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ATTACKING THE JUDICIAL PROTECTION OF MINORITY RIGHTS: THE HISTORY PLOY

John E. Nowak*

DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME. By Richard E. Morgan. New York: Basic Books. 1984. Pp. ix, 245. \$16.95.

Disabling America is receiving a lot more attention than it deserves. Professor Gerald P. Lopez has reviewed the book in the *Harvard Law Review*.¹ He succinctly and accurately describes the worth of the book, and the primary question it raises:

Scholars will not consider Morgan's work anywhere near first-rate. I can hear them delivering the short, swift, knock-out punches of the profession: "There's not much there: incomplete and skewed historical accounts, embarrassingly inconsistent arguments, indeterminate evidence, an incoherent conception of causation, and a transparently self-serving portrait of reality." Nor will litigators think much of Morgan's efforts: "Haven't we heard all this organic conservative stuff before?" or "Better than most pro se briefs, but that's not saying a whole lot." Perhaps that is all that should be said about *Disabling America*—the equivalent of "Why even review this book?"²

Professor Lopez and I do not differ at all in our assessment of the worth of this book as scholarship. However, we have different answers to his concluding question: why review this book? Professor Lopez analyzed Morgan's book as a reflection of the current division in society about the status of racial minorities, women, and the economically disadvantaged in America. I wish to point out some of the flaws in Morgan's analysis because I fear that the federal judiciary may one day be dominated by persons who will rely on this type of "scholarship" not only to reverse the constitutional protections for minority rights established in the past quarter century, but also to restrict or invalidate legislative attempts to protect civil rights.

Professor Lopez thought that the book reflected the views of a side that was "winning" in the political arena, and that liberals needed to be reminded that we could no longer simply dismiss these unscholarly arguments.³ Political trends seem to be adverse to the protection of

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1. Lopez, *A Declaration of War by Other Means* (Book Review), 98 HARV. L. REV. 1667 (1985).

2. *Id.* at 1668-69 (footnote omitted).

3. *Id.* at 1678:

minority rights. There are no black senators or governors; no Democratic presidential candidate has won a majority of white persons' votes since 1969.

Professor Lopez wisely reminds us that a political battle is going on to determine whether our country will continue to protect economic and racial minorities. However, I do not believe that attacks on the protection of minority rights and civil liberties by persons such as Edwin Meese or Richard Morgan can prevail in the political process. The fact that Congress during the Reagan years has not significantly restricted the scope of any civil rights legislation is a telling point. At the national level, we will not see the election of a significant number of persons who will seek to overturn such legislation. Except in small segments of our country, there is no political advantage to be gained by attacking the legislative or judicial protection of civil rights. A majority of persons in our country, both lawyers and nonlawyers, continues to believe that *Roe v. Wade*⁴ should not be overruled.⁵ A majority of Americans supports affirmative action programs for women and minorities, at least so long as the affirmative action goals are not achieved through rigid quotas in employment or educational programs.⁶

The greatest danger to the protection of civil rights in America lies in the judiciary. I realize that such a statement would be as shocking to Professor Morgan as to liberal professors. Morgan's thesis in *Disabling America* is that the country has been subverted by lawyers and judges protecting civil rights. Liberal professors see the judiciary as

What bothers me again and again about *Disabling America* are the dreams Morgan claims we share. If Morgan is like many of my neighbors, I am not. They know it, I know it, and that knowledge frames our always fragile coexistence. We fight over what is and should be un-American. They think my people are losing right now, and I think they are right. That realization is familiar and scary, humbling and threatening, a feeling that is both personal and political. But if Morgan's "let's take the gloves off" attitude prompts a certain despair in me, it simultaneously reinforces and relocates my anger. It makes me recognize our political disagreement for the battle that it is — a battle that Morgan's people and my people often fight in the literature and the courtrooms but that nonetheless produces human casualties. We are still at war, no less so because ideas and language and silence express much of the violence. The remarkable thing is that I could ever have forgotten.

4. 410 U.S. 113 (1973).

5. Fifty-three percent of the lawyers questioned in a recent ABA sponsored poll believed that *Roe v. Wade* should be neither overruled nor modified. Ten percent believed that the opinion should be modified, and only 22% believed that it should be overruled. Reskin, *LawPoll: Lawyers are at odds with Reagan administration on abortion*, A.B.A. J., Jan. 1, 1986, at 42.

In 1982, the public opposed, by a two-to-one margin, amending the constitution to overturn the Supreme Court's abortion rulings. The Harris Survey, 1982, no. 63 (August 9, 1982) (on file with the author; provided by the Harris Survey). This survey found that the public (by a 62 to 31% margin) opposed "a constitutional amendment to ban legalized abortions."

6. In 1982, 69% of the public supported "federal laws requiring affirmative action programs for women and minorities in employment, provided there are no rigid quotas." The Harris Survey, *supra* note 5. Apart from the need for federal laws, 75% of the public in 1982 agreed with the following statement: "After years of discrimination, it is only fair to set up special programs to make sure that women and minorities are given every chance to have equal opportunities in employment and education." The Harris Survey, 1982, no. 8 (January 28, 1982) (on file with the author; provided by the Harris Survey).

the savior of civil rights. Both sides of that academic debate are wrong. Although it would be foolish to claim that judicial rulings have not aided the course of civil liberties, I believe that the primary protector of minority interests has been Congress.

Prior to 1954, the Supreme Court had been no protector of civil liberties or the interests of racial or economic minorities. One need not be an ardent believer in legal realism (though I am one)⁷ to agree with Fred Rodell's assessment of the Court's history prior to 1954: "the only minority in whose behalf the Justices have regularly and effectively used their power, to block the majority will as expressed in federal laws, is the minority of the well-to-do."⁸

There is simply no truth to the claim that the Supreme Court, as an historic institution, has championed the rights of racial minorities. Proving racial minorities have benefited from the existence of judicial review can be accomplished only by disregarding all Supreme Court history prior to 1954. The Supreme Court sided with the slave holders prior to the Civil War.⁹ After the Civil War, the Supreme Court invalidated civil rights acts, endorsed racial segregation, and condoned unequal public education opportunities for black children.¹⁰ In the 1930s the Court finally began to mitigate the effect of some of its earlier rulings, and in 1954 it attempted to reverse some of the harm it had done to members of racial minorities. In the past three decades the Court has protected the rights of members of racial minorities against government-enforced segregation. But recent cases regarding affirmative action programs may indicate the period of active Supreme Court promotion of the interests of members of racial minorities is at

7. This review is written by a die-hard legal realist and an ardent believer in the writings of the late Professor Fred Rodell. My apologies to Fred for this and all other footnotes in this essay. (Why won't law review editors just let professors give their opinions without having to prove we know the citations to cases, articles, books, etc.?) Other articles or essays in which I discuss legal realism and Fred Rodell include Nowak, *Woe Unto You, Law Reviews*, 27 U. ARIZ. L. REV. 317 (1985); Nowak, *Professor Rodell, The Burger Court, and Public Opinion*, 1 CONST. COMMENTARY 107 (1984); see also Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985).

8. F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 26 (1955); see also Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

9. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); see also J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 612-16 (2d ed. 1983).

10. See *Berea College v. Kentucky*, 211 U.S. 45 (1908) (Court upholds interpretation of state statute allowing racial segregation of schools); *Cumming v. Board of Educ.*, 175 U.S. 528 (1899) (Court permits state board of education to close high school attended by black children); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Court endorses racial segregation); *Civil Rights Cases*, 109 U.S. 3 (1883) (Court invalidates civil rights legislation); *Hall v. DeCuir*, 95 U.S. 485 (1877) (Court invalidates state civil rights law as applied to interstate carrier). There would seem little doubt that the Supreme Court's actions retarded attempts to secure educational opportunities for black children during this period. See Kousser, *Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. SOUTHERN HIST. 17, 42-44 (1980).

an end.¹¹ If that is true, I challenge any defender of the Supreme Court to show that the good produced for racial minorities by the Court's rulings in the past thirty years has offset the damage it has helped inflict on racial minorities at other times.¹²

The interests of racial minorities are better served by civil rights legislation, which for political reasons cannot be easily modified by a subsequent Congress, than by Supreme Court rulings, which are always subject to being narrowed or overruled by a new set of Justices. The Burger Court is no more (or less) different from the Warren Court than is the current United States Senate from the "Great Society" Senate of the 1960s. But it is dramatically easier for the Burger Court to restrict Warren Court rulings than it is for the Congress to repeal the civil rights legislation. It must be remembered that for most of its history the Supreme Court has hindered rather than helped the interests of racial minorities.

Civil liberties apart from minority interests are also best protected by the political process. Government punishment of unpopular political beliefs has been effectively prevented in our history by changes in the political tenor of the times rather than by Court rulings. Remember, it was not until the 1960s that the Court cast doubt on the legitimacy of the cold war activities of legislative investigators during the 1950s,¹³ and the Court sided with the government only a few years later when it prosecuted young men who tore up their draft cards to protest the Vietnam war.¹⁴ Unjust wars — cold or hot — are stopped by political movements, not Supreme Court rulings.

The totality of protection for the aged or for handicapped persons, against public or private sector discrimination, has come from Congress. The totality of protection for women and racial minorities from private sector discrimination has come from Congress. The Congress has gone farther in protecting women and racial minorities from discrimination in education, government employment, housing, and voting than has the Supreme Court through constitutional rulings.

There is no reason to believe that the judiciary will do more than the Congress for the protection of minority interests in America in the future. Why then would persons like Attorney General Meese or Professor Morgan spend their time and efforts attacking the constitutional decision-making process of the judiciary? If I thought that Morgan's book was no more than an unscholarly attack on present court doc-

11. Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), with *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Compare *United Steel Workers v. Weber*, 443 U.S. 1983 (1979), with *Firefighters v. Stotts*, 467 U.S. 561 (1984). At the time that this book review was written the Supreme Court had agreed to hear arguments in new affirmative action cases.

12. *But cf.* *Bell*, *supra* note 8.

13. Compare *Barenblatt v. United States*, 360 U.S. 109 (1959), with *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

14. See *United States v. O'Brien*, 391 U.S. 367 (1968).

trines, I could not answer Professor Lopez's question about why I should review this book. But I find it hard to dismiss the fact that the judiciary restricted the scope of the nineteenth-century civil rights acts for many years. The 1960s and 1970s saw the greatest expansion of minority rights through legislation since the 1860s and 1870s. I wonder if the next turn of the century will find the judiciary, armed with the theories of persons like Morgan, restricting the scope of modern civil rights legislation. If we enter a new progressive era, will the judiciary once again prevent wealth transfers?

People like Meese and Morgan, with their accusations that professors and judges have subverted American values through an "incorrect" form of constitutional analysis, may be setting the stage for a return to "correct" constitutional decisionmaking and judicial protection of "correct" American values: values that protect the interests of economically well-off white persons. Make no mistake about it, the attacks of Attorney General Meese on the Supreme Court and the attacks of Richard Morgan on the legal protection of minority interests are nothing less than a claim that the judges and their fellow travelers, liberal academics and lawyers, are subverting the American democratic and social structure. Although Morgan claims his charge that the rights industry has become "unhinged" and has "disabled" America is not used "with any overtones of wreaking or sabotage" (p. 7), he accuses those who have advocated the protection of minority rights of disabling the American political system, and declares that their use of the legal system is "at war with the kind of subtle discriminations that advance excellence" (p. 161). What reason could civil rights advocates have for such actions? Morgan tells us that the actions of the "rights industry" are the result of "disaffection toward the real American society—the one we have now, which our forebearers [sic] experienced and contributed to in essentially the same form" (p. 192). He anticipates the liberal response that we not only support our country but seek to make it better through the protection of civil liberties and minority rights. Morgan asserts:

Intellectual and emotional commitment to an idealization of a society is no substitute for some serious attachment to the actual one. Certainly it is necessary to criticize imperfect institutions in order to improve them, but when one's primary psychological investment is in the ideals, not the existing institutions, one becomes unhinged. [p. 193]

This type of attack on civil rights advocates could be the precursor of arguments that the judiciary should restore the proper order in American society by limiting or overturning legislation or executive agency actions that protect minority interests at the expense of economically secure white males. A judicial narrowing or overturning of legislative guarantees of equal opportunity for women and racial minorities would be one way of protecting "existing institutions" and the "subtle discriminations that advance excellence."

If people like Meese and Morgan are going to accuse those who advocate the protection of minority rights of becoming "unhinged" and undermining our social structure, it is fair for us to defend ourselves by pointing out the flaws in their arguments. I use the word "us" advisedly. I should state my personal biases against Mr. Morgan's positions at the outset. In his book Professor Morgan insults friends of mine whom I consider to be outstanding scholars, such as Michael Perry¹⁵ and Yale Kamisar.¹⁶ He dismisses with disdain the observations on the nature of due process of the judge for whom I clerked, Justice Walter V. Schaefer of the Illinois Supreme Court (p. 105).¹⁷ I will even admit to feeling bad at not having been personally attacked in Morgan's book, like the liberal senators who were upset that they were left off Richard Nixon's enemies list in the 1970s. However, I take some solace in the fact that my writing has been attacked by others as an attempt to subvert the minds of law students by leading them to believe that, although history is unclear, courts would be justified in asserting that there is an historically and functionally sound basis for using the fourteenth amendment to define and protect rights that are not mentioned specifically in that amendment.¹⁸ This review of *Disabling America* should be evaluated by the reader with my liberal, legal realist biases in mind. All of that aside, I will now turn to an examination of Morgan's book.

Disabling America is an attack on the expanded protection that has been given to civil liberties and minority race interests by the federal

15. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982). Morgan labels as "colossal impudence" Perry's intellectually sophisticated argument that the judicial role in modern democracy should be one of assisting our society with a moral reevaluation of its principles. P. 177. Interestingly, Morgan also sees no merit in Professor Perry's idea that the Congress should be free to restrict Supreme Court jurisdiction as a means of checking Supreme Court decisions in areas of legal and moral uncertainty. P. 186. Either Morgan does not realize that these are complementary concepts that would allow society to develop its own standards of moral and legal justice, or he fears that Perry's model of a system that would assist our moral development would result in a society that did not match Morgan's view of what America should be like in the future. I suspect the latter, but I have not met Professor Morgan.

16. He labels Professor Kamisar as (no kidding) the "Leader of the Mirandistas." P. 89.

17. Morgan manages to misspell Justice Schaefer's name in both the text and footnotes. Pp. 105, 225 n.54.

18. In Maltz, *Trust Betrayed*, 97 HARV. L. REV. 1016 (1984) (reviewing J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9), Professor Maltz, whose view of the proper use of history is similar to that of Professor Morgan, accused my coauthors and me of having misled untold numbers of students by telling them that the history of the fourteenth amendment could not be determined with sufficient clarity to resolve civil liberties issues but that intentions of the framers of that amendment could be used as a basis for the judicial definition of fundamental constitutional rights. Maltz thought that our book was "often clearly slanted toward the view that holds that the judiciary should broadly construe the powers of Congress and should take an active role in enunciating and protecting the individual rights it finds enumerated in the Constitution." *Id.* at 1017. Maltz attacked our work as a sample of the "left-center" school of constitutional scholarship." *Id.* What makes Richard Morgan mad about liberal law professors is that this "left-center school of constitutional scholarship" in fact is the position that is reflected by the vast majority of Supreme Court holdings in the past thirty years and the majority of scholarly publications during those decades. Thus, I feel a closeness with those professors Morgan attacks.

judiciary and federal executive agencies in the past quarter century. Morgan believes that liberal professors have misled courts and administrative agencies into expanding constitutional and statutory protection for civil liberties beyond the scope of protection envisioned by the drafters of the constitutional amendments or statutes he examines. We can summarily dismiss Morgan's discussion of how executive agencies have (in his view) improperly expanded the protection for racial minorities and women in schools and private sector employment through an unjustified overreaching of their federal statutory authority. We can do so because Morgan in his book never deals with the fact that agency decisions regarding both the scope of agency authority and the meaning of statutes are reversible by Congress; Congress has remained silent in the face of these protective agency actions. This congressional silence says something about whether the agencies' decisions were in tune with popular opinion concerning the respect we demand for individuals, as individuals, in the work place, the schools, and elsewhere. Professor Morgan refuses to admit that congressional silence may mean that the rulings of the agencies that protect civil rights are more representative of the political and moral ideals of the American people than are his own extremely conservative views.

Morgan's claim that courts have been misled by civil rights lawyers and liberal professors requires a lengthier response. Morgan asserts that proper constitutional interpretation must be "interpretivist" in nature although he, unlike many interpretivists, does not demand that judges protect only those rights that are explicitly mentioned in the Constitution or for which unquestionable historical support can be found. He has read John Ely and knows that a strict interpretivist position is easy to rip apart.¹⁹ Morgan does flirt with a strict interpretivist position in parts of his book; many conservatives who would agree with his view of liberal professors would also subscribe to such a theory. For him and them I offer two quotations.

The first quotation comes from the late Professor Robert McCloskey, an eminent political scientist. I have chosen this quotation because Morgan seems to be particularly mad at law professors, and claims that part of the reason courts have gone wrong is that they have listened to law professors (pp. 164, 207-08). McCloskey knew how to respond to persons, like Meese and Morgan, who demand that the Court limit itself to a strict construction of the Constitution:

From time to time it is urged that the Court should carry the virtue of modesty to an extreme, adopting a policy of self-restraint that would leave other branches of government almost entirely immune from constitutional restriction. Whatever the theoretical merits of such a sugges-

19. Pp. 165-66. See J. ELY, *DEMOCRACY AND DISTRUST* 1-41 (1980); see also Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482 (1985).

tion, the short answer is that it asks the Court to take leave of its heritage. The Court of history has never assessed itself so modestly, and there is not much reason to expect that the Court of the future will deliberately choose such a policy of renunciation. In fact we might almost think that the argument in its pure form had been foreclosed by the passage of time. As I have earlier suggested, the process of policy formation in America has been handled by a rough division of labor: representation of immediate and sometimes imperative interests has been assigned to the legislative branch; the judiciary has been bequeathed a significant share of the responsibility for taking the longer view. If the Court, after nearly two centuries, should cease to perform its wonted share of this work, there is grave doubt that the shirked task would get done at all.²⁰

The second quote comes from the late Professor Alexander Bickel because the writings of the late Professor are used by Professor Morgan in a most selective way. Morgan quotes Bickel's attacks on some Warren Court rulings, but fails to mention Bickel's championing of first amendment rights. Bickel's first amendment views should have qualified him as a law professor guilty of subverting national security by the standards Morgan uses to evaluate civil liberties advocates.²¹ Professor Bickel was by no means an advocate of unrestrained judicial review, but he would have no part of the claim that the text or history of the Constitution will settle the great issues that come before the Court. Professor Bickel said:

There is a body of opinion — and there has been, throughout our history — which holds that the Court can well apply obvious principles, plainly acceptable to a generality of the population, because they are plainly stated in the Constitution (e.g., the right to vote shall not be denied on account of race), or because they are almost universally shared; but the Court should not manufacture principle. However, although the Constitution plainly contains a number of admonitions, it states very few plain principles; and few are universally accepted. Principles that may be thought to have wide, if not universal, acceptance may not have it tomorrow, when the freshly-coined, quite novel principle may, in turn, prove acceptable. The true distinction, therefore, relevant to the bulk of the Court's business, lies not so much between more and less acceptable principles as between principles of different orders of magnitude and complexity in the application. This distinction can be sensed, and can serve as a caution, but no one has succeeded in defining it, and hence it is not serviceable as a rule. Unable to cabin the Court's interventions by rule, we have been generally content with the exercise of authority not so cabined. We do not confine judges, we caution them. That, after all, is

20. R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 228 (Univ. of Chicago paperback ed. 1960).

21. Bickel was the attorney for the *New York Times* in the Pentagon Papers Case, *New York Times Co. v. United States*, 403 U.S. 713 (1971). This is not to say that Bickel would not have had some sympathy for Morgan's aversion to disruptive civil disobedience. However, Bickel, unlike Morgan, demonstrated intellectual sensitivity and insight into the complex legal and social problems involved in the judicial protection of first amendment freedoms and civil disobedience problems. See A. BICKEL, *THE MORALITY OF CONSENT* 57-142 (1975).

the legacy of Felix Frankfurter's career.²²

Bickel would not pass off a simplistic view of history for constitutional analysis.²³ Unlike some other former Yale law professors, he would not provide the politically powerful with a defense of positions a true scholar could not believe in, merely to obtain appointment to a government position.²⁴

So much for simplistic interpretivism. Richard Morgan does not want to defend that extreme position, although he suggests it several times in attacking Supreme Court rulings that he believes are not consistent with the "clear history" of a given portion of the Constitution. To establish the "proper" role of courts when they interpret the Constitution, Morgan offers his own definition of interpretivism. According to Morgan:

Interpretivism does not insist that the meaning of a constitutional provision is fixed forever by the immediate concerns of the framers or bound in hoops of steel by history. It does mean that to qualify as constitutional interpretation an argument must give weight to what can be known of the intent of the framers and must take into account what previous generations of constitutionally literate persons conceived the words at issue to mean. [p. 166]

If you read the preceding quotation quickly, it may sound like simplistic interpretivism to you, but it is not. The key phrase is "previous generations of constitutionally literate persons." The Constitution, as Morgan sees it, protects a social order that existed in an idealistic America before civil libertarians and the courts got their hands on it during the past quarter century. What is dangerous about Morgan's theory is that this type of constitutional interpretation could provide a basis for constitutional protection of dominant political and economic forces from progressive legislative reforms. Morgan's thesis could be used not only to turn courts away from the claims of minorities for protection from majority political and economic groups, but also to urge courts to reverse the actions of legislatures that attempt to ex-

22. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 177 (1970).

23. Professor Bickel began as a neutral principles theorist but eventually came to endorse a role for the Supreme Court much more limited than that of even the neutral principles of process-oriented scholars. Perhaps to a greater degree than any other American scholar, Bickel sought to confront honestly and openly the realist challenge. For a listing of Professor Bickel's publications, see *Writings of Alexander M. Bickel*, 84 YALE L.J. 201 (1974). For a representative sample of the scholarship of Alexander Bickel, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); A. BICKEL, *supra* note 21; A. BICKEL, *supra* note 22; Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). For commentaries on Bickel's theories and writings, see Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025 (1976); Purcell, *Alexander M. Bickel and The Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521 (1976); Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985). I have elsewhere expressed my view of the constitutional law scholarship of Alexander Bickel. See Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263, 266-72 (1980).

24. See Black, *Alexander Mordecai Bickel*, 84 YALE L.J. 199 (1974).

pand the rights of the economically disadvantaged, racial minorities, or women.

The reader will be forgiven for thinking that I am "crying wolf." After all, it may seem impossible that speeches by conservative politicians like the Attorney General, or books written by conservative professors, could turn the judiciary into an opponent of civil rights. But it has happened before, and there is no reason why it cannot happen again. The conservative factions of the legal profession in the 1980s (whether symbolized by "law and economics" theorists²⁵ or advocates of "interpretivist" constitutional theories²⁶) may appear only to be asking courts to refrain from a judicial redistribution of wealth or a judicial expansion of civil rights. A century ago the majority of conservatives in the legal profession were like the majority of conservative lawyers today. They believed in the existing economic and political order; they merely opposed judicial tampering with the order. A significant faction of the conservatives in academia and the legal profession in the late nineteenth century advanced the argument that the judiciary must protect established economic interests from progressive legislation by restricting federal power (in the name of a strict interpretation of the tenth amendment) and state economic reforms (through their interpretation of the due process clauses). Professor Paul has explained the intellectual background of the turn-of-the-century Court's interpretation of the tenth amendment and due process clauses as follows: "[I]n tracing the changing attitudes of lawyers and judges from 1887 to 1895, when court intervention reached its climax, we shall find that it was a significant movement to the right within traditional legal conservatism that finally determined the triumph of the new judicialism."²⁷

A century ago Thomas Cooley, among others, made speeches and wrote books advocating the use of the judicial power to protect an idealistic (for him) America where the economically powerful were not disabled by progressive legislation.²⁸ Though his writing may not have the scholarly merit of Thomas Cooley's works (what did you ex-

25. See, e.g., Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984). Compare Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985), with Easterbrook, *Moral Method, Result, And Authority: A Reply*, 98 HARV. L. REV. 622 (1985).

26. One of the best known champions of this position is Raoul Berger. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979).

27. A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH, 1887-1895*, at 5 (1960).

28. See *id.* at 12-13, 38, 47, 129, 142-43, 232; C. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954). Cooley's most influential (or, at least, most cited) work was *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1868).

pect me to say — this is the *Michigan Law Review*), Morgan is presenting a constitutional defense of the political order that protects the wealthy and the racial majority. If theories like his go unchallenged, Richard Morgan and other interpretivist “scholars” one day may be cited by courts in support of judicial protection of the economically powerful from progressive legislation.

In five of the eight chapters of *Disabling America*, Morgan attempts to set forth “examples” of how civil libertarians have misled the Courts, “corrupt[ed] constitutional interpretation” (his phrase, p. 162), and disabled America. In a passage that I suspect reveals quite a bit of his outlook on life, Morgan says: “[W]e might have surveyed the work of professional civil libertarians in the mid-1970s in savaging the intelligence agencies. Or we might have explored the unmanning of the military in response to the radical feminism of the past decade. But the examples chosen will suffice.”²⁹ How much damage have the civil rights and civil liberties activists done to Morgan’s ideal America? He tells us: “The chapter titles speak for themselves: ‘Isolating the Churches,’ ‘Destabilizing Public Schools,’ ‘Enfeebling Law Enforcement,’ ‘Undermining Order Maintenance,’ and ‘Preempting Private Choice’ ” (p. 5).

In Chapter Two of his book, Morgan accuses the Supreme Court of “isolating the churches” with an unjustified view of the required separation between church and state. I have argued that the Supreme Court has been unnecessarily strict in limiting the types of religiously neutral aid that could be given to all students (such as tuition vouchers), because I believe that such programs could help the children in the inner city to receive a higher quality education.³⁰ What troubles me about this chapter is Morgan’s assertion that the Court was misled, almost in a conspiratorial sense (although Morgan does not allege an actual conspiracy), into accepting an incorrect view of the history of the first and fourteenth amendments. Morgan attempts to use his defense of religiously neutral aid to children who attend parochial schools (which can be defended with a nonhistorical, functional argument) to influence the reader to reject all Supreme Court rulings requiring a separation of church and state.

Morgan suggests that the Court was misled by a series of books, “most of them from one publishing house, the (Unitarian) Beacon Press of Boston” (p. 32), and arguments made by a variety of litigants, among whom “[t]he ACLU and the American Jewish Congress were the front line groups” (p. 33). Morgan believes that these authors and civil liberties advocates have led the Court to apply the first amendment religion clauses to the states and to demand strict judicial protec-

29. P. 5 (footnotes omitted).

30. See Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 Nw. U. L. REV. 883 (1976).

tion of the rights of religious minorities who object to subsidizing religious activities in either private or public schools.

At this point in the chapter, any reader familiar with the Supreme Court's history would like to remind Professor Morgan that the religion clauses, like the other clauses of the first amendment, were among the first provisions of the Bill of Rights to be incorporated into the fourteenth amendment.³¹ These laws were incorporated during the era of *Palko*,³² when only those rights deemed fundamental to any system of ordered liberty were made binding on the states.

Disabling America is dedicated by Morgan "to the memory of Robert H. Jackson" (p. v). Throughout the book Morgan fails to reveal the complexity of Justice Robert Jackson's view of the judicial role in protecting civil liberties.³³ To his credit, Morgan is honest enough to admit that Justice Jackson thought that the history of the first and fourteenth amendments, and the history of religious freedom in America, required a separation of church and state. Morgan finds it "shocking" (p. 16) that virtually every member of the Court in *Everson v. Board of Education*³⁴ endorsed the strict separation of church and state. The world has not changed much. Last year the Supreme Court reaffirmed the position that the first amendment is incorporated into the fourteenth amendment.³⁵ Justice Jackson, if he were alive, would not agree with Morgan. Instead, he would be ashamed that one of his former clerks is the only Justice currently arguing to free the states from principles of the establishment clause.³⁶

Virtually all Justices in the last thirty years, including Justices —

31. The free exercise clause was first held applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The establishment clause was held applicable to the states in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). These cases completed the incorporation of the provisions of the first amendment. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, at 452-57.

32. *Palko v. Connecticut*, 302 U.S. 319 (1937).

33. Morgan mentions Jackson's dissents in some criminal procedure cases, but fails to note his championing of the freedom of religion, the freedom of belief, and the right of poor persons to interstate travel. For more thoughtful examinations of Justice Jackson's position on civil liberties issues, see Kurland, *Justice Robert H. Jackson — Impact on Civil Rights and Liberties*, 1977 U. ILL. L. F. 551, reprinted in *SIX JUSTICES ON CIVIL RIGHTS 57* (R. Rotunda ed. 1983); Freund, *Mr. Justice Jackson and Individual Rights*, in *MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR* (Legal Studies of The William Nelson Cromwell Foundation 1969). See generally E. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* (1958); E. GERHART, *LAWYER'S JUDGE* (1961). Although I rarely find myself in disagreement with any of the late Professor Rodell's writings, I believe that he was too harsh in his assessment of Justice Jackson. See F. RODELL, *supra* note 8, at 279-82.

34. 330 U.S. 1 (1947).

35. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985).

36. *Jaffree*, 105 S. Ct. at 2508 (Rehnquist, J., dissenting). Justice White has some sympathy for Rehnquist's arguments. *Jaffree*, 105 S. Ct. at 2508 (White, J., dissenting). I doubt that Justice Jackson would have been pleased by his law clerk casting a vote to punish a person for refusing to have a state motto on his automobile license plate. Compare *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jackson, J.), with *Wooley v. Maynard*, 430 U.S. 705, 719 (1977) (Rehnquist, J., dissenting).

such as Jackson, Frankfurter, and Stevens — who hardly could be described as radical liberals, have viewed our history as leaving unclear the exact degree of separation the first and fourteenth amendments require between church and state. Virtually all of these Justices have agreed that the history and function of religious freedom in America justified a judicial requirement of a clear separation of church and state at the local and federal levels. To Morgan, that tradition is not the correct reading of history or, I take it, given his formula for judicial review, not the view of “constitutionally literate persons.” Not surprisingly, Morgan relies on Thomas Cooley’s writings (pp. 29-30).³⁷ Morgan, like Cooley, will only accept a view of history that protects the society dominated by the white Christian majority.

Chapter Two reveals the “strict constructionist” or “interpretivist” fraud. The use of history by interpretivists is no more than a ploy to advance the interests of white Christian males. Conservatives like Morgan have a way of finding historical data that always proves their position to be correct (since they simply define their view as correct), even though their view of history has been rejected by most scholars and the vast majority of Supreme Court Justices in the past forty years. The only thing that can be said safely about the history of the religion clauses and the history of the fourteenth amendment is that the history is unclear: virtually every Justice on the Supreme Court in the past half century agrees on that point. Morgan’s argument is not grounded in a neutral view of history, but rather on the political and religious view that somehow we would be a better nation if government could actively support religious activities. Conservatives like Cooley and Morgan appear to have no sympathy for the members of religious minorities who do not want their money taken to support churches to which they do not belong or their children forced to listen to prayers of a religion in which they do not believe.

In his chapter on “Destabilizing the Schools,” Morgan slights liberal law professors and attorneys by making us share the credit for destroying the American educational system with “[t]rendy egalitarianism, abandonment of the fundamental subjects in pursuit of fashionable ephemera, and the inferior education received by so many teachers in their universities” (p. 73). He does, however, give us a good share of the blame by attacking what he sees as the unjustifiable requirement of racial balance in public schools and the protection of students’ process rights.

In regard to Morgan’s attack on “requiring racial balance,” I am afraid that I must say that Professor Morgan’s lack of training as a lawyer is apparent. I am a legal realist who has given speeches endorsing Fred Rodell’s attack on the claim of lawyers to having a special ability (not to be shared with the public) to determine the meaning of

37. See note 28 *supra*.

"The Law."³⁸ When reading this chapter, however, I found myself thinking that Professor Morgan might have saved himself from making some embarrassing statements about Supreme Court decisions if he had received a lawyer's advice about the scope of the Court's desegregation rulings. Professor Morgan reads cases such as *Green v. County School Board*,³⁹ *Swann v. Charlotte-Mecklenburg Board of Education*⁴⁰ and *Keyes v. School District No. 1*⁴¹ to establish the principle that "some degree of racial balance was required although it need not be arithmetically precise" (p. 49). This statement simply is not true. These cases involve instances in which a school board was found to have engaged in intentional segregation in the school system.

Professor Morgan should be told that in many areas of the law we operate on the basis of presumptions and circumstantial evidence. Persons go to jail every day on the basis of circumstantial evidence that was no stronger than that used to show that racial segregation had occurred in the Denver or Charlotte school systems. In *Keyes*, the Court found that once a plaintiff met the burden of proving intentional, state-imposed segregation in one part of the school district, a judge could presume that all of the school boundary lines in that school district were affected by racially biased decisionmaking. In such cases the school board has the opportunity to prove that the established racial segregation did not affect school assignments and that the racial segregation practices (which had to be proven by means other than mere statistical proof) were limited to one portion of the school district. The Supreme Court has required only the amount of desegregation necessary to remedy governmentally established racial segregation.⁴²

Professor Morgan also attacks the judicial and administrative expansion of the federal Civil Rights Acts to force a degree of racial balance in the schools which was not constitutionally required. Here, as I noted earlier, and as Professor Lopez noted in his review,⁴³ Morgan totally disregards the fact that the judicial and administrative rulings on the scope of federal statutes, if incorrect, could have been changed by Congress. Professor Morgan is not only upset about

38. I really hate footnotes. Nevertheless, see note 7 *supra*.

39. 391 U.S. 430 (1968).

40. 402 U.S. 1 (1971).

41. 413 U.S. 189 (1973).

42. The Supreme Court has required that constitutional remedies be carefully tailored to correct only unconstitutional segregation. The Court has found that, once unconstitutional segregation is corrected, lower federal courts do not have the power to supervise school districts to insure that no *de facto* segregation occurs in the future. See, e.g., *Austin Indep. School Dist. v. United States*, 429 U.S. 990 (1976); *Pasadena City Bd. of Educ. v. Spangler*, 423 U.S. 1335 (1975); *Milliken v. Bradley*, 418 U.S. 717 (1974); see also J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, at 643-49; Shoben, Book Review, 2 CONST. COMMENTARY 494 (1985) (reviewing R. WOLTERS, *THE BURDEN OF BROWN* (1984)).

43. See Lopez, *supra* note 1, at 1668 n.4.

judges being misled by liberal professors; he also is upset about Congress not having stood up and put us in our place by restricting federal desegregation of schools. Perhaps, Professor Morgan, it is not the advocates of school desegregation who are out of step with America's ideals. Perhaps it is you.⁴⁴

Professor Morgan's claim that the American public school systems lack discipline in major part because we have protected the due process rights of individual students ("little litigators," in Morgan's terms) is too simplistic to require much of an answer. The Supreme Court has approved physical punishment of students⁴⁵ and allowed schools to dispense with the constitutionally required hearing before suspending a student.⁴⁶ Professor Morgan should be reminded that any lack of school authority to mold children into true believers of his view of America started with an opinion written by Robert H. Jackson holding that schools could not discipline children for refusing to pledge allegiance to the flag.⁴⁷

I have not discussed Professor Morgan's book in any detail with Yale Kamisar because I did not want to be biased by his view of it. However, I am sure that Yale took some pride in being made the major villain in Morgan's Chapter Four, "Enfeebling Law Enforcement." If you believe Professor Morgan, Professor Kamisar was the leader of a band of professors and lawyers who induced the Court to misread history in order to apply the fifth and sixth amendments to police interrogations. I have never been a big fan of the *Miranda*⁴⁸ ruling, simply because I doubt that it does much good for anyone.⁴⁹ I have never been convinced that a police officer who would lie about his use of unconscionable means to extract a confession from a prisoner would hesitate to lie about his having given the *Miranda* warnings to the prisoner. Nevertheless, although Professor Morgan may not agree, I am sure that the people of this country do not wish for a return to the

44. It is possible to point to flaws in statutorily or constitutionally mandated desegregation programs on the basis of the ineffectiveness of some programs in advancing the interests of minority race students. See generally P. DIMOND, *BEYOND Busing* (1985) (reviewed in this issue); SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (D. Bell ed. 1980).

I strongly recommend to readers of this essay a recent article by Professor Derrick Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985), which contains important reflections on the value of civil rights litigation as a tool for the advancement of minority interests.

45. *Ingraham v. Wright*, 430 U.S. 651 (1977).

46. The Court first found that such hearings were required by due process. *Goss v. Lopez*, 419 U.S. 565 (1975). The Court then made this a meaningless requirement, as it found that a student suspended from school without a hearing is entitled only to nominal damages unless he or she can prove actual damage due to the lack of a hearing. *Carey v. Piphus*, 435 U.S. 247 (1978).

47. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

48. *Miranda v. Arizona*, 384 U.S. 436 (1966).

49. See Nowak, *Foreword — Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 409-13 (1979).

wonderful days of the "third degree" interrogations. Justice Walter Schaefer was correct, in his Holmes Lecture at Harvard, when he said that "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."⁵⁰ Morgan dismisses Justice Schaefer's position summarily (p. 105). What Morgan does not realize is that Walter Schaefer was analyzing the cost to society both from crime itself and from the failure to require government respect for individuals in our society.

The interesting part of the chapter on law enforcement is Morgan's claim that the "Leader of the Mirandistas" (p. 89), Yale Kamisar, and other professors misled the judiciary into believing that the police have assumed the interrogating function that previously was performed by a "committing magistrate" in order to find an historical basis for the application of the fifth and sixth amendments to police interrogation. Morgan finds no historical basis for disputing the claims of Kamisar and others that the fifth and sixth amendments should have applied to interrogation by a committing magistrate. Morgan argues that this is the wrong history to refer to when resolving police interrogation issues, and that Kamisar and others "go wrong [in] suggesting that the modern police adopted a discredited practice of which the judiciary had purged itself as a matter of high principle" (p. 96).

Professor Kamisar, and others, have historical data to support the position that the fifth and sixth amendments should limit police interrogations.⁵¹ But Kamisar, like the overwhelming majority of professors who have advocated the judicial protection of civil liberties in the past several decades, did not claim that "history" required the judiciary to take a specific position on a constitutional issue. Kamisar argued that the concept of fundamental fairness, inherent in many due process rulings, required judicial supervision of the interrogation process, and that the judiciary could best protect persons from unfair police practices by developing specific fifth and sixth amendment limitations on the interrogation process.⁵² Kamisar argued that there was no historical or interpretivist barrier to the judicial development of such principles. He demonstrated that there was evidence that the drafters of the fifth and sixth amendments would have applied those

50. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).

51. Y. KAMISAR, POLICE INTERROGATION AND CONFESSION 33-36 (1980).

52. Kamisar states:

I do not contend that "the implication[s] of a tangled and obscure history" dictate that the privilege apply to the police station, only that they permit it. I do not claim that this long and involved history displaces judgment, only that it liberates it. I do not say that the distinct origins of the confession and self-incrimination rules are irrelevant, only that it is more important (if we share Dean Charles T. McCormick's views) that "the kinship of the two rules is too apparent for denial" and that "such policy as modern writers are able to discover as a basis for the self-crimination privilege . . . pales to a flicker beside the flaming demands of justice and humanity for protection against extorted confessions."

Id. at 36-37 (footnotes omitted).

limitations to the actions of committing magistrates and that the judiciary would not be transgressing its proper role in our democratic system by imposing similar limitations on modern police interrogation practices.

Morgan's attack on Kamisar demonstrates the duplicity of conservatives who claim that judicial interpretations of the Constitution must be based on historical evidence of the intentions of those who drafted or ratified a constitutional provision. If someone, like Kamisar, has historical evidence that would support the judicial protection of civil liberties or minorities, then interpretivist "scholars" will find some trivial historical data to argue that the civil libertarian position is "wrong." Like sideshow magicians, they always have a little something up their sleeves. You see, history is not a proper basis for judicial rulings unless it is the correct history. Somehow the only history that is correct (in the view of professors like Cooley or Morgan or politicians like Meese) is history supporting a right-wing position that would eliminate judicial protection of civil liberties or racial minorities.

Morgan's attack on Kamisar provides the basis for answering Professor Lopez's question: "Why review this book?" There is a danger in pretending that right-wing authors who use history to attack modern civil liberties rulings are scholars. Being polite in our treatment of persons like Raoul Berger or Richard Morgan may help to establish their writing as worthy of serious consideration. One day right-wing legal advocates will ask the judiciary to use a formal method of constitutional interpretation (such as law and economics analysis or interpretivism) to strike down legislative protection of minority rights or legislation that redistributes wealth. Scholars such as Bruce Ackerman,⁵³ Paul Dimond,⁵⁴ Arthur Leff,⁵⁵ and Laurence Tribe⁵⁶ have noted the fraudulent nature of law and economics arguments to limit the judicial role. Many persons realize that those who advocate the use of economic analysis do so to protect the economically powerful

53. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984). There is some debate regarding the worth of Ackerman's attempt to use a form of economic analysis to advance liberal goals. Compare Schauer, *Lawyers and Lawmaking*, 83 MICH. L. REV. 1141 (1985), with Tushnet, *The New Marketplace of Ideas*, 79 NW. U. L. REV. 857 (1984).

54. Dimond & Sperling, *Of Cultural Determinism and the Limits of Law*, 83 MICH. L. REV. 1065 (1985). This essay is a review of T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* (1984), which is an economist's attack on civil rights legislation. Professor Dimond has also been a most able opponent of interpretivist authors who advise courts to restrict or overturn civil rights protections. See Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982).

55. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1978)). Professor Leff understood the role of the Supreme Court in our society better than any interpretivist scholar or law and economics advocate. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

56. Tribe, *supra* note 25.

interests in our society. We need to bring to the attention of the judiciary, the scholarly community, and the public the fact that interpretivist arguments are nothing more than a means of advancing the position of economically well-off persons and repressing civil liberties. Those who care about civil liberties need to challenge those who would use a history ploy to mislead the public, students, or the courts. If we fail to do so, the judiciary one day may use formal methods of analysis to restrict civil liberties.⁵⁷

In his chapter on "Undermining Order Maintenance," Professor Morgan complains about the first amendment vagueness and overbreadth doctrines. He is upset that people can use nasty words in public; he is upset with the Supreme Court's recent decision that police do not have unbridled discretion to stop persons and demand that they present identification and a reason for being in a public place.⁵⁸ This argument cannot be made simply on an historical or interpretivist basis. Historical arguments are a facade to hide the preferences of white conservative males for a world where people act in public in a way that is pleasing to the eyes and ears of white conservative males. I commend to Professor Morgan the words of the younger Justice Harlan. While it is true that Justice Harlan was no strict constructionist, he certainly was no radical liberal.⁵⁹ Justice Harlan wrote the decision in *Cohen v. California*,⁶⁰ explaining that our first amendment freedoms may be disquieting to many but that this discomfort is the price we have to pay in order to be true to our tradition of freedom of expression. (Perhaps Morgan would doubt that this is the tradition of "constitutionally literate persons.") The Justice said:

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.⁶¹

Professor Morgan's chapter on "Preempting Private Outcomes" is a rather simplistic attack on the expansion of the state action doctrine,

57. For an analysis of rival theories of constitutional analysis, see Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

58. See *Kolender v. Lawson*, 461 U.S. 352 (1983). Professor Lopez noted that Morgan's discomfort with this ruling had to rest in Morgan's value preferences and the fact that white male professors are rarely harassed by the police. Lopez, *supra* note 1, at 1675.

59. See Farber & Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENTARY 425 (1985); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

60. 403 U.S. 15 (1971).

61. 403 U.S. at 24-25.

which scholars have debated for quite some time.⁶² This chapter shows the danger of interpretivism and how it can be used to strike down progressive legislation. Professor Morgan is not only upset because of an expansion in the state action doctrine, he also is upset because executive agencies, in his view, have unjustifiably expanded the scope of civil rights legislation to prohibit gender and racial discrimination in private employment. As one would suspect, he sees no philosophical justification for affirmative action for women or minorities in education or employment. Masked by the claim of strict constitutional and statutory interpretation is an argument that the Court should have used Title VII of the Civil Rights Act⁶³ to invalidate an affirmative action plan voluntarily undertaken by an employer and union (p. 150).⁶⁴

In arguing that judges should not expand the state action doctrine to require gender or racial integration of private sector organizations, Morgan calls into question the constitutionality of legislation that demands that private schools or economic groups give equal treatment to women and racial minorities. Fortunately, the Supreme Court has rejected such arguments, for now.⁶⁵ But Morgan's interpretivist thesis, in the future, could be used as a basis for the judicial limitation or invalidation of civil rights legislation. Indeed, Morgan hints that this might be his purpose when he tells us that there is a "primacy of the private sector" (p. 136). While he states that "[f]ederalism issues are beyond the scope of this book," he indicates that there is something constitutionally wrong with the expansion of federal power to displace state and local authority.⁶⁶

The economic and moral preferences of Christian, economically advantaged, white males are easily disguised by language about the intentions of drafters of constitutional or legislative provisions. Morgan's attacks on the administrative, judicial, or legislative expansion of educational or employment opportunities for racial minorities or women appear to be based on his personal dislike for the way life in American schools and work places has changed in recent years. Life is not as comfortable for white males as it used to be; Morgan is more than a little upset about that fact.

As Morgan tells us:

62. See generally Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221.

63. 42 U.S.C. § 2000e (1982).

64. In Morgan's opinion, Justice Brennan "looked past both the clear language and the unambiguous legislative history" to validate the affirmative action plan in *United Steel Workers v. Weber*, 443 U.S. 193 (1979). P. 150.

65. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

66. Morgan states: "Explaining all that is wrong with [Dean Choper's argument that the Court should not actively review the scope of federal authority] will have to await another day." P. 136 n*.

What is so hard for us to understand as a people who have revered "the law," is that it is now law against which many important social institutions must be protected—law as the instrument of egalitarianism, law as the statist chilling of excellence. Indispensable as it is in ordering some of the relations between us (our behavior toward one another in the streets and other really public places), law is, in other contexts, at war with the kind of subtle discriminations that advance excellence. [p. 161]

Professor Morgan, you could not be more wrong. You may honestly believe what you say, but there is nothing to prove your case other than your personal view of American history and traditions. It is you, and not Michael Perry, who is out of tune with our country;⁶⁷ we want to be a land of true equality of opportunity for the poor, racial minorities, and women. Your views have been rejected not only by our judiciary but also the Congress (in its passage of the civil rights acts and its refusal to restrict them) and most (if not all) of our Presidents of the last half-century.

One of the most eloquent responses to those who would use the power of government to protect the interests of those who had managed to accumulate wealth and secure positions in society was made by Justice Robert Jackson. For it was Robert H. Jackson who, in *Edwards v. California*,⁶⁸ thought that the Supreme Court should not rely on the commerce clause to limit the state's ability to restrict travel by poor persons. Justice Jackson thought that the Court had both an historical and a functional basis for defining the privileges and immunities clause to prevent such discrimination against poor persons. Justice Jackson stated:

Rich or penniless, [the individual plaintiff's] citizenship under the Constitution pledges his strength to the defense of California as a part of the United States, and his right to migrate to any part of the land he must defend is something she must respect under the same instrument. Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.⁶⁹

Were the judiciary to follow the advice of interpretivists like Edwin Meese or Richard Morgan, economically well-off white males would be well protected. For the poor, racial minorities, and women, the Constitution's promise of due process, equality, and liberty indeed would be worth no more than "a munificent bequest in a pauper's will."

67. See note 15 *supra* and accompanying text.

68. 314 U.S. 160 (1941).

69. 314 U.S. at 185-86.