THE BURGER YEARS

RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986

EDITED AND WITH AN INTRODUCTION BY

HERMAN SCHWARTZ

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"Somebody splendid
Someone affectionate and dear"

PREFACE

This book analyzes the record of the Supreme Court from 1969 to 1986, the period of Warren E. Burger's tenure as Chief Justice and one of the most turbulent and unpredictable periods in the Court's history. We consider not only the legal soundness of the Court's decisions, but also the real-world impact on those directly affected by them, such as blacks, women, the press, criminal defendants, labor unions, and others.

The contributors to this collection have a corresponding duality. Most have been actively involved as lawyers in the cases and social conflicts about which they write. All are also recognized scholars and experts as either teachers or writers. They accordingly analyze the Court's rulings from both practical and theoretical perspectives.

The book had its genesis in an issue of *The Nation* that was devoted to the work of the Burger Court on its fifteenth anniversary. The issue was well received, winning the American Bar Association Silver Gavel Public Service award for 1985, and it was decided that the essays should be given the more permanent book form. This also provided an opportunity to broaden and deepen the discussions, so that the book covers areas not treated in the *Nation* symposium and treats the subjects originally discussed much more intensively. Although size considerations have prevented analysis of the Court's decisions in some areas, we hope we have covered enough of the Court's work to give the reader a sense of what the Burger Court did during this period and what it meant to the American people.

This is the place to acknowledge how much this book owes to Victor Navasky, editor of *The Nation*. His support and encouragement while we gathered and edited the many contributions that make up

the volume were indispensable. His wise suggestions at crucial points resolved delicate problems that often seemed intractable.

I also want to thank our wonderful editor Elisabeth Sifton, who guided us through the shoals of book publishing and often seemed to understand what we wanted to say better than we did ourselves. She has this rather astonishing notion that lawyers should write in English, and disconcerting as it was to many of us, insisted—with wit and good humor—that we at least try.

Most of all, thanks are due to the contributors who complied patiently with my nagging about deadlines, graciously responded to impertinent suggestions, and were willing to write and rewrite to accommodate new developments. They made putting the book together not just an exciting intellectual experience but also an occasion for enjoyable friendship.

Finally, my appreciation to my secretary, Yvonne Montanye O'Neill, who patiently typed and retyped much of the manuscript, often deciphering handwriting of near-hieroglyphic obscurity.

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Introduction

HERMAN SCHWARTZ

On June 16, 1986, Chief Justice Warren E. Burger announced his retirement from the Supreme Court after seventeen years. President Reagan promptly nominated the most conservative member of the Court, Justice William H. Rehnquist, as the sixteenth chief justice, and elevated Court of Appeals Judge Antonin Scalia, also a very conservative jurist, to be associate justice. The Burger Court became history.

This marks the beginning of a reshaping of the Supreme Court, the contours of which are still unknown. It coincides with the two hundredth anniversary of the Constitution. These concurrent events serve as a reminder that, with rare exceptions, major changes in the Court are never made on a clean slate, but almost invariably against a background of precedent, tradition, and institutional constraints that limit or channel the changes.

The record of the Burger Court is one of the best illustrations of that. Despite the many decisions criticized by the contributors to this volume, many basic principles and doctrines developed by the Court under Chief Justice Earl Warren to protect individual liberty and promote social justice have survived the Burger era intact, and some were strengthened. For example, the high points of the Warren Court's revolution in criminal procedure, *Mapp v. Ohio* (1961) and *Miranda v. Arizona* (1966), though battered and diminished, nevertheless survive; as Yale Kamisar notes, a 1986 opinion by the prosecution-ori-

ented Justice Sandra Day O'Connor viewed *Miranda* as a serious effort to strike a proper balance between competing interests.[1] The basic church-state separation principles worked out over the last forty years were refined and firmly reasserted, and, with some important exceptions and backslidings, the Warren Court rulings on the rights of blacks and women, including the right to an abortion, also still stand.[2]

One would never have expected this in 1969, when Richard M. Nixon nominated Warren Burger to be the Chief Justice. During his 1968 campaign, Nixon had devoted a good deal of heated rhetoric to assailing Earl Warren and his colleagues for being soft on crime and too activist, and chose Burger because he had written some articles to the same effect. Radical change seemed even more likely when, just a few years later, three other Warren Court justices (Abe Fortas, John M. Harlan, and Hugo L. Black) were succeeded by Nixon appointees Harry Blackmun, Lewis F. Powell, and William H. Rehnquist. Later, Presidents Gerald R. Ford and Ronald Reagan replaced Justices William O. Douglas and Potter Stewart with John Paul Stevens and Sandra Day O'Connor, who were both more conservative than their predecessors. The Burger court thus had a solid six-member majority of appointees made by three presidents who had harshly criticized liberal judicial activism and vowed to change the Court's direction.

Part of the reason for this unexpected degree of continuity is that the problems confronting the Court changed. Abortion and other women's rights and gender issues, prisoners' rights, capital punishment, interdistrict busing, affirmative action, rights of the handicapped, of aliens, and of illegitimate children are all areas that the Warren Court barely touched.

Still, the Burger Court was discernibly more conservative than the Warren Court, even though by 1968 the latter was moving to the right along with the nation, in reaction to riots, assassinations, and the Vietnam War. The Burger Court's rightward shift was most explicit in two areas where its predecessor seemed to be making especially significant changes: access to the federal courts and national security. Just two years after his appointment, Chief Justice Burger cautioned young people against becoming lawyers in order to effect social or legal progress in the courts, because "that is not the route by which basic changes in a country like ours should be made." Evidently he had forgotten that for two hundred years the courts have indeed made

"basic changes." He promised lawyers "some disappointments" if they tried.[3]

In chapter 1, Burt Neuborne documents the persistence with which Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor worked to ensure such "disappointments" by shutting the courthouse doors. This shutdown was selective, however, limited largely to those seeking to enforce constitutional rights. When those same justices wanted to promote nuclear power, for example, "standing" and other courthouse-closing concepts became flexible indeed. And one might add to Neuborne's discussion of the standing, class-action, and immunity cases the Court's ruling requiring prior recourse to state courts in the name of "our federalism," and the very high barriers that the Burger Court erected against federal habeas corpus review of constitutional issues that might arise in state criminal trials.[4]

There were rulings going the other way, as Neuborne notes in his discussion of some Civil Rights Act cases. And where the regulatory agencies are concerned, Alan Morrison shows that the Court actually expanded judicial review of administrative rulings. Almost invariably, however, it supported governmental and other efforts to withhold information from the public by narrowly construing the Freedom of Information Act, at times so restrictively that several of its decisions were overturned by Congress.

Matters were almost totally one-sided, however, where national security was concerned. Here the Burger Court adopted what the late Edmond Cahn felicitously called "the imperial perspective"—what the government wants, the government gets because it is the government. In *Snepp v. United States* (1980),[5] as Morton Halperin points out, the Court did not even bother hearing arguments or reading briefs before giving the government broad authority to control disclosures by former Central Intelligence Agency employees. In *Regan v. Wald* (1984), the Court allowed the President to bar travel to Cuba, despite a 1977 law clearly intended to deny him that power.[6] And in the 1986 yarmulke case, *Goldman v. Weinberger*, the Court, in an opinion by now–Chief Justice Rehnquist, brushed aside a major claim of religious freedom—the right of an army psychologist who is an Orthodox Jew to wear a small skullcap—with a one-liner: "The desirability of dress regulations . . . is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."[7] So much for the First Amendment.

Earlier precedents in the area of criminal procedure also suffered some heavy blows, as Yale Kamisar points out. However, there was some expansion of individual rights, such as the revival of a Sixth Amendment right to counsel for suspects during the interrogation process once adversary proceedings have begun.

In other fields there was more of a steady drift to the right than an explicit turnaround. This was particularly true in the business area. Jerry Cohen and Herbert Milstein show that in the antitrust and securities cases decided under Warren Burger, the Court became more and more a defendants' court, after issuing some antitrust decisions extending antitrust principles to professions and municipalities. David Silberman documents a similar tilt toward management in labor-management relations. But as Arthur Fox shows, where union members tried to enforce some union democracy, the unions generally came out ahead.

This rightward drift favoring business is part of a more general movement to protect property rights, which a number of observers of the Court have noted. Some conservatives have gone so far on behalf of those with money as to urge the Court to scrap almost the entire structure of modern social legislation.[8] They have proposed that the Court use the Fifth Amendment requirement that property not be taken for public use without just compensation, and the ban in Article 1, section 10, on state impairment of contractual obligations, to strike down rent control, zoning, the National Labor Relations Act, land-reform, minimum-wage, and maximum-hours laws, and other social legislation. The *Wall Street Journal* has editorially embraced this cause, urging judicial activism to protect what it calls "economic civil rights."

Even under Chief Justice Rehnquist, the Court is unlikely to accept these invitations to resuscitate such decisions as *Lochner v. New York* (1905),[9] which nullified a state's effort to limit working hours for bakers, drawing from Justice Oliver Wendell Holmes an angry complaint that the Court was writing Herbert Spencer's *Social Statics* into the Constitution.

Nevertheless, the labor and business cases discussed in this book support the view of those who believe that the Burger Court reemphasized protection for traditional property rights by, for example, banning the distribution of leaflets and labor organizing in shopping centers.[10] In a 1983 essay, Norman Dorsen and Joel Gora suggested

that "with few exceptions, the key to whether free speech will receive protection depends on an underlying property interest, either private or governmental. . . . [F]ree speech has received diminished protection when [it] appeared to clash with property interests."[11] Recent decisions support this, like the one allowing Harper & Row to use copyright law to prevent *The Nation* from printing three hundred words from Gerald Ford's memoirs.[12] Laurence Tribe has also found in the Burger Court a "substantive tilt" against a redistribution of wealth and in favor of "those with sufficient economic clout to win bilateral contract protection vis-à-vis the government while providing virtually no protection for those whose only power lies in concerted political action."[13]

My own feeling is that these observers somewhat overstate the situation. Along with these decisions favoring vested and traditional property rights were others, either curtailing property rights[14] or favoring less conventional property interests. For example, the Burger Court refused to grant significant judicial protection for claims to welfare, shelter, or other "basic necessities," or to insist on equalization of school financing, housing, or welfare benefits.[15] Yet when Texas tried to deny all schooling to children of illegal aliens, when Pennsylvania tried to cut off all welfare benefits to a fifteen-year-old, when Maricopa County, Arizona, refused hospital care to recent arrivals, and when the federal government denied food stamps to households in which not all the members were related, the Court, often by top-heavy majorities, insisted that the benefits be provided. Equality of benefits—no; but a total denial of basic necessities to some when they are made available to others is beyond the pale.[16]

In other contexts, the Burger Court's performance was more mixed, and many decisions in its last years began to go against the claims of constitutional right. *New York Times v. Sullivan* (1964),[17] which imposed First Amendment limitations on the libel laws, was originally hailed as a great victory for the press. Lyle Denniston contends that it was flawed from the outset, however, and he analyzes just how those original faults resulted in sharply curtailing press freedoms during the Burger era. Sidney Zion supplements this with a report on how the Burger Court discriminated among different kinds of defamatory speech.

A more sharply demarcated reversal of form appears in two criminal contexts. As Michael Meltsner writes, in the mid-1970s, the Court

was making capital punishment so difficult to administer within constitutional standards that it seemed doomed. By 1983, however, the Court had lost patience with lawyers trying to save their clients by insisting on fair procedures, and began to abandon its concern for fairness. In my essay on prisoners' rights, I chronicle a somewhat similar rise and fall in the Court's prisoners-rights cases. Between 1969 and June 1974, prisoners rarely lost a case in the Supreme Court. From June 1974 on, however, it became almost impossible for a prisoner to win one, as the Court, led by Justice Rehnquist, insisted on judicial deference to prison administrators, a throwback to the old "hands off" doctrine that many of us thought long since discredited.

Where the handicapped are concerned, the picture is more confusing. The Court did recognize some constitutional and statutory rights, but, as Norman Rosenberg explains, it often took away in practical application what it seemed to be giving in principle.

There remain, however, some very important continuities. Decisions from 1981 to 1984 seemed to signal a significant erosion of the wall of separation between church and state. Norman Redlich's comprehensive analysis of the decisions on the First Amendment's prohibition against official establishments of religion shows, however, that as a result of the 1985 and 1986 cases, the basic doctrines establishing the separateness of church and state still survived when Warren Burger left, though the decisions were often very close. And with some important exceptions, highlighted by Haywood Burns and Wendy Williams, the rights of racial minorities and women—including the right to an abortion—were still receiving substantial protection.

In the very last days of the Burger era, however, the Court reasserted and underscored its conservatism. In a cruelly traditionalist opinion by Justice Byron White, *Bowers v. Hardwick* (1986), a 5–4 majority of the Court refused to extend to private homosexual conduct the right to privacy recognized in the abortion, contraception, and other cases. In a biting comment, Yale professor Paul Gewirtz assailed the Court's opinion for responding to the arguments favoring such a right with nothing but insults, and its "failure to acknowledge in any way the human dimension of this issue . . . that this case involves human beings who have need for intimacy, love and sexual expression like the rest of us." It is not surprising that the five-member majority was composed of the four critics of the abortion decision and Justice Powell, who is frequently uneasy about developing new protections for individual rights.[18]

The Burger Court remained consistent, however, with respect to a matter we do not deal with separately but is basic to American constitutionalism: the respective roles of the federal government and the states, and how to reconcile conflicts between them. The Court consistently struck down parochial state efforts to favor in-state businesses at the expense of out-of-staters,[19] with Justice Rehnquist in frequent and sometimes solitary dissent. And despite a sharply split 1976 decision, *National League of Cities v. Usery*, which nullified a federal statute applying the minimum-wage and maximum-hour requirements of the Fair Labor Standards Act to state and local employees, the Court imposed few limits on congressional power over state authorities. *National League of Cities* was subsequently interpreted as not preventing application of federal energy standards to state utility commissions or the Age Discrimination in Employment Act to state employees. In 1985 the Court finally overruled the decision as "unworkable" in *Garcia v. San Antonio Metro. Transit Authority*, though two of the four dissenters in *Garcia*—Justices Rehnquist and O'Connor—warned that they would reinstate *National League of Cities* as soon as the Court composition changed in their favor.[20]

What of the future? How will the changes on the Court affect the Reagan administration's campaign to turn the clock back a half century and more in such matters as abortion, church-state separation, civil rights, criminal law and capital punishment, free speech and press, environmental and safety regulation, and a competitive economy?

One thing is clear already. Given the opportunity, President Reagan will appoint justices who will be eager participants in this effort, for based on their records to date, Chief Justice Rehnquist and Justice Scalia share the administration's hostility to the rulings of the Warren and Burger Courts.

The administration's campaign purports to be based on two fundamental principles, both of which are often invoked by Chief Justice Rehnquist and Justice Scalia: courts should exercise "judicial restraint," and judges should construe constitutional provisions in accordance with the framers' original intent.

"Judicial restraint" sounds like the reasonable notion that judges should not intrude on legislative and executive prerogatives. But in practice, Attorney General Edwin Meese III, Chief Justice Rehnquist, and others who share their views have given it a variable content. They support judicial restraint when the judiciary is asked to *protect*

civil rights and civil liberties; while they unabashedly favor an energetic activism when it comes to *curtailing* such rights and liberties, or to promoting business interests.

The controversy over tax exemptions for schools that discriminate against minorities is a good example of this ambivalence. In *Allen v. Wright* (1984), the Reagan administration persuaded the Court to reject a challenge by black parents to enforcement procedures the IRS itself had found inadequate, on the ground that the courts should not mix into such matters. But one year earlier, in the *Bob Jones University* case, the administration urged the Court to ignore what was found to be clear congressional intent and to set aside the IRS regulations entirely; Justice Rehnquist was the administration's only supporter.[21]

The administration has also urged the Court to ignore one of the cardinal principles of judicial restraint—that it should decide cases on the narrowest ground possible, especially if that avoids deciding a constitutional question. In *United States v. Leon* (1984), in which the Court created a good-faith exception to the rule excluding illegally obtained evidence from criminal trials, and in *Grove City College v. Bell* (1984), in which the Court narrowly construed the statute barring discrimination by recipients of federal funds, the administration urged far-reaching outcomes, even though the decisions could have been based on limited, fact-specific grounds. Here, the Burger Court was far more receptive, and accepted the administration's broad position, ignoring the available narrow base.[22]

Under the Reagan administration, the Attorney General's zeal for judicial restraint also seemed limited where presidential power is involved. In a little-noticed address in September 1985, Meese challenged the constitutionality of the long-established congressional practice of delegating enforcement power to regulatory agencies. Justice O'Connor saw a similar implication in the government's argument in the *Gramm-Rudman* case (1986), and the lower-court opinion striking down the act, which is generally attributed to then-Judge Scalia, showed great sympathy for this position; the Supreme Court's decision affirming the nullification of the Gramm-Rudman Act—itself a major bit of activism urged by the administration—pointedly omitted all reference to the issue. If this position were adopted—and it would involve overturning a fifty-year-old precedent—it would place the now-independent regulatory agencies under the President's control.[23]

Consider also the Attorney General's reaction to the Supreme Court's decision in the *Garcia* case mentioned earlier. *National League of Cities v. Usery*, which ruled that the federal Fair Labor Standards Act could not constitutionally be applied to state and local employees, was judicial activism at its most vigorous, for it involved congressional action in economic matters, and judges had not overruled such actions since 1937. In *Garcia*, the Court advised the states to look to Congress for protection against federal action, a principle more than 150 years old. Although one would have expected applause from Meese for this judicial deference to the representative organs of government, he and other devotees of his brand of judicial restraint assailed the decision for leaving the states to the tender mercies of "political officials," bereft of a judiciary to "protect . . . the States from federal overreacting."[24]

Mr. Meese claims that his concern for federalism is partly behind his criticism of *Garcia*. But here, too, the Attorney General has shown a remarkable inconsistency. In the "Baby Doe" case, *Bowen v. Am. Hosp. Ass'n.* (1986), the Solicitor General asked the Supreme Court to approve the use of section 504 of the Rehabilitation Act of 1973 to justify sweeping federal intervention in decisions concerning the treatment of seriously ill infants. Child protection and medical treatment are areas traditionally handled by the states, and in 1977 the Secretary of Health, Education and Welfare had concluded that the act provided no authority for federal intervention. That, however, didn't stop the Solicitor General from asking the Court to allow the federal government to ignore what the states had done in such matters. The Court again rebuffed him, noting that Congress had shown no interest in overriding state and local authority in such matters.[25]

Where the interests of business are concerned, the administration has also not been shy about seeking judicial activism. As Jerry Cohen and Herbert Milstein document, it has continually asked the Court to rewrite the antitrust laws to favor business, which has drawn angry responses from Congress including a prohibition against presenting to the Court certain arguments for relaxing the ban on price fixing between buyers and sellers.[26]

In March 1986, *Congressional Quarterly* concluded that "despite its stated opposition to judicial activism, the Reagan administration has engaged in an unprecedented degree of legal activism before the Supreme Court. Since President Reagan took office in 1981, the Solicitor General—who speaks for the government before the high court—

has volunteered that administration's views to the justices more often than any of his predecessors."[27] The cases involved not just abortion and other social issues, but sexual-harassment problems, unemployment compensation, civil rights damages and attorney's fees, land-use legislation, and more. In all of these, the government was not a party but a volunteer, and it asked the Court to exercise vigorous judicial activism in support of property and against poor people, workers, and those whose civil rights were violated. More often than not, the Court turned down the government, on the ground that Congress had decided otherwise.

The justices do not really believe in judicial restraint either, as the Burger Court graphically demonstrated in two of the most important opinions of its entire seventeen-year history, decided in its last days. On June 30, 1986, the Court decided *Bowers v. Hardwick*, the homosexuality case. Writing for the Court, Justice Byron White stressed the need for judicial self-restraint. The same day, however, he wrote the lead opinion in *Davis v. Bandemer*, creating a new right to challenge political gerrymandering, over angry complaints about improper judicial activism from the dissenters (who had voted for healthy activism in other cases); Justice Powell, who in the sodomy case had joined the White opinion urging restraint, also voted to create the right to challenge gerrymandering.[28] Regardless of whether it is sound, the gerrymandering decision has put the courts in the business of remaking the political face of the country and will force them to adjudicate bitter partisan disputes without the benefit of objective criteria, since the Court offered none.

Indeed, the entire record of the Burger Court, from its first days to its very last, when it struck down the Gramm-Rudman Act, is one of activism. And so it will always be. Since its earliest years, the Supreme Court has been actively and deliberately shaping the social and political structure of the nation, and that will never change. The pertinent question is, activist for what goal?

The administration's "original intent" argument is cut from the same motivational cloth, though its threadbare and patchy quality is more obvious. In various speeches, Mr. Meese has criticized judges who engage in "chameleon jurisprudence, changing color and form in each era" and who think

> that what matters most about the Constitution is not its words but its so-called "spirit." These individuals focus less

> on the language of specific provisions than on what they describe as the "vision" or "concepts of human dignity" they find embodied in the Constitution. This approach to jurisprudence has led to some remarkable and tragic conclusions.
>
> In the 1850s, the Supreme Court under Chief Justice Roger B. Taney read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery. The *Dred Scott v. Sandford* decision, famously described as a judicial "self-inflicted wound," helped bring on civil war.[29]

The ludicrousness of this will be obvious to anyone who reads *Dred Scott.* Apart from the inherent implausibility of the notion that a decision "read[ing] blacks out of the Constitution" could be based on "concepts of human dignity," the fact is that Taney did precisely what Meese wants judges to do: he engaged in an extensively researched, strict reading of the framers' original intent, explicitly rejecting any "more liberal" (Taney's phrase) current views.[30]

Meese's fidelity to the original-intent doctrine is itself somewhat dubious. *Brown v. Board of Education* (1954)[31] is now so well established that only an occasional disinterested scholar like Raoul Berger criticizes it, and certainly not a politician like Meese, who has praised it as an example of fidelity to the original intent of the framers of the Fourteenth Amendment in 1866. But if anything is clear from the less than pellucid history of that enactment, it is this: the amendment was not meant to outlaw segregated schools. Indeed, as Alexander Bickel concluded, the Fourteenth Amendment

> was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation. . . . The evidence of congressional purpose is as clear as such evidence is likely to be.[32]

On the other hand, the historical record makes it equally clear that the framers of the amendment had no objection to racial preferences and affirmative action—the Freedmen's Bureau Act, also adopted in 1866, was bitterly opposed because, as one senator complained, it "gives them [blacks] favors that the poor white boy in the North cannot get."[33]

Obviously, Meese would not try to justify school segregation or antimiscegenation statutes today, and he is certainly not impressed