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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. paper	re Justice Sandra Day O'Connor (p. 2, partial)	n.d.	~~P5, P6~~ B6
2. paper	re Robert Bork (p. 2, partial)	n.d.	~~P5, P6~~
3. paper	re Patrick Higginbotham (1 pp., partial)	n.d.	~~P5, P6~~ B6
4. paper	re Anthony Kennedy (1 pp., partial)	n.d.	~~P5, P6.~~ B6
5. paper	re Ralph Winter (p. 1, partial)	n.d.	~~P5, P6~~ B6 CCS 1/3/01

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
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- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
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- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
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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.

JUSTICE SANDRA DAY O'CONNOR

Justice O'Connor has generally, although not uniformly, followed the path of judicial restraint and sound constitutional interpretation. For example, with rare exceptions, she has joined or authored opinions that made it easier for criminal trials to perform their function of determining guilt or innocence and those that have furthered the principles of federalism and separation of powers. See, e.g., United States v. Leon, 104 S. Ct. 3405 (1984) (good faith exception to the exclusionary rule); Garcia v. San Antonio Transp. Co., 105 S. Ct. 1005 (1985) (dissented from overruling National League of Cities v. Usery); INS v. Chadha, 462 U.S. 919 (1983) (joined opinion overruling legislative veto); Pennhurst v. Halderman, 465 U.S. 89 (1984) (Pennhurst II) (Eleventh Amendment prohibits federal courts from enforcing state law against state governments).

A number of her decisions, however, have created serious concerns about the depth and consistency of her commitment to principles of judicial restraint and fundamental constitutional values. Her most glaring weakness has been in the religion cases, where she has consistently taken the indefensible position that legitimate efforts to accommodate religion or to enact purely secular programs that incidentially benefit religious organizations violate the Establishment Clause of the First Amendment. She has thus voted to strike down educational programs that benefit private religious and nonreligious schools, state enactments requiring a moment of silence in public schools, laws requiring employers to excuse employees from working on their Sabbath and a municipal ordinance allowing churches to prevent the granting of a liquor license to nearby establishments. See Grand Rapids Sch. Dist. v. Ball, 105 S. Ct. 3216 (1985); Wallace v. Jaffree 105 S. Ct. 2479 (1985); Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985); Larkin v. Grendel's Den, 459 U.S. 116 (1982). Moreover, she has substantially expanded the effect of New York Times v. Sullivan, 376 U.S. 254 (1964), by authoring a 5-4 opinion which invalidated, on First Amendment grounds, a state law that required defendants in libel suits to prove that defamatory allegations were true. Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986). She also joined in the Batson v. Kentucky (April 30, 1986) decision which overturned Swain v. Alabama, 380 U.S. 202 (1965), and established the rule that disproportionate exclusion of jurors sharing the criminal defendant's race through peremptory challenges, even in a single trial, creates a prima facie constitutional violation. This result will further delay criminal trials, completely divert them from their purpose of adjudicating guilt or innocence and place prosecutors in the impossible position of articulating with precision a nonracial reason for using a peremptory challenge against a juror.

Although her record in the criminal area is generally good, she has also taken occasional missteps here as well. See

Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) (vacating death sentence because the prosecutor informed the jury that the death penalty would be reviewed, and possibly reversed, by the state supreme court); New York v. Quarles, 467 U.S. 649 (1984); (dissenting in part from Rehnquist opinion creating a public safety exception for the Miranda decision). In civil rights, her record is similarly good but she has demonstrated a troublesome propensity to file concurring opinions seeking to dilute the force of opinions condemning racially preferential quotas. See Memphis Firefighters v. Stotts, 52 U.S.L.W. 4767 (U.S. June 12, 1984), (O'Connor, J. concurring). In Wygant v. Jackson Board of Education, (May 19, 1986), her concurring opinion undercut the plurality opinion's condemnation of racial quotas and evinced acceptance of such racial discrimination even absent tangible findings of past discrimination. This concurrence demonstrates an error in strategic judgment as well because it attempts to create a "consensus" among the various justices where there clearly was not one. Such "diplomatic" efforts are inevitably doomed to failure and simply provide the dissenters with further ammunition in future cases. Further, in the Bob Jones case, she ignored clear congressional intent by creating, out of whole cloth, a "public policy" exception for granting tax exempt status, a failure which admittedly was shared by all her colleagues except Rehnquist. (Rehnquist also disagreed with every decision by her criticized above.) Finally, we are reliably informed that she believes gender classifications should be judged by the same "strict scrutiny" given to racial classifications under the Constitution, which would esentially create an Equal Rights Amendment through judicial fiat.

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JUSTICE WILLIAM REHNQUIST

Before and during his tenure on the Supreme Court, Justice Rehnquist has established himself as the paridagmatic example of a jurist committed to principles of judicial restraint in all of its contexts. In all areas of constitutional law -- e.g., criminal procedure, due process, civil rights, freedom of press and religion -- Rehnquist's jurisprudence has been scrupulously premised on the principles of federalism and separation of powers and he has resisted any attempt to engage in unwarranted judicial evisceration of traditional values or democratic choices through the invention of "rights" discerned in "penumbras" emanating from a "living" Constitution.

Most notably, Rehnquist pioneered the rehabilitation of federalism principles by his landmark decision in National League of Cities v. Usery, 426 U.S. 833 (1976), which revived, albeit temporarily, the presumed - dead Tenth Amendment as an affirmative safeguard against federal encroachment into the states' sovereign prerogatives. See also Rizzo v. Goode, 423 U.S. 362 (1976) (federal courts are prohibited from entering injunctions against local governments absent clear evidence of a continuing pattern or practice of unlawful activity); Pennhurst v. Halderman, 451 U.S. 1 (1981) (Pennhurst I) (congressional statutes imposed on states pursuant to the spending power must be narrowly construed to avoid infringement of state prerogatives); Pennhurst v. Halderman, 465 U.S. 89 (1984), (Pennhurst II) (Eleventh Amendment prohibits federal courts from requiring states to follow state law) (opinion joined, not authored, by Rehnquist). Indeed, in every important (and unimportant) decision during his time on the Court, Rehnquist has penned or joined the opinion which best reflects the intent of the legislative or constitutional authors, not his own personal policy preferences.

In Roe v. Wade, 410 U.S. 113 (1973), Rehnquist dissented from the Court's creation of a right to abortion on demand. In United Steelworkers v. Weber, 443 U.S. 193 (1979), and all the school desegregation cases, Rehnquist strongly resisted distorting legislative and constitutional principles of nondiscrimination into mandates for a particular degree of racial balance. See, e.g., Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976); Columbus Board of Education v. Penick, 439 U.S. 1348 (1978). His dissenting opinion in Wallace v. Jaffree, 105 S. Ct. 2479 (1985), masterfully demonstrated, through exploration of historical evidence revealing the Framers' intent, that the First Amendment's religion clauses were designed to prevent an establishment, not an acknowledgement or accommodation, of religion, a principle he has adhered to in all the religion cases. He also led the Court's effort to cut back significantly on New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Warren Court, notwithstanding 600 years of common law and the Framers' contrary intent, invented First Amendment immunity for false, libelous statements. See, e.g., Time Inc. v. Firestone, 424 U.S.

443 (1976). The same is true of the criminal and prison context, where he has pushed the Court to reverse the excesses of the Warren Court with respect to the exclusionary rule created by Miranda v. Arizona, 384 U.S. 436 (1966), the cases all but abolishing the death penalty and those outlawing legitimate penal practices that "shock the conscience" of liberal judges but not of the Framers. See, e.g., New York v. Quarles, 467 U.S. 649 (1984); Gregg v. Georgia, 428 U.S. 153 (1976); Bell v. Wolfish, 441 U.S. 520 (1979).

Perhaps more importantly, by dint of his personal qualities, intellect and sheer cleverness in reshaping erroneous precedent, Rehnquist has formed a consensus on a generally rudderless Court behind fundamental principles which might well have otherwise been rejected. His landmark deseygregation opinion in Spangler, for example, established the fundamental principle that the Constitution does not require racial balance in government programs notwithstanding potentially contrary precedent. His accomplishments in the areas of of federalism, libel and criminal law listed above were similarly achieved in the face of inconsistent precedent. Moreover, virtually every beneficial decision listed above grew out of a small seed of legal principle that Rehnquist had planted in a prior, seemingly innocuous case, thus further demonstrating his mastery at looking beyond the facts of an individual case to gradually achieve fundamental reform in constitutional law. In General Electric Company v. v. Gilbert, 429 U.S. 125 (1976), for example, Rehnquist used a footnote buried in a prior decision, (Geduldig v. Aiello, 417 U.S. 484 (1974)) to establish the principle that pregnancy-based discrimination does not constitute impermissible discrimination on the basis of sex. In Lloyd Corportation v. Tanner, 407 U.S. 551 (1972), Rehnquist persuaded a majority of the Court to distinguish, on the thinnest of reeds, a very recent precedent (Logan Valley, 391 U.S. 308 (1968)), thus effectively reversing the holding that privately-owned shopping centers were state actors for purposes of the First Amendment. He built on this precedent, in turn, to effectively overrule Warren Court precedent that had converted a multitude of purely private activities into "state action" subject to constitutional constraints. See e.g, Moose Lodge v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

Further, Rehnquist possesses all the leadership qualities required to make a superb Chief Justice. No one can question the depth of his scholarship or intellect, the clarity of his philosophical vision or his ability to build a consensus to implant that vision in the Court's decisions. Moreover, he enjoys a warm collegial relationship with, and is genuinely respected by, all of his fellow justices, even those with whom he often disagrees. His fourteen year tenure on the Court has given him valuable insights into the predilections of these justices and the politics and machinations of the Court. Although he had significant problems with his back three years ago, this is no longer a real health problem. In sum, Justice Rehnquist would add immeasurably to the development of proper constitutional jurisprudence if appointed as Chief Justice.

ROBERT BORK

Robert Bork has been the leading spokesman for an interpretavist theory of constitutional law and judicial restraint for over 20 years, spearheading the at-times lonely conservative reaction to the excesses of the Warren Court. Moreover, Bork played a seminal role in developing the "Chicago School" revision of antitrust law that shapes this Administration's policy of giving the free market relatively uninhibited play to maximize consumer welfare.

His judicial philosophy is that of the President's: interpretavisim and strict construction. That is, the judicial branch should interfere with the policy choices made by elected representatives at the state or federal level only when the majority seeks to infringe on those freedoms expressly enshrined in the Constitution. If the judiciary overrules democratically sanctioned choices by creating rights not found in the constitutional text, it has engaged in an illegitimate--indeed, tyrannical--suppression of self-government through an assumption of powers the judiciary clearly does not possess in our tripartite system of government. Accordingly, Bork has consistently denounced, from the bench and elsewhere, the judicial creation of any "right" not traceable to the Constitution, such as the right of privacy to abort one's child or engage in homosexual conduct. See Dronenburg.

With respect to rights that are found in the Constitution, such as freedom of speech, Bork's analytical method of discerning the limits of these liberties is less clear. His analysis is generally rooted in but explicitly not limited to the constitutional text, drawing heavily on the structure of the Constitution as a whole and history, but without absolute allegience to the original intent of the Framers. That is, it seems that Bork, after determining the precise libertarian value enshrined in general phrases such as freedom of speech, would give full force to this value, apparently even in specific contexts and ways that the Framers had not intended. This nuance of Bork's jurisprudence slightly distinguishes him from Scalia and led to his only disturbing opinion on the appellate court. In the Ollman libel case, Bork wrote a concurring opinion holding that, at least with respect to political speech, the court should expand the already extraordinary protection afforded the media by New York Times v. Sullivan in certain libel actions because of the proliferation of libel suits. Scalia, in dissent, rightly criticized this opinion as inappropriate "sociological jurisprudence", but perhaps it is best viewed as an isolated misstep attributable to Bork's normally laudable devotion to granting absolute protection to political speech.

Bork also favors a strong Executive in the context of a limited national government possessing only enumerated powers and is generally inclined to grant administrative agencies broad discre-

tion over matters within their ambit. He has also demonstrated a healthy lack of respect for unprincipled precedent and while he recognizes that stare decisis is an important value, he would not hesitate to overturn constitutional aberrations such as Roe v. Wade. Finally, one other substantive shadow hangs over Bork's career. As Solicitor General, he filed a number of briefs, particularly in the civil rights area, that were clearly erroneous on important issues. Some of these filings are attributable to the institutional constraints of the Solicitor General's office, but others are not, and thus reflect at least a lack of diligent oversight and aggressiveness.

As the foregoing indicates, Bork possesses monumental intellectual and scholarly credentials and has personnally reexamined many of the broad, fundamental legal and jurisprudential issues of our time. He has served as Solicitor General under Presidents Nixon and Ford, a Yale law professor, an appellate litigator in private practice, and an appellate judge on the District of Columbia Circuit since 1982. At that time, the American Bar Association gave him its highest rating, "exceptionally well qualified". He is extremely eloquent and persuasive, both in print and in person, a talent that will serve him well in building a consensus supporting conservative principles on the Court. Moreover, his acknowledged scholarly credentials and pre-existing personal relationships with many of the justices should lead to his automatic acceptance on the Court, while others would need to go through at least a brief transition period.

There are other miscellaneous factors that bear on the desirability of appointing Bork to the Court. First, if he is passed over for the next opening on the Court, he may be insulted and resign from the District of Columbia Circuit. This will not only weaken that appellate court, but will deprive us of an extremely attractive nominee if a second slot becomes available. Further, he is 59 years old, smokes heavily, drinks somewhat and engages in little if any exercise. This indicates that his tenure on the Court may well be of a shorter duration than other potential candidates. It should also be noted that Bork, as Solicitor General, was responsible for firing Archibald Cox during the Watergate "Saturday Night Massacre". This will be raised at his confirmation, although it played a surprisingly limited role during his hearing for the District of Columbia Circuit. Conflicting views have been expressed on the warmth of his personality and the extent of his humility, but all agree on his eloquence and skills of advocacy. Some have suggested a certain lack of energy and organization during his initial years on the D.C. Circuit, but others minimize this and all agree that he has recently improved in these areas. Finally, some concern was expressed over his administrative expertise and experience, but, true or not, administrative skills are of minimal significance, even for the job of Chief Justice.

PATRICK HIGGINBOTHAM

Like Judge Kennedy, Judge Higginbotham's judicial ideology remains somewhat unclear since he has not produced a comprehensive body of scholastic or judicial writings that chart a clear jurisprudential course. To the extent he has spoken to this issue, in his opinions and elsewhere, the thrust certainly has been one of judicial restraint; restraint, however, grounded perhaps too much on the practical limits of the judiciary, rather than its inherent institutional limitations. In one article, Higginbotham did write that broad intrusive injunctive decrees are contrary to the concept of limited judicial power that led to the immunization of the judiciary from the political process and ultimately undermines public confidence in the judiciary as a disinterested arbiter of neutral legal principles.

This restained approach is also generally reflected in his judicial opinions. However, Higginbotham has not had occasion to grapple with some of the difficult, fundamental questions that truly test one's interpretavist values and his record has not been entirely free of unwarranted activism and/or inappropriate constitutional analysis. In one case, Higginbotham held that an ambiguous statement in a personnel handbook of a state agency created a constitutional property interest in being dismissed for just cause only. In a habeas proceeding, moreover, he directly substituted his judgment for that of a state appellate court that had reviewed precisely the same question and found no fundamental error in the criminal trial. As a district and appellate court judge in the Fifth Circuit, Higginbotham has decided many more civil rights cases than any of the other candidates. On the question of reverse discrimination, he has consistently and vigorously adhered to a "color-blind" view of the Constitution and civil rights laws. Higginbotham's performance on other civil rights questions has been almost uniformly laudable, except for his tendency in the employment area to unnecessarily expand the "equality of results" analysis in areas not required or contemplated by Supreme Court precedent.

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Higginbotham is 48 years old and a graduate of the University of Alabama Law School. Judge Higginbotham was a private trial lawyer with an antitrust and general litigation practice for 15 years, a district court judge from 1976 to 1982, and an appellate judge on the Fifth Circuit since that time.

ANTHONY KENNEDY

Like all the candidates, Judge Kennedy's opinions generally reflect judicial restraint, classically defined. Unlike some other candidates, Judge Kennedy has published few legal articles and has never expressed any general judicial philosophy. Moreover, Kennedy has had the misfortune to serve in the Ninth Circuit, probably the worst court of appeals in the country. Accordingly, he has had to deal with bad precedent and was probably deterred from writing bold, conservative opinions for fear of losing his panel majority or being reversed en banc. Further, his natural tendency is to narrow the scope of issues presented by a case and to avoid constitutional questions. Accordingly, his philosophical moorings remain an unknown quantity to a large extent.

Although the large bulk of Kennedy's work during his eleven years on the Ninth Circuit has been quite good, he has had few real gems and an occasional significant misstep. In a case involving the Navy's regulation of homosexual conduct, Kennedy, although grudgingly upholding the regulations, spoke very favorably of constitutional "privacy rights" and formulated the rationale for validity very narrowly, thus giving the most limited possible effect to the Supreme Court precedent that had upheld a state's criminalization of homosexual conduct. Kennedy also stretched to expand the Supreme Court's "one-man, one-vote" decisions in the face of inconsistent precedent and argued that such constitutional rights of participation might ebb and flow with changed material circumstances. Further, Judge Kennedy has strongly suggested that there is a substantial limitation on Congress' substantive authority over the appellate jurisdiction of the Supreme Court. Finally, Kennedy joined an opinion which upheld employment goals imposed under Executive Order 11246 and accepted unquestioningly the theory of "underutilization".

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Judge Kennedy is 49 years old. Before being appointed to the Ninth Circuit in 1975, he had pursued a general litigation practice in a small firm in California and taught part-time at the McGeorge School of Law. He received his law degree from Harvard in 1961.

J. CLIFFORD WALLACE

Judge Wallace is clearly an interpretavist in practice and theory. In two articles on this subject, he has defended judical restraint on the grounds that it leads to more stability and allows more room for democracy. Both articles are unpersuasive and reflect a lack of insight and well-developed theoretical underpinnings. Although he has not written any landmark decisions, his opinions show him to understand judicial restraint much better in practice.

The best description of Wallace's judicial opinions is that they are generally eminently reasonable but unremarkable. He is clearly an excellent and dedicated technical judge but has never sought to reshape the law in any fundamental way. He is very insistent on justiciability requirements (with one exception), appropriately defers to state and coordinate branches, particularly in immigration law, and takes an appropriate view of criminal law and its procedures. His most serious substantive flaw is that he has demonstrated a marked, and inexcusable, tolerance for racial and gender quotas in three different cases. On the other hand, he wrote a very good opinion objecting to the "comparable worth" theory of sex discrimination.

In sum, it is fair to say that Wallace has been a very good, but not extraordinarily outstanding circuit judge. He has been on the bench long enough really to leave his mark on the law, and has not done so.

Wallace is 57 years old and a graduate of the University of California at Berkeley Law School. He was in private practice for 15 years and served as a district court judge for two years until he was appointed by Nixon to the Ninth Circuit in 1972. He has taken an active interest in issues affecting court administration.

RALPH WINTER

Before and during his tenure on the Second Circuit bench, Ralph Winter has proven to be an able legal scholar with a strongly interpretavist approach to constitutional law. Certain articles and opinions of his, however, suggest a not insignificant note of caution.

Generally, Winter believes that constitutional interpretation is properly a search for original intent. Several of his statements, however, indicate that there may well be more play in the joints of his interpretative philosophy than appropriate. For example, he describes constitutional analysis as a "multidimensional task" in which "constitutional language, structure, and history" serve only as "the main sources of constitutional law". Moreover, Winter defended, albeit pursuant to a different rationale, the Supreme Court's indefensible holding in Shelley v. Kraemer that judicial enforcement of private racially restrictive covenants was state action subject to the Equal Protection Clause. Although his judicial writings are almost uniformly excellent, there are some glaring flaws and inconsistencies in his approach to several important legal issues. For example, in two significant cases, Judge Winter did not accord sufficient deference to administrative decisionmaking. The Supreme Court reversed him in both of these cases by votes of 9-0 and 8-1. In the criminal law area, Winter struck down a juvenile preventive detention statute as facially unconstitutional because statistics showed that most juveniles are ultimately released. The Supreme Court again reversed in a 6-3 opinion by Justice Rehnquist. In an opinion with federalism implications, Winter opined in dissent that the state had no authority to immunize its regulation of alcoholic beverages from federal antitrust laws. Finally, notwithstanding seemingly contrary Supreme Court precedent, Winter granted standing to plaintiffs in a housing discrimination case, an opinion which evidences a lack of sufficient respect for the importance of justiciability requirements.

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Winter is 50 years old. He was a law professor at Yale from 1962 until his appointment to the Second Circuit in 1982. Finally, it should be noted that Winter wrote an article expressing "grave doubt" about the desirability of employment discrimination laws because they were not addressed to the economic plight of minorities and would inevitably result in racial quotas and preferences. Civil rights groups could make much of this article, either taken within or without its context, at a confirmation hearing.

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ROBERT BORK

Although perhaps best known to the nation at large for execution of the "Saturday Night Massacre," Robert Bork is heralded in constitutionalist circles as the very model of the modern intentionalist jurist. When we speak of the need for a proper understanding of the judicial role, we would be hard pressed to explain why our ideal vision is not in fact of Judge Bork in action. Indeed, the consistency of his approach to judicial duties demonstrates the devotion with which Robert Bork, the judge, has followed the teachings of Robert Bork, the academic proselytizer of judicial restraint.

"Judicial restraint," Bork explains in one of his opinions, "is shorthand for the philosophy that courts ought not invade the domain the Constitution marks out for democratic rather than judicial governance." This credo is the hallmark of Bork's jurisprudence. Just as Bork's 1971 Indiana Law Journal article responds to Justice Peckham's Lochner question ("are we all . . . at the mercy of legislative majorities?") by observing that "[t]he correct answer, where the Constitution does not speak, must be 'yes'," Bork's opinions from the bench are equally emphatic that "[w]hen the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process . . . come before us not as suspect because majoritarian but as conclusively valid for that very reason." Dronenberg.

Bork, then, recognizes and abides by the constraints that law imposes upon judges. He is no conservative mirror-image of Justice Warren, endeavoring to implement right-minded public policy through judicial fiat; he is not an activist judge of the sort encouraged by Richard Epstein. To Bork, for example, substantive due process, whether as applied in Griswold or as in Lochner, "is and always has been an improper doctrine." Indiana Law Journal. As he recently reiterated in his San Diego Law School address, he is unalterably opposed to the notion that some "general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review virtually all regulations of human behavior."

Bork's brand of judicial restraint, however, is more textured than simple opposition to unfettered judicial power; he is decidely unawed by misguided precedent, and his constitutional analysis does not always end, although it always begins, with the actual words of the charter. On or off the bench, Bork's criticisms of the Supreme Court are sharp, and indicate a willingness, if given the opportunity, to help revisit and correct improper Court doctrine. (As he has written, his philosophy "does not even remotely suggest that a court may not offer criticism of concepts employed by a superior court.") He is insistent, for example, that the Supreme Court's "right to privacy" opinions are incoherent and "[do] not provide any

guidance for reasoning about future claims laid under that right." Dronenberg. His writings and speeches, as well as his court opinions, have vigorously attacked the Griswold line of "reasoning"; typical was the newly-appointed Judge's 1982 Yale Federalist Society address castigating the high court for legislating (and nationalizing) morality on the basis of certain Justices' "middle-class values." Indeed, his prodding of the Supreme Court has extended well beyond the "privacy" area, as witness, for example, Loveday and Quincy Broadcasting (where Bork urges expanded protections for broadcast political speech and questions the Court's [incorrect] scarcity rationale for differentiating between the print and broadcast media in First Amendment matters).

Bork's opinions in the First Amendment area not only illustrate his willingness to question Court doctrine, but provide additional insight into his approach to constitutional analysis. In his Ollman concurrence, for example, Bork demonstrates what he has meant by his repeated statements that the "penumbras, formed by emanations" language of Griswold is in and of itself unexceptional and unexceptionable. Bork's position in Ollman follows from his dicta in McBride that "problems posed by contemporary libel law," if not "carefully handled," will "threaten journalistic independence." Changing times, in Bork's view, demand a changed response to protect the constant "values" implicit in the First Amendment; he sees a proliferation of libel suits threatening the values of political expression that emanate from the free press clause, and is therefore willing to see doctrine evolve to constrain libel suits in ways that the Framers would not necessarily have thought the First Amendment to demand.

In Ollman, Bork puts into practice the theory of his San Diego speech that:

> all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then provide the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee.

Bork begins with the "core value" of the First Amendment and urges creation of new rules to protect that preexisting right. "Penumbras" are thus deemed useful by Bork insofar as they can be traced to specific constitutional clauses from which they emanate; these radiations cannot, however, properly be used to form some more general principle from which new constitutional rights not linked to specific text may be derived (Bork having disavowed this earlier theory in his 1971 piece). Nonetheless, this Ollman approach is unsettling to some conservatives.

Bork's willingness to vindicate rights grounded in the Constitution does not alter his general suspicion of judicial action. His jurisdictional opinions, for example, consistently attempt to narrow the scope of federal court involvement. Bork's approach here is presented perhaps most dramatically in his dissent from Barnes, where he details an array of arguments against congressional standing. He identifies the entire concept as a violation of separation of powers principles and of the case or controversy requirement, fabricated without any constitutional warrant: "it is absolutely inconceivable that Framers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all." In other areas as well, Bork makes clear his sensitivity to justiciability issues. (He is not willing to distort constitutional intent to reach these aims, however; in Silverman, for example, he refuses to invoke the greatly appealing but constitutionally dubious notion of Burford-type abstention for matters involving important but not unsettled issues of state law.)

The alternative to judicial power is to leave authority with the people and their elected representatives; in particular, Bork favors a strong executive (see, e.g., Persinger) in the context of a limited national government possessing only enumerated powers (see, e.g., Franz). He is generally inclined to grant administrative agencies broad discretion over matters within their ambit (perhaps especially when a deregulatory agenda is at issue), although he will entertain textually based constitutional claims against regulators (as in Jersey Central, a takings clause case against FERC). Some have discerned a pro-prosecution bias in his criminal law rulings, and he is not enthusiastic about any non-deterrent aspects of the exclusionary rule. He is unwilling for the courts to extend statutory civil rights laws to conduct not addressed by the legislature. Again, his reaction to claims of new found constitutional "rights" is illustrated by his view of Griswold and by his Dronenberg opinion (upholding military regulations against homosexual conduct): "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."

In short, Robert Bork is an extraordinarily articulate advocate of an intentionalist philosophy that he himself has greatly helped to define and popularize. In both his areas of professorial concentration, antitrust and constitutional law, he has been in the vanguard of the conservative legal renaissance. His powerful abilities as a writer, his always evident analytical skills, and his diverse professional experience (Kirkland & Ellis partner, Yale professor, Solicitor General, judge) all contribute to his intellectual influence. Bork is 59 years of age.

Bork

This discussion of Robert Bork's work is designed to respond to the search's criteria and is therefore divided into three general headings. The first is a brief discussion of Bork's professional and intellectual qualifications. Next, constituting the bulk of the memo, is a treatment of his jurisprudence as developed in his opinions on the D.C. Circuit. The memo concludes with some thoughts on his broader political and social philosophy.

Because of the unique character of Bork's writing, commentary can convey only so much. In order to let Bork speak for himself, I suggest that anyone who does not read all his cases look at Barnes, (IV.A.1) Dronenberg, (IV.D.2) Hanoch tel Oren, (VIII.3) Nathan (III.D.5) and Franz (IV.D.2). Those, together with the last chapter of The Antitrust Paradox and the Indiana Law Journal article on neutral principles and the First Amendment, should give some indication of the character of his thought and work.

I. Qualifications

Bork's resume -- private trial lawyer, law professor, Solicitor General -- speaks for itself. More important for these purposes is his influence on legal thinking. As an academic, Bork concentrated on two fields: antitrust and constitutional law. In both of them, he was a leading spokesman for the conservative reaction against the excesses of the courts and the Warren Court in particular.

Fifteen years ago the Administration's merger reform proposal would have been thought radical. Today, it is very close to the consensus among serious students of antitrust law and policy. This is a measure of the success of the Chicago School, the "new learning" in antitrust, which has succeeded in reducing dramatically the courts' intrusions into the marketplace.

The Antitrust Paradox is, along with Posner's hornbook, the favorite guide to Chicago-style thinking. Bork, however, is not primarily a law-and-economics theorist in the manner of Posner; on the contrary, he has expressed the view that Posner overdoes economic analysis. Bork's primary contribution to the new learning is legal, not economic: his seminal article on the legislative history and intent of the Sherman Act argued that the antitrust laws are a ban on price-fixing and restrictive horizontal practices, designed to maximize consumer welfare. This legal conclusion is the necessary predicate for the judicial adoption of the new learning. Without it, courts simply would be replacing Congress's bad law with their good law.

Virtually any article about the fundamental questions of constitutional interpretation and the power of the courts will begin its citations of interpretative, judicial-conservative, writings with Bork's Indiana Law Journal article. The Article is

not a finished piece of theory by any means, but a preliminary study, one that mixes well-established thinking about the counter-majoritarian difficulty with speculation about the possible sources of values. Bork has elaborated his views somewhat in numerous popular articles and speeches since then, but the basic theme has never changed: to stray from the law is to move from popular government to a tyranny of the robe.

Part of the reason Bork has been influential is the lucidity of his writing. When he wants to, Bork can be magisterial. Take for example the conclusion of the Paradox:

> Because it deals directly and explicitly with the functioning of markets, antitrust has a unique symbolic and educative influence over public attitudes toward free markets and capitalism. That lends the discussion of this law an added degree of importance. The regime of capitalism brings with it not merely unexampled economic performance and a social and cultural atmosphere that stresses the worth of the individual, but, because of the bourgeois class it creates, trains, and raises to power, the possibility of stable, liberal, and democratic government. Antitrust goes to the heart of capitalist ideology, and since the law's fate will have much to do with the fate of that ideology, one may be forgiven for thinking that the outcome of the debate is of more than legal interest.

Everything Bork writes, however, is not this solemn. Earlier in that book, he characterized the "rising tide of competition," referred to by all advocates of strict merger regulation, as "the standard, Mark I all-weather antitrust hobgoblin."

As a judge, Bork sometimes tends to paint with a broad brush, as will be noted in the discussion below of his controversial Ollman (IV.B.2) concurrence concerning the First Amendment and libel law. His constitutional work generally is rooted in but explicitly not limited to text, drawing heavily on structure and history; Charles Black's Structure and Relationship in Constitutional Law profoundly influenced Bork's methods of reasoning, although not the substance of his views. Bork still exhibits the primary virtue of any judge: being careful about the law. His opinion in York v. MSPB (III.B.1), which is of no conceivable interest to anyone but York, patiently comes to grips with the procedural details of the Civil Service Reform Act; Judge MacKinnon's dissent in that case exhibits a contrasting, result-oriented impatience with the details of statutory and regulatory interpretation.

II. Legal Principles

The dominating themes of Bork's work on the D.C. Circuit are attention to the law -- as attested by his unusual willingness to rehear panel decisions in order to come to the right answer -- and a profound suspicion of the courts' ability to do anything but interpret the relevant authorities.

A. Interpretavism and Judicial Role

Bork exemplifies judicial conservatism in its classic form: he is both an interpretavist and an advocate of judicial restraint. The two are not exactly the same thing, and for Bork the latter acts as a gloss on the former. Bork's primary argument for interpretavism is from the fact that the premises of our national government are those of popular rule. For him, this has two complementary consequences. First, since the Constitution and the laws represent the choice of majoritarian or supermajoritarian processes, they are the privileged bases of decision. Second, since judicial preferences are not democratically sanctioned, they are unacceptable bases of decision. Thus, Bork is not simply an interpretavist. His primary principle is to analyze the law -- cases and statutes and the Constitution -- but he does so in light of a second-order principle of suspicion of judicial power. While Bork is certainly willing to overrule agencies in the name of the law and laws in the name of explicit constitutional text (such as the First Amendment), his bias appears to be against judicial action.

A nice formulation of this distrust of judicial power is found in his concurring opinion in Williams v. Barry, (IV.C.2) a procedural due process challenge to the decision of the Mayor of the District of Columbia to close shelters for the homeless. The majority intimated in dictum that under certain circumstances such decisions by the Mayor, which admittedly were purely political and not controlled by substantive law, might have to be made pursuant to minimal procedures. Bork blasted this flea with the big gun: after citing the passage in Marbury which explains that mandamus does not lie for political acts of the President, he says:

> 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.

It is typical of Bork that he combined the purely interpretive point -- that there were no limits on the Mayor's discretion in that case -- with the judicial-restraint point, that in any event courts should not seek to provide such limits.

In statutory contexts, Bork rejects readings that would give judges more discretion. In a powerful separate opinion in Hanoch tel Oren (VIII.3), for example, he confronted the Alien Tort Claims Statute, which by its terms permits aliens to sue in our courts for torts in violation of the law of nations. In Hanoch, plaintiffs, victims of a terrorist bombing in Israel, sued the PLO and Libya in U.S. court. On the basis of a comprehensive analysis of the language, historical context, and underlying policy considerations of that venerable but seldom-used law, Bork adopted a limited view of the statute's reach, in contrast to that taken by the Second Circuit in its influential and

widely-praised Filartega opinion. His line in Hanoch was rooted explicitly in the notion that to give the statute the broadest interpretation its language might bear would invite judicial policymaking that easily could interfere with the conduct of the nation's foreign affairs.

B. Constitutional Law

1. Jurisdictional doctrines

Bork maintains that the jurisdiction of the federal courts is sharply limited by the Constitution and statutes. His best known opinions on this subject involve congressional standing, and argue that standing doctrine should include separation-of-powers considerations. The underlying thinking seems to be this: something that looks like a lawsuit is not one if it demands that the court enter into the sphere of decision belonging to another branch of government. This means that certain "political" complaints do not, as a constitutional matter, amount to injury-in-fact of the sort required by Article III. This view is not universal among conservative judges: Malcolm Wilkey, for example, generally was willing to adjudicate anything that had a plaintiff and a defendant.

Bork argues that, since anything can be made to look like a lawsuit, only jurisdictional limitations will keep the courts from controlling the entire constitutional system. In order to prevent this, he has entered into an admittedly difficult field. His first congressional standing opinion, a concurrence in vanderJagt v. O'Neill (IV.A.2), discusses the importance and difficulty of the jurisdictional doctrines:

> All the doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question and the like -- relate in part, and in different but overlapping ways, to an idea which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

The jurisdictional doctrines are the very heart of judicial restraint.

In vanderJagt, Bork was willing to accept what he characterized as his court's fairly narrow congressional standing rule. After the Supreme Court's decision clearly importing separation-of-powers considerations in standing in Wright v. Allen, Bork revisited congressional standing in an extensive and powerfully reasoned dissent that may be his best work to date, an opinion which has been characterized as a proof by construction of the possibility of interpretive judging. That case, Barnes v. Kline (IV.A.1), involved a congressman's challenge to a presidential pocket veto. Once again, Bork's underlying claim, for which he relied on John Marshal among others, was that if the courts can adjudicate anything that takes the form of a lawsuit they will run the government. In dissenting from the majority's holding

against the Executive on the merits, Bork rejected congressional standing root and branch:

> With a constitutional insouciance impressive to behold, various panels of this court, without the approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against Congress or by congressmen against the President. This jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Bork's argument drew heavily on constitutional structure and history as well as the uniform practice of the government since the framing. The Supreme Court currently is considering our argument in Barnes that congressional standing be eliminated.

Bork's wariness of jurisdictional excess extends beyond politically controversial cases involving congressional standing. In von Aulock (IV.A.4), for example, he found a jurisdictional difficulty that this Department, representing the EEOC, had missed. At issue was an EEOC Interpretative Bulletin which, plaintiffs alleged, enabled their employers to discriminate against them. Bork, sua sponte, found that plaintiffs' problem arose from the statute, not from the EEOC's views, so that the redressability and traceability requirements of standing were not satisfied. Similarly, in Weisberg (V.6) Bork made himself the special friend and advocate of the exclusive jurisdiction of the Federal Circuit under the Federal Courts Improvements Act and the Tucker Act -- a jurisdiction that often ousts that of his own court. This doctrine is part of the Department's defense in Hohri, the Japanese exclusion-order damages case in the D.C. Circuit.

2. Separation of powers

The congressional standing cases are, of course, also separation of powers cases. Barnes in particular represents an attempt by a Member of Congress to recruit the judiciary in his attack on the Executive. For that reason, one can speculate that Barnes must have seemed especially easy for Bork, who has long championed a strong executive in the President's wars with the other branches.

Two other opinions are especially important here. In the first panel opinion in Persinger (VIII.1), Bork went to considerable lengths to find presidential power sufficient to support the U.S./Iran executive agreement which terminated the hostage crisis and, along with it, plaintiffs' tort actions. (Persinger was a Marine hostage who sued Iran.) Bork's position on the broad scope of the executive power is controversial, within and without the conservative camp, but he adheres to it consistently.

The other signal opinion is his concurrence in Nathan v. Smith (III.D.5), where plaintiffs sought to compel the Attorney General to conduct a preliminary investigation under the Ethics in Government Act, an investigation that might have led to the appointment of an independent counsel. In finding that the Ethics in Government Act created no private right of action to ground the court's jurisdiction, Bork emphasized the unique nature of prosecutorial functions and the constitutional sensitivity of the issue. Any statute giving a private individual the opportunity to control the Attorney General's prosecutorial decisions, Bork thought, would raise serious constitutional issues.

In addition, his separate opinions in two CIA FOIA cases, Sims (III.A.1) and McGehee (III.A.2), suggest a feeling that application of FOIA to intelligence agencies represents an attempt by Congress to interfere dangerously with the conduct of the executive in the vital field of national security. Sims was particularly troubling, since it involved an attempt to obtain through FOIA names of individuals who had cooperated with the CIA's MKULTRA project and who therefore were intelligence sources. Bork's dissent in Sims, which was somewhat constrained by his court's earlier holding in the case, was largely adopted by the Supreme Court when it reversed the original Sims decision. Finally, Bork's Abourezk (VIII.4) dissent argued in favor of a broad executive power to exclude dangerous aliens from the country.

3. Federalism

Given the chance, Bork produced a very interesting opinion involving the relationship between the states and the national government. In Franz (IV.D.2), a father sought relief against the Marshals Service in order to see his children, who were being hidden by the Witness Protection Program. Franz brought substantive and procedural due process challenges which Edwards, for the majority, dealt with at length. Bork pointed out that the constitutional issues were not properly reached until Franz's rights, both to visitation and to relief against any third party (including possibly the United States) interfering with visitation, had been determined by a lower court, probably a Pennsylvania court.

Franz is interesting not only because it takes seriously the substantive state law of child custody, but also because it entertains the notion that alterations of such law may be beyond the enumerated powers of Congress. Citing Usery, Bork argued that Edwards erred in cavalierly asserting that any state law rights Franz might have had were preempted by the Witness Protection Act. Rather, according to Bork, that Act should be read so as to avoid that question, which would raise grave constitutional issues as to Congress's power over domestic relations. Bork's criticism of Edwards' substantive due process "fundamental

right" of family association is well taken, and his discussion of the context, conduct and content of the hearing that Edwards requires is a fine send-up of judicial process-worship.

4. Individual rights

For Bork, there is a clear dividing line in the jurisprudence of constitutional rights: the line between rights contained in the Constitution and rights the courts have made up. He is solicitous of the former -- sometimes more so than conservatives would prefer -- and contemptuous of the latter.

It is clear that Bork is a strong friend of the First Amendment's protection of the news media. His treatment of the common law of libel in McBride (IV.B.1) and of the legislative history of the Communications Act in Loveday (I.A.8) are strongly and explicitly linked to a profound skepticism concerning any regulation of the means of communication. Loveday, which involves the FCC's authority to require that the sponsorship of political commercials be identified, is especially interesting because it shows Bork reaching out to discuss First Amendment protections for the electronic media, a point on which he has been outspoken. Given the chance, Bork in Quincy Broadcasting joined in rejecting the scarcity rationale and in striking down the FCC's must-carry rules on constitutional grounds.

This advocacy of the press has gotten Bork into considerable trouble with conservatives over his Ollman (IV.B.2) concurrence, in which he endorses limited First Amendment-based restrictions on libel actions involving political statements of the sort incapable of proof or disproof at trial, an application arguably at variance with the original understanding. There are two crucial steps in Ollman: first, the characterization of the First Amendment as seeking some particular (very high) level of freedom to express political opinion, and second the claim that the proliferation of libel suits threatens that outcome. The characterization of a constitutional right as effecting an outcome rather than a rule is, of course, highly controversial. The second step is likewise questionable, but reasoning of that sort is inevitable if one is to be anything but the most literal-minded sort of originalist. The Ollman opinion represents a real but probably errant attempt to apply the clearly expressed values of the Framers to the contemporary world.

Ollman annoyed quite a few readers of National Review; Dronenberg (IV.D.1), which upheld military regulations on homosexuality against a constitutional right-of-privacy challenge, infuriated patrons of the New York Review of Books. Dronenberg, denounced by Ronald Dworkin as lawless, was an adventurous opinion. In order to determine the reach of the right of privacy protected by Roe and its relatives, Bork conducted a systematic analysis of the cases on which the Roe court rested its decision. He found no intelligible principle capable of supporting protection of homosexual conduct. Given the Supreme Court's position -- the

Court cannot and does not admit that it made Roe up -- the opinion was fairly radical, although its forthrightness in criticizing the Supreme Court drew a laudatory response from Judge Ginsburg in a statement explaining her refusal to vote to rehear the case en banc. The issue of treatment of homosexual conduct under Roe has generated a split in the circuits and is currently before the Supreme Court.

C. Administrative Law

The heart of Bork's administrative law jurisprudence might be said to be openmindedness. He needs to be convinced that an agency decision is genuinely wrong on the law before he will reverse, but he can be persuaded. An example of willingness to listen to agencies, and unwillingness to consult his own preferences, is the New York City Broadcasting (I.A.3) case, where Bork simply refused to challenge an FCC determination as to the content of the public interest in the granting of exemptions to its AM broadcasting rules. One indicator of the change that has come over his court is Bork's concurring statement in Office of Communications of the United Church of Christ (I.A.1), which largely upheld the FCC's deregulation of broadcasting. In the old days, the pro-regulatory sentiments expressed by Judge Wright with which Bork refused to associate himself probably would have become holding rather than mere dictum. A companion case written by Bork, Black Citizens for a Fair Media (I.A.6), likewise captures the change, and Bork's tendency. In Black Citizens, Judge Wright dissented violently from Bork's opinion upholding a fairly extreme deregulation of radio relicensing.

As a general matter, Bork is an attentive statutory analyst, although his focus tends to be more on purpose and structure than on text. For example, his opinion in Middle South (I.B.1), which disputes with Judge Ginsburg over the meaning of the word "such," is a reasonable interpretation of the statute in its full context, not a mere parsing. Another characteristic performance is in Bellotti v. NRC (II.B.2), which upheld (over a Wright dissent) an NRC refusal to hold a hearing. Although the language of the statute could be read in petitioners' favor, Bork reasoned from the absurd and destructive results to another, quite reasonable, construction of the extent of the agency's power.

Bork's deference certainly has limits. His opinions in two FERC procedure cases, New York State ERDA (II.A.1) and International Paper (II.A.2), show impatience with unreasonable agency excuses. More important is his dissenting opinion in Planned Parenthood (II.B.3), the "squeal rule" case, in which Bork rejected the reading of HHS's authority advocated by this Department. Unlike the majority, Bork did not think this put an end to the case. Rather, he suggested that the Secretary might have had some other basis for her action, a basis that could be found if the regulations were remanded per Chenery.

Bork's most important administrative decision may turn out to be the opinion on rehearing in Jersey Central Power (I.B.3), where he held a utility entitled to a hearing on its claim that the rate FERC had set was so low as to be unreasonable under the Federal Power Act and an unconstitutional taking of property under the Just Compensation Clause of the Fifth Amendment (the Supreme Court has found the statutory and constitutional standards to be the same). Jersey Central shows Bork willing both to reverse an agency and to entertain textually based constitutional claims directed against regulatory statutes. While Bork's view is plainly correct under governing Supreme Court precedent (a Douglas opinion in Hope Natural Gas), Judge Mikva in dissent accused him of Lochnerizing, which enabled Bork to make this memorable response: "The dissent must represent the first recorded instance of anyone confusing the philosophy of Justice Rufus W. Peckham and that of Justice William O. Douglas with respect to economic regulation."

D. Criminal Law

Two of Bork's criminal law opinions are worth noting. Mount (VI.1) involved the application of a version of the exclusionary rule developed under the so-called supervisory power, according to which foreign evidence collection methods that "shock the conscience" of the court should result in suppression, even though exclusion would have no deterrent effect on foreign law enforcement. Rejecting the rule in other circuits, Bork's concurrence suggested that the supervisory version of the exclusionary rule is, in the face of congressionally-adopted Rules of Evidence, unacceptable judicial legislation. He also questioned the propriety of any non-deterrent exclusionary rule: "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence."

If any generalization is possible on this limited a basis, it is that Bork may have a pro-prosecution bias. His opinion on remand in Singleton (VI.2 & 3) characterizes as obviously correct a rule which in fact is very difficult, that due process and sufficiency-of-the-evidence standards are the same. Bork's position is sufficiently shaky on the law that a majority of the judges in the en banc vote questioned it, although they did not think the case merited full consideration.

E. Civil Rights

Bork has made a few noteworthy contributions to anti-discrimination law. He dissented from denial of en banc reconsideration in two cases now before the Supreme Court: Paralyzed Veterans (VII.1), which asks whether the funding strings of the Rehabilitation Act are program-specific (as in Grove City), and Vinson (VII.2), in which the D.C. Circuit found an employer vicariously liable for sexual harassment as a result of a liaison

that may have been voluntary. Paralyzed Veterans, in which handicapped groups are seeking to apply the Rehabilitation Act's anti-discrimination provisions to airlines, is particularly controversial, given that it involves the Grove City issue: airports receive funds, but airlines themselves do not. In his Vinson dissent, Bork challenged a developing consensus among the other circuits that applies Title VII to sex harassment claims.

Bork's reluctance to accept yet another judge-made extension of the doctrine of sexual harassment under Title VII led to the six-judge concurrence in denial of rehearing en banc in King v. Palmer (VII.3). Judge Edwards' opinion for the panel had implied that Title VII gives relief to an employee who is passed over for promotion in favor of a co-worker with whom the employer was having an affair. Bork's concurrence pointed out that this part of Edwards' decision was dictum.

III. Political Philosophy

On the surface questions of the day, Bork is easy to describe. He believes that the nation is overgoverned and overlawyered. As to the latter, his discussion of summary judgment in dissent in Catrett (V.4) and of tort law in Wilson (IX.1) are similar to the line the Department has taken in its litigation reduction and tort reform proposals. Of course, it should not be at all surprising that Bork sounds so many of the standard conservative themes. Judicial restraint, for example, is a standard conservative theme in part because Robert Bork has been espousing it for the last twenty years. Our underlying model of a conservative jurist has been profoundly influence by Bork's work.

But Bork's deeper political convictions -- the wellsprings of his obvious conservatism -- are more obscure. Ten years ago, he readily would have been classified as part of the libertarian wing of Classical Liberalism, as represented by the Chicago School. Thus, it is clear that when in the conclusion of the Paradox Bork identifies four trends in antitrust, he is identifying four tendencies of contemporary politics of which he disapproves:

> The trends observable in antitrust, I have suggested, are four: (1) a movement away from political decision by democratic processes toward political choice by courts; (2) a movement away from the ideal of free markets toward the ideal of regulated markets; (3) a tendency to be concerned with group welfare rather than general welfare; and (4) a movement away from the ideal of liberty and reward according to merit toward an ideal of equality of outcome and reward according to status. Common to all of these movements is an anticapitalist and authoritarian ethos.

The reader can tell what the author thinks of the authoritarian ethos.

Since then, however, Bork has moved in the direction of communitarianism and traditionalism. He has spoken in praise of Thomas More and his reverence for established authority. His speeches attacking the "privatization of morality" are even more instructive. That anyone would object to keeping or making morality a private concern would shock a Classical Liberal, and in my view it would have shocked the author of The Antitrust Paradox. Nevertheless, the author of that book and of that phrase are the same.

For most purposes, though, these differences are unimportant. The conservative movement is a coalition of traditionalists and radicals, individualists and communitarians. All are enemies of the regulatory redistributionist state and of the legal doctrines that have made the Constitution and the courts its tools. That Bork is not readily classified as between these two camps reinforces his status as an archetypal judicial conservative.

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).

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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).

makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that *Griswold*'s antecedents were also wrongly decided, *e.g., Meyer v. Nebraska,*[21] which struck down a statute forbidding the teaching of subjects in any language other than English; *Pierce v. Society of Sisters,*[22] which set aside a statute compelling all Oregon school children to attend public schools; *Adkins v. Children's Hospital,*[23] which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia; and *Lochner v. New York,*[24] which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps *Pierce's* result could be reached on acceptable grounds, but there is no justification for the Court's methods. In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, "[A]re we all . . . at the mercy of legislative majorities?"[25] The correct answer, where the Constitution does not speak, must be "yes."

The argument so far also indicates that most of substantive equal protection is also improper. The modern Court, we need hardly be reminded, used the equal protection clause the way the old Court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws.

The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some

21. 262 U.S. 390 (1922).
22. 268 U.S. 510 (1925).
23. 261 U.S. 525 (1923).
24. 198 U.S. 45 (1905).
25. *Id.* at 59.

cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as *Griswold v. Connecticut*. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preferences for particular values: *Skinner v. Oklahoma*[26] (a forbidden inequality exists when a state undertakes to sterilize robbers but not embezzlers); *Kotch v. Board of River Port Pilot Commissioners*[27] (no right to equality is infringed when a state grants pilots' licenses only to persons related by blood to existing pilots and denies licenses to persons otherwise as well qualified); *Goesaert v. Cleary*[28] (a state does not deny equality when it refuses to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments); *Railway Express Agency v. New York*[29] (a city may forbid truck owners to sell advertising space on their trucks as a distracting hazard to traffic safety though it permits owners to advertise their own business in that way); *Shapiro v. Thompson*[30] (a state denies equality if it pays welfare only to persons who have resided in the state for one year); *Levy v. Louisiana*[31] (a state may not limit actions for a parent's wrongful death to legitimate children and deny it to illegitimate children). The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.

Professor Wechsler notes that Justice Frankfurther expressed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'."[32] The line is not very thin; it is nonexistent. There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.

We may now be in a position to discuss certain of the problems of legitimacy raised by Professor Wechsler. Central to his worries was the

26. 316 U.S. 535 (1942).
27. 330 U.S. 552 (1947).
28. 335 U.S. 464 (1948).
29. 336 U.S. 106 (1949).
30. 394 U.S. 618 (1969).
31. 391 U.S. 68 (1968).
32. WECHSLER, *supra* note 1, at 11, *citing* Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-28 (1955).

Supreme Court's decision in *Brown v. Board of Education*.[33] Wechsler said he had great difficulty framing a neutral principle to support the *Brown* decision, though he thoroughly approved of its result on moral and political grounds. It has long been obvious that the case does not rest upon the grounds advanced in Chief Justice Warren's opinion, the specially harmful effects of enforced school segregation upon black children. That much, as Wechsler and others point out, is made plain by the per curiam decisions that followed outlawing segregated public beaches, public golf courses and the like. The principle in operation may be that government may not employ race as a classification. But the genesis of the principle is unclear.

Wechsler states that his problem with the segregation cases is not that:

> History does not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence that many thought the contrary; the words are general and leave room for expanding content as time passes and conditions change.[34]

The words are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling and all the other relations in life, I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed. It is the fact that history does not reveal detailed choices concerning such matters that permits, indeed requires, resort to other modes of interpretation.

Wechsler notes that *Brown* has to do with freedom to associate and freedom not to associate, and he thinks that a principle must be found that solves the following dilemma:

> [I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension. . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in

33. 347 U.S. 483 (1954).
34. WECHSLER, *supra* note 1, at 43.

> neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.[35]

It is extemely unlikely that Professor Wechsler ever will be able to write that opinion to his own satisfaction. He has framed the issue in insoluble terms by calling it a "conflict between human claims of high dimension," which is to say that it requires a judicial choice between rival gratifications in order to find a fundamental human right. So viewed it is the same case as *Griswold v. Connecticut* and not susceptible of principled resolution.

A resolution that seems to me more plausible is supported rather than troubled by the need for neutrality. A court required to decide *Brown* would perceive two crucial facts about the history of the fourteenth amendment. First, the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment. Second, those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through. Almost certainly, even individuals among them held such views as that blacks were entitled to purchase property from any willing seller but not to attend integrated schools, or that they were entitled to serve on juries but not to intermarry with whites, or that they were entitled to equal physical facilities but that the facilities should be separate, and so on through the endless anomalies and inconsistencies with which moral positions so frequently abound. The Court cannot conceivably know how these long-dead men would have resolved these issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws.

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that

35. Id. at 47.

applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson.* The same result might be reached on an alternative ground. If the Court found that it was incapable as an institution of policing the issue of the physical equality of separate facilities, the variables being insufficiently comparable and the cases too many, it might fashion a no-segregation rule as the only feasible means of assuring even physical equality.

In either case, the value choice (or, perhaps more accurately, the value impulse) of the fourteenth amendment is fleshed out and made into a legal rule—not by moral precept, not by a determination that claims for association prevail over claims for separation as a general matter, still less by consideration of psychological test results, but on purely juridical grounds.

I doubt, however, that it is possible to find neutral principles capable of supporting some of the other decisions that trouble Professor Wechsler. An example is *Shelly v. Kraemer,*[36] which held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. Although the amendment speaks only of denials of equal protection of the laws by the state, Chief Justice Vinson's opinion said that judicial enforcement of a private person's discriminatory choice constituted the requisite state action. The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish. Any dispute between private persons about absolutely any aspect of life can be brought to a court by one of the parties; and, if race is involved, the rule of *Shelley* would require the court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination. The principle would apply not merely to the cases hypothesized by Professor Wechsler—the inability of the state to effectuate a will that draws a racial line or to vindicate the privacy of property against a trespasser excluded because of the homeowner's racial preferences—but to any situation in which the person claiming freedom in any relationship had a racial motivation.

That much is the common objection to *Shelley v. Kraemer,* but the trouble with the decision goes deeper. Professor Louis Henkin has suggested that we view the case as correctly decided, accept the principle

36. 334 U.S. 1 (1948).

that must necessarily underline it if it is respectable law and proceed to apply that principle:

> Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or perferred by the Constitution, the state may enforce it.[37]

This attempt to rehabilitate *Shelley* by applying its principle honestly demonstrates rather clearly why neutrality in the application of principle is not enough. Professor Henkin's proposal fails the test of the neutral derivation of principle. It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. The judge's power to govern does not become more legitimate if he is constrained to apply his principle to all cases but is free to make up his own principles. Matters are only made worse by Professor Henkin's suggestion that the judge introduce a small number of exceptions for cases where liberty is more important than equality, for now even the possibility of neutrality in the application of principle is lost. The judge cannot find in the fourteenth amendment or its history any choices between equality and freedom in private affairs. The judge, if he were to undertake this task, would be choosing, as in *Griswold v. Connecticut,* between competing gratifications without constitutional guidance. Indeed, Professor Henkin's description of the process shows that the task he would assign is legislative:

> The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from *laissez-faire* government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context—the adequacy of progress toward

37. Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion,* 110 U. PA. L. REV. 473, 496 (1962).

> equality as a result of social and economic forces, the effect of lack of progress on the life of the Negro and, perhaps, on the image of the United States, and the role of official state forces in advancing or retarding this progress.[38]

In short, after considering everything a legislator might consider, the judge is to write a detailed code of private race relations. Starting with an attempt to justify *Shelley* on grounds of neutral principle, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society.

The argument thus far claims that, cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or the equal protection clause. Such rights cannot be constructed without comparing the worth of individual gratifications, and that comparison cannot be principled. Unfortunately, the rhetoric of constitutional adjudication is increasingly a rhetoric about "fundamental" rights that inhere in humans. That focus does more than lead the Court to construct new rights without adequate guidance from constitutional materials. It also distorts the scope and definition of rights that have claim to protection.

There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights. This latter category is extraordinarily important. This method of derivation is essential to the interpretation of the first amendment, to voting rights, to criminal procedure and to much else.

Secondary or derivative rights are not possessed by the individual because the Constitution has made a value choice about individuals. Neither are they possessed because the Supreme Court thinks them fundamental to all humans. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.

38. *Id.* at 494.

The distinction between rights that are inherent and rights that are derived from some other value is one that our society worked out long ago with respect to the economic market place, and precisely the same distinction holds and will prove an aid to clear thought with respect to the political market place. A right is a form of property, and our thinking about the category of constitutional property might usefully follow the progress of thought about economic property. We now regard it as thoroughly old hat, passe and in fact downright tiresome to hear rhetoric about an inherent right to economic freedom or to economic property. We no longer believe that economic rights inhere in the individual because he is an individual. The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of such rights to forward some other value. We may, for example, wish to maximize the total wealth of society and define property rights in a way we think will advance that goal by making the economic process run more efficiently. As it is with economic property rights, so it should be with constitutional rights relating to governmental processes.

The derivation of rights from governmental processes is not an easy task, and I do not suggest that a shift in focus will make anything approaching a mechanical jurisprudence possible. I do suggest that, for the reasons already argued, no guidance whatever is available to a court that approaches, say, voting rights or criminal procedures through the concept of substantive equality.

The state legislative reapportionment cases were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.[39] The principle was not neutrally defined: it presumably rests upon some theory of equal weight for all votes, and yet we have no explanation of why it does not call into question other devices that defeat the principle, such as the executive veto, the committee system, the filibuster, the requirement on some issues of two-thirds majorities and the practice

39. See the dissents of Justice Frankfurter in Baker v. Carr, 369 U.S. 186, 266 (1962); Justice Harlan in Reynolds v. Sims, 377 U.S. 533, 589 (1964); and Justice Stewart in Lucas v. Forty-Fourth Gen. Ass'y, 377 U.S. 713, 744 (1964).

of districting. And, as we all know now, the principle, even as stated, was not neutrally applied.[40]

To approach these cases as involving rights derived from the requirements of our form of government is, of course, to say that they involve guarantee clause claims. Justice Frankfurter opposed the Court's consideration of reapportionment precisely on the ground that the "case involves all the elements that have made the Guarantee Clause cases nonjusticiable," and was a "Guarantee Clause claim masquerading under a different label."[41] Of course, his characterization was accurate, but the same could be said of many voting rights cases he was willing to decide. The guarantee clause, along with the provisions and structure of the Constitution and our political history, at least provides some guidance for a Court. The concept of the primary right of the individual in this area provides none. Whether one chooses to use the guarantee of a republican form of government of article IV, § 4 as a peg or to proceed directly to considerations of constitutional structure and political practice probably makes little difference. Madison's writing on the republican form of government specified by the guarantee clause suggests that representative democracy may properly take many forms, so long as the forms do not become "aristocractic or monarchical."[42] That is certainly less easily translated into the rigid one person, one vote requirement, which rests on a concept of the right of the individual to equality, than into the requirement expressed by Justice Stewart in *Lucas v. Forty-Fourth General Assembly*[43] that a legislative apportionment need only be rational and "must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State."[44] The latter is a standard derived from the requirements of a democratic process rather than from the rights of individuals. The topic of governmental processes and the rights that may be derived from them is so large that it is best left at this point. It has been raised only as a reminder that there is a legitimate mode of deriving and defining constitutional rights, however difficult intellectually, that is available to replace the present unsatisfactory focus.

At the outset I warned that I did not offer a complete theory of constitutional interpretation. My concern has been to attack a few points that may be regarded as salient in order to clear the way for such a theory. I

40. *See* Fortson v. Morris, 385 U.S. 231 (1966).
41. Baker v. Carr, 369 U.S. 186, 297 (1962).
42. THE FEDERALIST No. 43 (J. Madison).
43. 377 U.S. 713 (1964).
44. *Id.* at 753-54.

turn next to a suggestion of what neutrality, the decision of cases according to principle, may mean for certain first amendment problems.

Some First Amendment Problems: The Search for Theory

The law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech. Nor have many such theories been urged upon the courts by lawyers or academicians. Professor Harry Kalven, Jr., one whose work is informed by a search for theory, has expressed wonder that we should feel the need for theory in the area of free speech when we tolerate inconsistencies in other areas of the law so calmly.[45] He answers himself:

> If my puzzle as to the First Amendment is not a true puzzle, it can only be for the congenial reason that free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live.[46]

Kalven is certainly correct in assigning the first amendment a central place in our society, and he is also right in attributing that centrality to the importance of speech to democratic organization. Since I share this common ground with Professor Kalven, I find it interestng that my conclusions differ so widely from his.

I am led by the logic of the requirement that judges be principled to the following suggestions. Constitutional protection should be accorded only to speech that is explictily political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.

I am, of course, aware that this theory departs drastically from existing Court-made law, from the views of most academic specialists in the field and that it may strike a chill into the hearts of some civil libertarians. But I would insist at the outset that constitutional law, viewed as the set of rules a judge may properly derive from the document and its history, is not an expression of our political sympathies or of our judg-

45. H. Kalven, The Negro and the First Amendment 4-5 (1966) [hereinafter cited as Kalven].
46. *Id.* at 6.

ments about what expediency and prudence require. When decision making its principled it has nothing to say about the speech we like or the speech we hate; it has a great deal to say about how far democratic discretion can govern without endangering the basis of democratic government. Nothing in my argument goes to the question of what laws should be enacted. I like the freedoms of the individual as well as most, and I would be appalled by many statutes that I am compelled to think would be constitutional if enacted. But I am also persuaded that my generally libertarian commitments have nothing to do with the behavior proper to the Supreme Court.

In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the "first amendment is an absolute." Devotees of this position insist, with a literal respect they do not accord other parts of the Constitution, that the Framers commanded complete freedom of expression without governmental regulation of any kind. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech. . . ." Those who take that as an absolute must be reading "speech" to mean any form of verbal communication and "freedom" to mean total absence of governmental restraint.

Any such reading is, of course, impossible. Since it purports to be an absolute position we are entitled to test it with extreme hypotheticals. Is Congress forbidden to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors' gallery during its own deliberations or to provide any rules for decorum in federal courtrooms? Are the states forbidden, by the incorporation of the first amendment in the fourteenth, to punish the shouting of obscenities in the streets?

No one, not the most obsessed absolutist, takes any such position, but if one does not, the absolute position is abandoned, revealed as a play on words. Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made. Nor does that in any way involve us in a conflict with the wording of the first amendment. Laymen may perhaps be forgiven for thinking that the literal words of the amendment command complete absence of governmental inhibition upon verbal activity, but what can one say of lawyers who believe any such thing? Anyone skilled in reading language should know that the words are not necessarily absolute. "Freedom of speech" may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be "abridged."

If we turn to history, we discover that our suspicions about the wording are correct, except that matters are even worse. The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. Professor Leonard Levy's, work, *Legacy of Suppression*,[47] demonstrates that the men who adopted the first amendment did not display a strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness. In colonial times and during and after the Revolution they displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse. Jeffersonians, threatened by the Federalist Sedition Act of 1798, undertook the first American elaboration of a libertarian position in an effort to stay out of jail. Professor Walter Berns offers evidence that even then the position was not widely held.[48] When Jefferson came to power it developed that he read the first amendment only to limit Congress and he believed suppression to be a proper function of the state governments. He appears to have instigated state prosecutions against Federalists for seditious libel. But these later developments do not tell us what the men who adopted the first amendment intended, and their discussions tell us very little either. The disagreements that certainly existed were not debated and resolved. The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended. One reason, as Levy shows, is that the Anti-Federalists complained of the absence of a Bill of Rights less because they cared for individual freedoms than as a tactic to defeat the Constitution. The Federalists promised to submit one in order to get the Constitution ratified. The Bill of Rights was then drafted by Federalists, who had opposed it from the beginning; the Anti-Federalists, who were really more interested in preserving the rights of state governments against federal power, had by that time lost interest in the subject.[49]

We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials

47. L. LEVY, LEGACY OF SUPPRESSION (1960) [hereinafter cited as LEVY].
48. Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109.
49. LEVY, *supra* note 47, at 224-33.

for building. The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. Further guidance can be gained from the fact that we are looking for a theory fit for enforcement by judges. The principles we seek must, therefore, be neutral in all three meanings of the word: they must be neutrally derived, defined and applied.

The law of free speech we know today grows out of the Supreme Court decisions following World War I—*Schenck v. United States,*[50] *Abrams v. United States,*[51] *Gitlow v. New York,*[52] *Whitney v. California*[53]—not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis. Professor Kalven remarks upon "the almost uncanny power" of these dissents. And it is uncanny, for they have prevailed despite the considerable handicap of being deficient in logic and analysis as well as in history. The great Smith Act cases of the 1950's, *Dennis v. United States,*[54] as modified by *Yates v. United States,*[55] and, more recently, in 1969, *Brandenburg v. Ohio*[56] (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis. And other cases, culminating perhaps in a modified version of *Roth v. United States,*[57] have pushed the protections of the first amendment outward from political speech all the way to the fields of literature, entertainment and what can only be called pornography. Because my concern is general theory I shall not attempt a comprehensive survey of the cases nor engage in theological disputation over current doctrinal niceties. I intend to take the position that the law should have been built on Justice Sanford's majority opinions in *Gitlow* and *Whitney*. These days such an argument has at least the charm of complete novelty, but I think it has other merits as well.

Before coming to the specific issues in *Gitlow* and *Whitney,* I wish

50. 249 U.S. 47 (1919).
51. 250 U.S. 616 (1919).
52. 268 U.S. 652 (1925).
53. 274 U.S. 357 (1927).
54. 341 U.S. 494 (1951).
55. 354 U.S. 298 (1957).
56. 395 U.S. 444 (1969).
57. 354 U.S. 476 (1957).

to begin the general discussion of first amendment theory with consideration of a passage from Justice Brandeis' concurring opinion in the latter case. His *Whitney* concurrence was Brandeis' first attempt to articulate a comprehensive theory of the constitional protection of speech, and in that attempt he laid down premises which seem to me correct. But those premises seem also to lead to conclusions which Justice Brandeis would have disowned.

As a starting point Brandeis went to fundamentals and attempted to answer the question why speech is protected at all from governmental regulation. If we overlook his highly romanticized version of history and ignore merely rhetorical flourishes, we shall find Brandeis quite provocative.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. The belief that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against, the dissemination of noxious doctrine. . . . They recognized the risks to which all human institutions are subject. But they knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[58]

We begin to see why the dissents of Brandeis and Holmes possessed the power to which Professor Kalven referred. They were rhetoricians of extraordinary potency, and their rhetoric retains the power, almost half a century latter, to swamp analysis, to persuade, almost to command assent.

But there is structure beneath the rhetoric, and Brandeis is asserting, though he attributes it all to the Founding Fathers, that there are four benefits to be derived from speech. These are:

58. 274 U.S. at 375.

1. The development of the faculties of the individual;
2. The happiness to be derived from engaging in the activity;
3. The provision of a safety value for society; and,
4. The discovery and spread of political truth.

We may accept these claims as true and as satisfactorily inclusive. When we come to analyze these benefits, however, we discover that in terms of constitutional law they are very different things.

The first two benefits—development of individual faculties and the achievement of pleasure—are or may be found, for both speaker and hearer, in all varieties of speech, from political discourse to shop talk to salacious literature. But the important point is that these benefits do not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the first two benefits can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.

The third benefit of speech mentioned by Brandeis—its safety valve function—is different from the first two. It relates not to the gratification of the individual, at least not directly, but to the welfare of society. The safety valve function raises only issues of expediency or prudence, and, therefore, raises issues to be determined solely by the legislature or, in some cases, by the executive. The legislature may decide not to repress speech advocating the forcible overthrow of the goverment in some classes of cases because it thinks repression would cause more trouble than it would prevent. Prosecuting attorneys, who must in any event pick and choose among cases, given their limited resources, may similarly decide that some such speech is trivial or that ignoring it would be wisest. But these decisions, involving only the issue of the expedient course, are indistinguishable from thousands of other managerial judgments governments must make daily, though in the extreme case the decision may involve the safety of the society just as surely as a decision whether or not to take a foreign policy stand that risks war. It seems

plain that decisions involving only judgments of expediency are for the political branches and not for the judiciary.

This leaves the fourth function of speech—the "discovery and spread of political truth." This function of speech, its ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity. But the difference exists only with respect to one kind of speech: explicitly and predominantly political speech. This seems to me the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification and their protection against legislative regulation involves the judge in making decisions of the sort made in *Griswold v. Connecticut*.

It is here that I begin to part company with Professor Kalven. Kalven argues that no society in which seditious libel, the criticism of public officials, is a crime can call itself free and democratic.[59] I agree, even though the framers of the first amendment probably had no clear view of that proposition. Yet they indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies. It is for this reason, the relation of speech to democratic organization, that Professor Alexander Meiklejohn seems correct when he says:

> The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.[60]

But both Kalven and Meiklejohn go further and would extend the protection of the first amendment beyond speech that is explicitly political. Meiklejohn argues that the amendment protects:

> Forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.

59. KALVEN, *supra* note 45, at 16.
60. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

He lists four such thoughts and expressions:

> 1. Education, in all its phases. . . . 2. The achievements of philosophy and the sciences. . . . 3. Literature and the arts. . . . 4. Public discussions of public issues. . . .[61]

Kalven, following a similar line, states: "[T]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."[62] It is an invitation, I wish to suggest, the principled judge must decline. A dialectic progression I take to be a progression by analogy from one case to the next, an indispensable but perilous method of legal reasoning. The length to which analogy is carried defines the principle, but neutral definition requires that, in terms of the rationale in play, those cases within the principle be more like each other than they are like cases left outside. The dialectical progression must have a principled stopping point. I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech. If the dialectical progression is not to become an analogical stampede, the protection of the first amendment amendment must be cut off when it reaches the outer limits of political speech.

Two types of problems may be supposed to arise with respect to this solution. The first is the difficulty of drawing a line between political and non-political speech. The second is that such a line will leave unprotected much speech that is essential to the life of a civilized community. Neither of these problems seems to me to raise crippling difficulties.

The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the govern-

61. *Id.* at 256-57.
62. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.

mental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection. This is not anomalous, I have tried to suggest, since the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct. The line drawn must, therefore, lie between the explicitly political and all else. Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

The other objection—that the political-nonpolitical distinction will leave much valuable speech without constitutional protection—is no more troublesome. The notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not to think it so.

The practical effect of confining constitutional protection to political speech would probably go no further than to introduce regulation or prohibition of pornography. The Court would be freed of the stultifying obligation to apply its self-inflicted criteria: whether "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social

value."[63] To take only the last criterion, the determination of "social value" cannot be made in a principled way. Anything some people want has, to that degree, social value, but that cannot be the basis for constitutional protection since it would deny regulation of any human activity. The concept of social value necessarily incorporates a judgment about the net effect upon society. There is always the problem that what some people want some other people do not want, or wish actively to banish. A judgment about social value, whether the judges realize it or not, always involves a comparison of competing values and gratifications as well as competing predictions of the effects of the activity. Determination of "social value" is the same thing as determination of what human interests should be classed as "fundamental" and, therefore, cannot be principled or neutral.

To revert to a previous example, pornography is increasingly seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution. A majority of the community may foresee that continued availability of pornography to those who want it will inevitably affect the quality of life for those who do not want it, altering, for example, attitudes toward love and sex, the tone of private and public discourse and views of social institutions such as marriage and the family. Such a majority surely has as much control over the moral and aesthetic environment as it does over the physical, for such matters may even more severely impinge upon their gratifications. That is why, constitutionally, art and pornography are on a par with industry and smoke pollution. As Professor Walter Berns says "[A] thoughtful judge is likely to ask how an artistic judgment that is wholly idiosyncratic can be capable of supporting an objection to the law. The objection, 'I like it,' is sufficiently rebutted by '*we* don't.' "[64]

We must now return to the core of the first amendment, speech that is explicitly political. I mean by that criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.

A qualification is required, however. Political speech is not any speech that concerns government and law, for there is a category of such speech that must be excluded. This category consists of speech

63. A Book Named "John Clelend's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966).

64. Berns, *Pornography vs. Democracy: The Case for Censorship*, THE PUB. INTEREST, Winter, 1971, at 23.

advocating forcible overthrow of the government or violation of law. The reason becomes clear when we return to Brandeis' discussion of the reasons for according constitutional protection to speech.

The fourth function of speech, the one that defines and sets apart political speech, is the "discovery and spread of political truth." To understand what the Court should protect, therefore, we must define "political truth." There seem to me three possible meanings to that term:

> 1. An absolute set of truths that exist independently of Constitution or statute.
>
> 2. A set of values that are protected by constitutional provision from the reach of legislative majorities.
>
> 3. Within that area of life which the majority is permitted to govern in accordance with the Madisonian model of representative government, whatever result the majority reaches and maintains at the moment.

The judge can have nothing to do with any absolute set of truths existing independently and depending upon God or the nature of the universe. If a judge should claim to have access to such a body of truths, to possess a volume of the annotated natural law, we would, quite justifiably, suspect that the source of the revelation was really no more exalted than the judge's viscera. In or system there is no absolute set of truths, to which the term "political truth" can refer.

Values protected by the Constitution are one type of political truth. They are, in fact, the highest type since they are placed beyond the reach of simple legislative majorities. They are primarily truths about the way government must operate, that is, procedural truths. But speech aimed at the discovery and spread of political truth is concerned with more than the desirability of constitutional provisions or the manner in which they should be interpreted.

The third meaning of "political truth" extends the category of protected speech. Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly. "Political truth" in this sense must, therefore, be a term of art, a concept defined entirely from a consideration of the system of government which the judge is commissioned to operate and maintain. It has no unchanging content but refers to the temporary outcomes of the democratic process. Political truth is what the majority

decides it wants today. It may be something entirely different tomorrow, as truth is rediscovered and the new concept spread.

Speech advocating forcible overthrow of the government contemplates a group less than a majority seizing control of the monopoly power of the state when it cannot gain its ends through speech and political activity. Speech advocating violent overthrow is thus not "political speech" as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech. It follows that there is no constitutional reason to protect speech advocating forcible overthrow.

A similar analysis suggests that advocacy of law violation does not qualify as political speech any more than advocacy of forcible overthrow of the government. Advocacy of law violation is a call to set aside the results that political speech has produced. The process of the "discovery and spread of political truth" is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement, and hence the putting of political truth into practice, impossible or less effective. There should, therefore, be no constitutional protection for any speech advocating the violation of law.

I believe these are the only results that can be reached by a neutral judge who takes his values from the Constitution. If we take Brandeis' description of the benefits and functions of speech as our premise, logic and principle appear to drive us to the conclusion that Sanford rather than Brandeis or Holmes was correct in *Gitlow* and *Whitney*.

Benjamin Gitlow was convicted under New York's criminal anarchy statute which made criminal advocacy of the doctrine that organized government should be overthrown by force, violence or any unlawful means. Gitlow, a member of the Left Wing section of the Socialist party, had arranged the printing and distribution of a "Manifesto" deemed to call for violent action and revolution. "There was," Justice Sanford's opinion noted, "no evidence of any effect resulting from the publication and circulation of the Manifesto."[65] Anita Whitney was convicted under California's criminal syndicalism statute, which forbade advocacy of the commission of crime, sabotage, acts of force or violence or terrorism

65. 268 U.S. at 656.

"as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Also made illegal were certain connections with groups advocating such doctrines. Miss Whitney was convicted of assisting in organizing the Communist Labor Party of California, of being a member of it and of assembling with it.[66] The evidence appears to have been meager, but our current concern is doctrinal.

Justice Sanford's opinions for the majorities in *Gitlow* and *Whitney* held essentially that the Court's function in speech cases was the limited but crucial one of determining whether the legislature had defined a category of forbidden speech which might constitutionally be suppressed.[67] The category might be defined by the nature of the speech and need not be limited in other ways. If the category was defined in a permissible way and the defenadant's speech or publication fell within the definition, the Court had, it would appear, no other issues to face in order to uphold the conviction. Questions of the fairness of the trial and the sufficiency of the evidence aside, this would appear to be the correct conclusion. The legislatures had struck at speech not aimed at the discovery and spread of political truth but aimed rather at destroying the premises of our political system and the means by which we define political truth. There is no value that judges can independently give such speech in opposition to a legislative determination.

Justice Holmes' dissent in *Gitlow* and Justice Brandeis' concurrence in *Whitney* insisted the Court must also find that, as Brandeis put it, the "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent."[68] Neither of them explained why the danger must be "clear and imminent" or, as Holmes had put it in *Schenck,* "clear and present"[69] before a particular instance of speech could be punished. Neither of them made any attempt to answer Justice Sanford's argument on the point:

> [T]he immediate danger [created by advocacy of overthrow of the government] is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a

66. 274 U.S. at 372 (Brandeis, J., dissenting).
67. 268 U.S. at 668; 274 U.S. at 362-63.
68. 274 U.S. at 373.
69. 249 U.S. at 52.

> jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . . . .[70]

To his point that proof of the effect of speech is inherently unavailable and yet its impact may be real and dangerous, Sanford might have added that the legislature is not confined to consideration of a single instance of speech or a single speaker. It fashions a rule to dampen thousands of instances of forcible overthrow advocacy. Cumulatively these may have enormous influence, and yet it may well be impossible to show any effect from any single example. The "clear and present danger" requirement, which has had a long and uneven career in our law, is improper not, as many commentators have thought, because it provides a subjective and an inadequate safeguard against the regulation of speech, but rather because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government. Whether or not it is prudent to ban advocacy of forcible overthrow and law violation is a different question although. Because the judgment is tactical, implicating the safety of the nation, it resembles very closely the judgment that Congress and the President must make about the expediency of waging war, an issue that the Court has wisely thought not fit for judicial determination.

The legislature and the executive might find it wise to permit some rhetoric about law violation and forcible overthrow. I am certain that they would and that they should. Certain of the factors weighted in determining the constitutionality of the Smith Act prosecutions in *Dennis* would, for example, make intelligible statutory, though not constitutional, criteria: the high degree of organization of the Communist party, the

70. 268 U.S. at 669.

rigid discipline of its members and the party's ideological affinity to foreign powers.[71]

Similar objections apply to the other restrictions Brandeis attempted to impose upon government. I will mention but one more of these restrictions. Justice Brandeis argued that:

> Even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.[72]

It is difficult to see how a constitutional court could properly draw the distinction proposed. Brandeis offered no analysis to show that advocacy of law violation merited protection by the Court. Worse, the criterion he advanced is the importance, in the judge's eyes, of the law whose violation is urged.

Modern law has followed the general line and the spirit of Brandeis and Holmes rather than of Sanford, and it has become increasingly severe in its limitation of legislative power. *Brandenburg v. Ohio*, a 1969 per curiam decision by the Supreme Court, struck down the Ohio criminal syndicalism statute because it punished advocacy of violence, the opinion stating:

> . . . *Whitney* [the majority opinion] has been thoroughly discredited by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

71. 341 U.S. at 511.
72. 274 U.S. at 377-78.

> advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[73]

It is certainly true that Justice Sanford's position in *Whitney* and in *Gitlow* has been completely undercut, or rather abandoned, by later cases, but it is not true that his position has been discredited, or even met, on intellectual grounds. Justice Brandeis failed to accomplish that, and later Justices have not mounted a theoretical case comparable to Brandeis'.

* * * * *

These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here.

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73. 395 U.S. at 447.