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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. paper	re Robert Bork submitted by Department of Justice (p. 2, partial)	n.d.	~~P5, P6~~ B6
2. paper	re Patrick Higginbotham (p. 5, partial)	n.d.	~~P5, P6~~ B6
3. paper	re Higginbotham submitted by Department of Justice (1 pp., partial)	n.d.	~~P5, P6~~ B6
4. paper	re Anthony Kennedy submitted by Department of Justice (1 pp., partial)	n.d.	~~P5, P6~~ B6 EB 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].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
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- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
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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.

LEVEL 1 - 10 OF 10 STORIES

December 7, 1984, Friday, Final Edition

Bork Tab D

SECTION: Metro; C5

LENGTH: 156 words

HEADLINE: Judge Criticizes Trend to Rights Of Individuals

KEYWORD: BORK

BODY:

U.S. Court of Appeals Judge Robert H. Bork, widely regarded as a top Reagan administration choice for a future seat on the Supreme Court, said yesterday that the courts are focusing too strongly on the rights of individuals and that communities should be allowed to enforce moral standards.

Addressing about 600 at a gathering of the American Enterprise Institute, a Republican-oriented think tank, Bork rebuked judges for what he described as a growing trend toward policymaking from the bench. Judges, he said, "must refrain from injecting their own morality into their interpretations of the law."

Bork, who has been associated with the institute since 1964, was given its Francis Boyer award, previously given to such recipients as then President Gerald R. Ford and secretary of state Henry Kissinger.

Ford was among several prominent Republicans who attended last night's reception for Bork at the Washington Hilton Hotel.

GRAPHIC: Picture, Judge Bork with former president Ford at American Enterprise Institute event. BY JOEL RICHARDSON -- The Washington Post

LEVEL 1 - 2 OF 2 STORIES

Bork Tab E

December 8, 1984

SECTION: WHITE HOUSE; Vol. 16, No. 49; Pg. 2339

LENGTH: 961 words

HEADLINE: Reagan's List of Potential High Court Justices

BODY:

If President Reagan, as expected, gets a chance to name additional Supreme Court Justices, the leading contenders will fall into two categories: the academics and the allies. Most observers expect that the next judge Reagan nominates to the Court will come from the ranks of either the conservative academics he has appointed to the appeals courts or his old California allies in the Administration.

In 1981, Attorney General William French Smith asked several department officials to begin looking for potential Supreme Court nominees even before Justice Potter Stewart announced he would resign. Planning continues. At the White House, presidential counsel Fred F. Fielding has been collecting a list of names and, on occasion, has sat down to talk with potential candidates.

Moreover, the Administration can build on the search that produced Sandra Day O'Connor, the first woman appointed to the Court. The Justice Department reviewed the record and writings of about 25 candidates after Stewart retired. "There were a number of very good names on the original list," said a senior White House official who was involved in the search.

There would still be a lot of work to do if another vacancy opens, though, because early in the process, Justice officials were informed by the Attorney General that Reagan intended to keep his campaign promise to name a woman to the Court. As a result, the only candidates closely analyzed were women, among them Cornelia G. Kennedy of the U.S. Court of Appeals for the 6th Circuit and Amalya Lyle Kearse of the U.S. Court of Appeals for the 2nd Circuit.

Robert H. Bork, who sits on the U.S. Court of Appeals for the District of Columbia Circuit and was one of those penciled in on the original Supreme Court list in 1981, is thought by many observers to be the favorite if Reagan chooses a conservative intellectual. The other consensus front-runner, though perhaps a half stride behind, would be former University of Chicago law professor Richard A. Posner of the U.S. Court of Appeals for the 7th Circuit. (Potentially also in the running is Antonin Scalia of the D.C. Circuit.)

Although both are well thought of by conservatives, and considered brilliant legal scholars even by critics, Bork and Posner offer Reagan a clear choice. Bork, who received a perfect score on the judicial restraint scorecard prepared by the conservative Center for Judicial Studies, is considered somewhat more cautious in moving to overturn judicial precedent than is Posner, who, in the view of Georgetown University Law School dean Robert Pitofsky, "at times reaches pretty far to introduce into his opinions his views." Posner also offers a more extreme brand of the "Chicago school" of thought that emphasizes economic analysis in judicial (as well as regulatory) decisions.

Although Bork made his name largely as a scholar calling for increased reliance on economic factors and efficiency in antitrust decisions, he thinks Posner has on occasion gone too far. "There are people who seem to think that any subject lends itself to economic analysis, but I'm not one of them," Bork said in a recent speech. "I have seen opinions by Judge Posner in which he analyzed the law of entrapment with economc principles, which is fine, but I don't think it's very useful. I think he overdoes it."

Many court watchers believe Posner would offer Reagan quicker ferment on the Court but a more fractious confirmation process. Prolific and intellectually intense, either Posner or Bork could be expected quickly to share leadership of the Court's conservative wing.

Such a leader is not likely to emerge from the Reagan allies often discussed for the job: Smith, presidential counselor Edwin Meese III and Interior Secretary William P. Clark. Any of those nominees would give the conservatives another vote, but not strong intellectual direction.

A close observer of Administration judicial activities doubts that any of those Reagan allies would want the job, noting that Smith has long been eager to return to California, that Clark only accepted judicial appointments in California at Reagan's persistent urging and that Meese wants to make a mark as Attorney General, if he can get confirmed.

How Reagan chooses between these and other contenders may depend not only on their qualifications but also on the political atmosphere at the time he makes the choice. Democratic gains in the 1986 elections -- perhaps even the recapture of the Senate -- or an economic recession that puts the Administration on the defensive could make it extremely difficult for Reagan to nominate one of his old friends.

Whoever Reagan chooses (assuming vacancies occur), "his influence will be enormous," said Herman Schwartz, a professor at American University Law School. Of the five justices over 75, two (William J. Brennan Jr. and Thurgood Marshall) make up the Court's solid liberal wing, two more (Harry A. Blackmun and Lewis F. Powell Jr.) are closer to the center, and only Chief Justice Warren E. Burger is a hard-core conservative.

A White House official estimated that the "outside limit" of openings the Administration could reasonably expect would be three. As long as Burger, William H. Rehnquist and O'Connor remain on the Court, as few as two vacancies would give Reagan a chance to construct a solid conservative majority.

And if any of the older Justices falter, Reagan is not likely to muff his chance. Although there are notable exceptions, "historically there have been very few instances where a President didn't get exactly what he wanted from [his choice] . . . on the Court," Schwartz said. "There's no shortage of people for Reagan to choose from, and the likelihood is that like O'Connor, they will vote exactly as he hoped."

GRAPHIC: Picture, Appeals court judge Robert H. Bork, Richard A. Bloom

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JUDGE BORK

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.

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CYNTHIA HOLCOMB HALL

Biographical Information

AGE: 56

BORN: February 19, 1929

COLLEGE: Stanford University, A.B., 1951 (age 21)

LAW SCHOOL: Stanford University, LL.B., 1954 (age 24)
N.Y. University, LL.M., 1960 (age 30)

PARTY: Republican

MILITARY SERVICE: United States Naval Reserve, 1951-53, Lieutenant (J.G.)

FAMILY: Widowed; two children. Husband, John Harris Hall, former Treasury official in Nixon Administration, killed October 16, 1980 in plane crash

RESIDENCE: Pasadena, California

HEALTH: Excellent; avid tennis player

Judicial History

TRIAL COURT: U.S. Tax Court, appointed by President Nixon, 1972-81
C.D. Cal., appointed by President Reagan, 1981

APPELLATE COURT: Ninth Circuit, appointed by President Reagan, 1984

Professional Experience

Braverman & Holcomb, Beverly Hills, California; partner, 1966-72 (specialty: tax law)
U.S. Department of the Treasury, Office of Tax Legislative Counsel, 1964-66
Department of Justice, Trial Attorney, Tax Division, 1960-64
Law Clerk to Hon. Richard Chambers, Ninth Circuit, 1954-55

General Considerations and Confirmability

Judge Cynthia Hall is second in seniority (after Sandra Day O'Connor) among women federal judges appointed by President Reagan. Prior to her appointment in 1981, the Washington Post observed that she was the "sole woman known to be a strong contender for a judgeship" in the Reagan Administration. Her

ten years as a federal trial judge preceding her appointment to the Ninth Circuit Court of Appeals make her, at the age of 56, one of the longest-sitting Republican women judges. Her academic, professional and intellectual qualifications are first rate. Throughout her tenure as a federal trial and appellate court judge, she has consistently evidenced a solidly conservative judicial philosophy.

While Judge Hall has never been active in politics, she and her husband John were modest financial supporters of their Congressman from Pasadena, John Rousselot, a well-known conservative. In a Los Angeles Daily Journal profile, Judge Hall noted that while she has never been active in politics, "I know it helped that I was a woman, a Republican, and a judge. If I had been a bra-burning liberal, I probably wouldn't have gotten the job."

Throughout Judge Hall's career, she has not attracted any negative publicity. To the contrary, she has been consistently mentioned in articles otherwise critical of the Reagan Administration's judicial appointments. For example, she was a lonely bright spot in an otherwise dour article appearing in the Washington Post on September 10, 1982, entitled "Reagan's Judiciary: Mostly White, Mostly Men." In that article, Deputy Attorney General Edward C. Schmults was quoted as saying that the Administration was looking for qualified women, but could not find any. Other articles in the Washington Post have asserted that President Reagan has substantially reduced the proportion of women and blacks being appointed to federal judgeships. The National Women's Political Caucus has criticized the President's record in appointing women to federal judgships as "abysmal."

When Judge Hall was sworn in as a Ninth Circuit Judge by Sandra Day O'Connor at a private ceremony in Washington in 1981, she immediately began to apply her conservative, pro-individual, no-nonsense philosophy evidenced consistently on the U.S. Tax Court. She immediately became known as a tough, independent and fair judge in the criminal field who was prone to stiff sentences. A Charles Manson follower who committed two consecutive bank robberies within a 90-day period following his release from ten years in prison was sentenced to an additional 30 years by Judge Hall. A woman identified as the local boss of a major drug ring, apprehended in the largest cocaine seizure ever by Los Angeles police, was sentenced to 20 years in prison, a $75,000 fine and 15 years parole after her release from prison. A securities promoter who swindled hundreds of investors, including comedian Rich Little, out of more than $8 million in a bogus tax shelter was sentenced to six years in prison and $50,000 fine. Another white-collar criminal, a securities broker who falsely confirmed transactions in bearer bonds to his customers and converted them to personal use, was enjoined under an order freezing all of his assets except $75

per day for living expenses and $5,000 for legal fees, pending trial.

Well respected for her tax expertise both as a practitioner and on the bench, Judge Hall deftly handled an extremely sensitive international tax case involving Toyota and the government of Japan. The tax unit of the Department of Justice sought to enforce a summons against Toyota U.S.A.'s Japanese parent corporation. The IRS claimed it required information on Toyota's manufacturing and selling costs in Japan in order to determine the validity of transfer prices to its U.S. subsidiary in the course of a tax audit. When the Department of Justice sued, the Japanese government threatened to take retaliatory action against U.S. firms. The Japanese Foreign Minister, in a speech before the Diet, alleged that enforcement of the summons would violate international law. Judge Hall reacted deliberately, but with caution. She received advice from the Department of State that, while it had not responded to Japan's protest, she should not wait for State's response before ruling. Judge Hall held that the information sought was "necessary for a fair and accurate determination of Toyota U.S.A.'s tax liability," and enforced the summons. Her opinion's exposition of international law was publicly hailed by Justice, and is an example of fine work in an exceptionally complicated area.

Judge Hall's no-nonsense reputation was earned anew in Thompson Co. v. General Nutrition Corp., in which a company that had destroyed vital records during discovery in violation of a court order and its lawyers were held jointly liable for $375,000 in sanctions. Judge Hall ruled that "neither GNC nor its counsel made any creditable attempt to ensure or monitor GNC's compliance." The decision was favorably reported in several news articles and professional journals.

Judge Hall refused to permit a defense of duress in a drug smuggling case in which the defendant claimed that there had been indirect threats on his life if he did not continue in the drug trade. This decision was subsequently reversed by the Ninth Circuit.

In another decision reported by the general media, Judge Hall held that reparations payments that the German Federal Republic made to a survivor of the Holocaust constitute countable "income" in determining eligibility for supplemental security income (SSI) under the Social Security Act. The case eventually came before the Ninth Circuit en banc (Judge Hall did not participate on the en banc court) and was reversed, the court admitting that the case was one of first impression which Congress had not addressed. "Neither the Act, its legislative history, nor its implementing regulations explicitly mention" the situation in the case, according to the court. 748 F.2d. 503, 504. Judge Hall had supported the determination of the Social Security Administration, which was predicated on the

rationale that SSI payments are based on need, and for this purpose take into account all forms of cash income.

In a sensitive political case decided in June 1982, Judge Hall closely followed a direct precedent in the Central District of California in granting the State of California's request for a preliminary injunction against opening bids on certain offshore oil leases. The case involved Interior Secretary James Watt's offshore oil leasing plans, which opened up bidding on 164 tracts off the California coast. Judge Hall's order barred accepting bids on ten tracts off the coast in Orange County, an additional ten off the Malibu coast, two in Ventura, and two in Long Beach Harbor. The Ninth Circuit of Appeals upheld her order. The decision was based on the Coastal Zone Management Act, which requires that federal oil leasing must be consistent with the states' coastal plans. In the earlier case upon which Judge Hall relied, Judge Pfaelzer in Los Angeles had held that Secretary Watt had failed to comply with these consistency requirements. The result of Judge Hall's decision was to leave 140 tracts open for bidding and cancel 24. In the course of her decision, Judge Hall ruled that the Sierra Club had no standing to challenge the offshore oil leasing plans.

In a case involving negotiations for the sale of the San Diego Clippers NBA franchise, Judge Hall ruled that a three-page handwritten memorandum from one of the negotiations did not constitute an enforceable contract for the multi-million dollar sale of the team. Among other things, the handwritten memo failed to mention whether the deal was a stock or an asset transaction, and failed to specify many other critical financial, tax and business terms. The California Supreme Court subsequently reversed a longstanding line of cases holding that a cause of action for tortious misrepresentation does not lie where it is based on an oral contract which would not be enforceable under the Statute of Frauds, and the Ninth Circuit reversed Judge Hall's ruling based on this later case, which the California Court made retroactive. Notwithstanding the unpredictable California Supreme Court's location of a new tort cause of action, Judge Hall's decision on the contract issue is clearly sound.

Overall, Judge Hall appears to be the perfect Reagan judge. Moreover, she would have little problem with confirmation. She is a woman head of household with two bright children (she has been quoted in the press as wondering whether "women who give up a husband or a family to have a career, or give up a career to have a family . . . get to a point when they realize they've missed something. I liked having a husband, I love my children, and I wouldn't give up my career for the world, although I've had to work hard to manage them all"); she served three years in the U.S. Naval Reserve, reaching the rank of Lieutenant J.G.; she is a graduate of Stanford University, and -- like Justices Rehnquist and O'Connor -- earned her law degree there as well at

a time when few women graduated from Stanford Law School; and she is the very model of judicial demeanor on the bench. According to the Los Angeles Daily Journal profile, "Lawyers praise her years on the Tax Court as well as her years practicing law. 'She was very independent and very fair," said one. "She wasn't afraid to make a ruling in a tough area. That took courage.' Indeed, it is tough to find any shortcomings in Judge Hall save that she is 56 instead of 46.

Positions on Critical Issues

Criminal Justice. Judge Hall has a deserved reputation as tough on crime. As a district court judge, she meted out some of the toughest sentences in the Ninth Circuit. According to the Los Angeles Daily Journal, "in keeping with her conservative philosophy, Hall is unsympathetic to tax protestors or anyone else who tries to avoid paying taxes. 'During the Vietnam War, everyone was protesting the war,' she said. 'After the war, they looked for something else to protest.' Hall said she blamed some of the protests on inflation, which 'pushed everyone into higher brackets, so people were looking for excuses not to pay their taxes.'"

Federalism. Judge Hall has a keen respect for proper delineation of authority among the federal government, the states and the individual. In a difficult political context, she ruled that the attempt by the city of Oakland, California to use eminent domain procedings to force the return of the NFL Raiders to Los Angeles (a procedure that had been expressly authorized by the California Supreme Court) could not be enjoined as a violation of federal antitrust law. Her decision in the Watt offshore oil leasing case reflected both a careful and fair construction of the federal statutes and a concern for states' rights (which, in that case, the statutes expressly required should be deferred to in implementing the leasing program).

Separation of Powers. Judge Hall's opinion in the Toyota U.S.A. extraterritorial summons enforcement case illustrates a thorough appreciation of the relative roles of the executive, the Congress and the judiciary in international affairs. Her many decisions on the Tax Court showed a healthy concern when IRS rulemaking strayed too far from its purported basis in the Code. Her willingness to exercise judicial restraint in a variety of circumstances typifies her vision of a strong, certain and evenhanded -- but not inventive -- application of the law by the courts.

Economic Matters. Few sitting judges have a better appreciation for business finance than Judge Hall. Her easy grasp of financial and economic issues permits her to render decisions in such matters incorporating a consistent clarity of logic, with crisp opinions of manageable length. Moreover, she has shown a

special sensitivity to the economics of a case in determining whether to grant emergency relief or to rule on the pleadings at an early stage. In 1983, when "E.T." was the largest grossing feature film in history, Judge Hall refused to grant injunctive relief in favor of the owner of a copyrighted play and script who claimed the film was based on his work. Judge Hall further ruled swiftly that the works were "dissimilar" and that "no reasonable jury could conclude otherwise." The plaintiffs had sought damages of $1 billion. In Grunfeder v. Heckler, the case discussed above involving the effect of reparation payments to a Holocaust victim on her eligibility for supplemental security income, Judge Hall showed a sensitivity to both legislative intent and the fiscal effects of her decision.

Other Matters. The Almanac of the Federal Judiciary (1986) contains the following lawyers' comments about Judge Hall: "Judge Hall is generally given high marks for her service on the U.S. Tax Court and the federal district court in Los Angeles. She was courteous (but somewhat strict and humorless, according to some), was well prepared, knowledgeable, evenhanded, articulate, and decisive. Additional comments: 'No-nonsense, perhaps too severe in demeanor, did not seem to get much pleasure from being a district judge.' 'Reportedly exercises considerable influence on the selection of other federal judges.' 'Follow the rules if you don't want to be up to your ankles in blood.' 'Very bright, writes interesting decisions -- readable, cogent, analytical.'"

Conclusion

Judge Hall is an excellent prospect for the Supreme Court. As it happens, she is a woman, and the most qualified in the country of her gender. But more importantly, she stands shoulder-to-shoulder with the small group of male Supreme Court candidates, based solely on her individual merits.

PATRICK E. HIGGINBOTHAM

Biographical Information

AGE: 47

BORN: December 16, 1938, Bessemer, Alabama

COLLEGE: Arlington State College, Arlington, Texas, 1956-57
North Texas State University, 1958
University of Texas, Austin, Texas, 1958
University of Alabama, Tuscaloosa, Alabama, A.B., 1958 (age 20)

LAW SCHOOL: University of Alabama, Tuscaloosa, Alabama, 1959-61, LL.B., 1961 (age 23); Note Editor, Alabama L. Rev.

MILITARY: U.S. Air Force, 1961-64, Captain

RELIGION: Methodist

FAMILY: Married since 1961; two children

RESIDENCE: Dallas, Texas

Judicial History

TRIAL COURT: N.D. Texas, appointed by President Ford, 1975

APPELLATE COURT: Fifth Circuit, appointed by President Reagan, 1982

Professional Experience

Coke & Coke, Dallas, Texas, associate and partner, 1964-75

General Considerations and Confirmability

Since his appointment as a trial judge by President Ford in 1975, Judge Higginbotham has established himself as a moderately conservative judge with a strong interest and somewhat unpredictable bent in the affirmative action area. He has become more consistently conservative since his appointment to the Fifth Circuit in 1982.

Judge Higginbotham's most significant decision as a trial judge came in Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980), a race and sex discrimination class action. The opinion, at a massive 227 pages, was heralded in the press as the longest ever in a case of this kind. In an earlier

ruling concerning class certification in the same action, Judge Higginbotham, according to press reports, stated that Republic National Bank's personnel practices were "infested to the core by racial and sex discrimination." A 1979 opinion by Judge Higgenbotham in this case took an expansive view of standing to sue in class actions, holding that a class representative could raise class claims that she would not be able to assert individually. See 83 F.R.D. 420, 426-29 (N.D. Tex. 1979). The hefty 1980 opinion is widely reputed to have engendered wider acceptance of the use of mathematical models, including regression analysis, in race and gender based discrimination class actions. While disclaiming complete reliance on statistics, Judge Higginbotham seemed to relish the use of elaborate statistical evidence as the principal basis for determining whether "the facts found are more likely true than not true." See 505 F. Supp. at 394, and passim. The press estimated potential liability to the bank from Judge Higginbotham's ruling at $50 million. Vuyanich did, however, sidestep an endorsement of the plaintiffs' comparable worth arguments, with Judge Higginbotham describing the comparable worth concept as a "hopelessly involved task inappropriate for judicial resolution."

Judge Higginbotham is also well known for his ruling against Southwest Airlines, which had operated with all-female crews and ticket agents out of Love Field in Dallas as the "Love Airline." Judge Higginbotham ruled that female sex appeal is not a bona fide occupational qualification, and required the airline to hire men as well as women. Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981). While the result is supportable, the analysis consisted merely of examination of marketing surveys to weigh the airline's claim that its "sex appeal" image was a principal factor in distinguishing it from its competitors. Id. at 294-96. The opinion relied on Justice Marshall's concurrence in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), but the analysis suggests that if the marketing surveys had more clearly shown that passengers preferred female attendants, a BFOQ might have been established. The opinion is also windy and rambling.

In other notable trial court rulings covered in the press, Judge Higginbotham entered a contempt order against a reporter for failing to disclose his sources, accompanied by an opinion expressing respect for the reporter's courage; declared misdemeanor arrest warrant procedures unconstitutional in a ruling that affected thousands of misdemeanor cases and gave rise to damage actions against the county (see Crane v. Texas, 534 F. Supp. 1237 (N.D. Tex. 1982)); and granted summary judgment for defendants in a massive antitrust suit against supermarkets and beef packers (In re Beef Industry Antitrust Litigation, 542 F. Supp. 1122 (N.D. Tex. 1982)).

In a decision more notable for its potentially enormous fiscal effects than its legal reasoning, Judge Higginbotham in 1981 ordered the Irving Independent School District to provide daily catheterization for a student afflicted with spina bifida. The School District had argued that the statute requiring it to provide an "appropriate program" to handicapped students did not require it to perform expensive medical procedures such as catheterization. Moreover, the statute exempts from its requirements medical services except those "for diagnostic and evaluation purposes only." 20 U.S.C. § 1401(17). The decision is, for a conservative judge, a puzzlement. Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981).

In a 1980 ruling, Judge Higginbotham decided that assets of the Iranian government were immune from attack in private suits by American citizens. E. Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980). The federal courts were split on this issue.

In a 1982 reverse discrimination case, Jurgens v. EEOC, 30 Employment Practice Decisions (CCH) ¶ 33, 090, 29 Fair Employment Practice Cases (BNA) 1561, he outlined evidence that the EEOC was guilty of reverse discrimination because of its over-representation of minorities and women.

As a Fifth Circuit Judge, Judge Higginbotham's rulings have been more conservative. In Dunagin v. City of Oxford, 718 F.2d. 738 (5th Cir. 1983), for example, Judge Higginbotham ruled that a ban on liquor advertising in Mississippi infringed First Amendment rights of commercial speech.

In a recent en banc opinion in Baker v. Wade, 769 F.2d. 289 (5th Cir. 1985), Judge Higginbotham joined the majority opinion of another judge in a 9-7 vote, ruling that "in view of the strong objection to homosexual conduct, which has prevailed in western culture for the past seven centuries," the Texas sodomy law forbidding sexual intercourse among homosexuals was constitutional.

In Brewer v. Austin Independent School District, 779 F.2d. 260 (5th Cir. 1985), Judge Higginbotham held that school disciplinary proceedings are not the equivalent of criminal court proceedings, and therefore due process guarantees permitting confrontation and cross examination of witnesses are inapplicable.

Other Information

The Almanac of the Federal Judiciary (1985) contains the following lawyers' comments on Judge Higginbotham: "courteous, moderately conservative, smart, knowledgeable, very strong on antitrust and admiralty matters, is diligent and writes well." Additional comments: "If I were Reagan, I'd put him on the

Supreme Court." "Too venturesome." "Still too soon to say. He could turn out to be another good one. We have a lot of good judges down here, and he compares well. He's still very young though." "Potential superstar."

Judge Higginbotham is apparently a close personal friend of Merri Spaeth, the former White House Director of Media Relations, and Tex Lezar, Attorney General Meese's former Chief of Staff. He performed their marriage at the boyhood home of Robert E. Lee in Alexandria.

In 1982, at the San Francisco convention of the American Bar Association, Judge Higginbotham presided at a recreation of the 1921 Sacco/Vanzetti trial.

Positions on Critical Issues

Criminal Justice. While generally conservative on criminal justice issues, Judge Higginbotham's independent streak -- manifested in such civil cases as Vuyanich v. Republic National Bank of Dallas, supra -- also is evident in the criminal area. The Crane case, with its wholesale invalidation of thousands of outstanding arrest warrants, could have been crafted much more carefully. More representative of the typical Higginbotham opinion, however, is U.S. v. Brooks, 786 F.2d. 638 (5th Cir. 1986), in which Judge Higginbotham rejected a number of procedural challenges to a conviction for conspiracy to interfere with commerce by threats or violence. The case is noteworthy because the defendant was Sen. Thomas Brooks, President Pro Tem of the Mississippi Senate.

Federalism. Judge Higginbotham's decisions do not evidence any particular penchant to raise to federalism issues. While a LEXIS search revealed many passing references to federalism in general, the thrust of more than one Higginbotham decision is to interpret liberally the scope of federal power as against state or local interests. See, e.g., Tatro v. Texas, supra; Dunagin v. City of Oxford, supra (states' rights under 21st Amendment balanced against 1st Amendment). On the other hand, in Baker v. Wade, supra, in a majority opinion in which he concurred, the right of the State of Texas to legislate on the subject of private sexual conduct was upheld principally on the basis of federalism principles. Judge Higginbotham's opinion in Terrell v. Maggio, 693 F.2d. 591 (5th Cir. 1982), has been noted as an example of aggressive federalism. In that case, the Fifth Circuit vacated the district court's grant of habeas corpus relief, ordering the district judge to explain why he disregarded the state court's findings on the petitioner's claims. Higginbotham asserted:

> "If a single federal judge is to stand an entire state at bay, he ought to say why."

Id. at 594.

Separation of Powers. Judge Higginbotham has not written a significant opinion on this subject. However, references to separation of powers throughout his opinions suggest some amount of reverence for the concept. It would appear that Judge Higginbotham accords a great deal of respect to legislative enactments, and that he favors a cautious judiciary that steers clear of political questions.

Economic Matters. With the notable exceptions of his vindication of commercial speech rights in two cases, Judge Higginbotham has not always been aggressively defensive of either property rights or commercial rights. The $50 million liability generated by his Republic National Bank of Dallas decision, some of the dicta notwithstanding, rested principally upon high-tech, high-powered mathematical formulae for quotas. The Tatro decision, unqualifiedly mandating unlimited public spending, clearly did not give much weight to the economic effect of the court's action.

Conclusion

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MATERIALS SUBMITTED BY

THE DEPARTMENT OF JUSTICE

JUDGE HIGGINBOTHAM

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 M. KENNEDY

Biographical Information

AGE: 49

BORN: July 23, 1936, Sacramento, California

COLLEGE: Stanford University, 1954-57
London School of Economics, 1957-58 (no degree)
Stanford University, B.A., 1958 (age 21)

LAW SCHOOL: Harvard University, 1961 (age 24); Board of Student Advisors

MILITARY: California Army National Guard, 1961, private first class

PARTY: Republican

FAMILY: Married, three children

RESIDENCE: Sacramento, California

Judicial History

TRIAL COURT: None

APPELLATE COURT: Ninth Circuit, appointed by President Ford, 1975

Professional Experience

Evans, Jackson & Kennedy, Sacramento, California, partner, 1967-75
Sole practitioner, Sacramento, California, 1963-67
Thelin, Marrin, John & Bridges, San Francisco, California, associate, 1961-63

General Considerations and Confirmability

Alex Kozinski (with Richard Willard) was one of Judge Kennedy's past law clerks.

Writing for a Ninth Circuit panel in a September 1985 "comparable worth" case, Kennedy overturned an order that the State of Washington pay hundreds of millions of dollars to 15,000 women who said that they should be paid the same as men who do comparable work. Kennedy said the state was not

obligated to "eliminate an economic inequality which it did not create." The comparable worth theory should only be used in cases in which there is a "specific, clearly delineated employment practice applied at a single point in the job selection process," he wrote. Instead, the Washington system was based on numerous factors "including supply and demand and other market forces." The State of Washington "has not been shown to have been motivated by impermissible sex-based considerations in setting salaries" he said. He also ruled that "a study which indicates a particular wage structure might be more equitable should not categorically bind the employer . . . ."

In a suit brought by CBS radio and a television network to have legal documents unsealed in the case of a man who pleaded guilty to drug and tax charges in the same transaction that resulted in federal cocaine charges against John DeLorean, Kennedy decided to grant the media request. None of the documents had been made public, and the federal district court ruled that they should remain sealed. Kennedy wrote that only compelling reasons can justify secrecy in court records, and found the government's reasons insufficient. "Most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record," Kennedy said. The documents made public detailed the defendant's request for sentence reduction and the government's response. In his opinion, Kennedy held that there is a presumption that the public and news media have a right of access to files in criminal proceedings. The fact that the district court sealed its findings was given no special weight.

Judge Kennedy was one of the six Ninth Circuit judges (as was Judge Wallace) to join in the unusual "dissent" filed after the panel disposition in Students of California School for the Blind v. Honig. The six judges were unable to muster the absolute majority needed to rehear the case en banc and therefore filed an inchoate "dissent" after the case had been disposed of, even though none was on the panel. Judge Sneed, who wrote the dissent, said that the panel decision reflects "an insensitivity to the most recent relevant Supreme Court pronouncements and to the principles of federalism those pronouncements sought to explicate." The panel had upheld a federal order that state officials either perform more seismic testing in a California school or close it. The Ninth Circuit panel held that California had waived its immunity to sue in federal court under the 11th Amendment by participating in federally funded and regulated programs. That decision appeared to conflict directly with Pennhurst State School and Hospital v. Halderman, 109 S. Ct. 900 (1984).

Judge Kennedy's panel decision in another case reinstated a false-arrest and brutality suit against Las Vegas police by two

jewelry salesmen who were apprehended in 1976 under suspicion of killing two shop owners and stealing their jewelry. The suit, alleging violation of the individuals' civil rights, unlawful arrest and seizure, had previously been thrown out by the district court. The case "reflects the inescapable conclusion that the jewelry salesmen were arrested because there is an unknown possibility that the jewelry was stolen," said Kennedy's opinion. The police actions, if true, are "outrageous and unjustifiable," he wrote.

Over constitutional objections, Judge Kennedy -- writing for an en banc court -- ruled that federal magistrates may conduct all procedings in civil cases, provided the litigants consent. The Kennedy opinion reversed a panel decision that had held that magistrates possess only limited power because they do not have the Article III constitutional protection of judges to ensure their independence. The case, Pacemaker Diagnostic Clinic of America v. Instromedix, Inc., decided in 1984, was seen as a major victory for magistrates. It had precedent in the Third Circuit. "Upon examination of the statute before us, we conclude that it contains sufficient protection against the erosion of judicial power to overcome the constitutional objections leveled against it, " Kennedy wrote. The panel had held that magistrates cannot render final decisions or enter judgments in civil cases because of their lack of independence, relying on the Supreme Court's 1982 decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co., which struck down provisions in the 1978 bankruptcy act that gave jurisdiction to federal bankruptcy judges. Judge Kennedy relied heavily on the fact that the waiver of the right to have one's case heard by an Article III judge would be voluntary and knowing.

In a 1983 decision involving Jane Fonda's claim that two banks conspired with the FBI in the 1970s to suppress her political views, Judge Kennedy's panel affirmance said Fonda produced no evidence of a "meeting of the minds between the banks and the FBI" which would have been necessary to prove a conspiracy. Fonda had sued nearly two dozen past or present government officials and Morgan Guaranty Trust Co. of New York and City National Bank in Los Angeles, claiming a wide-ranging conspiracy aimed at supressing her opposition to the Vietnam War and the Nixon Administration. Her suit was based principally upon columnist Jack Anderson's reprints of excerpts from FBI files that revealed phone taps and other surveillance, including examination of her bank records without court clearance. Judge Kennedy concurred in the panel's opinion.

In South-Central Timber Development, Inc. v. LeResche, 693 F.2d. 890 (9th Cir. 1982), Judge Kennedy, writing for the panel, lifted a district court injunction against enforcement of an Alaska statute that was pointedly designed to favor local timber processors. Kennedy concluded that the state statute was not

violative of the commerce clause because it was consistent with federal statutes that likewise favored Alaska timber processors. The Supreme Court reversed, holding that the mere fact that the state statute furthered the goals of a federal statute did not give a sufficient basis for inferring congressional intent to burden intersate and foreign commerce relating to Alaskan timber.

In Park'N Fly, Inc. v. Dollar Park and Fly, 718 F.2d. 327 (9th Circuit 1983), Judge Kennedy wrote that the holder of the registered trademark "Park'N Fly" was not entitled to an injunction prohibiting the use of the words "Park and Fly" as the name of a competitor because the mark was merely descriptive and therefore unregisterable (even though it had, in fact, been registered). The Supreme Court reversed, holding that the owner of a registered mark may enjoin infringement, and the fact that a registered mark was merely descriptive was no defense in an infringement action.

Position on Critical Issues

Federalism. Judge Kennedy's decisions in this area are notable for their clear explication of concepts of federalism and deference to state concerns. His exceptional concern for proper state/federal roles in judicial matters is illustrated by his decision in a damage suit for negligence against a drug manufacturer. Judge Kennedy's panel decision expressly asked the Idaho Supreme Court to explain the Idaho standard for negligence claims, and whether jury instructions on the issue of negligence were sufficient. The Court also asked whether, based on Idaho law, the jury could have found the defendant negligent for failure to develop a safer cell vaccine, since "relevant Idaho precedents do not indicate whether [the defendant's] conduct in designing and distributing a vaccine for which there is no legally available substitute and which possesses a degree of social utility may be characterized as negligent." His decision in South Central Timber Development showed that he can carry federalism so far that it conflicts with other important Constitutional principles.

Economic Matters. Judge Kennedy dissented from a 1982 panel decision holding that an employee who was discharged for her failure to abide by her participated in an antitrust conspiracy entered into by his employer has standing to bring a private treble damage suit under Section 4 of the Clayton Act. The dissent in Ostrofe v. H.A. Crocker Co., issued in 1982, argued that the court's majority opinion extended the reach of the antitrust laws far beyond the established precedent and the intent of Congress. Under the Supreme Court's decision in Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 447 (1977), actions under Section 4 are limited to persons injured as competitors in a defined market or a discreet area of the economy. Since the plaintiff was not in the area of the economy

endangered by a breakdown of competitive conditions -- i.e., he was not injured by any elimination of competition -- Judge Kennedy's should not have standing, according to the dissent. His majority opinion in the Washington State comparable worth case, described above, is significant.

Separation of Powers. Judge Kennedy wrote the unanimous three-judge panel's decision in the Chadha case for the Ninth Circuit, which was affirmed on appeal. The opinion, which struck down the legislative veto, said that the use of this procedure "undermines" the executive branch's powers and replaces it with "a species of nonlegislation" making "meaningless" the executive's duty to enforce law fairly. Kennedy's opinion also stressed that the use of the congressional veto in immigration cases interfered with "a central function of the judiciary," that of ensuring fairness and uniformity in dealing with aliens who seek suspension of deportation. The opinion said the use of the Congressional veto also "trespasses upon central functions of the executive" to enforce the law. The Court found that the one-house veto provision bypassed "the internal check of bicameralism" inherent in the constitutional requirement that legislation be passed by both House and Senate. The decision, reported at 634 F.2d. 408 (1980), held (1) that the Ninth Circuit had the jurisdiction to hear a case in which an alien was challenging the constitutionality of the statute rather than a decision of the INS; (2) that the statutory one-house "legislative veto" of the Attorney General's suspension of an INS deportation order violated the doctrine of separation of powers; and (3) that the unconstitutional portion of the statute was severable from the remainder.

Other Issues

Judge Kennedy was involved as a witness in the 1984 trial of U.S. District Harry E. Claiborne for bribery, wire fraud, obstruction of justice, tax evasion and filing a false financial disclosure form. One of the bribery charges was that Judge Claiborne bilked Nevada brothel owner Joe Conforte (who owns the Mustang Ranch Brothel outside of Reno), promising to influence the Ninth Circuit Court of Appeals decisions on Conforte's criminal tax conviction and never doing so. That count was framed as wire fraud. To establish the fraud element, the prosecution called all three Ninth Circuit judges who were members of the panel hearing Conforte's criminal case, one of whom was Judge Kennedy. Two of the panel members said they had no contact at all with Judge Claiborne, but Judge Kennedy recalled one conversation, which he said was brief and inappropriate. Judge Kennedy said the phone conversation regarding Conforte's tax case occurred in late 1979 or early 1980. At that time, according to Judge Kennedy, he and Judge Claiborne were in intermittent contact because they were sitting

together on a Ninth Circuit case. "When are you coming out with Conforte?" Judge Claiborne allegedly asked. "The case is under submission," Judge Kennedy said he replied curtly. Kennedy testified that he was "taken aback" when Claiborne called him about the Conforte case. Judge Claiborne allegedly collected $55,000 from Conforte as a result of the promise.

The Almanac of the Federal Judiciary contains the following lawyers' comments about Judge Kennedy: courteous; stern on bench, sociable otherwise. Somewhat conservative; evenhanded; bright; usually well prepared.

Additional Comments: 'Very young when appointed. Smart, filled with nervous energy. Usually asks many questions.' 'Good judge, good analytical mind, courageous, not afraid to break new ground. Well prepared, asks many questions.' 'A follower, doesn't do anything on his own.' 'Open-minded.' 'Very bright.' 'Quiet. Asks perceptive questions. Not hostile or aggressive.' 'Good business lawyer.' 'Sometimes caustic.' 'Not that well prepared.' 'An enigma. Hard to peg. Tends to agonize over opinions. Very conservative on Title VII.' 'Writes well reasoned opinions.' 'Opinions are not always well worked out. He loses track of the central argument.' 'Opinions go off on tangents and are too long-winded.' 'Bright, conservative, polite, works hard.'"

One of Kennedy's two former law partners has been the subject of press reports because of his decision to abandon the law in favor of running a pizza parlor. Herb Jackson, a former prosecutor in Sacramento, operates a pizza parlor in the resort town of Stinson Beach, California. Jackson started the pizza parlor when he lost his bid for re-election as District Attorney of Sacramento County in 1982. Kennedy's other former partner, Hugh Evans, is a California appellate judge.

Conclusion

Judge Kennedy is bright and conservative. His conservatism is intellectual rather than practical, leading to an occasional anomalous result. His reversals by the Supreme Court in South Central Timber Development and Park'N Fly may be examples of this overintellectualization. As noted by one of the lawyers who commented on him, his opinions often take tangents away from the panel; the number of cases in which he filed separate concurrences is relatively high. The Joe Conforte/Harry Claiborne fraud trial involvement could conceivably come up in confirmation hearings, but there is no evidence that Kennedy did anything but what was properly required in the circumstances. There has been no negative publicity about Judge Kennedy. Overall, his youth, intelligence, and stature among his colleagues warrant his inclusion in a "short list" of Supreme Court candidates.

MATERIALS SUBMITTED BY

THE DEPARTMENT OF JUSTICE

JUDGE KENNEDY

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.