

Spring 2017

## (Re)Evaluating the Burger Court

L.A. Powe, Jr.

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

L.A. Powe, Jr., *(Re)Evaluating the Burger Court*, 52 *Tulsa L. Rev.* 587 (2017).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/22>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

## (RE)EVALUATING THE BURGER COURT

L.A. Powe, Jr.\*

EARL M. MALTZ, *THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW* (UNIVERSITY PRESS OF KANSAS 2016). PP. 262. HARDCOVER \$34.95.

MICHAEL J. GRAETZ AND LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (SIMON AND SHUSTER 2016). PP. 480. HARDCOVER \$30.00. PAPERBACK \$18.00

The Burger Court lacks the cache of the Courts preceding and succeeding it. Its majority opinions were written in a lengthy and deadly formulaic style.<sup>1</sup> Its prime dissenters, William J. Brennan on the left and William Rehnquist on the right, were not natural dissenters like William O. Douglas and Antonin Scalia. Nor did the Court have outsized personalities like Douglas and Scalia. Chief Justice Warren E. Burger lacked both Earl Warren's gravitas and Rehnquist's intelligence; instead he was a pompous dullard. As such, few books find the Burger Court a worthy topic.

The first three important books on the Burger Court were all relatively short. The first was a collection of essays, likely completed in 1980 or 1981, edited by Vincent Blasi that carried the provocative subtitle "The Counter-Revolution that Wasn't."<sup>2</sup> Next, and years after Warren Burger retired, was another collection of essays edited by Bernard Schwartz, where Mark Tushnet wrote that the Court was a "[t]riumph of Country-Club Republicanism."<sup>3</sup> A volume by Earl Maltz in the largely unread South Carolina series on the Court followed this.<sup>4</sup> It went way beyond Blasi and Tushnet by implausibly arguing that the Court "produced the most liberal jurisprudence in history—even more liberal than that generated by its predecessor."<sup>5</sup> Most recently Kevin McMahon focused on Richard Nixon's meaning when he stated he could appoint "strict constructionists" to the Court.<sup>6</sup> He demonstrated that Nixon

---

\* Anne Green Regents Chair, The University of Texas

1. Robert Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).
2. *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi, ed., 1983).
3. MARK TUSHNET, *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?* 203 (Bernard Schwartz, ed., 1998).
4. EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN E. BURGER, 1969-1986* (2000).
5. *Id.* at 1.
6. KEVIN J. MCMAHON, *NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL*

only cared about criminal procedure and school desegregation, and that his Court prevailed on those issues. Now, Maltz has written another book, looking at the first full term when the four Nixon appointees were together, while Michael Graetz and Linda Greenhouse offer the most complete discussion of Burger's seventeen-year Chief Justiceship to date.<sup>7</sup> Both books are well researched and take advantage of the available papers of the justices.

In March, 1969, before Nixon had selected him to succeed Warren, Burger wrote a letter to his best friend, Eighth Circuit Judge Harry Blackmun where, referring to the Court, he claimed, "RN can only straighten that place out if he gets four appointments."<sup>8</sup> Within barely two and a half years of that letter, Nixon had his four, adding Lewis Powell and Rehnquist to Burger and Blackmun. Yet, at least three of the four were not ideologues. Rehnquist was a Goldwater Republican from Arizona, but Burger and Blackmun were Country-Club (or Eisenhower or Rockefeller) Republicans from Minnesota, and Powell would have been one too had he come from the North instead of Virginia. Along with Warren Court holdovers, Potter Stewart, a Country-Club Republican from Ohio, and Byron White, a moderate Colorado Democrat who was pro-civil rights but tough on crime, the Court had a very solid middle between Brennan and Thurgood Marshall on one side and Rehnquist on the other. If the four Nixon appointees voted together, they would prevail unless all five Warren Court holdovers voted together (and Stewart and White had been frequent dissenters in criminal procedure decisions). As Maltz aptly notes, the centrists had the values generally held by the affluent, well-educated white Protestant community "from which all . . . were drawn."<sup>9</sup>

## I. BEGINNINGS

I clerked during the 1970 Term, the first where the Burger Court had its full complement of nine justices. From my perspective then—and now—it was obvious that this was not the Warren Court. Maltz's implausible claim in his first Burger Court book was simply wrong. To be sure there were big liberal victories. Massive bussing was ordered in the urban South and Title VII of the Civil Rights Act was interpreted as enshrining disparate impact.<sup>10</sup> Refusing to enjoin publication of the *Pentagon Papers* and protecting the slogan "Fuck the Draft" were, and are, major First Amendment landmarks.<sup>11</sup> The Court blocked financial aid to parochial schools and created a cause of action against federal officials for constitutional violations.<sup>12</sup> These decisions are

---

CONSEQUENCES 113 (2011).

7. MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2016); EARL M. MALTZ, *THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW* (2016).

8. GRAETZ & GREENHOUSE, *supra* note 7, at 4.

9. MALTZ, *supra* note 7, at 192. Graetz and Greenhouse agree, but it puts the number of centrist justices at four, pairing Burger with Rehnquist. GRAETZ & GREENHOUSE, *supra* note 7, at 6-7.

10. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31, 436 (1971).

11. *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971); *Cohen v. California*, 403 U.S. 15, 26 (1971).

12. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971); *Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics*,

more important than the more numerous conservative victories—although the latter were not unimportant.<sup>13</sup>

To mention just a matching five, the Court upheld capital punishment against claims of standardless sentencing and the lack of bifurcated juries;<sup>14</sup> it gutted *Dombrowski v. Pfister's* authorization for federal courts to enjoin unconstitutional state criminal prosecutions;<sup>15</sup> it allowed un-Mirandized confessions to be used in grand jury proceedings;<sup>16</sup> it found nothing wrong with Jackson, Mississippi closing its public swimming pools to avoid desegregating them;<sup>17</sup> and it cut back on the promise of *Stanley v. Georgia* by allowing the government to prevent willing adults from acquiring obscene pictures.<sup>18</sup>

Three little known, or unknown, decisions illustrated the major divide between this Court and its predecessor. At one point in time, there were five votes on an opinion to overrule *Mapp v. Ohio*, although of course that did not happen.<sup>19</sup> The Court issued an injunction, sought by the Nixon Administration, against an anti-war protest on the Mall.<sup>20</sup> The Court granted certiorari in an urban renewal (aka Negro removal) case; then over the objections of those voting to grant the Court refused to stay the bulldozers; after an unnecessary oral argument the Court dismissed it as improvidently granted.<sup>21</sup>

As Maltz describes it, the 1972 Term looks a lot like the 1970 Term. He covers eight substantive areas: voting, obscenity, criminal procedure, school desegregation, equality and wealth, gender discrimination, aid to parochial schools, and abortion. In each chapter, he first quickly details the law as it existed prior to the 1972 Term and then describes the process by which the cases were decided.<sup>22</sup> Liberals (Brennan, Marshall, and Douglas) were sometimes able to attract at least two necessary votes to prevail, while sometimes conservatives (Burger and Rehnquist) won as well, being able to attract three or more from that large middle group. Sometimes the Court opened new avenues of constitutional law; the gender discrimination cases and *Roe v. Wade* are well known, the aid to parochial schools less so.<sup>23</sup> In obscenity and issues

403 U.S. 388, 397-98 (1971).

13. It probably merits mention that Muhammad Ali's conviction for refusing to report for draft induction was, to everyone's surprise, unanimously reversed. *Clay v. United States*, 403 U.S. 698, 705 (1971). In 2014 HBO created a movie about the case which properly emphasizes the role played by a Harlan clerk in producing the result. MUHAMMAD ALI'S GREATEST FIGHT (HBO 2013).

14. *McGautha v. California*, 402 U.S. 183, 221-22 (1971).

15. *Younger v. Harris*, 401 U.S. 37, 41, 53 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 497-98 (1965).

16. *Harris v. New York*, 401 U.S. 222, 226 (1971).

17. *Palmer v. Thompson*, 403 U.S. 217, 227 (1971).

18. *United States v. Reidel*, 402 U.S. 351, 357 (1971); *United States v. 37 Photographs*, 402 U.S. 363, 376-77 (1971); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

19. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 112-19 (1979) (discussing five justices' votes to overrule *Mapp* in *Coolidge*).

20. BOB WOODWARD AND SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT*, 133-36 (discusses Vietnam Veterans Against the War).

21. *Triangle Improvement v. Ritchie*, 402 U.S. 497 (1971).

22. The two exceptions are the chapters on Obscenity and Equal Protection and Wealth where the discussions of the prior law are extensive.

23. 410 U.S. 113 (1973).

of poverty the Court called retreat; the latter produced the most revealing internal discussions I have read. In school desegregation it looked both ways. And in the cases of voting and criminal procedure it left the status quo untouched.<sup>24</sup>

With White joining the four Nixon appointees the Court retreated back to the 1950s in obscenity doctrine. Dueling memoranda from the two had presaged the Burger majorities and the Brennan dissents in *Miller v. California* and *Paris Adult Theatre I v. Slaton*.<sup>25</sup> Brennan wanted to relieve the institutional strain on the Court by limiting prosecutions to cases involving nonconsenting adults and juveniles while Burger “brimmed with indignation” at what he saw “as efforts to subvert traditional standards of morality and civility.”<sup>26</sup> Burger’s victory ironically solved Brennan’s problem—because Burger always had five votes there was rarely any need to revisit the area.

In writing about the Warren Court, I have suggested that it was moving toward a special constitutional status for the less well-off in society—something along the lines of Frank Michelman’s famous Harvard Foreword.<sup>27</sup> Had Hubert Humphrey won the 1968 squeaker, he would have had the four seats Nixon filled and those Warren Court seeds would have blossomed. But Nixon won, and rights for the poor died still-born.<sup>28</sup> Maltz extensively discussed the two cases that ended the short-lived quest to give added protections to the poor, *United States v. Kras* and *San Antonio Independent School District v. Rodriguez*.<sup>29</sup> In the former, White provided the fifth vote for Blackmun’s majority, while in the latter Stewart provided the fifth vote while Powell authored the majority opinion. In both cases Marshall wrote angry dissents.

Kras, who was indigent, claimed he lacked the \$50 in fees to avail himself of a voluntary personal bankruptcy.<sup>30</sup> Previously, in the 1970 Term, the Court had held that indigents could not be denied access to divorce if they could not pay the required fees.<sup>31</sup> Blackmun’s opinion agreed with statements by Burger and Powell that a state had a monopoly on divorce, but there was an alternative to bankruptcy through private negotiations with creditors.<sup>32</sup> Furthermore, Blackmun’s opinion picked up on Powell’s observation that at a savings of \$1.27 (three packs of cigarettes) a week, Kras could amass the fee.<sup>33</sup> Whether Kras smoked was not considered and the more likely explanation was White’s assertion that the claim was “close to frivolous.”<sup>34</sup>

24. In criminal procedure, that was because the Court did not decide important cases. Maltz did not have to discuss the 1972 cases outlawing capital punishment as it was practiced, because they came in the Term that started with only two Nixon appointees on the Court. *Furman v. Georgia*, 408 U.S. 238 (1972).

25. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

26. MALTZ, *supra* note 7, at 63.

27. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 445-55 (2000); Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

28. L.A. Powe, Jr., *Griswold and Its Surroundings: The 1963, '64, and '65 Terms*, 64 Am. U. L. Rev. 1443, 1462 (2015).

29. *United States v. Kras*, 409 U.S. 434 (1973); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

30. *Kras*, 409 U.S. at 436-37.

31. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

32. *Kras*, 409 U.S. at 445.

33. MALTZ, *supra* note 7, at 113.

34. *Id.*

*Rodriguez* was a block-buster challenge to Texas' use of local property taxes to fund public schools.<sup>35</sup> Two school districts within San Antonio highlighted the vast disparities under the Texas system. Englewood families had a median income of \$4,681 while Alamo Heights families had \$8,001.<sup>36</sup> The assessed property value per pupil in Englewood was \$5,690, which at its tax rate of \$1.05/\$100.00 valuation yielded \$356 per pupil.<sup>37</sup> Alamo Heights had an assessed value of \$49,000 per pupil and at its tax rate of \$0.85/\$100.00 it raised \$594 per pupil.<sup>38</sup> Plaintiffs might well have said “res ipsa loquitor.”

The Nixon justices did not take plaintiffs' claims seriously, and to the extent they did, the four were horrified. Powell, a former member of the Richmond School Board and the Virginia Board of Education, saw the plaintiffs' claims as a first step toward national control of education—“a regime Powell associated with totalitarian governments.”<sup>39</sup> Even if funding were placed and left at the state level, he saw problems because with the purse strings comes control, and local control “has been the most dynamic force behind the overall effectiveness of our public school system.”<sup>40</sup> Further, he questioned “the relationship between expenditures and [the] quality of public education.”<sup>41</sup> But it did not matter. In his notes he described the plaintiffs' theory as a “‘communist’ doctrine that had no place in a society based on the principle of free enterprise.”<sup>42</sup> Blackmun had a similar thought. If plaintiffs prevailed there would be “a disinteresting equality with no one getting anything that is very good. This smacks of the type of thing that emerged from the French Revolution.”<sup>43</sup> As a Marxist would predict, it was a class issue and the majority voted its class.<sup>44</sup>

Everyone also worried about the problems of judicial intervention, entering an “educational thicket[, which] would be far worse than the reapportionment area,” overhauling “the fiscal and taxation structures across the land.”<sup>45</sup> So, education was not a fundamental right and the Texas scheme, similar to those of all states except Hawaii, was rational.

School desegregation looked like an advance when bussing was extended to a northern city in *Keyes v. Denver School District* over Rehnquist's dissent and a partial dissent by Powell arguing against using bussing as a remedy.<sup>46</sup> But a 4-4 split in a

35. *Id.* at 116.

36. *Id.* at 117.

37. *Id.*

38. MALTZ, *supra* note 7, at 119.

39. *Id.* at 117.

40. *Id.* at 120 (quoting Memorandum from Lewis F. Powell, Jr., Supreme Court Justice, to Larry Hammond 5 (October 12, 1972), available at [http://law2.wlu.edu/deptimages/powell%20archives/71-1332\\_SanAntonioRodriguezBasic3.pdf](http://law2.wlu.edu/deptimages/powell%20archives/71-1332_SanAntonioRodriguezBasic3.pdf)).

41. *Id.* at 119.

42. *Id.* at 118 (quoting Conference Notes by Lewis F. Powell, Jr., Supreme Court Justice, 2 (October 9, 1972), available at [http://law2.wlu.edu/deptimages/powell%20archives/71-1332\\_SanAntonioRodriguezBasic3.pdf](http://law2.wlu.edu/deptimages/powell%20archives/71-1332_SanAntonioRodriguezBasic3.pdf)).

43. MALTZ, *supra* note 7, at 120 (quoting Memorandum from Justice Harry A. Blackmun Papers (on file in the Manuscript Division at the Library of Congress)).

44. Amazingly Rodriguez is never mentioned in John C. Jeffries' 600 plus page biography. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY (1994).

45. *Id.* at 119 (quoting Blackmun); *Id.* (quoting Burger).

46. 413 U.S. 189 (1973).

cross-district desegregation case out of Richmond pointed in the other direction.<sup>47</sup> Given Powell's embrace of local control and antipathy toward bussing, there was no doubt he would have been the fifth vote to reject cross-district bussing had he not been recused. That, of course proved the case the next Term.<sup>48</sup>

The real areas of advance were in gender discrimination, including abortion, (where Maltz offers nothing new) and the rejection of most aid to parochial schools. The former were in line with the spirit of the times and were issues on which the justices could be lobbied by the women in their lives. The latter corresponded to the hostility to Roman Catholicism that had yet to be softened by the realization that Vatican II had fundamentally changed the Catholic Church.

The principal gender discrimination case, *Frontiero v. Richardson*, started as a Brennan opinion that did not mention making gender—"sex" as it was then called—a suspect classification, but changed due to Brennan's observation that ratification of the then-pending Equal Rights Amendment was a "lost cause."<sup>49</sup> The observation was prescient, but rather early, since the ERA had only been sent to the states in March of the previous year.<sup>50</sup> Getting a majority opinion in 1973, for holding that the Fourteenth Amendment was already an ERA, was a cause lost from its inception. Eight justices found the military's policy of automatically treating wives—but not husbands—as dependents was unconstitutional; but four justices, supposedly, relied on the rational basis test.<sup>51</sup>

There were, by far, more amicus briefs filed in *Lemon v. Kurtzman* than any other case during the 1970 Term. Catholic briefs lovingly praised the program of aiding (private but overwhelmingly) parochial schools. Protestants and Jews saw Jefferson's wall of separation between church and state being dismantled. Collectively the briefs looked like religious warfare over tax dollars. The same pattern repeated itself in the 1972 Term with the same results in blocking aid.<sup>52</sup> Non-Catholics applauded the decisions; thus even the normally critical Wall Street Journal found the decisions as "perfectly consistent with the spirit and intent of the Founding Fathers."<sup>53</sup>

## II. ENDINGS

Seven of the nine justices of the 1972 Term served for the remainder of the Burger Court that Graetz and Greenhouse describe. The Court lost its most liberal member—Douglas—in 1975 and Stewart, six years later. Both were replaced by Republican presidents appointing Country-club Republicans, John Paul Stevens, and

47. *Bradley v. State Bd. of Educ.*, 412 U.S. 92 (1973).

48. *Milliken v. Bradley*, 418 U.S. 717 (1974).

49. 411 U.S. 677 (1973); MALTZ, *supra* note 7, at 143.

50. Unlike Brennan, Powell thought the ERA would be ratified. GRAETZ & GREENHOUSE, *supra* note 7, at 172-173.

51. *Richardson*, 411 U.S. at 690-691.

52. *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973). Tushnet writes that the "Country-club Republicans were, at their core, WASPs, and the 'P' meant something." TUSHNET, *supra* note 3, at 208.

53. MALTZ, *supra* note 7, at 167.

Sandra Day O'Connor respectively. The Graetz and Greenhouse book is intentionally set against Blasi's "Counter-Revolution That Wasn't."<sup>54</sup> The authors detail a conservative Court undermining (but not overruling) Warren Court precedents.<sup>55</sup> Yet anyone aware of Blasi's book is someone who follows the Court closely enough to know how it kept moving to the right. The book is welcome because it is a readable full treatment of the Burger Court, but its thesis is not news.

The book is arranged under five headings: Crime, Race, Social Transformation, Business, and the Presidency.<sup>56</sup> In each area the authors describe the trajectory of the Burger Court decisions, typically but not invariably to the right, and then they briefly carry the area forward to the Rehnquist and Roberts Courts, to illustrate an even more rightward trend.<sup>57</sup> The exception to this being, the two chapters on the presidency where presidential powers were increased, with the exception of Nixon and his tapes. This is neither liberal nor conservative, because both parties like presidential power when they hold the presidency, and both are skeptical when the other party holds the presidency.

The first crime chapter covers the well-trod capital punishment jurisprudence, but omits *Batson* where the Court corrected an extreme Warren Court blind spot.<sup>58</sup> The second chapter is "Taming the Trilogy."<sup>59</sup> Anyone teaching criminal procedure knows that while *Mapp*,<sup>60</sup> *Miranda*,<sup>61</sup> and *Gideon*<sup>62</sup> remain the law, each has been hollowed out: *Mapp* by the good faith exception and a cost benefit analysis,<sup>63</sup> *Miranda* by a public safety exception and lax waiver standard, and *Gideon* by a refusal to take the need for competent counsel seriously.<sup>64</sup> For those who did not know this, Graetz and Greenhouse make it unmistakably clear. They also document the limiting of habeas and the shameful unwillingness to monitor prosecutorial overreaching in plea bargaining.<sup>65</sup>

The two chapters on race are split between public schools and affirmative action in higher education. "Still Separate, Still Unequal" is the title of the former chapter. Still Separate refers to the refusal to allow cross-district bussing. Still Unequal refers to *Rodriguez* allowing major funding disparities between districts.<sup>66</sup> The discussion of the latter is cursory when compared to Maltz, but like Maltz, the authors

---

54. BLASI, *supra* note 2.

55. GRAETZ & GREENHOUSE, *supra* note 7.

56. *Id.*

57. *Id.*

58. *Batson v. Kentucky*, 476 U.S. 79 (1986).

59. GRAETZ & GREENHOUSE, *supra* note 7, at 42.

60. *Mapp v. Ohio*, 367 U.S. 643 (1961).

61. *Miranda v. Arizona*, 384 U.S. 436 (1966).

62. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

63. *United States v. Leon*, 468 U.S. 897 (1984).

64. *New York v. Quarles*, 467 U.S. 649 (1984); *North Carolina v. Butler*, 441 U.S. 369 (1979); *Strickland v. Washington*, 466 U.S. 668 (1984).

65. *Stone v. Powell*, 428 U.S. 465 (1976); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

66. *Milliken v. Bradley*, 418 U.S. 717 (1974).



emphasize that Powell “abhorred any sacrifice of quality education by whites in pursuit of desegregation.”<sup>67</sup> Stephen Breyer, dissenting in *Parents Involved*, claimed that the 2007 case “threaten[s] the promise of *Brown*.”<sup>68</sup> He was thirty-three years late.

The affirmative action story of *Bakke*<sup>69</sup> is the story of Powell. As his biographer tells it, Powell was “[f]aced with two intellectually coherent, morally defensible, and diametrically opposed positions” to either validate all such programs or hold them unconstitutional and he “chose neither.”<sup>70</sup> Powell’s opinion, drawing no support from any other justice became the operative law, allowing admissions committees to pretty much do as they pleased, so long as they did so in the name of diversity. That was not a high bar. Yet, as the authors cogently observe, by asserting it was a university’s right to have a diverse student body, Powell “essentially disabled minority applicants from advancing any legal claim (in the absence of intentional discrimination, of course). However it simultaneously allowed disappointed white applicants to claim their rejection was illegal because it was based on race.”<sup>71</sup> Whites thus could claim rights, while minorities could not. It seemed backwards.

The two best chapters in the book are those on abortion and gender discrimination. The justices never saw the reaction to *Roe v. Wade* coming.<sup>72</sup> They were initially willing to decide it by the seven-man Court and had “every reason to suppose that they were embracing a broad national consensus.”<sup>73</sup> Blackmun’s opinion is about empowering doctors, and as such, minimizes the woman’s interest in the decision (and how it would affect her career). A Powell clerk raised this point with his justice, but there is no evidence Powell did anything.<sup>74</sup>

In contrast to the cursory discussion of *Rodriguez*, the authors give a full description of the decisions to deny federal and state funding for abortions even as the other medical needs of the poor received funding. A Powell memo was blunt: “The source of deprivation—indigency—is not action of the state.”<sup>75</sup> *Harris v. McRae* noted that the lack of federal funding “leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.”<sup>76</sup> The indifference Maltz illustrated with *Rodriguez* is here too, as the authors assert “[t]his was Warren Burger’s Constitution in the raw.”<sup>77</sup>

67. GRAETZ & GREENHOUSE, *supra* note 7, at 89. Amazingly, the authors never mention *Plyler v. Doe*, 457 U.S. 202 (1982) where Powell provided the fifth vote to invalidate Texas’ policy of denying public education to undocumented children.

68. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 868 (2007) (dissent).

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

70. JEFFRIES, *supra* note 44, at 469.

71. GRAETZ & GREENHOUSE, *supra* note 7, at 127.

72. 410 U.S. 113 (1973).

73. GRAETZ & GREENHOUSE, *supra* note 7, at 139.

74. *Id.* at 146.

75. *Id.* at 156.

76. *Harris v. McRae*, 448 U.S. 297, 317 (1980).

77. GRAETZ & GREENHOUSE, *supra* note 7, at 160. The authors never mention *Kras*, which would also support their conclusion.

The chapter on sexual equality has two themes: advocate Ruth Bader Ginsburg's efforts to get the nine men to understand that laws based on gender stereotyping violated the Equal Protection Clause for that reason, and the inability of the nine men to see legal disabilities based on pregnancy as sexual discrimination. Ginsburg kept winning, but never was able to convince the justices to see the big picture.<sup>78</sup> Interestingly, Graetz and Greenhouse seem less interested in the fact that outside of pregnancy—which was easily cured by a federal statute—that the women always won, instead of the fact that the authors wish they had won differently.<sup>79</sup>

Three things stand out in the discussion of gay rights that, for the Burger Court, ended with *Bowers v. Hardwick*.<sup>80</sup> The first is how much the justices wished to avoid the issue. The second is Powell's ambivalence (which is so at odds with his steadfast support for *Roe*.) The third is Burger's over-the-top reaction to the case which he claimed “presents for me the most far reaching issue of those thirty years [he spent on the bench].”<sup>81</sup>

The final chapter on social issues concerns religion and especially the cases decided after Catholics and Evangelicals found themselves as part of the winning Reagan coalition. As the authors describe, it “offered a preferred place at the constitutional table, religion emerged from the Burger Court stronger and emboldened, with new weapons at hand for the battles that lay ahead.”<sup>82</sup> This without adopting the conservative view that *Lemon* was a lemon. The cases that the authors rely on are *Mueller v. Allen* and *Lynch v. Donnelly*.<sup>83</sup>

Minnesota allowed tax deductions for tuition and school supplies.<sup>84</sup> Pawtucket, Rhode Island had an annual Christmas display that featured a Nativity scene, as well as candy canes, reindeer, and a sleigh, plus a banner reading “Seasons Greetings.”<sup>85</sup> Over the dissents of Brennan, Marshall, Blackmun, and Stevens, the Court upheld both situations over Establishment challenges.<sup>86</sup> In the former, the law was facially neutral between religious and secular schools, and the decision of where to send a child was left to private choice.<sup>87</sup> That was enough. In the latter, the city was celebrating a holiday and encouraging shopping. Nor was there divisiveness: “A litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement.”<sup>88</sup>

Normally, invalidating restrictions on speech have been celebrated by liberals. But the first of the two chapters on business describe three invalidations that the

78. *Id.* at 174.

79. The Pregnancy Discrimination Act, 42 U.S.C. §2000(e) (1978); 92 Stat. 2076 (1978) (an amendment to the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy).

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

81. GRAETZ & GREENHOUSE, *supra* note 7, at 209.

82. *Id.* at 217.

83. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Mueller v. Allen*, 463 U.S. 388 (1983).

84. *Mueller*, 463 U.S. at 388, 393 n.2.

85. *Lynch*, 465 U.S. at 668, 671.

86. *Lynch*, 465 U.S. at 668; *Mueller*, 463 U.S. at 388.

87. *Mueller*, 463 U.S. at 399, 401.

88. *Lynch*, 465 U.S. at 684-85.

authors question from the left. The first is the extension of First Amendment protections for commercial speech over a solo dissent by Rehnquist.<sup>89</sup> The authors celebrate Rehnquist as the prescient member of the Court. He wrote that the Court's logic "will be open not only for dissemination of price information but for active promotion of prescription drugs, liquors, cigarettes, and other products the use of which has previously been thought desirable to discourage."<sup>90</sup> Without the protection of commercial speech, parents would have no occasion to answer their child's question: "what is erectile dysfunction?"

One of the most significant First Amendment decisions, *Buckley v. Valeo*, involved campaign finance regulation.<sup>91</sup> Among other things, the post-Watergate campaign finance regulations limited candidate spending, spending by third parties independent of the candidate, and contributing to candidates. Rushing to judgment in advance of the 1976 campaigns, the Court created a nearly 150 page per curium with parts written by Burger, Brennan, Stewart, Powell, and Rehnquist.<sup>92</sup> The Court sustained the limitations on contributions because of the compelling interest in avoiding corruption or the appearance thereof. In striking down the spending limitations, the Court rejected the political equality arguments offered in support of the law. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the . . . voice of others is . . . foreign to the First Amendment . . ." <sup>93</sup> Under *Buckley*, money could flow freely into the electoral process one way or another. This was the Magna Carta for billionaires like Tom Steyer and the Koch brothers. Candidate arms races for dollars became the order of the day.

In *First National Bank of Boston v. Bellotti*, decided two years later, the Court invalidated a Massachusetts law that prohibited expenditures by business corporations for the purpose of influencing a referendum (other than one affecting the corporation).<sup>94</sup> Powell noted that the commercial speech case had already authorized corporate speech and restricting it based on its source "would be a most serious infringement of First Amendment rights."<sup>95</sup> In *Bellotti*, he offered the standard First Amendment idea that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."<sup>96</sup>

While discussing the *Bellotti* dissenters, the authors do not comment on the fact that this was the oddest four-justice dissent of the Burger Court: the two justices most sympathetic to First Amendment claims, Brennan and Marshall, and the two least sympathetic to First Amendment claims, Rehnquist and White. However, the authors do come to the support of Samuel Alito for his "not true" response to President

89. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 786 (1976) (Rehnquist, J., dissenting).

90. *Id.* at 781.

91. *Buckley v. Valeo*, 424 U.S. 1, 1-2 (1976).

92. GRAETZ & GREENHOUSE, *supra* note 7, at 258.

93. *Buckley*, 424 U.S. at 48-49.

94. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

95. GRAETZ & GREENHOUSE, *supra* note 7, at 263.

96. *First Nat'l Bank of Bos.*, 435 U.S. at 791.

Obama's 2010 State of the Union Address attack on *Citizens United* as overruling a century of law. "What the Court had done [in *Citizens United*] was take a logical step along the path the Burger Court had paved in its *Buckley* and *Bellotti* decisions."<sup>97</sup>

With the exception of *Washington v. Davis*, where the Court held that equal protection required intentional discrimination, the cases discussed in the second business chapter are less well known to constitutional law scholars.<sup>98</sup> The rejection of disparate impact in *Washington v. Davis* was done without briefing or oral argument on the issue, and initially "the justices regarded it as just one among many, and not a very interesting one at that."<sup>99</sup> After argument the justices found it quite interesting; White, the eventual author of the opinion, asserted "[t]he test [used by the city] was neutral and the Constitution requires no more."<sup>100</sup> If there was doubt about what *Washington v. Davis* meant, that was wholly removed three years later in *Massachusetts v. Feeney*, where the same 7-2 Court upheld a civil service veteran's preference even though it severely restricted women's opportunities.<sup>101</sup> "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."<sup>102</sup>

During the Burger Court the Democratic Party coalition was fracturing as labor unions and civil rights groups fought over a declining share of the economic pie, especially during the 1979-1983 recession. Sharing the rightward move of the country, the Court favored management against labor<sup>103</sup> and seniority against equal opportunity.<sup>104</sup>

#### CONCLUSION

These are two worthwhile books. Maltz offers as good of a discussion of a single term as exists, and Graetz and Greenhouse have pushed any new volume on the Burger Court well into the future. The similarities between the books abound, especially the featuring Lewis Powell. This stems from the fact that he was the most important centrist, but even more because of the incredibly candid notes he wrote. He told his clerks and posterity what he was thinking and why. Graetz and Greenhouse also make a continuing theme of their business chapters a memorandum Powell wrote (before he came to the Court) to the Chamber of Commerce urging an aggressive effort in litigation (especially with amicus briefs) and the media to support business interests against unions, civil rights groups, environmentalists, and government regulation.<sup>105</sup> The other key similarity is the authors' focus on the country club

---

97. GRAETZ & GREENHOUSE, *supra* note 7, at 266; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

98. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

99. GRAETZ & GREENHOUSE, *supra* note 7, at 289.

100. *Id.* at 290.

101. *Pers. Admin of Mass. v. Feeney*, 442 U.S. 256, 256-57 (1979).

102. *Id.* at 272.

103. GRAETZ & GREENHOUSE, *supra* note 7, at 275-78.

104. *Id.* at 279-95.

105. *Id.* at 237-40, 253, 255, 267-68, 277, 342. The memorandum did not surface until after Powell was confirmed. Jack Anderson characterized it as "so militant that it raises a question about his fitness to decide any case involving business interests." *Id.* at 239.

Republicans in the center between the Court's two wings. These justices explain why there was neither a continuation of the Warren Court nor the conservatism of the Rehnquist and Roberts Courts. The centrists were neither counter-revolutionaries nor Jacobins; no, the proper analogy is Thermidor.