

## THE OPTIMIST'S TALE

THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T.  
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An optimist is a person who, after being pushed out of a thirtieth-story window, replies to a questioner on the fifteenth floor, "All right so far!" *The Burger Court: The Counter-Revolution That Wasn't*,<sup>1</sup> a collection of eleven essays on the Burger Court's decisions, is an optimist's book. Its thesis is clear from the subtitle: liberals feared that the Burger Court would gut the advances in civil liberties made during the Warren era, but it has not. Defending this thesis requires that one both identify the advances in civil liberties made by the Warren Court and determine to what extent, if any, the Burger Court has undermined them. If one agrees, as I do on balance, that no counterrevolution has occurred, two additional questions need answers. Why didn't the counterrevolution occur, given what we think we know about the political predilections of the Nixon and Reagan appointees? And if no counterrevolution occurred, what did happen? This Review takes up those questions.<sup>2</sup>

## I. THE WARREN COURT AND THE BURGER COURT

Each of the contributors to *The Burger Court* writes against a usually implicit background of admiration for the accomplishments of the Warren Court. The "no counterrevolution" thesis can be sustained either by diminishing the grandeur of those accomplishments or by exalting the accomplishments of the Burger Court. Ruth Bader Gins-

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<sup>1</sup> (V. Blasi ed. 1983) [hereinafter cited as *THE BURGER COURT*].

*THE BURGER COURT* is sponsored by the Society of American Law Teachers (SALT), which will receive a portion of the royalties. For the past two years I have been a member of the board of directors of SALT. The project was essentially completed before I became a member of the board.

<sup>2</sup> Because of my competence, I will discuss in this Review only those essays dealing with constitutional law. I suspect—and regret—that other reviewers are just as likely to slight the essays by Theodore St. Antoine on labor law and Richard Markovits on antitrust law. But I certainly can't say anything about them that anyone ought to be interested in reading.

burg's essay on sex discrimination<sup>3</sup> takes the latter course. Consisting largely of a summary of the Burger Court's decisions, the essay properly characterizes the Court's performance as "striking"<sup>4</sup> and "spectacular."<sup>5</sup> Because "[e]vening up the rights, responsibilities, and opportunities of men and women was not on the agenda of the Warren Court,"<sup>6</sup> anything the Burger Court did would improve on the Warren Court's performance. That remains true even though the Burger Court has not done all that supporters of equal rights desired. Without deprecating the accomplishment, though, I want to mention something that I discuss in more detail later: the Burger Court's decisions in gender discrimination cases are shot through with class concerns.<sup>7</sup> Perhaps because of how the essays divide up the terrain, class issues never fully emerge from the background.

The other strategy for sustaining the book's thesis is pursued most clearly by Yale Kamisar in an essay on criminal procedure.<sup>8</sup> He begins by describing what the Warren Court did. It approved the use of the intrusive investigative techniques often thought necessary in cases of corruption and large-scale trafficking in drugs: undercover agents and electronic surveillance.<sup>9</sup> It sought to impose the rules professionals in the field had been using without difficulty—warnings and controlled use of investigative stops—on all police departments.<sup>10</sup> Although Kamisar does not say so, what the Warren Court did was to attempt to remold all police forces on the model of the most thoroughly professionalized. If police departments actually conformed to the professional model, their own adherence to professional norms, more than external controls imposed by the courts, would guarantee the liberty of the citizenry.

Kamisar identifies "two Burger Courts."<sup>11</sup> The first appeared in the immediate aftermath of the Rehnquist and Powell appointments. That Burger Court seemed to be bent on "gutt[ing]"<sup>12</sup> many of the Warren Court's decisions. Here too Kamisar ventures no explanations,

<sup>3</sup> Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in *THE BURGER COURT*, *supra* note 1, at 132.

<sup>4</sup> *Id.* at 132.

<sup>5</sup> *Id.* at 151.

<sup>6</sup> *Id.* at 132.

<sup>7</sup> See *infra* text accompanying notes 112-15.

<sup>8</sup> Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT*, *supra* note 1, at 62.

<sup>9</sup> *Id.* at 63-64.

<sup>10</sup> *Id.* at 64-67.

<sup>11</sup> *Id.* at 68.

<sup>12</sup> *Id.*

but it seems likely that this first Burger Court felt it essential to establish a different tone from its predecessor, to signal that the forces of law and order had (re)gained control of the Court. Then, that signal clearly sent, the second Burger Court proceeded to consolidate and even extend the most enduring contributions of the Warren Court. It has demonstrated a "strong commitment to the warrant clause"<sup>13</sup> by insisting that a valid warrant to search a bar and the bartender did not authorize a search of the bar's customers<sup>14</sup> and by holding that the police could not routinely enter a home to make an arrest without a warrant.<sup>15</sup> It has developed a definition of "interrogation" that is sensitive to the values served by the *Miranda* warnings<sup>16</sup> and has disinterred the doctrine limiting interrogations after adversary proceedings have been initiated.<sup>17</sup>

Kamisar rejects the claim that the decisions of the second Burger Court look tolerable only because they have not fulfilled the worst fears engendered by the decisions of the first Burger Court.<sup>18</sup> I am inclined to agree, but do have some questions about Kamisar's analysis. First, the second Burger Court appears to have come into its own around 1979. With Justice O'Connor replacing Justice Stewart, who had a perverse attraction to the warrant clause,<sup>19</sup> we may find yet a third Burger Court in the making, one that resembles the first. Second, in describing the Burger Court's first amendment decisions, Thomas Emerson concludes that it "has lost that feeling for the dynamics of the system . . . which was the hallmark of the Warren Court."<sup>20</sup> Something similar may characterize the criminal procedure decisions. The Warren Court had a vision of policing as an integrated system all elements of which could be professionalized.<sup>21</sup> The signals the Warren Court sent to police officers and administrators about its expectations may have been even more significant than its doctrinal innovations. In this light the counterrevolution may have been completed by the first Burger Court. It told police administrators and officers that they could

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<sup>13</sup> *Id.* at 79.

<sup>14</sup> *Ybarra v. Illinois*, 444 U.S. 85 (1979).

<sup>15</sup> *Payton v. New York*, 445 U.S. 573 (1980).

<sup>16</sup> Kamisar, *supra* note 8, at 87-89.

<sup>17</sup> *Id.* at 90.

<sup>18</sup> *See id.* at 81.

<sup>19</sup> *See, e.g., Robbins v. California*, 453 U.S. 420 (1981), *overruled by United States v. Ross*, 456 U.S. 798 (1982); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>20</sup> Emerson, *Freedom of the Press Under the Burger Court*, in *THE BURGER COURT*, *supra* note 1, at 26.

<sup>21</sup> This vision is expressed in passages like that in *Terry v. Ohio*, 392 U.S. 1, 13 (1968), noting the limitations on the exclusionary rule "as a tool of judicial control," and in *Lewis v. United States*, 385 U.S. 206, 208 (1966), discussing the need for undercover agents to investigate certain types of crimes.

loosen up. The second Burger Court, on this interpretation, simply issues occasional reminders that loosening up does not mean abandoning all controls. The system of policing would be measurably less protective of the citizenry under these circumstances, again no matter what the particular holdings were. My guess is that changes in policing essentially unrelated to judicial doctrine have imposed the kinds of constraints on police forces that the Warren Court sought. These constraints are not, of course, uniform throughout the country nor are they sufficient as yet, but police forces have become more professionalized, and the increasing racial integration of urban police forces has reduced the kind of harassment to which judicial doctrine rarely speaks.<sup>22</sup> If my guess is correct, the counterrevolution, if any there was, came too late.

## II. WHY THE COUNTERREVOLUTION DID NOT HAPPEN

Certainly it is true that the Burger Court has not (yet) fulfilled the worst fears of those who admire the Warren Court. Yet we know from what they say in their separate opinions that, as individuals, three to five members of the Court have quite conservative political views that sometimes affect their judicial performance. The Warren Court's admirers thought that in every case one or two others would be moved to join the conservatives, producing a uniformly conservative body of law. Why didn't that happen?

Anthony Lewis's foreword offers the conventional view that we have come to expect of him. Sure, he says, the judges are political conservatives. But conservatives "are naturally committed to the doctrine of *stare decisis* . . . [and it] follows logically that they should respect a precedent once established, even though they opposed that result during the process of decision."<sup>23</sup> Although I have my doubts, perhaps this is so for "true [conservatives such] as Justice John Marshall Harlan."<sup>24</sup> But, apart from the lack of a counterrevolution, there really is not a lot of evidence that Chief Justice Burger or Justice Rehnquist is a "true" conservative. They are reactionaries, pure and simple, and, as I will argue, they have indeed conducted a counterrevolution of sorts by infusing the forms of adjudication developed by the Warren Court with a new content.<sup>25</sup>

Martin Shapiro's brilliant essay<sup>26</sup> comes closer to the mark. He

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<sup>22</sup> *But see* *City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983) (damaging chokehold applied without provocation or justification).

<sup>23</sup> Lewis, *Foreword*, in *THE BURGER COURT*, *supra* note 1, at vii, viii.

<sup>24</sup> *Id.*

<sup>25</sup> *See infra* text accompanying notes 64-115.

<sup>26</sup> Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for*

argues that the Warren Court succeeded because its decisions constitutionalized the political bargains struck by the New Deal coalition and thus drew into the Court's fold the constituencies of the New Deal.<sup>27</sup> The Warren Court "was working out to its final conclusions a set of values and policy preferences that had achieved an overwhelming consensus produced by one of the few great crises and value reorderings in American political history."<sup>28</sup> Viewing the Court as an actor in the political universe, Shapiro suggests that the Court is unlikely to depart very far, or for very long, from the views that hold sway in the rest of the political system. Thus, as the New Deal consensus broke down,<sup>29</sup> the Court, no less than Congress and the presidency, quite literally lost its center. But a judicial counterrevolution was impossible because no political counterrevolution had occurred.

I would push Shapiro's argument a little further than he does. As a political scientist, Shapiro emphasizes that the Court's actions build constituencies of support and opposition.<sup>30</sup> "In a world in which political goals are not clear and policy consensus is diminished, the Supreme Court is as unlikely as the rest of government to acquire a cheering section."<sup>31</sup> But, cheering section or no, the Court is well advised to avoid creating a constituency whose interests it never advances. If under present circumstances the Court cannot rely for support on the constituencies satisfied by an existing consensus, it can build its own coalition. It does so by what Vincent Blasi calls its "rootless activism."<sup>32</sup> Liberals swallow hard and live with *Buckley v. Valeo*<sup>33</sup> because they are given *Washington v. Seattle School District No. 1*<sup>34</sup> in return and decide that on balance it's worth it all.<sup>35</sup> Conservatives, who in general do not have to swallow quite so hard, live with *Mills v. Habluetzel*<sup>36</sup> because they are given *Allied Structural Steel Co. v. Spannaus*<sup>37</sup> and *Buckley v. Valeo* in return and decide that on balance it's worth it all. (The difference in the significance of the cases suggests why the conservatives do not have to swallow so hard and why the liberals' judgment about the

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Values, in THE BURGER COURT, *supra* note 1, at 218.

<sup>27</sup> *Id.* at 219.

<sup>28</sup> *Id.* at 237-38.

<sup>29</sup> *Id.* at 237.

<sup>30</sup> *Id.* at 219.

<sup>31</sup> *Id.* at 237.

<sup>32</sup> Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT, *supra* note 1, at 198.

<sup>33</sup> 424 U.S. 1 (1976).

<sup>34</sup> 458 U.S. 457 (1982).

<sup>35</sup> I question this judgment in Tushnet, *An Essay on Rights*, 62 TEX. L. REV. — (forthcoming May 1984).

<sup>36</sup> 456 U.S. 91 (1982).

<sup>37</sup> 438 U.S. 234 (1978).

net benefits might be wrong.) As a result, no one is really cheering for the Court, but it maintains a solid political base.

Although Shapiro does not make the argument in this way, his analysis suggests that "rootless activism" is a political strategy well adapted to preserving the Court's prerogatives in an era when any "rooted" activism—revolutionary or counterrevolutionary—would generate intense opposition. Indeed, the argument can be extended a bit more, as my earlier parenthetical comment hinted. A really clever counterrevolutionary, faced with the political situation Shapiro describes, would conduct what Antonio Gramsci called a war of position. Conceding small gains to the opposition in areas not of central concern, the counterrevolutionary would attempt to secure somewhat larger gains in areas closer to the center and would conduct lightning raids to capture really important targets.<sup>38</sup> *Mills v. Hableutzel*, *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>39</sup> and *Buckley v. Valeo* exemplify each of the three categories. I will argue in the next section that, in the end, the Burger Court's activism is rooted in exactly that way. There is a counterrevolution under way, but the tactics are not what the liberals expected.

There is, however, another reason for the failure of open counter-revolution. Vincent Blasi offers a capsule description of the present Court.<sup>40</sup> He finds the center "intelligent, open-minded, and dedicated," and writes that "[a]n advocate faced with the challenge of changing judicial minds with sound arguments would do better to attempt the task in front of [Justices White, Blackmun, Powell, and Stevens] than almost any other [group of Justices] that has in the past held the balance of power on the Court."<sup>41</sup> Perhaps so, but notice that the task is one of changing minds by argument rather than supplying arguments to support predispositions. Tony Amsterdam must do the former; Rex Lee need only do the latter. I take it to be clear which position an advocate would prefer to be in. If the center is strong, Blasi says, the extremes are weak. Justice Brennan is "pragmatic . . . , more clever than profound."<sup>42</sup> Justice Rehnquist is "more a debater than a thinker, more a lawyer than a statesman."<sup>43</sup> Blasi says that Brennan and Rehnquist "could serve much better as coalition builders operating at the

<sup>38</sup> That this analysis makes William Rehnquist sound like Ho Chi Minh is not the only reason I find it attractive.

<sup>39</sup> 458 U.S. 419 (1982).

<sup>40</sup> Blasi, *supra* note 32.

<sup>41</sup> *Id.* at 210-11.

<sup>42</sup> *Id.* at 211. I have to say that I do not really grasp the grounds for the deprecatory tone of the contrast. *It* strikes me as more clever than profound.

<sup>43</sup> *Id.*; see also *supra* note 42.

center of the Court's divisions," a role that Brennan played for the Warren Court and that Rehnquist could play in the future.<sup>44</sup>

What is striking about this is not the perfectly accurate observation that Brennan *was* a coalition builder,<sup>45</sup> nor the depressing suggestion that Rehnquist *could become* one,<sup>46</sup> but the failure to notice that Brennan continues to be a coalition builder. I suspect that when the history of the Supreme Court in the 1970's is written, it will reveal that Brennan's skills contributed as much as anything to the absence of a counterrevolution. For example, one can infer from Justice Brennan's opinions in criminal procedure cases that he simply makes no effort to build a five-person majority in most such cases and that he hoards his resources to deploy them in the cases, criminal procedure or otherwise, that he regards as truly important.<sup>47</sup>

But one need not rely on an extended chain of inference from a pattern of decisions. One need only read *Plyler v. Doe*.<sup>48</sup> In traditional lawyers' terms, Justice Brennan's opinion, holding unconstitutional a Texas statute that denied a free public education to children of aliens unlawfully in this country, is analytically indefensible.<sup>49</sup> It jams together doctrines that other cases carefully held apart<sup>50</sup> and refrains in a footnote from deciding an issue that plays a crucial role in a later section of the opinion.<sup>51</sup> The opinion cannot be taken seriously as a piece of legal analysis. But its very awkwardness reveals much about what Justice Brennan really was doing: not writing a carefully crafted opinion, not being profound, but building a coalition.

Here is what must have gone on in Justice Brennan's mind:<sup>52</sup>

I think that the statute embodies a dreadfully unwise

<sup>44</sup> *Id.*; see also *infra* note 46.

<sup>45</sup> See Hutchinson, Book Review, 81 MICH. L. REV. 922, 924 (1983).

<sup>46</sup> I shudder at imagining the coalition in which Justice Rehnquist is the center.

<sup>47</sup> I have been persuaded that, despite its generally high level of accuracy, B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 224-25 (1979), errs in identifying a specific instance where the authors contend that Brennan consciously made such a judgment. But the psychological picture seems to me entirely correct.

<sup>48</sup> 457 U.S. 202 (1982).

<sup>49</sup> See Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167.

<sup>50</sup> See 457 U.S. at 223-24 (in determining appropriate level of scrutiny to apply, Court must take into account the importance of education and the severity of effect of deprivation on alien children, as well as the costs to the nation likely to result).

<sup>51</sup> Compare *id.* at 210 n.8 (Court need not reach question whether Texas statute is preempted by federal law and policy) with *id.* at 224-26 (the states' power to deal with illegal aliens is limited by Congress's plenary power to regulate immigration).

<sup>52</sup> Safe in the knowledge that it won't happen in my lifetime, I will contribute a suitable amount to the Society of American Law Teachers, see *supra* note 1, if Justice Brennan's papers do not confirm the proffered reconstruction of his thought processes.

social policy. Justice Marshall certainly agrees with me. Fifteen years ago we might have said so openly, held the statute unconstitutional, and have been done with it. But things have changed, and I have to get three more votes. How can I do that?

Well, one thing about this case is that it involves kids who are being deprived of something largely because of what their parents have done. In that way it is sort of like the various illegitimacy cases we have decided.<sup>53</sup> I know that the analogy isn't exact, and our decisions in those cases are to say the least not readily reconciled.<sup>54</sup> But one thing is clear from the cases. Justice Blackmun thinks that it's not a nice thing to penalize kids for their parents' actions; indeed it's so "not nice" as to be quite often unconstitutional.<sup>55</sup> So if I stick in some stuff about the analogy to illegitimacy, maybe I can get Justice Blackmun to go along.<sup>56</sup>

Who next? Justice Powell knows, from Virginia's experience during the period of massive resistance to desegregation, the severity of the social costs of wholesale denials of education. Indeed, he said something along those lines in *San Antonio Independent School District No. 1 v. Rodriguez*.<sup>57</sup> So what I should do is stress that this case involves absolute deprivations of education,<sup>58</sup> and maybe Justice Powell will go along. Of course, by throwing in the analogy to illegitimacy cases and emphasizing the importance of education, I may make it look like we are abandoning the rigid two-tier approach to equal protection law to which Justice

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<sup>53</sup> See, e.g., *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

<sup>54</sup> Compare *Levy v. Louisiana*, 391 U.S. 68 (1968) (state law preventing illegitimate children from recovering for the wrongful death of their mothers held unconstitutional) with *Labine v. Vincent*, 401 U.S. 532 (1971) (upholding bar to illegitimates taking under state intestate succession law).

<sup>55</sup> See, e.g., *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) (Blackmun, J., for the Court) (conceding that strict scrutiny is not applicable to laws classifying on the basis of legitimacy but writing that the Court has "had no difficulty in finding the discrimination impermissible on less demanding standards" when laws penalize illegitimate children solely because of their illegitimacy); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 176 (1972) (Blackmun, J., concurring in the result) (stating that a Louisiana statute denying a father the ability to acknowledge his illegitimate children without marrying their mother and thus barring the children from receiving survivorship benefits as acknowledged dependents of their father denies equal protection to the illegitimate children).

<sup>56</sup> See *Plyler*, 457 U.S. at 220.

<sup>57</sup> 411 U.S. 1, 23-25, 29-30 (1973).

<sup>58</sup> See 457 U.S. at 221-22.

Powell is committed. So I guess I ought to stick in some language expressly reaffirming our adherence to the *Rodriguez* approach.<sup>59</sup> Justice Marshall's not going to like that,<sup>60</sup> but he certainly will go no farther than writing a concurring opinion.

Who's left? Justice Stevens has this bizarre attraction to the idea that equal protection cases involving state regulations affecting aliens are rather like preemption cases.<sup>61</sup> No one else will go along with a pure preemption analysis, probably correctly, but I can stress the primary responsibility of the national government for regulating aliens and for creating the problem Texas was dealing with in the first place. Having done that, I can try a sort of reverse preemption argument, that the statute is unconstitutional kind of because Congress didn't authorize it.<sup>62</sup> That's five. What a weird opinion this is going to turn out to be.

And so it is.<sup>63</sup>

Precedents, politics, and personality thus have influenced the Burger Court's failed counterrevolution. But something surely has happened.

### III. WHAT ACTUALLY HAPPENED

The Burger Court differs from the Warren Court along dimensions that I label technical, cultural, and political. Although some of the differences are only matters of degree, taken together they have significant consequences.

Along the technical dimension, the most striking difference is the

<sup>59</sup> See *id.* at 221, 223; see also *id.* at 239 n.3 (Powell, J., concurring); *id.* at 232-33 (Blackmun, J., concurring).

<sup>60</sup> See *id.* at 230-31 (Marshall, J., concurring).

<sup>61</sup> See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100-01 (1976) (Stevens, J., for the Court) (dictum) ("We agree with the petitioners' position that overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State." (footnote omitted)); *Mathews v. Diaz*, 426 U.S. 67, 84 (1976) (Stevens, J., for the Court) (dictum) ("[I]t is the business of the political branches of the Federal Government, rather than that of . . . the States . . . , to regulate the conditions of entry and residence of aliens.").

<sup>62</sup> See *id.* at 218-19 & nn.17-18, 225-26.

<sup>63</sup> For a case in which Justice Brennan wrote a concurring opinion emphasizing the limits to the holding of the opinion of the Court—limits he seems likely to have assisted in inserting—see *Rhodes v. Chapman*, 452 U.S. 337 (1981). For a case in which it seems likely that Justice Brennan narrowed the holding and then joined the dissent, see *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983).

one to which Thomas Emerson alludes in referring to the Burger Court's insensitivity to the systemic operations of institutions regulated by law.<sup>64</sup> Emerson specifically mentions the Burger Court's "return[] to a balancing test" in first amendment cases.<sup>65</sup> There is no necessary connection between relying on balancing and making relatively conservative decisions, nor between adopting bright-line rules and making relatively liberal ones. It is not hard to imagine a speedy trial rule that barred relief to anyone who had failed to make a timely demand or that started the speedy trial clock running at the moment a demand was made.<sup>66</sup> The grimness of that alternative undoubtedly explains why the Court's decision in *Barker v. Wingo*<sup>67</sup> was unanimous in adopting a balancing test in which the demand and its timing were relevant but never dispositive factors.<sup>68</sup> That the stated doctrine requires balancing disposes of no cases, nor does such a doctrine necessarily incline the Court one way or the other. But the choice between balancing and bright-line rules may well affect how actors outside the courts—police officers, or government officials annoyed by the press—approach their tasks. In the absence of a bright-line rule, those actors may be more inclined to test the ill-defined limits of their authority. They may hope that no litigation will result because of the ambiguity of the rule<sup>69</sup> or that years later some court will decide that on balance they were right. In this light Kamisar's distinction between the two Burger Courts<sup>70</sup> takes on a new importance. The first Burger Court, it might be said, accomplished its task by shifting from bright-line rules to balancing tests. That sent the message to police officers. Of course, sometimes the listeners are more aggressive than the broadcasters expected, which Kamisar suggests is the explanation for some of the decisions by the second Burger Court.<sup>71</sup> But taking activity that never comes before the

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<sup>64</sup> Emerson, *supra* note 20, at 26.

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Cf.* United States v. MacDonald, 456 U.S. 1 (1982) (the speedy trial clause does not apply to the period between the dropping of military charges and indictment on civilian charges).

<sup>67</sup> 407 U.S. 514 (1972) (opinion of the Court by Powell, J., joined by, *inter alia*, Douglas, Brennan, and Marshall, JJ.).

<sup>68</sup> *Id.* at 530-33; *see also* Oregon v. Bradshaw, 103 S. Ct. 2830 (1983) (statements made after *Miranda*-ized suspect initiated discussion to be judged by test of knowing and intelligent waiver under all the circumstances, rather than being automatically admissible).

<sup>69</sup> This inclination may be bolstered by Harlow v. Fitzgerald, 457 U.S. 800 (1982) (government official liable for damages caused by his or her violation of constitutional rights only if official knew or should have known that action was unconstitutional by reference to clearly established law).

<sup>70</sup> *See supra* text accompanying notes 11-22.

<sup>71</sup> Kamisar, *supra* note 8, at 81.

courts into account, the systemic impact of the shift may be more significant than one might think after reading the Court's opinions.

The cultural dimension of the Burger Court's shift from the Warren Court is explored in a superb essay by Robert Burt on the Burger Court and the family.<sup>72</sup> By carefully exposing the often unstated assumptions that animate decisions, Burt establishes that the Burger Court prefers the assertion of communal authority, either through traditional authoritarian families or by social agencies if the parents are too spineless, over the autonomous decisions of families considered as independent social units.<sup>73</sup> The most dramatic pair of cases here is *Ingraham v. Wright*,<sup>74</sup> which denied parents a say in the administration of corporal punishment to their children in schools, and *Parham v. J.R.*,<sup>75</sup> which allowed parents to commit their unruly children to state mental institutions without anyone (else) to speak for the children. Burt contrasts this vision with the Warren Court's image of reason rather than authority as what defines why and how the state may regulate families.<sup>76</sup> Burt is not happy with either vision,<sup>77</sup> but that is less important here than the connection between this analysis and Shapiro's.<sup>78</sup> The Burger Court's family law cases show it defining its constituency as adherents of traditional values, in contrast to the Warren Court's constituency of highly educated professionals. The shift illustrates one of the cultural changes to which Shapiro's essay directs our attention.

On the borderland between culture and politics lies the Burger Court's enthusiasm for the imperial presidency. Here we are likely to be misled by the cases directly connected to Watergate,<sup>79</sup> in which the Court implicitly acknowledged that, at least with regard to Watergate, Richard Nixon was indeed a crook.<sup>80</sup> Maybe those cases should have been covered in the criminal law chapter. After the passions of Water-

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<sup>72</sup> Burt, *The Burger Court and the Family*, in *THE BURGER COURT*, *supra* note 1, at 92.

<sup>73</sup> *Id.* at 93.

<sup>74</sup> 430 U.S. 651 (1977) (use of corporal punishment in schools does not infringe student's due process rights so long as it is within limits of the common law privilege permitting justifiable and reasonable correction).

<sup>75</sup> 442 U.S. 584 (1979). The Court stated that the parents "retain a substantial, if not a dominant role in the decision, absent a finding of neglect or abuse," but added, "the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized." *Id.* at 604.

<sup>76</sup> Burt, *supra* note 72, at 103-07.

<sup>77</sup> *Id.* at 111.

<sup>78</sup> See *supra* text accompanying notes 26-39.

<sup>79</sup> See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977); *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>80</sup> See generally B. WOODWARD & S. ARMSTRONG, *supra* note 47, at 285-349.

gate waned and the Court faced a case not involving Watergate itself, it was willing to insulate the President from liability in damages for violating the Constitution.<sup>81</sup> That decision fits into a general pattern of enhancing the power of the President.<sup>82</sup> Moreover, the Court held unconstitutional an effort by Congress to establish an administrative agency, the Federal Election Commission, over which it thought, sensibly enough, it ought to have more control than usual.<sup>83</sup> In cases involving prosecutions of legislators, it has endorsed a relatively limited definition of the immunity provided by the speech and debate clause,<sup>84</sup> thus making it easier for prosecutors appointed by the President to influence the composition of Congress. *Dames & Moore v. Regan*<sup>85</sup> approved an exercise of presidential authority indistinguishable in its essentials from that disapproved in the *Steel Seizure Case*.<sup>86</sup>

*Dames & Moore* shows how the considerations of judicial politics that Shapiro emphasizes interact with substantive concerns. For, in addition to a rather greater enthusiasm for the imperial presidency these days, *Dames & Moore* differs from the *Steel Seizure Case* primarily in that the Court in 1981 could not possibly have gotten away with invalidating the Iranian Hostage Accords while the Court in 1952, facing a politically weakened President who had—horror of horrors—trampled on the prerogatives of property, could get away with what it did.<sup>87</sup> The Court's more recent invalidation of the legislative veto in *INS v. Chadha*<sup>88</sup> is equally illuminating. The decision is one for which there is, so far as I can tell, no defensible justification in constitutional theory. Jesse Choper's version of the popular theory authorizing judicial

<sup>81</sup> *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982).

<sup>82</sup> For a paragraph on the issue, see Blasi, *supra* note 32, at 202. In addition to the cases there mentioned, see also Haig v. Agee, 453 U.S. 280 (1981); *Snepp v. United States*, 444 U.S. 507 (1980). The *Snepp* case is discussed by Emerson in his essay on freedom of the press. See Emerson, *supra* note 20, at 12-14.

<sup>83</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>84</sup> See, e.g., *United States v. Brewster*, 408 U.S. 501 (1972).

<sup>85</sup> 453 U.S. 654 (1981).

<sup>86</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For a discussion of *Dames & Moore*, see *Symposium: Dames & Moore v. Regan*, 29 UCLA L. REV. 977 (1981). Although the President's actions in these cases were similar, the contexts in which they acted possibly are distinguishable. In the *Steel Seizure Case* Congress had indicated its intent that emergency strikes should not be handled by seizure. See Labor Management Relations Act §§ 201-210, 29 U.S.C. §§ 171-180 (1982). In *Dames & Moore* the Court found implicit congressional support for the President's actions in the International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979), and the Hostage Act, 22 U.S.C. § 1732 (1982). In my view, however, the nature of the implicit support found by the Court in *Dames & Moore* suggests that the *Steel Seizure Case* Court could have found equally "persuasive" authority if it had chosen to uphold the President's actions.

<sup>87</sup> See generally M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE (1977).

<sup>88</sup> 103 S. Ct. 2764 (1983).

invalidation of legislation only where the political process is unlikely to take account of affected interests<sup>89</sup> demonstrates that there are no political obstacles justifying the Court's action in overturning deals that Presidents had cut with Congress.<sup>90</sup> Chief Justice Burger's opinion hews to the interpretivist line and clinches its argument by underlining the word "and."<sup>91</sup> But *Chadha* accomplished two things. First, the response to the decision anticipated the "no counterrevolution" thesis. It went roughly like this: "People were afraid that the Burger Court lacked dedication to constitutional principles. The legislative veto case shows that they were wrong. Admittedly, we're not sure why the legislative veto is unconstitutional even after reading the opinions, but by God it does show that they care about 'The Constitution.'" And second, the decision endorsed a theory of the presidency that stresses the prerogatives and powers of the office.<sup>92</sup> Thus the Court satisfied two constituencies: those favoring an imperial President and those espousing a "strict construction" perspective.

The final, purely political dimension of what has happened substantially qualifies Vincent Blasi's argument that the Burger Court is characterized by a rootless activism. To Blasi, the Burger Court has been driven to that position by "the reactive nature of judicial review."<sup>93</sup> It has been committed to respect for precedent and the cases it confronts have been shaped by lower courts not as deeply conservative as it is.<sup>94</sup> Further, the "rampant growth of government bureaucracy" engendered a sense among the citizenry that the government was too complex and impersonal.<sup>95</sup> It was natural for the Court to respond to this concern by adopting simple constitutional solutions.<sup>96</sup> Finally, as single issue politics came to distort the legislative process, the Court responded, offering itself as an institution that could take an appropriately comprehensive view of the problems.<sup>97</sup> According to Blasi, the result has been a Court whose "activism has been inspired not by a commitment to fundamental constitutional principles or noble political

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<sup>89</sup> See J. ELY, *DEMOCRACY AND DISTRUST* 101-04 (1980).

<sup>90</sup> J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 2 (1980).

<sup>91</sup> *Chadha*, 103 S. Ct. at 2781.

<sup>92</sup> This is not to say that the decision enhances the President's power. As Choper shows, Congress has many resources of its own. See J. CHOPER, *supra* note 90, at 281-311. *Chadha* forces the deals between the executive and legislative branches to be renegotiated from scratch, but it is not clear that the substantive outcomes of the negotiations will change.

<sup>93</sup> Blasi, *supra* note 32, at 208.

<sup>94</sup> *Id.* at 208-09.

<sup>95</sup> *Id.* at 209.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 210.

ideals, but rather by the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to some of the excesses and irrationalities of contemporary governmental decision-making."<sup>98</sup> The Burger Court's activism is "centrist . . . [and] essentially pragmatic in nature, lacking a central theme or an agenda."<sup>99</sup>

There is less here than it first seems, and the essay by Norman Dorsen and Joel Gora<sup>100</sup> identifies what is missing. Dorsen and Gora examine the Burger Court's free speech decisions and conclude that a "new variable"—property—has been added to the mix of values protected by the first amendment.<sup>101</sup> *Buckley v. Valeo*,<sup>102</sup> in its free speech dimension, and the commercial speech cases, most notably *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>103</sup> make this explicit.<sup>104</sup>

With this insight it is indeed possible to find the roots of the Burger Court's activism. They lie in the philosophy that the government as a whole has the duty to protect the prerogatives of property<sup>105</sup> and that no part of the government has the duty to minimize the harms that lack of property inflicts on those so unfortunate as not to have enough. Robert Bennett's essay on poverty law<sup>106</sup> not surprisingly presents the most unrelievedly dark view of the Burger Court. The best he can do to lighten the gloom is to include *Califano v. Westcott*,<sup>107</sup> in which the Court held unconstitutional a federal law extending public assistance to intact families when the father was unemployed but not when the mother was.<sup>108</sup> *Califano v. Westcott* is, however, more a gender case than a poverty case.

But the poverty cases are not examples of the Burger Court's activism anyway. More revealing are the free speech cases,<sup>109</sup> *Allied*

<sup>98</sup> *Id.* at 211.

<sup>99</sup> *Id.*

<sup>100</sup> Dorsen & Gora, *The Burger Court and the Freedom of Speech*, in *THE BURGER COURT*, *supra* note 1, at 28.

<sup>101</sup> *Id.* at 31.

<sup>102</sup> 424 U.S. 1 (1976).

<sup>103</sup> 447 U.S. 557 (1980).

<sup>104</sup> See Dorsen & Gora, *supra* note 100, at 31-35.

<sup>105</sup> *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), holding that a state may require owners of shopping centers to allow distribution of political materials, is arguably to the contrary. Perhaps all it involves is a definition of the central prerogatives of property.

<sup>106</sup> Bennett, *The Burger Court and the Poor*, in *THE BURGER COURT*, *supra* note 1, at 46.

<sup>107</sup> 443 U.S. 76 (1979).

<sup>108</sup> Bennett, *supra* note 106, at 52.

<sup>109</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

*Structural Steel Co. v. Spannaus*,<sup>110</sup> and the like that underscore the Court's preoccupation with protecting property values. I believe that the Court's sympathy to claims of presidential authority<sup>111</sup> are cut from the same pattern, in that such authority is seen as essential to guarantee the position of the United States in the world economic and political system, a system that on the whole functions to protect the position of the privileged.

The gender discrimination cases are obviously more problematic. But two points seem worth making. First, many of the relevant decisions hold unconstitutional the exclusion of males from benefits made available to women.<sup>112</sup> As Ginsburg explains, these decisions can readily be rationalized as attacks on stereotypes of the proper female role.<sup>113</sup> Those stereotypes are closely bound up with images of household work as unproductive in contrast to "productive" work "outside" the household. They are therefore closely bound up with issues of class as well.<sup>114</sup> The Court's willingness to question gender-role stereotypes will have a limited impact so long as it fails to question class stereotypes too. Yet that is precisely the limit of its activism. Second, because of the present contours of political power in the United States, middle-class women have been the primary direct beneficiaries of the women's movement. That is not to say that working-class women have not benefited, nor is it to assert that women's activists have been satisfied with advances limited in that class-based way. But that fact of political life makes it easier to understand why the Burger Court's activism in gender cases is at least not inconsistent with its concern for the prerogatives

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<sup>110</sup> 438 U.S. 234 (1978) (contracts clause of the Constitution prohibits states from substantially impairing a contractual relationship, such as the pension provisions of an employment contract, absent a purpose of resolving a broad, generalized economic or social problem).

<sup>111</sup> See *supra* note 82; see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>112</sup> See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama's statutory scheme imposing alimony obligations on husbands but not on wives violates the equal protection clause). Where the benefits are an essential part of the income that flows to a family unit over the lifetime of its members, as are Social Security benefits, one cannot unambiguously define the gender bearing the burden. For example, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), the Court held unconstitutional a statute that provided a benefit to female caretakers of a deceased wage earner's child but none to male caretakers. From one view, this decision increased the income of fathers after their wives died. From another, it increased the value of the fringe benefits included in wives' incomes during their lifetimes.

<sup>113</sup> Ginsburg, *supra* note 3, at 137-40.

<sup>114</sup> The "inside/outside the home" dichotomy rests on the image of a world of work, governed by class relations, contrasted to a world of domesticity, governed by gender relations. For an examination of the instability of this dichotomy's applications to legal topics, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

of property. And, of course, in its most direct confrontation with a problem in which women's issues and class issues intersected, the Court in *Harris v. McRae*<sup>115</sup> forthrightly held that governments had no duty to make abortions available to those who could not otherwise afford them.

### CONCLUSION

The Burger Court's interest in the prerogatives of property suggests that its activism is more rooted than Blasi indicates. But does that impair the "no counterrevolution" thesis? According to Blasi's assessment of the Warren Court, it does. He writes, "[T]he Warren Court was fired by a vision of the equal dignity of man," and though "on many occasions" it "exhibited a pragmatic, compromising side," the compromises "took place against a background in which the direction of constitutional development was both clear and, to many, inspiring."<sup>116</sup> The Burger Court is also pragmatic, but it has "no deep-seated vision."<sup>117</sup> Contrary to Blasi, I believe that it does have a vision, one that, moreover, is also inspiring "to many."

But notice the difference between Blasi's and Kamisar's contrasts between the Warren and Burger Courts. I believe that Kamisar is more accurate. Here I revert to Shapiro's argument that the Warren Court constitutionalized the policies of the New Deal. I have no doubt that the New Deal program was, for its time and given the limits on effective transformative action in the United States, a major achievement, providing an important foundation—or "safety net"—which has recently been undermined (or unravelled). But that program was no less pragmatic and compromising than any other political program. It is no more a moral vision when adopted by the Supreme Court than it was when Congress adopted it. Or, to put it another way, what Blasi views as occasional compromises with a moral vision should rather be seen as integral parts that serve to define precisely what that vision was.

Indeed it may be that the ultimate judgment on the Warren Court is that "many" were able to read into its decisions a moral vision that was not there. All the Burger Court has done, on this interpretation, is to disabuse—or, in light of Blasi's position, provide us with the opportunity to disabuse—those readers of the illusion that the Warren Court was a place where the party of humanity implemented its political pro-

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<sup>115</sup> 448 U.S. 297 (1980).

<sup>116</sup> Blasi, *supra* note 32, at 212.

<sup>117</sup> *Id.*; see also *id.* at 216 (Burger Court has "powerful aversion to making fundamental value choices"; Warren Court "had a moral vision and an agenda").

gram. It turns out that there was in fact no counterrevolution because there had been no revolution in the first place.<sup>118</sup>

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<sup>118</sup> This, I take it, is one reading of the thesis of A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978).



COLLINS J. SEITZ

This issue of the *Law Review* is dedicated to Collins J. Seitz, who steps down this year from his position as Chief Judge of the United States Court of Appeals for the Third Circuit.