THE WHITE HOUSE
WASHINGTON

July 27, 1987

TO: C. Christopher Cox

FROM: Peter D. Keisler

FYI

July 24, 1987

To: Lloyd Cutler
Fred Fielding
Keith Jones
Phil Lacovara
Ray Randolph
Jonathan Rose
Mike Uhlman

From: Lee Liberman

Attached is a list of people from various segments of the legal community who have stated their intention to support Judge Bork. I am sure there are people whom you know of that I have missed. If you could give me any additions or corrections at our meeting (presently expected to be held on Wednesday July 29 at 8:30 A.M. in the Pepper Hamilton conference room), I would greatly appreciate it.

I have also enclosed the same list of states, Senators and coordinators I sent around previously, this time with room to jot down ideas of what to do in those states or activities that you have already initiated there. Since everybody probably has contacts in several states of which he is not in charge, it would probably be a great help to the person coordinating in each state to know about what else is going on there. I have made a few changes in the assignments of states, as underlined, to reflect your preferences.

Law Profs/Lawyers for Bork
(as of 7/24/87)

Law Professors

Yale:	Guido Calabresi, Dean (but a little weak) Eugene Rostow George Priest Karen Stiff
Chicago:	Geoff Stone (Dean) Ed Levi Gerhard Casper Paul Bator (NYT edit) Phil Neal Mike McConnell
Harvard:	Hal Scott (will co-write piece with Bob Clark if Clark is willing) Raoul Berger Richard Stewart
Stanford:	Tom Campbell Bill Baxter
Michigan:	Tom Kauper
Columbia:	Henry Monaghan
UVa:	Lillian Bevier Ed Kitch
U Penn:	Robert Mundheim (dean) (is co-writing piece with Casper)
Texas:	Michael Sharlot Lino Graglia (may not want to use)
UCLA:	Wes Liebeler
NYU:	John Slane
Duke:	C. Allen Foster Clark Havighurst Bertel Sparks Bill Reppe Don Horowitz
Cornell:	Jon Macey
Catholic:	Robert Destro
Brooklyn:	David Trager (dean) Hank Holtzer

4 other profs whose names I don't know (Holtzer, Dave Schwartz have them)

Temple: Jan Ting
Olin Lowry
A third prof who's in England whose name Ting has
Charles H. Rogovin

Fordham: Edward Yorio
Robert Byrn
Earl Phillips
Earnest van den Haag

Vandbilt: Jim Blumstein

UC Davis: Tom Smith
Robert Hellman

Hastings: James McCall

G. Mason: Lee Liberman

Hoover
Inst.: John Bunzel

<u>Law Profs Leaning Toward/Rumored to Support</u>

Columbia: B. Black (leaning)
Herb Wechsler (leaning)
Paul Freund (rumored)

Michigan: Yale Kamisar (rumored)

Stanford: Gerald Gunther (leaning)

Duke: George Christie (leaning)
John Weistart (leaning)

<u>Law Profs Contacted Who Are Taking No Position So Far or Definitely</u>

Yale: Geoffrey Hazard (so far)

Columbia: Bruce Ackerman (so far)

Texas: Charles Wright (definitely)

Stanford: John Ely (definitely)
Paul Brest (dean) (so far)

Berkeley: Mishkin (will go through materials & decide) (Ray Randolph is sending)

Boston C: Bob Cottrol (Lee Liberman will give materials on Wed.)

Law Profs Opposing Privately/Publicly

Yale: Abe Goldstein (privately)
Harry Wellington (privately)
Burke Marshall (testifying anti)
Paul Gewirtz (has written edit. anti)
Owen Fiss (writing edit. anti)

Columbia: Curtis & Lillian Berger

Non-Legal Profs Supporting

Walter Berns
Jeremy Rabkin
(There are surely many others, but have to talk to Berns)

State Officials Supporting

Governor Sununu (NH)
Dave Wilkenson (AG, Utah)
Dave Fronmeyer (AG, Oregon)
Hal Stratton (AG, New Mexico)
Jose Berrocal (legal counsel to Governor, Puerto Rico)

Members of Bar Supporting

Elliott Richardson
William F. Smith (Gibson, Dunn, L.A.)
Nicholas Katzenbach (Cutler must talk to again) (Reicher, Danzig, Newark)
Sic Schreiber (former N.J. judge) (Reicher, Danzig)
Bill Highland (Reicher, Danzig)
Paul McGrath (I forget which NY firm)
Bob Bicks (Breed Abbott, NYC)
Don Baker (Sutherland & Asbill, D.C.)
Lloyd Cutler (Wilmer, Cutler, D.C.)
Jewel Lafontant (Bork's former black female deputy S-G)
Andy Frey (Mayer Brown, D.C.)
Steve Shapiro (Mayer Brown Chicago)
Steve Gillis (Mayer Brown, Chicago)
9 of 10 former ABA Antitrust Section heads
Ken Bialkin (Anti-Defamation League)
Dennis Jacobs (Simpson, Thatcher, NYC)
Stewart Smith (Shea & Gould, NYC)
Keith Jones (Fulbright & Jaworski, Houston)
Mike Horowitz (Dickstein, Shapiro, D.C.)
Ace Tyler (Patterson, Belknap)
Mike Uhlman (Pepper, Hamilton, D.C.)
Ray Randolph (Pepper, Hamilton, D.C.)
Bill Barr (Shaw Pittman, D.C.)
Peter Ferrara (Shaw, Pittman, D.C.)
Morrie Leibman (Sidley & Austin, D.C¢)
Fred Fielding
Jonathan Rose

Ernest Gellhorn
Jim Liberman (Berlack Israels, NYC)
Mike Weinberger (NYC)
Jim Bopp (Utah)

Alabama (Heflin) (Jones)

Arizona (De Concini) (Randolph)

Arkansas (Bumpers, Pryor) (Lacovara)

Connecticut (Weicker) (Cutler)

Florida (Chiles, Graham) (Lacovara)

Georgia (Nunn, Fowler) (Cutler)

Illinois (Dixon) (Rose)

Louisiana (Johnston, Breaux) (?)

Maine (Cohen) (Fielding)

Minnesota (Cohen) (Fielding)

Mississippi (Stennis) (Randolph)

New Hampshire (Rudman) (Rose)

North Carolina (Sanford) (Lacovara)

Oklahoma (Boren) (Rose, Randolph, or Jones)

Oregon (Hatfield, Packwood) (Fielding)

Pennsylvania (Specter, Heinz) (Uhlman)

Rhode Island (Chafee) (Rose)

South Carolina (Hollings) (Rose)

Texas (Bentsen) (Jones)

Vermont (Stafford, Leahy) (Uhlman)

Washington (Evans) (Uhlman)

Wisconsin (Proxmire) (Cutler)

THE WHITE HOUSE

WASHINGTON

July 29, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.
JAY B. STEPHENS
C. CHRISTOPHER COX
PATRICIA MACK BRYAN
BENEDICT COHEN

FROM: PETER D. KEISLER PDK

SUBJECT: Justice Stevens

Attached is a copy of the transcript of the relevant portion of Justice Stevens' address to the Eighth Circuit Judicial Conference on July 17, 1987. The remarks about Judge Bork begin on page 22.

Attachment

THE WHITE HOUSE

WASHINGTON

July 29, 1987

MEMORANDUM FOR C. CHRISTOPHER COX
PATRICIA M. BRYAN
PETER D. KEISLER
LESLYE ARSHT

FROM: BENEDICT S. COHEN BSC

SUBJECT: Judge Bork's Environmental Record

Attached are press reports from the July 29, 1987 editions of the Washington Post and the New York Times concerning the unanimous en banc decision of the D.C. Circuit in Natural Resources Defense Council v. EPA. The decision, written by Judge Bork, held that the EPA could consider only health, not cost or technological feasibility, in determining safe exposure levels for toxic air pollutants. The decision reversed Judge Bork's earlier panel decision, which had allowed EPA to consider cost and technological factors in setting exposure levels. As the New York Times stated:

> Judge Bork's role in this case provides some support for two themes that he and his supporters in the looming confirmation battle over his nomination to the Supreme Court have stressed in seeking to rebut charges that he is a rigid conservative ideologue far from the mainstream of legal thought.
>
> The fact that he changed his position in the case after it was reheard by the entire 11-man court supports the view that he does not invariably prejudge issues on the basis of his overall philosophy and can keep an open mind.
>
> The fact that his opinion on an ideologically charged issue of great complexity and some importance was signed by all 10 other members of a court that is deeply divided between liberals and conservatives supports the view that he is capable of consensus-building, at least when he wants to be.

Attachments

THE WASHINGTON POST ... WEDNESDAY, JULY 29, 1987

Emission Rules Must Be Health-Based

By Nancy Lewis
Washington Post Staff Writer

The Environmental Protection Agency can only use health factors to determine safe emissions levels of toxic pollutants and cannot base decisions on how much it will cost an industry to meet them, as it does now, the U.S. Court of Appeals here ruled yesterday.

The 11-to-0 decision in a case challenging the EPA's standards for emissions of vinyl chloride, a cancer-causing gas used in the production of most plastics, is considered a victory for environmentalists and is expected to affect current or proposed emissions standards for at least three dozen hazardous pollutants, from chromium and cadmium to carbon tetrachloride.

The opinion also is a surprising reversal by Circuit Judge Robert H. Bork, whom President Reagan has nominated for the Supreme Court.

Last November, Bork wrote a strongly worded decision for a three-judge court panel that said the EPA could consider cost and technological feasibility in setting safety levels under the Clean Air Act of 1982. He also wrote an equally strong opinion yesterday that said it couldn't.

Bork's office said he would not comment on why he changed his mind.

Toxic pollutant safety levels "must be based solely upon the risk to health," Bork wrote for the full court in yesterday's decision. "The [EPA] administrator cannot under any circumstances consider the cost and technological feasibility at this stage of the analysis."

David D. Doniger of the Natural Resources Defense Council, which

See CHLORIDE, A11, Col. 4

CHLORIDE, From A1

brought the case, said the decision is only a partial victory because the judges ruled it might be possible to allow a "safe" level of emissions for non-threshold toxic pollutants—those for which any exposure is a risk. The NRDC had sought a complete ban on such emissions.

In addition, the court ruled that the EPA may consider cost and technological feasibility in setting the "margin of safety," which Congress mandated as a hedge in case scientific estimates of pollutants' hazards are wrong and they prove more dangerous than thought.

The NRDC had asked the court to rule that only health factors could be considered both in assessing safe emissions levels and in considering the margin of safety. Vinyl chloride has been shown to cause brain and liver cancer.

"We continue to believe that a person exposed to any level of a cancer-causing chemical is not safe," Doniger said.

"But the court has said that officials can no longer turn people's lives and health into ordinary commodities like wood or plastic" by using a cost-benefit analysis to determine safe levels of dangerous substances, Doniger said.

Doniger predicted that the ruling will result in tougher emissions standards for many toxic pollutants.

Chris Rice, an EPA spokesman, last night said it was too early to determine if the agency will appeal the ruling. Technically, the appeals court vacated the EPA's 1985 decision to withdraw amendments proposed in 1977 to the vinyl chloride emissions standards, Rice said.

The EPA now must decide whether it must supplement those amendments, Rice said. He said the law requires the agency to propose new standards in six months and finalize them in another six months, but noted that the agency has never met those deadlines.

The court's decision will also have an immediate impact on emissions levels proposed last month for coke ovens, used in steelmaking, Rice said. He did not know how long it might take to revise those standards.

The court did not suggest a specific method for EPA Administrator Lee M. Thomas to determine what is a safe level of emissions, saying only that it must be based on an "expert judgment" and may take into account "scientific uncertainty."

An attorney for the Vinyl Institute, a trade organization comprising major chemical companies including B.F. Goodrich, Occidental Petroleum and Dow Chemical, praised the decision, which he said embraced the approach to standard-setting that the group had espoused as an intervenor in the lawsuit.

Gary H. Baise, the Vinyl Institute's lawyer, said his group believes that even using the new criteria, the EPA "will affirm that the current levels of vinyl chloride emissions are not only safe but provide an ample margin of safety to protect the public health."

In the decision last November upholding the EPA's use of cost and technological capability in determining safe emissions levels, Bork seemed to favor the free-market approach. The EPA's method was not precluded by Congress, he said, and ensured that "costs do not become grossly disproportionate to the level of reduction achieved."

Yesterday Bork wrote that the EPA's current method is "contrary to clearly discernible congressional intent."

Court Tells E.P.A. to Change the Way It Sets Pollution Rules

By PHILIP SHABECOFF
Special to The New York Times

Judge Bork writes a decision holding that 'safe' air levels must be based on health considerations.

WASHINGTON, July 28 — In a decision written by Judge Robert H. Bork, a Federal appellate court here ruled today that the Environmental Protection Agency could consider only health, and not cost or technological feasibility, when determining what are safe levels of exposure to toxic air pollutants.

But the court also ruled that once that safe level was set, the agency could consider costs and other factors in determining how far the polluter must go in reduce the offending emissions.

The unanimous decision by the 11-member United States Court of Appeals for the District of Columbia ordered the E.P.A. to review its standard for emissions of vinyl chloride, a gas emitted in the manufacture of some plastics, because the standard was based on cost and technological feasibility. The gas has been shown to cause liver cancer in humans.

The decision emphasized that the environmental agency's determination of a safe level of air pollution that can cause cancer "must be based solely on the risk to health."

The court granted a petition by the Natural Resources Defense Council, a private environmental group, asking that the E.P.A. be required to review its decision that it would not issue new standards that would place more stringent restrictions on emissions of vinyl chloride. On this issue Judge Bork's decision was a reversal of the way he voted last year when the case was considered by a three-judge panel of the court.

But the decision would presumably apply to all toxic air pollution the agency is responsible for regulating under the Clean Air Act and would therefore put some limitations on its applying cost and benefit tests when deciding on anti-pollution regulations.

The decision today is based on a section of the Clean Air Act that requires the agency to protect the public from hazardous air pollutants, which are defined as those that may cause "an increase in mortality or an increase in serious irreversible or incapacitating reversible illiness." The environmental agency is required to adopt a standard that first determines the maximum amount of a pollutant beyond which these adverse health effects may take place and is then required to set an "ample margin of safety" below that level.

The agency has adopted the policy that the standards required by this section of the law can be met through the use of the "best available technology" that would reduce emissions to a point beyond which the costs would be "grossly disproportionate" to the benefits of lowering the risk to health.

Considerations of Health

Today the appeals court found that the Congressional mandate requires the Administrator of the E.P.A. to make an initial determination of what is "safe." It said this determination must be based exclusively "on the risk to health."

"Under this opinion, the E.P.A. has to be able to look people in the eye and tell them they are safe from a cancer-causing air pollutant," said David D. Doniger, a lawyer for the Natural Resources Defense Council. He said the decision would require the agency to change the way it has been setting standards, particularly under the Reagan Administration.

However, the court also ruled that, once the environmental agency has determined on health grounds alone what constitutes a safe level of exposure to a pollutant, it may use considerations of cost and technological feasibility to determine what is an "ample margin of safety" to establish beyond the safety level required by the law.

The court rejected the contention by the Natural Resources Defense Council that the environmental agency is required to bar any emissions of a cancer-causing chemical when there is scientific uncertainty about what constitutes a safe level of exposure.

The decision stated that the court was requiring a review of the vinyl chloride standard because the E.P.A. had not determined the health risks involved. But it added that the agency did not have to find that "safe" means "risk free." It also said that the finding of the court was "limited" in that it was not intended to bind the agency "to any specific method of determining what is safe" or what constitues an "ample margin."

Lawyers for the E.P.A. and for the vinyl chloride insititute, as well as Mr. Doniger of the natural resources group, said they were happy with the court decision.

The decision reverses, in part, a 2-to-1 decision reached by a three-member panel of the appeals court last November, which rejected the petition to have the environmental agency review its decision not to issue a more stringent standard on vinyl chloride. Judge Bork was one of the two judges to rule against the petition at the time.

Judge Bork's role in this case provides some support for two themes that he and his supporters in the looming confirmation battle over his nomination to the Supreme Court have stressed in seeking to rebut charges that he is a rigid conservative ideologue far from the mainstream of legal thought.

The fact that he changed his position in the case after it was reheard by the entire 11-man court supports the view that he does not invariably prejudge issues on the basis of his overall philosophy and can keep an open mind.

The fact that his opinion on an ideologically charged issue of great complexity and some importance was signed by all 10 other members of a court that is deeply divided between liberals and conservatives supports the view that he is capable of consensus-building, at least when he wants to be.

Chris - F41

THE WHITE HOUSE
WASHINGTON

Mr. Will:

I hope the attached is helpful to you.

I thought it best to focus principally upon Justices who served on the Court fairly recently, and who were objects of widespread respect. The two who most frequently took positions for which Judge Bork is being criticized today were Hugo Black and the second John Harlan.

I have included a variety of lengthy quotations, in order both to give you a feel for some of the nuances in their positions and to give you a selection from which to choose.

If I can be of any further assistance, on this or any other matter, please let me know.

Peter Keisler

Notable Jurists who Shared Judge Bork's Views on Controversial Issues

Criticism of Judge Bork's judicial philosophy has focused on two principal areas of law: privacy and civil rights. The impression has been conveyed that in these fields there is only one morally acceptable point of view, and that holders of contrary views are not fit for the bench. I have set forth below the names of some of those who have held contrary views.

I. Privacy

(a) In Griswold v. Connecticut (1965), the Supreme Court struck down a Connecticut state statute criminalizing the use of contraceptives. Justice Douglas, writing for the Court, found that the law violated a constitutional "right to privacy." Although no such right is expressly mentioned in the Constitution, he explained that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and that privacy was one such penumbra. The Court noted: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

In his 1971 Indiana Law Journal article, "Neutral Principles and Some First Amendment Problems," Professor Bork wrote that Griswold:

> is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in Griswold through principle.

This criticism was echoed 13 years later, when, in response to a constitutional challenge by a Navy petty officer discharged for homosexual conduct, Judge Bork surveyed the privacy case from Griswold on and found "no unifying principle."

Justice Hugo Black dissented in Griswold. The following are excerpts from his dissent:

> ...the law is every bit as offensive to me as it is to my Brethren...who, reciting reasons why it is offensive to them, hold it unconstitutional....

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not....

I like my privacy as well as the next one, but I am nevertheless compelled to admit that a government has a right to invade it unless prohibited by some specific constitutional provision....

[The majority is] claim[ing] for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive....

If these formulas based on "natural justice", or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body....

Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention....

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good enough for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. [This] formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought we had laid that formula, as a means for striking down state

legislation, to rest once and for all....

Justice Potter Stewart, calling the statute "an uncommonly silly law," wrote a separate dissent. He asked:

> What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

[Reference to Justice Stewart in this context may be of only limited use, since he later joined the majority in Roe v. Wade.]

Stanford Law Professor Gerald Gunther, who edits the leading law school casebook on constitutional law, has stated that Griswold:

> marked the return of the Court to the discredited notion of substantive due process. The theory was repudiated in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard.

(b) In Roe v. Wade (1973), the Court invalidated most of the existing state abortion laws. In 1981, testifying before a Senate subcommittee in opposition to the Human Life Bill, Professor Bork stated:

> I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority.

Dissenting in Roe, Justice Byron White -- the only member of the Court appointed by President Kennedy -- wrote:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right...and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes....As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagent exercise of the power of judicial review that the Constitution extends to this Court.

In The Role of the Supreme Court in American Government (1976), Archibald Cox wrote of Roe:

> How should such a case be decided? Justice Frankfurter, Judge Learned Hand, and the other apostles of judicial self-restraint would have no trouble upholding the constitutionality of the statutes....Justice Black would have reached the same conclusion....My criticism of Roe v. Wade is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical and social sciences. Nor can I articulate such a principle -- unless it be that the state cannot interfere with individual decisions relating to sex, procreation and family with only a moral or philosophical state justification -- a principle which I cannot accept or believe will be accepted by the American people.

There are many, many others who have registered their disagreeement with Roe. One in particular may deserve mention. In 1982, Senator Hatch introduced the Hatch Amendment, which would have overruled Roe. The Hatch Amendment was less sweeping than the other Human Life Amendments that have been proposed. Rather than forbidding abortion, the amendment would simply have vested Congress and the state legislatures with authority to decide the question. The first sentence of the proposed amendment read: "A right to abortion is not secured by this Constitution." It was approved by the Senate Judiciary Committee 10-7, with Senator Biden voting in favor. (That proposal never reached the Senate floor. When a similar amendment was reintroduced the next year, Senator Biden voted against it, both in Committee and on the floor.)

II. Civil Rights

(a) In Reynolds v. Sims (1964) and five companion cases, the Supreme Court established the one-man-one-vote rule: "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

In his 1971 Indiana Law Journal article, Professor Bork wrote: "The state legislative apportionment cases were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument."

Justice John Harlan dissented in Reynolds:

> The Court's constitutional discussion [is] remarkable [for] its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand. Stripped of aphorisms, the Court's argument boils down to the assertion that petitioners' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal"....The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

(b) Judge Bork's opponents frequently refer to his criticism of Harper v. Virginia Board of Elections (1966), which invalidated Virginia's $1.50 poll tax under the Equal Protection Clause on the ground that it was irrational. The Court held that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." Bork's opponents never elaborate upon their reasons for regarding Bork's views on this case as disqualifying. Rather, they rely on the general sense the listeners are likely to have that poll taxes are an antiquated vehicle for racial discrimination. In fact, there was never any evidence that the poll tax at issue in Harper was racially discriminatory, and the Court did not make that argument. As the excerpt quoted above makes clear, the problem for the Court was wealth discrimination, not race discrimination.

During his 1973 confirmation hearings to be Solicitor General, Bork was asked his position on Harper, and responded:

> I think I have previously indicated that that case, as an equal protection case, seemed to me wrongly decided. It might have been decided the same way, and now we are getting into areas of speculation and theory more appropriate to my role as a professor.
>
> It seems to me that a lot of those cases are really essentially republican form of government clause cases and maybe you can uphold that decision on a theory like that rather than on an equal protection theory.
>
> May I add, Senator, that was a case in which there was no evidence or claim of racial discrimination in

> the use of the poll tax. If there had been, of course, it would be properly an equal protection case and the result would have come out just the way it did.

Justice Black dissented, noting that the Court had rejected identical challenges twice before in 1937 and 1951, in cases in which he had participated. Black explained that the Court in Harper had overruled those cases "not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy." He continued:

> Although I join the Court in disliking the policy of the poll tax, this is not in my judgment a justifiable reason for holding this poll tax law unconstitutional. Such a holding on my part would, in my judgment, be an exercise of power which the Constitution does not confer upon me.
>
> Another reason for my dissent from the Court's judgment and opinion is that it seems to be using the old "natural-law-due-process forumula" to justify striking down state laws as violations of the Equal Protection Clause. I have heretofore had many occasions to express my strong belief that there is no constitutional support whatsoever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems....
>
> The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of a majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided.

Justice Harlan dissented as well:

> In substance the Court's analysis of the equal protection issue goes no further than to say that the

> electoral franchise is "precious" and "fundamental," and to conclude that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." These are of course captivating phrases, but they are wholly inadequate to satisfy the standard governing adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification? I think the answer to that question is undoubtedly "yes."
>
> Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one. Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed....
>
> [I]t is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to [the] advisability [of property qualifications]. Most of the early Colonies had them; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them....
>
> These viewpoints, to be sure, ring hollow on most contemporary ears....
>
> Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the laissez-faire theory of society. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.

Just fifteen years before the Court's decision in Harper, the Court, by a vote of 8-1, rejected an identical challenge to the same Virginia law (Butler v. Thompson). Thus, Chief Justice Vinson, and Justices Black, Reed, Frankfurter, Jackson, Burton,

Clark and Minton all agreed with Judge Bork's interpretation of the Constitution. Only Justice Douglas dissented.

In 1937, the Supreme Court unanimously rejected a constitutional challenge to Georgia's poll tax (Breedlove v. Suttles). Thus, Judge Bork's position was also that of Chief Justice Charles Evan Hughes and Justices McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, Cardozo and Black.

(c) Judge Bork was critical of the Court's decision in Board of Regents of the University of California v. Bakke (1978). He expressed his criticism in two 1978 articles, one published by the Wall Street Journal, the other appearing in Regulation. "We have at bottom a statement that the 14th Amendment allows some, but not too much, reverse discrimination. Yet that vision of the Constitution remains unexplained. Justified neither by the theory that the amendment is pro-black nor that it is colorblind, it must be seen as an uneasy compromise resting upon no constitutional footing of its own." (Bork, "The Unpersuasive Bakke Decision," Wall St. Journal) (It is important to be somewhat careful in characterizing Judge Bork's position on affirmative action. These articles were written before numerous subsequent Supreme Court decisions on this issue, decisions about which Robert Bork has not commented as judge or scholar.)

Four years before Bakke, in Defunis v. Odegaard, the Supreme Court faced a similar question, but dismissed the case as moot. (The white applicant had been ordered admitted to law school by the lower court; by the time the appeal reached the Supreme Court, he was about to graduate.) Justice Douglas dissented, arguing that the case should be heard and decided. He rejected what would later become Justice Powell's position in Bakke in the following terms: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." Thus, Justice Douglas concluded, "So far as race is concerned, any state-sponsored preference to one race over another in [the competition among races at all professional levels] is in my view 'invidious' and violative of the Equal Protection Clause."

Professor Scalia criticized Bakke as well. Addressing himself to Justice Powell's position that the goal of diversity in medical school could justify official racial preferences, Scalia wrote in the Washington University Law Quarterly: "If that is all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivialization of the Constitution."

Two years after Bakke. Justice Stewart dissented from the Court's decision in Fullilove v. Klutznick, in which a statutory 10% minority set-aside program was upheld. Justice Stewart wrote: "[U]nder our Constitution, the government may never act to the detriment of a person solely because of that person's race....The

rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority...."

(d) When we originally discussed this matter by telephone, you suggested I include the incorporation doctrine in this outline. I think the situation with respect to incorporation is too murky for it to serve as a good example for your column.

The traditional Court position was that only "fundamental" matters -- rights essential to "fundamental principles of liberty and justice," rights "essential to a fair trial" -- were constitutionally required in state proceedings. These broad formulations, which have their origins in late 19th century cases, have been most articulately elaborated in the 20th century by Justices Cardozo, Frankfurter and Harlan. Beginning in the post-World War II years, however, a forceful counterposition began to be voiced, especially by Justice Black. He insisted that the 14th amendment incorporated the specific guarantees of the Bill of Rights, and he objected to the vague, "natural law" forumulations of the majority.

The outcome of the incorporation battle is fairly well settled. As to doctrine, the majority has adhered to the "fundamental rights" approach and has never accepted Justice Black's notion of wholesale incorporation. In practice, however, virtually all of the procedural guarantees of the Bill of Rights have been incorporated into the 14th amendment, and the incorporated guarantees apply to the states in precisely the same way as to the federal government.

The modern political focus on incorporation was sparked by a few remarks made in a speech delivered by the Attorney General. It is not clear to me what the Attorney General meant to say when he criticized incorporation. Was he criticizing the Black approach, or the Cardozo-Frankfurter-Harlan approach? Does he believe that none of the guarantees of the Bill of Rights were incorporated, or that some were but not all? Judge Bork has never, to my knowledge, publicly expressed an opinion on this issue. Since neither a Meese position nor a Bork position has ever been fleshed out, it is difficult to say who in the past might have agreed with them.

It is true, however, that any nominee today who asserted that a constitutional provision previously held to have been incorporated ought not, in fact, to be applied to the states would have his head handed to him. In this regard, it may be worth a parenthetical to note that Justice Cardozo wrote an opinion for the Court in 1937 holding that the prohibition against double jeopardy did not apply to the states. This case was overruled in 1968.

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I was chatting last week with Gerhard Casper, who recently stepped down as Dean of the University of Chicago Law School. He is a strong friend and supporter of Judge Bork's, but he does not consider himself a conservative and went public last year in his opposition to the confirmation of Judge Manion. He remarked to me with some astonishment: "When I was a young professor, what Bob is saying now was orthodoxy. Some of us disagreed at the time, but we were a lonely minority. It is remarkable to see how things have changed." This was a private conversation, and should not, of course, be quoted in your column, but it does support the theme you discussed with me.

Those who oppose Judge Bork make no effort at consistency. On Monday, in justifying a new and controversial decision which represents a break with the past, we are told that the Constitution, like the society it governs, is organic, that it grows and evolves, and that we must not be bound by notions whose only power derives from their antiquity. On Tuesday, when others challenge Monday's decision and recommend its reconsideration, we are told that those others are attacking the Constitution, and deserve to be locked up, or at least shunned. For example, soon after Judge Bork's nomination to the Supreme Court was announced, Eleanor Smeal explained its implications on television in the following terms: "We are this close [she held her fingers very closely together] to amending the Constitution on abortion." (I can't vouch for the precise quote, but it is my best recollection.)

Moreover, the opposition's characterizations cannot withstand analysis. On the one hand, we are told that Judge Bork is an extremist, a radical, someone who is outside the community of accepted constitutional thought. On the other hand, we are told that Judge Bork's appointment to the Supreme Court could mean that settled law in areas such as civil rights, voting rights, church-state separation, free speech, and privacy will be undone "overnight." (Ralph Neas, Leadership Conference on Civil Rights) This can only be the case if there are four other equally extreme radicals sitting on the Court right now, just waiting to reach critical mass. But if that is so of half the current Court, then from what source can we derive that "mainstream position" from which Judge Bork is purportedly separated?