

5-1-1986

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### Recommended Citation

James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. Miami L. Rev. 913 (1986)

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# Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges

JAMES G. WILSON\*

*The author evaluates the constitutional jurisprudence of judges Posner, Bork, Easterbrook, Scalia, and Winter by contrasting their views with the political theory of noted conservative Edmund Burke. These judges' conception of politics, legitimacy, separation of powers, and tyranny differ significantly from Burke's views, thereby raising questions about the nature of these jurists' conservatism.*

*On June 17, 1986, after this article went to press, Chief Justice Burger resigned from the Supreme Court. President Reagan nominated Justice Rehnquist as the sixteenth Chief Justice, and Judge Scalia as Justice Rehnquist's successor.*

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## I. INTRODUCTION

President Reagan has successfully influenced the American judicial system by appointing five academics from leading law schools to the United States Court of Appeals: Robert Bork, Richard Posner, Frank Easterbrook, Antonin Scalia, and Ralph Winter, Jr. Each of these conservative scholars played important roles in both criticizing liberal Supreme Court decisions and in proposing alternative legal visions. Bork provided an updated version of Weschler's theory of

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neutral principles to justify limited judicial review of constitutional claims. Posner is the acknowledged leader of the law and economics school. Easterbrook created a variety of rules of statutory and constitutional construction that limit judicial review. Scalia condemned affirmative action. Winter rearticulated, in constitutional terminology, classic objections to wealth distribution. One or more of these judges will gain even more power if he is appointed to the Supreme Court. In fact, President Reagan recently nominated Scalia to the Supreme Court. Even assuming that they all remain at their existing posts, these five jurist-scholars will provide intellectual leadership to their colleagues on the bench, bar, and academy. Their opinions and their law review articles will be read with more frequency and intensity.

This article, the first of two planned articles, probes these judges' constitutional jurisprudence as presented in their scholarly works, speeches, and testimony before Congress. The second piece, to later be published in this Law Review, will study these judges' constitutional decisions to see how consistent those opinions are with their earlier political perspectives, their academic theories of judicial review, and their positions on appropriate and inappropriate forms of constitutional argument. Initial research indicates that, except for Scalia, their opinions are somewhat more moderate than their academic writings.

There are several reasons for first dwelling upon theory. The presentation can become quickly confusing if one has to compare not only five views of scholars living in a world of academic discretion, but then contrast each of those perspectives with the decisions those academics make in the far more constrained role as an intermediate appellate judge, a role that may constrain each of these men differently. Furthermore, one needs to study their constitutional jurisprudence to see how they attempt to resolve two intertwined dilemmas. If these men believe they can implement any of their previously held constitutional viewpoints, including the theme of judicial restraint, they have to explain how they can use their theories while condemning liberals for applying values. Furthermore, they have to explain how they are acting conservatively when also proposing significant alterations in the existing judicial interpretation of the Constitution. As Judge Posner has pointed out, conservative judges can be caught in a process which perpetually ratchets to the left; temporary liberal majorities feel free to impose their views, but conservatives can only prevent new theories while having to accept all existing doctrine.<sup>1</sup>

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1. R. POSNER, *THE FEDERAL COURTS; CRISIS AND REFORM* 217 (1985). Posner argues

All five of these scholars have invoked the concept of legitimacy<sup>2</sup> to attempt to resolve these two potential contradictions. They claim that legitimacy is primarily found in the ballot box to resolve constitutional issues and in the market to resolve regulatory issues. Not only do those two structures best reflect existing preferences, but they also are the most democratic, the most accountable. The Supreme Court should defer to the legislature and the executive since those two branches are elected, and thus legitimated by the democratic process. The Court should only construe the Constitution to void legislation that conflicts with the intentions of those who drafted the Constitution and/or its amendments. Such action would not be countermajoritarian because the Constitution itself reflects the will of a supermajority.

On the other hand, these scholar/judges have maintained that

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that although *stare decisis* is usually considered a principle of judicial restraint: "[A judge] . . . could be an activist judge who was deferential toward precedent or a restrained judge who was not." *Id.* Judicial activism is primarily defined by the judge's relation to outside society, not by his relation to his institution's tradition.

2. Discussion about legitimacy is not limited to conservatives. Critical legal scholar Duncan Kennedy has stated that hierarchies are illegitimate because they are not voluntary, which is the basic criteria for legitimacy. Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 567, 577 (1982). Although "voluntariness" may have more substantive preconditions than "consent," Kennedy seems to be approaching Judge Posner's jurisprudence, which relies primarily upon agreement to validate acts. *See, e.g., West, Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

William Fletcher finds federal court regulation of public institutions is legitimated because such supervision is necessary. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982). Fletcher defines such necessity in terms of political failure: "The only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body." *Id.* at 694. Conversely, he concludes that power is used illegitimately when there is no "effective control over the person exercising that power." *Id.* at 642. Such a process-oriented view of legitimacy can deflect the legitimacy inquiry from the more fundamental questions of tyranny and justice.

The legitimacy debate has extended to debates on how to interpret the Constitution: "An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of the document, and only insofar as the interpretation is within the boundaries at least suggested by that language." Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 431 (1985). In his textbook, Professor Gunther traces the legitimacy debate back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See, e.g., G. GUNTHER, CONSTITUTIONAL LAW* 13-21 (11th ed. 1985).

Finally, this article is not considering legitimacy in the Weberian sense that legitimacy is a force that convinces the populace that their government deserves allegiance. That positive description of the sociological effects of the law differs from the normative conclusion that certain judicial opinions are "illegitimate." In his article attacking the Weberian idea for being meaningless, Professor Hyde also distinguishes between the use of the concept of legitimacy as a description and as a judgment. Hyde, *The Concept of Legitimation in the Sociology of the Law*, 1983 WIS. L. REV. 379, 419.

any Court opinions primarily formed by the values of Justices can be overruled as illegitimate, as being worse than unconstitutional or wrongheaded. These conservative judges conclude they would not be imposing their own views; they would be seeking to implement the views of the Framers. Nor would they be judicially active; their jurisprudence only permits them to interpret the text to implement the Framers' original intentions.

The final reason for separating theory from practice is to present in some detail the political perspective of Edmund Burke, the first and best advocate of conservatism. Naturally, Burke's belief that one should defer to existing institutions exacerbates the irony of modern conservative activism, which repudiates the Warren Court tradition. But that single rhetorical maneuver would hardly justify arguing that these jurists are not very Burkean. Anyone can claim to be conservative, to support the status quo, if he chooses that time in history when those in power best reflected his current views.<sup>3</sup> The major reason to study Burke is that Burke provides less support to the basic assumptions of contemporary right-wing jurisprudence than most modern liberals or conservatives believe. Judge Bork's frequent invocation of Burkean arguments does not signify that Bork and his colleagues ought to have a monopoly on Burke's perspective. Indeed, these judges are not just caught in dilemmas caused by being conservatives; in many ways, they are not Burkean conservatives at all.

One need only return to the idea of legitimacy to begin to see the gap between Burke and these five judges. Burke properly evaluated the legitimacy of a constitution or of an institution's actions by assessing its historical ability to resist tyranny.<sup>4</sup> That partially indetermi-

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3. Two major themes run through Burke's work. He applauds institutions and traditions that have survived the test of time. But as noted above, pure traditionalism does not provide us with very much direction in our volatile and diverse society. There are so many traditions from which to choose. Burke defends England's Constitution not only because it is ancient, but also because it provides for a mixed government. Although this article will periodically consider the tradition theme, it will primarily focus on the methodology Burke used to defend the English Constitution. We shall see that his way of looking at a constitution and at a mixed government that closely resembles our constitutional structure differs radically from the perspective of the five judges we are also studying. Yet Burke's specific political positions frequently, but not always, are echoed by modern conservatives. Thus, the gap between modern conservatives and Burke is not total, but is nevertheless far larger than most scholars might initially believe.

4. Professor Tribe links this article's two major themes of legitimacy and tyranny by arguing that belief in the former may facilitate the latter: "[I] believe that all exercises of power by some over others—even with what passes for the latter's consent—are and must remain deeply problematic that I find all legitimating theories not simply amusing in their pretensions but, in the end, as dangerous as they are unconvincing." L. TRIBE, *CONSTITUTIONAL CHOICES* 6 (1985). Labelling an action "legitimate" implies a perfect understanding of right and wrong: "It is to say that, in matters of power, the end of doubt and

nate (since it is historically bound) perspective generates a better mix of liberty, equality, and community than the views of the five jurists. Such moral opposition to injustice also reveals the extent of the gap between Burke's politics and contemporary conservative jurisprudence, which is heavily positivist. For instance, Burke argued that certain revolutions are legitimate; legitimacy encompasses more than legality. Finally, Burke's perspective is particularly relevant because he consistently defended England's mixed Constitution as the form of government that best combats tyranny. His specific defenses and criticisms of the Crown, the Parliament, and the aristocracy remain pertinent to understanding the proper blend of executive, legislative, and judicial power under our Constitution. The best way to evaluate the propositions that these conservatives are not Burkean conservatives and that Burke's conservatism offers needed guidance to contemporary American constitutional theory is to first study in some detail Burke's complex political perspective.

## II. THE COMPLEX POLITICS OF EDMUND BURKE

When Edmund Burke assaulted the ideology underlying the French Revolution in his *Reflections on the Revolution in France*,<sup>5</sup> he not only finally achieved the fame and impact that he had sought, but also brilliantly articulated a set of arguments that seriously questioned any proposed change. Although Burke was criticizing a bourgeois

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of distrust is the beginning of tyranny." *Id.* at 7. Instead of making the next step—arguing that tyranny itself is the central issue—Tribe remains fascinated with indeterminacy. Although tyranny is an indefinite concept, it provides more guidance than Tribe's general request to "begin the process of replacing arrogant certitudes about our often unshared pasts with a more open search for a shared future." *Id.* at 267.

The anti-tyranny standard provides both less and more scope than Sedler's individual rights criteria. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 136 (1983). The violation of some alleged individual rights might not be considered unconstitutionally tyrannical: for instance, preventing an employee from entering into a contract to work for more than 50 hours a week. But Sedler's test does not aid us in resolving separation of powers and federalism issues, while Burke's approach explicitly addresses that problem. Burke typically argued that his opponents were becoming tyrannical by seeking excessive power for one branch of the mixed government at the expense of the other branches. *See infra* text accompanying notes 42-48.

This article does not mean to imply that combatting tyranny is the only test of legitimacy. Yet focusing on prevention of evil is the best place to begin the legitimacy inquiry because the "bad" may be easier to recognize than the "good." As Kant observed, "it is misfortune that the concept of happiness is so indefinite that, although each person wishes to attain it, he can never definitely and self-consistently state what it is he really wishes and wills." I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALITY* 35 (L.W. Beck trans. 1959), *quoted in* B. AUNE, *KANT'S THEORY OF MORALS* 39 (1979). To put the issue more specifically, more of us will agree that extermination camps are tyrannical than will agree that equality of income is just.

5. E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1st ed. n.p. 1790).

revolution which had toppled a monarchy, a clergy, and an aristocracy, the victorious middle class subsequently appropriated his arguments to defend their regimes. His views continue to inspire modern American conservatives. In a recent speech on the morality of judges, Judge Robert Bork confidently blended Burke's argument that the French Revolution was misguided because of its excessive reliance on abstract rights with his own thesis that judges should limit their morality to determining the morality of the legislation they are scrutinizing.<sup>6</sup> Irving Kristol echoes Burke in his condemnation of radicals' excessive political expectations and in his applause for the average person's unquestioning acceptance of existing society.<sup>7</sup>

With the notable exception of Alexander Bickel,<sup>8</sup> whose political views may be as difficult to categorize as Burke's, virtually all liberal

6. R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 11 (1984).

7. 9 I. KRISTOL, *ON THE DEMOCRATIC IDEA IN AMERICA* 62-63, 69, 149 (1972).

Burke's writings have also inspired Russell Kirk:

Burke's ideas did more than establish islands in the sea of radical thought: they provided the defenses of conservatism, on a great scale, defenses that still stand and are not liable to fall in our time . . . . Our age . . . seems to be groping for certain of the ideas which Burke's inspiration formed into a system of social preservation.

R. KIRK, *THE CONSERVATIVE MIND FROM BURKE TO SANTAYANA* 79 (1960).

8. Bickel argued that Burke's antipathy toward theory is very relevant to a skeptical world:

Our problem, as much as Burke's, is that we cannot govern, and should not, in submission to the dictates of abstract theories, and that we cannot live, much less govern, without some 'uniform rule and scheme of life,' without principles, however provisionally and skeptically held. Burke's conservatism, if that is what it was, belongs to the liberal tradition, properly understood and translated to our time.

A. BICKEL, *THE MORALITY OF CONSENT* 25 (1975). In a short review of Bickel's *THE MORALITY OF CONSENT*, Robert Bork wrote that Bickel used Burke to repudiate contractarianism and egalitarianism, both of which may generate tyranny. Bork, *Alexander M. Bickel, Political Philosopher*, 1975 SUP. CT. REV. 419, 420-21.

Professor Kronman argued that Bickel was continuing the Burkean tradition by emphasizing prudence as a practical political virtue. Kronman claims that Bickel believed that society is not formed by contract: "Unlike the contractarian, however, the Whig looks for the values that sustain his society in its history and traditions, in the experience of an actual past, and not in some imaginary antecedent condition from which the contingencies of historical experience have all been carefully expunged." Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1603 (1985). The proper test is consent: "What the Whig values, above all else, is workable accommodation of existing interests and ideals, one to which those affected are willing to give their consent even though the accommodation itself is theoretically indefensible. Without consent, stable government is impossible and without government, all other human goods are unattainable." *Id.* at 1604.

The dichotomy between contract and consent seems exaggerated. Burke, for instance, justified the Whig Rebellion because the King violated his contract with the people. See *infra* note 82 and accompanying text. The big difference between Burke and the contractarians is not in the use of the metaphor of contract, but in describing how the social contract is formed. Do we rely upon theory as the primary legitimating test or do we premise the social contract

legal academics and critical jurisprudence theorists also equate Burke with contemporary conservatism. For instance, in his avowedly liberal defense of Professor Laurence Tribe from the blistering criticism of critical legal theorist Mark Tushnet, Professor Stephen Schiffin assumes that the adjective "Burkean" is a perjorative:

Tushnet portrays Professor Tribe as a Burkean (thus conflating conservatism and Tribe's brand of liberalism) and goes on to call him corrupt, suggesting that his scholarship is directed to seeking public office and that it lacks integrity. A public relations firm would never have cleared . . . Tribe's position on state action, criminal procedure, or many other topics. If ambition truly reigned over integrity, Tribe could have tried to be a shade more Burkean.<sup>9</sup>

This cardboard version of a Burke relentlessly opposed to change and to rights is easily discredited by reading his works and studying his biographers. We then face a man of many dimensions, a man who provides insight and guidance to both the contemporary right and left. Depending upon the issue, Burke was a reactionary conservative, a bourgeois reformer, or even a revolutionary. Burke believed that one should determine legitimacy by evaluating an institution's historical ability to resist tyranny.<sup>10</sup> Carefully reviewing his postulates and arguments helps answer two questions raised by such a thesis: how are we to determine the meaning of tyranny, and if history plays a primary role in that definition, won't the definition be hopelessly indeterminate? At the very least, the technique might please Burke: "Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour and discriminating effect."<sup>11</sup> This sketch of Burke's life will not introduce any new historical data—indeed, the theory that Burke held compli-

upon the consensual meeting of real minds in real history? A detailed discussion of this question is beyond the scope of this article.

9. Schiffin, *Liberalism, Radicalism, and Legal Scholarship*, 30 *UCLA L. REV.* 1103, 1114 n.42 (1983).

Professor Perry commences his most recent inquiry into constitutional interpretation with an admiring quotation from Alistar MacIntyre: "Traditions, when vital, embody continuities of conflict. Indeed when a tradition becomes Burkean, it is always dying or dead." A. MACINTYRE, *AFTER VIRTUE* 206 (1981), *quoted in* Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 *S. CAL. L. REV.* 551 (1985).

Another example is Professor Cover's reference to Burke as an opponent to natural law. R. COVER, *JUSTICE ACCUSED* 22-25 (1975). This utilization of Burke is somewhat misleading because Burke vigorously opposed slavery. *See infra* note 223 and accompanying text. Furthermore, Burke saw morality playing a dominant role in political discourse; he was wary of the current idiom of natural law because of its oversimplifications and its excessive abstraction.

10. *See* E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (T. Mahoney ed. 1982) (1st ed. n.p. 1790).

11. *Id.* at 8.



cated, even contradictory, political views is unoriginal.<sup>12</sup> Yet, such a narrative is a precondition to applying Burke's beliefs to the modes of conservatism articulated by the five academic judges now sitting on the court of appeals.

### A. *Young Burke*

Burke's politics cannot be completely understood without some knowledge of his personal background. Although he became its most articulate advocate, Burke was not a member of the English aristocracy. Born in 1729 in Dublin, Ireland, to a Protestant lawyer and a Catholic mother, Burke was always aware of his middle class origins. Professor Isaac Kramnick argues that Burke's political ambivalence is traceable to his relatively humble origins and to excessive tensions with his moody father, both of which were ameliorated by his

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12. Scholars differ dramatically on this basic point. Professor Isaac Kramnick uses a Freudian approach to support his thesis that "[i]nvestigating the relationship between Burke's private and public self indeed stands him on his head. No longer the dogmatic ideologue that conventional wisdom portrays, Burke emerges a figure of uncertainty and ambivalence. No longer the conservative prophet, Burke emerges the ambivalent radical." I. KRAMNICK, *THE RAGE OF EDMUND BURKE* 11 (1977).

Francis Canavan concedes that Burke's thought is flawed because he never articulated, much less organized, his basic philosophical assumptions. F. CANAVAN, *THE POLITICAL REASON OF EDMUND BURKE* 52-53 (1960). Nevertheless, Burke consistently applied a form of practical political reason based upon both pragmatic and metaphysical concepts. For example, Burke wrote one of his friends that "I love order so far as I am able to understand it, for the universe is order." *Id.* at 19 (quoting Letter from Edmund Burke to the Archbishop of Nisibi (Dec. 14, 1791), cited in Somerset, *Edmund Burke, England, and the Papacy*, 202 *DUBLIN REV.* 140 (1938)). George Sabine has found Burke's commitment to a mixed government only one manifestation of a greater belief in prescription:

Our constitution is a prescriptive constitution; it is a constitution whose sole authority is that it has existed time out of mind. . . . Your king, your lords, your judges, your juries, grand and little, are all prescriptive . . . . Prescription is the most solid of all titles, not only to property, but, which is to secure that property, to government . . . .

G. SABINE, *A HISTORY OF POLITICAL THEORY* 609 (1961) (quoting E. Burke, *Reform of Representation in the House of Commons (1782)*, in 6 *WORKS* 146 (Bohn edition 1861)). Sabine concludes that Burke's commitment to tradition not only led to mystification of existing institutions but also to the fallacy that the existing government is the same thing as the society: "This tendency to idealize the state by making it the bearer of all that has the highest value for civilization became characteristic of Hegel and of the English idealists." *Id.* at 616. Burke's statism can be exaggerated. He believed in opposing many existing government policies and believed both the Glorious Revolution and the American Revolution were justified.

Nevertheless, deference to prescription is a major Burkean premise. The article does not emphasize the premise because the author wishes to demonstrate the flexibility of Burke's other political beliefs. But even if one takes a more positivist view of Burke, such a view does not completely support modern conservative legal theory. One can make the Burkean argument that the conservatives should defer to the liberal activist tradition because it is a part of our society's inherited culture.

mother's love.<sup>13</sup> Burke battled his father when he refused to continue to study law, preferring to pursue a literary career, and his rejection of the legal profession helps explain why he consistently criticized lawyers and laws throughout his career. Burke scorched legal education with rhetoric that would make critical legal studies Professor Duncan Kennedy envious:

Thus the law has been confined and drawn up into a narrow and inglorious study, and that which should be the leading science in every well-ordered commonwealth remained in all the barbarism of the rudest times, . . . insomuch that the study of our jurisprudence presented to liberal and well-educated minds, even in the best authors, hardly anything but barbarous terms, ill explained, a coarse, but not a plain expression, an indigested method, and a species of reasoning the very refuse of the schools, which deduced the spirit of the law, not from original justice or legal conformity, but from causes foreign to it and altogether whimsical. Young men were sent away with an incurable, and, if we regard the manner of handling rather than the substance, a very well-founded disgust.<sup>14</sup>

In 1748, at the age of nineteen, Burke wrote for and edited a weekly periodical, *The Reformer*, which was hardly conservative. He first graphically described the misery of the poor:

As for their Food, it is notorious they seldom taste Bread or Meat; their Diet, in Summer, is Potatoes and sour Milk; in Winter, when something is required comfortable, they are still worse, living on the same Root, made palatable only by a little Salt, and accompanied with Water; . . . it is no uncommon Sight to see half a dozen Children run quite naked out of a Cabin, scarcely distinguishable from the Dunghill, to the great Disgrace of our Country with Foreigners . . . .<sup>15</sup>

Burke claimed that the decadent aristocracy caused this squalor:

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13. I. KRAMNICK, *supra* note 12, at 53-56.

14. E. BURKE, *An Essay Towards an Abridgment of the English History*, in 7 THE WRITINGS AND SPEECHES OF EDMUND BURKE 477 (Beaconsfield edition 1901) (Burke wrote this essay in 1757 in three separate pieces.). Numerous other examples exist of Burke's limited respect for the law, legal learning, and lawyers. For instance, he stated that the law is "a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and liberalize the mind exactly in the same proportion." E. BURKE, *Speech on American Taxation*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 38 (Beaconsfield edition 1901) (Burke delivered this speech on Apr. 19, 1774.). Burke explained how the narrowness of legal training leads to political miscalculation: "Mr. Grenville thought better of the wisdom and power of human legislation than in truth it deserves." *Id.*

15. I. KRAMNICK, *supra* note 12, at 61 (quoting Samuels, *The Early Life* 297-98 (1923) reprinting Burke, 1 THE REFORMER *passim* (1748)).

Who, after having seen this [poverty], comes to town and beholds the sumptuous and expensive Equipages, their Treats and Diversions, can contain the highest indignation? Such Follies considered in themselves, are but ridiculous; but when we see the bitter consequences of them, 'twere Inhumanity to laugh . . . I fancy, many of our fine Gentlemen's Pageantry would be greatly tarnished, were their gilded coaches to be preceded and followed by the miserable Wretches, whose labor supports them . . .<sup>16</sup>

Burke then presented a model "gentleman of fortune," who epitomized the middle class values of hard work and sobriety, as the solution:

When he designed the improvement of this, he did not take the ordinary Method of establishing Horse races and Assemblies, which do but encourage Drinking and Idleness but at a much smaller expense he introduced a Manufacture which, though not very considerable, employed the whole town, and in time made it opulent.<sup>17</sup>

In his early twenties, Burke married and also became very close to his cousin Will Burke, an aggressive, unscrupulous speculator who initially made both of them a small fortune in the stock market. Burke then bought a huge estate in Beaconsfield in 1768 for twenty thousand pounds,<sup>18</sup> where he settled with his wife, his son Richard, his cousin Will, and his younger brother Dick, who was known as a cheat.<sup>19</sup> But "the Burkes," as they were labelled by London society, quickly lost sixty percent of their capital in the stock market.<sup>20</sup> They never could be sure that they would keep their magnificent estate. Although they entertained constantly, they cut corners to keep their home. A visitor described their unusual living conditions: "I lived with him & his Lady at Beaconsfield among Dirt Cobwebs, Pictures and Statutes that would not have disgraced the City of Paris itself: where Misery & Magnificence reign in all their Splendor, & in perfect Amity."<sup>21</sup>

Burke relied upon aristocratic patronage throughout his career. In 1765, after six years of service, he bitterly left his first patron, William Hamilton, because Hamilton wanted Burke to devote himself exclusively to Hamilton's career and to stop writing.<sup>22</sup> Burke then

16. *Id.* at 61-62.

17. *Id.* at 62.

18. T. COPELAND, *The Little Dogs and All*, in OUR EMINENT FRIEND EDMUND BURKE 51 (1949).

19. *Id.* at 50.

20. *Id.* at 53.

21. *Id.* at 55.

22. I. KRAMNICK, *supra* note 12, at 101.

obtained a seat in the House of Commons with the help of his cousin Will, who had also found an aristocratic patron, Lord Veney. Burke made an immediate impact with dazzling speeches in Parliament. His friend, Dr. Johnson, correctly predicted that Burke would soon be "one of the first men in the country."<sup>23</sup>

Burke then found a particularly powerful patron when he became personal secretary to Lord Rockingham, leader of the Rockingham Whigs. Lord Rockingham loaned Burke almost thirty thousand pounds and cancelled those debts in his will.<sup>24</sup> Several of Burke's biographers have concluded that this uncertain economic status partially explains Burke's need for, and admiration of, the inherited aristocracy, and his anger and frustration over never fully becoming a member.<sup>25</sup>

### B. *Burke's Rise to Eminence*

In 1756, Burke first expressed his conservative politics in *A Vindication of Natural Society*,<sup>26</sup> a parody of the Enlightenment theorist Bolingbroke. He demonstrated how relentless use of reason to further virtue and truth not only undercuts the legitimacy of organized religion, Bolingbroke's target, but also of all political societies. Monarchies lead to despotism;<sup>27</sup> aristocracies are haughty and capricious, nothing more than disorderly tyrannies;<sup>28</sup> and democracies hate merit while degenerating into self-indulgent mobs.<sup>29</sup> Mixed governments, which combine all three forms of government, constantly fluctuate between the types of tyranny typical of each of the three underlying forms: "The Government is one Day, arbitrary Power in a single Person; another, a juggling Confederacy of a few to cheat the Prince and enslave the People; and the third, a frantic and unmanageable Democracy."<sup>30</sup>

In a subsequently published *Preface*,<sup>31</sup> Burke wrote that such eloquent arguments undercut themselves by leaving us with no society, no religion. Excessive reliance on reason is more than dangerously anarchistic; it both denies our true inability to understand our society

23. T. COPELAND, *supra* note 18, at 60.

24. *Id.* at 61.

25. See, e.g., I. KRAMNICK, *supra* note 12, *passim*.

26. E. BURKE, *A VINDICATION OF NATURAL SOCIETY* (London 1756) [hereinafter cited as E. BURKE, *VINDICATION*].

27. *Id.* at 45.

28. *Id.* at 53, 55.

29. *Id.* at 57, 59.

30. *Id.* at 72.

31. E. BURKE, *A VINDICATION OF NATURAL SOCIETY* (2d ed. London 1757) (1st ed. London 1756).

and implies that we have a right to comprehend our system: “[W]hat would become of the World if the Practice of all moral Duties, and the Foundations of Society, rested upon having their Reasons made clear and demonstrative to every Individual?”<sup>32</sup>

### C. *Burke’s Attack on the Crown*

Burke evaluated specific political issues by demonstrating how his opponents’ position threatened the English Constitution, a properly mixed form of government. Burke supported England’s mixed government both because of its wisdom, which could be inferred from its antiquity, and because it best prevents tyranny by distributing and balancing power. When, in 1770, he wrote *Thoughts on the Present Discontents*<sup>33</sup> in response to King George III’s attempts to preclude Mr. Wilkes from being seated in the House of Commons after winning an election in Middlesex, Burke combined a defense of the existing electoral system with his right to dissent from the use of excessive executive power.

In the very first paragraph, Burke clearly stated that his conservatism is not mere statism: “[T]hough [dissenters] displease the rulers for the day, they are certainly of service to the cause of Government.”<sup>34</sup> Indeed, unquestioning deference is dangerous: “I repeat it again—He that supports every Administration, subverts all Government.”<sup>35</sup> Thus, Burke reasoned, dissenting parties like the Rockingham Whigs are not treasonous factions, but legitimate parts of the Constitution.<sup>36</sup> Furthermore, such parties also stabilize societies by developing healthy friendships.<sup>37</sup> Burke praised ancient Rome’s tolerance of political disagreement: “For it was then thought no crime, to endeavour by every honest means to advance the superiority and power those of your own sentiments and opinions.”<sup>38</sup>

Burke defended political opposition by placing ultimate power not with any administration, but with the people: “The temper of the people amongst whom he presides ought therefore to be the first study

32. *Id.* at 9.

33. E. BURKE, *Thoughts on the Present Discontents*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 252 (P. Langford ed. 1981) (text first appeared in Apr. 1770) [hereinafter cited as E. BURKE, *Discontents*].

34. *Id.* at 252.

35. *Id.* at 312.

36. Burke first made this argument the year before in the first sentence of his first major political work: “Party divisions, whether on the whole operating for good or evil, are things inseparable from free government.” E. BURKE, *Observations on a Late State of the Nation*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 110 (P. Langford ed. 1981).

37. E. BURKE, *Discontents*, *supra* note 33, at 316.

38. *Id.*

of a Statesman."<sup>39</sup> Whenever tension might arise, Burke would be sympathetic to average citizens' reactions: "[I]n all disputes between them and their rulers, the presumption is at least upon a par in favour of the people."<sup>40</sup> The rulers are only "trustees for the people," and the House of Commons must be protected from monarchical encroachment because it best reflects the "feelings of the nation."<sup>41</sup>

Burke began his attack of the King's supporters by defining despotism: "It is the nature of despotism to abhor power held by any means but its own momentary pleasure; and to annihilate all intermediate situations between boundless strength on its own part, and total debility on the part of the people."<sup>42</sup> He argued that the Crown's attempt to control the House reflects that technique: "It must be always the wish of an unconstitutional Statesman, that an House of Commons who are entirely dependent upon him, should have every right of the people entirely dependent upon their pleasure."<sup>43</sup> These potential despots also tried to gain power which the people never agreed to give them: "The people of a free Commonwealth, who have taken such care that their laws should be the result of general consent, cannot be so senseless as to suffer their executory system to be composed of persons on whom they have no dependence."<sup>44</sup> The Wilkes affair demonstrated how the administration engaged in politically biased prosecutions.<sup>45</sup> The executive improperly tried to control elections, in an effort to assure that connections would prevail over popularity: "A restoration of the right of free election is a preliminary indispensable to every other reformation."<sup>46</sup> Burke also found claims of necessity and of "new powers" to be indicia of tyranny: "Any new powers exercised in the House of Lords, or in the House of Commons, or by the Crown, ought certainly to excite the vigilant and anxious jealousy of a free people."<sup>47</sup>

Burke reminded the reader that he was not attempting to strip the Crown of its rightful amount of power, but was only trying to maintain the proper blend of the three forms of government: "Our constitution stands on a nice equipoise, with steep precipices, and deep waters upon all sides of it. In removing it from a dangerous

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39. *Id.* at 252.

40. *Id.* at 255.

41. *Id.* at 292.

42. *Id.* at 259-60.

43. *Id.* at 258.

44. *Id.* at 278.

45. *Id.* at 298.

46. *Id.* at 308.

47. *Id.* at 267.

leaning towards one side, there may be a risque of oversetting it on the other."<sup>48</sup> We cannot decide which branch is overreaching based upon any abstract theory; we can only make that determination by evaluating the effects of given policies<sup>49</sup> and the extent of danger: "The question, on the influence of a Court, and of a Peerage, is not, which of the two dangers is the most eligible, but which is the most imminent."<sup>50</sup> Nor can one assess the relative strength of institutions solely through the structure of the positive law. Invoking an image later to be made famous by Chief Justice Marshall, Burke believed that administrative discretion must be based upon the "prudence and uprightness of Ministers of State. Even all the use and potency of the laws depends upon them. Without them, your Commonwealth is no better than scheme upon paper; and not a living, acting, effective constitution."<sup>51</sup>

#### D. *Burke the Revolutionary*

Burke consistently applied a limited set of theories and arguments to any political issue that he analyzed. Condemning his opponents for being excessively theoretical, he combined dazzling rhetoric with his thorough knowledge of the facts and underlying conception of a mixed government. His defense of the Americans both before and during the American Revolution included a general explanation of when revolution is legitimate. By castigating his opponents for being too theoretical, too metaphysical, while supporting the Americans' right to resist slavery and tyranny to protect their "natural liberty,"<sup>52</sup> Burke paired potentially inconsistent arguments. He condemned political theory while defending rights and liberties, components of political theory. But even if Burke never completely escaped the paradox of proposing an antitheoretical theory, he correctly emphasized the dangers of excessive reliance on abstract political/philosophical concepts.

Such ambiguity permeates Burke's works; he never totally explained how he could distinguish dangerously abstract theory from needed political reason, desired reform from loathsome innovation, and deference to history from sensitivity to improvement. This uncertainty, even inconsistency, can be an additional Burkean value: It may be difficult, if not impossible, for anyone to create a determinate structure simply out of the combined beliefs that good and evil exist

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48. *Id.* at 311.

49. *Id.* at 289.

50. *Id.* at 268.

51. *Id.* at 277.

52. E. BURKE, *Speech on Conciliation with America*, in BURKE'S SPEECHES 82 (F. Selby ed. 1974) [hereinafter cited as E. BURKE, *Conciliation*].

and that they can only be recognized and treated depending upon all the circumstances.

In 1774, Burke spoke against a revenue tax on the colonies. Once again he had to rebut charges that his position was seditious. This time he did not theoretically justify dissent, as he had when he criticized King George III and his allies. Instead, Burke turned to another of his formidable debating skills—scathing, even repulsive approbation:

Thus are blown away the insect race of courtly falsehoods!  
thus perish the miserable inventions of the wretched runners for a  
wretched cause, which they have fly-blown into every weak and  
rotten part of the country, in vain hopes that when their maggots  
had taken wing, their importunate buzzing might sound something  
like the public voice!<sup>53</sup>

Turning to the issue of taxation, Burke observed that, based upon experience, “the effects” of such taxation would be to aggravate the Americans for little profit.<sup>54</sup> Although the tax was small, the Americans would resist it because it was a new policy and because it was a form of slavery.<sup>55</sup> Citing Spain as an example, Burke stated that such tyrannical policies impoverish all parties.<sup>56</sup> In one of the few passages complimentary of lawyers, Burke explained why the American leaders, many of whom were legally trained, would not tolerate such a tax: “This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. . . . They augur misgovernment at a distance; and sniff the approach of tyranny in every tainted breeze.”<sup>57</sup> To the argument that England had the right to tax America for revenue, Burke replied: “I am not here going into the distinction of rights, not attempting to mark their boundaries. I do not enter into these metaphysical distinctions; I hate the very sound of them.”<sup>58</sup>

The following year Burke again failed to persuade Parliament to make peace with the colonies. The issue could not be resolved legalistically: “It looks to me to be narrow and pedantic, to apply the ordinary ideas of criminal justice to this great public contest. I do not know the method of drawing up an indictment against a whole peo-

53. E. BURKE, *Speech on American Taxation*, in BURKE'S SPEECHES 47 (F. Selby ed. 1974) [hereinafter cited as E. BURKE, *Taxation*].

54. *Id.* at 2, 4.

55. *Id.* at 13, 60.

56. *Id.* at 62.

57. E. BURKE, *Conciliation*, *supra* note 52, at 84.

58. E. BURKE, *Taxation*, *supra* note 53, at 58.



ple.”<sup>59</sup> He repeated his admonition against governing America “according to our own imaginations . . . [or] . . . according to abstract ideas of right,”<sup>60</sup> but he also proposed some “principles of colony government.”<sup>61</sup> The first rule of empire should be compromise: “As we must give away some natural liberty, to enjoy civil advantages; so we must sacrifice some civil liberties, for the advantages to be derived from the communion and fellowship of a great empire.”<sup>62</sup>

Burke argued that the proposals to experiment with new taxes or to resort to military force were ill advised because they ignored the true interests of the Americans.<sup>63</sup> Enforcement will be impossible because of the ocean: “You cannot pump this dry.”<sup>64</sup> But the greatest cost may be to England itself:

For, in order to prove that the Americans have no right to their liberties, we are every day endeavouring to subvert the maxims which preserve the whole spirit of our own. To prove that the Americans ought not to be free, we are obliged to depreciate the value of freedom itself . . . .<sup>65</sup>

Burke’s favorite themes reappeared when he explained why he continued to support the Americans, even after they revolted. His moderation to the rebels was not treason.<sup>66</sup> The colonists were claiming the right to revolt, a right common to all men: “For I never knew a writer on the theory of government so partial to authority as not to allow, that the hostile mind of the rulers to their people did fully justify a change of government . . . .”<sup>67</sup> Burke observed that the people have delegated their power to the government, which is designed to further their happiness; thus, they can best decide if it has failed in its duty.<sup>68</sup> Burke again bemoaned the costs to English liberty caused by the government’s attempts at suppression: “Liberty, if I understand it at all, is a *general* principle, and the clear right of all subjects within the realm, or of none. Partial freedom seems to me a most invidious mode of slavery. . . . Indeed, nothing is security to any individual but

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59. E. BURKE, *Conciliation*, *supra* note 52, at 93.

60. *Id.* at 70.

61. *Id.* at 66.

62. *Id.* at 121.

63. *Id.*

64. *Id.* at 92.

65. *Id.* at 88.

66. E. BURKE, *Letter to the Sheriffs of Bristol*, in BURKE’S SPEECHES 153 (F. Selby ed. 1974) [hereinafter cited as E. BURKE, *Letter*].

67. *Id.* at 154. Burke also expressed sympathy for Irish revolutionary motivations. I. KRAMNICK, *supra* note 12, at 179.

68. E. BURKE, *Letter*, *supra* note 66, at 167.

the common interest of all."<sup>69</sup>

Burke proudly accepted the accusation that he was a "*party man*."<sup>70</sup> He used this charge of partisanship, of bad motivation, to explore human nature, which he believed was a mixture of good and evil. The Hobbesian viewpoint was excessive: "Am I not to avail myself of whatever good is to be found in the world, because of the mixture of evil that will always be in it?"<sup>71</sup> Indeed, such pessimists should look in the mirror: "A conscientious person would rather doubt his own judgment, than condemn his species. . . . But he that accuses all mankind of corruption, ought to remember that he is sure to convict only one."<sup>72</sup> This Hobbesian "moral levelling" is a "servile principle": it denies the desirability of reform because evil remains constant.<sup>73</sup> Cynical views are particularly dangerous during a time of troubles, destroying the English commitment to both liberty and equality: "Liberty is in danger of being made unpopular to Englishmen. Contending for an imaginary power, we begin to acquire the spirit of domination, and to lose the relish of honest equality."<sup>74</sup>

#### E. *Burke the Anti-Revolutionary*

One ironic reason for Burke's early opposition to the French Revolution may have been his previous support of the American Revolution. Those successful revolutionaries believed Burke was a complete ally. Burke became friends with Thomas Paine in 1788 when Paine toured England and France promoting an iron bridge Paine had designed; Paine stayed a week at Burke's Beaconsfield mansion.<sup>75</sup> When the American Ambassador John Adams returned home, Paine became an unofficial ambassador for the United States,<sup>76</sup> maintaining a close correspondence with such leaders as Jefferson, Franklin, Madison, Jay, and Adams.<sup>77</sup> Burke became anxious about Paine's expressed hopes for revolution in France. This anxiety turned

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69. *Id.* at 142-43.

70. *Id.* at 176.

71. *Id.* at 178.

72. *Id.*

73. *Id.* at 179.

74. *Id.* at 180-81. Burke saw legal equality as one crucial aspect of freedom: "There is no equality among us; we are not fellow-citizens, if the mariner, who lands on the quay, does not rest on as firm legal ground as the merchant who sits in his counting-house." *Id.* at 144. Liberty and equality thus are not in contradiction: "Liberty, if I understand it at all, is a general principle . . ." *Id.* at 142.

75. T. COPELAND, *Burke, Paine, and Jefferson*, in OUR EMINENT FRIEND EDMUND BURKE 153, 157 (1949).

76. *Id.* at 159.

77. *Id.*

to alarm when Paine showed Burke a letter from Thomas Jefferson containing the following passage, a passage endorsing total revolution based upon political abstractions:

Every government should have for it's [sic] only end the preservation of the rights of man: whence it follows that to recall constantly the government to . . . the end proposed, the constitution should begin by a Declaration of the natural and imprescriptible rights of man.<sup>78</sup>

When the French Revolution erupted in 1789, Burke reacted quickly. He terminated correspondence with Paine at approximately the same time as he made his first public speech against the revolution—February 9, 1790:

Instead of redressing grievances, and improving the fabric of their state . . . [t]hey first destroyed all the balances and counterpoises which serve to fix the state and to give it a steady direction, and which furnish sure correctives to any violent spirit which may prevail in any of the orders. These balances existed in their oldest constitution, and in the constitution of this country . . . . These they rashly destroyed, and then they melted down the whole into one incongruous, ill-connected mass.<sup>79</sup>

Because Burke conceded the right to revolt and was reluctant to "indict a people," he concluded that the revolution was unjustified because it was led by evil people with evil designs. Nevertheless, compared to his later writings about the Revolution, he was relatively even tempered when he attacked the Jacobins in his most famous work, *Reflections on the Revolution in France*.<sup>80</sup> Burke subsequently cast the Jacobins as ghouls:

[O]ut of the tomb of the murdered monarchy in France has arisen a vast, tremendous, unformed spectre, in a far more terrific guise than any which ever yet have overpowered the imagination, and subdued the fortitude of man. Going straight forward to its end, unappalled by peril, unchecked by remorse, despising all common maxims and all common means, that hideous phantom overpowered those who could not believe it was possible she could at

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78. *Id.* at 188.

79. E. BURKE, *Speech on the Army Estimates*, in 3 THE WRITINGS AND SPEECHES OF EDMUND BURKE 221 (Beaconsfield edition 1901) (Burke delivered this speech on Feb. 9, 1790.).

80. E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (T. Mahoney ed. 1982) (1st ed. n.p. 1790) [hereinafter cited as E. BURKE, *REFLECTIONS*]. Burke's rage against the Jacobins loosened his customary attention to facts. He exaggerated how the revolutionaries mistreated Marie Antoinette. I. KRAMNICK, *supra* note 12, at 152. Even at this stage, he equated Jacobinism with evil irrationality. Their riot was "a drunken delirium from the hot spirit drawn out of the alembic of hell." *Id.* at 182.

all exist . . . .<sup>81</sup>

Although *Reflections* permanently catapulted Burke to international fame and quickly altered British public opinion about the Revolution from acceptance to fear, it contained few new ideas. Burke explained how the French Revolution differed from the Glorious Revolution of 1688, which as a Whig, Burke supported. In the Glorious Revolution revolution, the Whigs threw out King James II to preserve their ancient constitution and to protect their ancient rights and liberties which James had violated.<sup>82</sup> But those Whig rebels had not established the principle that government could be changed by any passing majority. Past generations could bind the future because society's contract is a covenant between past, present, and future generations.<sup>83</sup>

Burke argued that the Jacobins' false version of equality undercut social stability:

You would have had a protected, satisfied, laborious, and obedient people, taught to seek and to recognize the happiness that is to be found by virtue in all conditions; in which consists the true moral equality of mankind, and not in that monstrous fiction [levelling] which, by inspiring false ideas and vain expectations into men destined to travel in the obscure walk of laborious life, serves only to aggravate and embitter the real inequality which it never can remove.<sup>84</sup>

Burke predictably found such levelling to be dangerously abstract, but he did not conclude that the concept of equality was either vacuous<sup>85</sup> or totally dangerous: "The pretended rights of these theorists are all extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of *middle*,

81. E. BURKE, *Three Letters to a Member of Parliament on the Proposals for Peace with the Regicide Directory of France. Letter I. On the Overtures of Peace*, in 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE 237 (Beaconsfield edition 1901) (Burke wrote these letters in 1796.) [hereinafter cited as E. BURKE, *Regicide Directory*].

82. E. BURKE, REFLECTIONS, *supra* note 80, at 35, 37. Burke argued that he was not being inconsistent in opposing the French Revolution while accepting the 1688 Revolution, nor was he hostile to contractarianism as Bickel or Bork had assumed. See *supra* note 8. He justified the Glorious Revolution by stating: "I assert, that the foundations laid down by the Commons . . . for justifying the Revolution of 1688, are the very same laid down in Mr. Burke's Reflections,—that is to say, a breach of the *original contract*, implied and expressed in the Constitution of this country . . ." E. BURKE, *Appeal from the New to the Old Whigs*, in 4 THE WRITINGS AND SPEECHES OF EDMUND BURKE 121 (Beaconsfield edition 1901) (Burke wrote this statement in 1791.) [hereinafter cited as E. BURKE, *Whigs*]. The Whigs had invoked the contractual defense of necessity to justify their civil war. *Id.*

83. E. BURKE, REFLECTIONS, *supra* note 80, at 22, 110.

84. *Id.* at 42.

85. See, e.g., Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

incapable of definition, but not impossible to be discerned."<sup>86</sup> Thus, men of great merit are needed to determine the proper scope of rights:

The rights of men in governments are their advantages; and these are often in balances between differences of good, in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations.<sup>87</sup>

Although Burke argued that the revolutionaries' destruction of the French economy typified their political wrongheadedness, he did not believe that economics should be the center of his political calculus. The economists were members of the opposition: "But the age of chivalry is gone. That of sophisters, economists, and calculators has succeeded . . ." <sup>88</sup> Excessive reliance on markets will only concentrate power in the hands of the sophisticated, urban speculators: "Your legislators, in everything new, are the very first who have founded a commonwealth upon gaming . . ." <sup>89</sup>

By putting all power in the National Assembly, the French violated the tenets of mixed government. To dramatize the evil devaluation of the monarchy, Burke invented facts to describe how the radicals mishandled Queen Marie Antionnette. He also defended the church and the aristocracy. Their crucial right was the right to property, which is the basis of the true rights of men.<sup>90</sup> The government had no legitimate power to confiscate property; it could only regulate property.<sup>91</sup>

To refute the revolutionaries' claim that all legitimacy is found in pure democratic rule, Burke revived arguments first made in *A Vindication of Natural Society*<sup>92</sup> thirty-four years before:

But where popular authority is absolute and unrestrained, the people have an infinitely greater, because a far better founded, confidence in their own power. . . . Besides, they are less under responsibility to one of the greatest controlling powers on earth, the sense of fame and estimation. . . . A perfect democracy is, therefore, the most shameless thing in the world. As it is the most shameless, it is the most fearless.<sup>93</sup>

86. E. BURKE, REFLECTIONS, *supra* note 80, at 70-71.

87. *Id.* at 71.

88. *Id.* at 86.

89. *Id.* at 226.

90. *Id.* at 115, 120-23.

91. *Id.* at 115.

92. E. BURKE, VINDICATION, *supra* note 26.

93. E. BURKE, REFLECTIONS, *supra* note 80, at 106-07.

Citing Aristotle, Burke showed how majority tyranny, by its very nature, can be far more venal than any despotic regime:

Aristotle observes that a democracy has many striking points of resemblance with a tyranny. Of this I am certain, that in a democracy the majority of the citizens is capable of exercising the most cruel oppression upon the minority whenever strong divisions prevail in that kind of policy, as they often must . . . .<sup>94</sup>

By making even the judiciary elective, the French have removed all "balances and correctives to the evils of a light and unjust democracy. . . . Such an independent judiciary was ten times more necessary when a democracy became the absolute power of the country."<sup>95</sup> The Jacobins thus also created judicial tyranny:

However, if great care is not taken to form it in a spirit very different from that which has guided them in their proceedings relative to state offenses, this tribunal, subservient to their inquisition, The Committee of Research, will extinguish the last sparks of liberty in France and settle the most dreadful and arbitrary tyranny ever known in any nation.<sup>96</sup>

The revolutionaries' fundamental error was in not properly understanding human nature. They ignored how moral sentiments bind a society.<sup>97</sup> They exaggerated the importance of self-interest,<sup>98</sup> and "by hating vices too much, they [came] to love men too little."<sup>99</sup> In seeking to eliminate evil, they denied the plastic nature of power and the fallible nature of man—men would eventually seize and use power, and unchecked power would become tyrannical power. Such insensitivity to the validity of existing institutions also revealed their egotism; they selfishly sought innovation instead of proposing gradual reform.<sup>100</sup>

Burke's warnings cost him politically. In a dramatic Parliamentary session, Whig leader Charles Fox tearfully forced Burke to "retire" from the Whig party. In *An Appeal From the New to the Old Whigs*,<sup>101</sup> Burke defended himself by arguing that he was furthering

94. *Id.* at 143-44.

95. *Id.* at 243.

96. *Id.* at 246-47.

97. *Id.* at 74.

98. *Id.* at 88.

99. *Id.* at 199.

100. *Id.* at 37-38. Burke observed that this theory ultimately generated dangerous feelings: "[W]hat . . . [the Jacobins] . . . held out as a large and liberal toleration is in reality a cruel and insidious religious persecution, infinitely more bitter than any which had been heard of within this century." E. BURKE, *Whigs*, *supra* note 82, at 72.

101. E. BURKE, *Appeal from the New to the Old Whigs*, in 4 THE WRITINGS AND SPEECHES OF EDMUND BURKE 121 (Beaconsfield Edition 1901).

the Whig tradition of mixed government. His complaints against the French became a litany. Fascinated by novelty and abstraction, the Jacobins had put theory above feelings,<sup>102</sup> yet they tried to make their constitution forever binding.<sup>103</sup>

Burke rejected the charge that he had been inconsistent because he had supported the revolution in America and the Glorious Revolution in England, and had opposed the excesses of King George III. He first observed that an advocate of mixed government will use different arguments depending upon which branch is threatening which other branch; there are different principles for each branch.<sup>104</sup> Thus Burke could justify the Glorious Revolution of 1688 because it was a limited revolution to remedy a tyrannical king's breach of contract—"necessity" forced the Whigs to use extreme measures to return the social contract to its ancient origins.<sup>105</sup> The victorious Whig revolutionaries then appropriately bound future generations to that revived constitution: "The Revolution did not introduce any innovation . . . . *The whole frame of the government was restored entire and unhurt.*"<sup>106</sup> The French Revolution, however, was unjustified because the people cannot change their government at will; one cannot expect the positive law to authorize its own destruction.<sup>107</sup> Burke's distinction between the two revolutions is not reducible to a theorem. He made an overall assessment of the need for revolt, the motive for revolt, and the effects of that revolution on such institutions as property, the Church, the economy, and the form of government.

Just as Burke would limit the people's power to revolt to times of necessity, he also would constrain majoritarian powers during less trying times: "And the votes of a majority of the people, whatever their infamous flatterers may teach in order to corrupt their minds, cannot alter the moral any more than they can alter the physical essence of things."<sup>108</sup> The people need to be checked by an aristocracy, which Burke defined to include judges, traders, and professors—a natural aristocracy.<sup>109</sup> Otherwise, the infinite power of the majority will be unleashed: "Whatever he may lawfully originate he may lawfully endeavour to accomplish."<sup>110</sup>

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102. *Id.* at 82-83.

103. *Id.* at 121.

104. *Id.* at 93.

105. *Id.* at 121.

106. *Id.* at 137.

107. *Id.* at 140.

108. *Id.* at 162.

109. *Id.* at 174-75.

110. *Id.* at 184.

Burke clarified how ancient institutions combine with “just prejudices” to protect us all: “We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.”<sup>111</sup> Instead of looking at all non-majoritarian structures as usurpations,<sup>112</sup> Burke suggests doubting one’s own wisdom, deferring to the existing mixed government: “The whole scheme of our mixed Constitution is to prevent any one of its principles from being carried as far as, taken by itself, and theoretically, it would go.”<sup>113</sup>

In letter after letter, Burke assaulted the French Revolution. Its subsequent excesses only confirmed his hatred. When England considered making peace with France in 1796, he bitterly opposed such negotiations; one cannot make peace with a monster.<sup>114</sup> Burke predicted the “Republic of Regicide” was implacable and would fight England again: “It is with an *armed doctrine* that we are at war.”<sup>115</sup> Personalizing his politics, he so feared that the Jacobins would desecrate his grave that he directed in his will that he be buried in a secret location: “I am not safe from them. They have tigers to fall upon animated strength; they have hyenas to prey upon carcasses. . . . Neither sex, nor age, nor the sanctuary of the tomb is sacred to them.”<sup>116</sup> The location of Burke’s gravesight is still unknown.

#### F. *Reforms and Innovations*

Burke’s passionate political commitment also embroiled him in many Parliamentary controversies over governing the country and the Empire. His intensity and flaming rhetoric were not limited to the written word; his raging Parliamentary debates<sup>117</sup> inspired his friend Boswell to describe him as “foaming like Niagra.”<sup>118</sup> Burke justified his attacks on governmental abuses as reform: “Reform is not a change in the substance or in the primary modification of the object, but a direct application of a remedy to the grievance complained

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111. E. BURKE, *REFLECTIONS*, *supra* note 80, at 99.

112. E. BURKE, *Whigs*, *supra* note 82, at 206.

113. *Id.* at 207.

114. E. BURKE, *Regicide Directory*, *supra* note 81, at 245.

115. *Id.* at 250.

116. E. BURKE, *Letter to a Noble Lord on the Attacks made upon Mr. Burke and his Pension, in the House of Lords, by the Duke of Bedford and the Earl of Lauderdale*, in 5 *THE WRITINGS AND SPEECHES OF EDMUND BURKE* 175 (Beaconsfield edition 1901) (Burke wrote this letter in 1796.) [hereinafter cited as E. BURKE, *Noble Lord*].

117. I. KRAMNICK, *supra* note 12, at 181.

118. *Id.* at 180.



of.”<sup>119</sup> Even the Constitution can sometimes be improved: “Publick troubles have often called upon the Country to look into its Constitution. It has ever been bettered by such a revision.”<sup>120</sup> On the other hand, Burke noted that innovation and change characterized the “complete revolution” in France:

[Change] alters the substance of the objects themselves, and gets rid of all their essential good as well as of all the accidental evil annexed to them. Change is novelty; and whether it is to operate any one of the effects of reformation at all, or whether it may not contradict the very principle upon which reformation is desired, cannot be certainly known beforehand.<sup>121</sup>

Once again, a Burkean distinction is theoretically elusive—a distinction only partially understood in its application.

If Burke’s prescient warnings about the French Revolution represented his greatest triumph, his futile attempt to impeach Warren Hastings, head of the East India Company exemplified his obsessive nature: “[N]either hope, nor fear, nor anger, nor weariness, nor discouragement of any kind, shall move me from this trust.”<sup>122</sup> Burke consistently argued that England’s efforts to colonize India were evil. Parliament tired of his ten-year crusade, censuring him in 1789 for his alleged excesses in presenting the case.<sup>123</sup> An indication of Burke’s commitment to the Indian issue is that four out of the twelve volumes of his published speeches and writings concern the topic. Defending even the caste system, Burke predictably urged deference to healthy prejudices formed by tradition:

But God forbid we should pass judgement upon people who framed their laws and institutions prior to our insect origins of yesterday. With all the faults of their nature, and errors of their institutions, the institutions, which act so powerfully upon their natures, have two material characteristics that entitle them to respect:— first, great force and stability; next, excellent moral and civil effects. . . . They have stood firm on their ancient base—they have cast their roots deep in their native soil.<sup>124</sup>

Burke’s acceptance of a caste system, which most would find unjust, did not mean he totally deferred to existing social structures: “I never mean to put any colonist, or any human creature, in a situa-

119. E. BURKE, *Noble Lord*, *supra* note 116, at 186.

120. E. BURKE, *Address to the British Colonists in North America*, 9 WORKS 212 (1777), *quoted in* R. CANAVAN, *THE POLITICAL REASON OF EDMUND BURKE* 170 (1960).

121. E. BURKE, *Noble Lord*, *supra* note 116, at 186.

122. I. KRAMNICK, *supra* note 12, at 127.

123. *Id.*

124. *Id.* at 128.

tion not becoming a freeman."<sup>125</sup> For instance, he drafted a Sketch of a Negro Code which would have gradually emancipated American black slaves.<sup>126</sup> Nevertheless, Burke's analysis has a circular quality: He characterized a social system as either unjust or as a hallowed institution, and then defended that distinction with appropriate arguments. Burke's arguments both explain and rationalize the conclusion he reached. Thus his arguments eliminate social and political problems, but they do not provide automatic answers.

From the beginning of his political career, Burke seemed to have been aware of his strong will and powerful beliefs (and the need to protect them). His belief in self-expression generated several novel political ideas. For example, in his first speech to the Bristol voters who elected him, he stated he did not feel bound to represent their exact views, but had a duty to apply his own judgment on behalf of all of England.<sup>127</sup> Additionally, his first major political writing, *Thoughts on the Causes of the Present Discontents*,<sup>128</sup> was a defense of dissenting party politics.

Burke was not the first to defend religious moderation or free speech. John Locke wrote: "The magistrate's power extends not to establishing of any article of faith, or forms of worship, by the force of his laws. For laws are of no force without penalties, and penalties in this case are absolutely impertinent; because they are not proper to convince the mind."<sup>129</sup> Milton saw truth prevailing over falsity "in a free and open encounter."<sup>130</sup> But it was, nevertheless, Burke who advanced the libertarian tradition by eloquently linking free exercise of speech and religion with the beneficial political values of moderation, tolerance, and compromise. In 1773, he argued against a bill limiting the rights of Dissenting Methodists: "Toleration is good for all, or it is good for none."<sup>131</sup> Such toleration is an essential part of

125. E. BURKE, *Speech at His Arrival at Bristol*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 86 (Beaconsfield edition 1901) (Burke delivered this speech in 1774.) [hereinafter cited as E. BURKE, *Arrival*].

126. E. BURKE, *Letter to the Right Hon. Henry Dundas: with the Sketch of a Negro Code*, in 6 THE WRITINGS AND SPEECHES OF EDMUND BURKE 255-91 (Beaconsfield edition 1901) (Burke wrote this letter in 1792.).

127. E. BURKE, *Arrival*, *supra* note 125, at 86.

128. E. BURKE, *THOUGHTS ON THE CAUSES OF THE PRESENT DISCONTENTS* (London 1770).

129. J. LOCKE, *A Letter Concerning Toleration*, in 5 THE WORKS OF JOHN LOCKE (n.p. 1689), quoted in P. GAY, *THE ENLIGHTENMENT: A COMPREHENSIVE ANTHOLOGY* 77 (1973).

130. AREOPAGITICA, *A Speech for the Liberty of Unlicensed Printing, to the Parliament of England* (n.p. 1644), in *PROSE WRITINGS* 23-38 (Everyman edition 1927).

131. E. BURKE, *Speech on a Bill for the Relief of Protestant Dissenters*, in 7 THE WRITINGS AND SPEECHES OF EDMUND BURKE 29 (Beaconsfield edition 1901) (Burke delivered this speech on Mar. 17, 1773.).

Christianity itself.<sup>132</sup> It would be dangerous for the Church or state to become tyrannical, forcing dissenters to become virtual slaves, "living under will, not under law."<sup>133</sup>

Burke was horrified at proposals to introduce penal laws depriving Irish Catholics of their franchise and limiting their ability to receive an education: "The taking away of a vote is the taking away of the shield which the subject has, not only against the oppression of power, but that worst of all oppressions, the persecution of private society and private manners."<sup>134</sup> Educational deprivation constitutes another form of despotism: "Indeed, I have ever thought the prohibition of the means of improving our rational nature is the worst species of tyranny that the insolence and perverseness of mankind ever dared to exercise."<sup>135</sup> Such proposals destroy "some part of that equality without which you can never be FELLOW-CITIZENS."<sup>136</sup>

Not surprisingly, the French Revolution diminished Burke's moderation. Burke justified the regulation of Unitarians because their religion became a dangerous political faction:<sup>137</sup> "The principle of your petitioners is no passive conscientious dissent, on account of an over-scrupulous habit of mind: the dissent on their part is fundamental, and goes to the very root . . . ."<sup>138</sup> Burke also argued that overtly political support of the Jacobins and of radical change in England should be unprotected speech: "These insect reptiles, whilst they go

132. *Id.* at 25.

133. *Id.* at 24.

134. E. BURKE, *Letter to a Peer of Ireland on the Penal Laws against Irish Catholics*, in 4 THE WRITINGS AND SPEECHES OF EDMUND BURKE 225 (Beaconsfield edition 1901) (Burke wrote this letter in 1782.).

135. *Id.* at 228.

136. *Id.* at 220.

137. Burke explained how he could still support religious tolerance:

If religion only related to the individual, and was a question between God and the conscience, it would not be wise, nor in my opinion equitable, for human authority to step in. But when religion is embodied into faction, and factions have objects to pursue, it will and must, more or less, become a question of power between them.

E. BURKE, *Speech on a Motion for Leave to bring in a Bill to repeal and alter certain acts respecting Religious Opinions, upon the Occasion of a Petition of the Unitarian Society*, in 7 THE WRITINGS AND SPEECHES OF EDMUND BURKE 48 (Beaconsfield edition 1901) (Burke delivered this speech on May 11, 1792.).

In many other works, he expressed similar sentiments:

The members of this faction leave no doubt of the nature and extent of the mischief they mean to produce. . . . They are put out of all dispute by the thanks which, formally and as it were officially, they issue, in order to recommend and to promote the most atrocious and treasonous libels against all the hitherto cherished objects of love and veneration of this people.

E. BURKE, *Whigs*, *supra* note 82, at 69.

138. *Id.* at 56.

on only caballing and toasting, only fill us with disgust; if they get above their natural size, and increase the quantity whilst they keep the quality of their venom, they become the objects of the greatest terror."<sup>139</sup> Of course, at that time in history hardly anyone disagreed with the crime of seditious libel.<sup>140</sup>

Only one year after the Revolution began, Burke led a movement to make the English government more efficient. Burke advocated that: pensions should be reduced; the King should keep accurate records; and unprofitable public lands should be put on the market block. Burke almost sounds Jacobin in his attack on waste: "But when the reason of old establishments is gone, it is absurd to preserve nothing but the burden of them. This is superstitiously to embalm a carcass not worth an ounce of the gums that are used to preserve it."<sup>141</sup>

Burke's commitment to efficiency exemplified the middle class bias in his politics. Burke proposed that government be minimal:

The state ought to confine itself to what regards the state or the creatures of the state: namely, the exterior establishment of its religion; its magistracy; its revenue; its military force by sea and land; the corporations that owe their existence to its fiat; in a word, everything that is *truly and properly* public.<sup>142</sup>

The government should not regulate the market, which is based upon the laws of Nature, and thus the laws of God:<sup>143</sup> "The moment that government appears at market, all the principles of market will be subverted."<sup>144</sup> Although the rich are "trustees for those who labor,"<sup>145</sup> the poor should expect nothing from the government: "Patience, labor, sobriety, frugality, and religion should be recommended to them; all the rest is downright *fraud*."<sup>146</sup> He did not think such views represented class hostility.<sup>147</sup>

Burke fought all efforts to reapportion the electorate and charac-

139. *Id.* at 51.

140. See, e.g., L. LEVY, *LEGACY OF SUPPRESSION* (1960).

141. E. BURKE, *Speech on presenting to the House of Commons a Plan for the Better Security of the Independence of Parliament, and the Economical Reformation of the Civil and other Establishments*, in 2 *THE WRITINGS AND SPEECHES OF EDMUND BURKE* 265 (Beaconsfield edition 1901) (Burke delivered this speech on Feb. 11, 1780.).

142. E. BURKE, *Thoughts and Details on Scarcity*, in 5 *THE WRITINGS AND SPEECHES OF EDMUND BURKE* 166 (Beaconsfield edition 1901) (Burke wrote this article in 1795.).

143. *Id.* at 157.

144. *Id.* at 154.

145. *Id.* at 134.

146. *Id.* at 135.

147. Burke used the theory of virtual representation to justify uneven apportionment. Under that theory, an enlightened minority elected by a larger minority could best protect the country. G. SABINE, *supra* note 12, at 610.

terized such proposals as innovations. He created a presumption in favor of existing institutions: "To those who say it is a bad one, I answer, look at the effects. In all moral machinery, the moral results are its test."<sup>148</sup> Burke then claimed that the government treated all the regions equally.<sup>149</sup> Instead of applying his usual anti-metaphysical approach, Burke acknowledged the need for political theory: "I do not vilify theory and speculation: no, because that would be to vilify reason itself."<sup>150</sup>

Despite his triumphs, Burke's last years were filled with despondency. Both his wife and son died and he felt he had sacrificed them to his career. He also was embittered because he was never made a Lord; the nobility obviously viewed his service to and defense of aristocratic values as insufficient. These frustrations exploded when several Lords fought a pension proposed for him. Burke's *Letter to a Noble Lord*<sup>151</sup> contained a painful collection of brilliant observations and cruel counterattacks: "I have strained every nerve to keep the Duke of Bedford in that situation which alone makes him my superior."<sup>152</sup> Burke belittled the Duke's appearance:

The Duke of Bedford is the leviathan among all the creatures of the crown. He tumbles about his unwieldy bulk, he plays and frolics in the ocean of the royal bounty. Huge as he is . . . he is still a creature. His ribs, his whalebone, his blubber, the very spiracles through which he spouts a torrent of brine against his origin, and covers me all over with the spray, everything of him and about him is of the throne.<sup>153</sup>

Burke sounded like a Jacobin when he used Enlightenment theory to remind the Duke that his heritage had illegitimate origins: the Duke's ancestors had received their fortune from Henry VIII, "a *levelling* tyrant,"<sup>154</sup> for making a dishonorable peace treaty with France.<sup>155</sup> Burke even invoked his son's death, reminding the Duke that he had progeny while Burke was only an "old oak."<sup>156</sup> Burke suggested the Duke should follow the example of Lord Keppel, who

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148. E. BURKE, *Speech on a Motion for a Committee to inquire into the State of the Representation of the Commons in Parliament*, in 7 THE WRITINGS AND SPEECHES OF EDMUND BURKE 96 (Beaconsfield edition 1901) (Burke delivered this speech on May 7, 1782.).

149. *Id.* at 99.

150. *Id.* at 97.

151. E. BURKE, *Noble Lord*, *supra* note 116, at 175.

152. *Id.* at 196-97.

153. *Id.* at 199.

154. *Id.* at 202.

155. *Id.* at 204.

156. *Id.* at 208.

energetically preserved aristocratic values by expanding the aristocracy: "He valued ancient nobility; and he was not disinclined to augment it with new honors. He valued the old nobility and the new, not as an excuse for inglorious sloth, but as an incitement to virtuous activity."<sup>157</sup> If aristocrats become too decadent, they will not fulfill their constitutional obligation to check the levity of the crown and the multitude.<sup>158</sup>

### III. SUMMARY AND TRANSITION

Burke's views have been arranged like pieces on a chessboard after the opening series of moves. A variety of approaches, varying in risk, suggest themselves. One could sweep the board clean, concluding that Burke is so incoherent or ambivalent that his views provide no contemporary value. Or Burke could be dismissed because his politics clearly clash with the views of such founders of our country as Paine or Jefferson. Because Burke contested "innovation" while accepting "reform" and certain limited "revolutions," any clever lawyer could use the "If He Were Alive Today" argument to support virtually any policy. That gambit could use Burke's views on the issue of judicial review to reach opposite conclusions. A proponent of judicial activism can claim that Burke would accept judicial review as a healthy American institutional tradition. An opponent could use Burke's own words against judicial activism. Because only legislatures can make and rescind rights,

[a] judge, a person exercising a judicial capacity, is neither to apply to original justice nor to a discretionary application of it. He goes to justice and discretion only at second hand, and through the medium of some superiors. He is to work neither upon his opinion of the one nor of the other, but upon a fixed rule, of which he has not the making, but singly and solely the *application* to the case.<sup>159</sup>

Many modern conservatives are guilty of the intellectual sins Burke most dreaded. They have created abstract theories of judicial review and of politics that are based upon a constricted view of human nature, a hostility to institutions that have not historically reflected their particular beliefs, an insensitivity to the values of a mixed government, and a limited, metaphysical definition of liberty and equality. Furthermore, by dwelling upon the relative legitimacy

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157. *Id.* at 224.

158. *Id.* at 225.

159. E. BURKE, *Speech relative to the Middlesex Election*, in 7 THE WRITINGS AND SPEECHES OF EDMUND BURKE 64 (Beaconsfield edition 1901) (Burke delivered this speech on Feb. 7, 1771.).

of such structures as courts, markets, and elections, they have improperly tolerated or proposed certain tyrannical acts. Thus, they have deviated from the essence of Burke's conservatism: a vigilant hostility to injustice.

In discussing the above proposition, one must assume that the courts, particularly the tenured federal courts, play the equivalent of the "aristocratic" role in Burke's mixed government. This assumption is not arbitrary. It is not necessary to deny that the people retain ultimate sovereignty to argue that the plastic powers characteristic of aristocracy and monarchy have reappeared in the courts and the presidency. The framers, who like Burke were inspired by Montesquieu, believed that by separating powers, they were creating a structure resembling mixed government.<sup>160</sup>

The word "aristocracy" takes on understandably negative connotations in our culture; one imagines a group of rich people who have inherited their wealth and only wish to ossify the status quo. But a

160. According to Gary Wills, Madison considered Montesquieu "the oracle" of separated powers, but Montesquieu was not completely useful because he also was discussing mixed government. G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 180 (1981). For instance, Montesquieu considered the judicial branch a nonentity. *Id.* at 121. Madison rejected the mixed government idea because all power under the American structure represents the people. *Id.* at 120. The "republican genius" of the Constitution prevailed over the other forms of government: "Monarchical and aristocratic principles were not to be introduced in the American scheme, even as partial or balancing factors." *Id.* at 104.

This article does not try to argue that the Constitution is a mixed government deriving its sovereignty from the one, the few, and the many. *Id.* at 120. The Constitution, however, operates on a day to day basis as if it were a mixed government, even though sovereignty ultimately remains with the people. Thus, the works of both Montesquieu and Burke are relevant, even if they were primarily thinking of mixed governments and intermingling that theory with the doctrine of separation of powers.

Montesquieu heavily influenced Burke:

Above all, both Burke and Montesquieu revered the British Constitution, which the revolutionaries considered a monument of superstition and ignorance. It is chiefly as the defender of the British Constitution that Burke, at this time, admires Montesquieu. Montesquieu had spent twenty years writing the *Esprit des lois*, and his considered judgment was that the British Constitution was the greatest monument to liberty.

C. COURTNEY, *MONTESQUIEU AND BURKE* 183 (1963).

Sabine argues that Burke's use of Montesquieu was window-dressing:

For rhetorical purposes he was not above using the weight of Montesquieu's authority, but in fact his idea of constitutional balance had little to do with the separation of powers which liberals regard as the bulwark of individual liberties. For Burke the balance is between the great vested interests of the realm and its ground is simply prescription, not at all the inviolability of individual rights. He agreed substantially with Hume that the arrangements of a political society are conventions sanctified by use and wont.

G. SABINE, *supra* note 12, at 608. Sabine emphasizes Burke's conservatism and consistency, although Professor Kramnick's theory of ambivalence is perhaps more persuasive. Otherwise, Burke could not have supported so many revolutions and reforms.

“meritocracy” can replace an “aristocracy.” Burke considered the “natural aristocracy” to be at least the equal of the titled gentry. He was not a member of the nobility—nor did he believe in total rigidity. As De Tocqueville observed, American lawyers constitute a peculiar aristocracy.<sup>161</sup> And the federal judges, lawyers who can create law without fear of loss of job or income, have all the characteristics of Burke’s aristocrats except personal wealth and inheritable title. They have the power to ameliorate abuses by the people or the executive, and yet they also have the power to create arrogant, disorderly tyranny.

Turning now to the scholarly work of the five judges, the article shall retain a Burkean tone by discussing how these judges apply their jurisprudence to several contemporary issues. Those discussions will focus on a specific legal issue and an underlying theoretical difference between the judge and Burke. For example, the article compares Burke’s and Bork’s views on political dissent not only to evaluate that particular issue, but also to assess how abstractly theoretical they were in reaching their conclusions. The judge and Burke may agree on the solution to a specific problem, but they will differ radically on how they reached that conclusion.

#### A. Judge Bork’s Abstract Political Theory

Equality of preferences has been a consistent theme in Judge Bork’s constitutional theorizing. In his most influential work, *Neutral Principles and Some First Amendment Problems*, Bork assumes “there is no principled way to prefer any claimed human value to any other.”<sup>162</sup> Thus the Court, whose legitimate authority is suspect because it is not a majoritarian institution, should remain “controlled by principles exterior to the will of the Justices.”<sup>163</sup> The Warren Court, according to Bork, violated the judge’s duty by including moral intuitions—a sense of fairness—in its constitutional calculus: “The judge must stick close to the text and the history, and their fair

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161. In his discussions of how majority tyranny is mitigated in America, De Tocqueville found that the lawyers were a partial check:

Some of the tastes and habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people.

A. DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 284 (P. Bradley ed. 1945) (1st ed. Paris 1835).

162. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 8 (1971) [hereinafter cited as Bork, *Neutral Principles*].

163. *Id.* at 6.



implications, and not construct new rights."<sup>164</sup> Bork implies that there is no difference between political preferences and personal preferences: a judge interested in autonomy or equality is no different from a judge who wants another milkshake. In other words, there is no legal difference between having a political/moral viewpoint and being personally biased.

At his Senate confirmation hearing, Bork again used the concept of legitimacy to limit the types of arguments judges can use: "I do not know any way to apply the Constitution that I regard as legitimate other than in terms of the intent of the framers, as best as that can be determined."<sup>165</sup> Legitimacy, of course, is a potent theoretical noun: it creates a test which, if not met, leads to the conclusion that the challenged act is not only ill-advised, but completely wrong, even unconstitutional. According to Bork, if a judge does not base his or her opinion upon the framers' intent and the governmental structure implied by the framers' law, the judge is engaging in "judicial imperialism."<sup>166</sup>

In a recent speech made after his appointment, Judge Bork found fault with contemporary first amendment theory for imposing the same moral relativism that he had previously used to justify judicial deference. Although the judges should be amoralist in their jurisprudential assumptions, Bork accuses them of erring by making amoralism part of first amendment theory: "Moral harm is not to be counted, but to do so would interfere with the autonomy of the individual. The result of discounting moral harm is the privatization of morality. The law of the community is thus required to practice moral relativism."<sup>167</sup> Only judges must be pure relativists, remaining morally indifferent and inactive until required to implement whatever values legislatures or constitutions generate: "In a constitutional democracy the moral content of law must be derived from the morality of the framer and the legislator, not that of the judge . . . . That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist."<sup>168</sup>

Bork's speech is permeated with Burkean concepts and imagery. Bork's opponents are excessively abstract. They disrespect existing

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164. *Id.* at 8.

165. *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 7 (1982) (statement of Robert Bork, nominee) [hereinafter cited as *Confirmation Hearings—Bork*].

166. *Id.* at 5.

167. R. BORK, *supra* note 6, at 11.

168. *Id.* at 12.

institutions and ignore how those institutions gradually change while maintaining “wholesome inconsistencies.” Bork refers to Burke’s *bête noire*, the French Revolution, to exemplify the costs of excessive “rights talk”:<sup>169</sup> “[T]he outcome for liberty was much less happy under the regime of ‘the rights of man.’ ”<sup>170</sup> Bork also echoes Burke’s distaste for “new rights” and for judicial activism.

Judge Bork is not being logically inconsistent in making moral relativism a basic assumption, and then arguing that moral relativism should bind judges by prohibiting expression of their beliefs, including relativism, while the legislature can express its preferences any way it feels. Different governmental institutions have different political/moral responsibilities. The mix and weight of moral assumptions will vary for each institution. Consequently, the debate is over the proper content of that mixture.

Bork, however, is not thinking in a very Burkean fashion when he bemoans the lack of constitutional theory: “This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the wind of intellectual or moral fashion, which it then validates as the commands of our most basic compact.”<sup>171</sup> Perhaps Bork’s anxiety over the lack of a constitutional theory explains why his assault on “judicial imperialism” is at least as abstract as the one he claims underlies contemporary liberalism. His theory of judging—total positivism based upon abstract assumptions about morality, majoritarianism, and separation of powers—conflicts with the historical practice of the Supreme Court. Since the days of Chief Justice Marshall, moral concepts such as Natural Law have influenced judges’ constitutional decisions.<sup>172</sup> Bork apparently has forgotten that the Court also

169. *Id.*

170. *Id.*

171. *Id.* Bork had argued previously that his neutral principles would provide a theory of the first amendment. He does not adopt Harry Kalven Jr.’s acceptance of ambiguity:

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.

Bork, *Neutral Principles*, *supra* note 162, at 20 (quoting H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 6 (1965)).

172. Justice Bushrod Washington provides the most famous example:

The privileges and immunities of citizens of the several States . . . [are those] which are fundamental; which belong of right to the citizens of all free governments . . . . What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government; . . . with the right to acquire and possess property of every kind, and to pursue and obtain

embodies "wholesome inconsistencies that are completely at odds with abstract generalizations about the just society."<sup>173</sup> He has discounted completely the Court's history of moral leadership, particularly when confronting such fundamental problems as segregation, and the Court's deterrent power in preventing temporary majorities from oppressing minorities. Under Bork's theory, which emphasizes the Framers' specific intentions, segregation would still be legal if one accepts historian Raoul Berger's massive historical evidence that the framers of the fourteenth amendment opposed desegregation, particularly in the schools.<sup>174</sup> His refusal to read the text of the Constitution compassionately means that if there were no fourteenth amendment, apartheid would be constitutional. If there were no thirteenth amendment, one could own slaves. Pre-Civil War justice should not be condemned for supporting slavery; the text of the Constitution tolerated slavery.<sup>175</sup> Equally important, Bork seems to imply that the Court is unable to fight new forms of tyranny, which the framers could not have contemplated. Imagine how he would decide a case where the government put all citizens with intelligence quotas of less than eighty in "re-education centers." For Bork, legal tyranny is not an oxymoron. Indeed, Bork would probably reject the Burkean idea that tyranny is the crucial concern of constitutional law because that mode of analysis forces the judge to make an evaluation about good and evil human behavior.

Contrasting how the two men justified their theory of appropriate dissent reveals Bork's dislike of mixed government. His commitment to abstract rigid theories of judging and of legitimacy creates an

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happiness and safety, subject, nevertheless, to such restraints as the government may proscribe for the general good of the whole.

Corfield v. Coryell, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823) (No. 3,230).

Chief Justice Marshall, in his opinion in *Fletcher v. Peck*, held that the Georgia legislature could not rescind previously tainted land grants because the legislature was "restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States." 10 U.S. (6 Cranch) 87, 139 (1810).

173. R. BORK, *supra* note 6, at 12.

174. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 117-33 (1977). Bork does not hedge about the primacy of history: "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." Bork, *Neutral Principles*, *supra* note 162, at 13. Bork may have been creating a pseudo standard if he was serious about demanding consensus since there will always be some dispute about the meaning of a proposed amendment among both its supporters and detractors. If only consensus is a constraint, then there is no constraint at all. But if Bork meant something less than perfect consensus, he has to confront Raoul Berger's troubling history.

175. See, e.g., R. COVER, *JUSTICE ACCUSED* (1975) (antislavery judges struggle with Fugitive Slave Acts).

environment conducive to tyranny. While Burke defends tolerance as a Christian policy and as a necessity for good government, Judge Bork tries to remove not only all moral arguments, but also policy arguments from constitutional law: "No, I do not think that is a policy ground, Senator. I think that is a constitutional argument."<sup>176</sup>

Bork's initial definition of the scope of first amendment protection made suprisingly little use of history, the text, or the framers' intentions. Judge Bork ignored two textual problems when he proposed that the first amendment protects only purely political speech and not other forms of expression. Arguably, the first amendment does not have such a broad scope because it textually limited congressional actions, not state actions. But more importantly, the first amendment states that "no law" shall limit speech—without narrowing that protection to political speech.<sup>177</sup> Because Bork does not dispute Leonard Levy's findings that the framers had a very limited conception of free speech,<sup>178</sup> he finds broader protection under the structure of the Constitution: "Freedom for political speech could and should be inferred even if there were no first amendment."<sup>179</sup> Thus Bork is willing to create a "new right," and then use that right to limit the textual right. All other forms of expression can be completely regulated because they "raise only issues of human gratification."<sup>180</sup>

Bork relies upon neither history nor text in defining protected political speech, but utilizes a nonhistorical, nontextual source when he partially adopts Justice Brandeis's concurring opinion in *Whitney v. California*.<sup>181</sup> But, he excises Justice Brandeis's concern for individual self-fulfillment because that value clashes with his own allegedly neutral theory that excludes all preferences because all preferences are equal. Only the state's preferences matter to the Court. Thus, Bork's abstract theory of preference neutrality virtually eliminates individual rights. Only nonrevolutionary political speech is protected, solely because it helps the democratic state function. Bork has subsequently changed his views to include constitutional protection of "[f]orms of discourse, such as moral and scientific debate, [which] are central to democratic government . . . ."<sup>182</sup> For another example, the individual

176. *Confirmation Hearings*—Bork, *supra* note 165, at 7.

177. U. S. CONST. amend. I.

178. See L. LEVY, *LEGACY OF SUPPRESSION* (1960).

179. Bork, *Neutral Principles*, *supra* note 162, at 23.

180. *Id.* at 26.

181. 274 U.S. 357, 372 (1927).

182. Bork, *Judge Bork Replies*, 70 A.B.A. J. 132 (Feb. 1984). Bork still maintains that obscenity and pornography should not be protected because they are not essential to democratic government. *Id.*

has the right to participate in the political process by voting, but the majority can alter even that vote because he did not neutrally define the principle of "one person/one vote."<sup>183</sup> The individual can express any preference through that vote, including sadism, so long as his or her legislators do not allow that sadism to take forms which the framers previously proscribed.

Bork accepts Justice Brandeis's arguments that the first amendment serves as a safety valve and as a tool to discover and spread political truth.<sup>184</sup> Despite its explicit language and its location within the Bill of Rights, Bork suggests that the first amendment actually represents a governmental power. Bork quotes Professor Meiklejohn approvingly to support the thesis that only political speech is protected speech:

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.<sup>185</sup>

Bork is now willing to distinguish between political values and personal preferences. The first amendment protects public expression of the former, but not the latter.

Even Bork's definition of political speech is a grudging one. Speech advocating violent overthrow of the government is unprotected because "it is not aimed at a new definition of political truth by a legislative majority."<sup>186</sup> Nor should the first amendment protect the advocacy of any law violation because "[t]he 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."<sup>187</sup> The only truth is the majority's truth. Civil disobedience cannot be discussed. Bork then argues that Justice Brandeis erred in providing too much protection to dissent by protecting teaching as well as advocacy. Bork concludes by partially adopting the position of the *Whitney* majority that Brandeis did not join: "Justice Sanford's deferential approach and his rejection of the 'clear and present danger test' have never been discredited, or even met."<sup>188</sup>

In terms of doctrine, Burke and Judge Bork do not differ greatly

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183. See Bork, *Neutral Principles*, *supra* note 162, at 18.

184. *Whitney*, 274 U.S. at 375.

185. Bork, *Neutral Principles*, *supra* note 162, at 26 (quoting Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255).

186. *Id.* at 31.

187. *Id.* (quoting Justice Brandeis in *Whitney*, 274 U.S. at 375).

188. *Id.* at 35.

about regulating political dissent, particularly after Burke became enraged by the French Revolution. Both men have stated that there are limits to political speech. While pleading for religious toleration, Burke also emphatically attacked those who questioned the basic political and religious assumptions of English society: “[T]he infidels, are outlaws of the constitution, not of this country, but of the human race. They are never, never to be supported, never to be tolerated.”<sup>189</sup> Although he eloquently defended conscientious dissent many times and was far more accepting of political and religious differences than most of his peers, Burke believed that those who supported the Jacobins were guilty of seditious libel. Burke never argued that all other forms of expression could be regulated, for example, that the government could prevent the sale of all French art. Furthermore, Burke was extremely tolerant, given the beliefs of his time.

Nonetheless, the two men reached their conclusions using markedly different methods. Bork based his first amendment theory upon a moral desert that Burke would find repugnant; Burke certainly felt capable of distinguishing between preferences, between good and evil. Political leaders should not be moral eunuchs. Although he believed that the people retain ultimate sovereignty, Burke dreaded majority tyranny far more than does Bork. Burke constantly defended the checks and balances of a mixed government, while Bork’s rigid theory places almost all legitimate substantive power with the legislature and little with the Court. Rather than evaluating specific actions of the Court for their effects, Bork has created a theory of judicial review that never allows the use of judicial review to fight new forms of tyranny. It is a theory based upon the individual’s right to participate in the political process to the degree that process allows participation. Burke also seemed more tolerant of dissent; only the most total forms of opposition, such as Jacobinism or atheism, were so repugnant as to justify suppression.

Burke frequently defined tyranny in terms of specific actors and actions. In his first book, he cited *Plutarch’s Lives* for an example of how tyranny is formed.<sup>190</sup> After killing his best friend during a drunken rage, Alexander the Great asked a philosopher for advice. The philosopher said, “let a Sovereign do what he will, all his actions are just and lawful, because they are his.”<sup>191</sup> Bork revives the ancient evil of positivism when, like one of Burke’s “courtly philosophers,” he

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189. E. BURKE, *Speech on a Bill for the Relief of Protestant Dissenters*, in 7 THE WRITINGS AND SPEECHES OF EDMUND BURKE 36 (Beaconsfield edition 1901) (Burke delivered this speech on Mar. 17, 1773.). Burke’s tolerance did not extend to atheism. *Id.* at 35-36.

190. E. BURKE, VINDICATION, *supra* note 26, at 47.

191. *Id.*

advises the legislature to flex its preferences while requiring the Court to remain neutral, unless the narrowly construed Constitution is violated. There is a difference between the view that the people ultimately should be sovereign and the belief that legislative majorities should be the predominant source of legitimate authority.

Bork has not consistently followed his abstract theory of judicial review. In a workshop in 1983, he seemed to place his economic beliefs above the positive law: "[I]t is entirely proper that the law changes as economic understanding progresses; . . . once we know what is going on, there is no reason why we should keep doing harm rather than good."<sup>192</sup> But once he admits the justice of economics, no neutral principle exists to prevent other judges from considering other forms of morality. One of the ironies of Burkean analysis is that one is relieved to find inconsistencies, which usually are considered the worst sins of legal analysis. Bork, however, should have turned to a deeper vision of justice than economism.

### B. *Judge Posner's Constricted View of Human Nature*

While Bork premises his constitutional jurisprudence upon the assumption that legislatures are to evaluate equally all preferences, Judge Richard Posner has championed the "law and economics" theory that the legislature should design laws to promote economic efficiency, which maximizes preferences.<sup>193</sup> In such nonconstitutional

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192. N.Y. Times, Mar. 8, 1983, at D2, col. 1. The relevant part of the reporter's article follows:

Last week, at a daylong workshop sponsored by the Conference Board, a business research organization, Judge Bork, who sits on the United States Court of Appeals for the District of Columbia, made it plain that he felt free to apply his economic theories, whatever the law says.

Take his views on the Robinson-Patman Act, which prohibits price discrimination. "If the new economics is right, there is never a case in which price discrimination injures competition," Judge Bork said. "In the Robinson-Patman Act, when Congress said it wanted to forbid price discrimination to protect competition, they said it with a wink. I don't think it's a judge's job to enforce winks."

Judge Bork had rather definite ideas on what a judge should do if presented with an argument he believes to be economically unsound. "If a judge is told that a tying arrangement, the linking of one product to another, is a company's way of leveraging itself into a monopoly in a new market, that's roughly the equivalent of being told that a man jumped out of the window and fell up," he said. "If a judge knows that, he shouldn't let that go to the jury."

Under the premise that "it is entirely proper that the law changes as economic understanding progresses," he said that "once we know what is going on, there is no reason we should keep doing harm rather than good."

*Id.*

193. This article has been structured to avoid debating the appropriate use of law and economics to resolve common law and statutory cases. Posner's productivity is legend. *See,*

fields as antitrust, Bork has agreed with Posner.<sup>194</sup> Judges Easterbrook<sup>195</sup> and Winter<sup>196</sup> have also written extensively in favor of a legal system that only regulates the market when there is fraud, duress, or monopoly—with those terms being narrowly defined and applied. Only Judge Scalia has been more tolerant of market regulation.<sup>197</sup>

Because Posner frequently has applied economic analysis to such constitutional questions as racial discrimination, privacy, and the fourth amendment, his vision is potentially far more activist than Bork's view. While Bork defers to legislative decisions because he has no power or ability to distinguish between right and wrong, Posner

e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* (1981); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976). The titles alone suggest the breadth of his scholarship as well as his belief in the broad applicability of economics. Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979); Landes & Posner, *Saviors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979); Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

194. Bork has presented similar views, particularly in the antitrust field. See, e.g., R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); Bork, *Antitrust and the Theory of Concentrated Markets*, 46 ANTITRUST L.J. 873 (1978).

195. Easterbrook has also argued on behalf of deregulation. See Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23 (1983); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733 (1981). Winter has contributed to the theory.

196. See Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); R. WINTER, *THE CONSUMER ADVOCATE VERSUS THE CONSUMER* (1972).

197. Scalia's work has been more moderate. In his thorough discussion of the Consumer Product Safety Act, he concludes that the law can be useful: "The success of the legislation will depend upon whether the balance between these competing procedural safeguards was wisely struck and can be effectively maintained. . . . Much depends upon the vigor and strictness of implementation." Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899 (1973). Even when he seems to criticize the D.C. Circuit's excessive judicial activism over administrative actions, his remedy would approach the court's solution of requiring more procedures than currently exist in the Administrative Procedure Act: "I would settle for an APA that contains not merely three but ten or fifteen basic procedural formats . . ." Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345. Scalia warns against perfect resolution of the sovereign immunity question. "[Accept] the fact that such reconciliation is, and probably will remain unattainable; to explain why this is so; and to suggest why it is not so bad." Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public Land Cases*, 68 MICH. L. REV. 867 (1970).



criticizes certain laws for inefficiency. This approach to constitutional law can reincarnate the discredited economic due process doctrine. Applying this approach, courts could hold unconstitutional many laws, such as the minimum wage law, because they are economically inefficient. Thus, Judge Posner would be engaging in a form of judicial activism that both he and Bork consider illegitimate:

Decisions made by so unrepresentative, so isolated, indeed so oligarchic an institution as the federal judiciary lack legitimacy when the courts stray into areas, as increasingly they have been doing, where they cannot point either to an authoritative text or a national consensus to support their decisions.<sup>198</sup>

Posner has never argued for total revival of *Lochner's* economic due process jurisprudence. Yet his efforts to construe the fourteenth amendment contain a peculiar mix of economics, history, and text. It is instructive to analyze his proposals by reconsidering *Brown v. Board of Education*,<sup>199</sup> in which the Supreme Court desegregated public schools. *Brown* epitomizes the modern Court's success in combating tyranny. Posner, like Bork, does not disagree with the *Brown* decision.<sup>200</sup> Although Posner is generally attracted to the idea of neutrality, he rejected Professor Wechsler's argument that *Brown* was wrongly decided because there was no neutral principle by which to determine whether the blacks' desire to be educated with whites should prevail over the whites' desire to remain separated. Posner found the appropriate principle in the historical purpose of the fourteenth amendment: "The main purpose of the Fourteenth Amendment—as is clear not only from its background but also from its little-read sections 2 through 4—was to complete the emancipation of the Negro."<sup>201</sup>

Posner's historical assessment of the framers' intentions may well be wrong, and this creates a weakness in his interpretation of the fourteenth amendment. Just as Leonard Levy has demonstrated the narrowness of the framers' conception of the first amendment, Raoul Berger has raised similar doubts about broad readings of the fourteenth amendment.<sup>202</sup> For instance, many supporters of the fourteenth amendment explicitly denied that the new law would require desegregation of public schools (including segregated schools existing in the North).<sup>203</sup> Liberals initially felt threatened by these historical

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198. R. POSNER, *THE FEDERAL COURTS; CRISIS AND REFORM* 213 (1985).

199. 347 U.S. 483 (1954).

200. Bork has also accepted *Brown*. See Bork, *Neutral Principles*, *supra* note 162, at 13-15.

201. R. POSNER, *supra* note 197, at 193.

202. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

203. See *id.* at 118.

criticisms which questioned the legitimacy of cases ranging from *Brown* to Brandeis's concurrence in *Whitney*.<sup>204</sup> Yet Berger's troubling history ironically presents more difficulties for conservatives such as Bork or Posner because they claim they must be bound by the Framers' intentions, as reflected by Posner's statement before the Senate Judiciary Committee: "I think the judge's duty is to try to enforce the Constitution according to the intent with which it was drafted rather than according to his own personal views of what is right."<sup>205</sup> The text of the fourteenth amendment does not mandate desegregation because it does not unequivocally state that "separate but equal" is unconstitutionally unequal.

Contemporary liberals can justify *Brown* on another basis: the Framers created the concept of equality, but delegated the evolution of that doctrine to future generations.<sup>206</sup> They are relieved to escape the constraints of history by finding certain historical beliefs illegitimate or outdated. They can open a Pandora's Box of substantive due process to protect a variety of individual rights. If history does not support *Brown*, but *Brown* is properly decided, then equally hostile history does not necessarily negate the legitimacy of cases like *Baker v. Carr*,<sup>207</sup> or even *Roe v. Wade*.<sup>208</sup>

Posner again turns to history when proposing a very limited definition of substantive due process. Posner suggests that the only other purpose of the fourteenth amendment, besides furthering the emancipation of blacks and protecting the black freemen, was to prevent a civil war. From this dubious historical assumption, he creates a "consensus" test which is virtually impossible to meet because the challenged state law reflects, at the very least, the views of a majority of state leaders: "[A] law . . . deprives a person of life, liberty, or property in violation of a fundamental social norm *held by most of the nation* . . ."<sup>209</sup> The Court thus has "the power to prevent the growth in the states of new social institutions that would be so obnoxious to dominant national feeling that they might kindle sectional passions of the sort that had led to the Civil War."<sup>210</sup>

Compared to Bork's positivism, Posner's standard provides some

204. See *Whitney v. California*, 352 U.S. 357, 372-80 (1927).

205. *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 91 (1981) (statement of Richard Posner, nominee) [hereinafter cited as *Confirmation Hearings—Posner*].

206. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

207. 369 U.S. 186 (1962).

208. 410 U.S. 113 (1973).

209. R. POSNER, *supra* note 197, at 194.

210. *Id.*

Burkean flexibility.<sup>211</sup> The Constitution is sufficiently alive to prevent certain civil wars. Yet his standard is filled with difficulties. It assumes that the Court can somehow determine which laws or social customs will start massive armed strife. Courts cannot easily make such political predictions. Even if the Court makes such an assumption, it still has no guidance on how to decide the case. Consider *Dred Scott v. Sanford*,<sup>212</sup> a decision which helped provoke a civil war. How is a court to decide whether Dred Scott should have remained a slave under Posner's test? Either upholding or striking down slavery might trigger a civil war. Because the criteria has no independent moral content beyond preservation of the state, it provides no guidance to complex moral or political dilemmas. In comparison, Burke would defer to the will of the people when they act justly, as in the American Revolution, and he would oppose political movements he perceived as tyrannical, including slavery.

Because small minorities are incapable of starting a civil war, Posner's test also fails to provide protection for them. The test also makes national opinion the law. How would Posner decide a case where several states started experimenting with forms of socialism that angered the majority of the country? His test could be manipulable to allow significant judicial activism. A judicially active court could easily manipulate his test to combat emerging socialism. What if one assumes that great disparity in wealth distribution is a prime cause of revolution and civil war? Also, the standard seems artificially narrow because it only addresses sectional disputes. If one purpose of the Civil War amendments was to prevent future revolts, why shouldn't the Court strike down state or national laws that might also provoke civil war?

In practice, the test's greatest flaw is its extremely high burden of proof. How can plaintiffs demonstrate that state laws will generate such sectional strife that civil war is imminent? Substantive due process is retained in name, but buried in fact.

While the above two standards represent controversial historical judgments, Posner also retains economic analysis to help determine the scope of the fourteenth amendment. Federal courts should regulate state laws when "state court[s] may be an unsympathetic tribunal

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211. *Id.* at 197. Since Posner would determine the consensus primarily by looking at existing state legislation, his test is potentially hostile to desirable and undesirable change. *Id.* at 194. It is not enough to say that "[m]ost new ideas are bad." *Id.* at 195. When trying to determine whether new ideas are unconstitutional, the Court should rely upon a less speculative, but still deferential test based on general citizenry beliefs. If a majority of the populace becomes attracted to evil, Posner's standard provides no protection.

212. 60 U.S. (19 How.) 393 (1856).

where a federal right has been created in order to correct an interstate externality."<sup>213</sup> This standard has no historical justification; the Framers of the fourteenth amendment never heard of externalities, much less "interstate externalities." Posner then defines constitutional externalities in a way which threatens *Brown*:

Most Fourteenth Amendment rights, however, simply are not related, or are related only tenuously, to externalities. Consider the oppression of blacks by the southern states after Reconstruction. Unless one treats moral outrage as a cost—a step that pretty much erases the distinction between internal and external costs—the costs of that oppression were borne mainly by the southern rather than the northern states.<sup>214</sup>

This passage demonstrates the narrowness of Posner's economic vision. First of all, both the North and the South had to bear many costs as a result of apartheid, even assuming it was economically efficient and generated an optimum gross regional product. Externalities can last for generations; the continuing gap between black and white income levels, the slums, and the broken homes are all traceable back to the venal effects of slavery transactions and of subsequent segregation. The Supreme Court's decision requiring states to educate the children of illegal aliens provides a contemporary example.<sup>215</sup> Failure to cure this problem would generate social costs that could last for decades.

Because he evaluates transactions primarily by their immediate market effects, Posner ignores how certain market transactions constitute long-term threats to security. He does not appreciate Burke's argument that tyranny in one section, or one colony, threatens the liberty of everyone: "Liberty, if I understand it at all, is a general principle, and the clear right of all subjects within the realm, or of none."<sup>216</sup> The anxiety generated by seeing one's neighbor oppressed consists of more than moral outrage. Posner's constricted parameters of time and personality consistently make him insensitive to the effects of tyranny.

Posner's economic reductionism not only excludes real costs, but also improperly discounts the only external cost he acknowledges: moral outrage. Moral outrage should be part of constitutional adjudication. Burke saw all political decisions as primarily moral decisions. If indignation is a cost that destroys Posner's aesthetic distinction

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213. R. POSNER, *supra* note 197, at 175.

214. *Id.* at 179-80.

215. *Plyler v. Doe*, 457 U.S. 202 (1982).

216. E. BURKE, *Noble Lord*, *supra* note 116, at 10.

between internal and external costs, why should that distinction prevail over a more just definition of rights? Consequently, Posner's definition of externalities fails to be politically non-neutral.

The concept of externalities is particularly pliable. For instance, Professor Bruce Ackerman recently argued that liberals can use a broad definition of "externalities" to justify many of their policies.<sup>217</sup> Posner even uses a loose definition of externalities to explain anti-obscenity laws: "And the possible external effects of pornography (on the crime rate and on the family), though they have never been measured, conceivably may justify the laws and at least explain the intense hostility that many people feel toward pornography."<sup>218</sup> A similar analysis could apply to far greater evils, such as segregation.

Posner tries to preserve some fourteenth amendment rights by arguing that federal courts are necessary to protect "people who are politically disfavored in state courts not because they are nonresidents—most of them are residents—but because they lack effective political power in the state."<sup>219</sup> For example, the politically powerful elderly do not need age discrimination laws in federal courts to protect their interests. But Posner's basic standard—the federal courts should protect the weak—is remarkably liberal and open-ended, reminiscent of Professor Shapiro's thesis that the Court's first amendment constituency is the politically powerless.<sup>220</sup> Indeed, Posner adopts the "marketplace of ideas" image of the first amendment, a far more libertarian vision than Bork's crabbed version of political speech. It is difficult to reconcile Posner's different tests. For instance, how does one integrate the protection of minorities theory with the anti-civil war substantive due process standard? After all, one can argue that homosexuals are a politically powerless, oppressed groups, yet they are unlikely to start a civil war.

Burke's writings provide far more guidance. Burke defined tyranny in terms of specific episodes, and justified dissent and mixed governments as weapons against tyranny. Posner, however, recasts those terms in economic imagery: "Important examples of laws that serve the public interest, economically defined, are the provisions of the Constitution that establish the separation of powers and guarantee freedom of political speech, both devices for warding off a particularly costly form of monopoly—a monopoly of political power."<sup>221</sup> But

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217. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).

218. R. POSNER, *supra* note 197, at 266.

219. *Id.* at 180.

220. M. SHAPIRO, *FREEDOM OF SPEECH; THE SUPREME COURT AND JUDICIAL REVIEW* (1966).

221. R. POSNER, *supra* note 197, at 265.

unless one includes factors such as moral outrage, compassion, and insecurity as "costs," it is possible to conclude that a monopoly of political power might be more efficient, and might satisfy more preferences. Posner again generates political insecurity by deriving all political values from his economic imagery. Perhaps we all would be happier in a Brave New World of pure economic efficiency.

Finally, Burke and Posner think about slavery in radically different ways. Posner was unable to escape from, or even reject, a tyrannical implication of his economic analysis when he concluded that not only could slavery be economically efficient,<sup>222</sup> but also that economic theory would enforce contracts where a person bargained to be a slave.<sup>223</sup> Of course, as a judge, Posner would strike down slavery laws under the thirteenth amendment. But once again, solely because his theory so requires, we see how Posner would tolerate, and thus legitimize in the absence of text, the most evil practices. Burke, on the other hand, always loathed slavery—he proposed to end slavery in the colonies and gradually emancipate the slaves. Throughout his works, references to slavery were references to tyranny.<sup>224</sup> Indeed, slavery plays a crucial role in Burke's thinking because it is a concrete example of the tyranny he opposed. Thus, even without textual support, Burke might well have found the *Brown* decision acceptable. As seen in his opposition to anti-Irish laws, he loathed systems that educationally deprived people, punishing them for their background.

Posner might well reply that his ruminations on the possible scope of economic analysis are not part of his judicial jurisprudence. As he told the Senate Judiciary Committee: "[T]he role of a judge is very different from that of a law professor. The responsibility of a judge is to carry out the will of others—of the legislature—rather than to push his own academic ideas."<sup>225</sup> However, Posner's change in role will alter his views on statutes more than his scholarly constitutional interpretations. Judges are more bound by specific statutes than they are by the unamended Constitution. For instance, Posner presumably would enforce an amended, "economically inefficient," antitrust law that explicitly made protection of small businesses a

222. R. POSNER, *THE ECONOMICS OF JUSTICE* 102 (1981).

223. *Id.* at 86.

224. Burke was not the only one to see the link between oppressive governmental actions and slavery. Before the American Revolution took place, George Washington criticized British policies: "[T]hose from whom we have a right to seek protection are endeavouring by every piece of art and despotism to fix the shackles of slavery upon us." Letter from G. Washington to George William Fairfax (June 10, 1774), in 3 *WRITINGS* 223-24, *quoted in* L. BAKER, *JOHN MARSHALL; A LIFE IN LAW* 19 (1974).

225. *Confirmation Hearings*—Posner, *supra* note 204, at 91.

predominate policy. But because there are so many competing methods of how to construe the Constitution, Posner could include, as policy or philosophy, economic analysis in constitutional adjudication. Posner's underlying commitment to economics may explain why he has offered so many weak, but nevertheless, conflicting standards to interpret the fourteenth amendment, and why economic analysis continues to play a major role despite his claims that judges should rely primarily on text and history.

### C. *Judge Easterbrook's Economic Canons of Judicial Construction of Statutes and the Constitution*

In a series of articles on judicial construction of statutes and of the Constitution, Judge Easterbrook supplemented Posner's and Bork's modernist assumptions that, because one cannot choose between preferences, judges should defer to the market and to the text or history of laws and constitutions as the legitimate sources of power. Easterbrook has demonstrated how this jurisprudence can survive the ambiguities of history, language, and institutional inconsistency. He concedes that texts are vague: "[T]here is no community of understanding among writers and readers of words, no meeting of the minds."<sup>226</sup> Nor can we ever sufficiently penetrate history's veil to perfectly ascertain the framers' intentions: "Ultimately this approach fails because no one can do what it requires. How many judges could think themselves into the minds of members of Congress sitting in 1871 and 1929, or know what clauses capable of enactment in 1930 were out of the question in 1931 because of subtle changes?"<sup>227</sup> Nevertheless, "a judge should in no circumstances create obligations that cannot solidly be founded on statutes or on the text and history of the Constitution itself."<sup>228</sup>

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226. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL'Y 87 (1984).

227. *Id.* at 92. Easterbrook makes similar observations in determining how to apply the antitrust laws:

I do not argue that Congress intended courts to use economics in establishing the appropriate relation between state and federal law. I have avoided this not only because it is impossible to determine the 'intent' of any collective body but also because few if any members of Congress had a personal intent on the subject in 1890.

Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23, 40 (1983) [hereinafter cited as Easterbrook, *Federalism*]. He is, thus, willing to use evolving conceptions of efficiency to modify existing laws and policies, but claims he should not use evolving standards of justice in constitutional adjudication. It is not obvious what neutral principle makes it legitimate to read one's economic politics into one broad statute but precludes one from including any sense of fairness in the constitution itself.

228. *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm.*

History and text provide sufficient guidance to act, but insufficient direction to act aggressively. According to Easterbrook, the barriers of language and history are not total obstacles: "To many questions there are answers—right answers. Often people agree on meaning; text and history supply guides. I do not for a second suppose that law is mush."<sup>229</sup> The Court can legitimately engage in "astute guesses," but not in "wild guesses."<sup>230</sup> Yet the interpretive problems mandate restraint: "The more we doubt the power of words to convey meaning, the more we must doubt the authority of judges to coerce compliance with their conclusions, and the more modest judges must be about their demands."<sup>231</sup> Because the ambiguities of life, law, and language combine to require judicial restraint, the present court acts wrongly when it requires additional procedures, such as pretermination welfare hearings, under the due process clause of the fourteenth amendment:

This Term's cases have no roots in history and few roots in any decision older than twenty years. . . . Today the Court makes no pretense that its judgments have any basis other than the Justices' view of desirable policy. This is fundamentally the method of substantive due process. Giving judges this power of revision may be wise or not. The Court may design its procedures well or poorly. But there is no sound argument that this is a legitimate power or function of the Court.<sup>232</sup>

Easterbrook supplements this plea for judicial constraint by combining the themes of positivism and economic theory:

The legislative and executive branches have access to information about the costs and error rates produced by particular procedures. They are well aware that the accuracy of decisions may be improved by adopting more elaborate procedures. That they choose not to use these procedures is strong evidence that their costs outweigh their benefits.<sup>233</sup>

Thus, the State can establish any procedures it wants, including a system where the plaintiff loses the right to file a discrimination claim solely because the State agency failed to process his or her claim

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on the Judiciary, 98th Cong., 2d Sess. 456 (1984) (statement of Frank Easterbrook, nominee) [hereinafter cited as *Confirmation Hearings*—Easterbrook].

229. Easterbrook's next sentence clearly illustrates how he can suddenly add an ideological zinger to apparently innocuous commentary: "Most questions have answers, which can be supplied without resort to politics." Easterbrook, *supra* note 225, at 95 n.9.

230. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 548 (1983).

231. Easterbrook, *supra* note 225, at 98.

232. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125.

233. *Id.* at 110.



within the State's statutory limit.<sup>234</sup> Easterbrook even claims that because all adjudication procedures are somewhat inaccurate, a lottery might be acceptable.<sup>235</sup> He does not see how tyranny can emerge out of arbitrary procedures.

Many of Easterbrook's articles have a consistent pattern. Beginning with a series of modernist assumptions, such as the malleability of language,<sup>236</sup> they then propose in economic terms a variety of policy arguments, or modes of legal interpretation, that seem relatively innocuous. But toward the end of the articles, both in the text and footnotes, he makes numerous controversial constitutional arguments, even while claiming his economic tests are not universal. He suddenly reduces his flexible, realist conservatism to the economic scientism of Posner and the positivism of Bork.<sup>237</sup> He becomes vulnerable to the Burkean criticism of being excessively theoretical. Easterbrook's theory is also troubling because it explicitly disavows considering fairness. I can no longer resist juxtaposing Burke's lament: "But the age of chivalry is gone. That of sophisters, economists, and calculators has succeeded . . ."<sup>238</sup> Easterbrook might turn to Burke's argument that "[p]olitical reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations."<sup>239</sup> Yet, that quotation dramatizes another major difference between Burke and all three of the judges we have so far considered. Burke saw politics as a moral enterprise, not an economic one.

Easterbrook's recent exchange with Professor Tribe in the *Harvard Law Review* exemplifies this pattern.<sup>240</sup> Undeterred by Karl Llewellyn's article demonstrating that for every judicial canon there is a contrary canon of equal weight,<sup>241</sup> Easterbrook proposes three tests:

- (1) judges should be aware that their decisions create incentives influencing conduct *ex ante*, and that attempts to divide the stakes fairly *ex post* will alter or reverse the signals that are desirable from an *ex ante* perspective;

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234. *Id.* at 118.

235. *Id.* at 120.

236. Easterbrook, *supra* note 229, at 535.

237. *See, e.g.*, Easterbrook, *supra* note 225; Easterbrook, *supra* note 229.

238. E. BURKE, *Whigs*, *supra* note 82, at 86.

239. *Id.* at 71.

240. Compare Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985) with Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985) and Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 21 (1984).

241. Easterbrook, *supra* note 225, at 91 (citing K. LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960)).

(2) judges should be aware that marginal effects, and not average effects, influence the responses to their decisions, and that responses are pervasive; and

(3) judges should be aware of the interest-group nature of much legislation, for this influences its meaning.<sup>242</sup>

If we liberate those tests from their economic jargon, they are admonitions to the judiciary (1) to "examine how rules affect future behaviour,"<sup>243</sup> (2) to be satisfied with determining the general direction of the impact of an act, not the magnitude of that impact,<sup>244</sup> and (3) to be reluctant to add any new terms or implications to statutes that primarily serve special interest groups.<sup>245</sup>

Easterbrook would probably concede that only the first two tests are relevant for constitutional adjudication. One of the most cherished modern conservative beliefs is that the Constitution was primarily a patriotic document. To construe it as special interest legislation would mean it primarily reflects the influences of large states, small states, slaveowners, and the struggle between personalty and realty, debtor and creditor.<sup>246</sup> Newer groups, such as Hispanics, or weaker groups, such as children, would receive no constitutional protection. Easterbrook might also reply that the Constitution's relatively vague language reflects a public interest motivation and a wish to delegate discretionary power to the judiciary. For example, Easterbrook has argued that statutes drafted with broad language, such as the Sherman Antitrust Act, are presumably passed in the public interest and deliberately delegate power to the judiciary, which can therefore play

242. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985).

243. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 21 (1984).

244. *Id.* at 34.

245. *Id.* at 54.

246. See, e.g., C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). Beard's thesis that the Constitution represented a triumph of personalty over realty interests has long been a subject of historical dispute. For an edited collection of many of the works discussing Beard, see L. LEVY, ESSAYS ON THE MAKING OF THE CONSTITUTION (1969).

Posner once wrote that the Constitution should be read as special interest legislation:

In the view proposed here, the Constitution has two purposes. One is to establish the ground cones for a system of interest group politics; Article III is to be understood in this light. The second is to confer protective legislation of a peculiarly durable kind on those specially effective interest groups that are able and willing to incur the costs necessary to obtain a constitutional provision in their favor.

Landes & Posner, *The Independent Judiciary In An Interest Group Perspective*, 18 J. L. & ECON. 875, 892 (1975).

Posner says he has tempered this view since his nomination. Margolick, *Ally and Foe Admire Bench Nominee*, N.Y. Times, Nov. 20, 1981, at A14, col.1.

a more active role.<sup>247</sup>

Because the first two tests seem relatively banal, why did Professor Laurence Tribe condemn so heavily Easterbrook's article? How can one criticize awareness of future effects and acceptance of ignorance about the exact impact of those effects, if not the direction of that impact?<sup>248</sup> As Easterbrook notes in his response to Professor Tribe's attack, he did not advocate that:

- (a) all human concerns can be monetized in practice and deployed by courts in a grand cost-benefit analysis;
- (b) an application of the three normative principles leads to a determinate outcome in all (or even most) cases; and
- (c) utilitarian principles should govern all kinds of disputes.<sup>249</sup>

Easterbrook seems to have escaped from the two Posnerian fallacies of claiming that economic analysis determines most issues and that it should determine those issues.

Professor Tribe has partially fallen into Judge Easterbrook's trap. One cannot attack Easterbrook for being totally doctrinaire in his economic analysis, by using with equal force all the arguments raised against Posner's theories. In attacking Easterbrook, one is tempted to launch into a purely anti-economic analysis because he usually reaches the same conclusions as Posner does. Thus Tribe can accuse Easterbrook of being obsessively economic at the expense of rights, while Easterbrook can criticize Tribe for imposing upon him a philosophy he does not endorse; they both can be correct in complaining that the other is not addressing the criticisms levelled against him. From a Burkean perspective, the major flaw with Easterbrook's canons is not what they imply or mandate, but what they leave out: any consideration of fairness, of morality.

Professor Tribe's overreaction is not surprising. Easterbrook's introductory sentence makes the rich history of the Supreme Court

247. Tribe sometimes uses the economic imagery he mistrusts:

Thus, when one evaluates the impact on commerce of the regional system insofar as it may be unauthorized, what is at stake is the marginal difference between the complete ban on interstate banking authorized by Congress and the partial ban chosen by the states that have decided to lift the congressional ban in part.

L. TRIBE, *supra* note 4, at 148. He does not mean to ban economics from constitutional law: "Nothing in my critique suggests that economic insights cannot be illuminating or that courts must ignore the light such methods may shed. My argument is with those who permit such methods to obscure the distributive and other dimensions of choice that the methods do not address." Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 619 n.161 (1985).

248. Easterbrook, *supra* note 225, at 92.

249. Easterbrook, *supra* note 241, at 623.

resemble an automobile part: "The Supreme Court is a regulator."<sup>250</sup> Easterbrook constantly makes controversial statements that are not integral to his basic canons: "Separation of powers could be a talisman for a mindless hands-off attitude."<sup>251</sup> As Tribe observes,<sup>252</sup> Easterbrook ends his article by embracing the myth that his canons are value neutral. Yet somehow they mesh with the conservative agenda:<sup>253</sup> "Exclusionary rule cases, once addressed in terms of 'judicial integrity' or the moral standing of the police, are today treated as occasions for the assessment of the marginal deterrent effects of excluding particular categories of evidence."<sup>254</sup> Echoing both Posner's scientism and Bork's positivism, Easterbrook relentlessly opposes morality in favor of economics and politics. He concludes a discussion of affirmative action cases with the following: "This is not principle; it is politics. And the Court's obligation is to enforce the political answer, not the principled one."<sup>255</sup> His conclusion reaches much further than his initial standards:

Those who would prefer the Court to follow a path emphasizing moral rather than instrumental values find the Court's course distressing . . . [but Easterbrook concludes]: Judges must be honest agents of the political branches. They carry out decisions they do not make. Judges who appreciate the economics of legislation and the markets will be good agents as well as honest ones.<sup>256</sup>

Apparently liberals are not just illegitimate, they are bad and dishonest.

Professor Tribe is not just responding to a few isolated comments in an article dealing primarily with statutory construction. In much of his previous work, Easterbrook has also linked relatively noncontroversial theories of judicial construction with extremely controversial applications. When Tribe accuses Easterbrook of being insensitive to the first amendment in his approval of how the Court decided to prohibit protesters from sleeping in at Lafayette Park in

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250. Easterbrook, *supra* note 242, at 4.

251. *Id.* at 41. Tribe is troubled by Easterbrook's tendency to put cost-benefit analysis at the top of all analytical hierarchies: "It may be that Professor Easterbrook believes the vague structural norms of the Constitution to be relevant to decision making only when they happen to coincide with the results of an appropriate cost-benefit analysis." Tribe, *supra* note 246 at 593 n.9.

252. Tribe, *supra* note 246, at 597 (quoting Easterbrook, *supra* note 242, at 59-60).

253. Tribe observes that to the degree neutrality has any determinate meaning, it blindly affirms the status quo. L. TRIBE, *supra* note 4, at 189. He makes the same point in his critique of Easterbrook's article. Tribe, *supra* note 246, at 600.

254. Easterbrook, *supra* note 242, at 59 n.157.

255. *Id.* at 56 n.141.

256. *Id.* at 60.

*Clark v. Community for Creative Non-Violence*,<sup>257</sup> one should assume Tribe is also aware of Easterbrook's earlier approval of Justice Stewart's warning against "the dangers that beset us when we lose sight of the First Amendment itself, and march off in blind pursuit of its 'values.'"<sup>258</sup> Easterbrook puts the burden of proof on individual rights, omitting their benefits: "[T]he creation and maintenance of rights is very costly."<sup>259</sup> He seems to forget his theory that the Court can be more aggressive when interpreting open-ended public interest legislation, such as the Constitution: "*Miranda*, the abortion cases, and other statute-like decisions offend in this way by announcing that the Constitution contains a level of detail that is plainly missing."<sup>260</sup>

Easterbrook's conservative politics constantly emerge out of his canons. Not only is cost-benefit the preferred technique, but also the Court should defer to the legislative assessment of costs and benefits both in special interest statutes<sup>261</sup> and in determining the amount of process due under the fourteenth amendment.<sup>262</sup> Thinking about effects, and their costs and benefits, does not mandate such positivism. Judicial withdrawal may be very costly in terms of future legislative behavior and the direction of that behavior. For example, if legislatures can terminate welfare benefits any way they want, they may try to terminate government contracts and licenses to practice law any way they want.

Easterbrook also endorses the current conservative theory that constitutional adjudication should consist of text and history. Yet when he defines the scope of due process, jobs but not welfare are protected under his idiosyncratic definition of "natural liberty."<sup>263</sup> Indeed, a somewhat *Lochnerian* assumption against government regulation in the market permeates his analysis: "Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government."<sup>264</sup> Yet, as his previous reservations about *Roe v. Wade*<sup>265</sup> indicate, he has not extended this privacy

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257. 104 S. Ct. 3065 (1984).

258. Easterbrook, *supra* note 229, at 19 n.546.

259. Easterbrook, *supra* note 225, at 89 n.2.

260. Easterbrook, *supra* note 231, at 93 n.24.

261. Easterbrook, *supra* note 229, at 544.

262. Easterbrook, *supra* note 231, at 110.

263. Easterbrook's reply might be that he explicitly reserved special due process protection for gainful employment, but that this protection cannot be derived nonpolitically. For a discussion of these protected categories and the results they bring to those who attempt to categorize, see Easterbrook, *supra* note 232.

264. *Id.*

265. 410 U.S. 113 (1973).

expectation to the sexual world.<sup>266</sup> Finally, when forced to choose between history and economics, he chooses economics:

The economics of federalism offers a way to approach the state-federal problem with an eye to maximizing efficiency and thus to achieving the substantive goal of antitrust. A historical approach, by contrast, probably would permit states to adopt any form of regulation they chose, even forms that imposed monopoly overcharges on neighbors.<sup>267</sup>

Once again we see elaborate models built to determine legitimacy which are quickly scuttled when they conflict with the theorist's politics.

#### D. Judge Scalia's Abstract Theory of Equal Rights

Frank Easterbrook's combining indeterminacy with law and economics represents a transition from the theoretical work of Posner and Bork to the more straightforward jurisprudence of Judges Antonin Scalia and Ralph Winter, Jr. These latter judges have not made assumptions about "preference neutrality" and "preference maximization" cornerstones of their legal theory. Although they agree with the other judges that text and history are the primary legitimate sources of constitutional law, they frequently utilize other forms of constitutional argument.

The affirmative action issue reveals the futility of the conservative efforts designed to limit judicial review, to separate law and politics. Scalia's argument against affirmative action, a policy that all five judges oppose,<sup>268</sup> consists primarily of an abstract principle: "I owe

266. Easterbrook, *supra* note 229, at 549. Posner has written extensively on privacy. He creates a hierarchy of privacy interests. With virtually no historical support, he argues that perhaps seclusion was the only protected privacy interest. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190. He tolerates certain secrecy interests since the costs of losing communications outweigh the benefits. *Id.* at 178. Sexual liberty deserves little protection since it is the liberty to do something, not the freedom from some governmental action. *Id.* at 193.

Posner agrees there should be a tort against the publication of embarrassing private facts. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978). He extends his analysis to seclusion and defamation in a later piece. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1 (1979).

267. Easterbrook, *Federalism*, *supra* note 226, at 42.

268. At his Senate Confirmation hearing, Judge Easterbrook agreed with converted Senator Strom Thurmond that the Constitution is "color-blind." *Confirmation Hearings—Easterbrook*, *supra* note 227, at 457. Ralph Winter has also condemned the policy: "A prohibition on racial discrimination is designed to permit minorities to compete without being disadvantaged by racism. Quotas, on the other hand, are designed to obviate the need to compete." Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741, 747.

Judge Posner has written several articles criticizing affirmative action. See, e.g., Posner,

no man anything, nor he me, because of the blood that flows in our veins."<sup>269</sup> Affirmative action violates a "presumption against discrimination by race."<sup>270</sup> It unfairly grants preferences to the son of a black lawyer over the son of a recent refugee from Eastern Europe: "[I]t is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say, because it is racist."<sup>271</sup>

Scalia also resorts to a variety of policy arguments. Affirmative action, he argues, is counterproductive because it impairs minority members from distinguishing themselves solely because of their merit.<sup>272</sup> He even uses statistical arguments: the scheme has not been demonstratively effective because there was an increase in black wealth before affirmative action and a decline thereafter.<sup>273</sup> Nor can one argue whites have agreed to affirmative action just because certain institutions have adopted the policy.<sup>274</sup> If Scalia were appointed to the Supreme Court, he probably would join Justices Stewart and Rehnquist in holding that all affirmative action programs based upon race violate equal protection.<sup>275</sup>

Although proponents of the scheme can reply that the benefits of affirmative action outweigh the costs, Judge Scalia's philosophical arguments theoretically may be more just than the liberals' utilitarian

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*The Bakke Case and the Future of 'Affirmative Action'*, 67 CAL. L. REV. 171 (1979); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; see also R. POSNER, *supra* note 221, at 351-408.

Posner does not use efficiency to justify a rule proscribing governmental distribution of benefits and costs since race "may be a good proxy for functional classifications." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, *supra* at 22. The author certainly does not quarrel with excluding his definition of efficiency to resolve affirmative action issues, but this is another example of using efficiency selectively to resolve certain constitutional issues but not others. For instance, Posner resorts to economic theory to evaluate fourth amendment doctrine, arguing that "[i]n contrast to the right to vote and freedom of speech, the nature of the right protected by the fourth amendment invites the private-law perspective of this paper." Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 62. Thus, he uses efficiency selectively to enforce and define a hierarchy of rights. And he cannot claim any historical or textual basis for his concluding that the exclusionary rule over-deters. *Id.* at 80. Indeed, he overlooks the fourth amendment's mandate that citizens be "secure." Security can mean more than knowing the police are efficient; security may also include an extra layer of deterrence. Once again, Posner focuses on the costs and benefits of excluding one piece of evidence at one trial and minimizes the general insecurity costs of admitting that evidence.

269. Scalia, *Commentary, The Disease as Cure*, 1979 WASH. U.L.Q. 147, 153.

270. *Id.* at 148.

271. *Id.* at 154.

272. *Id.* at 154-55.

273. *Id.* at 156.

274. *Id.* at 150.

275. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Stewart & Rehnquist, JJ., dissenting).

claim that affirmative action is necessary to prevent racial polarization.<sup>276</sup> Also, one should not quarrel with the decision to sometimes rank moral philosophy above history and even predicted effects. For instance, the Court correctly decided *Brown*<sup>277</sup> even if the sociological data had proved that blacks were not suffering from segregated education.<sup>278</sup>

If any of these five judges, however, find affirmative action to always be unconstitutional, they would be practicing the very judicial activism they claim is illegitimate. They would be imposing their version of equality upon the legislative majority. They would have to override majoritarian preferences in cases such as *Fullilove v. Klutznick*,<sup>279</sup> in which Congress provided that local governments must spend ten percent of all federal funds allocated to local public works projects on services or supplies provided by minority owned businesses. The judges are relying upon a theory of justice that ignores the history of the fourteenth amendment and the history of oppression of certain discrete and insular minorities. As Posner observed, one undisputed purpose of the Civil War amendments was to protect the blacks. Nor were the Framers thinking of possibly outlawing affirmative action. If anything, one could consider the "Forty acres and a mule" slogan such a scheme. The text of the amendments does not state conclusively that majorities are prevented from temporarily limiting some of their own rights so that victimized minorities can recover and thrive. These conservatives make text and history bow to abstract conceptions of justice, minimizing Burke's observations that circumstances are crucial to the finding of a right. They are caught in a dilemma where many of their general rules of judicial review can be used against them. For instance, an advocate of affirmative action could argue that because the affirmative action issue is a relatively new issue, the right of white males not to be discriminated against by affirmative action is a suspect "new right."

By imposing their political views of equality upon the majority, these conservatives also have violated their own argument that judicial activism undercuts proper separation of powers. For example, Judge Scalia endorsed James Madison's comment that the doctrine of separation of powers is more sacred than any other in the Constitution,<sup>280</sup> even though the doctrine can only be inferred from the struc-

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276. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 223-39 (1978).

277. 347 U.S. 483 (1954).

278. Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

279. 448 U.S. 448 (1980).

280. Scalia, *Bicentennial Institute Proceedings*, 28 AD. L. REV. 569, 686 (1976).



ture of the document.<sup>281</sup> Scalia sounds like Burke in his defense of separation of powers: “[T]hat feature, above all others, was to assure the absence of despotism.”<sup>282</sup> Perhaps Scalia would defend judicial activism outlawing affirmative action by referring to his argument that the Court has a limited antimajoritarian responsibility: “[I]ts traditional undemocratic role of protecting individuals and minorities against impositions of the majority.”<sup>283</sup> But this concession legitimizes many Warren Court opinions, ranging from *Baker v. Carr*<sup>284</sup> to *Roe v. Wade*.<sup>285</sup> We are then no longer in the black and white world of legitimacy, but in the more ambiguous world of trying to determine when the Court should overrule majorities in light of many competing pressures and arguments.

Scalia’s analysis of the legislative veto, which the Supreme Court subsequently found to be unconstitutional,<sup>286</sup> provides another example of his broad constitutional methodology. Text and history predominate in his analysis, but they are not exclusive: “Custom or practice may give content to vague or ambiguous constitutional provisions, but it cannot overcome the explicit language of the text, especially when that text is supported by historical evidence that shows it means precisely what it says.”<sup>287</sup> As with affirmative action, Scalia supplements his argument by describing some of the “unfortunate effects” of allowing the veto. Congress could delegate power too broadly because of the availability of this rarely used tool.<sup>288</sup> Single congressional committees would effectively control entire executive bureaucracies.<sup>289</sup> As the veto works its way through the many stages of the legislative process, which form of the veto should the agency accept?<sup>290</sup> Finally, congressional lobbying would never end, even after the initial bill had been passed. This is “nonlegislation,” says Scalia, “Congress has not finished its job.”<sup>291</sup>

Scalia concludes with “several rather philosophical observations.”<sup>292</sup> Society seems to be forgetting that separation of powers is

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281. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

282. *Id.*

283. *Id.* at 894.

284. 369 U.S. 186 (1962).

285. 410 U.S. 113 (1973).

286. *INS v. Chadha*, 462 U.S. 919 (1983).

287. Scalia, *supra* note 280, at 689.

288. *Id.* at 691.

289. *Id.* at 692.

290. *Id.*

291. *Id.*

292. *Id.* at 693.

“the cornerstone of our Constitution.”<sup>293</sup> He makes the Burkean argument that all three branches are agents of the people: “Of course we are *not* an agent of Congress for purposes of administering the law. We are an agent of the *people* for purposes of administering it, just as the Congress is an agent of the people for purposes of enacting it.”<sup>294</sup> Although Congress has a legitimate role in overseeing the executive, it should be less deferential to the executive in its primary function of legislating.<sup>295</sup> Such a broad perspective, not as bound by theories of personality or of economics, is more Burkean in its flexibility than the jurisprudence of Bork or Posner.

### E. Judge Winter's Theories of Equality

In his confirmation testimony before the Senate Judiciary Committee, Judge Winter discussed how the conservative constitutional methodology is not only preferable, but also is, in fact, mandatory. Many Warren Court decisions were not just ill-advised, they were unconstitutional:

[W]hen a court perceives that a problem exists and there is no legislation dealing correctly with the problem, in the view of the judiciary, a court is free to seek out what it thinks is the best solution to the problem [sic] that if an issue was raised as a constitutional issue and there is nothing specifically in the Constitution about it, courts are free to decide what the Constitution ought to say about it. I have criticized that attitude in the past. I think it is an unconstitutional performance of the judicial function . . . .<sup>296</sup>

If these conservatives' antipathy toward affirmative action reveals a methodological inconsistency, Winter's general observations demonstrate the potential extent of that inconsistency. If certain Supreme Court opinions are illegitimate, then a subsequent Court should reverse them. In so doing, the new Justices may deny they are acting politically; they would only be enforcing judicial restraint through “neutral principles.” Thus a judicial or legal revolution with profound political repercussions would be based upon political theories of judicial review that are allegedly passive. The dramatic effects of the reversals would be called “side-effects” because the judges would claim they were not implementing their values but deferring to existing structures. But this conservative structuralism does not include deference to the Supreme Court. Partially out of ignorance

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293. *Id.*

294. *Id.* at 694.

295. *Id.* at 695.

296. *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 91 (1981) (statement by Professor Winter, nominee).

and partially out of humility, the new conservatives are unwilling to defer to the historical tradition of a major political institution, solely because it has not consistently adopted their particular views. These new conservatives, who would change so much law, refuse to accept an institutional history with which they disagree. They do not heed Burke's advice that they should acknowledge their own ignorance and humility by not totally undercutting the values of existing institutions simply because those structures do not completely follow their particular political theory.

Winter also reveals how deeply political theory penetrates constitutional adjudication when he discusses whether or not the equal protection clause mandates wealth redistribution. Winter creates an abstract distinction between two competing definitions of equality: equality before the law versus equality of social-political-economic status.<sup>297</sup> In his defense of "highly individualistic" equality before the law, Winter is reviving Burke's distinction between legal equality and "levelling."

Although he concedes that the "truly poor" need help, Winter makes the sociological argument that much of the money has been wasted on intermediaries.<sup>298</sup> Winter uses arguments from the law and economics school when he states that wealth redistribution reduces capital expenditures and distorts market mechanisms: "[I]ncome is the sole signal inducing the production of what society values."<sup>299</sup> The best way to help poor people is to make the entire society more prosperous.<sup>300</sup> This reminds one of Burke's comment that the poor need to work, and all else is a fraud.

Increased welfare has increased the power of government and blurred the distinction between public and private sectors, violating that separation of powers: "[C]entralized power that inheres in large government was feared."<sup>301</sup> Soon, every group is at the trough: "None of these programs directly helps the genuinely poor, but all penalize consumers or taxpayers; we accept them as routine exercises of government's legitimate responsibility. In reality, the modern welfare state is little more than a mechanism by which politically powerful groups vote themselves subsidies."<sup>302</sup>

Winter does not omit these policy arguments when he turns to the equal protection issue: "[T]he result might well be to affect the

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297. Winter, *supra* note 249, at 741.

298. *Id.* at 748.

299. *Id.* at 753.

300. *Id.* at 754.

301. *Id.* at 742.

302. *Id.* at 749.

total wealth of the society adversely and to increase poverty in an absolute sense."<sup>303</sup> But he first invokes the text and history theme to repudiate using the equal protection clause to justify income redistribution: "[I]t not only finds no support in the language or discernible purpose of the Equal Protection Clause but fairly flies in their face."<sup>304</sup> According to Winter, Social Darwinism heavily influenced the Framers and they never could have believed their amendment would be so interpreted.<sup>305</sup>

Winter gravitates toward the abstractions of the conservative law and economics school when he acknowledges Bork's value preference criticism, but skirts endorsement by stating: "Be that as it may . . . ."<sup>306</sup> He later notes that the "fundamental rights" theory "depends almost entirely on the value preferences of individual Justices."<sup>307</sup> He also agrees with Bork that one must neutrally apply all legal principles, even though the concepts themselves need not be neutral. The Constitution itself can contain non-neutral principles.<sup>308</sup> And like Bork, he finds legitimacy primarily in "particular governmental processes." Once again we see deference to structures because they exist, not because they in fact reduce oppression. Fortunately, Winter interprets "processes" rather broadly to justify decisions granting criminal indigents free appellate transcripts<sup>309</sup> and outlawing a \$1.50 poll tax.<sup>310</sup> Nevertheless, we continue to see this fetish for structures for their own sake, not because the structures actually combat tyranny. Nor do we see any concern that these structures may themselves sometimes be tyrannical. The conservatives should argue that deferring to markets and ballot boxes normally best combats tyranny, but they should also concede that market and ballot box failure to combat oppression should justify judicial intervention.

Winter rejects the argument that there is no limit of "just wants" that must be provided poor people because there is no consensus as to what those wants are.<sup>311</sup> Indeed, the real issue is over relative deprivation, not absolute deprivation.<sup>312</sup> Finally, wealth redistribution is suspect because courts would have great difficulty managing a welfare

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303. Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 62.

304. *Id.* at 43.

305. *Id.* at 46.

306. *Id.* at 53.

307. *Id.* at 58.

308. *Id.* at 90.

309. *Griffin v. Illinois*, 351 U.S. 12 (1956).

310. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

311. Winter, *supra* note 303, at 70.

312. *Id.* at 71.

system. Judicial competence becomes a constraint, and thus a constitutional argument:<sup>313</sup> "In any event, there is no transcendent income line below which is poverty."<sup>314</sup> Winter includes in his article a discussion of how much is actually being spent to combat poverty. He concludes by analogizing his opponents' arguments to the substantive due process era of *Lochner*: "Thus it is that any observer concerned about maintaining constraints on judicial power is likely to view further intervention by the Court in the name of reduction of income inequality more as a seizure of power than a legitimate exercise of judicial review."<sup>315</sup>

Winter has created a false dichotomy with his two theories of equality. Although he can certainly quote Burke to support his dislike of welfare and his belief in the market, a third option exists aside from levelling and formal equality. Wealth redistribution, like judicial activism, is part of our historical and institutional heritage. Even Winter seems to find it acceptable in certain limited circumstances, such as free appellate criminal transcripts (and presumably, free lawyers for indigents facing capital charges). Equality can also require prevention of gross deprivation, such as starvation, malnutrition, and death by freezing, without being a totally levelling force. Winter's theoretical opposition to gradual evolution in the constitutional definition of equality may prevent a needed reform.

Unlike so many constitutional theorists, Winter frequently cites, in a Burkean fashion, current political actions as examples to support his arguments. For instance, he uses the failure to discuss affirmative action in the 1976 Presidential campaign as an example of the impotence of the elected branches.<sup>316</sup> To demonstrate how equality is threatening the "marketplace of ideas" assumption underpinning the first amendment, Winter finds examples throughout the political spectrum:

The Nixon Administration's quarrels with the media invoked the rhetoric of equality in charging that centralized control permitted the deliberate slanting of news and commentary in favor of the forces of the Left, and even today Kevin Phillips calls for greater government regulation of the media in the name of equalizing influence. Liberals, on the other hand, want to control campaign financing and lobbying in the name of equalizing political communication.<sup>317</sup>

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313. *Id.* at 92.

314. *Id.* at 98.

315. *Id.* at 102.

316. Winter, *supra* note 249, at 751.

317. *Id.* at 752.

This final quote reflects a difference between Winter and the other four judges; he is willing to criticize both the liberals and conservatives. He has worked for both camps, as a member of the American Civil Liberties Union and as a consultant for the American Enterprise Institute. We have previously seen how he might apply conservative theories to justify liberal decisions such as *Harper v. Virginia Board of Elections*<sup>318</sup> and *Griffin v. Illinois*.<sup>319</sup> This undercurrent of libertarianism, with its commitment to individuality, does not completely fit with his deference to legislatures. But Burke has shown us that perfect consistency, which usually is the pride of a legal academic, may be the sin of a political leader.

#### IV. CONCLUSION

Fortunately, law review articles do not end like chess games; there is no clear win, lose, or draw. The conservatives can reply that this article has actually demonstrated significant agreement between Burke and the conservatives on such issues as political dissent, reapportionment, wealth redistribution, market regulation, and arguably, desegregation. But even if the reader has found this application of Burke strained, similar to wondering what Pascal would think of indifference curves,<sup>320</sup> the article does raise at least one troubling question about the methodology of contemporary conservative jurisprudence.

In these judges' efforts to theoretically constrain liberal judicial activism, they have left themselves little room to fight new forms of fascism, whether those forms emerge from the extreme right or left. They thus are missing what I believe was the basic structural purpose of the Constitution: it was designed to combat tyranny in any form,<sup>321</sup> and all the branches of government were to participate in that perpetual struggle. Burke has given us numerous examples of tyranny: lawlessness, intolerance, slavery, total concentration of power, ideological fanaticism. But just as power is plastic, so is tyranny. Modern forms include Jim Crow laws, apartheid, concentration camps, and genocide. I believe that the Court has both the duty and authority to fight such evils. Indeed, if the Court fails to battle gross wrongs, or becomes a party to them, I shall be quick to complain of abuse of judicial power, of wrongheaded judicial activism or passivity. As Burke explained, a set of principles exist that both limit

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318. 383 U.S. 663 (1966).

319. 351 U.S. 12 (1956).

320. STIGLER, *Festschriften*, in *THE INTELLECTUAL AND THE MARKET PLACE* 37 (1984).

321. See Sedler, *supra* note 4.

and justify the powers of each branch of mixed government. The Court has a Burkean duty to perform its role in a mixed government as an active opponent of oppression. It should not defer to evil because it believes evil is unrecognizable, or because it has no power or duty to interfere. The Court may agree with Burke that some evil must be tolerated, but the Court should retain a trump card (place it in the structure if you wish) to combat the most egregious attempts to dominate. Arguably, such tyranny only manifests itself in extreme cases; perhaps only the desegregation and reapportionment cases qualify. Nor have I tried to precisely define tyranny in this work. Nevertheless, the Burkean perspective provides at least a minimal definition of legitimacy that is far different and far better than the contemporary conservatives' viewpoints, or Professor Tribe's position that legitimacy is dangerously indeterminate.<sup>322</sup>

The modern conservatives might defend their modes of construction as principled attempts to constrain a presently tyrannical judiciary. But by trying so rigidly to separate powers through commitment to an abstract collection of assumptions, they have isolated and weakened judicial powers and responsibilities. Such a failure neither conserves all that the Court has done well, nor preserves the power to do all that it ought to do in the future. Perhaps a "justice" loophole exists in the conservatives' arguably inconsistent position that affirmative action is unconstitutional. If they let their vision of justice resolve that question, perhaps they will consider other forms of justice and injustice.

These concluding criticisms reveal several dilemmas about consistency. I have frequently accused the five judges of being excessively ideological, and then complained about their refusal to include any sense of justice in their jurisprudence. I have bemoaned their rigidity, and then jumped at their inconsistency when they apparently have included some version of justice in their politics. Of course, critics of judicial activists have built the same Procrustean bed. Professor Wechsler criticizes the Court for not using "neutral principles,"<sup>323</sup> while Bork attacks it for being too abstract.<sup>324</sup> I cannot escape these dilemmas any more easily than they can or Burke did, when he proposed a political theory in opposition to excessive political theory. Burke provides some direction by describing examples of tyranny.

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322. L. TRIBE, *supra* note 4, at 7.

323. H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

324. *See supra* note 162 and accompanying text.

Such an approach is preferable to either total indeterminacy or positivism.

While I have used the word "legitimacy" to evaluate different conservative modes of thought, why have the five judges so often utilized the word? Perhaps one reason is that the word's very strength allows them to be judicially active without claiming to be so. It is a tool of radical conservatism. In a recent speech, Bork listed what he considered to be the legitimate sources of constitutional authority: "the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning."<sup>325</sup>

If judicial precedents are also legitimate sources of power, as Bork concedes, then he ought to comply with cases he has severely criticized, such as *Roe v. Wade*,<sup>326</sup> even if he were appointed to the Supreme Court. But if he continues to believe that those cases are illegitimate, even unconstitutional, then there is no reason for him to heed Burke's admonitions to defer partially to the Court's past practices and traditions, because the Court has been a partial repository of our country's collective wisdom.<sup>327</sup>

These contemporary conservatives cannot have it both ways. If they wish to be Burkean, they should formulate a broad definition of justice to aid in the battle against tyranny. They should be deferential to most opinions, such as *Baker v. Carr*<sup>328</sup> or *Roe v. Wade*,<sup>329</sup> which they have labelled "illegitimate." They cannot, however, claim Burke as a close ally if they maintain their existing constitutional ideologies.

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325. R. BORK, *supra* note 6, at 29.

326. 410 U.S. 113 (1973).

327. G. SABINE, *supra* note 12, at 608.

328. 369 U.S. 186 (1962).

329. 410 U.S. 113 (1973).