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The Burger Court: The Counter-Revolution That Wasn't.
Edited by Vincent Blasi.¹ New Haven: Yale University
Press. 1983. Pp. xiv, 326. \$25.00.

*Samuel Krislov*²

Collections of essays are not much in favor with publishers nowadays. We therefore owe gratitude to Yale University Press as well as to Professor Blasi for this unusually good one. One might perhaps wish that Professor Blasi had had enough clout with the publisher to get the footnotes printed in a convenient form or with his collaborators to get them all to address directly the subject of the book. One might even wish that every contributor had composed a chapter of the intellectual quality of Blasi's own superb essay. But such hopes are almost always illusory; he who edits a multivolume work has given hostages to Murphy (he of Murphy's law). This is an uncommon volume, rising above its problems with chapters ranging from very good indeed to superb.

The provenance of the book is mysterious and complex. It is "sponsored" by the Society of American Law Teachers and received assistance from the Kingsley Trust Association Publication Fund. Two essays appeared in expanded form in the *Supreme Court Review* in 1979 and 1982. Material on the justices is reprinted from the Friedman and Israel collection and photographs are from the Court's own collection. There is a foreword by Anthony Lewis, not one of his best.

Thomas Emerson opens the volume with a discussion of press law. As would be expected he is profoundly unhappy with the Burger Court and suggests that it has persistently undermined first amendment rights, leaving the legal posture of the press "somewhat bleak." Similarly, the Dorsen-Gara piece on freedom of speech concludes that the Court has sacrificed liberty for property rights. Both presentations are single-minded in their advocacy of absolute first amendment doctrine, and give no real consideration to any misgivings, even those of the Father of Absolutism, Justice Black. Their summaries of case law are fair enough as far as they

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go, but the underlying analysis of social consequences is one-sided, pietistic, and not very impressive.

Rather predictable, too, is Professor Kamisar's treatment of criminal law. He evaluates each case meticulously in the light of his own strong views, and apparently only the rare decision rates even a "C+." Kamisar suggests, however, that the Warren Court pulled in its horns in its last years, while the Burger Court has recently moderated its pro-prosecution stance. The Court's recent endorsement of a "good faith" exception to *Mapp* may lead Professor Kamisar to reconsider the latter conclusion.

More challenging are the essays on what used to be called the "social issues" in the political arena — by Robert Bennett on poverty law, Theodore St. Antoine on labor law, Robert Burt on family law, Paul Brest on race, and Ruth Bader Ginsburg on gender discrimination. The varying orientations of these pieces give them a collective richness not matched by the speech and press essays. Brest, Ginsburg, and St. Antoine contributed impressive, non-tendentious summaries of complex and live areas of law. Bennett argues that the Court is excessively influenced by middle-class values, and unwilling to face up to the political handicaps of the poor. At several points he seems ready to break new ground on how the Court might undertake compensatory rulings, but stops short each time.

The Burt essay is reminiscent of Justice Rehnquist's style—brilliant, suggestive, but strained, perverse, and perhaps even foolish in its fundamental argument. He offers a number of trenchant observations on judicial philosophy and the process of decision. His basic argument is that the Burger Court sides with bureaucracies, especially in defense of traditional, authoritarian family structures. This argument does not do justice to Burger Court decisions on women's rights, often in the context of bureaucratic and family situations, as well as its decisions on illegitimate children. Professor Burt tries heroically to explain away the *Yoder* and *Moore v. East Cleveland* decisions. *Yoder* after all exempted Amish children from the need to attend school, and *East Cleveland* nullified an attempt to limit the family unit occupying a residence to parent and children. The emphasis on the historic durability of the Amish family structure in *Yoder* does not comport with Burt's generalization. Nor does Professor Burt's sympathy for what he sees in *East Cleveland* as a middle-class black community's desire to build a community based upon "standard families" obviate the fact that it is Burt, not the Burger Court, that is here pleading for traditional family structure.

Capping these generally excellent treatments of specific legal topics are more general analyses by Blasi and by Martin Shapiro. Both are pungent and thought-provoking. Blasi finds the Burger Court preoccupied with policy, consequences, but without a vision—activism without direction. The net effect has been to develop the themes of the Warren court, playing Taney to its Marshall. It has been a court of achievements, but not of repute.

A common perception about the Court of recent years is that it represents one of the lower points in Supreme Court history so far as the quality of personnel is concerned. That perception is, I believe, quite mistaken. If one concentrates on the ideological center of the Court, the three or four or five justices who hold the balance of power on the most divisive constitutional issues of the era, the Burger Court measures up well compared with its predecessors. Seldom, if ever, in the Court's history has there been a period when the pivotal justices were as intelligent, open-minded, and dedicated as Potter Stewart, Byron White, Harry Blackmun, Lewis Powell, and John Paul Stevens.

He suggests that the Court's weakness lies in its "ideological extremes," in that Justices Brennan, Marshall, and Rehnquist are really centrists in temperament, and consequently not well-equipped to develop a programmatic constitutionalism. It is hard to see Justice Rehnquist, mischievously determined to push the Court off the cliff in *Gannett* and other cases, or so often in solo dissent, as an amiable pragmatist. Few would quarrel, however, with the characterization of Justice Brennan as a pragmatic liberal — perhaps not even the Justice himself.

In general, Blasi's analysis is more accurate than the conventional one. But I believe that he, like most of us, too readily assumes that a constitutional "leader" has to resemble Brandeis or Black. The Court has been led, not merely conciliated, by charismatic centrists — by Associate Justice Hughes on commerce cases and Chief Justice Hughes on liberties, by Justice Miller, and by Marshall himself. Stewart, Powell, White, and Stevens represent, as Blasi suggests, a very high level of judicial ability. But the Burger Court's problem is lack of statesmanship, and that fault is apparent in all wings of the Court.

Martin Shapiro's article is less developed than most of his work, but nonetheless stimulating. It was both generous and logical for Professor Blasi to let Shapiro's piece close the volume, for it raises questions that range well beyond the rest of the book. He seems to be gently chiding lawyers (including the authors) for continuing to believe that proper principles conclusively resolve cases. He further suggests that most older constitutional analysts never could accept the Warren Court, because it went beyond the New Deal consensus, while the new generation of commentators can-

not forgive the Burger Court for abandoning the pure Warren approach. His discussion of Ely and Choper and their difficulties in rationalizing the dominant role that equality played in Warren Court jurisprudence is fresh if not fully realized. There are gestating ideas here, but the tools of analysis — “New Deal consensus” for instance—need further honing before they can cut very deep.

One topic that still needs treatment is the inhibiting effect of the lower courts’ attitudes, which on the whole differ considerably from those of the justices. A good subject, perhaps, for a *Constitutional Commentary* article.

Both in positive terms, and especially in what was not undone, the Burger Court emerges redeemed as a court of accomplishment, composed of industrious, principled, and intelligent jurists. And the Warren Court’s achievements and limits emerge as well. Its ability to base its sometimes technically weak opinions on strong and vital principles has made it difficult to reverse the doctrinal advances of that era.

All in all, the volume is an intellectual treat. If reprinted as a paperback, it will make a superior supplementary text for constitutional law courses at both the undergraduate and law school levels.