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## FOREWORD\*

In his preface to *The Jacksonian Persuasion*,<sup>1</sup> Marvin Meyers recalls a Kentucky folk saying: "If you want to know what a politician is up to, watch his feet, not his mouth." This beguiling bit of hard-nosed realism, while memorable, is nonetheless dangerously simplistic. For, as Meyers notes, it understates the importance of what politicians *say*; the public articulation of justifications should not be so casually denigrated.

"Realist" observers of the Supreme Court may have overlearned the lesson of the Kentucky aphorism. As the Court concludes its first decade since Warren Burger became Chief Justice, some critics may be tempted to explore the hooves of the Justices, to search for the hidden explanations of judicial behavior that may be found in previous party affiliation, the continuing influence of an appointing president, the interaction of the Court's personalities, or the economic, social or professional attachments of individual justices. The irony of such an investigation of the Supreme Court is that the Court is, in a significant respect, the most public of our public institutions. Almost all of what is worth knowing about the Court is available to one who will attend to the arguments pressed upon the Court and read the several thousand pages of opinions issued each Term announcing and justifying the judgments the Court has reached.

One with a serious interest in the work of the Supreme Court since the end of the era marked by the retirement of Chief Justice Earl Warren will find the papers in this Symposium to be rewarding reading. Originally presented at the 1980 Annual Meeting of the Association of American Law Schools in Phoenix, these eight papers are based in the main upon a careful review of the Court's decisions and of the opinions offered as justification for the results reached.

In his thoughtful overview of the Court's last decade, Professor Howard cautions that one should be slow to put labels on the present Court. Although the first five years of the decade provided some indications that a dramatic

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\* Michael Chartan, Associate Editor for this Symposium, assisted in the preparation of this foreword.

1. M. MEYERS, *JACKSONIAN PERSUASION* v (Vintage ed., 1960).

shift to a more conservative philosophy might yet unfold (as had been widely predicted), "[b]y 1980 it had become far more difficult to draw clean distinctions between the years of Earl Warren and those of Warren Burger."<sup>2</sup> In most of the substantive areas canvassed by these papers, continuity with the decisions of the past is a recurring theme.

Reviewing the Court's work in the area of federalism, for example, Professor Monaghan concludes that: "One can quarrel about the details, but taken in the main, the Burger Court has left intact the federal edifice bequeathed by its predecessors."<sup>3</sup> Dean Sandalow, focusing upon the cases involving gender classifications and those related to childbearing, suggests that the Court over the last ten years has subjected to federal control an area long regarded as the province of the states. Viewing these cases as a demonstration of the extent to which a unitary system has evolved in the United States, Sandalow makes the perceptive observation that: "The Burger Court is not responsible for that development, but its decisions confirmed it in much the same way that the actions of the Eisenhower Administration confirmed the New Deal."<sup>4</sup>

In reviewing the Court's work in the area of equality, Professor Mishkin echoes this theme of continuity. The present Court's continuing commitment to the efforts to achieve racial and sexual equality is particularly worth noting when one considers that the passing of overt legal discriminations has left to the present Court "underlying problems far more complex, deepseated, and difficult to extirpate."<sup>5</sup> Assessing the work of the present Court in the context of diminished public support for civil rights advances, Mishkin perceives "a pattern [of decisions] much more on the side of advancing equality than what I conceive to be the center of gravity of the national will."<sup>6</sup>

The Warren Court bequeathed to its successors the task of implementing and confirming bold principles that had been created with broad strokes. The present Court, containing fewer members with strong ideological predispositions and evidencing a "distaste . . . for categorical, per se rules,"<sup>7</sup> confronts issues that are seen to be more complex with results less likely to appear preordained.

One significant philosophical shift is noted in these papers. Weaving together decisions from a number of areas touching upon individual liberties, Professor Van Alstyne perceives a Court more in sympathy with John Locke than with John Stuart Mill, one which has "furnish[ed] a renewed emphasis upon entrepreneurial rights as an important civil liberty of the nineteen-

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2. Howard, *The Burger Court: a Judicial Nonet Plays the Enigma Variations*, 43:3 LAW & CONTEMP. PROB. 11, 12 (1980).

3. Monaghan, *The Burger Court and Our Federalism*, 43:3 LAW & CONTEMP. PROB. 50 (1980).

4. Sandalow, *Federalism and Social Change*, 43:3 LAW & CONTEMP. PROB. 38 (1980).

5. Mishkin, *Equality*, 43:3 LAW & CONTEMP. PROB. 52 (1980).

6. *Id.* at 64.

7. *Supra* note 2, at 25.

seventies." The result, he finds, "is not less liberty, but a reapportionment in ways that confirm the value of private property" and lessen the scope of liberty for those who lack it.<sup>8</sup>

Nor has the Court been much influenced by Mill in its decisions concerning sex, marriage and the family. As Professor Grey notes in *Eros, Civilization and the Burger Court*, the Court takes sex more seriously than do its liberal critics. In an imaginative essay, Grey suggests that the Court's thinking parallels the view of Freud and Max Weber that modern civilization is dependent upon the control of sexual drives. The decisions in this area therefore reflect "not any Millian glorification of diverse individuality, but the stability-centered concerns of moderate conservative family and population policy."<sup>9</sup>

Together with an introduction by Professor Gellhorn,<sup>10</sup> and a useful concluding survey of each of the ten Terms of the Burger Court by John P. Frank of the Phoenix bar,<sup>11</sup> these papers offer a reflective assessment of the work of the nation's highest court during the decade of the seventies.

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8. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43:3 LAW & CONTEMP. PROB. 72 (1980).

9. Grey, *Eros, Civilization and the Burger Court*, 43:3 LAW & CONTEMP. PROB. 90 (1980).

10. Gellhorn, *Introduction*, 43:3 LAW & CONTEMP. PROB. 3 (1980).

11. Frank, *The Burger Court: The First Ten Years*, 43:3 LAW & CONTEMP. PROB. 101 (1980).