Washington University Law Review

Volume 63 | Issue 3

1985

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Recommended Citation
Thomas F. Eagleton, *Rights Without Remedies: The Burger Court in Full Bloom*, 63 WASH. U. L. Q. 365 (1985).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol63/iss3/3

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# RIGHTS WITHOUT REMEDIES: THE BURGER COURT IN FULL BLOOM

UNITED STATES SENATOR THOMAS F. EAGLETON*

Since the dawn of the Burger Court over fifteen years ago, many believe it has defied labels. At one point it was said that the Burger Court ". . . may indeed be like Churchill's much-scorned pudding, without a theme."[1] I strongly disagree. I see the Burger Court, as Justice Blackmun said last year, "moving to the right," going "where it wants to go . . . by hook or crook."[2] True, the Court has puzzled its critics by failing to directly overrule watershed Warren Court decisions; instead, it has skirted them, chipped away at them, and riddled them with exceptions.

I will first highlight recent cases that signal new trends of the Burger Court. Then I will offer my own theory about where I think the Burger Court revolution is really leading. I will conclude with a glimpse at those in line for Court appointment and with a prediction that—with an already sharply divided Court—the new appointees will surely beget a solid reactionary majority.

## CRIMINAL LAW

Let us first look at criminal law, an area of the law in which the Court has been most active. The exclusionary rule, which protects against unreasonable searches and seizures, has been a brooding omnipresence over the Court. In 1984, at a dizzying pace, the Court created "inevitable discovery,"[3] "public safety,"[4] and, most significantly, "good faith"[5] exceptions to the exclusionary rule. If this trend continues, we may witness the first direct reversal not only of the Warren Court decision that extended the exclusionary rule to the states,[6] but also of the rule itself,

* I want to thank my legal staff counsel, Kathleen J. Tuttle, for her invaluable assistance in my preparation of this article.

1. Herman Schwartz, Professor of Law, American University, Washington, D.C. (November, 1979).
2. Spoken in a private speech at the Cosmos Club, Washington, D.C., September, 1984.
3. Nix v. Williams, 104 S. Ct. 2501 (1984).
4. New York v. Quarles, 104 S. Ct. 2626 (1984).
5. United States v. Leon, 104 S. Ct. 3405 (1984).
6. Mapp v. Ohio, 367 U.S. 643 (1961).



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which dates to 1914.[7]

In my judgment, the exclusionary rule *is* the fourth amendment, and its protection is critically important. To make this point is not to favor "coddling criminals." One need only remember that the roots of the fourth amendment lie in the fear the American colonists and the English had of the tryannical authority of the King's troops, who would barge into homes to search on mere suspicion. The ever-increasing resentment of the colonists impelled William Pitt the Elder to defend their interests in Parliament with the unforgettable words:

> The poorest man in his cottage bid defiance to the crown. It may be frail—its roof may shake—the wind may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.[8]

The fourth amendment, aided by the exclusionary rule, protects each one of us from the overreach of the government.

The Court has taken equally troubling actions with the fifth amendment, which protects us from self-incrimination. Early in 1985, in *Oregon v. Elstad*,[9] the Court held that this constitutional protection does not require suppression of lawful evidence even when such evidence flows from an illegally obtained confession. This holding prompted Justice Brennan to contend in his dissent that: "It is but the latest of the escalating number of decisions that are making this tribunal increasingly irrelevant in the protection of individual rights."[10]

## First Amendment

The religion portion of the first amendment is another area in which the Court is drifting rightward.

No other Warren Court rulings have generated as much controversy for as long a period as its school prayer decisions.[11] Those decisions sought to prevent government from putting its power and prestige behind a particular belief. But match this principle with what the Burger Court held in a closely-divided vote (5-4) last year in *Lynch v. Donnelly*, that a

7. Weeks v. United States, 232 U.S. 383 (1914).

8. Ervin, Sam J., Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, SUP. CT. REV. 282, 285 (1983).

9. 105 S. Ct. 1285 (1985).

10. *Id.* at 1322 (Brennan, J., dissenting).

11. Abington School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

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city *may* put its imprimatur on a Christmas nativity scene placed in front of the city hall.[12]

Concurring separately, Justice O'Connor confidently asserted that when viewing a city-sponsored crèche, citizens "fairly understand"[13] from the context that the government intends no endorsement of Christian beliefs. That statement is a startling reversal of the Court's presumptions twenty years ago about "public perceptions." In the past, the Court cared about minority perceptions;[14] in this case, it evidently cared only about those of the majority.

Demonstrating how profoundly unsettled and unpredictable these church-state waters are, the Burger Court closed out its 1984-85 term by calling for more government "neutrality" toward religion and less "accommodation" than in the previous term.

In *Wallace v. Jaffree*,[15] the Court rejected Alabama's "moment of silence" statute. The Court's ruling centered on the fact that the bill's legislative history revealed the statute to be a blatant pretext for returning prayer to the public schools. However, the dizzying array of concurrences and dissents indicates that a "pure" moment of silence statute without such a legislative history would be acceptable. It appears that such a statute could even include "prayer" among other listed alternatives, so long as there is no indication by the government that it would prefer that students use the moment to pray.

In *Estate of Thornton v. Caldor, Inc.*,[16] the Justices next struck down a Connecticut law that gave employees an absolute right to take their chosen Sabbath day off. With such a law, the Court held, "[t]he state thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer. . . . This unyielding weighting in favor of Sabbath observors over all other interests contravenes a fundamental principle of the Religion Clauses. . . ."[17]

In two other cases, *School District of the City of Grand Rapids v. Ball*[18] and *Aguilar v. Felton*,[19] a narrow 5-4 majority held unconstitutional pro-

12. 104 S. Ct. 1355 (1984).
13. *Id.* at 1369 (O'Connor, J., concurring).
14. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).
15. 105 S. Ct. 2479 (1985).
16. 53 U.S.L.W. 4853 (1985).
17. *Id.* at 4855.
18. 53 U.S.L.W. 5006 (1985).
19. 53 U.S.L.W. 5013 (1985).

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grams using public school teachers to provide remedial assistance in private religious schools. The former case held that the school district failed to go far enough in supervising its programs to avoid any religious content. As for the latter case, the Court declared the programs unconstitutional because the school district's efforts to ensure that a religious message was not conveyed went too far, enmeshing state authorities in the religious institutions. Both circumstances, the Court held, "infringe precisely those Establishment Clause violations at the root of the prohibition of excessive entanglement."[20]

These close votes show that, with even one more conservative Justice, the recent insistence on strict separation easily might be supplanted by renewed tolerance toward the mixing of government and religion. Moreover, the Court's work in this area is not over. Although the Court in the 1984-85 term heard an unusually large number of religion cases, already four new church-state cases have been accepted for argument in the next term.[21]

## CIVIL RIGHTS

Let us turn now to civil rights, an area in which the Reagan Administration has sought to divert the nation from its twenty-year commitment to equal rights. Lamentably, Administration policy has begun to gain some ground with the Court. In 1984, the Court took the teeth out of the most important law governing sex discrimination in education and, by implication, jeopardized civil rights statutes protecting racial minorities, the disabled, and the elderly.[22]

Until last year, the Court had not decided whether racial preference could be squared with the Equal Protection clause. But in *Firefighters Local Union No. 1784 v. Stotts*,[23] it came close to resolving this conflict in the negative. The Court held that a seniority system takes precedence over an affirmative action plan when layoffs are involved. The Court went beyond the question presented, purporting to declare that Title VII,

20. *Id.* at 5016.

21. N.Y. Times, July 10, 1985, at B6. The issues presented in these cases include "equal access" to public school facilities by voluntary student religious groups; a military dress code prohibition against wearing a Jewish yarmulke; a government requirement that members of a religious group submit their social security numbers in order to get welfare benefits, even though use of the numbers violates their beliefs; and use of federal funds to educate a blind person studying for the ministry.

22. Grove City College v. Bell, 104 S. Ct. 1211 (1984).

23. 104 S. Ct. 2576 (1984).

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a potent antidiscrimination law, allows relief only to victims of actual or direct discrimination, as opposed to an entire race burdened only indirectly by a past history of societal discrimination.[24] Although President Reagan's Justice Department quickly heralded the opinion as ruling out all preferential treatment of minorities and women through quotas and other devices,[25] it is clear that our highest tribunal has left us without final and definitive guidance. Such guidance may be forthcoming and may well outlaw the bulk of affirmative action programs.

Surprisingly, in one respect the Burger Court has largely maintained the Warren Court's momentum in civil rights: it has upheld the use of limited and well-defined busing as a device for school desegregation.[26]

## ABORTION

In concluding this brief review of these substantive areas, I cannot overlook the Court's abortion ruling, *Roe v. Wade*,[27] in which, to quote Harvard Law Professor Archibald Cox, "the Justices read into the generality of the Due Process clause of the Fourteenth Amendment a new 'fundamental right' not remotely suggested by the words."[28]

Most liberals would single out this decision as perhaps the one instance in which the Burger Court rose above its conservative ideology and "did what was right." I do not share that view. Rather, I believe that in one swift edict, the Court federalized a state law issue and usurped authority over a matter previously thought to be within the domain of legislative discretion. A reconstituted Supreme Court with two or three Reagan appointees may very well reverse *Roe v. Wade.*

## THE REAL AGENDA: USING PROCEDURE TO GUT SUBSTANCE

Even after criticizing the Court's resolution of the abortion issue, I believe that the Burger Court is sometimes troubling less for the cases it resolves than for the cases it ignores. In my view, the hallmark of the Burger Court will be its systematic refusal to provide a federal judicial

24. *See* Fallon and Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, SUP. CT. REV. 1 (1984).

25. N.Y. Times, June 16, 1984, § A, at 1, col. 1.

26. Keyes v. School District No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

27. 410 U.S. 113 (1973).

28. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 51-55, 112-14, 117-18 (1976).

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forum for the enforcement of important constitutional rights. It is fine to say that the Burger Court has judiciously refrained from rolling back Warren Court precedents, but when the means for enforcement are dismantled, these substantive rights are in fact reduced to rights without remedies.

*Standing*

First consider the Court's new standing rules. The Warren Court used flexible standing guidelines so that litigants with a colorable argument of being adversely affected by an illegal act could obtain a judicial hearing.[29] Since then, considerable gloss has been added,[30] but only, I would argue, to coincide with the Court's view of the underlying merits.

For example, in *Allen v. Wright*,[31] black parents sued the IRS for failing to withdraw the tax exempt status of private segregated schools. Although their children attended black *public* schools, the parents argued that their children were nonetheless "injured" because the government's policy was draining white children from the public schools.

The majority denied standing. It simply refused to believe that granting preferential tax treatment to white private schools robs black children in public schools of a chance for an integrated education. Justice O'Connor, writing for the majority, noted: "Animating this Court's holdings was the principle that a federal court . . . is not the proper forum to press general complaints about the way in which government goes about its business."[32]

This statement is a disconcerting, new expression of the shrunken role of federal courts. Justice Brennan obviously agrees: "[W]e have consistently recognized throughout the last 30 years that the deprivation of a child's right to receive an education in a desegregated school is a harm of special significance; surely, it satisfies any constitutional requirement of injury in fact."[33]

29. *See generally* Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

30. Litigants now must show that a "fairly traceable" causal connection exists between the claimed injury and the challenged conduct, that the Court's remedial powers would redress the injury, and that the injury is particular—*not* shared with the citizenry. *See* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

31. 104 S. Ct. 3315 (1984).

32. *Id.* at 3330.

33. *Id.* at 3338 (Brennan, J., dissenting).

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*City of Los Angeles v. Lyons*[34] displays equally well the Court's use of standing to diminish constitutional rights. *Lyons* involved a black plaintiff who, despite offering no threats or resistance at being stopped for a motor vehicle violation, was subjected to a "choke hold" until he blacked out. When he awoke gasping for air and spitting up blood and dirt, he was issued a traffic ticket and released. He sued for damages and sought injunctive relief to forbid use of deadly force by police officers when an officer's safety is not threatened. The Court denied standing because the plaintiff had no reason to anticipate future chokings.

The case has broad ramifications. *Lyons* may preclude the use of prospective federal equitable relief against policies authorizing persistent deprivations of constitutional rights, if an individual cannot establish with substantial certainty that he will be injured in the future.

I am dubious about these standing pronouncements. Justice Rehnquist, revealing his own skepticism, said in an important 1982 standing case[35] that ". . . it has not been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Article III . . . or whether they are requirements the Court itself has erected and which were not compelled by the language of the Constitution."

*Class Actions*

The Court has advanced its constricted view of federal relief in another way, by backing off the use of class actions. Since 1966,[36] class actions have facilitated aggregation of claims so that less prosperous litigants, or those with negligible damages, could seek legal redress, whereas alone they might lack resources or capacity.

From the beginning, the Court has applied rigorous standards to this procedural aid. In 1969,[37] it ruled that members of a class could not aggregate their individual claims to satisfy the amount-in-controversy requirement for diversity or federal question jurisdiction. A few years later, in *Zahn v. International Paper Co.*,[38] the Court barred a class action even though the named plaintiffs' claims exceeded the amount.

34. 103 S. Ct. 1660 (1983).

35. Valley Forge Christian College v. Americans United, 454 U.S. 464, 471 (1982).

36. The Federal Rules of Civil Procedure were amended in 1966 in part to strengthen the use of class actions.

37. Snyder v. Harris, 394 U.S. 332 (1969).

38. 414 U.S. 291 (1973).

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*Zahn* held that *each* class member had to satisfy the amount, thus transforming class actions into a device that protects only those claims which are sufficiently large not to require class actions in the first place.[39]

In essence, class actions started as a device to enable litigants with important rights at stake but with individually negligible financial injuries (typically civil rights or environmental cases) to get into court by aggregating damages. Now, the Court seems bent on forcing satisfaction of the amount-in-controversy requirement on an *individual* basis. That really turns the law on its head.

*Habeas Corpus*

The writ of habeas corpus, explicitly recognized in the Constitution, was restrictively interpreted by early courts. Significantly expanding use of the "Great Writ," the Warren Court sought to ensure that substantive constitutional rights would be fully realized. The Court saw habeas corpus as a necessary remedy against constitutionally infirm state proceedings. It held that state prisoners may submit their constitutional claims to federal courts even if they had failed to raise the arguments in state court, unless the prisoners had "deliberately bypassed" state remedies.[40]

Paying little deference to this line of cases, the Burger Court sharply constricted this doctrine. In 1976, the Court held that a state prisoner may not obtain habeas relief on an illegal search and seizure claim unless he had been denied an opportunity for full and fair litigation of the claim in state courts.[41] The exclusionary rule is thus relegated to an historically unsympathetic state forum, dramatically altering its practical significance.

The most extreme hostility to habeas occurred in *Engle v. Isaac*.[42] There, prisoners challenged a requirement that they carry the burden of proving an affirmative defense. They had not objected earlier because the state appellate courts had upheld this burden. After their convictions, the rule was reinterpreted to place the burden of disproving the defense on the prosecution. The Supreme Court denied relief because the defend-

39. *See also* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

40. Fay v. Noia, 372 U.S. 391 (1963).

41. Stone v. Powell, 428 U.S. 465 (1976).

42. 456 U.S. 107 (1982).

ant's lawyers failed to object in a timely fashion, even though they could not have done so any earlier.

*Remedies*

So far, I have dwelled upon the inability of plaintiffs to get into federal court. But once they do, there may be another problem: the Burger Court has constricted federal remedies by drastically limiting use of equitable powers. In *Rizzo v. Goode*,[43] documented and repeated instances of police abuse had gone unredressed, impelling a federal judge to order city officials to establish a program to handle citizen complaints. The Burger Court held that this use of the lower court's equitable powers exceeded the court's proper role. That means one thing: the Burger Court wants federal courts to refrain from broad remedial decrees, even where problems admittedly contain constitutional dimensions.

## COURT PERSONALITIES: A SWING TO THE RIGHT

What of these already foreboding legal trends, if one or two more conservative appointments are made to the Court, presumably by President Reagan? Obviously, the consequences depend on who leaves and who joins the Court. Not knowing either, I suggest that we would do well to concentrate on three of President Reagan's recent circuit court appointments said to be on the "most-likely" appointees list.

I refer to Judges Robert Bork and Antonin Scalia of the District of Columbia Circuit and Judge Richard Posner of the Seventh Circuit.[44] About these three judges we can quickly say this: they are highly accomplished academics, politically conservative, and constitutionally "interpretivist."

My own view is that, while they boast adherence to the very words of the original authority propounding a law, they practice this adherence selectively, in order to reach the most rigid and narrow legal interpretation. For example, law professor Ronald Dworkin has written that in a recent decision,[45] Judge Bork "shows how little he would need, by way of argument, to justify sweeping what he dislikes away."[46] Professor Dwor-

43. 423 U.S. 362 (1976).

44. *See* Barnes, *Reagan's Full Court Press: How the Supreme Court is Going to be Reaganized*, THE NEW REPUBLIC 16 (June 10, 1985); Wermiel, *The New Judiciary: Reagan-Picked Judges Put the Federal Courts on Conservative Path*, Wall St. J., Dec. 18, 1984, at A1.

45. Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

46. Dworkin, *Reagan's Justice*, The N.Y. Rev. of Books, Nov. 8, 1984, 27 at 31.

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kin concluded that Judge Bork's approach is "the jurisprudence of fiat, not argument."[47]

Judge Bork so abhors "judicial overreach" that in a recent 63-page dissent[48] he excoriated the majority for granting standing to Congress to obtain an important interpretation of the Constitution's Article I provision allowing for presidential "pocket-veto" of congressional bills. Judge Bork argued that the court's role is "solely to decide on the rights of individuals," not to "correct constitutional errors" such as entertaining suits directly between the two political branches of the federal government.[49] He obviously feels the federal courts should not dictate who wins in disputes between Congress and the President. Nor do I. But I do think that we all rely on the Supreme Court to say what the rules are.

Judge Scalia's judicial philosophy goes in the same direction although, if anything, he is more conservative in some substantive areas. Take religion, where he is even less troubled about church-state involvement than the present Court. As for judicial restraint, like Judge Bork, Judge Scalia defers to the other two branches of government, sometimes through rather strained analysis. For example, he held in one case[50] that a statute precluded judicial review of virtually all Veterans Administration decisions regarding veterans' disability benefits, even though the rulemaking at issue violated the Administrative Procedure Act and even after the VA told Congress it did not interpret the statute as insulating its rulings from court scrutiny. This caused the dissent to charge that Judge Scalia's view ". . . constitutes rank judicial interference with a reasonable statutory interpretation."[51]

Judge Posner is distinguishable from the other two for the inventive approach he brings to the law: to him, efficiency and "wealth-maximization" are what the common law is all about. For example, to correct unlawful searches and seizures, he would abolish the exclusionary rule and let the free market settle law suits pressed by victims against police officers.[52]

Judge Posner is one of the most prolific circuit judges, so there is no

47. *Id.* at 31.

48. Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting).

49. *Id.* at 52 (Bork, J., dissenting).

50. Gott v. Walters, 756 F.2d 902 (D.C. Cir.1985).

51. *Id.* at 929 (Wald, J., dissenting).

52. Warren, *Richard Posner Shakes Up the Bench,* THE AM. LAW. 75, 76 (Sept. 1983).

want of opinions indicating his judicial temperament. One case[53] involved a prison inmate complaining of blurred vision. After six months without proper care, the inmate received surgery, but on the wrong eye, leaving him functionally blind. The inmate requested a jury trial and also sought court-appointed counsel in his civil suit against prison authorities. Both were denied by the lower court. On appeal, Judge Posner agreed with the majority that a jury trial should have been granted but, contrary to the circuit's applicable precedent, ruled that no counsel should be appointed because ". . . a prisoner who has a good damages suit should be able to hire a competent lawyer . . . by making the prisoner go this route we subject the case to the test of the market . . . . If [he] cannot retain a lawyer on a contingency fee basis the natural inference to draw is that he does not have a good case."[54]

Clearly, none of these three judges would divert the Burger Court from where it is already headed, but instead would most certainly hasten it getting there.

## CONCLUSION

As I have tried to show, the Burger Court does have a theme. It doggedly seeks to close the federal courthouse doors by manipulating jurisdictional tests, claiming judicial deference to state courts, constricting federal remedies, and erecting procedural barriers to the combined efforts of similarly harmed litigants.

Supreme Court Justice Robert H. Jackson wrote a famous opinion[55] in which he spoke of the majesty of the Bill of Rights because its purpose was to withdraw protected liberties from the "vicissitudes of political controversy" in order to insulate them as "legal principles to be applied by the courts." He went on to say that our freedoms "may not be submitted to vote; they depend on the outcome of no elections." Were it only true that the status of our rights and freedoms had nothing whatever to do with President Ronald Reagan's reelection and his impending opportunity to bring the Burger Court into full bloom.

If I have not appeared exactly ebullient in this review of the Burger Court, let me conclude with a word on what I believe our highest tribunal should be about. I draw from the words of Harvard Law Professor

53. Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983).

54. *Id.* at 769-70, citing McKeever v. Israel, 689 F.2d 1315, 1324-25 (7th Cir. 1982) (Posner, J., dissenting). *See generally* Press & McDaniel, *Free-Market Jurist*, NEWSWEEK, June 10, 1985, at 93.

55. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

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Archibald Cox on the occasion of Chief Justice Earl Warren's retirement.[56] Professor Cox said that Chief Justice Warren was distinguished because he pushed aside weary arguments concerning the "proper role of the judiciary" with the persistent questions "Is that fair?" or "Is that what America stands for?" Professor Cox spoke of how the Warren Court would be remembered:[57]

> It will be recognized a century hence, I venture to think, no less than many of us suppose today . . . [for establishing] the responsibility of government for equality among men, the openness of American society to change and reform, and the decency of the administration of criminal justice . . . .

Would that we could say this about the Burger Court decades hence.

56. Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1 (1969).
57. *Id.*

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