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CONSTITUTIONAL POLICYMAKING IN THE BURGER YEARS

Joel B. Grossman*

THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986. Edited by *Herman Schwartz*. New York: Viking, 1987. Pp. xxv, 293. \$22.95.

Dividing the Supreme Court into periods denominated by the name of the chief justice is a venerable and useful custom, but also a risky practice if it implies an exaggerated role for the chief justice or an analytically meaningful segmentation of the Court's work. We may thus refer to the years 1969-1986 as the "Burger Court" only so long as we do not forget that it was not, in any predominant way, "Warren Burger's Court." Likewise, as some (but not all) of the essays in this collection make clear, some of the conservatizing trends said to mark the Burger Court were, in fact, merely continuations of developments and ideas already apparent in the last years of the Warren Court. The title "*The Burger Years*" is thus at least an implicit recognition of the artificial and ephemeral boundaries imposed by the comings and goings of chief justices.

The Burger Years, which began as a series of commentaries in *The Nation*, offers a left/liberal perspective on the recent course of constitutional law. It is firm, though not heavy handed, in its ideology; and light (with a few exceptions) in its analysis. The views of its authors, most of whom are law professors and/or liberal political activists, are predictable. Their common task is to assess (and lament) first, the degree to which the Supreme Court, after Warren Burger became its chief, departed from the benchmark decisions and trends of the Warren Court; and second, what these departures might imply for the future of constitutional jurisprudence. The book predates the controversy over President Reagan's ill-fated nomination of Robert Bork, and the subsequent appointment of Judge Anthony Kennedy. But its not-so-hidden concern is clearly what will become of the Court — and the Constitution — under the stewardship of William Rehnquist. Things can only get worse, or so it would appear.

I

Herman Schwartz's introductory essay offers some analytical in-

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sight to the mostly uncritical critical perspective of his coauthors. Echoing the theme of an earlier volume on the same subject,¹ Schwartz suggests several reasons why the Burger Court fell into a slow but steady drift to the right, characteristically avoiding the cutting edge of ideology rather than engaging in a more direct and explicit repudiation of doctrines which, it was assumed, no credentialed conservative (and particularly not one appointed by a Republican president) could permit to continue.

We know that the institutional tradition of *stare decisis* (however attenuated at the Supreme Court level), and incremental decisionmaking practices tend to undermine even the most devoted judicial efforts at radical change. Likewise, we recognize that the appointment process does not always produce the "right Justice." Justices appointed because it is believed they hold certain views may not hold such views; or they may not hold them very strongly; or once on the Court, their views may change. Ideology is not a perfect predictor of subsequent judicial performance. The judicial role may also liberate ideas and values imprisoned by the dictates of a prior legal or political role, as the liberalism of Earl Warren, and the (still ongoing) metamorphosis of Harry Blackmun suggest. Who could have predicted, for example, that one of the most influential and liberal modern interpretations of the first amendment would be written by the second Justice John Marshall Harlan?² Or that William Rehnquist, in his first year as chief justice, would *reject* a tenth amendment challenge to taxing and spending clause regulations designed to establish a national drinking age of twenty-one (and be flanked on the right by Brennan and O'Connor)?³ The view from the bench may, indeed, be very different from one's views *before* the bench!

The unexpected moderation of the Burger Court also reflected a changing external environment. Judges cannot make the world stand still (and they are not too good at making it move, either!). Decisions which seem to some critics to be revolutionary and illegitimate (and crying out for repudiation) may seem much less (or more) so over time, after their impact has been assessed. Thus, *Miranda v. Arizona*,⁴ despite all the initial prophecies of doom and gloom, has not fatally undermined the police interrogation process. To be sure, this is partly because the Supreme Court has narrowed the decision's scope and application. But it is also true that the police have learned to live with the *Miranda* rules (and in some unexpected ways *Miranda* has helped them); and the Court now accepts that red flag of Warren Court liber-

1. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

2. See *Cohen v. California*, 403 U.S. 15 (1971).

3. See *South Dakota v. Dole*, 107 S. Ct. 2793 (1987).

4. 384 U.S. 436 (1966).

alism as “strik[ing] the proper balance.”⁵ *Mapp v. Ohio*,⁶ on the other hand, while much less controversial at its inception, has become a primary target (and likely victim) of judicial conservatives. This is partly because conservatives have accepted, or want to believe, distorted estimates of its impact,⁷ but also because a significant upgrading of the law of search and seizure since *Mapp* has substantially enhanced the stakes in the exclusionary rule debate.⁸

A changing external environment can also influence the Court's agenda, and thus the parameters within which it can effectively operate. Initial Supreme Court hostility to affirmative action, for example, has been replaced by a grudging, albeit limited, acceptance that equity and equality are not implacable opposites, and that moderate affirmative action remedies are consistent with other constitutional values. Having rejected the Reagan administration position that affirmative action (including school desegregation) is proper only when it provides make-whole relief to individuals who have been personally injured,⁹ the Supreme Court is hardly likely (or able) to reverse the tide of limited affirmative action efforts which are now so widespread in both the public and private sectors. Having initiated and fostered a legal revolution favoring gender equality, the Court, even if it were of a mind to do so, could hardly reverse itself amidst the strong social currents pressing to carry that revolution even further. Having recognized that students, prisoners, and hospital residents have constitutional rights, the Court is unlikely to turn the clock back to the “hands off” doctrine of an earlier day, although the Burger Court did narrow the constitutional protections which members of those groups now routinely expect and seek to expand.¹⁰ Rights, once set loose, are very difficult to contain; rights consciousness — on and off the Court — is a powerful engine of legal mobilization and change.

The recent debates over original intent and derivative constitutional rights, which focused mainly on, but were not limited to, the right of privacy, did little to damage and much to strengthen the emerging regime of rights which confronted (and for the most part

5. *Moran v. Burbine*, 106 S. Ct. 1135, 1143 (1986).

6. 367 U.S. 643 (1961).

7. See Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. BAR FOUND. RES. J. 611.

8. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969) (The Court tightened restrictions on searches pursuant to a lawful arrest.); *Katz v. United States*, 389 U.S. 347 (1967) (The Court imposed new restrictions on electronic surveillance, and more generally, linked searches to expectations of privacy.); *Payton v. New York*, 445 U.S. 573 (1980) (The Court limited warrantless home arrests.).

9. See Local No. 93, Intl. Assn. of Firefighters v. Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheetmetal Workers Intl. Assn. v. EEOC, 478 U.S. 21 (1986).

10. See *Hudson v. Palmer*, 468 U.S. 517 (1984) (Inmates have no fourth amendment protection against searches in their cells.).

resisted) the Burger Court. The juxtaposition of Judges Bork and Kennedy reveals little support for original intent as an exclusive theory of constitutional interpretation, and very considerable public support for *some* constitutional right to privacy, whatever its origins. What those nomination debates revealed is that most people (and perhaps many judges, too) care little for theoretical niceties and jurisprudential subtleties; what concerns them are specific applications of those rights which, for reasons of ideology or personal benefit, they may favor or oppose. Thus the constitutional right of privacy is not in serious danger of repudiation. The Burger Court accepted this, and so too will its successor.

To whom this right applies, and how it applies, however, remain controversial and dynamic issues still open to judicial revision. Just as the Court sometimes sets constitutional boundaries (and goals) for the society and the political system, so too its effective agenda must reflect the national agenda and the realities of political dynamics. The Burger Court did not repudiate the liberalism of the Warren Court in wholesale fashion because the Supreme Court is inescapably part of a political society which had absorbed and largely sustained the values to which the Warren Court had subscribed. What looked like judicial radicalism in the 1960s had become, except to a few die-hard conservatives, mainstream jurisprudence and politics in the 1980s.

One final perspective on the Burger Court's "conservative conservatism" needs to be elaborated; regrettably, it is not addressed in this book. Not only was the Burger Court operating in a changed, and changing, policy arena, but it was itself an institution undergoing modest, but important, structural change that may well have contributed to its conservative "drift." The Supreme Court is, at best, neither well suited nor often disposed to making sharp doctrinal breaks with the past. Serial negative incrementalism¹¹ is usually its top speed. But the 1970s and 1980s witnessed a breakdown in institutional consensus marked by a sharp increase in closely divided decisions, a proliferation of opinions, substantial increases in the length of opinions, and extensive footnotes. This was no doubt a response to increasingly complex and ideologically charged issues generated by the growth of the administrative state and the proliferation of rights and rights consciousness. It was also the practical consequence of a divided Court. But there has also been a gradual bureaucratization of the Court's internal procedures marked, most importantly, by an enlarged clerk pool and substantial enhancement, at least in most chambers, of the clerks' responsibilities. As I have pointed out elsewhere, this is more a bureaucratization of diffusion rather than of lockstep Weberian hier-

11. By which I mean the common practice of announcing a constitutional rule but deferring to subsequent cases to provide a precise operational definition of what that rule means or requires.

archy.¹² But it cannot be ignored in explaining the drift of the Burger Court. The Burger Court's lack of a clear ideological direction was thus rooted in changing institutional norms as well as in judicial traditions, a divided bench, and external political reality.

II

What were the main currents of doctrinal evolution and constitutional thinking in the Burger years? Supreme Court policymaking rarely produces clear policy statements or guidelines for implementation of its decisions. Few decisions are as specific as *Miranda* in spelling out just what has been decided, what must be done, and who is to do it. This encourages reliance on conventional doctrinal analysis, which conveniently focuses on what the justices have said in a few leading cases, with little regard for process or context. Unfortunately that is what most of these essays entail.

Nevertheless, several cross-cutting themes emerge. One is the importance of the Burger Court's effort to contain and modify efforts to relax the rules governing access to the federal courts. Another is its persistent effort, in a number of policy areas, to blunt the cutting edge of Warren Court liberalism by reducing the scope of federal judicial intervention to enforce constitutional rights.

As to the first theme, Burt Neuborne and Herman Schwartz (pp. 3, 177) both argue that there was a mixed record of decisions regarding access to the federal judiciary to claim or protect constitutional rights. Access rules, which are often expressed conceptually as matters of jurisdiction or justiciability, go to the very heart of the judicial function and our understanding of the Supreme Court's proper role. Is it the Court's job merely to decide disputes between adverse parties, or does it have a broader "public law" function of expounding (perhaps even creating) and protecting constitutional rights? Is its role to be justified and its legitimacy derived solely or primarily by fidelity to the traditional rules of bipolar constitutional adjudication, or is it to be evaluated by some external measure of function or outcome?¹³

It is possible to read the Burger Court's record in two ways. There can be little doubt of its predisposition to refashion traditional limits on the ability of taxpayers and citizens to employ the courts for a general airing of political grievances, i.e., to "challenge the system." The Court not only limited the briefly emergent taxpayer standing doctrine

12. See J. GROSSMAN, SOME THOUGHTS ON THE EVOLUTION OF THE SUPREME COURT'S ROLE AND STRUCTURE (1985).

13. See Grossman, *Judicial Legitimacy and the Role of the Courts*, 1984 AM. BAR FOUND. RES. J. 214 (reviewing M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981)) and sources cited therein, especially: Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); and Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

of *Flast v. Cohen*¹⁴ but even tightened, at least rhetorically, traditional standing doctrine by adding to it "injury in fact" and "causation in fact" requirements.¹⁵ The justiciability doctrine of political questions, which had been substantially narrowed by the Warren Court, seemed likely to take on new life (though never, I think, to return to its pre-*Baker* incarnation).¹⁶ And the Burger Court erected a high barrier against federal habeas corpus review of constitutional issues in state criminal trials.¹⁷

Access is affected not only by doctrines of jurisdiction and justiciability, but also by certiorari practices, substantive rules and constitutional interpretations, and remedial doctrines. Empirical studies have shown more than a tendency for Supreme Court justices to grant review primarily to reverse lower court decisions they believe to be erroneous.¹⁸ In the Burger Court, there was a clear pattern of granting review in criminal cases to prosecutors challenging the reversal of convictions by the lower courts (often their own state supreme courts), and, reversing the pattern of the Warren Court, few grants to defendants seeking review of their convictions.

Reversal of substantive doctrinal trends may also be a signal to potential litigants that certain cases and issues are likely (or very unlikely) to be selected for review. The post-1930s consensus against economic substantive due process, for example, has been strictly enforced by refusing to take cases challenging state economic regulations, a pattern continued by the Burger Court. Potential challenges to official authority have been limited by curtailment of the expansion of the state action doctrine,¹⁹ by setting high barriers of immunity for some (though not all) political officials,²⁰ by limiting the occasions for federal court intervention in state court proceedings,²¹ and by attempts to revive the eleventh amendment to ward off constitutional challenges to state policies.²²

Likewise, the Burger Court's decisions on major criminal justice issues, including capital punishment and prisoners' rights, must certainly suggest to those target groups that relief from the current

14. 392 U.S. 83 (1968).

15. *E.g.*, *Allen v. Wright*, 468 U.S. 737 (1984).

16. *See Baker v. Carr*, 369 U.S. 186 (1962).

17. *See Stone v. Powell*, 428 U.S. 465 (1976).

18. D. PROVINI, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980); Provine, *Deciding What to Decide: How the Supreme Court Sets Its Agenda*, 64 *JUDICATURE* 320 (1981).

19. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). *See also Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

20. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

21. *See Younger v. Harris*, 401 U.S. 37 (1971), and its progeny.

22. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

Supreme Court is unlikely (although they are peculiarly unlikely to be dissuaded from *seeking* review). While not repudiating the basic principles of *Brown v. Board of Education*²³ and *Baker v. Carr*,²⁴ the Court has cut back on available remedies for, and judicial intervention to protect against, violations of those decisions.²⁵ Overall, the Court made it clear that it would not be hospitable to certain kinds of constitutional claims and thus to certain classes of claimants.

The Burger Court did not uniformly close all courthouse doors to nontraditional litigants. It often permitted an expanded judicial review of administrative agency decisions, which not only benefited environmentalists and those challenging nuclear power, but also those challenging restrictions on private property. And, often over the opposition of the Chief Justice, it did substantially enhance remedial opportunities for those seeking redress for violations of constitutional rights.

Neuborne (p. 3) argues that, on balance, the Burger Court favored the more traditional, and restrictive, rules of access, and the more limited judicial role which those rules serve. I think he is essentially correct. But if our baseline is the 1950s instead of the 1960s, then the net result of the Warren *and* Burger Court decisions has been substantially to enlarge access to the federal courts. It seems highly unlikely that even the Rehnquist Court would return us all the way to the much narrower private law view of standing and of which issues are appropriate for Supreme Court consideration.

Like Neuborne, I prefer a more flexible, open-ended view of the Court's function, and an expanded conception of access which is sensitive to nontraditional litigants and causes. It is, in my judgment, the only tenable position for the Supreme Court of the 1980s (leaving aside questions of particular doctrines). Constitutional rights and values ought not to be merely instrumental means of resolving disputes selected for decision by essentially technical criteria, but instead should be aspirations of a liberal polity to which the Supreme Court can make more than a modest contribution. On the other hand, in order for the Supreme Court to function effectively as a policymaker it must also be seen as a *court*. Its legitimacy can never rest entirely on the outcome of its decisions. I share Neuborne's rejection of a rigid "*Marbury*" model of adjudication,²⁶ but he does fail to address the

23. *Brown v. Board of Educ.* (Brown I), 347 U.S. 483 (1954); *Brown v. Board of Educ.* (Brown II), 349 U.S. 294 (1955).

24. 369 U.S. 186 (1962).

25. Of course, this retrenchment has been countered by efforts to bypass the Supreme Court by reliance on state law and state constitutions, which state supreme courts can interpret more liberally than the federal constitution. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983).

26. Pp. 1-5. It is clear what Neuborne means by a *Marbury* model of adjudication, but it is an apt metaphor only because it has come to be used that way. Technically speaking, Neuborne is correct; the decision turned on a hypertechanical reading of article III limitations on the

necessary question of limits. Is he urging adoption of the William O. Douglas position that all citizens should be allowed, more or less without restraint, to become private attorneys-general?²⁷ Surely not; but then who should have standing to litigate in the federal courts? What kinds of cases should be allowed — encouraged? Is there room in our constitutional scheme for a constitutional “cop-out” such as the political questions doctrine? This is not the forum to answer those questions, but clearly they must be addressed in any complete assessment of the Burger Court.

A second theme of these essays might be labeled “phased regression from the liberal norm of federal judicial intervention to protect constitutional rights.” The strategy of the Burger Court (if strategy is the right word) was in many instances to accept the basic principles of major Warren Court decisions while at the same time altering their meaning and/or undermining their remedial force and applicability. Thus, while *Brown* has been deified, its engine has stalled; the Supreme Court has clearly orchestrated a policy of federal court disengagement from the desegregation arena. Justice Brennan’s updating of *Brown* in *Green v. County School Board*,²⁸ which required evidence of achievement of a “unitary, nonracial school system” in de jure segregated systems, was subsequently diluted in *Swann v. Charlotte-Mecklenburg Board of Education* to permit a significant number of one-race schools.²⁹ Thus a school child does not have an enforceable constitutional right to attend an integrated school (the word integration is, of course, never used), but only the right to attend a school in a system which nominally meets the *Green-Swann* standard. The equitable powers of federal judges to fashion appropriate desegregation remedies also have been limited; interdistrict busing strongly disfavored; and maintaining integrated schools in the face of white flight substantially impeded by linking continued judicial surveillance to proof of discriminatory intent or purpose.

The Burger Court did reject the Reagan administration position that school desegregation plans be not only halted, but undone. But the Court was clearly prepared to witness a substantially diminished desegregation imperative. It is, in fact, likely that maximum school desegregation in the United States has been achieved, and that we have begun (and apparently will tolerate) a steady retreat from the high point of the late 1970s, when about forty percent of America’s school children (slightly more in the south than in the north) attended more

Supreme Court’s original jurisdiction. Given that the power of judicial review is not mentioned in the Constitution, however, Marshall’s purpose was obviously to *transcend* article III and incorporate into the Constitution a much broader conception of judicial power. Thus, *Marbury* stands more for a broad than for a limited interpretation of judicial power.

27. *Flast v. Cohen*, 392 U.S. 83, 107 (1968) (Douglas, J., concurring).

28. 391 U.S. 430 (1968).

29. 402 U.S. 912 (1971).

than nominally integrated schools.³⁰ After *Milliken v. Bradley (Milliken II)*,³¹ when the Court said that a court-ordered plan that emphasized resources for the black schools and remedial teaching efforts rather than aggressive desegregation was responsive to "the condition which offends the Constitution,"³² and thus met the *Swann* version of *Brown*, some observers said that the Supreme Court was countenancing a return to a benign (but perhaps more insidious) version of the "separate-but-equal" doctrine of *Plessy v. Ferguson*.³³ I think that, tragically, that is what has happened.

One finds a similar strategy of judicial disengagement in the 1970s reapportionment cases (which, inexplicably, are omitted from discussion in the book), and in the Court's "deconstitutionalization" of *Miranda* and *Mapp*. As Yale Kamisar (p. 143) has noted, the Burger Court's strategy has been to chip away at *Miranda*, excising those requirements not specifically supported by the original facts of the case, and then holding that the *Miranda* rules were not themselves of constitutional dimension, but merely prophylactic devices designed to enforce the fifth amendment. New "public safety" and "inevitable discovery" exceptions have been adopted,³⁴ but, almost inexplicably, the Court has now announced that *Miranda*, in its new slimmed down version, strikes the proper balance. The exclusionary rule announced in *Mapp v. Ohio* is under greater attack, and seems more likely to be repudiated. It has also been downgraded to a mere prophylactic rule; and the good faith exception,³⁵ at the moment linked only to the warrant requirement, seems a likely precursor to full excision.

Similar examples of the Burger Court's incremental restructuring of liberal constitutional doctrine by reducing judicial policy intervention are found throughout the book. The three-part *Lemon*³⁶ test for determining an unconstitutional establishment of religion is a likely candidate for judicial surgery. The same can be said for the doctrine that the first amendment is not limited primarily to the protection of political speech, and that with some exceptions such as libel and obscenity, all expression is of equal value. Lyle Denniston's essay (p. 23) neatly points out how the *New York Times v. Sullivan*³⁷ case might be used by its opponents to bring about what would be a major regression in first amendment doctrine. Indeed, reinvigoration of the "two-level" theory of first amendment protections, all but lost in the modern lib-

30. C. BULLOCK & C. LAMB, IMPLEMENTATION OF CIVIL RIGHTS POLICY 55-92 (1984).

31. 433 U.S. 267 (1977).

32. 433 U.S. at 282.

33. 163 U.S. 537 (1896).

34. See *New York v. Quarles*, 467 U.S. 649 (1984); *Nix v. Williams*, 467 U.S. 431 (1984).

35. *United States v. Leon*, 468 U.S. 897 (1984).

36. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

37. 376 U.S. 254 (1964).

eral sweep toward a near absolutist interpretation, seems a very likely possibility.

For the sake of accuracy it must be conceded that judicial disengagement was not the exclusive denominator of the Burger Court. That Court is almost entirely responsible for the legal revolution in gender equality (although critics contend that it did not go far enough to eliminate gender inequality). It fostered the movement to extend constitutional rights to prison and hospital inmates — before pulling back in several recent decisions. It extended the right of privacy to abortions, and notwithstanding some concessions made to governmental restrictions on funding abortions, maintained that doctrine under extreme pressure. Until *Bowers v. Hardwick*³⁸ it even seemed to be developing a doctrine of “sexual due process” to protect the autonomy of private decisions in matters of sexual preference.

III

Constitutional policymaking is a continuous enterprise. It seems appropriate, therefore, to conclude this essay with some observations on trends likely to have long-term consequences which have not yet been fully articulated in the Burger years. Most obvious on the doctrinal side of the ledger is the growing reenchantment with private property (and disenchantment with its regulation) and the emergence, or resuscitation, of doctrinal thinking designed to restore its legal and constitutional primacy. There were certainly some hints of this in the Burger years in efforts to revive the contract clause, and in keying some first amendment decisions to property rights. Justice Scalia's opinion last year in the California beachfront case³⁹ forecasts continued movement in this direction. Challenges to the delegation of power doctrine, which is central to the legal structure of the administrative state, are also on the horizon. The administrative state is not likely to fall, but its scope and authority to regulate have certainly become more vulnerable to restriction, and its primacy is no longer unchallengeable.

Two other trends should be noted. First, there is the increasing empirical base of constitutional litigation. The Burger Court did not welcome, and certainly did not embrace, this development, but its march seems inexorable. What is the probative value of systematic statistical evidence, and to what extent should the determination of constitutional rights depend on it? Constitutional law — good constitutional law — after all, depends as much on valid observations about the nature of society and human behavior as it does on textual interpretation. The Burger Court made some effort to incorporate empiri-

38. 107 S. Ct. 29 (1986).

39. *Nollan v. California Coastal Commn.*, 107 S. Ct. 3141 (1987); See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

cal observations into its decision in the jury-size cases,⁴⁰ but shied away from serious empirical inquiry in other cases, such as the deterrent value of capital punishment.⁴¹ The Rehnquist Court's decision in *McCleskey v. Kemp* rejected a statistically-based equal protection challenge to the death penalty, although it did not dismiss it out of hand.⁴² Cases generated by the *Meese Commission Report on Pornography* on the alleged harms of sexual violence will once again necessitate consideration of social science data and its implications. Ultimately the Court will have to come to terms with a form of knowledge which has achieved increasing legitimacy in the social and political worlds. Legal empiricism began with the "Brandeis Brief" largely as a liberal effort to challenge traditional conservative legal doctrines. But increasingly it has transcended ideology and been embraced by advocates for conservative causes. As a new generation of justices, trained in statistics and comfortable with social science, reaches the bench, much orthodox legal and constitutional thinking will need to be reexamined.

Second, the empirical basis of constitutional jurisprudence has already begun to be tested in the Court's largely formalistic, and increasingly surrealistic, view of the political system. Recent decisions about party primaries and conventions, and political gerrymandering, have brought the Court into closer contact with the electoral system;⁴³ decisions about campaign contributions and their regulation have implicated the larger political system.⁴⁴ In each of these cases, as with the early reapportionment cases, the Court has been forced to make empirical assumptions about the operation of our political system that many have found unsatisfactory. A complete assessment of the Burger years will need to recognize both phenomena: the expanding constitutional framework of politics, and the growing empiricism of constitutional litigation.

40. *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978).

41. *See Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (Stewart, J., plurality opinion).

42. 107 S. Ct. 3199 (1987).

43. *See, e.g., Tashjian v. Republican Party*, 107 S. Ct. 544 (1986); *Davis v. Bandemer*, 478 U.S. 109 (1986).

44. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).