CHIEF JUSTICE PROFILE

In addition to the normal responsibilities of a Supreme Court justice, the Chief Justice obviously exercises a very important leadership role with respect to both the Supreme Court and the administration of lower federal courts. Accordingly, it is imperative that the Chief Justice has evinced a consistent and strong commitment to the President's view of the inherently limited role of the judiciary in our tripartite system of government, i.e., proper deference to the coordinate branches of government and states in their spheres and constitutional adjudication premised solely on its text and the Framers' intent, rather than the justice's personal view of benevolent social policy.

Beyond this, the Chief Justice needs a number of less tangible qualities to effectively perform this leadership function. He must possess extraordinary intellectual and legal skills (both practical and scholarly) to influence and command the respect of his fellow justices. He must have a clear philosophical vision of where he wants to take the law and the strategic and personal abilities to help move it in that direction.

Specifically, the most important prerogative of the Chief Justice is determining which justice will be assigned to write an opinion. This decision will profoundly influence the reasoning, dicta, and direction of the opinion in a manner that will significantly affect future development of the law. Thus, the Chief Justice must be familiar with the predilections of his colleagues, as well as being savvy and subtle enough to choose that justice who will produce the best product, without offending other justices. Moreover, the Chief must be adept at choosing the best cases for the Court to decide, avoiding cases with counter-productive factual or procedural histories and gauging the chances of commanding a majority of the Court in support of the "correct" position. The Chief Justice must also have the energy, and political, personal and intellectual talent, to form majorities and build a consensus among the justices on difficult legal issues. While these talents will be important for any justice, they are particularly valuable for the Chief since he leads the conference discussion of cases and is therefore in the best position to frame the legal issues and determine which way the Court is leaning. It will also be helpful, although far from essential, if the Chief Justice has an interest in and ability for administrative matters.

ROBERT H. BORK

Biographical Information

AGE: 59

BORN: March 1, 1927, Pittsburgh, Pennsylvania

COLLEGE: University of Chicago, B.A. 1950

LAW SCHOOL: University of Chicago, J.D., 1953

MILITARY: Marine Corps, 1945-46, Marine Corps Reserve 1950-52

PARTY: Republican

RELIGION: Not available

FAMILY: First wife died in 1980, remarried in 1982; three children.

RESIDENCE: Washington, D.C.

HEALTH: No negative indications

(See attached biographical materials.)

Judicial History

APPELLATE COURT: D.C. Circuit, appointed by President Reagan, 1982.

Professional Experience

Private practice in Washington, D.C., 1981-82.
Professor, Yale Law School, 1977-81, 1962-75, (on leave 1973-75).
Solicitor General, Department of Justice, 1973-77.
Acting Attorney General, Department of Justice, 1973-74.
Private practice Chicago, Illinois, 1955-62.
Private practice New York, New York, 1954-55.

General Considerations and Confirmability

Bork is usually described as brilliant, and a real intellectual powerhouse. Judge Bork, like Scalia, is recognized by all quarters to bear the "earmarks of excellence." Such kudos comes

from Democratic Senator Biden, who has noted that he voted to confirm conservative nominees such as Bork, Scalia and Posner. Bork has been considered the frontrunner for the next seat on the Supreme Court since the beginning of the first Reagan Administration. His star has dimmed somewhat with the addition of other conservative legal academics to the federal bench.

In any event, even liberals respect Bork's intellectual force. (See Legal Times, October 22, 1984, Tab A.) He is admired for his scholarship and the power of his writing. He is undeniably a leading thinker whose logic is said to be impeccable. On the bench, he has been well prepared and an active questioner. Instead of being arrogant, he has been responsive, evenhanded and respectful to all counsel. He is also supposed to be a tremendously warm human being and very witty.

The press accounts do not describe Judge Bork's health, but there are no indications that he has any difficulties in this regard. He remarried in 1982 after the death of his first wife, who had been ill for many years.

As a professor and practitioner, Bork was recognized as an outstanding antitrust and constitutional lawyer. (Some have said, however, that his interest in the D.C. Circuit's heavy dose of administrative law cases has appeared to drop off on occasion. For a while, he had a backlog in producing opinions. The backlog is now cleared up and Bork says he is not "bored.") Given his stature in the legal community, Bork's involvement in the "Saturday night massacre" is not likely to diminish his confirmation prospects significantly. A New York Times editorial (December 10, 1981) labeled Bork "a legal scholar of distinction and principle" who "given President Reagan's philosophy, [is a] natural choice for an important judicial vacancy." The Times declined to hold the Watergate firing against Bork. Bork also received the highest possible rating from the ABA in connection with his D.C. Circuit nomination.

Bork is also described as more likely to be confirmed by even a Democratic Senate because he is "much older and less radical than some of the other alternatives." (See States News Service, April 10, 1986.) He is thought to be about as liberal a nominee as the Democrats believe they will get from President Reagan and perhaps not as vigorous in his disdain for precedents. The media will also be kind to Bork because of his strong support for the First Amendment in a recent libel law decision, Ollman v. Evans and Novak. His opinion in that case argued essentially, for expanding the area of constitutionally protected "opinion." Some of these factors, of course, could suggest he would not be the most aggressive conservative who could be named to the Supreme Court.

If "separation of powers" is Judge Scalia's signature specialty, the doctrine of "original intent" would be Bork's. Bork is

viewed as the intellectual proponent, or "godfather," of the original intent school that has been strenuously advanced by Attorney General Meese. Simply stated, this doctrine holds that judges have no authority to add rights to those in the original document being construed, particularly the Constitution. Bork does not believe that judges' own preferences and personal values should be imported into their constitutional interpretations. (See Policy Review, Tab B.)

Bork has said that "where Constitutional materials do not clearly specify the value to be preferred, there is no principled way [for the Supreme Court] to prefer any claimed human value to another." According to his philosophy, judges should not make moral judgments. Rather, he has a strong faith in the moral sense of the electorate, and believes that it is the job of elected representatives to express those moral choices. Thus, he would contend that legislatures have the power and responsibility to decide social values regarding pornography, capital punishment, etc. Bork's credo is that "The liberty to make laws is what constitutes a free people."

Conversely, he believes that courts should not run school systems through the guise of enforcing civil rights laws. Bork has also criticized the extension of a so-called Constitutional "right of privacy." He has written opinions holding that homosexuals do not possess a special Constitutional right to privacy and the military is therefore free to expell them for engaging in homosexual acts in the barracks. In Senate testimony, Bork described the Roe v. Wade abortion decision as "an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."

Bork has written that insofar as the Constitution does not speak clearly on many issues, "deference to Democratic choice" means that courts should uphold the actions of the coordinate branches of government. In a famous law review article, "Neutral Principles and Some First Amendment Problems" (Tab C), Bork stated that judges "must accept any [social] value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution." Thus, "a court that makes rather than implements value choices cannot be squared with the presuppositions of a Democratic society." Bork has also said that courts focus too strongly on the rights of individuals and that communities should be allowed to enforce moral standards. He thinks judges should thus refrain from policy making and injecting their own morals from the bench. (See Washington Post, December 7, 1984, Tab D.)

In 1981, Bork criticized the Supreme Court for being "adrift and frequently performing not a Constitutional but a legislative function." In a recent speech, Bork says the Constitution does "not cover all possible or even all desirable liberties." However, although he thinks many Supreme Court decisions were

wrongly decided, especially in the area of privacy, he would not overrule all such decisions if he were on the Court. He has indicated that there are reasons not to break so dramatically with precedent. Bork received a perfect score on the scorecard prepared by the Conservative Center for Judicial Studies. (See National Journal, December 1984, Tab E.)

On the other hand, Bork has criticized legal scholars who urge judges to pursue a conservative brand of activism, striking down government regulation of business. He says that course recognizes "no law other than the will of the judge." While Bork opposes decisions of "the modern, activist, liberal Supreme Court" on such issues as abortion, school desegregation through busing, applying the First Amendment to "dancing in the nude", etc., he is opposed to bills that would strip federal courts of their jurisdiction to decide such cases.

He said, "What I object to is a court going beyond anything that was intended by the Constitution or by a statute. A judge's job is simply to enforce the will of the lawmaker as best the court can." He would thus defer to the policy choices of elected officials except where they conflict with the Constitution's language or reasonably unambiguous import.

Bork has been a conservative since his school days at the University of Chicago. Before that, he was a New Deal Democrat.

Positions on Critical Issues

Criminal Justice. Bork's views in this area are not especially prominent.

Federalism. Again, Bork is not particularly identified with the issue of states' rights. His views on the legislative prerogative to make policy choices, however, suggest that he would oppose efforts to strike down state laws on shaky Constitutional grounds. Furthermore, he believes that communities should be allowed to enforce moral standards. In the decision wherein he upheld the Navy's right to dismiss an officer for homosexual acts, Dronenburg v. Zech, Bork wrote:

> "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court."

He also indicated in Senate testimony before appointment to the D.C. Circuit that the Roe v. Wade decision trenched on states' rights.

Separation of Powers. Although Bork is not identified with this area to the same extent as Judge Scalia, their views appear to be congruent. He defers to the power of the executive in the area of foreign policy. Accordingly, he dissented from the D.C. Circuit's decision rejecting the government's power to deny visas to Communists. He criticized the majority's decision as a "judicial incursion into the United States's conduct of its foreign affairs."

He also dissented from the decision restricting the President's ability to exercise a "pocket veto." He said courts should refuse to "umpire" disputes between Congress and the President and found that the plaintiff members of Congress lacked standing. Courts threaten separation of powers by attempting to resolve such disputes. Courts would thus become an improper adjunct of the legislative process. The government adopted the rationale of Bork's dissent in its brief on certiorari.

Economic Matters. Bork was best known for his conservative, free market approach to antitrust law. His book, The Antitrust Paradox, became the Bible of the legal side of the Chicago School movement. He has praised the government's shift in antitrust policy under the Reagan Administration.

In a recent decision upholding the Nuclear Regulatory Commission's grant of a license for Diablo Canyon, Bork wrote that requiring the Commission to hold hearings on every circumstance that might conceivably affect emergency responses in a nuclear accident would permit opponents "to hold up licensing for many more years, and probably for a period long enough to make construction of nuclear power plants entirely economically infeasible."

Other Issues. In a recent decision under the Freedom of Information Act, Meeropol v. Meese, Bork held against the requests made by the sons of Julius and Ethel Rosenberg. He found that the government's file searches need only be "adequate" and not "perfect." He sided with the government because they had made sincere efforts to comply with the disclosure requirements.

Robert H. Bork

Circuit Judge
D.C. Circuit
U.S. Courthouse
Washington, D.C. 20001
(202) 535-3425
Appointed in 1982
by President Reagan

Born: 1927

Education Univ. of Chicago, B.A., 1948; J.D., 1953

Military Service U.S.M.C., 1945-46, U.S.M.C.R., 1950-52

Private Practice Wilkie, Owen, Farr, Gallagher & Walton, 1954-55; Kirkland, Ellis, Hodson, Chaffetz & Master, Chicago, 1955-62; partner, Kirkland & Ellis, Washington D.C., 1981-82

Government Positions Solicitor General, Department of Justice, 1973-77

Academic Positions Research associate, Law and Economics Project, Univ. of Chicago Law Sch., 1953-54; Yale Law Sch.: Associate Professor, 1962-65; Professor 1965-73; Chancellor Kent Professor of Law, 1977-79; Alexander M. Bickel Professor of Public Law, 1979-81

Professional Associations A.B.A.; Ill. Bar Assn.; D.C. Bar Assn.

Pro Bono Activities Trustee, Woodrow Wilson Int'l Center for Scholars

Other Activities Resident Scholar, American Enterprise Institute, Washington, D.C., 1977, adjunct scholar, 1977-82; Presidential Task Force on Antitrust, 1968; consultant, Cabinet Committee on Education

Publications
Book:
The Antitrust Paradox: A Policy at War With Itself (1978)
Article:
"Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 10 (1971)

Lawyers' Comments

Usually courteous, sometimes curt. Very smart; a conservative philosopher; generally highly regarded; writes well but somewhat slowly.

Additional comments: "The smartest there, but does not show off. Would be an exceptional Supreme Court member." "Bright, analytical, political, a good writer, but his biases are clear." "Tends to be a little short, perhaps abrasive at times. Has little patience for fools." "Sometimes appears bored. He is absorbed with intellectual questions that do not come up much on the D.C. Circuit." "Conservative activist. Potential membership on the Supreme Court affects his opinions." "Usually pleasant, an active questioner, evenhanded, but you know where he's coming from." "Doesn't overdo economic analysis." "Very good judge, gets a lot done, writes lots of opinions, is thoughtful, lucid, well regarded." "Labors over opinions." "Slow on opinions." "Has fun writing dissents." "Good writing style." "Wants to make points, goes deeply into issues no one raised. Overwrites. This impairs his productivity." "Very bright, sometimes arrogant." "Can get impatient." "Writes with an eye on the Supreme Court. Has a good batting average." "Brilliant, conservative, somewhat less personable that Scalia, much more personable than Posner." "Very good, at the top." "Definitely worth watching."

Miscellany

In his article, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1 (1971), Bork wrote: "Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy." Id at 10-11

A law review article described Bork as being "unwavering in his commitment to utilitarianism." He therefore "deplores any antimajoritarian adjudication not expressly authorized by the Constitution." R.L. West, "In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review," 18 Ga. L. Rev. 469, 475 (1984).

An article in Policy Review by Richard Vigilante stated that Bork is sometimes accused of moral skepticism but that he is innocent of the charge. Rather, the author asserts, Bork "has a strong faith in the moral sense of the electorate. What he forbids to courts, he endorses in legislatures because it is the job of the elected representatives 'to make value choices'." The article noted that Bork says judicial activism causes the "area of judicial power [to] continually grow and the area of democratic choice to continually contract." R. Vigilante, "Beyond the Burger Court: Four Supreme Court Candidates Who Could Head a Judicial Counterrevolution," Policy Rev., No. 28 (Spring 1984), at 22.

Lund (Sweden) University, LL.D., 1969; American University Law School, LL.D., 1981; Kent Scholar, Columbia Law School; Harvard Law Review; Columbia Law Review. American Bar Foundation board of directors and executive committee; Council on Foreign Relations; advisory board, Samuel Rubin Program for the Advancement of Liberty and Equality through Law at Columbia Law School; editorial board, Encyclopedia of the American Constitution.

Author "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976); "Women as Full Members of the Club: An Evolving American Ideal," 6 *Human Rights* 1 (Fall 1977); "Gender-Based Discrimination and the Equal Rights Amendment," 74 F.R.D. 298; "Let's Have ERA as a Signal," 63 *A.B.A. Journal* 70 (1977); "Realizing the Equality Principle, in Social Justice & Preferential Treatment," (Blackstone & Heslep eds. 1977); "Women, Equality, & The Bakke Case," 4 *Civil Liberties Review* No. 4, (November/December 1977); "Women, Men, and the Constitution: Key Supreme Court Rulings," *Women in the Courts;* "From No Rights, to Half Rights, To Confusing Rights," 7 *Human Rights* No. 1 (May 1978); "Sex Equality and the Constitution: The State of the Art," 4 *Women's Rights Law Reporter*, 143 "Equal Rights Amendment is the Way," 1 *Harvard Women's Law Journal* 19 (Spring 1978); "Sex Equality and the Constitution," 52 *Tulane Law Review* 451 (1978); "Some Thoughts on Benign Classification in the Context of Sex," 10 *Connecticut Law Review* 813 (Summer 1978); "Women at the Bar—A Generation of Change," 2 *University of Puget Sound Law Review*1 (Fall 1978); "Sexual Equality Under the Fourteenth and Equal Rights Amendments," *Washington University Law Quarterly* 161 (1979); "Judicial Authority to Repair Unconstitutional Legislation," 28 *Cleveland-Marshall Law Review* 301 (1980); "Gender in the Supreme Court: The 1976 Term," *Constitutional Government in America* (R. Collins ed. 1980); "Women's Right to Full Participation in Shaping Society's Course: An Evolving Constitutional Precept," *Toward the Second Decade* (B. Justice & R. Pore eds. 1981); "Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?," 15 *Georgia Law Review* 539 (1981).

Robert H. Bork United States Courthouse, 3rd & Constitution Avenue, N.W., Washingon, D.C. 20001. (202-535-3425). Orig. App't. Dt. 2-12-82.

Born Mar. 1, 1927 in Pittsburgh, Pennsylvania; married Claire Davidson (dec'd.); children Robert Heron, Charles E., Ellen E.; 1945-46, 50-52 USMCR.

University of Pittsburgh, 1944; University of Chicago, B.A., 1950, J.D., 1953; admitted to Illinois bar 1954.

1954-55 attorney Wilkie, Owen, Farr, Gallagher & Walton; 1955-62 associate, member Kirkland, Ellis, Hodson, Chafletz & Masters, Chicago, Illinois; 1962-65 associate professor Yale Law School, 1965-75 professor (on leave 1973-75); 1973-77 Solicitor General, U.S. Department of Justice, 1973-74 acting Attorney General; 1977-79 Chancellor Kent professor of law, 1979-81 Alexander M. Bickel professor of public law, Yale Law School; 1981-82 member Kirkland & Ellis, Washington; 1982-date Judge, U.S. Court of Appeals, District of Columbia Circuit appointed by President Reagan.

30TH STORY of Level 1 printed in FULL format.

Bork TAB A

October 22, 1984

SECTION: Pg. 1

LENGTH: 7406 words

HEADLINE: Loud and Clear, Bork Preaches Judicial Restraint

BYLINE: By Larry Lempert, Legal Tims Staff

BODY:

Establishing a constitutional right for a homosexual to stay in the Navy would be a tough case to make in many courts. But the attorneys for former officer James L. Uronenburg had an especially rocky road to travel as argument in their case began before a D.C. Circuit panel on Sept. 29, 1983.

In addition to a visiting district judge from California, the panel consisted of D.C. Circuit Judges Robert H. Bork and Antonin Scalia. Formerly, they were two of the academic community's leading voices for judicial restraint, and they were known on the bench for practicing what they used to preach. The panel's unanimous decision Aug. 17, 1984, in Dronenburg v. Zech, upholding the Navy in all respects, couldn't have been much of a surprise.

For Bork, the chance to write a precedent rejecting the constitutional privacy claim was a golden opportunity. His opinion marched through the Supreme Court's right-of-privacy cases, found them lacking in clear-cut principle, and concluded, "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court."

Dronenburg v. Zech and the 50 other opinions Bork has produced show what can be expected on the bench from a true, hard-core advocate of judicial restraint. One politically liberal lawyer called the Dronenburg opinion "an audition for a Supreme Court appointment" in light of Bork's lofty position on every prognosticator's guess-list (assuming, as most people expect, that a reelected Ronald Reagan will get the chance to fill a Supreme Court seat).

But that may be unfair: While his language and analysis were pure music to Reagan administration officials and supporters looking for voices of judicial restraint, Bork was doing no more than singing his usual tune. He sang it in academia and in the solicitor general's office (see box, this page), and it has come through loud and clear ever since he joined the U.C. Circuit on Feb. 12, 1982.

Impact of Appointments

Perhaps more than any recent president, Reagan has succeeded in naming judges with a pronounced philosophy about the role of courts in society. But the impact has not occurred at the Supreme Court level, where Reagan has had the chance to fill only one seat. And district court appointments are primarily the province of senators, who exercise the prerogative of initial selection according to longstanding practice.

Rather, Reagan has made his ideological mark on the federal appeals courts, which, after all, give serious consideration to thousands more cases than the Supreme Court does. Some of his best-known appointees -- Richard A. Posner (7th Circuit) in 1981 and Ralph K. Winter (2nd Circuit), Bork, and Scalia in 1982 -- had academic backgrounds and had enunciated their views clearly (see box, p. 15). The common denominator was not their views on such specific and sensitive issues as school prayer or abortion. While they had spoken up -- or in Posner's case, had shouted out -- for application of economic principles to legal decisionmaking, even that was not their primary attraction for Reagan's judicial talent scouts in the Justice Department.

Says Jonathan C. Rose, former head of the department's Office of Legal Policy now with Jones, Day, Reavis & Pogue in Washington, D.C., "The hallmark was their dedication to the principle of judicial restraint."

That principle has several important subsets, according to Bruce E. Fein, who until recently was Federal Communications Coinmission general counsel but who is also known as a Supreme Court analyst in touch with administration thinking. An advocate of judicial restraint, says Fein, avoids inferring social policies not clearly expressed by Congress in statutes, refuses to read in rights not mentioned or clearly inherent in the Constitution, closely guards access to the federal courts, and declines to second-guess administrative agencies in their areas of expertise.

Doing a Fine Job

If that is the job description for a Reagan judge, then Bork is doing one mighty fine job -- that much emerges easily from a reading of the 36 majority and 15 concurring or dissenting opinions written by Bork (see chart, pp. 12-14; citations for all cases discussed in this article appear in the chart). It is safe to say that a reelected Reagan would look for more judges who would go where Bork's opinions have gone.

The opinions are well-organized and precise. Although they impress more by force of argument than by style, they are quite literate. But above all, they are consistent. Like a straight, fast arrow, judicial restraint of the type described by Fein shoots through one opinion after the other -- provoking cries of dismay on occasion from the circuit's prominent judicial liberals.

Dissenting from Bork opinions most often -- or provoking Bork to raise dissenting views -- was Circuit Judge Harry T. Edwards, followed by Circuit Judge J. Skelly Wright. However, Bork is not always at odds with the D.C. Circuit's judicial liberals. Bork and Edwards sat togther on 17 appeals that produced a written opinion by one of them; their views could be categorized as being at odds in 11 of those cases but agreeing in the rest.

Also, in at least nine majority opinions, Bork was supported by various pairs of judges from the circuit's liberal wing. (That wing is generally seen as including, in addition to Wright and Edwards, Chief Judge Spottswood W. Robinson III, Circuit Judges Patricia M. Wald, Abner J. Mikva, and Ruth Bader Ginsburg, and Senior Judge David L. Bazelon.)

Access to the Courts

The visceral impulse of a judicial liberal is to open the courthouse door to a party alleging a serious grievance. Adherents of judicial restraint, in their gut, guard the same door suspiciously. These impulses do combat over issues framed as matters of standing or subject matter jurisdiction, or they arise in other contexts depending on the facts and the judges' approach.

One of the most dramatic reflections of Bork's position at the courthouse door is his concurring opinion in Tel-Oren v. Libyan Arab Republic. Talk about sympathetic plaintiffs: Survivors of a terrorist attack in Israel, invoking various treaties and international law, sued Libya, the Palestine Liberation Organization, and others. The case had to tread water for two years after oral argument before Bork, Edwards, and Senior Judge Roger Robb threw up their hands and issued three opinions in February 1984. Each affirmed dismissal of the action for different reasons.

For Bork, the suit had to fail because he could find no private cause of action under the treaties cited, under federal common or statutory law, or under international law itself. His opinion spoke at length about the inappropriateness of federal courts stepping into foreign relations -- the domain of the political branches of government -- without an express grant of a cause of action.

(Edwards spoke up generally for the authority of federal courts to adjudicate violations of international law, but said that it was too problematic to apply the law of nations to defendants that were not nations themselves. Robb believed that the case posed a nonjusticiable political question.)

A case with even more sympathetic plaintiffs -- as hard to believe as that may seem -- got similar treatment a month later. Bork ruled that a former hostage and his parents were barred by the Foreign Sovereign Immunities Act from suing for injuries arising from Iran's seizure of the U.S. hostages (Persinger v. Islamic Republic of Iran). Most of the opinion discussed his conclusion that Congress did not intend to give U.S. courts jurisdiction over suits against foreign states for torts committed on U.S. embassy premises abroad.

Plaintiffs Turned Away

Bork opinions shooed other plaintiffs out of court on a variety of grounds:

* Manufacturers of children's sleepwear injured by improper regulatory action banning the flame retardant Tris could not sue the Consumer Product Safety Commission or its commissioners. Bork could find no congressional intent in the Federal Tort Claims Act to allow damage actions as a way of policing agencies (Jayvee brand Inc. v. United States). However, Bork carried his colleagues in that case -- Edwards and Senior Judge J. Edward Lumbard (2nd Circuit) -- only in result.

* Employees had no standing to attack an interpretive bulletin of the Equal Employment Opportunity Commission, because the injury they alleged from age discrimination in pension plans was not traceable to the bulletin itself (Von Autock v. Smith).

* A minority shareholder, citing only the diminished value of his stock, lacked standing to pursue an injunctive action against management under the Securities and Exchange Commission's Rule 10b-5 (Cowin v. Bresler).

In several cases, although agreeing with his colleagues in result, Bork wrote separately to emphasize a narrower view of standing or jurisdiction. He argued that the Ethics in Government Act provided no cause of action for private parties eager to force the Justice Department to investigate the need for a special prosecutor (Nathan v. Smith). And he asserted twice that legislators' actions should be dismissed on standing grounds (Vander Jagt v. O'Neill, Crockett v. Reagan).

Bork succeeded at first in convincing two colleagues that a local government's notice-of-claim provision should be applied to bar a constitutional tort claim against a city and individual officials (McClam v. Barry), but that ruling was overruled in an en banc decision (Brown v. United States).

Only two opinions stand out as Bork precedents leaving a courthouse door open. In Cowin v. Bresler, the minority shareholder's case, Bork's opinion did allow standing to challenge proxy solicitations under § 14(a) of the Securities Exchange Act of 1934. And in Silverman v. Barry, a Bork opinion allowed a lower court to exercise civil rights and federal question jurisdiction over the claim of apartment owners that local government officials had unlawfully blocked condominium conversions.

Reading the Constitution

Constitutional interpretation, of course, is the arena in which an advocate of judicial restraint really shows his stuff. In that arena, someone like Bork is popularly known as a strict constructionist; some law professors prefer the term "interpretivist." Interpretivists do not insist on literal language to support a constitutional interpretation, but they insist -- as Bork wrote in a footnote to Dronenburg v. Zech, the case of the homosexual discharged by the Navy -- that "rights must be fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution."

As a circuit judge, Bork noted, he felt constrained to try to apply Supreme Court precedents acknowledging new constitutional rights. But in Dronenburg, after analyzing the Court's not-so-strict privacy precedents, Bork concluded that they were "not particularly helpful" because of the lack of a "general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme Court." And out the courthouse door went James L. Dronenburg: "Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by appellant," Bork said.

Arthur B. Spitzer of the American Civil Liberties Union in D.C., one of the lawyers who prepared an ACLU amicus brief supporting Dronenburg, says the opinion is unusual because of the extent to which "it criticizes the (Supreme Court) decisions themselves, implicitly if not explicitly." On occasion, lower court judges will say the Supreme Court was wrong, but "it's not commonly done so boldly," Spitzer says. A request for rehearing en banc is pending, he notes.

Earlier, Bork had addressed the question of creation of new rights in a vigorous dissent. He disagreed sharply that the Constitution established any right of a noncustodial parent to continue visiting his child; the visits in that case had been blocked because the mother and children had been relocated under the Justice Department's Witness Protection Program (Franz v. United States). The majority "innovates in creating a new fundamental right out of a

tradition that does not exist," Bork complained.

First Amendment Generosity

In contrast to his tight-fistedness when it comes to the creation of new rights, one opinion includes rather generous language about First Amendment rights. In McBride v. Merrell Dow and Pharmaceuticals Inc., Bork ruled that a libel claim stated a claim on which relief could be granted, but said, frankly, that the claim just barely made it.

"Libel suits, if not carefully handled, can threaten journalistic independence," he wrote. "Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. . . . [S]uits -- particularly those bordering on the frivolous -- should be controlled so as to minimize their adverse impact upon press freedom."

When it comes to procedural constitutional protections, Bork treads cautiously before acknowledging due process rights. He rejected, for example, a police officer's assertion of a "liberty interest" worthy of due process protection when the officer had been publicly criticized and transferred laterally (Mosrie v. Barry). And in a concurring opinion, he went out of his way to cut off at the pass any suggestion that the homeless have due process rights that can limit the closing of city shelters (Williams v. Barry).

Statutory Interpretation

In interpreting statutes, Bork looks hard for explicit directions from Congress. If the plain language does not reveal what Congress intended -- which, of course, is often a matter of debate -- he employs the usual tools of statutory and historical context and legislative history.

In particular, one principle of statutory constuction arises in his opinions with some regularity. It seems to be a corollary, with a Borkian twist, of the maxim that "legislators would not intend absurd consequences." The corollary might be called Bork's Rule of Extreme Consequences. The rule, drawn from at least five of his opinions, might provide: A legislature's failure to explicitly recognize far-reaching consequences must be taken as a sign that the interpretation leading to those consequences does not reflect the legislature's intent.

Bork applied this rule, for example, in the Iranian hostage case, Persinger v. Islamic Republic of Iran. One reason "for finding that sovereign immunity exists here is the series of unhappy consequences that would follow" if a private action against Iran were allowed, he said. He was careful to add, "We offer these considerations not as policies we choose but as throwing light on congressional intent."

Extreme Consequences

And in effect, he stated the rule of extreme consequences: "If Congress had meant to remove sovereign immunity for governments acting on their own territory with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country."

Bork's rule made an explicit appearance as well in Jayvee Brand Inc. v. United States, the attempted tort action against the CPSC. "Congress has provided elaborate mechanisms of judicial review so that rules adopted by improper procedures may be declared nullities," Bork wrote. "Nowhere, so far as we are aware, has Congress stated that, in addition, the affected parties could collect damages from the government.

Surely, so striking a mode of policing procedural regularity as the use of damage actions for millions or hundreds of millions of dollars would have been mentioned.." (The rule, or principles quite like it, also comes into play in the concurring or dissenting opinions in Nathan v. Smith, Planned Parenthood Federation of America Inc. v. Heckler, and Cosgrove v. Smith.)

Deference to Agencies

True to his frequently expressed concern for separation of powers, Bork shows considerable deference for the judgment of the other branches. That deference extends to agencies (and commissions and executive departments), and Bork upholds their decisions with striking regularity.

Reviews of agency action constitute a heavy proportion of the D.C. Circuit's caseload, so it is not surprising that Bork has had more cases of this type than any other. He has written at least majority opinions in which the main subject of the appeal was the action taken or interpretation rendered by an agency. The agency was upheld in all but two of those opinions. The Federal Communications Commission fared especially well; it went six for six.

Language invoking deference to agency expertise and experience appears frequently in Bork opinions, as do statutory interpretations finding that matters have been left to agency discretion. These two strains came together, for example, in McIlwain. v Hayes, in which the court upheld the authority of the Food and Drug Administration commissioner to extend -- for 20 years -- the 2 1/2-year deadline by which food color additives were to be proven safe, according to 1960 congressional amendments.

Dissenting judge Mikva complained bitterly that"the FDA has continued to kick the statutory scheme into perdition." The court, Mikva said, was putting its imprimatur on a regulatory "charade" that was "a pungent example of the administrative process at its worst."

But Bork saw it differently. "[There] is nothing in the legislative history that even remotely calls into question the existence of the powers given to the Commissioner by the unambiguous language of the statute," he said. The argument "that the Commissioner has abused his discretion is, in fact, fairly characterized as little more than nitpicking," he added.

The prosecutorial side of the executive branch also fared well before Bork. He sustained convictions in each of his three majority opinions on criminal law or procedure.

A Word of Support

If he sits on a panel that concludes an agency has erred, Bork has been known to add a word supportive of the agency in its hour of reversal. He did so in two Freedom of Information Act cases involving the Central Intelligence Agency,

dissenting in McGehee v. CIA and dissenting in part in Sims v. CIA. In both cases, he objected to aspersions cast in majority opinions by Edwards on the CIA's good faith.

In a similar vein, he tried to soften the blow when the D.C. Circuit smacked down regulations seeking to require notification of parents whose children sought contraceptives from family planning services (Planned Parenthood Federation of America Inc. v. Heckler). Although Bork agreed with much of the opinion, he dissented to argue that the regulations should be remanded for reconsideration by the Department of Health and Human Services, rather than blasted away entirely.

(In concurring opinions, Bork also spoke up to distance himself from criticism of the FCC in Office of Communication of the United Church of Christi v. FCC and of the National Labor Relations Board in Yellow Taxi Co. of Minneapolis v. NLRB).

Lawyers familiar with Bork's opinions see no suggestion that his general deference to agency decisions would alter if a more liberal administration were in power. Stephen A. Sharp, a former FCC general counsel now with the U.C. office of New York's Skadden, Arps, Slate, Meagher & Flom, says, "My opinion, frankly, is that we would see that deference even if he didn't like the outcome. I think the restraint is there."

Daniel J. Popeo of the Washington Legal Foundation, a law center supporting conservative causes, agrees -- but that doesn't alter his enthusiasm about Bork. "I'll be glad to take my chances knowing a judge is going to perform as a judge, not a politician," he says.

Getting Reversed

And what does an agency have to do to get reversed by Bork? The Federal Energy Regulation Commission had that distinction, by virtue of failing to follow its own rules for acting on requests for exemption from hydroelectric licensing requirements, and then calling that failure a "ministerial error" (International Paper Co. v. FERC).

The most significant reversal of an agency to date came in Oil, Chemical and Atomic Workers International Union v. American Cyanomid Co., in which several themes important to Bork come into conflict. The Occupational Safety and Health Administration went after a company whose "fetus protection policy" barred women of childbearing age from jobs exposing them to certain substances, unless the women chose to be sterilized. But Bork said, "The kind of 'hazard' complained of here [the company's policy] is not . . . sufficiently comparable to the hazards Congress had in mind" in passing the Occupational Safety and Health Act.

The opinion contains none of Bork's typical language about deference to an agency's interpretation of its statutory mandate. Rather, the decision turns on a different, quintessentially Borkian theme: reading a statute narrowly if the alternative calls for adopting "a broad principle of unforeseeable scope."

Role of the Courts

The American Cyanamid opinion is one of many in which Bork, taking on the tone of a prophet railing against evil, warns that judges must not

overreach.

Interference with the political branches is probably the cardinal sin, according to the prophet. In Williams v. Barry, the case on due process for the homeless, Bork emphasized in his concurring opinion that a city's decision to close shelters "is a wholly political one." Said Bork, "Given our legal tradition, the suggestion that there may be judicial imposition of procedures on, and review of, plainly political decisions is revolutionary. It ought to be recognized as such, lest judges grow accustomed to the suggestion that they may control any process and begin to assume powers that clearly are not theirs."

Bork's sense of courts' limitations infuses his treatment of the doctrine of standing. In his major discussion of standing to date, his concurrence in Vander Jagr v. O'Neill, he describes the importance of standing: "To make judicially cognizable all injuries that persons actually feel and can articulate would widen immeasurably, perhaps illimitably, the authority of the federal courts to govern the life of the society."

Limited Knowledge

Bork clearly believes that imposing judicial policy on society is wrong as a matter of principle, deriving that opposition from his reverence for the separation of powers doctrine per se. Moreover, he speaks on occasion of judges' limited knowledge. In Vander Jagt, the question was whether legislators could sue, complaining of discrimination by the House leadership in committee assignments. In his concurrence, Bork said that "there are more than considerations of comity and respect here, more than historical tradition and the constitutional need to retain limits on judicial power. There is the very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature so that they work better."

In the Bork world view, what judges lack most of all is the right to impose moral judgments. Although he agreed that the Health and Human Services parental notification regulations could not stand as they were, he did warn that the court should not "effectively make moral and prudential decisions that are properly left to those who are politically responsible."

Dronenburg v. Lech, too, rang with the Borkian command that moral assessments -- of homosexual conduct, in that case -- must be left to the legislature. But his opinion on American Cyanamid's fetus protection policy -- which left women workers to choose between sterilization and loss of their jobs -- perhaps best expresses his insistence that society address moral issues legislatively.

Said Bork, "These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy."

And he concluded in that case, "The women involved in this matter were put to a most unhappy choice. But no statute redresses all grievances, and we must decide cases according to law."

Opinions Written by Judge Bork of D.C. Circuit

Case Name n1	Citation or Docket No.	Date	Other Panel Members n2
Review of Agency and Administrative Board Action			
Richey Manor, Inc.	684 F.2d 130	7-30-82	Edwards

v. Schweiker			Bonsal (S.D.N.Y.)
Athens Community Hospital, Inc. v. Schweiker	686 F.2d 989	8-27-82	Robinson Larson (D. Minn.)
McIlwain v. Hayes	690 F.2d 1041	10-19-82	(Mikva) Jameson (D. Mont.)
McGehee v. Central Intelligence Agency (dissenting)	697 F.2d 1095	1-4-83	Wright Edwards
Devine v. White (concurring)	697 F.2d 421	1-7-83	Edwards Lumbard (2nd Cir.)
Office of Communication of the United Church of Christ v. Federal Communications Commission (concurring)	707 F.2d 1413	5-10-83	Wright Jameson (D. Mont.)
Loveday v. Federal Communications Commission*	707 F.2d 1443	5-10-83	MacKinnon Ginsburg
Sims v. Central Intelligence Agency** (concurring and dissenting)	709 F.2d 95	6-10-83	Edwards Fairchild (7th Cir.)
Planned Parenthood Federation of America, Inc. v. Heckler (concurring and dissenting)	712 F.2d 650	7-9-83	Wright Edwards
York v. Merit Systems Protection Board	711 F.2d 401	7-19-83	Wright (MacKinnon)
ICBC Corp. v. Federal Communications Commission	716 F.2d 926	9-2-83	Wald Scalia
Bellotti v. Nuclear Regulatory Commission	725 F.2d 1380	9-23-83	(Wright) Mackinnon
Black Citizens for a Fair Media v. Federal Communications Commission**	719 F.2d 407	10-7-83	(Wright) Jameson (D. Mont.)
Kansas State Network, Inc. v. Federal Communications Commission	720 F.2d 185	10-25-83	Wald Mikva
Yellow Taxi Co. of Minneapolis v. National Labor Relations Board (concurring)	721 F.2d 366	11-4-83	Wright MacKinnon
Ganadera Industrial, S.A. v. Block	727 F.2d 1156	2-17-84	Mikva Ginsburg
Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission	730 F.2d 816	3-30-84	Mikva Ginsburg
Midwestern Gas Transmission Co. v. Federal Energy	734 F.2d 828	5-11-84	Wald Edwards

Regulatory Commission			
Donovan	734 F.2d 1547	5-15-84	Wright
v. Carolina Stalite Co.			Edwards
Nathan	737 F.2d 1069	6-5-84	Edwards
v. Smith			Davis (Fed. Cir.)
(concurring)			
International Paper Co.	737 F.2d 1159	6-22-84	Mikva
v. Federal Energy Regulatory			Starr
Commission			
Amalgamated Clothing	736 F.2d 1559	6-22-84	Wright
and Textile Workers Union,			Mikva
AFL-CIO, CLC			
v. National Labor Relations			
Board (concurring)			
Oil, Chemical and Atomic	No. 81-1687	8-24-84	Scalia
Workers International Union			Williams (C.D. Calif.)
v American Cyanamid Co.			
Athens Community	No. 81-1807	8-28-84	Larson (D. Minn.)
Hospital, Inc.			
Schweiker			
P & R Temmer	No. 83-1657	9-4-84	Wald
v. Federal Communications			Starr
Commission			
National Treasury	No. 82-1206	9-11-84	Wald
Employees Union			Mikva
v. United States Merit			
Systems Protection Board			
Donovan	No. 83-1687	9-18-84	Edwards
v. Williams Enterprises, Inc.			Scalia
City of New York Municipal	No. 83-1663	9-21-84	Wright
Broadcasting System (WNYC)			Starr
v. Federal Communications			
Commission			
Civil Rights/Constitutional Rights			
McClam	697 F.2d 366	1-4-83	Mikva
v. Barry			Bazelon
Franz	712 F.2d 1428	5-10-83	Tamm
v. United States			Edwards
(concurring and dissenting)			
Williams	708 F.2d 789	6-3-83	Wright
v. Barry			Edwards
(concurring)			
Mosrie	718 F.2d 1151	10-7-83	Robinson
v. Barry			Ginsburg
Silverman	727 F.2d 1121	2-7-84	Wright
v. Barry			Mikva
Dronenburg	No. 82-2304	8-17-84	Scalia
v. Zech			Williams (C.D. Calif.)
Brown	No. 81-2083	9-4-84	Robinson, Wright,
v. United States			Wald, Mikva,
(dissenting)			Edwards, Ginsburg,
			Scalia (Tamm,
			Wilkey, Starr)
Criminal Law & Procedure			
United States	682 F.2d 1018	7-16-82	Robb

v. Harley			Gordon (W.D. Ky.)
Cosgrove	697 F.2d 1125	1-11-83	Mikva
v. Smith			Bonsal (S.D.N.Y.)
(concurring & dissenting)			
United States	701 F.2d 972	3-4-83	Scalia
v. Lewis			Bazelon
United States	720 F.2d 705	11-4-83	Wilkey
v. Garrett*			McGowan
Civil Procedure/Article III/Miscellaneous			
Vander Jagt	699 F.2d 1166	2-4-83	Gordon (W.D. Ky.)
v. O'Neill*			Robb
(concurring)			
Crowley	704 F.2d 1269	4-12-83	Wright
v. Schultz			Edwards
Lewis	716 F.2d 1398	8-30-83	Wilkey
v. Exxon Corp.			MacKinnon
Friends for All Children, Inc.	717 F.2d 602	9-9-83	Scalia
v. Lockheed Aircraft Corp.			Bazelon
McBride	717 F2.d 1460	9-27-83	Wright
v. Merrell Dow and			MacKinnon
Pharmaceuticals Inc.			
Von Aulock	720 F.2d 176	10-21-83	Tamm
v. Smith			Ginsburg
Jayvee Brand, Inc.	721 F.2d 385	11-15-83	Edwards
v. United States			Lumbard (2nd Cir.)
Crockett	720 F.2d 1355	11-18-83	Edwards
v. Reagan**			Lumbard (2nd Cir.)
(concurring)			
Tel-Oren	726 F.2d 774	2-3-84	Edwards
v. Libyan Arab Republic**			Robb
(concurring)			
Persinger	729 F.2d 835	3-13-84	(Edwards)
v. Islamic Republic of Iran*			Bazelon
Grano	733 F.2d 164	5-4-84	Wald
v. Barry			Starr
Cowin	No. 83-1597	8-7-84	Wright
v. Bresler			Wilkey

Case Name n1	Description of Result
Review of Agency and Administrative Board Action	
Richey Manor, Inc. v. Schweiker	Health and Human Services Department upheld, in opinion affirming Health Care Financing Administration's disallowance of Medicare reimbursement sought by health care provider
Athens Community Hospital, Inc. v. Schweiker	HHS upheld, in opinion approving of Provider Reimbursement Review Board's finding that it lacked juridiction over dispute involving time-barred claims (modified, No. 81-1807, 8-28-84).
McIlwain v. Hayes	Food and Drug Administration upheld, in opinion affirming FDA commissioner's authority to extend date by which food color additives had to be proven safe.
McGehee	Concurring in most of majority's ruling against

v. Central Intelligence Agency (dissenting)	CIA in Freedom of Information Act case, but dissenting from conclusion that agency showed bad faith in dealing with request for documents.
Devine v. White (concurring)	Concurring in opinion exercising judicial review of arbitrator's decision as sought by Office of Personnel Management and remanding for application of "harmful error" standard (concurring to emphasize conflict between congressional policies, with no guidance from Congress as how to resolve the dilemma).
Office of Communication of the United Church of Christ v. Federal Communications Commission (concurring)	Concurring in opinion upholding most of FCC's deregulation of radio industry, but declining to express view of the fact that deregulation was emanating from commission rather than Congress
Loveday V. Federal Communicatins Commission*	Fcc upheld, in opinion accepting agency's determination that stations adequately discharged any obligation to identify political advertising sponsors.
Sims v. Central Intelligence Agency ** (concurring and dissenting)	Concurring in part, but dissenting from view that agency's promise of confidentiality was insufficient to qualify an informant automatically as an intelligence source.
Planned Parenthood Federation of America, Inc. v. Heckler (concurring and dissenting)	Concurring inmuch of majority opinion criticizing HHS parental notification regulations (prescription of contraceptives to minors), but arguing for remand of regulations to HHS for reconsideration rather than striking down regulation outright.
York v. Merit Systems Protection Board	MSPB reversed, in opinion finding that board granted Office of Personnal Management Petition for reconsideration (and thereby upheld postal employee's dismissal) without making clear the statutory standard it used to determine when petitions for reconsideratin may be entertained.
ICBC Corp. v. Federal Communications Commission	FCC upheld, in opinion affirming agency's refusal to waive its rule designed to prevent AMradio interference.
Bellotti v. Nuclear Regulatory Commission	NRC upheld, in opinion affirming agency's refusal to allow state attorney general;'s intervention in enforcement proceedings.
Black Citizens for a Fair Media v. Federal Communications Commission**	FCC upheld, in opinion affirming its adoption of simplified radio and television license renewal applications.
Kansas State Network, Inc. v. Federal Communications Commission	FCC upheld, in opinion affirming agency denial o f certificate authorizing favorable tax treatment.
Yellow Taxi Co. of Minneapolis v. National Labor Relations	Concurring in opinion that contrary to holding of NLRB, taxi drivers were independent

Board (concurring)	contractors, not employees, but declining to join in criticism of agency's def iance of circuit court precedent.
Ganadera Industrial, S.A. v. Block	Department of Agriculture upheld, in opinion affirming its withdrawal of company's beef importing privilege.
Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission	FERC upheld, in opinion accepting commission's exclusion from rate base of utility's investment in canceled nuclear plant.
Midwestern Gas Transmission Co.V. Federal Energy Regulatory Commission	FERC upheld, in opinion affirming commission's approach to accounting for pipeline revenues from short-term transportation servics
Donovan v. Carolina Stalite Co.	Mine Safety and Health Administration upheld, in opinion overturning review commission's reversal of penalties (agency's broad definition of "mine" is entitled to deference and is supported by statute's text and history).
Nathan v. Smith (concurring)	Concurring in refusal to order attorney general to conduct preliminary investigation (to determine need for special prosecutor under Ethics in Government Act), but declining to reach merits on ground that act provides no private cause of action. (Panel agreed in result only; no majority opinion.)
International Paper Co. v. Federal Energy Regulatory Commission	FERC reversed, in opinion holding commission to its own fuel that exemption from hydroelectric licensing requirements is deemed granted if application is not acted on within 120 days (agency not excused by calling failure a "ministerial error").
Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC v. National Labor Relations Board (concurring)	Concurring in majority opinion deferring to NLRB's certification of union, but criticizing majority's "discussion of delay as an employer tactic" as being "superfluous and one-sided."
Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.	OSHA stance rejected, in opinion finding company's fetus protection policy was not a hazard cognizable under the Occupational Safety and Health Act (company policy barred women of childbearing age form jobs that would expose them to certain toxic substances unless they had been sterlized).
Athens Community Hospital, Inc. v. Schweiker	HHS upheld, in opinion on rehearing modifying 686 F.2d 989 but still approving of Provider Reimbursement Review Board'd finding that it lacked jurisdiction to hear claims not made in timely fashion.
P & R Temmer v. Federal Communications Commission	FCC upheld, in opinion affirming its revocations, based on failure to meet technological requirements, of authorizations to operate specialized mobile radio communications systems.

National Treasury Employees Union v. United States Merit Systems Protection Board	MSPB and OPM upheld, in opinion upholding validity of OPM regulation allowing seasonal employees to be laid off without adverse action protections of Civil Service Reform Act (Bork wrote one section of opinion; Wald wrote the rest).
Donovan v. Williams Enterprises, Inc.	OSHA upheld, in opinion affirming two citations for failure to comply with construction safety standards.
City of New York Municipal Broadcasting System (WNYC) V. Federal Communications Commission	FCC upheld, in opinion affirming commission's termination of a special exemption that had allowed nighttime broadcasts despite co-channel interference.
Civil Rights/ Constitutional Rights	
McClam v. Barry	Constitutional tort claims (42 U.S.C. § 1983 against local government and individual officials and police officers dismissed, based on application of local notice requirements and local limitations period (decision overruled by en banc decision, Brown v. United States, No. 81-2083, 9-4-84).
Franz v. United States (concurring and dissenting)	Concurring in conclusion that complaint should not have been dismissed (noncustodial parent complained of disruption of visitation rights caused by other parent's relocation under Justice Department Witness Protection Program), but dissenting from view that noncustodial parent has substantive constitutional right to visit children.
Williams v. Barry (concurring)	Concurring in holding that city's decision to close shelters for homeless required no more than notice and opportunity to comment, but rejecting any suggestion that homeless have due process rights that can limit such closings.
Mosrie v. Barry	Police officer's due process claims rejected (officer had asserted liberty interest impaired by lateral transfer and public criticism).
Silverman v. Barry	Court found to have civil rights and federal question jurisdiction over apartment owners' claim that local government unlawfully blocked condominium conversion.
Dronenburg v. Zech	navy discharge for homosexual conduct affirmed; private, consensual homosexual conduct is not constitutionally protected.
Brown v. United States (dissenting)	Dissenting from en banc overruling of McClam v. Barry, 697 F.2d 366, previous Bork opinion that had been applied and had resulted in dismissal of inmates' damages claim; disputing majority's refusal to apply D.C. six-month notice of claims requirement to constitutional tort claim.

Criminal Law & Procedure	
United States v. Harley	Conviction for drug distribution sustained in opinion disposing of evidence issues (prosecution refusal to reveal surveillance location; evidence necessary to show probable cause before grand jury).
Cosgrove v. Smith (concurring & dissenting)	Concurring in majority's rejection of one constitutional challenge to D.C. parole policy applying federal standards to D.C. Code offenders, but dissenting form majority's conclusion that need for further facts barred rejection of other statutory and equal protection challenges.
United States v. Lewis	Conviction for firearm possession sustained, in decision disposing of evidence issues (sufficiency of evidence; prejudicial questions on cross-examination).
United States v. Garrett*	Conviction for aiding and abetting transportation of minor in interstate commence for purpose of prohibited sexual conduct for commerical exploitation sustained, in decision disposing of Speedy Trial Act claims and determining elements of offense satisfied.
Civil Procedure/ Article III/Miscellaneous	
Vander Jagt v. O'Neill* (concurring)	Concurring only in result, arguing that lack of standing (not court's exercise of remedial discretion) required dismissal of legislators' complaint that House leadership discriminated against them in committee assignments.
Crowley v. Schultz	Attorney's fee award overturned in case challenging State Department personnel practices, based on interpretation of clause Back Pay Act limiting retroactive applicability.
Lewis v. Exxon Corp.	Termination of dealer franchise, based on felony conviction still on appeal, upheld under Petroleum Marketing Practices Act.
Friends for All Children, Inc. v. Lockheed Aircraft Corp.	Dismissal of air crash litigation on forum non conveniens grounds denied.
McBride v. Merrell Dow and Pharmaceuticals Inc.	Libel claim upon which relief could be granted just barely found.
Von Aulock v. Smith	Employes' challenge of Equal Employment Opportunity Commission interpretive bulletin denied, because employees lacked standing (injury was not traceable to bulletin, which they said authorized age discrimination in pension plans).
Jayvee Brand, Inc. v. United States	Manufacturers of children's sleepwear found to be barred by lack of jurisdiction from suing Consumer Product Safety Commision or individual commissioners for damages caused by regulatory

	action (improper ban of flame-retardent Tris did not give rise to cause of action under Federal Tort Claims Act, and individuals were entitled to absolute immunity).
Crockett v. ?Reagan** (concurring	Concurring in per curiam affirmance of district court's dismissal of challenge by members of Congress to U.S. presence in and military aid to El Salvador (emphasizing his view that plaintiffs lacked standing).
Tel-Oren v. Libyan Arab Republic** (Concurring)	Concurring in per curiam affirmance of dimissal, for lack of subject matter jurisdication, of action against Libya, the Palestine Liberation Organization Organization, and others brought by survivors of terrorist attack in Israel (no cause of action in U.S. courts under treaties or "the law of nations"). (Panel agreed in result only; no majority opinion.)
Persinger v. Islamic Republic of Iran*	Former hostage and parents found to be barred by Foreign Sovereign Immunities Act from suing for injuries arising from seizure of hostages.
Grano v. Barry	District court injunction affecting local affairs (demolition of historic tavern) overturned (injuntction barred issuance of demolition permit pending conclusion of procedures outlined in local referendum -- but federal law did not justify courts effort to ensure that state officials act inconformity with state law).
Cowin v. Bresler	Minority shareholder's attempts to gain redress for allegedly improper acts of management allowed in part, rejected in part. (Allegatins established elements of claim for court-appointed receiver; shareholder lacked standing to pursue Rule 10b-5 injunctive action based on diminished value of stock, but shareholder does have standing to challenge proxy solicitation under §14(a) of the Securities Exchange Act of 1934.)

Cases are organized by subject matter and listed chronologically within each subject category.
2. Parentheses indicate that the judge dissented from the majority ruling. Italics indicate that the judge wrote an opinion contrary to that written by Bork.

The other members of the D.C. Circuit bench are Chief Judge Spotswood W. Robinson III, J. Skelly Wright, Edward A. Tamm, Malcolm R. Wilkey, Patricia M. Wald, Abner J. Mikva, Harry T. Edwards, Ruth Bader Ginsburg, Antonin Scalia, Kenneth W. Starr, and Senior Judges David L. Bazelon, Carl McGowan, Roger Rob, and George E. MacKinnon.
Other Judges listed are from other courts, sitting by designation.
*Certiorari has been denied.
**Appeal is pending.

GRAPHIC: Illustration 1, no caption; Illustration 2, no caption, Illustration by Joseph Azar

Beyond the Burger Court Bork Tab B

Four Supreme Court Candidates Who Could Lead a Judicial Counterrevolution

Richard Vigilante

One of the most important issues at stake in the 1984 presidential election is the future of the Supreme Court. Five of the nine justices currently sitting—Harry Blackmun, William Brennan, Chief Justice Warren Burger, Thurgood Marshall, and Lewis Powell—are 75 or over, and not all are as healthy as Ronald Reagan. Whoever wins in November may well have the opportunity to appoint at least three and perhaps as many as five new justices. That President will therefore be able to determine the direction of the Supreme Court over the next 10 to 20 years.

Should Ronald Reagan or another conservative win the election, he will have an excellent opportunity to reverse the intellectual drift, the liberal interventionism, and the antireligious bias of the Warren and Burger courts. Opposition to "legal realism"—the belief that neutral interpretations of the Constitution are impossible and that judges must therefore impose a collage of sociological assertion and personal opinions on the Constitution—is more sophisticated than 20 years ago. An impressive battery of conservative legal minds in prominent law schools, on the federal circuit, and in state courts is preparing to challenge much of what the Court has wrought in the last 50 years.

A conservative victor in 1984's presidential election would have the chance to appoint one of the most intellectually powerful Supreme Courts in history. Should this happen, we could expect conservative judicial ideas to become suddenly fashionable in places where they are now ignored.

I recently asked prominent legal conservatives around the country what candidates they would recommend for the Supreme Court. They made clear that there are at least two dozen qualified conservatives whose appointments would raise the quality of the current Court.

John Marshall
Chief Justice of the Supreme Court, 1801–1835

What is needed, however, is not simply improvement but a judicial counterrevolution. And in conversations with conservative legal scholars and judges, four candidates keep coming up as having the intellectual stature and the fighting spirit to change the Court's direction despite the weight of judicial precedent. They are Robert Bork, Antonin Scalia, Richard Epstein, and William Bentley Ball.

Robert Bork

Judge Bork, now sitting on the U.S. Court of Appeals for the D.C. Circuit, the second most prestigious and powerful court in the country, former professor at the Yale law school, solicitor general under Presidents Nixon and Ford, has for so long been considered the obvious candidate for the next conservative appointment that he has been a "justice-in-waiting" for at least a decade. Liberal and conservative colleagues are united in recognition of his ability.

RICHARD VIGILANTE, *a Washington-based journalist, is executive producer of Victory Video.*

Mr. Bork is widely regarded as the most prominent and intellectually powerful advocate of "judicial restraint." He has long criticized the judiciary for interfering in policy and political questions by redrawing them as constitutional or procedural issues. Unless rights that are found in the Constitution by standard means of interpretation are violated, he argues, the courts should defer on matters of policy to democratic majorities in the states and in the political branches of the federal government.

In determining how it is proper for courts to intervene, he is an "interpretivist." Judges, in his view, should interpret the Constitution as they would a statute or any other legal document—by focusing on the meaning of the text and the history of its writing, without bringing in their own policy preferences and personal values. Thus, for example, he has publicly criticized the Supreme Court's use of the right to privacy—a right to be found nowhere in the Constitution—as the basis for overturning state prohibitions on abortion in its 1973 decision *Roe v. Wade*.

Mr. Bork's judicial interpretivism would restore to legislatures and the people such questions as whether and how pornography should be restricted. It would provide a coherent basis for sustaining state laws on capital punishment. It would keep the Court from imposing one man, one vote in reapportionment cases. It would keep the courts from running school systems, prisons, and mental hospitals under the guise of enforcing civil rights. It would uphold state legislation regulating the sale of contraceptives to minors or requiring that parents be notified when a minor seeks an abortion.

Mr. Bork says he was a New Deal liberal when he entered the University of Chicago law school in 1948. But at Chicago he was heavily influenced by Aaron Director, founder of the "law and economics" school of jurisprudence, which analyzes legal principles in terms of their economic efficiency, and by free-market economist George Stigler.

Mr. Bork applied the principles of economic efficiency and cost-benefit analysis to antitrust law, first as a partner in the Chicago law firm of Kirkland & Ellis, which he entered after law school, and then on the faculty of Yale law school, which he joined in 1962. In his book, *The Antitrust Paradox*, published in 1978, he argued that many antitrust policies, including some court decisions, have often been contradictory: Though designed to protect the consumer and promote competition, these antitrust policies have in practice often hurt consumers and discouraged competition by protecting inefficient enterprises.

At Yale, Mr. Bork became a close friend and colleague of Alexander Bickel, a moderate "legal realist" and in his day the dominant intellectual force on the Yale law faculty. Mr. Bickel saw the judge as scholar-king who would interpret the Constitution in the light of the lasting values of Western civilization: "The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets.

Robert Bork

The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition." While greatly admiring Mr. Bickel, Mr. Bork learned from him mostly by disagreeing. "The choice [by the Court] of fundamental values cannot be justified," Mr. Bork argued. "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way [for the Court] to prefer any claimed human value to any other."

Mr. Bork set forth the essence of his judicial philosophy in "Neutral Principles and Some First Amendment Problems," a now-classic article published in 1971. Always aggressive intellectually, he picked the most controversial possible ground on which to make his argument that judges should not impose their personal values on the Constitution: He argued that the freedom of speech provision of the First Amendment protects only "explicitly political speech." And he challenged the nearly sacrosanct writings of Justices Brandeis and Holmes that have been used to defend this century's expanded First Amendment protections. The Brandeis-Holmes arguments, Mr. Bork contended, weren't constitutional arguments at all but simply paeans to the worth of free discourse.

Mr. Bork could hardly have written anything better

calculated to infuriate the liberal judicial community. The article is still controversial today. Just recently, a headline in the American Bar Association *Journal*, summarizing an article in *The Nation*, compared Mr. Bork to Attila the Hun. He has been accused of being against free speech. He is not. And today he admits that the First Amendment covers a broader ground than "explicitly political" speech.

Some conservatives, too, have been worried by Mr. Bork's relentless disapproval of courts that make value judgments. He is sometimes accused of moral skepticism or relativism.

But Mr. Bork is entirely innocent of the charge. He is not a moral skeptic; instead, he has a strong faith in the moral sense of the electorate. What he forbids to courts, he endorses in legislatures because it is the job of the elected representatives "to make value choices . . . these are matters of morality, of judgment, of prudence. They belong, therefore, to the political community." And as for freedom of speech not protected by the First Amendment, it rests, "as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives."

Judicial activists would argue that Mr. Bork's "judicial restraint" would minimize constitutional protections. It would be more accurate to say that judicial restraint expands the number of questions open to discussion by citizens and their legislatures.

As Mr. Bork said in a recent address, judicial activism causes the "area of judicial power [to] continually grow and the area of democratic choice [to] continually contract . . . Activism . . . is said to be the means by which courts add to our constitutional freedom and never subtract from it. That is wrong. Among our constitutional freedoms or rights . . . is the power to govern ourselves democratically . . . G. K. Chesterton might have been addressing this very controversy when he wrote: 'What is the good of telling a community it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people.' "

Mr. Bork left Yale temporarily in 1973 to become solicitor general of the United States. In this role he is best remembered as the man who, at Richard Nixon's order, fired Watergate Special Prosecutor Archibald Cox after Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than do so. Even today it is rare for Mr. Bork to be mentioned in a newspaper story without being linked to the Cox firing.

It is a credit to Judge Bork's reputation for integrity and the respect he has among his peers that his perfectly correct explanation for his decision—Mr. Nixon had every legal right to fire Mr. Cox, and government could not function if legal orders were not carried out—has been widely accepted. Watergate came up at his confirmation hearings for his appointment to the D.C. Circuit in 1982 but provided little difficulty.

Judge Bork's reputation, his writing and public statements, and even his speaking style suggest that he would be an aggressive justice. He is intellectually aggressive—an imposing man to speak with. As a writer his inclination is toward sharpening rather than blunting points of possible disagreement. He would presumably be willing to reverse bad precedents.

Nevertheless, his brief career on the D.C. Circuit so far has been relatively quiet. From July 1982, when he wrote his first opinion, through March 1984 he had written about 30 majority opinions, somewhat fewer than might be expected. He dissents fairly often, but few of the cases have been controversial.

Judge Bork is 56. His first wife died in 1980, after an illness that lasted many years. He remarried in 1982. He has three children.

Antonin Scalia

Along with Mr. Bork, the most respected advocate of judicial restraint interpretivism is Judge Antonin Scalia, also of the D.C. Circuit and recently of the University of Chicago law school.

If Mr. Bork's emphasis is on democracy, Mr. Scalia's is on separation of powers. He would bring to the Court an acute sensitivity to the role of institutions and procedures in the preservation of liberty.

As Mr. Scalia would explain, the separation of powers is vital to the preservation of liberty because the different branches are suited to protecting different sorts of rights. The courts, in which there is no voting, no marshaling of forces, just one litigant against another, are uniquely well designed to protect the rights even of one man against the entire state. During that one man's day in court the entire power of the state will be focused on the resolution of his problem, the vindication of his rights. That solitary man with just one vote and no friends would get little help from a legislature.

For exactly the same reason, courts are no good at

Antonin Scalia

providing for the needs of majorities—organizing society, spending money, getting things done. The state's budget is determined not by disputing the rights of individuals but by resolving the differences of overlapping interest groups.

Let this scheme of not only separation but also specialization of powers break down and both sorts of decisions—those about individual rights and those about majority needs—will become increasingly arbitrary and government will become increasingly cruel.

Mr. Scalia's experience has been largely in administrative law, the rules that govern regulatory agencies. Graduating from Harvard law school in 1960, he joined a prestigious Cleveland law firm, taught at the University of Virginia law school, and in 1971 entered government, "just to see how the big monster works."

He had every opportunity to find out because he chose some of the most monstrous parts, laboring mostly in jobs where the issues involved were at best even more complex than they were dry. From 1971 through 1977 he was successively general counsel to the President's Office of Telecommunications Policy, chairman of the Administrative Conference of the United States, and assistant attorney general for the Office of Legal Counsel. He started teaching at the University of Chicago in 1977 but continued to dabble in government, serving as a consultant to the Federal Communications Commission and the Federal Trade Commission.

From 1977 until his appointment to the D.C. Circuit in mid-1982, he also served as editor of the American Enterprise Institute's scholarly but sprightly *Regulation* magazine. His editorials were marked not only by a coherence that made their subject matter accessible to any layman but also by a sharp sense of humor that was all the more welcome for being completely unexpected in a magazine that chronicled the doings of bureaucrats.

In a recent law review article, "The Doctrine of Standing as an Element of the Separation of Powers," Mr. Scalia drew on his vast experience in administrative law to give a full-bodied expression of his constitutional ideas. He argued that one of the primary purposes of the traditional rule of standing—which forbids lawsuits that do not allege a concrete injury—is to prevent courts from becoming legislatures of last resort.

Recently, however, courts have allowed increasingly broad interpretations of standing, consequently increasing their own "legislative authority." Mr. Scalia focused on one recent case under the liberalized doctrine of standing, the S.C.R.A.P. case, in which a group of Georgetown law students sued to stop the Interstate Commerce Commission (an administrative agency) from granting an increase in rail freight rates. They claimed standing on the basis of a dubious economic analysis purporting to show that higher freight rates would cause a drop in the use of recyclable goods and a correspondent increase in litter and pollution.

Stressing his separation of powers theme, Mr. Scalia argued that the Georgetown students' desire for less pollution was not an individual legal right of the sort the courts enforce but an interest shared by a majority of society. Similarly, a majority of society, including many of the same people, shares an interest in good railroads and thus perhaps in approving the rate increase. The conflicting interests of the majority are supposed to be balanced in the political process by the political branches.

Courts exist not to balance *majority* interests but to defend a short list of unassailable *minority* rights. By intervening in the students' behalf, the courts would be elevating one particular interest to the status of a right and making it uncontestable in the political process.

When that happens, Mr. Scalia says, almost inevitably the interests thus elevated are those the judges find worthy. "Where the courts do enforce . . . adherence to legislative policies that the political process itself would not enforce, they are likely . . . to be enforcing the prejudices of their own class. Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws . . . met with approval in the classrooms of Cambridge and New Haven, but not, I think, in the factories of Detroit and in the mines of West Virginia."

Everything about Mr. Scalia's first year and a half on the bench indicates that he would be not only a conservative justice but also an influential one.

Circuit court decisions are initially issued by three-judge panels, though they sometimes are reversed by the entire court voting *en banc*. No majority opinion filed by Mr. Scalia has ever been reversed *en banc*. But of the nine cases in which Mr. Scalia had written dissents as of December 1983, four had been accepted by the Supreme Court for review. That is an impressive record. One of those dissents was to the Community for Creative Non-Violence case, in which the D.C. Circuit decided that sleeping in a federal park was a form of speech and thus protected by the First Amendment.

Mr. Scalia is also one of the best writers on the federal bench, and history shows that a well-written opinion can have far more influence even than it deserves. In one recent case Mr. Scalia, responding to a colleague's vague references to the tradition of respect for individual rights, wrote: "But that tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong by thrusting the sharpest of our judicial lances heedlessly and in perilous directions." That sort of remark is calculated perfectly to embarrass and intimidate generations of judicial Don Quixotes.

Judge Scalia is 47. He and his wife have nine children, which may or may not be the reason his first involvement in politics was in a fight for tuition tax credits. He is a principled critic of racial goals and quotas on both constitutional and political grounds.

A Catholic, he is personally opposed to abortion. He would be the first Italian-American ever appointed to the Court.

Richard Epstein

"Judicial restraint" does have its conservative critics. Some conservative legal scholars think that there is a sound constitutional basis to overturn much restrictive economic regulation on the ground that economic liberties are entitled to protection similar to that afforded to freedom of speech and religion.

Richard Epstein

Perhaps the most impressive of these is Richard Epstein of the University of Chicago. Mr. Epstein is a brilliant young legal philosopher who would bring to the Court constitutional arguments for overruling many liberal restrictions on economic freedom, for restoring a concept of genuine justice to those areas of the law where justice has been supplanted by redistributionism, and for systematically defending individual rights as conservatives tend to understand them, including the rights of unborn children.

His appointment to the Court would accomplish a great deal precisely because he represents a different strand of conservative legal theory, a minority within a minority. Like the judicial restraint conservatives, he is an interpretivist who has a great deal of respect for the Constitution and believes in a close interpretation of it. He does not want to impose his own moderately libertarian views as an act of raw judicial power.

But he believes that the Constitution provides more direct guidance than judicial restraint conservatives. He is critical that economic regulation and other intrusions on individual rights get a free ride in the courts because liberal judicial realists like such legislation and conservative judicial restraint types don't have the heart to strike it down.

The key to Mr. Epstein is that he is a philosopher as much as a lawyer. As an undergraduate at Columbia, he was particularly influenced by the philosopher Ernest Nagel, whom he describes as a "tough, no-nonsense man." Professor Nagel believed that a philosopher's role was not to heap ridicule on common-sense beliefs but to find compelling philosophical arguments for ordinary beliefs and intuitions. That is an approach Mr. Epstein carries over into his legal scholarship. Thus, Mr. Epstein is comfortable with the ordinary meaning of justice—allowing each person to retain what is rightfully his. He rejects, as most ordinary people would, the equation by many modern legal theorists of justice with the equality of wealth or social status.

Though he considered becoming an academic philosopher, Mr. Epstein decided "the way to do philosophy was to go to law school, where a philosopher could depend on a constant infusion of new issues" on which to work. He studied law first at Oxford and then at Yale. He started teaching law at the University of Southern California in 1968 but in 1972 moved to the University of Chicago. Since 1981 he has been editor of the *Journal of Legal Studies*, which specializes in historical analysis of the common law as well as the descriptive and normative implications of modern economic theory.

His philosophical inclinations cause him to paint with a broader brush than the judicial restraint conservatives. The key to his approach is his belief in respecting "the theory of governance that inspired [the Constitution]."

Despite differences of detail among the Founders, that theory of governance, he would argue, rests comfortably on classical 18th-century liberalism. It thus has a great deal in common with the moderate libertarianism shared by most conservatives today.

The Founders were about the business of creating a commercial republic. As Mr. Epstein writes, they "came to the [constitutional] convention with a powerful presumption that trade and commerce was a social good, best fostered by institutions that restrained the use of force and stood behind private contractual arrangements."

Thus, much of Mr. Epstein's work is devoted to reinvigorating two mostly moribund clauses of the Constitution: the contracts clause—"no state shall . . . pass any . . . law impairing the obligation of contracts"; and the just compensation clause—"nor shall private property be taken for public use, without just compensation." These he reads as part of the Founders' attempt to guard the republic against the dangers of faction by limiting the power of government.

Mr. Epstein argues that a prime reason the Founders endorsed the principle of limited government was their fear that a too-powerful government might tempt factions to use the government to deprive men of their liberty and property. Give legislators too much power over property not their own and they may seek to dispose of "property of minority interests for personal gain," including reelection.

We see this evil in the present plague of interest-group politics, he maintains. Because we have given the government too much power over private property, we are encountering precisely the evils of faction that the Founders, in the *Federalist Papers*, argued the new Constitution

was designed to avoid. He argues that within close limits—and Mr. Epstein is a cautious analyst—the Court would be justified in reversing that trend and restoring the Founders' intent.

Citing the contracts and takings clauses, he has, for instance, broached the possibility that minimum wage laws and rent controls may be unconstitutional. Indeed, he thinks that the contracts clause places extensive limitation on the state power to restrict commercial agreements between consenting adults. He also believes that the government is limited in its ability to use the power of eminent domain to aid private business interests.

Mr. Epstein's full-bodied philosophical approach to the Constitution shows up in social issues as well. *Roe v. Wade* has been widely criticized, and Mr. Epstein joins in the criticism. But where much interpretivist scholarship has been devoted to debunking Justice Blackmun's assertion of a constitutional right to privacy, Mr. Epstein's criticism goes directly to the impropriety of deciding the case without considering the legitimate claims of the unborn child.

Mr. Epstein is 40 years old. He is married and has two children. He is probably too young to be on the administration's "short list," and his unusual views may keep him from having the sponsorship he would need to get appointed.

Nevertheless, appointing Mr. Epstein would accomplish a great deal. He is a brilliant advocate of a conservative view of the Constitution that is useful, more than respectable, and largely ignored. An Epstein appointment would not only produce an excellent justice, it would also give Mr. Epstein's ideas the status that only power can confer—a very useful thing for a conservative administration to do.

William Bentley Ball

Another leading conservative legal figure wary of judicial restraint is William Bentley Ball. Mr. Ball has become famous arguing free-exercise-of-religion cases before the Supreme Court, including the landmark *Wisconsin v. Yoder*, in which he successfully defended the rights of a group of Amish parents to keep their children out of state-accredited school systems, and the Bob Jones University case, in which he unsuccessfully argued that the college had a right to retain its tax exemption despite a religiously inspired rule against interracial dating among students. Though he was a *pro bono* lawyer for civil rights groups during the 1960s, Mr. Ball defended Bob Jones because he believes that the free-exercise clause of the First Amendment requires tax exemptions for religious institutions.

Like Mr. Epstein, Mr. Ball would bring to the Court an aggressive willingness to defend individual rights as many conservatives tend to define them. He would provide a powerful voice against the Court's antireligious bias, particularly its reading of the establishment clause of the First Amendment. He would also bring to the Court long experience as a litigator. He describes himself as "primarily an advocate." Colleagues call him brilliant. And he has spent decades devising practical legal strategies for defending liberty.

Mr. Ball has, in some ways, had an odd career. He has argued before the Supreme Court seven times and has been counsel for appellee or appellant in 20 cases considered for review by the Court—a remarkable record. But he is a graduate of Case Western Reserve University who got his law degree from Notre Dame, not—at least not in 1948—the conventional route to becoming one of the most important constitutional lawyers in the country.

After leaving Notre Dame, he went to New York and joined the legal staff of W. R. Grace, the multimillion-dollar firm founded by one of Notre Dame's greatest patrons. It was a good job but, especially in New York, did not carry the prestige of a place in a major law firm, where great legal careers are made.

After another corporate job with Pfizer Inc. he taught constitutional law on Villanova's first law faculty. In 1968 he founded his own firm, Ball & Skelly, in Harrisburg, Pennsylvania.

Today the firm has a grand total of six attorneys. Yet it is one of the most important constitutional law firms in the country and has done more in recent years to defend religious liberty than any other firm in America.

Long before he became famous for his free-exercise cases, Mr. Ball was involved in civil rights litigation. In 1967 he entered a brief on behalf of 25 Catholic bishops in *Loving v. Virginia*, where the Court for the first time

William Bentley Ball

struck down a state law against interracial marriage. He argued for the Court's eventual position, which denied "the constitutionality of measures which restrict the rights of citizens on account of race."

During the same period he served, typically *pro bono*, as counsel to the Pennsylvania Equal Rights Council, which was defending the civil rights of blacks. Of himself he says that he has always been primarily interested in "human rights and individual liberty."

There is no doubt that Mr. Ball is a conservative. "We are," he says, "drowning in government, greatly overtaxed and desperately in need of evenhanded justice to protect free citizens from unnecessary government intrusion."

He is critical of the Warren Court, saying that though "it did go to great lengths to protect some citizens, it would be nice if future Courts would consider the civil liberties even of those citizens who are not pornographers, subversives, or accused criminals."

But in that criticism there is some grudging respect. However erratic the Warren Court might have been, he will explain, willy-nilly it ended up finding ways to protect some rights that ought to have been protected. He is now deeply concerned that a new judicial conservatism will be narrow and niggardly where religious liberty is concerned. "Religious civil rights cases," he says, "must be treated with all the liberality accorded racial civil rights cases."

As in the 1960s, when he was arguing against racial discrimination, Mr. Ball is still wary of the judicial conservatives' tendency to defer to Congress or the states. In free-exercise cases the rights of religious schools often turn on the courts' attitude toward general state education statutes that do not specifically attack religious schools but dictate what they must do to meet educational standards.

This is a thorny area. All parties agree to the states' right to impose safety and health regulations and minimal curriculum standards—that is, required classes in English, math, and civics. But once that is admitted, can the states impose detailed and aggressive curriculum standards, licensing, and methodological standards?

Judicial restraint conservatives might overrule such detailed regulations, but they might not. Because of their justified wariness of turning political questions into constitutional ones, they would tend to ask whether the regulations were contrived to discriminate against religious schools, or whether they were impartially imposed on the entire state education system. In the latter case the judicial restraint conservatives *might* say that the regulations were legitimate exercises of the same authority by which the states impose mandatory education requirements.

Mr. Ball, on the other hand, and probably Mr. Epstein, would argue that detailed instructions to religious schools would be unconstitutional even if they were the same regulations imposed on state schools.

In voicing his fears about judicial restraint, Mr. Ball points to one of his recent cases, the Grace Brethren case, in which the Court refused to interfere with state imposition of unemployment taxes on nonchurch religious schools. The Court, with the concurrence of several relatively conservative justices, essentially decided to defer to the relevant state courts.

Mr. Ball is firmly antiabortion and was one of the attorneys for the 238 members of Congress who filed an *amicus* brief with the Supreme Court defending the Hyde Amendment's restriction against using Medicare funds to pay for abortions. One of his hopes for a new Court is that it would overrule *Roe v. Wade* as well as *Bob Jones*.

Mr. Ball is married and has one daughter. He is 67 years old, older than any other candidate recommended here. But he is a "daily five-miler" who, like President Reagan, does not look or act his age. He is extraordinarily well respected by his colleagues. His addition to the Court, like Mr. Epstein's, would significantly advance a conservative judicial point of view that is insufficiently noticed at present.

The appointments of Messrs. Bork and Scalia would do a great deal to persuade both the lower courts, and more importantly, the nation's prestige law schools, to take the Constitution more seriously. The more aggressive attitude of Messrs. Epstein and Ball would fill in some of the gaps left by the judicial restraint school and would quickly come to represent the point position in conservative jurisprudence. With Messrs. Epstein and Ball arguing for an aggressively conservative Court, judicial restraint suddenly becomes the moderate position.

Strategically, Messrs. Bork, Scalia, Epstein, and Ball would make a great combination. Add Justice Rehnquist's own powerful intellect and the five would together dominate one of the most distinguished Courts in American history.

Bork Tab C

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NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS*

ROBERT H. BORK†

A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.

The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots, an attempt to establish the necessity for theory and to take the argument of how constitutional doctrine should be evolved by courts a step or two farther. The first section centers upon the implications of Professor Wechsler's concept of "neutral principles," and the second attempts to apply those implications to some important and much-debated problems in the interpretation of the first amendment. The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.

THE SUPREME COURT AND THE DEMAND FOR PRINCIPLE

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form. The issue did not disappear along with the era of the Warren Court

* The text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harriss lecture series.

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majorities, however. It arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.

Our starting place, inevitably, is Professor Herbert Wechsler's argument that the Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle.[1] "A principled decision," according to Wechsler, "is one that rests on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[2]

Wechsler chose the term "neutral principles" to capsulate his argument, though he recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another. Wechsler asked for the neutral application of principles, which is a requirement, as Professor Louis L. Jaffe puts it, that the judge "sincerely believe in the principle upon which he purports to rest his decision." "The judge," says Jaffe, "must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish."[3] He must not, that is, decide lawlessly. But is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not, but to prove it we must rehearse fundamentals. This is familiar terrain but important and still debated.

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may for convenience, though perhaps not with total accuracy, call "Madisonian."[4]

A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical under-

1. H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 27 (1961) [hereinafter cited as WECHSLER].
2. *Id.*
3. L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 38 (1969).
4. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956).
5. *Id.* at 23-24.

pinnings of that assumption since it is a "given" in our society; nor need we worry that "majority" is a term of art meaning often no more than the shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so constituted is inevitable. In any case, one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Some see the model as containing an inherent, perhaps an insoluble, dilemma.[5] Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.

This argument is central to the issue of legitimate authority because the Supreme Court's power to govern rests upon popular acceptance of this model. Evidence that this is, in fact, the basis of the Court's power is to be gleaned everywhere in our culture. We need not canvass here such things as high school civics texts and newspaper commentary, for the most telling evidence may be found in the U.S. Reports. The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority

5. *Id.* at 23-24.

but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate. The root of its illegitimacy is that it opens a chasm between the reality of the Court's performance and the constitutional and popular assumptions that give it power.

I do not mean to rest the argument entirely upon the popular understanding of the Court's function. Even if society generally should ultimately perceive what the Court is in fact doing and, having seen, prove content to have major policies determined by the unguided discretion of judges rather than by elected representatives, a principled judge would, I believe, continue to consider himself bound by an obligation to the document and to the structure of government that it prescribes. At least he would be bound so long as any litigant existed who demanded such adherence of him. I do not understand how, on any other theory of judicial obligation, the Court could, as it does now, protect voting rights if a large majority of the relevant constituency were willing to see some groups or individuals deprived of such rights. But even if I am wrong in that, at the very least an honest judge would owe it to the body politic to cease invoking the authority of the Constitution and to make explicit the imposition of his own will, for only then would we know whether the society understood enough of what is taking place to be said to have consented.

Judge J. Skelly Wright, in an argument resting on different premises, has severely criticized the advocates of principle. He defends the value-choosing role of the Warren Court, setting that Court in opposition to something he refers to as the "scholarly tradition," which criticizes that Court for its lack of principle.[6] A perceptive reader, sensitive to nuance, may suspect that the Judge is rather out of sympathy with that tradition from such hints as his reference to "self-appointed scholastic mandarins."[7]

The "mandarins" of the academy anger the Judge because they engage in "haughty derision of the Court's powers of analysis and reason-

6. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) [hereinafter cited as Wright].
7. *Id.* at 777.

ing."[8] Yet, curiously enough, Judge Wright makes no attempt to refute the charge but rather seems to adopt the technique of confession and avoidance. He seems to be arguing that a Court engaged in choosing fundamental values for society cannot be expected to produce principled decisions at the same time. Decisions first, principles later. One wonders, however, how the Court or the rest of us are to know that the decisions are correct or what they portend for the future if they are not accompained by the principles that explain and justify them. And it would not be amiss to point out that quite often the principles required of the Warren Court's decisions never did put in an appearance. But Judge Wright's main point appears to be that value choice is the most important function of the Supreme Court, so that if we must take one or the other, and apparently we must, we should prefer a process of selecting values to one of constructing and articulating principles. His argument, I believe, boils down to a syllogism. I. The Supreme Court should "protect our constitutional rights and liberties." II. The Supreme Court must "make fundamental value choices" in order to "protect our constitutional rights and liberties." III. Therefore, the Supreme Court should "make fundamental value choices."[9]

The argument displays an all too common confusion. If we have constitutional rights and liberties already, rights and liberties specified by the Constitution,[10] the Court need make no fundamental value choices in order to protect them, and it certainly need not have difficulty enunciating

8. *Id.* at 777-78.

9. This syllogism is implicit in much of Judge Wright's argument. *E.g.*, "If it is proper for the Court to make fundamental value choices to protect our constitutional rights and liberties, then it is self-defeating to say that if the Justices cannot come up with a perfectly reasoned and perfectly general opinion *now*, then they should abstain from decision altogether." *Id.* at 779. The first clause is the important one for present purposes; the others merely caricature the position of commentators who ask for principle.

10. A position Judge Wright also seems to take at times. "Constitutional choices are in fact different from ordinary decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution." *Id.* at 784. One wonders how the Judge squares this with his insistence upon the propriety of the judiciary making "fundamental value choices." One also wonders what degree of specificity is required before the framers may realistically be said to have made the "most important value choices." The Warren Court has chosen to expand the fourteenth amendment's theme of equality in ways certainly not foreseen by the framers of that provision. A prior Court expanded the amendment's theme of liberty. Are both Courts to be judged innocent of having made the most important value choices on the ground that the framers mentioned both liberty and equality? If so, the framers must be held to have delegated an almost complete power to govern to the Supreme Court, and it is untrue to say that a constitutional decision is any different from an ordinary governmental decision. Judge Wright simply never faces up to the problem he purports to address: how free is the Court to choose values that will override the values chosen by elected representatives?

principles. If, on the other hand, "constitutional rights and liberties" are not in some real sense specified by the Constitution but are the rights and liberties the Court chooses, on the basis of its own values, to give to us, then the conclusion was contained entirely in the major premise, and the Judge's syllogism is no more than an assertion of what it purported to prove.

If I am correct so far, no argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat.

Such a man occupies an impossible philosophic position. What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can. In his view the Court has no legitimacy, and there is no reason any of us should obey it. And, this being the case, the advocate of a value-choosing Court must answer another difficult question. Why should the Court, a committee of nine lawyers, be the sole agent of change? The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution. If the Court will not listen, why not argue the case to some other group, say the Joint Chiefs of Staff, a body with rather better means for implementing its decisions?

We are driven to the conclusion that a legitimate Court must be controlled by principles exterior to the will of the Justices. As my colleague, Professor Alexander Bickel, puts it, "The process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function . . . ."[11] Recognition of the need for principle is only the first step, but once that step is taken much more follows. Logic has a life of its own, and devotion to principle requires that we follow where logic leads.

Professor Bickel identifies Justice Frankfurter as the leading judicial proponent of principle but concedes that even Frankfurther never found a "rigorous general accord between judicial supremacy and democratic

11. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 96 (1970).

theory."[12] Judge Wright responds, "The leading commentators of the scholarly tradition have tried ever since to succeed where the Justice failed."[13] As Judge Wright quite accurately suggests, the commentators have so far had no better luck than the Justice.

On reason, I think, is clear. We have not carried the idea of neutrality far enough. We have been talking about neutrality in the *application* of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles.

It is easy enough to meet the requirement of neutral application by stating a principle so narrowly that no embarrassment need arise in applying it to all cases it subsumes, a tactic often urged by proponents of "judicial restraint." But that solves very little. It cerainly does not protect the judge from the intrusion of his own values. The problem may be illustrated by *Griswold v. Connecticut*,[14] in many ways a typical decision of the Warren Court. *Griswold* struck down Connecticut's statute making it a crime, even for married couples, to use contraceptive devices. If we take the principle of the decision to be a statement that government may not interfere with any acts done in private, we need not even ask about the principle's dubious origin for we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor. We can gain the possibility of neutral application by reframing the principle as a statement that government may not prohibit the use of contraceptives by married couples, but that is not enough. The question of neutral definition arises: Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? The question of neutral derivation also arises: What justifies any limitation upon legislatures in this area? What is the origin of any principle one may state?

To put the matter another way, if a neutral judge must demonstrate why principle X applies to cases A and B but not to case C (which is, I believe, the requirement laid down by Professors Wechsler and Jaffe), he must, by the same token, also explain why the principle is defined as X rather than as X *minus*, which would cover A but not cases B and C, or as X *plus*, which would cover all cases, A, B and C. Similarly, he must

12. *Id.* at 34.
13. Wright, *supra* note 6, at 775.
14. 381 U.S. 479 (1965).

explain why *X* is a proper principle of limitation on majority power at all. Why should he not choose *non-X*? If he may not choose lawlessly between cases in applying principle *X*, he may certainly not choose lawlessly in defining *X* or in choosing *X*, for principles are after all only organizations of cases into groups. To choose the principle and define it is to decide the cases.

It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. The case just mentioned illustrates the point. The *Griswold* decision has been acclaimed by legal scholars as a major advance in constitutional law, a salutary demonstration of the Court's ability to protect fundamental human values. I regret to have to disagree, and my regret is all the more sincere because I once took the same position and did so in print.[15] In extenuation I can only say that at the time I thought, quite erroneously, that new basic rights could be derived logically by finding and extrapolating a more general principle of individual autonomy underlying the particular guarantees of the Bill of Rights.

The Court's *Griswold* opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle. Justice Douglas, to whose opinion I must confine myself, began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[16] Nothing is exceptional there. In the case Justice Douglas cited, *NAACP v. Alabama*,[17] the State was held unable to force disclosure of membership lists because of the chilling effect upon the rights of assembly and political action of the NAACP's members. The penumbra was created solely to preserve a value central to the first amendment, applied in this case through the fourteenth amendment. It had no life of its own as a right independent of the value specified by the first amendment.

But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment's penumbra a protection of "privacy" and

15. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec., 1968, at 170.
16. 381 U.S. at 484.
17. 357 U.S. 449 (1958).

then asserted that other amendments create "zones of privacy."[18] He had no better reason to use the word "privacy" than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones—from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth—covered the case before him. One more leap was required. Justice Douglas asserted that these various "zones of privacy" created an independent right of privacy,[19] a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.

The *Griswold* opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids. Derivation and definition are interrelated here. Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labelled "zones of freedom." If we follow Justice Douglas in his next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society.

Griswold, then, 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. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

In *Griswold* a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowl-

18. 381 U.S. at 484.
19. *Id.* at 485, 486.

edge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

The electrical company asserts that it wishes to produce electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulation impairs his and the company's stockholders' economic gratifications. The State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority's physical and aesthetic gratifications.

Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases. It is clear that the Court cannot make the necessary distinction. There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another.[20] Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy. The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcemment of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the "Equal Gratification Clause." The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature

20. The impossibility is related to that of making interpersonal comparisons of utilities. *See* L. ROBBINS, THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE, ch. 4 (2d ed. 1969); P. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 243-52 (1965).