The Burger Court

The Counter-Revolution That Wasn't

EDITED BY VINCENT BLASI

FOREWORD BY ANTHONY LEWIS

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• Foreword •

Anthony Lewis

When Warren E. Burger succeeded Earl Warren as chief justice of the United States in 1969, many expected to see the more striking constitutional doctrines of the Warren years rolled back or even abandoned. The reapportionment cases, *Brown v. Board of Education* and the other decisions against racial discrimination, the criminal-law decisions imposing what amounted to a code of fair procedure on the states, the cases enlarging the freedom of speech and of the press: In these, it was often said, the Warren Court had made a constitutional revolution. Now a counter-revolution was seemingly at hand.

It is fourteen years later as I write. Six members of the Warren Court are gone, replaced by nominees of Republican presidents: Nixon, four; Ford, one; Reagan, one. And what has happened to those controversial Warren Court doctrines? They are more securely rooted now than they were in 1969, accepted by the Burger Court as the premises of constitutional decision-making in those areas. Of course particular results have swung away from the trend apparent before 1969; of course this decision or that has disappointed those who welcomed the changes of the Warren years. But there has been nothing like a counter-revolution. It is fair to say, in fact, that the reach of earlier decisions on racial equality and the First Amendment has been enlarged. Even the most hotly debated criminal-law decision, *Miranda,* stands essentially unmodified.

The Burger Court approved busing as a judicial remedy for school segregation. The Burger Court made the press virtually immune to "gag orders" forbidding publication of stories about pending criminal cases and said that newspapers could not be made to balance critical stories by publishing replies; it held unconstitutional a state tax imposed on newspapers alone and held for the first time that the press and the public have a right to observe certain public proceedings, in particular trials.

There was a decision day toward the end of the 1982 term that symbolized the commitment of the Burger Court to the spirit of the Warren doctrines. On May 24, 1983, the Court decided by a vote of 8 to 1 that racist private schools are ineligible for tax exemptions because they are not "charitable" in the common-law sense of advancing agreed public policy. The opinion of the Court, rejecting arguments to the contrary by the Reagan administration,

was written by Chief Justice Burger. "Racial discrimination in education," he said, "violates a most fundamental national policy." That same day Justice Sandra Day O'Connor, President Reagan's appointee, wrote the opinion for a 5 to 4 majority holding that a state violated the due process clause of the Fourteenth Amendment when it revoked a convicted burglar's probation for failure to pay a $550 fine, without giving him alternatives to prison or showing that he had not made a bona fide effort to raise the money. It was an innovative decision right in the tradition of Earl Warren's egalitarian approach to criminal justice.

How has it happened, this extraordinary continuity of doctrine? Why have judges appointed by conservative presidents clung to the libertarian principles of the previous judicial generation or even enlarged upon them? These questions are evoked again and again in the mind of the reader who explores the work of the Burger Court in this book's fascinating analyses.

An irony must be part of the answer. Conservative judges—meaning by that term those who are more cautious in lawmaking—are naturally committed to the doctrine of *stare decisis*. It follows logically that they should respect a precedent once established, even though they opposed that result during the process of decision. For such a true conservative as Justice John Marshall Harlan, that consideration was certainly a factor; he might warn in dissent against what he foresaw as the baleful effects of a decision, but he would hesitate thereafter to subject it to constant relitigation. He valued stability over perfection.

A psychological truism supports *stare decisis*. Yesterday's surprise becomes today's commonplace. That is true of life generally in a changing world and of judicial life in particular, for it is the nature of the judicial process in our legal system to use yesterday's innovation as the accepted premise, the platform for further decision. Not only most judges but virtually all lawyers reason that way: incrementally consolidating the past into the future. It is the lawyer's way of thinking, taught in law schools.

Moreover, the public believes it is entitled to a certain reliance on constitutional decisions of the Supreme Court—and judges sense that. Reconsideration of doctrine in light of changed circumstances is one thing; our view of race was different after Hitler from what it had been in 1896, when *Plessy v. Ferguson* was decided. Reconsideration after a few years, in light of changed judges, is another.

It is also true that doctrines seen as radical when they first appear in Supreme Court opinions have a way of turning out to feel familiar and right. The decision that state legislators and members of the federal House of Representatives must be elected from districts of roughly equal population did force a lot of change—but it was change quite acceptable to the public. The United States still has much racial injustice, and much hypocrisy on the subject, but few Americans would want to go back to the rule of *Plessy*

v. Ferguson and have the Supreme Court say that segregation in public facilities meets the Constitution's demand for "the equal protection of the laws." Probably the most bitterly disputed decision of the Burger Court is *Roe v. Wade,* the abortion case. But if it were overruled, by the Court itself or by constitutional amendment, would the American public easily accept now the criminal prosecution of women or doctors involved in abortions?

However conservative their political outlook, very few judges today are prepared to break boldly—radically—from prevailing constitutional doctrines. On the Supreme Court, only Justice William Rehnquist really goes back to first premises in his opinions and is willing to rethink doctrines in terms of a personal constitutional ideology. He is today's equivalent of Hugo Black—at the other end of the judicial spectrum.

Perhaps this is only a transitional period. Perhaps Justice Rehnquist will be joined by others as ready as he is to uproot established doctrine. Then the Burger years might be seen in history as no more than what Justice Holmes called "that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction."

But as it stands, the Burger Court is doing what comes naturally to judges in the post-Warren era: trimming here and there, notably where egalitarianism looks to have costly consequences, but also building on the cases of the 1950s and 1960s when the spirit moves it—and doing so without any great concern for "self-restraint." That was the approach so often advocated in dissent by Justice Felix Frankfurter, who remembered that willful conservative judges had brought the Court to the edge of disaster in 1937 in their resistance to the New Deal.

One thing to be learned from these essays is that the great conflict between judicial "restraint" and "activism" is history now. Today's commentators on the Supreme Court are not survivors of the New Deal struggle, and neither are the justices. They comment and they decide without much self-conscious concern for whether this is a proper role for the Court.

We are all activists now. So this fascinating book tells us. Activists for what is a different question. Vincent Blasi, in his powerful summing-up, finds the Burger Court to be without the energizing moral vision of its predecessor; it is a rootless activism, he says. Martin Shapiro, telling us cheerily that the critics are never satisfied with the Supreme Court, nevertheless thinks we are better off arguing about the wisdom of what the Court does than wishing it had been done by someone else.

The great puzzle of American democracy has always been why so much should be done by judges, and ultimately by nine of them, appointed for life. After fourteen years of the Burger Court, the puzzle is more mesmerizing than ever.

The Society of American Law Teachers

The Society of American Law Teachers, the sponsor of this book, was founded in 1975 to represent the interests and concerns of teachers of law. The organization facilitates the efforts of law teachers to improve the capacity of the legal profession to serve societal needs, particularly as that capacity is affected by the quality and direction of legal education and legal scholarship. Over the years, the Society has testified in public forums in favor of affirmative action in law school admissions, in opposition to efforts to restrict the jurisdiction of the federal courts on such controversial issues as abortion and school prayer, and in favor of continued funding of the Legal Services Corporation. The Society has sponsored conferences and panel discussions on the future of legal education, access to the federal courts, the concept of equality, goals in law teaching, tenure standards for law professors, and clinical legal education. The book Looking at Law School, *designed to introduce law study to prospective and beginning law students, was published under the auspices of the Society. Each year the Society honors one member of the law teaching community for enduring contributions to the profession.*

• Preface •

This book presents a series of commentaries on the performance of the United States Supreme Court since Warren Burger became chief justice in 1969. Typically, the advent of a new chief justice signals more of a change in the public image of the Court than in the content or character of its work product. No modern chief justice, and least of all this one, has dominated the court over which he has presided. It is nonetheless a common expedient to use changes in the identity of the chief justice as dividing lines for demarcating segments of Supreme Court history.

Moreover, from the standpoint of the attitudes of the presidents who tried to shape the Court in recent years, Warren Burger serves as an appropriate symbol. Burger was viewed at the time of his appointment as a worthy champion of the conservative legal philosophy of the president who nominated him, Richard Nixon. In addition, Nixon and his personally selected successor, Gerald Ford, named four associate justices to the Court. Another was added by President Ronald Reagan, who like Nixon and Ford professed disenchantment with much of the work of the Warren Court. For the last half of the period under discussion, the Court has been composed of seven jurists nominated by Republican presidents and only two named by Democrats.

Surprisingly, in light of this political background, the last fourteen years have witnessed a series of decisions by the Supreme Court that seem on first view to be antithetical to what might be termed the modern conservative vision of the Constitution, a vision characterized primarily by the insistence on a limited, tradition-bound role for the Supreme Court. The departure from conservative principles, moreover, has not been confined to questions of judicial role. A remarkable number of the substantive results decreed by the Court during this period run counter to basic conservative political tenets favoring crime control over civil liberties, "family values" over the claims of liberty and equality associated with the feminist movement, neighborhood autonomy and states' rights over racial integration, and privacy and patriotism over aggressive, disturbing reporting by the press. At a more personal level, it is of course noteworthy that all three of the Nixon nominees who sat on the case voted against their nominator in the crucial Watergate tapes decision, thereby making his resignation from the presidency

all but inevitable. The story of the Burger Court to date, whatever else it might be, is not a tale of a conservative counter-revolution, at least not one of epic proportions or obvious import. If there have been historically significant shifts of premises or institutional dynamics, the movement has been subtle, complicated, not easily perceptible.

In bringing together essays by twelve close students of the Court's work, this book seeks to contribute to an assessment of this somewhat perplexing era. The book is designed to be accessible to nonlawyers and lawyers who claim no special expertise in the areas of law that are covered. The general observations of the distinguished contributors to this volume should also be of interest to specialists.

With two exceptions, each of the chapters in the book offers an overview of one significant area of the Burger Court's work. This format has enabled authors both to provide a narrative survey of a number of important decisions and to identify and comment upon noteworthy themes, trends, and problems. Even with this division, the essays converge in interesting ways. For example, the Burger Court's immensely significant and controversial decision in *Roe v. Wade*, the abortion case, is discussed in five different chapters. Several of the chapters address the basic question of the Supreme Court's proper role in a democratic system of government. In addition to the nine chapters on specific areas of the Court's work, the last two chapters, one by a lawyer and one by a political scientist, present general critiques of the Burger Court that cut across a broad range of doctrinal categories.

No attempt has been made to provide comprehensive coverage of the Burger Court's work. Too much has transpired, on too broad a front. Important areas such as administrative law, securities regulation, environmental law, taxation, voting rights, federal-state relations, the separation of powers, and freedom of religion could well support chapters of their own. Certain of these subjects are discussed in some detail in chapters devoted to more encompassing observations. Others receive no coverage whatever. In addition, the inevitable lead time in the production process has prevented the authors from taking into account the Court's decisions during its 1982–83 term.

The selection of topics and authors has been influenced to some degree by a desire that the book reflect, within a broad range, the concerns and ideals to which the Society of American Law Teachers is dedicated. Even so, the diversity of perspectives is striking. So too is the variety of assessments that emerge. The Burger Court receives high praise from Richard Markovits for its work in antitrust law and measured praise from Ruth Bader Ginsburg for its decisions regarding sex discrimination. Paul Brest (race discrimination) and Theodore St. Antoine (labor law) find the Court's work in their areas difficult to encapsulate but more respectful of traditional liberal values than might have been predicted. Robert Bennett (poverty law) and

Yale Kamisar (criminal procedure) see the Burger Court as stridently conservative in its early years but more balanced recently. Thomas Emerson is alarmed by the Court's consistent lack of realism and penchant for balancing tests in the area of freedom of the press. Several of the authors decry the Court's lack of direction, at times even schizophrenia, in their respective areas. Yet Robert Burt detects a coherent theme—promotion of the traditional authoritarian socializing conception of child rearing—in the Court's family jurisprudence. Norman Dorsen and Joel Gora also find an explanatory principle—respect for private property—that ties together the Burger Court's variegated free speech decisions. Martin Shapiro and I agree that the Burger Court has been activist in nature but has not had the kind of clear-cut agenda that propelled the Warren Court. He attributes this absence of a theme to the breakdown of the New Deal consensus; I attribute it more to the distinctive personnel profile of the Burger Court.

Taken together, these essays indicate that the Burger Court's work does not lend itself to any concise, comprehensive characterization. In certain areas, the recent Court has consolidated the landmark advances of the Warren years. In other areas, a mild retrenchment has taken place. Much of the time, the Court seems to have been drifting. It adds up to a curious but nonetheless intriguing period in the history of a remarkable institution.

• Acknowledgments •

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Freedom of the Press Under the Burger Court

Thomas I. Emerson

In 1969, when the transition to the Burger Court began, the press as a whole had grounds to feel that its position under the First Amendment was relatively secure. As far back as 1931, the Supreme Court in *Near v. Minnesota* had ruled that, except under certain limited circumstances, the press could not be subjected to restraint in advance of publication, either by a system of censorship or by court injunction. Shortly afterward, in *Grosjean v. American Press Co.*, the Court held that the press could not be subject to any burden, such as a tax, not imposed upon other enterprises. In the *Bridges, Pennekamp*, and *Craig* cases, decided in the 1940s, the Court had made clear that press criticism of the courts was protected, unless presenting a clear and present danger to the administration of justice, in marked contrast to the vulnerability of the press in England. The Warren Court, beginning with *New York Times Co. v. Sullivan* in 1964, had drastically altered the law of libel, assuring the press virtual immunity from damages for false statements, except where the statement was knowingly false or made with reckless disregard as to whether it was false or not. While the electronic media—radio and television—were subject to a licensing system and compelled to adhere to controls such as the fairness doctrine, that result was attributed entirely to the scarcity of facilities and the resulting need for those granted the privilege of owning broadcast stations to operate in the public interest. Even in the sensitive area of national security in time of war, the press had not been put under any formal restrictions.[1]

Despite appearances there were some weaknesses in the position of the press. A number of important issues remained unresolved. And the decisions of the Supreme Court, while generally favorable in results, were based upon doctrines that contained important loopholes. In making exceptions or employing the balancing test, the Court had never firmly closed the door to government intervention in the affairs of the press. Thus it was perhaps the general friendly attitude of the Warren Court, rather than a close analysis of its actual decisions, that gave comfort to the press.

In any event, 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 by various

judicial encroachments. Thus in April 1979 the president of the American Newspaper Publishers Association called upon his fellow publishers to "fight to rescue, defend and uphold the First Amendment," saying that the "imperial judiciary . . . is bending the First Amendment at every turn" and has created an "atmosphere of intimidation" for the press.[2]

What, then, has become the status of the press under the Burger Court? An appraisal of the situation requires examination of the Court's rulings in five major areas: (1) libel and privacy; (2) free press–fair trial; (3) restrictions based on national security or other social interests; (4) limitations upon newsgathering; and (5) government regulation designed to improve the functioning of the press.

Before proceeding to this analysis, however, one emerging problem of doctrine should be considered. Does the First Amendment, in specifically referring to "freedom of the press," in addition to "freedom of speech," confer upon the press any special status not available to other institutions, groups, or individuals?

THE SPECIAL STATUS OF THE PRESS

The proposition that the First Amendment should be interpreted to extend special constitutional protection to the press was first clearly advanced by Justice Potter Stewart in an address at Yale Law School in 1974. He suggested that the framers of the Constitution intended to recognize "the organized press," that is, "the daily newspapers and other established news media," as "a fourth institution outside the Government," serving as "an additional check on the three official branches." He concluded that, as such an institution, the press was entitled to enjoy not only "freedom of speech," available to all, but an additional right to "freedom of the press." Justice Stewart's position has received some support from commentators. It has never been accepted by a majority of the Supreme Court, however, and Chief Justice Burger has explicitly rejected it.[3]

The debate over whether the press should receive special protection under the First Amendment has not been a productive one. If the term "press" is narrowly defined, there is no justification for singling it out for special treatment as compared with other institutions or persons who perform similar functions. If the term is broadly defined, the whole concept is stretched beyond any meaning. Nor have any standards been developed for ascertaining just what special rights the press is entitled to receive.

There are other, even more cogent reasons for rejecting Justice Stewart's analysis:

1. If the First Amendment is broken down into its constituent parts—speech, press, assembly, and petition—its scope, force, and power are

greatly diminished. The more effective approach, and one which the Supreme Court has actually taken, is to construe the First Amendment as broadly establishing a comprehensive right to "freedom of expression."

2. A distinction between freedom of speech and freedom of the press makes sense only in the context of a balancing approach to the First Amendment. If one seeks a more precise standard for measuring First Amendment rights, such as a full protection theory, the dichotomy between the "institutionalized press" and other communicators is not helpful.

3. There are dangers in affording the press special privileges, especially if the press is defined as the mass media. Special responsibilities are likely to follow.[4]

All in all, therefore, it is better to consider "the press" as simply one feature of an integrated system of freedom of expression. There are times when the nature of the "institutionalized press" requires that its particular advantages in communication, and the particular function it performs, be taken into account. This occurs primarily where there are physical limitations upon the process of newsgathering, as where access to the scene of a natural disaster must be restricted to a few persons, or where there are limits upon the number of persons who can be accommodated on the president's plane. In such situations it makes sense to give access to a representative of the "institutionalized press," who is in a better position to carry the news to the general public than an ordinary citizen. But this is quite different from visualizing the press as broadly entitled to unique privileges. On this issue the Burger Court's treatment of the press seems entirely correct.

LIBEL AND PRIVACY

In libel law the legacy handed down by the Warren Court was of prime importance to the press. Prior to 1964, Supreme Court dicta had it that false and defamatory statements were completely outside the purview of the First Amendment. The vulnerability of the press under this legal doctrine was evident in the first case in which the Court squarely addressed the problem. In the midst of the civil rights struggle in the South, the *New York Times* published an advertisement sharply criticizing government officials in Alabama for the manner in which they had attempted to suppress persons engaged in protest against racial discrimination. Some of the statements made in the advertisement were not accurate. A high-ranking police official in Montgomery, Alabama, sued the *New York Times* in the Alabama state courts and won a verdict of $500,000. The United States Supreme Court, in the landmark decision of *New York Times Co. v. Sullivan*, held that the Alabama libel law did not meet the requirements of the First Amendment.[5]

Justice Brennan's opinion for the majority of the Court was based essentially upon the proposition that the system of freedom of expression contemplates that "debate on public issues should be uninhibited, robust, and wide-open" and that a rule of law requiring the press or others to guarantee the truth of all their assertions "dampens the vigor and limits the variety of public debate." The Court concluded that public officials could not recover damages for a defamatory falsehood unless they could show that the statement had been made with "actual malice"—in other words, "with knowledge that it was false or with reckless disregard of whether it was false or not." Three justices, including Justices Black and Douglas, would have gone further and held that a public official could not prevail in a libel suit regardless of whether "actual malice" had been proved.[6]

The decision in *New York Times Co. v. Sullivan* was noteworthy because it did not attempt to resolve the issue by a balancing test but rather undertook to focus on the purposes served by the First Amendment, the dynamics of limiting expression, and the realistic need for protection of the system against inhibiting or repressive measures. In this it conformed closely to full protection theories. On the other hand, the decision left open a number of questions, including the application of the rule to persons who were not public officials and the problems involved in proving "actual malice."

In a subsequent series of cases the Supreme Court extended the "actual malice" rule to "public figures" and in 1971 to all matters "of public or general interest." By this time, however, the Court was seriously fragmented. In 1974, with the arrival of two new justices, the Court turned sharply in the other direction. In *Gertz v. Robert Welch, Inc.* a majority of the Court, returning to a balancing test, held that the "actual malice" rule should be limited to public officials and public figures and that, in libel suits brought by "private individuals," the state or federal government could adopt any rule so long as it required at least a showing of negligence on the part of the defendant. This position was reaffirmed two years later by a 6 to 3 vote in *Time, Inc. v. Firestone*. Moreover, the Court adopted a very narrow definition of "public figure": in *Gertz* a well-known Chicago lawyer, who had been active in various controversial public issues, and in *Firestone* a socially prominent woman, who had been involved in a widely publicized divorce case, were held not to be public figures. Later decisions also excluded from the category of public figures a director of research at a state mental institution who had published widely in scientific journals and had received over half a million dollars in federal funds for a research project, and an individual convicted of criminal contempt for failing to appear before a grand jury investigating espionage.[7]

In *Herbert v. Lando*, the Supreme Court filled in some of the gaps left in the administration of the "actual malice" rule. Lieutenant Colonel Anthony Herbert had received extensive publicity during the Vietnam War when he