Book Review

Michael Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right*, New York: Simon & Schuster, 2016, pp. 480, $30.00 (cloth)

Reviewed by Alan B. Morrison

The Burger Court and the Rise of the Judicial Right is very upfront about its thesis—in its introduction, its conclusion, and in each of the five parts dealing with a significant area of the Supreme Court's work during the Burger Court era. The authors note that the Burger Court was "often depicted as simply having occupied a transitional role," but that the authors' goal was "to offer a different view," namely that "a great deal happened during the Burger Court" (7). In their view, much of what the Burger Court did either undermined what the Warren Court did or refused to take what looked like the logical next step needed to carry out the Warren Court's changes. Here is how the authors put it in their conclusion:

> Equality took a backseat to other values: to the prerogatives of states and localities within the federal system, to the preservation of elite institutions, to the efficiency of the criminal justice system, to the interests of business, and, above all, to rolling back the rights revolution the Warren Court had unleashed (341).[1]

This review will mainly address the question of whether that judgment and other similar ones in each chapter are supported by an analysis of the relevant cases. The focus is on the main cases discussed in the five subject areas chosen—criminal law, race, social transformation, business, and the presidency. It will also consider some Burger Court cases that are not discussed in the book, as well as some from the Warren Court that remain strong. But first a few words about the authors and then a brief discussion of which Justices constituted the "Burger Court."

Alan B. Morrison is the Lerner Family Associate Dean for Public Interest & Public Service Law at George Washington University Law School. As indicated in some of the note materials, he was counsel in several of the cases discussed in *The Burger Court,* as well as several noted in this review that were not discussed. By way of full disclosure: He has known and been a friend to Linda Greenhouse and her husband, Gene Fidell, almost since she began to cover the Court.

1. The press release for the book describes it this way: "Though traditionally described as a moderate or transitional court, the authors demonstrate that the Burger Court was actually a conservative one whose constitutional decisions still impact the political landscape in which we live today." https://www.law.yale.edu/yls-today/news/graetz-and-greenhouse-publish-book-burger-court [https://perma.cc/6RNK-FTD8].

"Linda Greenhouse is the Knight Distinguished Journalist in Residence and Joseph Goldstein Lecturer in Law at Yale Law School. She covered the Supreme Court for *The New York Times* between 1978 and 2008 and writes a biweekly op-ed column on law as a contributing columnist."[2] Not a lawyer, Greenhouse earned a Master in Studies of Law degree from Yale. With her co-author Michael Graetz, she teaches a course at Yale titled "Warren Burger's Supreme Court." Professor Graetz, who currently teaches at Columbia Law School, taught at Yale for nearly twenty-five years. His Columbia biography describes him as "a leading expert on national and international tax law," which has been the focus of his teaching and writing.[3]

The book defines the Burger Court as the seventeen years in which Warren Burger was Chief Justice of the United States, 1969-1986. During that time there was both continuity—Justices William Brennan, Byron White, and Thurgood Marshall (who was not really part of the Warren Court, having come on in 1967) were there from start to finish—and departures and new arrivals. The biggest change took place between June 1970 and January 1972, when Justices Harry Blackmun, first, and then Lewis Powell and William Rehnquist joined the Chief Justice. Justice William Douglas retired in December 1975 and was promptly replaced by Justice John Paul Stevens. The only other change took place in 1981, when Justice Potter Stewart retired and Justice Sandra Day O'Connor took his place (355). It is this Court that is pictured on the cover and is the main focus of the book. Finally, although perhaps unnecessary for readers of this journal, the fact that there is agreement among Justices on one or even many issues does not guarantee that they will go along on everything, which softens the concept of a "Burger Court," at least at the margins.[4]

Crime

As the book relates, getting tough on crime was a theme for Richard Nixon when he ran for President in 1968 and for Warren Burger when he was a circuit court judge (13-14). This section first discusses the death penalty cases, followed by three sets of Warren Court rulings that sparked opposition—the exclusionary rule, the right to counsel, and the required warnings for those in custody. It then turns to the substantially increased availability of federal habeas corpus under the Warren Court as a means by which defendants could collaterally attack their state court convictions, an issue that was not on the radar of the average citizen, but was very much a concern to prosecutors and other state and local officials. The authors assess the Burger Court's overall

2. *Linda Greehouse*, Yale L. Sch., https://www.law.yale.edu/linda-greenhouse [https://perma.cc/J3TK-A5E2] (last visited Oct. 26, 2016).

3. *Michael J. Graetz*, Colum. L. Sch., http://www.law.columbia.edu/fac/Michael_Graetz [https://perma.cc/G66Q-HSDQ] (last visited Oct. 26, 2016).

4. The book contains a few nods to those not familiar with the Court and legal doctrine—the note on Supreme Court Procedure (pp. 9-10) and the translation of *stare decisis* (p.22)—but in the main, it is a book written for lawyers, perhaps even that subset whose practices or teaching focuses on the Supreme Court.

performance on these issues this way: It "dramatically diminished the scope and impact of the Warren Court's precedents: they survived, but only their facade was left standing." (15).

No doubt to the surprise of some who are not close students of the Court, it was the Burger Court, and not the Warren Court, that held the death penalty unconstitutional, by a 5-4 vote in 1972 in *Furman v. Georgia*.[5] Nine separate opinions were issued, and the holding was a narrow one: The current death sentences involving 600 defendants cannot stand because in certain respects the imposition of the death penalty violated the Constitution. Five years later, after states had revised their death penalty statutes in an effort to conform to the Court's message, the Court confirmed in *Gregg v. Georgia*[6] that the death penalty was still alive in some of its applications, but held the laws of Louisiana and North Carolina, which mandated the death penalty in certain categories of cases, violated the prohibition on cruel and unusual punishment in the Eighth Amendment (26).

Given the narrow margin in *Furman,* the Burger Court could have sought to reverse *Furman* and hold that there are no Eighth Amendment limits on whether, under what circumstances, and how states may decide on the use of the death penalty. But it did not. Indeed, as the book points out, although the Court declined many opportunities to apply *Furman* to slightly different situations, it nonetheless mandated individual death penalty determinations, in which defendants are allowed to introduce all arguable mitigating factors (as are prosecutors for aggravators) (28). It also stopped the use of the death penalty for crimes that did not result in death, including reversing the penalty for rape of an adult and murder committed by another in the course of an armed robbery, at least without allowing testimony as to the defendant's limited role in the crime (29-32). The chapter also has a very useful summary of death penalty litigation while Warren Burger was Chief Justice and thereafter. In the end, surely no rollback and *some* positive developments for death penalty opponents occurred even while Burger was the Chief Justice. Then again, the authors' conclusion—that the Burger Court's death penalty decisions did not actually remedy the infirmities identified in *Furman*, nor have they managed to reliably separate out "those who 'deserve to die' from those who do not"—is surely correct (36).

The introduction to Chapter 2, "Taming the Trilogy," asserts that the Burger Court "constricted greatly" the rights of criminal defendants and that, while "[m]ost observers had expected the Burger Court to overrule the major criminal procedure decisions of the Warren Court," it did not, but instead "eviscerated them." (43). The chapter focuses on *Miranda* warnings, the right to counsel, and the exclusionary rule, and surely makes the case that, at almost every opportunity, the Burger Court refused to extend them or created exceptions that diminished the effectiveness of prior rulings. But whether those

5. 408 U.S. 238 (1972).

6. 428 U.S. 153 (1976).

rights were "eviscerated" is a matter of judgment. The police still give *Miranda* warnings every day, and some suspects and/or their lawyers take advantage of them. Indeed, as the book points out, the Court had an opportunity to overrule *Miranda*, but then Chief Justice Rehnquist's 7-2 decision for the Court declined to do so (44-45).

On the right to counsel, the Court has been very stingy in extending it and has found it to be inapplicable in a number of situations, often having to do with whether the accused was "in custody." The authors are also plainly correct that the right to counsel should include the right to effective assistance of counsel, and the Burger Court in *Strickland v. Washington*[7] set the bar for ineffectiveness at such a difficult level that almost no defendants can prevail on that claim. But almost none does not equal zero, and so even *Strickland* (which was not a Warren Court decision) provides some protection to the accused in some cases. Perhaps more important, no Burger Court ruling has suggested, let alone held, that we should revert to the days when there was no right to counsel in felony cases and before the right was extended to anyone whose term of imprisonment could exceed six months.

The Burger Court record on the exclusionary rule is also one of new exceptions and refusals to take the next step in protecting defendants. But the rule is still honored as law enforcement officials now regularly obtain the necessary search warrants and try to follow the strictures of the Fourth Amendment. Moreover, almost every term the Court faces Fourth Amendment issues that would vanish if the exclusionary rule did not exist. Again, like *Miranda* warnings, it is a rule with which the police can live, if not love, and it now protects all of us from invasions of privacy of the kind that could not have been contemplated when the rule was created, as evidenced by two unanimous decisions of the Roberts Court: *United States v. Jones*[8] (unconstitutional to attach tracking device for 30 days to a suspect's automobile without a warrant) and *Riley v. California*[9] (warrantless search of a cell phone violates the Fourth Amendment). To be sure, the exclusionary rule was less vigorous in the Burger Court, but it seems too harsh of the authors to conclude that it was "so circumscribed . . . as to render it virtually impotent." (49).

Any book that attempts to summarize the work of the Supreme Court over any time frame can always be faulted for not discussing a case, but in this instance, given the very negative assessment of the Burger Court and its efforts to "eviscerate" the Warren Court's criminal procedure rulings, the failure to discuss what happened, or did not happen, to the seminal ruling in *Brady v. Maryland*[10] is significant. In *Brady,* the Court established an affirmative obligation of prosecutors to produce for the defendant any favorable evidence in its possession or that of other law enforcement agencies with which they

7. 466 U.S. 668 (1984).

8. 132 S. Ct. 945 (2012).

9. 134 S. Ct. 2473 (2014).

10. 373 U.S. 83 (1963).

are working on the case. To my knowledge, no opinion of the Court, under any Chief Justice, has sought to overturn that basic due process principle, although the problems that *Brady* identified still persist.[11] While the due process principle has not always been applied as generously as defendants would like, or principles of finality (discussed below) precluded them from raising it, it continues to provide an important protection for the innocent and probably deserved at least a mention as an example of what the Burger Court did not try to eviscerate.

The third part of the discussion of the criminal procedure rulings of the Burger Court is, to my mind, the least controversial and, in many ways, the most convincing. "Closing the Federal Courthouse Doors" focuses mainly on the limits that were placed on the use of federal habeas corpus to challenge state court convictions. Here the Court, sailing under the banner of federalism, actually overruled precedents and erected a series of barriers that made it much more difficult, and in many cases impossible, for a defendant to have a federal court reach the merits of his constitutional claims. The authors' final thoughts on the Burger Court's rulings in criminal law matters are surely on target regarding the availability of habeas corpus: "The Burger Court was far more willing than its predecessor to rely on the good faith of law enforcement officers and state prosecutors and to rely on the fairness of state adjudications."(75).

That observation also explains many of the other Burger Court rulings in the area of crime, but readers will have to judge for themselves whether that is the whole story of what the Burger Court did and did not do in this area. Fortunately, the book provides the relevant facts of the cases and the necessary background to enable the reader to make an informed judgment.

Race

The next part deals with race and considers public schools first and then universities, with employment discussed in Chapter 11. It is hard to dispute the authors' assertion that "[a] half century after *Brown,* our nation still suffers dramatic racial disparities of wealth, income, education, employment, health, and incarceration." (78). The question raised by this part is whether the Burger Court is accountable for many of those disparities because of what it did or did not do in the area of education. The authors make the case that the path to further integration was surely not aided by the Burger Court, but there is no claim that the Justices tried to overrule *Brown* or to create exceptions to it. Rather, their point is that the Burger Court had opportunities to advance the progress that the Warren Court started, but did not do so.

The first question that the Burger Court tackled was busing. Initially, it supported the concept, but drew the line when the remedy required inter-district busing because of de facto racial segregation in housing within school

11. In his oft-cited dissent from denial of rehearing en banc in *United States v. Olsen,* 737 F.3d 625, 626 (9th Cir. 2013), then Chief Judge Alex Kozinski concludes that "[t]here is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." His opinion went on to cite many recent examples, which included the case before him. *Id.* at 631–32.

districts. The book also points out that busing was a remedy that extended into the North and that produced very different reactions from *Brown,* which only forbade segregation under law, primarily in the South. The opposition to busing was led by Justice Powell, a longtime member of the Virginia and Richmond school boards (84). As the authors put it, "the values that Powell held most dear exalted neighborhood schools and abhorred any sacrifice of quality education by whites in pursuit of desegregation." (89). The issue of busing never reached the Warren Court, and so we have no way of knowing how it would have reacted, but we do know that if busing is or were the key to further desegregation, the Burger Court stopped it from having any meaningful effect.

The Burger Court's other major school case was *San Antonio Independent School District v. Rodriguez,*[12] in which the plaintiffs challenged the great disparities in resources between the best- and worst-funded school districts, largely because the money for schools in Texas was raised by each locality. The issue was whether the differences in wealth should be subject to heightened scrutiny of some kind, and the Court said no, thereby sustaining the existing regime. Again, the issue was new, and so no Warren Court precedents were at stake. The plaintiffs had very sympathetic facts, but it was by no means clear what the limits of their wealth-based argument would be, in the context of schools or elsewhere. Indeed, some state courts have used this approach to re-balance the funding of their schools,[13] but whether they have succeeded in improving the quality of education for all students is at least debatable. In this instance, the authors' judgment seems unduly harsh: *"Rodriguez* eviscerated the most promising alternative avenue for claims based on racial discrimination. Finally, by consigning the right of public education to the constitutional dustbin, the Court constricted the minimal requirements of our Constitution's guarantee of liberty and justice for all." (93).

In their conclusion to the public school chapter, the authors acknowledge that the Burger Court did not seek to limit the impact of *Brown*, at least not directly (102). They then observe that despite the end of "separate but equal," our public schools "remain starkly separate and grossly unequal," and "Warren Burger's Supreme Court must take *much* of the responsibility for that." (102).[14] Again, the authors provide the evidence, and the reader is left to decide whether "much" in this assessment is too much, too little, or just about right.

Chapter 5 considers how affirmative action, or reverse discrimination, as it came to be known, fared in higher education in the Burger Court. In the first case discussed, Marco DeFunis, a white male, sued the University of Washington Law School, claiming that minority applicants less qualified than he were granted admission, while he was not. The evidence showed that there were separate applicant pools for minorities in which less emphasis was

12. 411 U.S. 1 (1973).

13. *See e.g.*, Serrano v. Priest, 487 P.2d 1241 (1971).

14. Emphasis added.

given to scores and grades. After DeFunis had twice been denied admission, while the school admitted 37 minority applicants who would not have been admitted under the normal criteria, he sued. The state trial court agreed with DeFunis; it therefore ordered his admission. The university complied, but also appealed. The state Supreme Court reversed, and the Burger Court agreed to hear the case, even though no conflict existed in the lower courts on this issue, which was then one of first impression (103-04).

DeFunis was allowed to continue his law studies while the case proceeded to oral argument. But instead of ruling on the merits, the Court decided to dismiss the case as moot, presumably because the only remedy that was available to the state would have been to ask the Court to deny DeFunis his diploma at his scheduled graduation a few weeks away.[15] What is most interesting about the *DeFunis* case for this book is that Justice Douglas dissented because he believed that DeFunis was entitled to have his application considered on the merits in a racially neutral manner (105). This at least suggests that treating applicants separately based on race, as the law school did for DeFunis, might not have passed muster in some circumstances even in the Warren Court.[16]

The book then discusses the violence accompanying efforts to integrate universities, followed by the progress that was made before *DeFunis*, although why the authors chose to reverse the order of history is unclear (106-14). Whatever relief the Court felt from the *DeFunis* dismissal was short-lived when Allan Bakke sued two months later for being denied admission to the University of California Davis Medical School (as well as ten other schools). He largely prevailed in the trial court and won the right to be admitted by the California Supreme Court, which was hardly a bastion of conservatism in the 1970s. Based on the papers of several of the Justices that are now available, the book relates how the Burger Court was divided 5-4 on granting review, with Brennan and Marshall opposing for fear of what the case would do to all affirmative action, and Burger and Blackmun agreeing for their own reasons. But Justice Stevens, who by then had replaced Justice Douglas, agreed with the other four to hear the case, and so review was granted (116).

Like many other parts of *The Burger Court,* the ins and outs of how the Court reached its decision are very much worth the read, even for those familiar with the compromise decision based on Justice Powell's opinion (114-22). In the end, the Court preserved the possibility of affirmative action in the name of promoting diversity in higher education, but barred the use of quotas.[17] In the concluding pages of this chapter, the authors recognize the difficulty of

15. DeFunis v. Odegaard, 416 U.S. 312 (1974).

16. The dismissal on mootness grounds in *DeFunis* contrasts sharply with the willingness of the Roberts Court to consider the merits not once, but twice, in *Fisher v. Univ. of Texas*, 136 S.Ct. 2198 (2016), and 133 S. Ct. 2411 (2013), even though the applicant had graduated from another university and her only claim was one for money damages, mainly her $100 application fee. Among lawyers who regularly have to deal with the implications of *DeFunis*, the case is often described as standing for the doctrine of "If it's very hard, it's moot."

17. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

achieving consensus regarding the role of race in university admissions and agree that the issue would not have disappeared no matter how the Court came out. But the authors find fault with the Court's focus on diversity on the ground that the decision "essentially disabled minority applicants from advancing any legal claim (in the absence of intentional discrimination, of course) [while] it simultaneously allowed disappointed white applicants to claim that their rejection was illegal because it was based on race." (127). After noting that the Court did not "slam the door on minorities' opportunities when the nation's colleges and universities voluntarily undertook to provide them . . . it bestowed on future courts a basis for eliminating affirmative action altogether." (128). Once again, the authors accurately state the facts as of 2015, but describe them in a way that assigns responsibility to the Burger Court for unleashing lawsuits based on claims of reverse discrimination, even while they agree that forces in society at large were pushing, and continued to push, in that direction.[18]

The Remaining Chapters

Because this is a book review, not a summary of a book that I would have written if I had undertaken this endeavor, I will not examine the remaining eight chapters as I did the first five. Instead, I will highlight some of their many insights and point out a few places where the judgments of the authors may be subject to some marginal debate.

In the "Privacy at a Price" chapter, the authors nicely capture the Burger Court's treatment of abortion. The Court did, after all, venture into territory from which the Warren Court stayed away, and when it ruled, it did so with a resounding 7-2 decision, with one of the dissenters, Justice White, a Warren Court holdover. But as this chapter explains, the ruling came with a price, or actually two. The first, which came to the fore with Justice O'Connor's dissenting opinion in the *Akron* case, introduced the concept of "undue burden." (153). That approach eventually gave courts and legislatures some room to argue that as long as abortions continued to be legally available, some conditions could be attached to obtaining them. Subsequent cases upheld some laws and struck down others, but the basic right remained intact. Indeed, in *Whole Woman's Health v. Hellerstedt,*[19] a law requiring that those operating abortion clinics have nearby hospital admitting privileges and that the clinics themselves be substantially upgraded (at very significant cost) was held to amount to a constitutionally excessive burden. The very fact-intensive opinion strengthened the ability of women to obtain abortions, while underscoring the

18. There is some irony in their conclusion that the Roberts Court is likely to end affirmative action entirely when, in the second *Fisher* decision, 136 S. Ct. 2198 (2016), Justice Anthony Kennedy sided with the University of Texas and upheld its race-conscious admissions plan. Further, with the death of Justice Antonin Scalia while *Fisher* was pending, and the fact that Justice Elena Kagan was recused in *Fisher* but not in future affirmative action cases, the fate of those programs seems much less precarious than when the book went to press.

19. 136 S. Ct. 2292 (2016).

reality that these cases will, at least for now, continue to be fought on a statute-by-statute basis.

The second condition is far more troublesome: It allows the federal government to refuse to pay for abortions for women on Medicaid, making the "right" to an abortion depend on wealth. The authors adroitly tie in this price with the Court's prior ruling in *San Antonio Independent School District v. Rodriguez,*[20] in which the Court refused to intervene to achieve financial equality in Texas schools. This is how Justice Stewart explained the Court's refusal to overrule the limitation on funding abortions to those that are medically necessary: "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of government restrictions on access to abortions, but rather of her indigency." (160).[21] I agree with the dissenters that the law was not about saving money, but about punishing women who could not afford an abortion. Nonetheless, the authors' conclusion that "This was Warren Burger's Constitution in the raw" (160) seems a little excessive.

On the subject of women's rights in Chapter 6, the book gives the Burger Court full credit for producing the most expansive definition of sex equality that the country had ever known: "The Warren Court, for all its activism and broad vision of constitutional rights, had been deaf to the claim that the Constitution's guarantee of equal protection had anything to do with women." (163). The chapter retells of the efforts to impose strict scrutiny on gender-based laws, which ended up with a form of intermediate scrutiny that is almost as powerful as strict scrutiny. It is mildly critical of the Court for failing to see laws treating pregnancy as being different from other discrimination based on gender. However, Congress eliminated that problem with the Pregnancy Discrimination Act in the days when Congress could be counted on to fix statutory construction errors made by the Court.

In "Expression and Repression," the book discusses the Court's ups and downs in trying to regulate obscenity, an exercise that will surely seem bizarre today in the face of the ready availability of hard-core pornography on the Internet and elsewhere. The most interesting part of this section is the discussion of the same-sex sodomy cases, culminating in the 5-4 decision upholding Georgia's law criminalizing the practice.[22] Like so many other parts of the book, the authors use the Justices' papers to great advantage to fill in background points not found in the *U.S. Reports*, the briefs, or transcripts of the oral arguments. Their conclusion that *Bowers* "was a devastating blow to the gay rights movement" (210) was surely right at the time, but as they point out, that loss was reversed seventeen years later in *Lawrence v. Texas*.[23] Now not only

20. 411 U.S. 1 (1973).

21. Quoting Harris v. McRae, 448 U.S. 297, 316 (1980).

22. Bowers v. Hardwick, 478 U.S. 186 (1986).

23. 539 U.S. 558 (2003).

have sodomy laws disappeared, but gays and lesbians have the constitutional right to marry their same-sex partners.[24]

The chapter on religion is framed around the sometimes-overlooked fact that the religion clauses of the First Amendment contain both a right to free exercise of religion and a prohibition against the establishment of religion, with the two rights often in tension. The authors observe that the Burger Court tended to favor free exercise and had less enthusiasm for expanding the anti-establishment portion than its predecessor (especially by opening the door to state aid to religious schools for secular purposes). Even so, overall the Burger Court did not tip the balance too far in that direction. And the authors also rightly praised the Court for rejecting the contention of Bob Jones University that it had a constitutional right to enforce its views on separating black and white students in the name of free exercise while maintaining its tax-exempt status under the Internal Revenue Code, even with the Reagan administration partly siding with the university (221).

The next part covers how businesses fared in the Court under Warren Burger. Much of the six-page summary is devoted to the memorandum that Justice Powell did for leaders of the business community, just two months before he was nominated. That was before the days when confirmation hearings explored in depth everything the nominee had ever said or written; in this case neither the FBI nor anyone who might have been concerned by its very strong pro-business position discovered it until almost a year after Powell was confirmed, when it was revealed by columnist Jack Anderson. Given Powell's background, his general attitudes should not have been a surprise, but his focus on specific individuals, including my boss Ralph Nader, was somewhat of a shock. As this part shows, Powell was a strong voice for business on the Court, but he did not always toe the line.[25]

Much of the chapter "Corporations Are People" is devoted to the development of the commercial speech doctrine and to showing how the ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[26] is mainly a pro-business decision. As the lawyer for the plaintiffs who challenged that law, which forbade pharmacists from advertising the price of prescription drugs, I saw the decision as a victory for consumers and for those pharmacies that wanted to compete over prices. As I have detailed elsewhere,[27] the *Virginia Board of Pharmacy* case, and our office's prior *amicus* participation in another case

24. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

25. I was co-counsel for Ralph Nader when the Court granted review in his dispute with Allegheny Airlines for its failure to disclose its intentional overbooking practice. We considered moving to recuse Justice Powell based on the memo, but decided against it. In the end, Powell surprised us by writing the opinion unanimously ruling in favor of Mr. Nader. Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976).

26. 425 U.S. 748 (1976).

27. Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 Case W. Res. L. Rev. 1189 (2004).

discussed in the book, *Bigelow v. Virginia,*[28] whose rationale led directly to the result in *Virginia Pharmacy*, were part of an overall strategy. Our goal was to enable consumers to obtain access to useful information in the marketplace, including ending the total ban on advertising by lawyers. To be sure, the Burger Court's subsequent ruling in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[29] opened up avenues for businesses to both advertise and make other commercial speech claims not previously available. Even so, without the commercial speech doctrine, consumers would have remained in the dark about important information affecting them. My judgment may not be entirely without bias, but these commercial speech decisions were, by and large, a win for both businesses that want to compete *and* the public.[30]

The final discussion in this chapter focuses on *First National Bank of Boston v. Bellotti,*[31] which was the forerunner, at least in the eyes of the Roberts Court, to *Citizens United v. FEC.*[32] The law at issue in *Bellotti* prohibited corporations from spending money supporting or opposing ballot initiatives. Unlike the federal law, which applies equally to corporations and unions, the ban in *Bellotti* ran only against the former. In addition, various other forms of businesses, such as real estate trusts, were exempt, for no apparent reason. Furthermore, the plaintiff was not spending money on a general election or a proposal unrelated to its business: In this case the initiative would have imposed a graduated personal income tax on the plaintiff's shareholders, and all it wanted was a right to be heard in opposition. The Court could easily have decided the case on equal protection grounds, using heightened scrutiny because of the First Amendment interest in the political speech at issue, but it did not, over the dissents of Justice Rehnquist and of Justice White, joined by Justices Brennan and Marshall. The Court did, however, include a footnote recognizing that contributions to candidates were a different matter;[33] but that did not stop the Roberts Court thirty-two years later from applying *Bellotti* to enable corporations to make unlimited independent expenditures in federal or state candidate elections.[34]

Before discussing *Bellotti,* the authors analyze the Burger Court's seminal decision in *Buckley v. Valeo.*[35] The decision to include *Buckley* in a chapter on corporations is a curious one, since no business corporation was a plaintiff

28. 421 U.S. 809 (1975).

29. 447 U.S. 557 (1980).

30. *See* Alan B. Morrison, *No Regrets (Almost): After Virginia Board of Pharmacy,* 58 Wm. & Mary Bill Rts. J. (forthcoming 2017).

31. 435 U.S. 765 (1978).

32. In contrast to the discussion of most of the cases, the authors did not discuss a number of the facts in *Bellotti* noted in the text.

33. 435 U.S. at 787 n.26.

34. Citizens United v. FEC, 558 U.S. 310 (2010).

35. 424 U.S. 1 (1976).

in that case. Nor does the discussion of part of the ruling in *Buckley*—that there can be no dollar limits on independent expenditures by individuals in elections for office—connect it to the later decision in *Citizens United* that brought corporations within that holding. Instead, the Court made the connection to *Bellotti*, which sought unsuccessfully to distinguish ballot issues from candidate elections. But as I have argued elsewhere,[36] the real culprit is *Buckley*, in which the Court issued a far broader ruling than necessary to strike down the $1000 limit on independent expenditures per candidate for anyone, when direct contributions of $2000 per election cycle could be made to the candidate. Instead of holding that $1000 was unreasonably low in light of the First Amendment rights at stake, and leaving other amounts for another day, the majority saw the independent expenditure limit as the same as the provision setting a ceiling on how much a candidate could spend from money lawfully raised. Then, once there was no limit on what individuals can spend on independent expenditures, it was much harder to justify an absolute ban on corporations making those expenditures, unless one concluded that corporate spending in elections was not governed by the same rules—a position that the *Citizens United* majority firmly rejected.

The second of the business chapters is titled "Battling Workplace Inequality," which includes both workers battling companies and discrimination against classes of workers (other than women, who were covered in Chapter 7). It is both hard to quarrel with the conclusion and quite expected that Justices appointed by Republican Presidents would favor companies against unions, which is what happened under Warren Burger in matters coming from the National Labor Relations Board. As the authors note, "The Burger Court decided hundreds of cases concerning employees' complaints of disadvantages in their workplace. In the most important conflicts between businesses and unions, business interests prevailed." (295).

The record in workplace discrimination was, as the book acknowledges, more mixed. The Court's 1971 decision in *Griggs v. Duke Power Co.*,[37] read Title VII of the Civil Rights Act of 1964 not only to include intentional discrimination, but also to reach facially neutral requirements—such as attaining a high school diploma or passing a general intelligence test. The Court found those requirements violated Title VII because they had a negative impact on minorities and had no connection to the qualifications needed for the job. The authors could also have cited *McDonnell Douglas Corp. v. Green*,[38] which set rules by which plaintiffs could shift to the company the burden of explaining the apparent discrimination by presenting a fairly simple prima facie case. Instead,

36. Alan B. Morrison, McCutcheon v. FEC *and Roberts v. Breyer: They're Both Right and They're Both Wrong*, Am. Const. Soc'y (Oct. 15, 2014), https://www.acslaw.org/sites/default/files/Morrison_-_McCutcheon_v._FEC.pdf [https://perma.cc/L9BY-9W25].

37. 401 U.S. 424 (1971).

38. 411 U.S. 792 (1973).

they focus much of their attention on *Washington v. Davis,*[39] the constitutional challenge to the District of Columbia's facially neutral hiring requirements for the police. I too disagree with the decision, but to call it "one of the Burger Court's foundational constitutional rulings" (288) widely overstates its significance. That is because Title VII had already been extended to state and local governments, making the decision largely of academic interest in the employment field. The authors also point to the impact of the case in the criminal law area, but its citations in notes 129 and 130 of that chapter fall short of establishing their conclusion.

The final section covers the presidency. In the first of two chapters, the authors deal extensively with the Pentagon Papers case,[40] approving of the protection afforded the press, but then pointing to a lack of protection for those who leak classified documents, without which the press has no sources (302-11). They then turn to the efforts of the Nixon administration to engage in warrantless wiretaps in the name of national security, which the Court properly halted (311-318). But the Court was far more protective of the executive when it came to providing defenses against civil liability. In another closely divided case that the authors discuss, the Court in a 5-4 vote provided absolute immunity for all Presidents from all civil liability claims, even those involving violations of the wiretap statute, letting former President Richard Nixon off the hook (321). Readers will find that decision to be either very, or just a little, harmful depending on whether their main concern is compensation or accountability: Presidents never act alone in these matters, and so if the underlings can be sued, the harm is greatly diminished. The problem is not so much presidential immunity, but the doctrine of qualified immunity for all executive branch officials, even for constitutional violations, which the Court upheld by a vote of 8-1 on the same day that Nixon received his absolute immunity (322). Federal officials had long received qualified immunity when sued for ordinary torts, although often the United States is liable under the Federal Tort Claims Act. And the Court had offered similar protection to state and local officials when they were sued for damages for constitutional violations. The real crime is not just that the officers get off in these cases, but that the governments that employ them are not held responsible, leaving the injured to absorb all the costs and pain and suffering on their own.

Among the most dramatic of Burger Court-era cases was one that involved the effort of President Nixon to avoid turning over the White House tapes to the prosecutor for use in the criminal trial against his former aids. The basic story is well-known, but its re-telling here has many nice additions. The President had to turn over the tapes, which prompted his resignation, but the authors suggest that the Court's opinion also "strengthened the presidency" by recognizing for the first time a privilege of the President to keep his papers secret, absent some compelling need of others (338). In this case the documents were needed for use in a federal criminal case (and, I would add, the House

39. 426 U.S. 229 (1976).

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

Judiciary Committee that was considering whether to impeach the President). But even before that formal recognition, Presidents regularly asserted the privilege, and no one was in a position to sue to test its validity. Moreover, in the subsequent civil case in which Nixon contested the statute in which the government repossessed all of the official papers and tapes that he claimed as his own, he raised the same executive privilege objection and the Burger Court quite sensibly rejected it.[41] Indeed, Congress has since enacted the Presidential Materials Act under which the records of all presidents remain government records after they leave office, and become publicly available in the future, subject to certain exceptions.[42]

Every author, especially in a book that seeks to portray the overall impact of seventeen years of Supreme Court decisions, has to make choices about what to include and what to leave out. One neutral criterion on whether a case should be included on the subject of the presidency would be whether the case is one that every first-year law student reads in constitutional law. I admit my bias on the question because the case I have in mind is *INS v. Chadha,*[43] in which I represented Mr. Chadha. The opinion, written by the Chief Justice, struck down the legislative veto in more than 200 statutes as a violation of separation of powers. The authors include it in the book's final and very lengthy footnote, but not in text. The limited reference is also somewhat strange because *Chadha* would support the chapter's conclusion that the Burger Court strengthened the institution of the presidency, which it did mainly by taking away a potent and potentially uncontrollable weapon from Congress. Whether the Burger Court rulings that the authors do discuss "insulated [the presidency] in important ways from liability and accountability" is one that the readers are in the best position to judge.[44]

Conclusion

The subtitle of the conclusion—"A Lasting Legacy"—makes clear that the authors believe that they have established that the Burger Court was far more consequential than has been previously considered and greatly contributed to "the Rise of the Judicial Right." As their counterpoint, they rely on a 1986 speech by Justice Powell to the American Bar Association, a year before he stepped down from the Court. The authors contest his "no counterrevolution" thesis, instead finding his assessment to be "at once both highly selective and internally contradictory—a mixed message that draws us down a path to a conclusion quite different from his own." (339). It continues with a point-

41. Nixon v. Adm'r of Gen. Servs. , 433 U.S. 425 (1977).

42. Presidential Records Act, 44 U.S.C. §§ 2201-2207.

43. 462 U.S. 919 (1983).

44. On page two, the authors report that Chief Justice Earl Warren considered that *Baker v. Carr,* 369 U.S. 186 (1963), was, with *Brown v. Board of Education* 347 U.S. 483 (1954) and *Gideon v. Wainwright,* 372 U.S. 335 (1963), the most important case decided when he was the Chief Justice. The book does not discuss what happened to *Baker* in the Burger Court—it survived, but was not expanded—while treating the fates of the other two extensively.

by-point (subject-by-subject) refutation of Powell, largely drawing on the conclusions that they reached earlier in the book.

One of the many positive features of *The Burger Court* is that it stakes out its position loud and clear and leaves no room for doubt as to what the authors conclude about that Court. In doing so, the authors are careful to set forth the facts on which they base their views, enabling the reader to decide whether to agree or not. To support their conclusion, the authors provide seventy-eight pages of footnotes, which include many citations to the papers of the deceased Justices, a feature that adds greatly to making the book of interest even to those who are familiar with most of the cases discussed. In the end, while I agree that the Burger Court moved our country to the right in several areas noted above, I am more dubious about the authors' conclusions in others, and in particular about those that utilize emotional adjectives, adverbs, and, in some cases, verbs to make their points.

A Final Thought

I presented this review to my colleagues at a workshop at George Washington Law School after I had submitted a near-final draft. Several of them observed that part of what I saw as problems with *The Burger Court* was that the authors had taken on the almost impossible task of summarizing seventeen years of Court decisions, over five major areas, and trying to find a unifying theme while doing so. I agree, and if I were to start this review again, I would surely have added that note of caution at the beginning. I would also note that the authors' task was complicated not only by trying to encapsulate the Warren Burger era, but also in seeking to compare it with the Earl Warren era. However, life in the United States did not stand still for those thirty-three years. In particular, significant changes arose in the mix of legal issues and problems facing our country that bear heavily on what cases the Court will hear and how they will be decided. The authors assigned themselves a very heavy lift, and if they did not fully succeed, it is in part because of their ambitious goal.