course. Depending upon the individuals chosen, a Reagan bench might be expected to move the Supreme Court in either of two directions. At the least, it appears likely that a strong majority employing a true philosophy[55] of judicial restraint would be achieved. If the last Term is any indication, the Burger Court itself has taken a marked turn in this direction—pursuing deference to other institutions of government as the highest value in constitutional adjudication.[56] Such a Court exacerbates the dangers to individual liberties presented by a strong executive or a Congress dominated by the New Right. A working majority of strong judicial conservatives, in short, would start the Court on a slow march toward inactivity. The eventual result would likely be the return of a sleepy federal judiciary similar to that presided over by Chief Justice Vinson after World War II.

A second course would be even more disturbing. New Justices in the Rehnquist[57] mold could help comprise an activist Court seeking to

55. The Burger Court has often employed the language of judicial restraint. *See, e.g.,* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (denial of standing on the basis of absence of injury, thereby supporting executive action).

56. *See, e.g.,* INS v. Lopez-Mendoza, 104 S. Ct. 3479, 3490 (1984) (exclusionary rule not applicable to deportation proceedings); Massachusetts v. Sheppard, 104 S. Ct. 3424, 3428 (1984) (creating an exception to the exclusionary rule where the police are relying on a judicially issued warrant obtained in good faith); Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 104 S. Ct. 3348 (1984) (upholding denial of financial aid to those failing to register for the draft); Allen v. Wright, 104 S. Ct. 3315, 3329 (1984) (no standing to challenge IRS guidelines to determine tax exempt status for private schools); Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984) (no privacy interest in prison cell); Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984) (upholding a ban on sleeping in national park against first amendment challenge); INS v. Delgado, 104 S. Ct. 1758 (1984) (upholding INS factory surveys); Lynch v. Donnelly, 104 S. Ct. 1355, 1356 (1984) (upholding government display of Christian nativity scene).

57. See, for example, Justice Rehnquist's opinions in Hodel v. Virginia Surface Mining & Recl. Ass'n; 452 U.S. 264, 307-13 (1981) (Rehnquist, J., concurring) (commerce clause not applica-

further conservative political values. Then not only would traditional civil liberties guarantees be called into question, but the constitutional protection of, for example, property interests and states's rights could be reinvigorated. In either case, history may well come to see the Burger Court as transitional—keeping alive the tools of activism until a new course is set for judicial authority. If that course incorporates either a heavy dose of political conservatism or an overriding predilection for judicial restraint, the civil rights battles of the next generation may well have to be fought without the assistance of, or even in direct opposition to, the decisions of the United States Supreme Court. In that unhappy event, our rights may be truly endangered.

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ble absent a showing that regulated activity has a *substantial effect* on interstate commerce) (emphasis in original); Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 681-82 (1980) (Rehnquist, J., concurring) (arguing for resurrection of the nondelegation doctrine); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138-53 (1978) (Rehnquist J., dissenting) (designation of building as official landmark by city constituted taking of property without just compensation in violation of the fifth amendment); National League of Cities v. Usery, 426 U.S. 833 (1976) (upholding states' rights under the tenth amendment). *See also* Justice O'Connor's opinion in FERC v. Mississippi, 102 S. Ct. 2126, 2145-57 (1982) (O'Connor, J., concurring in part and dissenting in part) (tenth amendment requires invalidation of Titles I and III of the Public Utility Regulatory Policies Act of 1978); Ruckelshaus v. Monsanto, 52 U.S.L.W. 4886, 4895 (U.S. June 26, 1984) (O'Connor, J., concurring in part and dissenting in part) (disclosure of data by Environmental Protection Agency constituted a taking of property without just compensation in violation of the fifth amendment).