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TWO CHEERS FOR WARREN BURGER

As Chief Justice, Warren Burger was widely respected by state judges and federal trial judges for his administrative skills. His judicial opinions received a significantly less enthusiastic response. Among law professors, he has few admirers, many detractors, and a high reputation for mediocrity. In a witty commentary on his departure from the bench, *The New Republic* compared him to Ted Baxter, the pompous anchorman on the old *Mary Tyler Moore* show.

And yet, even Ted Baxter had his good days. So, too, with Warren Burger. Liberals who now despise him may someday recall him more fondly. Unlike his successor, William Rehnquist, Burger was not an inflexible ideologue. An interesting article could be written with the title "Warren Burger's liberal opinions."

One of Burger's most memorable opinions was written in an environmental case, *TVA v. Hill*.¹ The case involved the construction of a dam that would imperil the snail darter, an endangered (if not particularly attractive) species of perch. Although the dam was almost complete at the time, Burger's opinion for the Court held that finishing it would violate the Endangered Species Act. The government argued that even if TVA was violating the law, the trial judge should have balanced the threat to the snail darter against the huge investment already made in the dam. Chief Justice Burger rejected this invitation to balance away a clear statutory violation. Instead, he said, the rule of law required that the judge issue an injunction against this illegal act. Justice Rehnquist, by the way, argued that the trial judge should have allowed TVA to violate the statute.

*Fullilove v. Klutznick*² was another major case in which Burger split from Rehnquist and joined the liberals. The case involved a set-aside for minority contractors. Burger upheld this fairly mild form of affirmative action as a proper exercise of Congress's power to promote racial equality. In another case, Burger upheld the ambitious remedial education program contained in a Detroit desegregation decree.³ Earlier, Burger had authored the Court's opinion in

1. 437 U.S. 153 (1978).

2. 448 U.S. 448 (1980).

3. *Milliken v. Bradley*, 433 U.S. 267 (1977). Justice Powell wrote separately, in an effort to limit the possible impact of the Court's holding. *See id.* at 292.

Swann v. Charlotte-Mecklenburg Board of Education,⁴ which upheld the power of federal judges to order widespread busing. In *Reed v. Reed*,⁵ he wrote the first Supreme Court opinion ever to strike down a statute discriminating against women. And in *Griggs v. Duke Power Co.*,⁶ Burger laid the foundations of modern employment discrimination law.

Burger was perhaps most predictably conservative in the area of criminal procedure. Even there, however, exceptions can be found. In the *Chadwick* case,⁷ for example, he wrote an opinion excluding evidence even though the police had probable cause for a search. The evidence was suppressed because, although the police had lawfully seized a footlocker, they had failed to get a warrant before opening it.⁸ Once more, Rehnquist was in the dissent.

The Burger Court is often chastised for its inconsistent opinions, fragmented votes, and poor craftsmanship. The Chief Justice may well have been partially responsible for these problems. Yet, even here something can be said in mitigation. For example, early in Burger's tenure, he wrote the *Harris* opinion,⁹ which sharply limited the *Miranda* rule. Under *Miranda*, a confession cannot be used in court unless the defendant was given the proper warnings. *Harris* carved a hole in this rule: the confession can be used if the defendant takes the stand and gives testimony inconsistent with the earlier confession. The *Harris* opinion was attacked by leading scholars for its inconsistency with *Miranda* and its glaring deficiency in judicial craftsmanship. Professors Alan Dershowitz and John Hart Ely said the opinion "in crucial respects, flatly misstates both the record in the case before it and the state of the law at the time the decision was rendered." In their view, each of the Court's arguments "masks a total absence of analysis and provides no support for its result." Burger's opinion, they said, exhibited "at best, gross negligence concerning the state of the record and the controlling precedents."¹⁰

The critics were undoubtedly right about Burger's failure to

4. 402 U.S. 1 (1971).

5. 404 U.S. 71 (1971).

6. 401 U.S. 424 (1971). *Griggs* holds that Title VII prohibits the use of employment criteria having a disproportionate impact on minorities, even though the employer had no intent to discriminate.

7. *United States v. Chadwick*, 433 U.S. 1 (1977).

8. In addition to *Chadwick*, see *Edwards v. Arizona*, 451 U.S. 477, 487 (1981) (Burger, J., concurring), for another notable example of Burger voting to overturn a criminal conviction on constitutional grounds.

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

10. Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971).

reconcile *Harris* with *Miranda*. But, if *The Brethren* is to be believed, Burger's initial decision would have been more principled: he wanted simply to jettison *Miranda*. He was persuaded not to do so by Justice Harlan, who was concerned about the effect of an overruling on the Court's institutional credibility.¹¹ Would Burger's liberal scholarly critics really have been happier if he had stuck to his original, more principled position?

None of this means that Burger was a great Chief Justice or a closet liberal. He was a relatively untalented, quite conservative jurist, with little flair for leadership. No John Marshall, to say the least. Still, we can do worse than mediocre. Under more talented leadership, the Court may yet produce the kind of cohesive majorities, principled opinions, and high technical craftsmanship that were missing from the Burger Court. A more ideologically consistent bench will find these virtues easier to achieve. But after a few years of the Rehnquist Court, perhaps some people will look back nostalgically on the good old days when the Burger Court muddled around, somewhere a bit to the right of center.

D.A.F.

11. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 113 (1979).