In August, 1986, a month before Warren Burger retired as Chief Justice of the United States Supreme Court, Justice Lewis Powell declared that there had been no counterrevolution by the Burger Court: “None of the landmark decisions of the Warren Court were overruled, and some were extended.” Responding to criticism that the Burger Court “lacked a sense of direction,” Powell added that “these observations should make little sense. The great strength of the Supreme Court is that we have no policy or purpose other than ‘faithfully and impartially’ to discharge our duties ‘agreeably to the Constitution and laws of the United States.’”

Michael Graetz, a professor of law at Columbia University Law School, and Linda Greenhouse, the Supreme Court correspondent of the New York Times for three decades, acknowledge that the Burger Court did not reverse the important rulings of the Warren Court. However, in this informative, accessible, and meticulously detailed new book, they argue that the Burger Court “hollowed out” Warren Court precedents. Far from having no policy or purpose, Graetz and Greenhouse demonstrate that for the Burger Court (four of whose members were appointed by President Nixon) equality and the rights revolution “took a back seat” to the prerogatives of states and localities, the “efficiency” of the criminal justice system, and the interests of corporations and elite institutions. And the Burger Court established the jurisprudential foundation for the even more conservative Rehnquist and Roberts courts that have followed.
Drawing on the personal papers of the justices, Graetz and Greenhouse provide close readings of the most important Burger Court cases. In a series of decisions, they indicate, the Burger Court weakened the requirement (in *Miranda v. Arizona*) that police inform suspects in custody that they had a right not to say anything that might incriminate them. Limiting the definition of custody, the Court allowed unfettered police questioning in a variety of circumstances. And they allowed authorities to exaggerate evidence they had or threaten suspects with harsh charges to elicit confessions.

Equally important, the Burger Court limited the right to legal representation (in *Gideon v. Wainright*) by refusing to require that every court appointed defense lawyer “act like a reasonably competent attorney.” And, according to the authors, the Burger Court refused to reign in prosecutors who tabled excessively harsh charges to increase the likelihood of a plea bargain.

By ratifying public school financing based primarily on local property taxes because it provided parents “the freedom to devote more money to the education of their children,” fostered innovation, and competition for excellence (in *San Antonio Independent School District v. Rodriguez*), Graetz and Greenhouse point out, a “tone deaf” Burger Court virtually guaranteed that the nation’s schools “would remain grossly unequal.”

By allowing Amish parents in New Glarus, Wisconsin to pull their children out of public school at the end of eighth grade (in violation of the state’s compulsory education law) because their religion prohibited exposure to secular instruction beyond the basics necessary to be competent workers, even though they did not provide them with “substantially equivalent” schooling (in *Wisconsin v. Yoder*), Graetz and Greenhouse indicate, the Burger Court opened the door to the 2014 *Hobby Lobby* decision, which exempted a religiously observant commercial retailer from having to provide contraception coverage to thousands of workers as part of its employer health insurance.

*The Burger Court*, the authors write, also shrugged off dissents by William Rehnquist (of all people!), who foresaw the far-reaching consequences of extending First Amendment to commercial advertising. And in *Buckley v. Valeo*, the Court dismissed as “ancillary” any claims of a constitutional government interest in democratizing the outcome of elections by restricting the money spent by the affluent and already influential to enhance the voices of the less powerful. The “Rosetta Stone of campaign finance jurisprudence,” *Buckley v. Valeo* laid the groundwork for *Citizens United v. Federal Election Commission*, which eviscerated the public financing of political campaigns, in essence ended limits on contributions by individuals and special interest groups, and extended First Amendment free speech rights to corporations.

Graetz and Greenhouse reminds us that, although the Supreme Court is constrained by the expectation that it follow the path marked out by precedent, it is clear that, for good and ill, precedent “can be discarded, either incrementally or abruptly, by any five justices acting in concert.” They do not need to remind us, do they, that, given the unfilled vacancy on the Court, the refusal of the Republicans to consider President Obama’s nominee, the
number of 4-4 votes in recent weeks, the political polarization and paralysis that has taken hold in Washington, D.C., and the weighty issues waiting to be adjudicated (including abortion, affirmative action, the separation of church and state, immigration, and the rights of gays and transgender people), a whole lot is at stake in the election of 2016?