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On Complaining About the Burger Court

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BOOKS

ON COMPLAINING ABOUT THE BURGER COURT

THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T. Edited by Vincent Blasi. New Haven and London: Yale University Press, 1983. Pp. xiv, 326. $25.00.

*Reviewed by Robert F. Nagel**

In *The Burger Court: The Counter-Revolution That Wasn't* distinguished scholars assess the work of the Burger Court and generally pronounce themselves less dissatisfied than they expected to be. In criminal procedure, freedom of speech, and race discrimination, they conclude the Court has not retreated from the ideals of the Warren Court to the degree anticipated; in other areas—such as sex discrimination and abortion—the Burger Court has been even bolder than the Warren Court. While the essays explore these themes in useful detail, the themes themselves are not new. The essays are therefore, with some exceptions, more interesting for what they reveal about the authors than for what they reveal about the Court.[1] To the extent that the authors' attitudes and standards represent those of an influential segment of the legal profession,[2] the book illuminates some of the sources of the modern drive to increase judicial power and helps to explain why that drive, feeding on its failures, builds even as it disappoints.

I.

The book is bracketed by explicit claims that the debate over judicial activism is over. In the final chapter, Professor Shapiro argues that a new generation of commentators is developing "a jurisprudence of values rather than institutional roles" built on "their happy acceptance of . . . judicial activism . . ." (p. 228). In the Foreword, Anthony Lewis writes that "the great conflict between judicial 'restraint' and 'activism' is history now" (p. ix). Asserting that neither commentators nor justices show much "self-con-

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1. Indeed, Professor Shapiro's summing-up, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, is largely about changes in academic thinking about the Court (pp. 218–38). Several of the chapters are, however, of considerable interest for their insights into the Court itself—especially Professor Kamisar's analysis of criminal procedure cases, Professor Burt's treatment of family law issues, and Professor Blasi's essay on *The Rootless Activism of the Burger Court*.

2. The Society of American Law Teachers sponsored the book. According to the authors' biographies the writers are affiliated with major universities, six hold chaired professorships, one is a federal appeals court judge, and three have been officers of the American Civil Liberties Union (pp. 312–14).

scious concern" for defining "a proper role for the Court," Lewis declares, "[w]e are all activists now" (p. ix).

Lewis' use of the pronoun "we" is arresting. Simultaneously inclusive and exclusive, it conveys perfectly the vague sense of clubbiness that characterizes much of the book. To whom does he refer with this apparently generous but subtly snobbish word? He surely does not include those citizens who are dismayed and outraged that their local public schools are largely run by judges, nor those who, furious with the Court's abortion decisions, propose a constitutional amendment to return that matter to the states, nor those who voted against the proposed Equal Rights Amendment partly because of a profound distrust of the brave possibilities that federal judges might see in that provision. No, "we" surely refers only to "commentators" and "justices." But how many commentators and justices can fairly be included? While activism can be defined so that everyone, including Justice Rehnquist, approves of it, does anyone "comment and . . . decide" (p. ix) without institutional considerations in mind? Unless their written opinions are disregarded, none of the sitting justices fits Lewis' description, since each has written about the need to define a limited and justifiable role for the courts.[3] Legions of academic writers, including many in Shapiro's "new generation" of commentators,[4] also work energetically to formulate a

3. Notable in this regard is Justice Blackmun, who wrote movingly in a death penalty case about how such cases cause him "an excruciating agony of the spirit," yet declined to cross the line from judicial decisionmaking into legislative policymaking. Furman v. Georgia, 408 U.S. 238, 405–11 (1972) (Blackmun, J., dissenting). Analogously, Justice Rehnquist gave institutional reasons for declining to rule on the question of a good-faith exception to the exclusionary rule. Illinois v. Gates, 103 S. Ct. 2317, 2321–25 (1983) (Rehnquist, J.). Other justices have also expressed institutional concerns. See Michigan v. Long, 103 S. Ct. 3469, 3489 (1983) (Stevens, J., dissenting); Zobel v. Williams, 457 U.S. 55, 71, 72–73 (1982) (O'Connor, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Burger, C.J., dissenting); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 479–89 (1979) (Powell, J., dissenting); Bell v. Wolfish, 441 U.S. 520, 545, 562 (1979) (Court majority included Chief Justice Burger, and Justices Rehnquist, Stewart, Blackmun, and White; Justice Powell concurred); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 22, 27, 30 (1978) (Stevens, J., dissenting); Bishop v. Wood, 426 U.S. 341 (1976) (Stevens, J.); National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Brennan, White & Marshall, JJ., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109–10 (1973) (Marshall, J., dissenting); Roe v. Wade, 410 U.S. 113, 221 (1973) (White, J., dissenting).

4. For works dealing with questions of institutional role and legitimacy, authored by scholars Shapiro lists as belonging to the "new generation," (p. 309 n.5), see P. Brest & S. Levinson, Process of Constitutional Decisionmaking, Cases and Materials (2d ed. 1983); J. Choper, Judicial Review and the National Political Process (1980); J. Ely, Democracy and Distrust (1980); Blasi, Creativity and Legitimacy in Constitutional Law (Book Review), 80 Yale L.J. 176 (1970); Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975); Michelman, States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery, 86 Yale L.J. 1165 (1977); Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981); Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973); Van Alstyne, A Political and Constitutional Review of United States v. Nixon, 22 U.C.L.A. L. Rev. 116 (1974); Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1.

proper role for the Court. Lewis suggests that the discussion is merely about the goals of judicial activism, not about its appropriateness (p. ix), but this is too slippery. Even Shapiro's review of the commentary on the Supreme Court demonstrates that eminent scholars arrive at their recommendations on the purposes of judicial power by focusing careful attention on institutional concerns.[5] Disagreements about the substantive objectives of judicial review often reflect institutional disagreements.

Lewis' rather smug inclusiveness is not even accurate as applied to the authors of the essays in the book to which he is contributing, many of whom attempt to define an appropriate role for the Court by considering institutional issues. Professor Blasi's thoughtful essay on the "rootless activism" of the Burger Court contains an effort to justify judicial power as a "corrective to unduly parochial patterns of political behavior" (p. 210). Professor Bennett argues that "[w]hen the interests of the poor, or a particularly weak segment of the poor, have been severely disadvantaged in a political forum, the judiciary can appropriately intervene" (p. 57). Moreover, the criticism that the Court has not sufficiently adhered to established principles—a requirement grounded in institutional concerns basic to judicial review[6]—appears in Professor Brest's chapter on race discrimination, in Professor Kamisar's chapter on criminal procedure, and in Judge Ginsburg's chapter on sex discrimination. Professor Burt's penetrating chapter on family law criticizes both liberal and conservative blocks on the Court for abandoning a proper institutional role, which he describes as leading "fundamentally alienated combatants toward the pursuit of mutual accommodation" (p. 107).

These efforts, though briefly sketched in the book and perhaps unconvincing, do reflect a self-conscious concern for defining the proper role for the judiciary. If anything, the essays suggest a nervous recognition that adequate justifications for activism are still needed. Such nervousness is understandable. The current ascendency of the judiciary exists on an intellectual foundation that has been severely attacked and is in considerable disarray.[7] It is true that activism flourishes today, but it flourishes

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5. Shapiro states:

> Intellectual life is not such that one can expect a total disjunction in constitutional thought when a change in generations occurs. For example, two members of the newer generation of constitutional commentators, Jesse Choper and John Hart Ely, have undertaken to preserve New Deal preferred position doctrines by grounding them in more sophisticated political analysis. Both continue to focus on the role of the Court [sic] problems so prominent in the 1950's.

(P. 222). He goes on to argue that Ely's process-oriented theory "will usually yield just that substantive value that the others posit . . . : equality." Id. at 224. This sentence is footnoted to an acknowledgement that Monaghan's institutional concerns also control the values that he recommends courts pursue. Id. at 309 n.13.

6. Professor Brest makes an explicit connection between adherence to principle and the legitimacy of judicial review when he notes that the Court's "only justification for meddling in the affairs of other institutions is that its judgments are grounded in principle rather than political expediency . . . ." V. Blasi, supra note 2, at 128.

7. Some of the most effective indictments of theories of judicial review have been written

amidst pervasive unease about the legitimacy of judicial power. "We" are all activists now, if we are, because of inertia, opportunism, or intellectual resourcefulness that approaches sheer will, not because institutional questions have been resolved or have receded in importance. The insistence that some happy consensus exists on the Court's proper role is wishful thinking.

II.

Many of the authors emphasize that the Burger Court has not turned out badly. What is odd is their ingratitude. Like children who expected their gifts, several of the authors no sooner tear off the wrapping than they are complaining.

Professor Emerson's essay on freedom of the press provides clear illustrations of this insatiability as well as clues as to its source. He complains that "after more than a dozen years of the Burger Court, much of the press has become seriously concerned. It feels that its First Amendment protections have been eroded and that it is being threatened . . ." (p. 1). What is the basis for this anxiety? In *Gertz v. Robert Welch, Inc.*,[8] the Court protected the press from state libel laws, holding as a matter of constitutional law that states must condition recovery for injury to reputation on a showing of at least negligent conduct and actual injury. But Emerson criticizes the case for "returning to a balancing test" and for holding that the actual malice test should be limited to public officials and public figures (p. 4). Similarly, in *Nebraska Press Association v. Stuart*,[9] the Court imposed severe restraints on the power of courts to prohibit publication of information about trials.

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to clear the ground for the proposal of a new theory. See, e.g., Ely, The Supreme Court 1977 Term—Foreword: On Discovering Fundamental Values, 92 Harv. L. Rev. 5 (1978); Perry, Noninterpretive Review in Human Rights Cases: A Functional Justification, 56 N.Y.U. L. Rev. 278 (1981). Of course, in their turn the new theories have been subjected to severe criticism. On Perry's book, *The Constitution, the Courts, and Human Rights*, see Symposium: Judicial Review and the Constitution—the Text and Beyond, 8 U. Dayton L. Rev. 443 (1983). On Ely's book *Democracy and Distrust*, see, e.g., Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063 (1980); Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 Yale L.J. 1037 (1980). See generally, Symposium: Judicial Review versus Democracy, 42 Ohio St. L.J. 1 (1981); Symposium: Constitutional Adjudication and Democratic Political Theory, 56 N.Y.U. L. Rev. 259 (1981). Professor Berger has produced an insistent drumbeat of criticism, see, e.g., R. Berger, Government by Judiciary (1977), and in turn has spawned comment. See Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 Ohio St. L.J. 261, 285 n.100 (1981). Some skeptics now have gone so far as to question whether interpretation of a written constitution can be anything other than an exercise of the readers' imagination. See, e.g., Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982). Accordingly, some proponents of judicial review think it is important to establish that the Constitution's text can provide *some* constraint external to the judge. See, e.g., Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982). In the face of this torrent of criticism and backpeddling, anyone who can assert that there is a consensus on the Court's role fully deserves the peace of mind he has been able to achieve.

8. 418 U.S. 323 (1974).

9. 427 U.S. 539 (1976).

Emerson describes the result as "an important victory for the press" but then laments that "the manner of reaching it left the press less satisfied" (p. 7). The *Pentagon Papers* case[10] "gave significant support to freedom of the press" (p. 12). But because the press might still be subject to an injunction if the government could prove " 'direct, immediate, and irreparable damage' to national security," Emerson concludes that "the theoretical position of the press does not appear strong" (p. 12).

Emerson states early in his essay that the Warren Court's record of protection for the press might have been a matter of appearances; substantively it left important loopholes, including the use of the balancing test. He also acknowledges that the Burger Court has expanded protections in some areas. Nevertheless he arrives at the overall view that "[t]he press no longer receives the vigorous support given it by the Warren Court" (p. 25). Indeed, "the legal future of the press look[s] somewhat bleak."[11]

Emerson's lugubrious conclusion seems to result from his confusion of the subjective state of "the press" with the content of the first amendment. He continually evaluates first amendment issues according to whether the Court demonstrated a "friendly attitude toward the press" (p. 10), whether the Court came down "on the side of the press" (p. 11), and whether the press was "satisfied" (p. 7). If the issue is framed according to whether "the press can[] take complete comfort from the Burger Court's approach" (p. 15), it is not surprising that the Court is found to be deficient.

The assumption that the Court's construction of the Constitution should be evaluated by the extent to which interest groups are satisfied appears in other essays. Professor Bennett writes that the "courts are designedly insulated from the usual levers of political influence and thus are particularly charged with ensuring that the benefits of the rule of law reach the nation's poor" (p. 61). While describing the Warren Court's record with regard to the poor as not "much beyond oversimplified catchphrases" (p. 56) and while acknowledging that the Burger Court's record is mixed—and in some respects very favorable to the poor—Bennett ends his article with a severe indictment of the Burger Court's insensitivity "to the importance of litigation as a vehicle by which the rnle of law is made available to the poor population" (p. 58). Judge Ginsburg describes the Burger Court's record on sex discrimination as "striking" in comparison to the record of its predecessors (p. 132). She states that perhaps no Court has acted as "intrepidly" as the Burger Court did in the abortion area (p. 147). Nevertheless, she is constrained to say that "women could not be regarded as a constituency of the Burger Court to the same extent that blacks were of the Warren Court" (p. 151). Professor St. Antoine assesses the Burger Court's record in labor law as "more moderate than the labor movement may have anticipated," but he notes that decisions in areas such as secondary boycotts

10. New York Times Co. v. United States, 403 U.S. 713 (1971).

11. Emerson's view is even more severe than this sentence suggests. He writes that "the Burger Court has either forgotten or ignored the most fundamental tenet of First Amendment theory. . . ." (P. 26).

and shopping center picketing "tip the scales still further against union organizational efforts" (p. 179). And for the unsqueamish, Professor Shapiro offers a "bald counting of constituencies." He tallies the gains and losses for "racial minorities," "the poor," "government workers," "intellectuals," welfare recipients, "the business community," and so on (p. 219).[12] That no interest group has yet been fully satisfied is certainly not surprising; what is suprising is that anyone should expect the Court to provide such satisfaction. Why, one wonders, adopt a standard that guarantees room for disappointment?

III.

Satisfaction in being dissatisfied with the Burger Court is also evident in the tendency to look closely at apparently "good" decisions to find less praiseworthy concerns and explanations. Writing about free speech cases, Professors Dorsen and Gora, for instance, see under the Court's apparent themes less obvious and less laudable considerations. They first dangle the bait: "The Burger Court's free speech cases sometimes contract earlier rulings of the Warren Court, sometimes expand them, and in some instances dramatically chart new ground" (p. 31). Is this good? Not really, not if, as the authors argue, the underlying pattern of these decisions demonstrates a preference for property interests over free speech values (pp. 31–41).

The method by which the authors reach this "finding" (p. 31) is instructive. They first point to a series of cases in which free speech interests coincide with property interests. In *Spence v. Washington*,[13] for instance, the Court protected expression by reversing the conviction of a man who had taped a symbol to an American flag that he owned. A similar result was reached in *Wooley v. Maynard*,[14] which involved covering a message placed by the State of New Hampshire on a privately owned license plate. Surely such cases are to be expected; it is hard to imagine a free speech case in which none of the speaker's property (whether a movie screen, a book, or an armband) is involved. Moreover, any court concerned with constitutional values ought to be especially sympathetic when property and speech coincide. The Constitution, after all, was designed by people who for good reason did not sharply distinguish the concepts of "property" and "freedom."[15]

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12. Judge Ginsburg puts the Court in broader perspective with this forthright scorecard:

> Also noteworthy in appraising gender discrimination decisions of the 1970s is the comparatively cold reception the Burger Court has accorded to other constituencies seeking to advance their positions on the equal protection spectrum. For the aging and the poor, equal protection remains a lean cupboard. Aliens did well in the early years of the Burger Court, but later the majority backtracked a considerable way. In contrast, apart from the slight slump in *Kahn v. Shevin*, claims challenging explicit sex classifieations inched steadily along.

(P. 152) (footnotes omitted).

13. 418 U.S. 405 (1974).

14. 430 U.S. 705 (1977).

15. Madison, for example, argued that the traditional concept of property derived from a broader concept of property that included " 'opinions and the free communication of

Dorsen and Gora then ask "what happens when the speech interest and property interests conflict[?]" (p. 34). Their conclusion—that the Burger Court often favors property interests when they conflict with free speech interests—is not, by itself, of much significance. Although the authors assert that there is "no basis in principle for preferring property interests over speech values" (p. 41), no one can believe that first amendment values should *always* prevail over other interests, including private property; surely no one should have a right to put a soapbox in your living room. Cases that subordinate speech interests to the commercial interests of shopping centers or the privacy interest of parents might be criticized for drawing the lines unwisely, but this is a critique that the authors do not make. Instead, their point is simply that "property interests" were favored. This observation obscures important differences among the interests protected and by itself is useful only as a way of gaining a certain rhetorical advantage over the Burger Court among those who are reflexively in favor of "free speech" and distrustful of "property."

Although Dorsen and Gora appear to suggest that the Burger Court generally values property interests more than free speech (pp. 37, 41), the authors cannot and, on close reading, probably do not claim that the Burger Court has been more solicitous of private property than of free speech. The Burger Court has made many notable decisions in the areas of privacy and free speech, but has shown little inclination to protect traditional property interests.[16] It has, in fact, repeatedly protected the power of the state

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them' " and " 'the free use of . . . faculties and free choice of the objects on which to employ them.' " Williams, Liberty and Property: The Problem of Government Benefits, 12 J. Legal Stud. 3, 11 (1983) (quoting and discussing Madison's comments).

16. See, e.g., Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984); Rice v. Norman Williams Co., 458 U.S. 654 (1982); G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982); Texaco, Inc. v. Short, 454 U.S. 516 (1982); Hodel v. Indiana, 452 U.S. 314 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); United States v. Darusmont, 449 U.S. 292 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Agins v. City of Tiburon, 447 U.S. 255 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); County Bd. v. Richards, 434 U.S. 5 (1977); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974). Against this record can be set only a few instances where the Burger Court has protected traditional property rights. E.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

In contrast, the Burger Court has made many major decisions protecting free speech values. E.g., Chandler v. Florida, 449 U.S. 560 (1981); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); In re Primus, 436 U.S. 412 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Wooley v. Maynard, 430 U.S. 705 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Elrod v. Burns, 427 U.S. 347 (1976); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Spence v. Washington, 418 U.S. 405 (1974); Miami Herald Publishing Co. v.

to regulate property interests. Accordingly, Dorsen and Gora can conclude merely that property is an "underlying theme" (p. 30) of the Burger Court's free speech decisions, that the cases show a "close link" between protecting free speech and protecting property (p. 44).

What is more intriguing than this bland thesis is the lengths to which the authors are willing to go in order to fit cases into the "pattern" they claim to have found. To support their view that the Court somehow is lukewarm toward free speech, they use cases that demonstrate precisely the opposite conclusion—that the Burger Court is inclined to protect the states' power to safeguard speech interests through restrictions on private property. For example, in *Prune Yard Shopping Center v. Robins*,[17] the Court upheld a state's construction of its constitution that required a private shopping center to permit a group to gather signatures on a petition, despite the Court's earlier decisions rejecting such a requirement as a matter of federal constitutional law. The authors admit that "[a]t first glance" *Prune Yard* appears to have been a major victory for free speech values over property values, since it enables demonstrators to use shopping center grounds as a matter of state constitutional law (p. 37). Nevertheless, the authors assert, "close examination" demonstrates that *Prune Yard* merely vindicated the states' power to regulate property and thus does not represent siguificant protection for free speech values (p. 37). Now, a case that validates the power of the states to restrict property rights in order to protect free speech values contradicts—to some degree—the thesis that the Court is partial to property values, and the case is plainly some evidence that the Court values free speech. Of course, the Court might have decided the case in a way *more* favorable to free speech values, but this possiblity, which always exists, does not convert the decision into a victory for private property. A modest gift is still a gift. The authors' analysis of *Prune Yard* amounts to willful insistence that the Burger Court be portrayed in an unfavorable light.

This insistence at times has dizzying results. Dorsen and Gora conclude that in *Young v. American Mini Theatres*,[18] where the Court upheld a zoning ordinance designed to regulate the location of "adult theaters," the Court was again dominated by property considerations. They convert the Court's approval of state regulation of private property into a vindication of private property by lumping the locality's concerns about protecting neighborhoods into the term "property" (p. 39). But such interests as the tone of a neighborhood, its aesthetic characteristics, and public safety belong to no one in particular. They are public interests, not private property. Moreover, if the Court had reached the opposite result in *Young*, the authors would only have found further evidence for their thesis that the Court tends to favor ownership interests.

The authors remove any doubt of this with their discussion of *Erznoznik*

Tornillo, 418 U.S. 241 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971); Cohen v. California, 403 U.S. 15 (1971).

17. 447 U.S. 74 (1980).

18. 427 U.S. 50 (1976).

v. City of Jacksonville,[19] which struck down a requirement that the owner of an outdoor movie theater build a visual barrier before showing movies displaying nudity. Dorsen and Gora make it clear that the interests of the theater owners are property interests (p. 39). They argue that in *Erznoznik* "the property interests of the community were not as weighty [as in *Young*]" (p. 39). Again, why are the locality's interests in avoiding moral offense and ensuring traffic safety "property interests" of any kind? The authors say that the Court found these interests less weighty because "the screen was on a busy highway and visible only from two adjacent streets and from a little-used church parking lot" (p. 39) (footnote omitted). This assertion is probably an oblique effort to suggest that the "neighborhood" interests vindicated in *Young* were actually the property interests of residential home owners, interests which were missing or of less weight in *Erznoznik*. But churches are owned, as are the homes along those two adjacent streets. The unavoidable fact is that in both cases the locality attempted to accomplish public objectives, such as safety and moral tone, and that the achievement of such objectives inevitably benefits not only the public but also individuals and their property. In *Erznoznik* the Court made a strained effort to protect the free speech interest of the owners of outdoor theaters. That the Court is willing to substitute its judgment about the wisdom of public policies for that of local authorities shows something about its self-assurance but nothing at all about any failure to accord sufficient weight to free speech values.

The mind is reeling by the time Dorsen and Gora discuss the Court's complicated decision in *Metromedia, Inc. v. City of San Diego*.[20] Does a case that extends first amendment protections to owners of billboards promote free speech or private property? If the case partially subordinates the billboard owners' interests (however labelled) to the authority of the state to achieve aesthetic objectives, does the case demonstrate a priority on state regulatory power or on private property served by public regulation? If the state's power to regulate for these public purposes (however described) is then subordinated to the free speech interest in preventing content discrimination against noncommercial messages, does the case demonstrate a preference for free speech or a tender regard for the property rights of purveyors of noncommercial messages? Relax. The authors cut easily through the complications:

> The billboard decision demonstrates two of the themes we have observed. First, government will be allowed to favor the speech and property interests of occupants of the particular property . . . . But beyond that, when speech interests confiict with property values protected by government through aesthetic zoning, speech will take second place . . . (pp. 40–41).

Fortunately, none of the other authors goes to such lengths to find unattractive themes underlying the Burger Court's decisions. But some do

19. 422 U.S. 205 (1975).
20. 453 U.S. 490 (1981).

have a milder inclination in the same direction. Professor Bennett's usually evenhanded assessment of the Burger Court's treatment of the poor makes an effort to explain favorable decisions on grounds other than concern for the poor. He argues that the poor generally prevail when their interests coincide with "another decisional theme with which the Court has felt comfortable" (p. 53). These themes are said to include a sensitivity to issues surrounding gender, illegitimacy, the right to travel, and procedural values (p. 53). Poverty, of course, is never the only issue in a case. It is natural and inevitable that a court's evaluation of legal claims of the poor will be influenced by the context in which those claims arise. That this should occur demonstrates nothing exceptional about the attitudes of the members of the Court.

Professor Burt's argument is, in part, that announced concerns about parental authority and family life "are an unacknowledged proxy for a different social concern regarding the strength and legitimacy" of social authority (p. 93). His analysis of the cases is illuminating and tends to confirm the claim. But in this essay the urge to deflate the Burger Court appears in the exaggeration with which the insight is stated: "[The members of the conservative nucleus of the Court] have concluded that our contemporary national life is so fractionated that any challenge to constituted authority excessively undermines the legitimacy of all authority, that we must recapture an earlier social attitude of unquestioning deference to authority . . ." (p. 103). Surely no one anywhere believes that "any" challenge to authority undermines the legitimacy of "all authority." Attributing such exaggerated notions to the Burger Court only demonstrates how irresistible is the urge to cast that Court in an unfavorable light.

The effort to find unobvious themes is a staple of legal scholarship. But in this book the tactic is used so stubbornly and so judgmentally that it seems suddenly curious. The search for underlying and disappointing reasons casts the Court in the role of something like a close friend whose decisions must not merely have a valid basis but must reflect views deeply consonant with our own. The insistent urge to undercut the Burger Court seems, then, to reflect a proportionately ambitious urge to have a complete sense of moral sympathy and intimacy with the Court. This paradoxical relationship is also suggested by the other ways in which these authors look closely at apparently benign decisions. When they are not looking under the Court's announced explanations, they are looking behind them for real-world influences, and above them for larger attitudes and visions.

Why, for example, has the Burger Court's initial hostility to the Warren Court's decisions on police practices subsided of late? It may be that some of the justices have been " 'liberalized' by their closeness to these difficult problems" (p. 91). Or perhaps "overzealous government lawyers . . . have led one or more justices to appreciate the need to resist encroachment . . ." (p. 91). Why did Justice Burger support a probusing position in the *Swann* case? "[O]ne need only consider (as he must have) the symbolism of the new chief justice breaking the Court's tradition of unanimity in school

desegregation" (p. 117). Why has the Burger Court continued to push for school desegregation? "[A]n explanation lies partly in an institutional nostalgia for the Court's historic role in the civil rights struggle of the 1950's and 1960's . . ." (p. 119). Why has the Burger Court shown such surprising receptivity to sex discrimination claims? It might be a result of the increasing numbers of women in the work force, the revitalization of the feminist movement, the development of effective means of controlling reproduction, and the "decreasing incidence of a single life partner" (pp. 139, 151).

Such explanations may or may not be accurate, but in either event they also communicate an implicit view of the Supreme Court as a person rather than an institution. As a person, the Court can be thought to respond to the same kinds of motives and perceptions that affect us in our private lives. Seen as a person, the Court performs unsatisfactorily because even its laudable actions are the result of social or psychological forces rather than such banal but appropriate influences as legal argument.

If a personalized and reduced view of the Court cannot be achieved by looking behind its decisions, it often can be achieved by looking above them for their more ethereal emanations. Professor Emerson criticizes the Burger Court's "attitude toward the press" in *Branzburg v. Hayes*[21] because the Court "is satisfied if the press is not subjected to 'official harassment' " (p. 17). The Court is insensitive or "unsympathetic" (p. 25) and has "lost that feeling for the dynamics of the system of freedom of expression which was the hallmark of the Warren Court" (p. 26). Professors Dorsen and Gora see nothing improper in some judicial regard for property rights, which after all enable people to "hire a good lawyer" (p. 41). But they perceive a different value hovering over the Court's regard for property:

> In terms of attitudes and imagery, free speech and property rights are different kinds of liberty. The protection of property is bottomed on the protection of "settled expectations" within the larger context of a model of society that is orderly, stable, and rational. Such a vision of society is apparently congenial to the Burger Court and its partisans. (Pp. 44–45.)

Professor Burt sets out to discover the "attitude" conveyed by the Court's family law decisions (pp. 93, 95). *Roe v. Wade*[22] is "perhaps the most egregious instance of the Court's desire to stifle confiict" (p. 109) and more generally the Burger Court "displays a distaste for direct, prolonged confiict and [does not] appreciate the importance of such conflict in forging communal bonds . . . " (p. 112).

Like underlying themes and theories of social causation, a court's attitudes—its insensitivities, sympathies, visions, tenor, and desires—are revealing and sometimes important. They help predict future directions and put discrete holdings in a larger perspective. In this book, however, their emphasis suggests both an inappropriate need for sympathetic intimacy

21. 408 U.S. 665 (1972).
22. 410 U.S. 113 (1973).

with the Court and a perverse satisfaction in being able to find the Court inadequate. Public institutions are not parents or friends or spouses, yet much of this book evaluates the Court as if it should serve the same sorts of emotional needs.

IV.

The puzzle presented by this book, then, is why many of the authors enjoy disapproving of a court for which they have such high aspirations, a court that—beyond all realistic predictions—has used its power in accordance with their own beliefs and values. This question bears on a more general one. Why does so much of the legal establishment, which purports to be disaffected with the Burger Court, retain so much enthusiasm for judicial review?

These questions are illuminated, I believe, by the place of the Warren Court in the book. For most of the essayists the Warren Court and its glories, real or imagined, are the touchstone for evaluating the Burger Court.[23] Although several of them acknowledge that the Warren Court's actual performance sometimes was no better and sometimes was worse than the performance of the Burger Court,[24] the Warren Court retains its emotional lure and its intellectual power for the bulk of these writers.

Professor Brest begins his essay with this astonishing sentence: "The Warren Court really had it pretty easy" (p. 113). Brest attributes this truth, which no doubt eluded the members of that Court, to the fact that by 1953 overt racism in the South was "widely perceived as a national moral disaster" (p. 113). He continues, "Civil rights in the 1960's was a good guys/bad guys issue (perhaps the last one we shall be blessed with) and there was no doubt which side the Court was on" (p. 113). This is, at the least, curious phrasing. The existence of moral disasters is not a blessing for those who suffer through them; they can be a blessing for those who had a hand in correcting them but are especially so in the kind of rosy glow prevalent at meetings of elderly veterans long finished with their wars.

Moral disasters are not fun, but they do, as Brest suggests, sometimes sharpen and simplify public issues. Brest's nostalgia for the days of moral clarity is repeated in a more serious tone by Professor Blasi, who writes, "The [Burger Court] justices have crafted some significant practical compromises, but have not exerted any kind of moral force either by legitimizing nascent aspirations or by reinvigorating dormant ideals" (p. 212). The Warren Court, in contrast, created a direction for constitutional law that "was both clear and, to many, inspiring" (p. 212) (footnote omitted).

The essays read as a whole suggest that the Warren Court, although its doctrinal developments and actual accomplishments were less than fully satisfactory, successfully represented a unified moral vision. Professor Sha-

23. For examples of this attitude, see pp. 25-27, 31, 46-47, 62-91, 113-16, 132-33, 151-52, 157, 168, 199, 203, 211-17, 218-38.

24. For such acknowledgments, see pp. 1, 29, 46, 56, 63-68, 113, 132, 157, 180, 201, 204.

piro writes that the Warren Court worked out a set of values "that had achieved an overwhelming consensus produced by one of the few great crises and value reorderings in American political history" (pp. 237–38). Shapiro acknowledges that critics existed but preserves his thesis by ascribing the criticism to institutional, rather than substantive, doubts. Holdovers from the era when the Supreme Court threatened much of the New Deal, the critics of the Warren Court "loved what the Court was doing but hated the fact that it was doing it" (p. 219). On the other hand, he argues that crities of the Burger Court all agree on the institutional question but are unhappy with the Court because of "the breakdown of the New Deal consensus which the Warren Court pursued . . ." (p. 237). That consensus depended upon an assimilation of the values of individualism and egalitarianism (p. 226). The recent ascendency of group-oriented politics has made this assimilation impossible, and the Burger Court is forced to confront inconsistencies between valuing the individual and valuing equality. Shapiro thinks that the critics of the Burger Court are dissatisfied because they place primary emphasis on equality while the Burger Court seeks a messy accommodation between equality and individualism (pp. 226–27, 237–38).

Shapiro and his coauthors are not remembering a time when the Court could provide unambiguous moral uplift; they are imagining one. Although Burger Court opinions, like Warren Court opinions, can be criticized for failings of craft, including an irrational ad hoc quality, the moral complexities and imperfections that are revealed in Burger Court opinions and that so frustrate these commentators have always been inherent in the political world. Inevitably, Warren Court decisions, too, were responsive to many conflicting values. The Warren Court was willing to strike down school segregation statutes but not to order immediate desegregation.[25] It ordered that police use *Miranda* warnings but it did not go to the heart of the problem of coerced confessions and order that all interrogations take place with a lawyer present.[26] It balanced national security interests against free speech values.[27] It equivocated when property rights conflicted with racial integration.[28] Nor were Warren Court decisions criticized only on institutional grounds. They were strongly criticized for inconsistency and hesitancy in the articulation and realization of public values. For example, crities charged that the Court had randomly allowed an occasional pornographic publisher to be jailed and had justified the school desegrega-

25. See Brown v. Board of Educ., 349 U.S. 294 (1955). The Warren Court's hesitancy in the area of school desegregation was criticized in Carter, The Warren Court and Desegregation *in* The Warren Court: A Critical Analysis 50–57 (R. Sayler, B. Boyer & R. Gooding eds. 1969).

26. Professor Kamisar discusses this point along with a number of other examples of Warren Court compromises. See pp. 63–68.

27. E.g., United States v. O'Brien, 391 U.S. 367 (1968); Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

28. For discussions of this equivocation, see A. Bickel, Politics and the Warren Court 169–72 (1965); Garter, supra note 25, at 49.

tion decision by unconvincing references to social science rather than to the great moral principle at stake.[29]

Shapiro also exaggerates when he attributes the modern consensus on the Court's institutional role to a newer generation's disregard of the Supreme Court's resistance to the New Deal. The commentators to whom he refers surely remember recent political history; they have not forgotten *Lochner v. New York*[30] and *Carter v. Carter Coal Co.*[31] Shapiro simplifies again when he writes that the current dissatisfaction with the Burger Court exists because the commentators favor equality while the Court pursues both equality and individualism. Every author in the book must place some value on individualism, as must the other commentators to whom Shapiro refers. They are displeased with some of the specific compromises made by the Burger Court, but these essays suggest a deeper source of dismay: an inability to tolerate the complexity and uncertainty of the moral issues involved in public decisions and an impatience with the compromises that are inevitable.

The malaise that Shapiro misdiagnoses exists for the same reason that Shapiro and others romanticize the Warren Court. The memories of wars are glorified because of a need for heroes, and the Warren Court is so enshrined because of a need for deeper roots in a political community—for ties and loyalties that could reduce the need for moral simplicity in public affairs. Those who know the Court to be a wholly ordinary and unholy institution are demanding that it provide substitutes for political fellowship and religious conviction.

A yearning for moral clarity and unity is entirely natural but must be attenuated and matured by some sustaining world view. Consider the needs left unfulfilled by the petty realism that dominates so much of this book. In many of the essays the legitimacy of the Supreme Court's decisions is dealt with in a sketchy and uneasy way. The meaning of the Constitution—and by inference, political discourse generally—is continually reduced to the calculus of interest group politics. The performance of governmental institutions is judged as if these institutions were no more than

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29. For these as well as other criticisms, see, e.g., A. Bickel, The Supreme Court and the Idea of Progress 50–57, 65, 95, 117–20 (1978); P. Kurland, Politics, the Constitution, and the Warren Court, xix, xxii, 127, 199, 204–05 (1970); E. Rostow, The Sovereign Prerogative 107–08 (1962); Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3–6 (1957); Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150 (1955); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 20–34 (1959); supra notes 25, 28. At least some of the contributors to *The Burger Court: The Counter-Revolution That Wasn't* were less than satisfied with the Warren Court in its day. Professor St. Antoine criticized the Warren Court's labor law decisions for caution and "retrenchments." St. Antoine, Judicial Valor and the Warren Court's Labor Decisions *in* The Warren Court: A Critical Analysis 133 (R. Sayler, B. Boyer & R. Gooding eds. 1969). Anthony Lewis criticized the Warren Court's record on obscenity and on foreign travel restrictions. See Lewis, Earl Warren *in* The Warren Court: A Critical Analysis 20–22 (R. Sayler, B. Boyer & R. Gooding eds. 1969).

30. 198 U.S. 45 (1905).

31. 298 U.S. 238 (1936).

the people who constitute them. The virtues of public institutions, like those of individuals in the modern world, are peeled away until underlying imperfections are identified; theories of social causation reduce further any remaining sense of virtue. If this is the political world inhabited by the legal establishment, "we" live in a barren place. The inhabitants of such a world become more unhappy as they make the landscape bleaker. They ask so much of the Supreme Court because their political and jurisprudential view can sustain so little, and in asking too much they assure continuing disenchantment.