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Frederick Schauer
University of Michigan Law School

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*Frederick Schauer**

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

If the United States can be said to have a dominant legal theory, that theory must be some version of Legal Realism. Formalism — treating legal rules as both totally binding and capable of mechanical application — continues to be the favorite straw man for a wide variety of critiques,[1] but it remains virtually impossible to locate real people who espouse formalism or who perform their role in a formalist fashion.[2] Yet Realism continues to be well-defended in the legal academy, among practicing lawyers, and, perhaps most importantly, among the population as a whole.[3] No matter how frequently or how resoundingly the strongest claims[4] of Realism have been refuted,[5] those claims, like the hydra, keep returning to torment us.

In a way, the persistence of Realism in the United States is as anomalous as it is surprising. For the claims that law is far less than it pretends to be have been the strongest in this most legalistic and most litigious of nations. One likely explanation for the common acceptance of Realism in the United States is the special nature of the United States Constitution and the pervasiveness of constitutional adjudication. When a constitution contains such vague man-

* Professor of Law, University of Michigan. A.B. 1967, M.B.A. 1968, Dartmouth College; J.D. 1972, Harvard University. Professor Schauer is the author of FREE SPEECH : A PHILOSOPHICAL ENQUIRY (1982) (reviewed in this issue). — Ed.

1. *E.g.,* D. Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1-2 (D. Kairys ed. 1982) (reviewed in this issue). A less extreme formalism is described in Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564-65 (1983).

2. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 15-16 (1977); *see also* Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision,* 14 CORNELL L.Q. 274 (1929).

3. *See, e.g.,* D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983); Nowak, *Realism, Nihilism, and the Supreme Court: Do the Emperors Have Nothing But Robes?*, 22 WASHBURN L.J. 246 (1983); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) [hereinafter cited as Tushnet, *Critique*]; Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983).

4. I recognize that Legal Realism in its most extreme form, including the less guarded statements of both Jerome Frank and Karl Llewellyn, is not necessarily representative of all of Legal Realism, and that the more refined and sophisticated versions of Realism have made major contributions to our understanding of the legal enterprise. I will leave to the reader the judgment of whether I am here arguing against straw men or against real people.

5. The classic refutation of Realism, albeit a somewhat caricatured Realism, is H.L.A. HART, THE CONCEPT OF LAW 121-50 (1961).

dates as "due process of law," "equal protection of the laws," "cruel and unusual punishments," "unreasonable searches and seizures," and "commerce . . . among the several states," when the issues arising under those provisions are among the most important that a society confronts, when judicial decision of those issues is frequent and active, and when the decisionmakers are chosen at least in part on the basis of their political predispositions, the divergence between the myth of judges as mechanical appliers of precise rules and their actual practice is greatest. Consequently, the Realist impulse is greatest with respect to constitutional adjudication, particularly in the Supreme Court. Because the external observer is forced to confront decisions that undoubtedly reflect the political values of the justices, it is easy for such an observer to conclude that decisionmaking by the Supreme Court is entirely political, unconstrained by constitutional tests, the original intentions of the drafters,[6] or, most importantly in the instant context, prior decisions of the Supreme Court.[7] And if this is the case, then one would expect a change in personnel on the Court to produce a dramatic change in the decisions that emanate from the Court.

The volume under discussion is most important for its powerful refutation of the thesis that doctrine does not matter and that a change in personnel on the Court will produce decisions unfettered by the developed principles of previous courts. In assessing the work of the Burger Court, Professor Blasi and his colleagues[8] have, in varying degrees, concluded that the Burger Court has departed from Warren Court precedents far less than was anticipated, that there has been no wholesale rejection of prior decisions or existing principles, and that the predictions and characterizations of a constitutional counter-revolution wrought by the Burger Court have, to say the least, been exaggerated. In drawing this conclusion, the writers assembled here do not contend that the Justices who now most commonly comprise the Court's majority are, in fact, less politically or even legally conservative than was originally supposed. Rather, they have, by and large, concluded that doctrine, precedent, and related institutional considerations have exerted a considerable restraining influence on what might otherwise have been the more extreme political predilections of the Court's personnel. I do not find this conclusion surprising. What I do find surprising is the number of people for whom the conclusion is surprising. But they do exist, and

6. I am not conceding that original intent *ought* to be a constraint, *see* Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982), but this is unquestionably a minority view. If in fact original intent ought to be a constraint, then I would maintain that it *could* operate as such.

7. *See* Tushnet, *Critique*, *supra* note 3.

8. The book is sponsored by the Society of American Law Teachers, whose aims are set forth at p. x.

in large numbers, and this book will have performed an enormous service if it can convince some of those people that doctrine does matter.

I

The very designation "The Burger Court" merits some reflection. Clearly Professor Blasi did not make up that title, and he admits that it is not much more than "a common expedient to use changes in the identity of the chief justice as dividing lines for demarcating segments of Supreme Court history" (p. xi). But the frequency with which we use this common expedient may, as with many convenient shorthand designations, blind us to the underlying complexities. Chief Justice Burger is indeed the nominal head of the Court, but Warren Burger as a justice is but one of a number of justices all of whom were selected, at least in part, for their particular conservative outlook, and because they were perceived as having little sympathy for the general tenor of the decisions and decisionmaking process of the Warren Court. Warren Burger is undoubtedly far less significant in this context than the forces and individuals who were responsible for his appointment as well as the appointments of Harry Blackmun, William Rehnquist, Lewis Powell, John Paul Stevens, and Sandra O'Connor. But even to refer to "The Nixon Court" is, if not unfair or erroneous, then at least distracting. For the crimes of Nixon the man are almost completely irrelevant in the context of discussing the appointment and performance of four justices whose selection undoubtedly reflected an emerging political mood at the time of their appointment. From this perspective it is perhaps more accurate to refer to "The People's Court," but that designation has apparently been preempted.

I mean to suggest by this that the very act of characterizing a Court in terms of its personnel is likely to give an unjustified primacy to personality over doctrine and is likely as well to focus on changes rather than on continuity. Indeed, it is one of the major strengths of this book that it has managed to transcend many of the limitations and distortions inherent in the definition of its mission. But the mission itself is still worth thinking about. Chronological approaches to constitutional law are, to say the least, passé,[9] and with good reason. Both the development of constitutional doctrine and the development of the Supreme Court as an institution are marked by the persistence of themes as well as by changing themes; by the growth of some doctrines as others go into decline; by areas of turmoil coexisting with pockets of stability; and, most importantly, by phenomena, doctrinal or otherwise, that persist in the face of

9. For an interesting historical curiosity, see J. SHOLLEY, CASES ON CONSTITUTIONAL LAW (1951), a casebook organized along strictly chronological lines.

changing personnel, or that change in the face of a stable makeup in the membership of the Court.

I mention these impressions only to encourage readers of Blasi's book, or others like it, to approach the enterprise with a skeptical eye. There are many windows through which one may view the Supreme Court and constitutional doctrine, and a chronologically demarcated and doctrinally subdivided[10] window is only one of them. Moreover, a chronological evaluation of the work of the Court is most useful if done against a backdrop of a chronological assessment of the society in which the Court operates. That is, we must be wary of attributing too much doctrinal change to changes in the personalities that sit on the Court, and not enough to changes in society that might influence even a stably constituted Court. As Martin Shapiro suggests in his important concluding essay,[11] evaluation of judicial philosophy must take place with reference both to "the . . . stage of American social and political development" (p. 225) within which a Court operates, and also to the backgrounds and training of those who are doing the evaluating. If we can imagine that American social and political development progressed exactly as it did from 1968 to 1982, with but one exception — Justices Warren, Black, Douglas, and Fortas remained on the Court — is it so clear that the themes of the Warren Court would have been extended, rather than experiencing a period of retrenchment or reversal in the face of political and popular reaction? I can provide no certain answer to this hypothetical question, but just as we may now be experiencing more "the Court of the 1970's and 1980's" than "the Burger Court," so too may we in the recent past have experienced less "the Warren Court" than "the Court of the 1960's."[12]

II

Turning more specifically to the essays collected in this volume, all of them, in one way or another, support the theme that there was far more continuity and far less cataclysm than was expected when the personnel of the Court changed from "the Warren Court" to "the Burger Court."[13] Judge Ginsburg's sympathetic discussion of the

10. With the exception of the essays by Professors Blasi and Shapiro, all of the contributions are oriented around specific substantive areas rather than broader themes.

11. "Fathers and Sons: The Court, The Commentators, and the Search for Values," pp. 218-38.

12. In a society in which the courts in general and the Supreme Court in particular are highly visible institutions deciding many of the great issues of the day, the relationship between courts and values is especially complex. To some extent the values of the times are *created* by courts, particularly the Supreme Court, as much as those values are reflected by the courts. Did the Warren Court reflect that social/political/chronological phenomenon known as the 1960's, or did it help to create it? I am quite confident that the answer must be "Both."

13. On what people expected, I rely not only on my own recollection, but also on Anthony

Burger Court's creation of and adherence to close scrutiny of gender-based classifications[14] would hardly support the charge that equality as a value has been abandoned, or even constricted. A similar conclusion can be drawn from Professor Brest's analysis of the race discrimination cases,[15] particularly his conclusion that "a relatively conservative Court in a conservative political environment has continued to press . . . hard for integrated schools" (p. 119). Professor Bennett's essay on poverty law appears to this reader as substantially less sympathetic to the Burger Court,[16] but even here the theme is more that a different court might have done more, rather than that this particular court has been actively antagonistic to the claims of the poor. Yet I wonder whether any real Court, sitting in the 1970's, or perhaps even in the 1960's, would have decided the Burger Court's docket in a drastically different fashion. Professor Bennett justifiably focuses, in part, on *San Antonio Independent School District v. Rodriguez*,[17] and that invites the question of whether even a Court of nine Earl Warrens would have decided that case differently, especially given the enormous social, political, and economic upheaval that such a result would have brought about, and given the enormous difficulties of enforcement such a decision would have occasioned. These considerations are suggested by Professor Bennett himself (p. 55), and to that extent he too is a supporter of the book's theme[18] that stability has been more important than change in the shift from Warren Court to Burger Court.

Three of the essays in this book make special attempts to locate themes running through specific substantive areas of Burger Court jurisprudence. Professors Dorsen and Gora see a special solicitude for private property as a unifying theme for many of the Court's free speech decisions,[19] and Professor Burt sees a particular authoritarian vision of the family as tying together the Burger Court's family law decisions.[20] In both of these instances the explanatory theme seems strained, but I cheerfully acknowledge that this criticism is but an

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Lewis's statement in his Foreword to this book that "many expected to see the more striking constitutional doctrines of the Warren years rolled back or even abandoned." P. vii.

14. "The Burger Court's Grapplings with Sex Discrimination," pp. 132-56.

15. "Race Discrimination," pp. 113-31.

16. "The Burger Court and the Poor," pp. 46-61.

17. 411 U.S. 1 (1973) (upholding the use of local property taxes to finance public schools).

18. Especially given the book's sponsorship, there is no reason to believe that the book's theme, embodied in its subtitle, was planned in advance. It seems much more likely that this theme emerged without any overall intention to promote this message on the part of either the editor or the sponsor. The emergent theme, and its prominence in the subtitle and the introductory matter, are thus a credit to the integrity of the editor and the sponsor.

19. "The Burger Court and the Freedom of Speech," pp. 28-45.

20. "The Burger Court and the Family," pp. 92-112.

offshoot of my general skepticism of unifying explanatory themes.[21] Professor Emerson, in discussing freedom of the press,[22] also finds an explanatory theme, but of a somewhat different variety. Although he too finds some aspects of the Burger Court's record either worthy of praise or less harmful than was anticipated, his evaluation is largely negative, and he places most of the blame on the Court's continued use of an increasingly vague balancing standard (pp. 14-15, 26). I had hoped that we had left the dispute between absolutists and balancers well behind us,[23] for that characterization obscures far more issues than it illuminates.[24] Given his unquestioned commitment to an extremely strong principle of freedom of speech and freedom of the press, I wonder whether Professor Emerson would prefer a set of absolute rules designed by Justice Rehnquist to ad hoc balancing by Justice Marshall.[25]

The essays that seem best to capture the spirit of the book (or, to be frank, that aspect of the book with which I am most sympathetic) are those that eschew unifying themes, and see in the work of the Burger Court some reinforcement and strengthening of Warren Court doctrines, some dilution or whittling away at other doctrines inherited from the 1960's, and some areas in which the work of the Burger Court is not capable of so simple a characterization. This pluralistic assessment is particularly evident in Professor Kamisar's essay on criminal procedure,[26] Professor Brest's on race discrimination,[27] and Professor St. Antoine's on labor law.[28] It also seeps through Professor Blasi's own substantive contribution to the volume, in which he finds in the Burger Court an activism not dissimilar in general judicial philosophy from that which characterized the Warren Court, but far less unified by a particular social, political, or philosophical vision.[29] These essays, more than any of the others in the book, implicitly support the view that an underlying phenomenon of stability can temper or prevent significant doctrinal changes even as the personnel of the Court changes.

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21. *See* Schauer, *supra* note 6; Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285.

22. "Freedom of the Press under the Burger Court," pp. 1-27.

23. *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 296-305 (1981).

24. *See* Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

25. *See* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

26. "The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosection-Oriented?), and Police Investigatory Practices," pp. 62-91.

27. "Race Discrimination," pp. 113-31.

28. "Individual Rights in the Work Place: The Burger Court and Labor Law," pp. 157-79.

29. "The Rootless Activism of the Burger Court," pp. 198-217.

III

It is possible, of course, that the expected counter-revolution did not occur merely because the wrong people sat on the Court. Perhaps Richard Nixon and subsequent presidents merely misjudged the attitudes of those they appointed. Maybe Warren Burger, William Rehnquist, Lewis Powell, Harry Blackmun, John Paul Stevens, and Sandra O'Connor hold personal political, moral, and social views that do not differ significantly from those justices who made up the majority of the Warren Court during the height of its powers. Although the personnel did not remain constant, representative individuals would include Earl Warren, William Brennan, Thurgood Marshall, Hugo Black, William Douglas, Arthur Goldberg, and Abe Fortas. If in fact the members of the first listed group hold political views substantially similar to those held by members of the second listed group, then even the most uncompromising Legal Realist would not expect significant changes in the course of the Court's decisions.

This hypothesis may be correct, but I am quite willing to assume (with little risk of contradiction) that it is not. The reason for putting it this way is to make it easier to focus on the pertinent issue. If we assume what is probably the case, that the typical "Burger Court" majority holds personal political and philosophical opinions that differ substantially from the opinions held by the typical "Warren Court" majority, then the occasionally explicit and pervasively implicit theme of this book is that Supreme Court justices frequently vote in ways that are contrary to their own political and philosophical views. Why, we must then ask, would they do this?

One reason is that the Court as an institution possesses only a finite, and indeed quite limited, amount of political capital, and that it must husband this capital carefully in order to preserve its authority.[30] This may explain why, in the not so distant past, the same Court that decided *Brown v. Board of Education*[31] could not at the same time have taken a strong stand against McCarthyism.[32] From this perspective, the members of the Burger Court might be said by some (but not by me) to have an agenda, but one that must be dealt with bit by bit. In order to preserve its political capital, the argument would go, the Court cannot reverse all of the dirty deeds of the Warren Court in one fell swoop, but must instead operate slowly in order to achieve its own objectives. Indeed, this might even explain those areas, such as sex discrimination, commercial speech, and abortion, in which the decisions of the Burger Court seem legiti-

30. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

31. 347 U.S. 483 (1954).

32. This point is noted by Professor Shapiro. Pp. 221-22.

mately "liberal." These might merely be diversions, designed to lull the liberals into complacency while individual rights are being significantly eroded in other areas. Under a sufficiently sophisticated conspiracy theory, any seemingly obvious counter-example to the original thesis can be fitted neatly into the conspiracy.

Alternatively, the Court might be said to be afraid of the political checks that are available to control its mistakes or its excesses. Justices can be impeached, the jurisdiction of the Court can be curtailed by Congress, and the Constitution can be amended to correct unpopular decisions. Deterred by these actual and potential checks inherent in the constitutional design, the members of the Burger Court might be reluctant to give full rein to their political or philosophical views for fear of congressional or other reprisal.

Apart from the fact that the specific checks I have mentioned are cumbersome, unpopular, or constitutionally dubious procedures, it is apparent that none of these checks apply in the current political climate. If the Supreme Court were in 1984 to reverse *Miranda v. Arizona*,[33] *Mapp v. Ohio*,[34] *Abington School District v. Schempp*,[35] *Reynolds v. Sims*,[36] *Green v. New Kent County School Board*,[37] and (perhaps) *New York Times Co. v. Sullivan*[38] and (perhaps) *Brown v. Board of Education*,[39] I seriously doubt that there would be sufficient uproar to produce impeachment, congressional control, or constitutional amendment. Indeed, I suspect that the jeers would be drowned out by the applause.[40] And if that is correct, then the phenomenon identified by this book can be stated even more starkly. Why would a group of Supreme Court justices vote in ways contrary to their own political and philosophical predispositions, when they can be confident that a vote in accordance with those predispositions would be quite popular with any constituency or political body having actual or potential control over the Supreme Court?

The answer, of course, is that the Supreme Court, for all of its political aspects, for all of the politically charged decisions it must make, and for all of the political input into the appointment of the justices, is still, in a very important respect, a *court*. What is involved in being a court is, of course, an enormously complicated set of considerations, and a book review is hardly the place to present an

33. 384 U.S. 436 (1966).

34. 367 U.S. 643 (1961).

35. 374 U.S. 203 (1963).

36. 377 U.S. 533 (1964).

37. 391 U.S. 430 (1968).

38. 376 U.S. 254 (1964).

39. 347 U.S. 483 (1954).

40. For an interesting empirical study of public attitudes toward prevailing constitutional doctrine, see H. McCLOSKY & A. BRILL, DIMENSIONS OF TOLERANCE (1983).

entire theory of law, even assuming I had one. But in this context at least some aspects of the special nature of judicial decision are worth mentioning.

Perhaps most importantly, precedent *does* matter. The most recent series of abortion decisions, in particular *City of Akron v. Akron Center for Reproductive Health*,[41] demonstrates that the Supreme Court does consider stare decisis a constraint, even though that constraint is far less than absolute.[42] And a pervasive theme of this book is the reluctance of the Burger Court to overturn Warren Court precedents. This should not come as any great revelation. Cases that may seem questionable when decided can become entrenched features of the legal landscape, with *Marbury v. Madison*[43] undoubtedly the most noteworthy example. Plainly it is within the power and province of a subsequent court to interpret a precedent either expansively or narrowly, but it is still the established precedent that provides the touchstone for subsequent argument and decision. Even a narrow interpretation of *New York Times Co. v. Sullivan*[44] would be far more protective of the press than was the state of the law before that case, and a grudging rather than enthusiastic application of *Brown* is still a major advance over *Plessy v. Ferguson*.[45]

Courts are constrained not only by precedent, but also by the necessity of justifying their decisions in written opinions, requiring as a result some degree of coherence and consistency. Justice Rehnquist's opinion for a unanimous Court in *Jenkins v. Georgia*[46] most likely did not reflect his own pre-legal political and philosophical views, but that clearly did not stop him from writing an opinion that was essentially compelled by the doctrine implicit in earlier cases.

To suggest that coherence, consistency, stare decisis, justification of results, and related constraints are essential parts of the legal enterprise is not to say that any of these, or other legal constraints, are invariably effective. It is common to look at certain less glorious episodes in Supreme Court history, such as the Court's quick turnaround in the flag salute cases[47] and in the shopping center picketing cases,[48] to demonstrate that doctrine and precedent "really" do not

41. 103 S. Ct. 2481 (1983).

42. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962); Smith v. Allwright, 321 U.S. 649, 665 (1944), both quoted by Justice O'Connor in her dissenting opinion in *Akron*, 103 S. Ct. at 2508 (O'Connor, J., dissenting). *See generally* Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

43. 5 U.S. (1 Cranch) 137 (1803).

44. 376 U.S. 254 (1964).

45. 163 U.S. 537 (1896).

46. 418 U.S. 153 (1974).

47. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

48. Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). This

matter. But I still fail to understand how it is possible to make the move from doctrine as non-dispositive to doctrine as irrelevant. The premise that doctrine does not inevitably control does not in any way entail the conclusion that doctrine does not matter. Constitutional doctrine and constitutional precedent channel behavior and thinking in the direction established by that doctrine and that precedent. This channeling establishes, at the very least, a presumption, albeit rebuttable, in favor of the doctrine. It takes a special kind of reason, a special force of argument, to reject established doctrine, reasons and arguments of a force not required if precedent and doctrine are to be followed.

No law of nature requires the foregoing observations to be true. They are true only if and because people, and in particular judges, think in particular ways. If in fact they think only as organs of naked political power, then it would be unlikely that they would think in accordance with the internalized guidelines that I described in the previous paragraph.

But it is hardly surprising that judges would have internalized[49] the powerful though not inexorable constraints of doctrine, precedent, and consistency. They are members of a society that itself has internalized the notion that law and legal rules are constraining forces. They have been to law school where that view was pressed upon them for three years. They have practiced law under the constraints of legal rules. And for most of the justices of the Supreme Court, they have served as judges in some other capacity before joining the Court. With all of this conditioning to the view that legal doctrine does matter, it would be phenomenal if that view did not influence the behavior of Supreme Court justices. Self-fulfilling prophecy it may be, but that is not the same as an empty myth.

I have not here provided evidence for my impressionistic assertions that doctrine does matter. It seems to me so obvious that it does matter that I assume that the burden ought to be on those who claim that it does not. But if evidence is required, I can think of no better place to start than with this collection of essays. For if doctrine does not matter, then one would expect to see that demonstrated most vividly in the decisions of the Supreme Court with respect to matters of great political importance on which the personal political and philosophical views of a majority of the justices are inconsistent with the precedents established by their predecessors. By providing a clear refutation of this hypothesis, this book has made a powerful demonstration that doctrine does matter.

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example is stressed by Kairys in *Legal Reasoning,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 1, at 12-15.

49. On the internalization of legal norms, see generally H.L.A. HART, *supra* note 5.