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Why the Burger Court Mattered

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THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT. By *Michael J. Graetz* and *Linda Greenhouse*. New York: Simon & Schuster. 2016. Pp. x, 345. Hardcover, $30; paper, $18.

INTRODUCTION

In his first term in office, President Richard Nixon appointed four justices to the U.S. Supreme Court, beginning with Chief Justice Warren Burger. It was not obvious, at first, how much difference the Nixon appointees would make. But even in retrospect—as Michael J. Graetz[1] and Linda Greenhouse[2] show in their important book, *The Burger Court and the Rise of the Judicial Right*—people have not realized how much the Burger Court mattered. The consensus, Gratz and Greenhouse say, is that the Burger Court "was a chapter of Supreme Court history during which nothing much happened" (p. 7). They quote, to that effect, Justice Lewis Powell, a central figure both on the Burger Court and in Graetz and Greenhouse's book. Powell remarked, just after Burger retired in 1986, that "[t]here has been no conservative counterrevolution by the Burger Court . . . . None of the landmark decisions of the Warren Court was overruled, and some were extended" (p. 339). A prominent book on the Burger Court is subtitled "The Counter-Revolution that Wasn't."[3]

Gratz and Greenhouse set out to overturn that consensus. Their engaging and comprehensive history of the Burger Court shows that that Court, whether or not it brought about a counterrevolution, was a critical turning point in the development of U.S. constitutional law. The book is full of important insights about the Court's work—both big-picture insights about the significance of the cases and biographical insights, drawn from the justices' papers, about how the justices thought about the issues and their colleagues. Graetz and Greenhouse's book should change not just the conventional wisdom about the Burger Court but our understanding of how constitutional law got to where it is now. It suggests how things might have

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3. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

turned out differently. And it reminds us of the ways in which constitutional law has moved in a decidedly conservative direction in the last half century.

I.

Burger succeeded Chief Justice Earl Warren. Among other things, the Warren Court ordered an end to legally mandated racial segregation in schools;[4] required that state legislatures be reapportioned according to the principle of "one person, one vote";[5] ruled that public schools could not sponsor prayer in the classroom;[6] greatly strengthened the guarantees of free speech;[7] and expanded the rights of people accused of crimes.[8] In Nixon's successful 1968 campaign, he explicitly attacked the Warren Court. He made no secret of his agenda for the Court: he wanted to appoint justices who would take a different approach, particularly to criminal defendants' rights. And Nixon, presented with four vacancies in his first term, got his opportunity. By way of comparison, only one president since Nixon—Ronald Reagan—filled even three seats.

Burger was a known critic of the Warren Court's decisions, especially those dealing with criminal justice. Harry Blackmun—Nixon's second successful appointment, after two nominations had failed—had been a lifelong friend of Burger's, and Burger, who appears to have had some questionable contacts with the Nixon White House while he was chief justice,[9] vouched for Blackmun.[10] Nixon's other two appointees were Powell, a prominent lawyer from Richmond, Virginia, and William Rehnquist, a forty-seven-year-old official in the Department of Justice. Meanwhile, three of the justices Nixon replaced—Earl Warren, Hugo Black, and Abe Fortas—had consistently supported the Warren Court's most controversial decisions, including those Nixon attacked. The fourth justice whom Nixon replaced was John Marshall Harlan, who had dissented from several of the Warren Court's landmark decisions. But Harlan's replacement was Rehnquist, who, Graetz and Greenhouse say, "was closely affiliated with the [Republican] party's most conservative wing" (p. 353), so that appointment, too, moved the Court to the right.

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4. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

5. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

6. Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

7. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

8. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

9. *E.g.*, p. 83.

10. Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 46 (2005) ("Burger had clearly been in on the administration's discussions, because he telephoned soon after Blackmun concluded his conversation with Mitchell, well before word of his possible selection became public.").

So the stage was set for a dramatic change. It is true that, as Powell said, the Burger Court did not overrule the Warren Court's most famous decisions. But Graetz and Greenhouse show how the Burger Court nonetheless moved constitutional law in a decidedly conservative direction. Three broad themes emerge from their account.

First, the Burger Court did not need to overrule important Warren Court decisions, because it "eviscerated them" (p. 43) by making those decisions much less effective in accomplishing their purposes. That was particularly true of many of the decisions that expanded criminal defendants' rights. For example, the Court limited the effectiveness of *Miranda v. Arizona*[11] by narrowing the circumstances in which officers must give the warnings required by that case (pp. 44–46). In *Mapp v. Ohio* the Warren Court had applied to the states the Fourth Amendment exclusionary rule, which forbade the use of evidence produced by an illegal search;[12] the Burger Court cut back on situations in which the exclusionary rule applied (pp. 48–49). And while *Gideon v. Wainwright*,[13] which required states to appoint lawyers for criminal defendants who could not afford them, was never drawn into question, the Burger Court made it much harder for convicted defendants to show that their lawyers had been ineffective (pp. 51–54).

The Burger Court also made it much more difficult for state criminal defendants to assert their rights in federal court (pp. 339–40). An individual who is being held by a state government may assert that his detention violates the Constitution by petitioning in federal court for a writ of habeas corpus. When habeas petitioners have been convicted of a state crime but assert that their constitutional rights were violated at trial, the question is how far the federal court may go in reexamining what the state court did. The Warren Court opened that door quite wide; the Burger Court, in an important series of cases, closed it (pp. 65–74).

Second, Graetz and Greenhouse show that the Burger Court, even if it did not effect the counterrevolution itself, paved the way for later Courts to move the law in a much more conservative direction (p. 344). Paradoxically, this was the effect of Burger Court decisions that were applauded by many liberals because those decisions seemed to expand the right of free speech under the First Amendment. The 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, established that commercial speech is protected by the First Amendment.[14] But a lot of economic activity arguably takes the form of speech, so the commercial speech decisions have been used by later Courts as a way of preventing governments from regulating business.[15] In *Buckley v. Valeo*, the Burger Court invalidated

11. 384 U.S. 436 (1966).

12. 367 U.S. 643 (1961).

13. 372 U.S. 335 (1963).

14. 425 U.S. 748 (1976).

15. Pp. 253–55; *see, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 371, 373 (2002). Some observers saw at the time that this would happen. *See* Thomas H. Jackson &

some of the campaign finance regulations that were enacted after the Watergate scandal.[16] The principles the Court announced in *Buckley* have governed that area ever since, and more recent Courts have invoked those principles to keep the government from limiting the role of money in elections.[17]

Third, Graetz and Greenhouse show that even when the Burger Court did not overturn Warren Court precedents, it permanently changed the trajectory of constitutional law. Three cases that the Burger Court decided in the mid-1970s—*San Antonio Independent School District v. Rodriguez*,[18] *Milliken v. Bradley*,[19] and *Washington v. Davis*[20]—were especially important turning points. Each of those cases terminated constitutional developments that the Warren Court had initiated and that otherwise might have changed U.S. society in significant ways. As Graetz and Greenhouse say, the Burger Court "doomed to failure the Warren Court's effort[s]" to move the law in a more egalitarian direction (p. 99).

II.

In my view, these three cases, more than anything else the Burger Court did, show the effect that Court had on constitutional law and reveal the most about the Burger Court's place in U.S. constitutional history. In many ways, *Rodriguez*, *Milliken*, and *Washington v. Davis*—decided within a three-year period—belong to a single chapter of constitutional history, a chapter that marked a decisive and, as far as we can tell today, permanent end to the core missions of the Warren Court.

Rodriguez. Toward the end of its tenure, the Warren Court began, tentatively, to suggest that the Constitution might be used to combat economic inequality. This was a natural step for the Warren Court to take. The central theme of the Warren years was the Court's attack on racial discrimination. Not only did the treatment of poor people seem to have much in common with the treatment of African Americans, but the issues were intertwined, given the prevalence of economic disadvantage among racial minorities and the role of discrimination in maintaining economic inequality. Early on, the Warren Court had struck some blows against economic inequality in the criminal justice system.[21] In one of its last decisions, *Shapiro v. Thompson*,

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John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

16. 424 U.S. 1, 58–59 (1976).

17. *See* p. 265; Citizens United v. FEC, 558 U.S. 310, 350 (2010). For discussion, see David A. Strauss, *The Equality Taboo*, 2015 U. CHI. LEGAL F. 509.

18. 411 U.S. 1 (1973).

19. 418 U.S. 717 (1974).

20. 426 U.S. 229 (1976).

21. *See* Douglas v. California, 372 U.S. 353, 357 (1963) (requiring that a lawyer be appointed to represent an indigent criminal defendant on first appeal of a conviction); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (requiring that indigent criminal defendants appealing their

the Warren Court invalidated laws that prevented people from receiving welfare benefits if they had lived in a state for less than a year.[22] And in *Goldberg v. Kelly*—after Burger's appointment, but before Blackmun, Powell, or Rehnquist had joined the Court—the Court (over Burger's dissent) held that the Due Process Clause gives people receiving welfare benefits a right to a hearing before their benefits are cut off, a decision that effectively made it less likely that benefits would be terminated at all.[23]

These decisions suggested that economic inequality might be the Court's next frontier. *Rodriguez* put an end to that possibility. The issue in *Rodriguez* was whether the Constitution allowed states to link public school funding to the property taxes collected in local school districts.[24] That system of educational finance is ubiquitous in the United States. But it means that districts in which property values are higher have more money to spend on public schools. Some states had held, under their state constitutions, that those systems were unconstitutional. In *Rodriguez*, the Court rejected the federal constitutional claim. The Court noted that people living in districts with lower property values are not necessarily poor themselves.[25] That is analytically correct, but it is cavalier about how property tax–based financing limits the resources available to poorer people and, as Graetz and Greenhouse also point out, to racial minorities, who in *Rodriguez* were concentrated in districts with lower property values (p. 92).

Powell's opinion in *Rodriguez* also went out of its way to say that the case involved issues of state fiscal and educational policy,[26] areas in which, the Court said, "the judiciary is well advised to refrain" from intervening.[27] Throughout the book, Graetz and Greenhouse emphasize both how central Powell was to the Burger Court and how Powell's background as chair of the Richmond Board of Education affected his views; *Rodriguez* may be the clearest example.[28] And *Rodriguez* was the death knell for the incipient Warren Court project of treating economic inequality as a constitutional issue.

Milliken v. Bradley. Before 1954, school segregation was explicitly required by law in many states in the South.[29] The Warren Court's famous

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convictions be afforded "as adequate appellate review" as defendants who could afford transcripts).

22. 394 U.S. 618, 621–22 (1969).

23. 397 U.S. 254, 264 (1970).

24. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 15–17 (1973).

25. *Id.* at 22–23.

26. *See id.* at 40–43.

27. *Id.* at 43.

28. *E.g.*, pp. 84–85.

29. *See* Brown v. Bd. of Educ., 347 U.S. 483, 486–90, 486 n.1 (1954) (discussing the mandatory school segregation statutes at issue); Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 291 (2004) (noting that, as of 1952, "racial segregation in public grade schools remained completely intact in the southern and border states and in the District of Columbia").

decision in *Brown v. Board of Education* held that those laws were unconstitutional.[30] But by the 1970s, school segregation had become a nationwide issue. There were still some recalcitrant Southern school districts, and Nixon gave indications of indulging them.[31] But as Graetz and Greenhouse show, the Burger Court (with only the very reluctant assent of Burger himself) initially held the line against Nixon and ruled that those districts had to make sure that their schools were actually racially integrated (pp. 83–84). The more complicated issues concerned Northern school districts. They had not been openly segregated by law, but many of them had deliberately, although covertly, adopted policies that led to segregation.[32] In principle, those districts should have been treated the same way as the Southern districts that segregated their schools overtly.

The problem was that by the mid-1970s, large numbers of white people had fled from major American cities to the suburbs. In many cities, the public school population was overwhelmingly black. The only way to bring about integration was to enforce an interdistrict remedy that would transport children from suburban schools to the inner cities and vice versa.[33] In *Milliken v. Bradley*, the Burger Court, by a 5–4 vote, effectively closed the door on interdistrict remedies.[34] Burger wrote the opinion, but the approach, again, was Powell's—Graetz and Greenhouse show how it reflected views he had held since his time in Richmond (pp. 96–97). As they also note, opposition to busing to promote school integration was widespread in the country at the time, and some of the justices were concerned that a ruling requiring busing would undermine confidence in the Court (p. 97). But whatever the reason, *Milliken* effectively ended the chapter that began with *Brown*. The courts would no longer be engaged in a substantial way in the racial desegregation of public schools.

Washington v. Davis. *Washington v. Davis*, in a different way, also marked a turning point in the project that began with *Brown*. While *Brown* itself was a school case, the Court extended the principle of *Brown* beyond schools: racial discrimination by state and local governments was unconstitutional whether it concerned schools, buses, public golf courses, or anything else. But what counted as racial discrimination? When a state explicitly treated blacks worse than whites, that was obviously unconstitutional. When it adopted a subterfuge—for example, carefully gerrymandering the boundaries of Tuskegee, Alabama, to exclude nearly every African American but no whites[35]—that was also unconstitutional. But what if government policies just had the effect of treating blacks worse than whites?

In 1971, the Burger Court addressed a parallel question in a different context—a lawsuit brought under Title VII of the Civil Rights Act of 1964,

30. *Brown*, 347 U.S. at 495.

31. *See, e.g.*, p. 83.

32. *See, e.g.*, p. 96.

33. *See* pp. 94–96.

34. 418 U.S. 717 (1974).

35. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

which prohibits racial discrimination in employment. The Court held, in *Griggs v. Duke Power Co.*, that an employer's action that had a disproportionate impact on a minority group—in that case, a high school diploma requirement that disqualified many more African Americans than whites—violated Title VII unless the employer could show that a "business necessity" justified its action.[36] The Constitution, unlike Title VII, applies to more than employment (and also, unlike Title VII, it is limited to government action). Still, it was natural to think that a standard similar to what *Griggs* established would apply under the Constitution: a government policy that disproportionately disadvantaged minorities would be unconstitutional unless the government had some especially strong justification for it. Some lower courts had, in fact, taken steps in that direction.[37] And such a standard could have required courts to address racial disparities in, for example, housing, health care, criminal justice, tax policy, and environmental protection—whenever government policy was involved.

Washington v. Davis closed the door on this potential development, although, as Graetz and Greenhouse explain, it was a few years before it became clear just how completely the door was closed (p. 288). *Washington v. Davis* held that a person alleging unconstitutional racial discrimination had to show discriminatory intent. "Discriminatory intent" might, potentially, have meant something not that far removed from *Griggs*. But the Court later made clear that *Washington v. Davis* required a deliberate intention to treat minorities worse than nonminorities. Graetz and Greenhouse have an eye-opening discussion of how *Washington v. Davis* was something of a sleeper case, both before and after it was decided (pp. 286–93). The justices did not see it as an important case, at least initially, and the decision to rule that the *Griggs* standard did not apply to constitutional claims seemed to emerge almost casually. Then after the case was decided, it took a while before the Court settled on the narrow definition of "intent."[38]

The United States might look quite different today if these three cases—*Rodriguez*, *Milliken*, and *Washington v. Davis*—had come out differently. Local governments across the country would be required to mitigate inequalities in funding public education. Courts would require that schools be racially integrated, at least if there was a showing that the government had been involved in maintaining segregation, even if that meant cross-busing urban and suburban children. And a wide range of racial disparities would be subject to constitutional attack even if there was no intentional discrimination by the government. The Burger Court turned away from all those possibilities. That alone establishes Graetz and Greenhouse's thesis, with a vengeance: the Burger period was certainly not one in which "nothing happened."

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36. 401 U.S. 424 (1971).

37. *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (citing cases).

38. *See e.g.*, p. 292; Pers. Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

III.

There was more to the Burger Court than that, though. The Burger Court moved constitutional law in a conservative direction, but some Burger Court decisions—*Roe v. Wade*[39] is the most prominent example—were not conservative, as that term is usually understood. Beyond that, there are complicated questions about the relationship between the Court and changes that were happening throughout society from the late 1960s to the mid-1980s, and related questions about the capacity of the Supreme Court and the lower federal courts to continue along the path on which the Warren Court had sent them. It might not be realistic to expect the Burger Court to have done things much differently from the way it did.

Graetz and Greenhouse understand all of this, of course. They explain that the Burger Court was not monolithically conservative (pp. 6–7). They also explicitly link the changes in the law brought about by the Burger Court with changes in society at large, and they raise, in that connection, the question whether the Burger Court's redirection of U.S. constitutional law was to some degree inevitable.[40] Because Graetz and Greenhouse are justifiably determined to rebut the conventional wisdom about how the Burger Court was relatively unimportant—and to show that it was in fact a quite conservative Court—these other aspects of the Burger Court are sometimes not emphasized. Nonetheless, one important lesson that emerges from the book—the lesson suggested by the second part of the book's title, "The Rise of the Judicial Right"—is that while the Burger Court was conservative, and more conservative than many people seem to think, the current Supreme Court is much more conservative still.[41] The Burger Court "establish[ed] the . . . legal foundation" for the conservative Courts that were to follow (p. 344). In fact, a case can be made that the current Supreme Court is further removed from the Burger Court, in a conservative direction, than the Burger Court was from the Warren Court.

A.

The Burger Court did a number of things that were not conservative in any ordinary sense of the term. *Roe v. Wade* is, as I said, the most famous example. Graetz and Greenhouse make the great point (p. 133) that many people reflexively think of *Roe v. Wade* as a Warren Court decision, even though three members of the seven-justice majority—enough to change the result—were appointed by Nixon, who ran against the Warren Court in 1968. As Graetz and Greenhouse explain, Republicans, at the time, tended to favor abortion rights more than Democrats; that pattern did not change until the Republican Party began courting evangelical Protestants, as well as Catholics, in the run-up to Reagan's election in 1980 (pp. 146–48).

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39. 410 U.S. 113 (1973).

40. *See* p. 295.

41. *See infra* Section III.B.

On abortion rights, then, the Burger Court (to use the conventional categories) was responsible for an important "liberal" decision. It was not the only time the Burger Court did that. The Warren Court was, of course, intensely concerned with racial inequality, but it was the Burger Court, not the Warren Court, that ruled that laws discriminating on the basis of sex also require an especially strong justification.[42] The Warren Court, despite its reforms of the criminal justice system, did little about capital punishment; the Burger Court, at one point, effectively declared capital punishment, as it was then practiced in the United States, to be unconstitutional.[43] When states revised their death penalty laws, the Court retreated and upheld many of them, but even the decisions upholding those laws imposed some new limits on the death penalty.[44]

The decisions in *Milliken v. Bradley* and *Washington v. Davis* cut short some of the efforts to achieve racial equality that the Warren Court had initiated, but the Burger Court also decided some important cases about race that were favorable to minorities and, in some instances, broke new ground. *Griggs v. Duke Power Co.*, the case holding that a plaintiff can show employment discrimination in violation of Title VII without establishing discriminatory intent, was one.[45] In *Bob Jones University v. United States*, the Burger Court, in an unmistakable rebuke to the Reagan Administration, upheld an Internal Revenue Service rule that denied tax-exempt status to private schools that engaged in race discrimination.[46] (The Reagan Administration had refused to defend the IRS position in the Supreme Court (p. 211).) In *United Steelworkers of America v. Weber*, the Burger Court upheld a private employer's affirmative action plan that was challenged under Title VII.[47] And the Burger Court's decision in *Regents of the University of California v. Bakke*,[48] upholding affirmative action in higher education by a state university, established the principles that continue to sustain the constitutionality of affirmative action today.[49]

At the same time, there is a sense in which the Burger Court should not be blamed, if that is the right word, for some of its important conservative decisions. Graetz and Greenhouse indirectly make this point. They show that public opinion on matters relating to criminal justice shifted sharply, beginning in the late 1960s (probably in response to an increase in crime that occurred in the 1960s) (pp. 2–3, 11–12). As Graetz and Greenhouse observe, the Supreme Court justices are members of society and are not

42. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

43. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

44. *See* pp. 24–33.

45. 401 U.S. 424, 432 (1971).

46. 461 U.S. 574, 605 (1983).

47. 443 U.S. 193, 209 (1979).

48. 438 U.S. 265, 271, 318 (1978).

49. *See, e.g.*, John C. Jeffries, Jr., Bakke *Revisited*, 2003 Sup. Ct. Rev. 1, 2; David A. Strauss, Fisher v University of Texas *and the Conservative Case for Affirmative Action*, 2016 Sup. Ct. Rev. 1, 20.

impervious to the currents in popular opinion that affect others.[50] While the appointees of a different president might have been less willing to undercut the Warren Court's criminal procedure decisions than Nixon's appointees were, it is not clear that any Court would have continued, full steam ahead, with the Warren Court agenda on those issues.

Besides that, some of the Warren Court's objectives had been accomplished,[51] so further expansions of criminal defendants' rights might not have been justified. In particular, the Warren Court, at the beginning of its tenure, was confronted with state criminal justice systems that were deeply infected by racism, many of them in states in which white supremacy was, in effect, official state policy. Much of the Warren Court's work—especially its expansion of habeas corpus, which allowed for more extensive federal court review of state criminal convictions—was a way of preventing state courts from having the last word on the fate of criminal defendants.[52] But by the 1970s, state courts, whatever their other problems, were much less characterized by outright racism. In some respects, in fact, state appellate courts were more hospitable than federal courts to defendants who asserted the rights that the Warren Court had established.[53] So the Burger Court's retreat from the Warren Court's habeas corpus decisions—a conspicuous aspect of the Burger Court's work, as Graetz and Greenhouse show—might not have been entirely unjustifiable.

Finally, the Burger Court decisions that seem to me to be the most significant and to provide the most powerful support for Graetz and Greenhouse's thesis about the importance and the conservatism of the Burger Court—*Rodriguez*, *Milliken*, and *Washington v. Davis*—can be defended as acknowledgments of the institutional limits that courts face. The opposite outcome in *Rodriguez*, for example, may not have helped disadvantaged children as much as the proponents of funding equalization hoped. When tax revenues are redistributed among districts to make expenditures more equal, taxpayers may be unwilling to pay as much, and courts cannot easily require state or local governments to raise taxes. Also, genuine educational equality requires more than just equal funding: school districts with large populations of disadvantaged students will need a greater share of resources, for example, and of course spending alone is not guaranteed to make schools better. In some states, courts did under the state constitution what *Rodriguez* refused to do under the U.S. Constitution, and there does not seem to be a

50. *E.g.*, pp. 295–96.

51. For an argument to this effect, see Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65.

52. *Id.* at 77–80.

53. *See* Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1431, 1445 (2002) (discussing the reaction of state appellate courts to the Warren Court decisions).

consensus on whether educational outcomes for disadvantaged children are better in those states.[54]

The result in *Milliken*, similarly, might rest on a recognition that a different outcome would engage the courts in a task they could not successfully carry out. Even abolishing Jim Crow segregation was very difficult for the Warren Court and the lower federal courts in the 1950s and 1960s, and Jim Crow was a regional system that was already under pressure from powerful economic and political forces.[55] There was no comparable political or economic momentum for busing children from mostly white suburbs into mostly black urban schools throughout the nation. Graetz and Greenhouse describe just how virulently school busing was opposed in Northern cities.[56] It is unclear how integration mandates, imposed by the courts with limited political support, could ever have overcome evasion and increasingly determined flight by white families.

In *Washington v. Davis*, the Court itself signaled that it was concerned about its own institutional capacity. If the Court were to require an especially strong justification for any measure that disproportionately burdened minorities, then any number of laws might be challenged:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[57]

A disproportionate-effects standard might put the Court in the position of having to remedy racial inequalities across U.S. society, and the Court was unwilling to do that.[58]

To be clear, this is not to say that these Burger Court decisions were correct; it is also not to say that the Burger Court justices were actually concerned about the institutional issues. Graetz and Greenhouse, throughout the book, suggest that the Burger Court had a distinctly political sense of its mission—to roll back Warren Court achievements and to move the country (or allow it to move) in a more conservative direction. They pooh-pooh a suggestion that Powell made to the contrary shortly after he retired (p. 341). The problems of inequality that the Court refused to address were, and are, serious ones. Maybe the Court should have tried to deal with them even if that meant taking a chance that it would fail. Alternatively, the Court, in these cases, could have adopted a more qualified position that still would

54. *See, e.g.*, Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); *see also* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994).

55. *See, e.g.*, KLARMAN, *supra* note 29.

56. *See* pp. 87–89.

57. Washington v. Davis, 426 U.S. 229, 248 (1976).

58. *Id.*

have mitigated the problems. For example, in *Rodriguez*, the Court could have condemned the most severe or unjustified inequalities in public education funding. In cases like *Milliken*, even if it did not mandate large-scale busing and more complete integration, the Court could have required that school boards take significant steps toward racial integration when they could do so at relatively low cost. After *Washington v. Davis*, the Court could have defined discriminatory intent in a way that made it much easier for plaintiffs to prove a constitutional violation when governments acted in ways that seemed culpably insensitive to the interests of minority groups.

So Graetz and Greenhouse are certainly not wrong in disapproving of these decisions—or in disapproving of the Burger Court for rendering them. In fact, one important point that emerges from their account is that the justices do not seem to have been primarily concerned about the institutional issues. Those issues do not seem to have played a large role in their deliberations with each other or within their chambers. For the most part, judging from Graetz and Greenhouse's accounts, the justices just thought that the Warren Court's movement toward greater equality, racial and otherwise, had gone far enough, and it was time to leave things in the hands of local school boards and state and local governments generally.[59] That is, of course, a policy judgment. But a justice or a Court who did have a principled concern about the institutional role of the judiciary, and who thought that large-scale social problems were better left to the elected branches of government, might have reached some of the same conclusions as the Burger Court did in these momentous cases. That should affect any final assessment of the Burger Court's work and its lasting imprint on constitutional law.

B.

One implication of Graetz and Greenhouse's account is that the while the Burger Court moved constitutional law in a conservative direction, the Supreme Court since the Burger era has been, in many respects, more conservative still. The point is captured in a sentence that Graetz and Greenhouse quote from an opinion that Justice John Paul Stevens wrote in 2007 (p. 386 n.97). Justice Stevens joined the Burger Court in 1975—he was the first new member after the four Nixon appointees—and he served until 2010.[60] In 2007, the Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, declared unconstitutional programs that two local school districts had adopted to increase racial integration in their schools.[61] The programs used the race of students, in certain limited ways, in determining the schools to which they would be assigned.[62]

Justice Stevens dissented. At the time, he was the only remaining member of the Burger Court. He concluded his opinion by writing: "It is my firm

59. *See* pp. 83–100.

60. Appendix, pp. 353–54.

61. 551 U.S. 701 (2007).

62. *Parents Involved*, 551 U.S. at 709–18.

conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."[63] And, in fact, the *Parents Involved* Court had struggled to distinguish an in-chambers opinion written by then-Justice Rehnquist—who was generally regarded as the most conservative member of the Burger Court—that concluded that a similar school integration plan was constitutional.[64]

Parents Involved is an especially dramatic example of far the law has moved, in a conservative direction, since the Burger Court, but it is not the only example. Graetz and Greenhouse identify several others. The current Court is much more receptive to the use of claims of religious freedom to undermine social welfare and regulatory laws.[65] It has suggested that the disproportionate-impact theory of employment discrimination, established in *Griggs*, may be unconstitutional.[66] It aggressively used Burger Court decisions on campaign finance and commercial speech to invalidate federal and state regulatory measures.[67]

Possibly even more revealing, positions that nearly became the law in the Burger Court era have disappeared entirely. *Rodriguez* was a 5–4 decision in the Burger Court, and, according to Graetz and Greenhouse, Powell had to "coax[ ]" Justice Potter Stewart to join the majority (p. 91). But no one today has tried to revive the argument that the Constitution requires equality in educational finance. In 1980, in *Harris v. McRae*, the Court had upheld the Hyde Amendment, which forbade the use of federal funds for abortions, by a 5–4 vote.[68] But a claim that such restrictions on abortion funding are unconstitutional seems to have no chance of success today. This is in sharp contrast to the Burger Court decisions in *Roe v. Wade*, establishing abortion rights, and in *Bakke*, permitting affirmative action; there are still powerful voices, on and off the Court, calling for those decisions to be overruled. But there are no comparable claims about *Rodriguez* or *Harris v. McRae*. In these ways, too, the law has shifted sharply to the right since the Burger Court years. But the movement in that direction began with the Burger Court.

Conclusion

Did the Burger Court stage a counterrevolution? I think the best answer is that, by itself, it did not. The landmark Warren Court decisions mostly remained intact, and in some respects the Burger Court moved the law in a more liberal direction. But constitutional law is a slow-moving enterprise, in which decisions build on each other over time. For that reason, a change in

63. *Id.* at 803 (Stevens, J., dissenting).

64. *See id.* at 721 n.10 (majority opinion) (discussing Bustop, Inc. v. Bd. of Educ., 439 U.S. 1380, 1383 (Rehnquist, Circuit Justice 1978)).

65. *See e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

66. *See* Ricci v. DeStefano, 557 U.S. 557 (2009).

67. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 312, 339–40 (2010).

68. 448 U.S. 297 (1980).

the direction in which the law is moving can be as significant as a more visible and dramatic undoing of a previous decision. Even if the Burger Court did not undo the Warren Court's work, in several respects it reversed the momentum of the Warren Court's movement toward greater equality. That made it easier for later Courts to take things further still away from the Warren Court's vision. As Graetz and Greenhouse say (p. 7), the period from 1970 to the mid-1980s was one in which U.S. society changed in many ways; no one could seriously argue otherwise. Thanks to this book, we now have an unparalleled account of how much of the change in the law we owe to the Supreme Court of that era.