# *The Burger Court and the Rise of the Judicial Right*

by Michael J. Graetz and Linda Greenhouse
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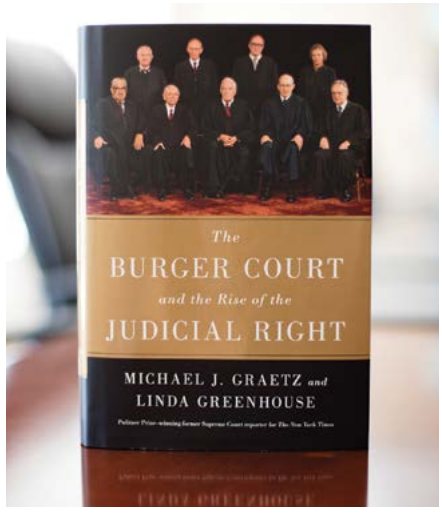
**Reviewed by E. Duncan Getchell Jr.**




Every Republican president beginning with Richard M. Nixon has been publicly committed to the nomination of non-activist judges and justices, defined variously as originalists or textualists. Those who have found themselves in sympathy with that project will be put off by the world view of this book, which sees the failure of the Burger Court to expand on Warren Court initiatives — with respect to the death penalty, consolidation of school districts as a remedy for segregated schools, judicially mandated parity in funding between school districts, public funding of abortion, strict scrutiny in gender equality cases, and the curtailment of the free speech rights of corporations — as missed opportunities rather than exercises of judicial modesty.

Chief Justice Burger so revered the founders that he resigned from the Supreme Court to preside over the Commission on the Bicentennial of the Constitution as it prepared for an extravagant celebration in Philadelphia on September 18, 1987. On that occasion the former chief justice remarked: "If we remain on course, keeping faith with the vision of the Founders, with freedom under ordered liberty, we will have done our part to see that the great new idea of government by consent — by We the People — remains in place." But Justice Thurgood Marshall saw things differently, telling a bar group four months before to be "wary of . . . 'flagwaving fervor'" for, as he maintained, "[t]he government the Framers devised . . . 'was defective from the start, requiring several amendments, a civil war, and momentous social transformation' to better realize the promise of a more just society." According to the authors, "[t]he competition between these two narratives is in many ways the subject of th[eir] book."

Virginia lawyers of all political outlooks should find the discussion of the two Virginians, Justice Lewis F. Powell Jr. and Judge Robert R. Merhige Jr., of interest. Judger Merhige makes two cameo appearances. First, on account of his order consolidating the school districts of the City of Richmond with those of Henrico and Chesterfield counties. When the issue reached the Supreme Court it was Justice Powell's recusal that left the Fourth Circuit's reversal of Merhige affirmed by an equally divided Supreme Court. Merhige's second appearance deals with his dissent from the ruling of a three-judge district court in which he anticipated the outcome of *Lawrence v. Texas* by twenty-eight years.

Justice Powell was a supporter of the summary affirmance of the three-judge court in that case. He was also the swing vote in *Bowers v. Hardwick* — the case that *Lawrence* reversed in 2003. The Powell connection in *Lawrence* went further because in retirement he ventured that his vote in *Bowers* had been a mistake, and, as we are told, the successful lawyer in *Lawrence* had been a Powell clerk in the 1980 term.

The authors tend to be respectful of Justice Powell, introducing him as "a partner in a Richmond, Virginia law firm" who had "had a distinguished legal career, serving as president of the American Bar Association and as head of both the Richmond and the Virginia school boards." The authors, in describing his opinion for the Court upholding the death penalty against a race-based challenge, note with apparent approval his statement made after he retired from the Court that he regretted his vote in that case.

Elsewhere the authors are condescending, speaking of "a tone-deaf Powell" in connection with a case rejecting the argument that unequal spending on education can rise to constitutional dimensions. They also explain Justice Powell's rejection of applying strict scrutiny to categories based upon sex in these terms: "But for a gentleman of the Old South, which Lewis Powell,

born in 1907, certainly was, women's role in society was another matter. . . . Lewis Powell was not about to enlist the Supreme Court in the feminists' social revolution."

Anyone who lived through these years would have to agree that the authors have correctly catalogued the cases and issues that excited the judicial era of the Burger Court. The writing is sufficiently pleasant to repel the tedium that sometimes creeps into such works. All-in-all the Library Journal justly described this book as "insightful and well-researched," although it is hardly even-handed.

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