

1985

# The Constitution as Mirror: Tribe's Constitutional Choices (reviewing Laurence H. Tribe, Constitutional Choices (1985))

Richard A. Posner

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

Richard A. Posner, "The Constitution as Mirror: Tribe's Constitutional Choices (reviewing Laurence H. Tribe, Constitutional Choices (1985))," 84 Michigan Law Review 551 (1985).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# THE CONSTITUTION AS MIRROR: TRIBE'S CONSTITUTIONAL CHOICES

*Richard A. Posner\**

CONSTITUTIONAL CHOICES. By *Laurence H. Tribe*. Cambridge, Mass.: Harvard University Press. 1985. Pp. xiv, 458. \$29.95.

This book of essays (some previously published) by a leading professor and practitioner of constitutional law argues, in effect and often in words close to these, that the Constitution is what we want it to be (hence "choices") and that what we should want it to be is the charter of a radically egalitarian society. Professor Tribe acknowledges the conventional constraints on judges' molding the Constitution to their personal preferences, but none of those constraints (text, structure, history, tradition, precedent) hampers him much. He makes the Constitution the mirror of his political preferences and criticizes the current Supreme Court for having sought to conceal its own political preferences behind a facade of formalistic reasoning and thus for being hypocritical and uncandid. I shall consider the method by which Tribe attempts to establish his criticism and his own effort to fill the chasm that appears if the criticism is accepted and constitutional decisions are judged purely on political grounds.

## I

The book has three parts. The first, "The Nature of the Enterprise," explains the author's method, which turns out to be the conscious rejection of method. The brief first chapter sets the tone by renouncing the quest for postulates or principles of constitutional "interpretation." Text, history, structure, philosophy, and political theory (as distinct from raw political preferences) are all rejected because "contingency pervades all" (p. 8). Although Tribe says that "constitutional interpretation is a practice alive with choice but laden with content" (p. 4), and that the Constitution is not "infinitely malleable" (*id.*), in his hands it is almost that; he recognizes few limits on "interpretation."

Chapter Two continues the theme of the first chapter with an attack on John Hart Ely's view that virtually all we need bother about in

---

\* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. — Ed.

I thank Frank Easterbrook, Philip Elman, Richard Levy, Bernard Meltzer, Henry Monaghan, Helane Morrison, Geoffrey Stone, and Cass Sunstein for their exceedingly helpful comments on a previous draft, and Levy in addition for his excellent research assistance.

reading the Constitution is what Ely regards as its latent goal of making the popular branches of government, the legislative and executive branches, more representative of the full range of outlooks and interests in society.<sup>1</sup> Although Tribe attacks Ely for neglecting the substantive policies in the Constitution, the force of the attack is blunted by Tribe's implicit belief that those policies do not really originate in the Constitution but are put there by the observer, the "chooser."

Chapter Three of Tribe's book takes up the matter of amending the Constitution. This may seem unrelated to interpreting the existing Constitution, but amending and construing are much the same thing to Tribe. Both are arenas of "constitutional choice," and, for him, choices of the same character. Thus he advances the startling proposition, one consistent with his view of the Constitution's plasticity but without basis in the language or history of the Constitution, that an amendment might be unconstitutional merely because of a lack of "fit" with the existing Constitution. "An amendment prohibiting atheists from holding federal office, for example, would clash with the current Constitution's paramount concern for freedom of conscience *no less* than a statute to the same effect would run counter to the current Establishment Clause."<sup>2</sup> Tribe rightly adds, however, that the courts should not pass on the constitutionality of amendments, as that "would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure" (p. 27).

This part of the book ends with a chapter on how courts should treat omissions in constitutional and statutory enactments. The chapter contains an interesting discussion of the steel seizure case<sup>3</sup> and little with which to disagree. A competent discussion of some technical problems of interpreting enactments, it shows that Professor Tribe has

1. See J. HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

2. P. 25 (emphasis added, and — a qualification I shall not repeat — end notes omitted). Although there are no footnotes, the 159 pages of end notes take up more than a third of the entire book. Many notes take up more than a half page of fine print; some as much as a page and a half. There are 1829 notes in all, which means that to read the notes together with the pertinent text the reader must flip to the back of the book an average of seven times for every page of text read. What a chore it was!

Publishers prefer end notes to footnotes because they are cheaper and enable the book to be produced faster. But having published two books in recent years with the publisher of *Constitutional Choices* (Harvard University Press), both with footnotes rather than end notes, I can testify that this publisher's policy on the matter is not inflexible; and Tribe would have been well advised to insist on footnotes. Yet if his notes had been printed as footnotes, each page of the book would be (on average) less than two-thirds text and more than one-third footnotes, and the reader would be spending too much time interrupting his reading of the text to read footnotes — often long and dense textual footnotes. (There would be less interruption than if the reader had to flip to the back of the book every time he hit a note, but there would still be too much.) There is something more deeply wrong with Tribe's notes than their location. I shall have more to say about the style of the book in Part III of this review.

3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

lawyerly skills, as his other writings, and his success as a practitioner of constitutional law, also show. The issue, we shall see, is whether such skills are alone enough to fashion a constitutional philosophy. But I find much to agree with in Part I. The problem is that one comes out of Part I and plunges into the consideration of specific doctrines without knowing what Tribe's own approach is to be. The approach of not taking an approach is not illuminating.

Part II addresses various topics in the allocation of powers within the federal government and between that government and state government. Chapter Five (the first chapter in this part) argues the unconstitutionality of legislative proposals to withdraw the Supreme Court's appellate jurisdiction over types of cases offensive to the proponents — such as abortion and school prayer cases. Tribe argues that the proposals he discusses (some of which may have been intended more as attention-getting gestures than as practical proposals) would circumvent the procedure for amendment set forth in the Constitution and violate the provision in article III ordaining a supreme court. Here, as in Tribe's discussion of the justiciability of constitutional amendments, the reader might think himself in the presence of a conventional constitutional analyst who derives modest conclusions from the text and structure of the Constitution. Not so; read on.

Chapters Six and Seven attack two recent decisions of the Supreme Court — the *Marathon*<sup>4</sup> and *Chadha*<sup>5</sup> decisions, the first holding that bankruptcy judges had been given certain powers in violation of article III, the second that the legislative veto violated articles I and II. Tribe makes several good lawyerly points about these decisions, but the points show only that better opinions could have been written in defense of the Court's results; they do not show why Tribe disagrees with the results. But he does, and the reason seems to be that the cases invalidate “political and institutional innovation[s] of the sort that may well be essential to the functioning of an ambitious government” (p. 85). The separation of powers in the Constitution was designed for a much smaller government, not for the welfare state; therefore the Constitution must be read flexibly if it is not to limit the growth of the federal government. Tribe does not pause to consider, however, whether we are better off or worse off with a big federal government — not merely a bigger government than we had in 1787, which is inevitable, but the giant government we have today — though he plainly thinks we are on the whole better off. Nor does he ask whether, if we are better off with a giant government, this might nevertheless be the type of good thing that requires a constitutional amendment to obtain. Tribe appears to believe that every good thing already is in the Consti-

---

4. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

5. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

tution,<sup>6</sup> which means, can be put there by judges "interpreting" its provisions. But this is assumed rather than argued.

And here we come close to the essential weakness of Tribe's method. He is good at demonstrating logical flaws in judicial opinions, but all that such a demonstration accomplishes is to knock out the opinion; it does not show that the result is wrong. Tribe writes as if showing that a particular decision is badly reasoned establishes that the opposite decision would have been correct.

This is further illustrated in the next chapter (Chapter Eight), where Tribe discusses standing to sue. He casts his discussion in the form of a diatribe against the *Lyons*<sup>7</sup> decision, where the Supreme Court held that the victim of a policeman's "choke hold" lacked standing to seek an injunction against the practice. Tribe contrasts *Lyons* with *Duke Power*,<sup>8</sup> where (he argues) the Supreme Court brushed aside a more serious problem of standing to sue in order to reach the merits and affirm the constitutionality of the limitations in the Price-Anderson Act on tort damages for nuclear reactor accidents.<sup>9</sup> The contrast between these decisions typifies for Tribe the dishonesty and class bias of today's Supreme Court, which Tribe thinks uses the doctrine of standing opportunistically, on the one hand to deny a legal remedy to a poor black man brutalized by the police and on the other hand to uphold a subsidy for big business. The contrast is overdrawn. *Lyons* had a remedy: damages. So would any other chokehold victim. The question was whether *Lyons* could also get an injunction, though it would be of very little benefit to him as he was unlikely to be subjected to a chokehold again. The denial of an injunction could have been upheld on the basis of standard principles of equitable relief, without reference to the constitutional doctrine of standing.

In any event, the cases that Tribe has chosen to discuss are not representative of the Supreme Court's recent decisions on standing.<sup>10</sup>

---

6. Henry P. Monaghan effectively criticizes this position in *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981), as conflating politics and constitutional law.

7. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

8. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

9. Tribe is not alone in the view that *Duke Power* presented a serious problem of standing. See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 229 (2d ed. 1980), which contrasts the upholding of standing in that case with the denial of standing in two cases where low income persons or their representatives were the plaintiffs: *Warth v. Seldin*, 422 U.S. 490 (1975), and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

10. To correct the balance, see *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954-59 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Commn.*, 461 U.S. 190, 199-203 (1983); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 297 (1981); *Zablocki v. Redhail*, 434 U.S. 374, 380 n.6 (1978); *Nyquist v. Mauclet*, 432 U.S. 1, 6 n.7 (1977); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260-64 (1977). *Havens*, involving the standing of black "testers" to complain about racial discrimination even though they weren't in the market for housing, and *Village of Arlington Heights*, involving a challenge to a

And while making clear that he thinks the requirement of standing should be relaxed, Tribe does not explain why it should be relaxed, whether this can properly be done without amending article III, how far he would go in relaxing the requirement, or what the impact on the workload of the federal courts would be of a minimal standing doctrine, consistently applied. So again he scores lawyer's points but does not lay a foundation for his own position.

As a critic, Tribe is open to several criticisms besides bias in the selection of cases to discuss. He criticizes only decisions he deems conservative. For example, a decision cutting back slightly on the minimalist doctrine of standing is criticized, but the decisions that created that doctrine in the first place are not. It seems that if a decision is politically "correct," Tribe will forgive its technical shortcomings.

Furthermore, the majority opinions of the Supreme Court are such large targets for technical criticisms that the sense of decency that restrains a sportsman from shooting fish in a barrel should restrain the critic from attacking the Court as fiercely as Tribe does. To secure a majority, a Justice must persuade four other Justices to join his opinion. To do that he may have to make compromises that reduce the opinion's intellectual integrity. The alternative is to condemn the bar and the lower courts to the frustrating labor of trying to extract a majority position from the intersection of a plurality opinion with a concurring opinion(s). The Justice who opts for compromise and consensus should ordinarily be forgiven the unavoidable intellectual untidiness of the opinion. A more important point — for my impression is that relatively few majority opinions in the Supreme Court are in fact the product of hard-fought compromise, that the spirit of compromise is not strong in the modern Court — the Court has so vast a jurisdiction that no Justice can hope to have the same knowledge of particular fields of law as a professor specializing in one or two fields has. A judicial opinion should not read like, and should not be read like, a law review article.

The next chapter of Tribe's book, Chapter Nine, deals with federalism, but turns out to be narrowly focused on a few decisions, mainly *National League of Cities v. Usery*<sup>11</sup> (which held that the federal minimum wage law could not constitutionally be applied to state government employees), and the cases following it. On the purposes and proper dimensions of federalism Tribe has little to say, but given his enthusiasm for centralized government I was surprised to find even qualified approval of the doctrine of *National League of Cities*, whose

---

zoning ordinance as being racially exclusionary, are particularly good counterexamples to Tribe's picture of a Supreme Court determined to manipulate the doctrine of standing to produce politically conservative outcomes.

11. 426 U.S. 833 (1976).

overruling<sup>12</sup> coincided with the publication of the book. The form of the doctrine that he approves (or should I say, approved) is, however, extremely narrow:

It may be virtually impossible to halt the erosion of state sovereignty caused by preemptive federal legislation, because the Supremacy Clause is essential to our federal system of government; national cohesion and national policy coherence demand it. But we surely can avoid insulting the states by ordering them about like so many federal bureaucratic lackeys when the federal constitutional rights of individuals are not at stake.  
[p. 131]

So it comes down to avoiding “condescension” (*id.*), which isn’t much; and given Tribe’s broad conception of “the federal constitutional rights of individuals” (of which more shortly), the qualification in the subordinate clause (“when the constitutional rights of individuals are not at stake”) overwhelms the assertion in the main clause.

This chapter also criticizes — and cogently, too — the Supreme Court’s decisions applying the Sherman Act to local but not state government. Tribe argues that the internal allocation of state powers is no business of the federal government “when the federal constitutional rights of individuals are not at stake” — a vital qualification, as we shall see. In this area, too, the rapid evolution of legal doctrine is overtaking Tribe’s discussion.<sup>13</sup>

The last two chapters in Part II deal with highly specialized problems, growing out of Tribe’s extensive consulting practice, in the application of constitutional doctrine to regional banking pacts and the issuance of bonds by American overseas possessions, respectively. Limitations of space move me to skip them<sup>14</sup> and come directly to Part III, “The Structure of Substantive Rights.” Here Tribe puts forth a very expansive conception of civil rights and civil liberties.<sup>15</sup> He thinks that as interpreted by the Supreme Court the Constitution is too protective of the status quo. He regrets for example that the Court has interpreted the just compensation clause of the fifth amendment to protect only conventional property interests and not the “new property” — such things as jobs and welfare benefits — that are so important to ordinary people and the poor. In Chapter Thirteen, Tribe points out that while freedom of speech has been interpreted to protect the interests of people who have the money to buy advertising — and

12. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985).

13. See *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985).

14. Except to note that again events have overtaken Tribe’s discussion: *Northeast Bancorp, Inc. v. Board of Governors of Fed. Reserve Sys.*, 105 S. Ct. 2545 (1985), though not inconsistent with Tribe’s analysis of regional banking pacts (he argued and won the case), makes the analysis somewhat academic. Tribe’s book is perhaps too topical; it is obsolescing rapidly.

15. A surprising omission from Tribe’s discussion of civil liberties, however, is criminal procedure, a matter on which Tribe feels strongly but which he does not discuss except for passing references in his discussion of the *Lions* decision, and a long and rather angry end note to the preface. See p. 271 n.1.

thus limits on campaign spending by individuals on their own behalf have been struck down — it has not been interpreted to protect the interests of those who cannot afford to put postage stamps on their campaign literature yet have been denied the right to deposit that literature (unstamped) in home letter boxes. Others who substitute personal time for money in the communication of ideas — labor picketers carrying placards — receive less protection than large corporations, which can take out full page ads to propagate their views. As with the just compensation clause, Tribe's answer to the law's tilt toward the status quo is not to curtail the rights of the wealthy and the established but to enlarge the rights of the poor and the marginal. That there might be a collision, since one person's right is another's duty, is not mentioned.

One form of the status quo that particularly distresses Professor Tribe is that caused by the physical differences between men and women. The fact that women get pregnant and men don't, a fact that underlies a variety of traditional laws and practices, is not for Tribe a legitimate basis for treating men and women differently. Tribe believes that the Constitution should be interpreted to offset such burdens as nature has imposed on women but not on men, even though in another sense, not considered by Tribe, this would mean treating men and women differently. If women are biologically vulnerable to particular workplace hazards, this would not for Tribe justify a law forbidding them to be employed where they are exposed to the hazard; rather, it would mean that they are constitutionally entitled to more protection than men. The excessively brief chapter in which this position is argued, Chapter Fifteen, is revealingly entitled, "Reorienting the Mirror of Justice: Gender, Economics, and the Illusion of the 'Natural.'"

The implicit theme of Part III is that the Constitution has (more precisely, can be given), as a principal goal, compensating for inequalities in wealth and power, however caused. Thus does Tribe, although opposed to overarching themes of constitutional interpretation, back into such a theme. As a redistributivist Tribe is led to endorse the constitutionality of affirmative action (reverse discrimination). But he does so with a caveat: he admires Justice Powell's opinion in the *Bakke* case,<sup>16</sup> rejecting rigid quotas, which in Tribe's view are impolitic and also insufficiently sensitive to people as individuals rather than as members of racial and other minority groups. Here and in Tribe's convoluted discussion of the freedom of speech of Nazis (pp. 219-20) one senses a slight unease with certain aspects of modern liberal thought. This chapter also endorses the suggestion that the propriety of affirmative action should depend, in part anyway, on the level of government that decrees it; the lower, the more suspect. So much for

---

16. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).



the principle that the internal allocation of functions in state government is not of federal constitutional concern.

The last chapter of Part III challenges the fundamental distinction in constitutional law between the public and private spheres. In general the Constitution is a charter of negative liberties. It requires government to leave people alone in certain respects but does not tell it to provide services, correct private wrongs, or bring about a more just distribution of the world's goods. The due process and equal protection clauses of the fourteenth amendment, for example, limit only "state action," not private action. Tribe will not abide the distinction; it seems to him to ignore "the state's complicity in" "the patterns of social and economic domination that permeate and in part define our society" (p. 265). This is strong language. Consider its application to the *Irvis* case,<sup>17</sup> where the Supreme Court held that the equal protection clause did not forbid a private club to discriminate against black people, merely because the state had given the club a license to sell liquor. Tribe thinks that the plaintiff should have sued the liquor control board rather than the club, so that "he could have directly charged the board members with suborning racism and aggravating its impact by handing out the privilege of a scarce liquor license without regard to the licensee's racist practices" (p. 255). If licensing the sale of liquor, as distinct from allowing liquor to be sold without a license, increased the likelihood of racial discrimination by private clubs, Tribe would have a point. Maybe some types of regulation do increase the likelihood of discrimination, and maybe the idea of state action could be enlarged to embrace discrimination by firms so regulated.<sup>18</sup> But Tribe makes no argument along these lines.<sup>19</sup> His position seems to be that state agencies that have the power to combat racial discrimination by private persons should not be allowed to take a neutral stance. They must use their power to forbid those persons to discriminate; the Constitution imposes an overriding duty on all public officials with an axe to wield it in such a way as will advance egalitarian ideals. The *reductio ad absurdum* of this view is that a minister or rabbi unwilling to perform mixed marriages should not be licensed to perform any marriages.

If one combines Tribe's view that the Constitution requires government to eliminate natural inequalities with his assault on the "public-private" distinction, one has a recipe for rampant judicial activism. Yet how far he would actually push the logic of his position is unclear. The chapter on state action is the least coherent in the book. To the

---

17. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

18. See R. POSNER, *THE ECONOMICS OF JUSTICE* 355-58 (1981).

19. In his treatise on constitutional law he suggests that *Irvis* might have found it easier to obtain liquor in nondiscriminatory surroundings if liquor were unlicensed. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1173 (1978). No basis for this suggestion is offered.

radical notion that private prejudice is typically a product of state action ("complicity") — that there is little or no bigotry in the state of nature — Tribe juxtaposes an imaginatively limited reading of *Shelley v. Kraemer*,<sup>20</sup> where the Supreme Court held that a state's judicial enforcement of racially restrictive covenants violated the equal protection clause. Tribe says that the state refused to enforce most restrictive covenants, deeming them impermissible restraints on alienation; the decision to enforce racial covenants was thus a decision to use state power to promote racial segregation. Since the state was Missouri and the time the 1940s, this is a realistic analysis. But in the name of "complicity," Tribe apparently is willing to find unconstitutional state involvement in private discrimination where (as in *Irviss*) others would find a policy neutral in purpose and effect: a policy not adopted in order to promote discrimination and unlikely to make it greater than it otherwise would be.

## II

In developing a rationale for *Shelley v. Kraemer*, and in his criticisms of specific cases, not all of which I have mentioned,<sup>21</sup> Tribe's book makes a worthwhile contribution to the literature of constitutional law. But the book aspires to be more than a series of individual case readings. The fulsome senatorial encomia that decorate the dust jacket are not likely to have been bestowed as compliments for Professor Tribe's legal analytic powers or individual case readings, but are more likely to reflect his political slant. In his view (one widely shared by constitutional scholars at all points of the political compass) every good thing can be found somewhere in the Constitution; and most of the good things happen also to be advocated by politicians supported by Tribe. As Tribe conceives constitutional "interpretation," the Constitution is flexible enough to embrace — to command — a partisan political position. The most important question about his book is whether this view is tenable.

I think not; and in fact the view is barely defended, in the book or anywhere else, which is a clue to its indefensibility. The book is overwhelmingly negative. It attacks; it does not defend. We learn what are not legitimate sources of constitutional meaning. Text is not. *Constitutional Choices* contains few quotations from the Constitution, an omission that obscures the distance between the actual words of the document and the meaning Tribe would impress on it. History,

---

20. 334 U.S. 1 (1948). This reading is foreshadowed in Tribe's treatise. See L. TRIBE, *supra* note 19, at 1023. This is true of some other discussions in *Constitutional Choices* — compare for example the discussion of the steel seizure case in *American Constitutional Law* at 181-82 with the discussion of the same case in *Constitutional Choices* at 32-33. For the most part, however, *Constitutional Choices* is not a rehash of the earlier book.

21. There is a particularly good discussion of *FERC v. Mississippi*, 456 U.S. 742 (1982). See pp. 125-32.

whether in the broad or the narrow (“legislative history”) sense, is not a proper source of constitutional meaning either, for Tribe. He has virtually nothing to say about history; history might have begun in the year of Earl Warren’s appointment as Chief Justice (the implicit view of many law students). Therefore the values and intentions of the framers of the Constitution and its amendments are not significant sources of constitutional meaning for Tribe. Precedents mean little to him, too, unless they come from or anticipate the era of expansive constitutional interpretations that crested between the replacement of Felix Frankfurter by Arthur Goldberg on the Supreme Court in 1962 and the appointment of Warren Burger in 1969. Any deviation from the “line” laid down in this era, the heyday of the “Warren Court,” Tribe deprecates; the line itself he swallows along with hook and sinker.

Tribe is also against “formalism,” the idea that legal outcomes can be derived by logical deduction from premises external to the judge’s own values and experience. He considers it a technique for concealing the true grounds of decision in difficult cases. He is also, as we have seen, against all overarching schemes of constitutional interpretation. And he is against “technocratic” reasoning,<sup>22</sup> typified by the cost-benefit approach of the economic analysts of law but apparently encompassing all instrumental reasoning. Thus he disagrees that the goal of legal procedure should be to minimize the sum of the error costs and avoidance-of-error costs of applying legal sanctions, or even that accuracy should be the overriding goal. He writes, “procedural *fairness* reflects the intrinsic value of assuring *fair* treatment as an individual and not simply the instrumental value of assuring correct outcomes” (p. 227; emphasis added). In other words, fairness means being fair. This is not quite so empty a view as it sounds; if it were, we would approve of lynching, provided it was clear that the victim of the lynching would have been convicted and executed if spared for trial, and we don’t approve of it. But whether there is as much to the view as Tribe thinks may be doubted; I shall come back to this point.

There are things that are appealing in Tribe’s litany of negations. Distinguished Supreme Court Justices as otherwise different as John Marshall and Oliver Wendell Holmes have also believed that the Constitution should, in many of its provisions anyway, be interpreted flexibly, as a document — with the amendments, really a series of documents — intended to be adaptable to an unforeseeable future. This view limits (but does not eliminate) the role of text, history, and

---

22. But not consistently against it. See p. 147 (“Only when the costs may be externalized, and the benefits internalized, does the Commerce Clause clearly disapprove of self-interested moves on the part of a state.”) Incidentally, the dust jacket and preface describe the book as an attack on cost-benefit thinking, see p. viii, but in fact this theme rarely appears. But see p. 271 n.1.

precedent, and makes formalism an unworkable judicial philosophy.<sup>23</sup> I even agree with Professor Tribe that the Constitution is not a general mandate for economic efficiency, though many of its provisions can be illuminated by economic analysis — among them the commerce clause, where, it seems to me, Tribe gets into trouble by refusing to think economically. I shall give just one example. The judge-made “market participant” doctrine allows a state engaged in market activities, such as selling cement from a state-owned cement plant, to impose restrictions on itself that would violate the commerce clause if imposed on private sellers. Tribe defends this result by reference to the distinction between “*creating* commerce that would otherwise not exist” and “merely *intruding* into a previously existing private market” (p. 146; emphasis in original — as a matter of fact twenty-four words on this page are italicized for emphasis). But before the state had a cement plant, there was a market for cement; otherwise the state would not have built or acquired the plant. By owning such a plant, the state reduces the private supply of cement; it substitutes a public for a private market participant. The restrictions it imposes on itself (e.g., refusing to buy inputs from out of state) are therefore equivalent to restrictions imposed on the same amount of private supply by a state that does not participate in the market.

Having stripped away the usual aids to constitutional interpretation, and lacking a taste for political philosophy, Tribe is left with a set of unexamined political premises to guide the formation of constitutional doctrine. They are not only unexamined; despite Tribe’s contempt for judges who (he believes) conceal their class bias and conservative politics behind a formalist facade, the political character of his own premises is not acknowledged. He deflects the reader’s attention from this omission by making the Supreme Court’s decisions of the 1960s the baseline for normative judgments (without explaining why) and then criticizing later decisions as reactionary deviations.<sup>24</sup> He criticizes them as illogical and not just politically repulsive deviations, but that angle of attack, as I have suggested, is superficial; to show that a decision is poorly reasoned does not establish that the opposite decision would be correct. Many of the decisions he admires

---

23. Unless (perhaps) a majority of Supreme Court Justices happen to come from identical backgrounds, both personal and professional. If so, their shared values might provide an adequate set of common premises from which to deduce the outcomes in otherwise indeterminate cases, and the reign of logic would be preserved. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77, 95 (2d ser. A.W.B. Simpson ed. 1973), makes a similar argument in discussing the cohesiveness of the English common law. But like other American judges, Supreme Court Justices come from diverse personal and professional backgrounds.

24. A good example is his use, in Chapter Eight, of *Flast v. Cohen*, 392 U.S. 83 (1968), as the baseline for attacking recent decisions on standing to sue. Had Tribe used as his baseline *Frothingham v. Mellon*, 262 U.S. 447 (1923), which announced the approach to standing that was repudiated in *Flast* over a forceful dissent by Justice Harlan, many of those recent decisions — though, admittedly, not *Duke Power* — would not seem deviant. See notes 9-10 *supra*.

were poorly reasoned too. At bottom Tribe is expressing disagreement with the politics of the current Supreme Court — and distorting those politics. If Tribe had taken as his baseline the Supreme Court of the 1940s or 1950s — both periods in which the Court's average quality was as high as at any time since — he would have to regard both the Earl Warren and the Warren Burger eras as “liberal” deviations. To think the contemporary Supreme Court a “reactionary” court is to betray a lack of perspective, as well as to ignore much scholarship to the contrary.<sup>25</sup>

Tribe might answer that the difference between the Warren and Burger eras that he perceives is not a difference in political orientation in a narrow partisan sense but a difference in fundamental values. The Warren Court (Tribe might say) wanted to create a freer, more equal society; the Burger Court wants to preserve social arrangements that are unjust, unfree, and unequal. If this were the choice, it would be an easy one to make. But in adumbrating his “vision of what this country is about” (p. 357 n.246), Tribe forgets that he is taking sides on burning issues, rather than uttering truisms. Diametrically opposed to the “liberal” ideology espoused by Tribe is an equally articulate “conservative” ideology with as good a philosophical pedigree as the “liberal”<sup>26</sup> and a better historical one from a constitutional standpoint because it is more in keeping with the values of 1787, 1789, and 1868. The adherents to this ideology would (improperly in my view) reorient constitutional law to make it a mandate for economic liberty and a nemesis of the welfare state.<sup>27</sup> Preoccupied with the modest retrenchments of the Burger Court — ignoring its bold initiatives in abortion, free speech, and other areas — Tribe overlooks the greater potential menace to all he holds dear in constitutional analysis that comes from a point of the political compass far to the right of the current Supreme Court, and that derives legitimacy from a position, such as Tribe's, which empties the Constitution of meaning.

Tribe's neglect of all but a narrow segment of political and social thinking on the issues that he discusses undermines his book at many points. For example, his position that due process (in the sense of notice and an opportunity for a hearing) is an unqualified good to be pursued without regard to costs is made unpersuasive by his refusal to consider the extensive literature, most of it neither economic nor con-

---

25. See, e.g., *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Blasi ed. 1983); Gunther, *Reflections on the Burger Court*, *STAN. LAW.*, Spring 1985, at 5.

26. See, e.g., R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

27. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 *EMORY L.J.* 785 (1982); Epstein, *Toward a Revitalization of the Contract Clause*, 51 *U. CHI. L. REV.* 703 (1984); *Economic Liberties and the Judiciary*, 4 *CATO J.*, 661 (1985). There are as well a variety of other conservative positions, none of which Tribe discusses. I mention only the most dramatic contrast to his position.

servative, that emphasizes the adverse impact on the very people intended to be benefited by the procedural safeguards that Tribe would see extended — juveniles, the disabled, people on welfare.<sup>28</sup> He also does not consider whether the poor would actually gain from an interpretation of the just compensation clause that made welfare a form of property, given that such an interpretation would make government reluctant to raise welfare levels, since once raised they could not be lowered. And he seems unacquainted with the literature on the actual consequences — many of them perverse — of welfare rights which he would constitutionalize.<sup>29</sup> His discussion of policy is, in a word, superficial — a serious weakness in a book that equates constitutional law with sound social policy.

Tribe's treatment of labor picketing, in the chapter on freedom of speech (pp. 198-203), provides a further illustration of this point. He considers the application to picketing of the principle that the first amendment permits the regulation of "speech brigaded with action" an example of the Supreme Court's class-conscious hostility to inexpensive modes of communicating ideas, for he can find no distinction between picketing and advertising except that the latter costs more. He ignores the fact that unions are allowed to and do make substantial political contributions,<sup>30</sup> and the fact that picketing is potentially coercive in ways that advertising is not. Even those most friendly to the union movement, and most hostile to the judicial position on picketing, recognize that picketers are sometimes violent (which means, often potentially violent) and that picketing enables the identification of replacement workers and other strikebreakers for future retaliation.<sup>31</sup> These are not properties of advertising. It is true that some people regard advertising as "coercive" in subtler ways, but the same people are likely to complain — with justification, too — about the loose use of the word "coercion" in discussions of purely peaceful, nonretaliatory picketing.<sup>32</sup> It is also true that labor picketing is a lot more peaceful than it once was; but it could become less peaceful again

---

28. See, e.g., 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 495-99 (2d ed. 1979); W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENT 445-51 (7th ed. 1979); J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND COMMENTS 192-94 (2d ed. 1985); Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1275-77, 1289-91, 1303-04, 1316-17 (1975); Fuerst & Petty, *Due Process — How Much is Enough?*, 79 PUB. INTEREST 96 (1985); Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

29. See, e.g., M. ANDERSON, WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES 43-58 (1978); B. PAGE, WHO GETS WHAT FROM GOVERNMENT 60-100 (1983) — the former written from a conservative, the latter from a liberal, standpoint.

30. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972).

31. See, e.g., Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1491 (1982).

32. See, e.g., Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023 (1953).

if it were wholly free from regulation, as Professor Tribe thinks the first amendment requires that it be.

There is a more fundamental point. The purpose of labor picketing generally is to increase wages, or economic equivalents such as fringe benefits. Picketing thus resembles concerted activity by companies to raise prices (or depress wages).<sup>33</sup> Yet even in an era when commercial speech is constitutionally protected, no one thinks the government cannot forbid cartels just because their members communicate information and opinions on prices and other matters of mutual concern, either with each other or (to make the analogy to picketing closer) with consumers, suppliers, and competitors. It is not obvious that wage-fixing should have a different status under the first amendment from price-fixing. This is another issue that Professor Tribe ignores.

His suggestions that the recent decline in the percentage of American workers belonging to unions is due to corporations' spending more than unions on propaganda (p. 202), and that American unions' traditional lack of interest in ideology "has been shaped in large degree by the Supreme Court itself" (pp. 202-03), are unsupported and implausible. And his failure to mention the severe restrictions that the National Labor Relations Board has imposed, and the Supreme Court has upheld, on employers' freedom of speech<sup>34</sup> leaves the reader in the dark about Tribe's view of what the first amendment should mean in the labor field. It also illustrates Tribe's selective use of legal doctrine to support his thesis about the political character of the current Supreme Court. By avoiding mention of the Supreme Court's refusal, in the teeth of the statute,<sup>35</sup> to give employers the same rights of free speech that the Court has given the Communist Party, Tribe avoids having to confront a conspicuous contradiction of his thesis that the Court is a right-wing institution.

### III

Tribe's policy choices seem based on will and emotion rather than evidence and logic. Maybe this is true for everyone, but not everyone is so eager to impose his choices on the community. Further evidence of the emotional and egoistic character of Tribe's constitutionalism is the book's overripe, immodest, and opaque style. Here is one example: "If I succeed in evaporating a cloud here or a mist there and, thus, in displaying more lucidly a broader span of the constitutional horizon

---

33. See Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

34. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and for criticism Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984).

35. See section 8(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(c); *NLRB v. Golub Corp.*, 388 F.2d 921, 926-28 (2d Cir. 1967) (Friendly, J.).

and its curvature, this volume will have achieved most of what I hoped to accomplish by writing it" (p. x). Here is another:

Publishing these essays in the meantime [pending revision of his 1978 treatise on constitutional law, which he describes as "a more global effort: it was an attempt to roll the constitutional universe into a ball and show it as a unified whole"], rather than reducing and polishing them into pieces of that more comprehensive later work, has been a liberation for me. I would not wish to squirrel the essays away until they can be folded into a larger study, one in which they fit elegantly but no longer reflect my freshest thoughts on the issues they seek to treat. I would rather publish them now — rough edges only partly trimmed and links only tentatively forged — in the season of their completion. [p. x].

This is awfully plummy prose ("season of completion," etc.), written by someone who takes himself awfully seriously; and it does not make much sense, either. Since many of the essays published in this book had been published previously in law reviews or elsewhere, the choice was not between collecting them in a book and "squirrel[ing] them away." And why should a reader want Professor Tribe's "freshest" thoughts, unmaturing by reflection? Do they stale so quickly?

Several other characteristics of Tribe's style also deserve attention for the light they cast on his method of constitutional argument:

1. Excessive use of italics is one. I mentioned a page on which twenty-four words are italicized for emphasis;<sup>36</sup> on another page I counted twenty-five (p. 43). Here is one sentence from a different page:

In short, remembering that it is an *amendment* to the Constitution we are considering may be almost as important as remembering that it is a *Constitution* we are, in the end, amending and construing — and remembering that, because *neither* process may be emptied of substance or subjectivity, *both* must engage the judiciary in a more candid and collaborative way than the pretense of proceduralism permits. [p. 28]

Notice, besides the italics, the excessive alliteration ("substance or subjectivity," "candid and collaborative," "pretense of proceduralism permits"), the filler words ("almost," "in the end"), the apparent lack of a verb to go with the third "remembering that," which makes the sentence collapse — and the incongruous "In short" which introduces the sentence.

2. Professor Tribe's writing is plethoric. In the following sentence I have bracketed the words that could be eliminated without loss of meaning:

At stake in [any] such response — particularly if it becomes a [more or less] common reaction to constitutional rulings that [seriously] displease a [popular] majority that finds itself not quite able to overturn them by amendment — is [nothing less than] the survival of a distinctly Ameri-

---

36. See text following note 23 *supra*.



can institution, that of review of legislative and executive action by an independent judiciary [entrusted to enforce the Constitution]. [p. 48]

Take away the superfluous words and you will realize how little is being said. Notice also the use of “distinctly” where Tribe means “distinctively.”<sup>37</sup>

3. Tribe is too fond of metaphor, as in “disarmed, disembodied oracle” (p. 53), “increasingly slender reed” (p. 358 n.250), and the “mythical” [was there, as Herodotus thought, a real?] “Sword of Damocles” that, all on one page (p. 49), hangs, is tested, then falls — then, in most un-Damoclean fashion, is fallen on — and the author wonders whether the Supreme Court would “take the blow lying down.” He makes metaphor a substitute for analysis, as when he says of the anti-abortionists that they would “conscript women . . . as involuntary incubators” (p. 243), “foster involuntary servitude” (p. 244), and make women “donate their bodies to their unborn children” (*id.*). These are arresting (if derivative<sup>38</sup>) ways of characterizing the anti-abortionists’ position, but they create a rhetoric of emotion rather than of meaning. Does Tribe really take these metaphors seriously? Consider the “incubator” metaphor. An incubator does not contribute anything to the genetic makeup of the baby. It is thus an impoverished metaphor for a mother. Tribe gives no evidence of being willing actually to think about the abortion controversy.

4. Legal and academic jargon, “with-it” cliches, and dense nominalizations give the book an air that Tribe might if more self-aware have called “technocratic,” as in “delineate the perimeter which circumscribes” (p. 123 — meaning, “describe”), “manipulable born-again Contract Clause analysis” (p. 182), “mechanical gender-based classifications” (p. 224),<sup>39</sup> “suitably sequenced combination of two different lenses” (p. 248), “Close-Focus Lens: Looking for a Nexus” (p. 249). The last phrase is a subtitle. The titles and subtitles are awful.

---

37. Other, less serious because more common, solecisms are the “hoi polloi,” p. 186, and “schizophrenic,” p. 195. “Hoi” is the Greek masculine plural nominative article, “the”; “the hoi polloi,” the form used by Tribe, means “the the many.” “Schizophrenia” is psychosis; it is not the condition in which one has trouble making up one’s mind or acts inconsistently — the latter being Tribe’s meaning. Of course this is a very common mistake; I’m sure I have made it. But he underscores it by saying, “The response of the Court may be described, without exaggeration, as schizophrenic.” “[W]ithout exaggeration” is, to anyone who knows what “schizophrenia” really means, a comical exaggeration.

38. See, e.g., Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

39. The use of “gender” for “sex,” and the addition of a superfluous “-based” to words like “gender” and (in first amendment law) “content,” are among the uglier bits of contemporary legal jargon. One might expect academics, at least, to eschew them. One might also expect academics to avoid false antitheses (“For a doctrine in its infancy, commercial speech has demonstrated remarkable vigor,” p. 211 — as if infants typically lacked vigor), as well as such gobbledygook as: “In short, the Court indulged in a shell game, first throwing out a circular definition of the limited public forum, then trying to break the circle by noting the acceptability of subject-matter restrictions, and, finally, proceeding to apply minimal scrutiny to alleged viewpoint discrimination,” p. 207.

These faults of style may be accidents of haste or carelessness,<sup>40</sup> but they are not unrelated to the book's substance. They pad and dazzle, and if one stripped them away one would lay bare a slim and unimpressive substance, the literary counterpart to a shaven Persian cat. Also, a writer's style indicates, if not always the quality of his (or her) thought, always the character of his culture. Despite Tribe's antagonism to "technocracy," he himself is not, on the evidence of this book anyway, a person steeped in the humanities. This would not be important if he did not present himself to the reader as a defender of traditional culture against economists and other "technocrats," or if he did not claim to be expounding a new constitutional philosophy. It is his ambition to shape and direct constitutional thinking along new paths that draws the reader's attention to the poverty of his style and to the fact that those 1829 end notes contain few references to the world of thought that exists outside of recent Supreme Court opinions (many drafted by twenty-five-year-old law clerks fresh out of law school) and the professional commentary on them.

So, to complete the list of the things that this book is not, it is not a book by someone who brings to the study of law a perspective beyond that of the intelligent legal practitioner equipped only with the lawyer's technical skills. I do not mean to denigrate those skills, which are essential to constitutional reasoning and enable Tribe to offer some shrewd analyses of individual cases. Only they do not, standing all by themselves, enable him, or anyone, to construct a system of constitutional law. A person who knows only what is in cases is not equipped to make fundamental social choices for us. If Tribe knew more, he would be less confident that he could make such choices correctly. Activism begins in ignorance.

And yet Professor Tribe is, if perhaps not as the dust jacket says the nation's leading scholar and practitioner of constitutional law, certainly a prominent one. The failure of the book is a failure not of a person but of a method; and the method is to use the skills of a lawyer to make political choices for society in the name of a fictive constitution, as if the Supreme Court really were a superlegislature and government by lawyers had, at last, arrived.<sup>41</sup> The failure is a particularly striking one because Tribe disparages the tradition of legal analysis at the same time that he wields its tools. He faults the Supreme Court for illogic and uncandor, often effectively, yet at the same time sug-

---

40. Tribe's constitutional law treatise, *supra* note 19, is much better written than *Constitutional Choices*. On the relationship of bad writing to bad thinking see, e.g., George Orwell's classic essay *Politics and the English Language* (widely reprinted); S. CHASE, *THE TYRANNY OF WORDS* (1938); G. KRESS & R. HODGE, *LANGUAGE AS IDEOLOGY* (1979).

41. See Professor (now Judge) Easterbrook's recent reply to an article by Tribe: Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 627-29 (1985), criticizing Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985).

gests that the test of constitutional doctrine is not its craftsmanship but its political soundness — that the question is not how good a court the Supreme Court is but how good a legislature.

He does not defend this view, so I shall not bother to attack it beyond remarking that although it is inevitable that judges will have political views, it is not inevitable that judges will use them to thwart the political decisions of the elected branches of government. Judging and legislating were not meant to be identical. The failure to appreciate this rather elementary point is the fatal, though not the only, flaw of this book.

The Supreme Court is a committee of lawyers, appointed for life, who are on average no wiser or humbler than Professor Tribe, except insofar as age and institutional responsibility create wisdom and humility in some. For the sake of social peace and stability, let us hope that the Court, whatever the politics of its members, will always hesitate more than the author of *Constitutional Choices* hesitates to translate personal political preferences into constitutional imperatives.

# CONSERVING THE FEDERAL JUDICIARY FOR A CONSERVATIVE AGENDA?†

*Samuel Estreicher\**

THE FEDERAL COURTS: CRISIS AND REFORM. By *Richard A. Posner*. Cambridge, Mass.: Harvard University Press. 1985. Pp. xvii, 365. \$25.

In his new book, *The Federal Courts: Crisis and Reform*, Judge Richard A. Posner, who while on the University of Chicago faculty revolutionized the academic study of law in this country,<sup>1</sup> now takes on the cause of the federal courts of appeals. As others have noted,<sup>2</sup> Judge Posner has really written two books, with the first five chapters describing and analyzing an alleged caseload crisis confronting the appeals courts, and the remaining chapters devoted to his views of the proper role of federal courts in the making of federal constitutional, statutory, and common law. There is no obvious tether connecting the two sections, for (aside from a halting attempt in the sixth chapter) Judge Posner never explicitly suggests that adoption of his conception of the federal judicial process will lessen the burdens on federal appellate judges. Perhaps the search for a unitary theme overstates the author's own objectives, which may simply have been to combine into a single volume his recent musings on the federal courts.

If there is an underlying connective tissue, however, I suspect it lies in Judge Posner's concept of "judicial self-restraint." In a widely publicized article<sup>3</sup> (which re-emerges as the seventh chapter of this book), Posner argues that the truly conservative judge owes no particular fidelity to *stare decisis* or "strict constructionism" — tenets of traditional conservatism. Rather, in cases that admit of no "right answer,"<sup>4</sup> the truly conservative judge should opt for those rules that

---

† Copyright 1986 by Samuel Estreicher.

\* Professor of Law, New York University. B.A. 1970, Columbia College; M.S. 1974, Cornell University; J.D. 1975, Columbia University. — Ed. I want to thank my colleagues Norman Dorsen, Rochelle Dreyfuss, Jeff Gordon, Lewis Kornhauser, Ricky Revesz, Larry Sager, and John Sexton, and Judge J. Harvie Wilkinson for reading and commenting on an earlier draft. The research assistance of Charles King of the New York University School of Law Class of 1987 and the support of the New York University Law Center Faculty Research Program are also gratefully acknowledged.

1. See, e.g., R.A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2d ed. 1977).

2. See, e.g., Monaghan, *Taking Bureaucracy Seriously* (Book Review), 99 HARV. L. REV. 344 (1985).

3. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

4. Posner assumes the existence of "an area in which a judge cannot decide cases simply by reference to the will of others — legislators, or the judges who decided previous cases, or the

minimize judicial interference with the decisions of the elected branches of government. The caseload explosion, Posner intimates, provides an additional reason for adopting the "judicial self-restraint" position. Strong medicine is needed, we are told, for clogged appellate dockets that threaten to undermine the system's capacity to render well-considered, uniform law; procedural tinkering and other "palliatives" will simply not do. What is called for is a "rethinking" of the role of federal courts. The unstated thesis of this book seems to be: the need to husband or "conserve" federal judicial resources requires a truly "conservative" agenda for the federal judiciary.

Although an immensely interesting effort brimming with information and insight, *The Federal Courts: Crisis and Reform* is for a number of reasons ultimately unsatisfying. First, neither the existence of a caseload crisis nor the futility of limited procedural reform is persuasively demonstrated. Second, even the more interesting second half of the book does not offer a fully elaborated presentation of Posner's views on the role of federal courts. Finally, because the author leaves unstated the connection between the first five chapters (and part of the sixth) and the rest of the book, we either have a book without a unifying thesis or one with a thesis only barely intimated and developed.

#### I. DO WE HAVE A CASELOAD CRISIS IN THE COURTS OF APPEALS?

I undertook this review with some trepidation, for I (with John Sexton) have explained at length elsewhere why the Supreme Court faces no workload crisis.<sup>5</sup> A major premise of our study was that the responsibility for correction of error in federal cases lies primarily with the federal courts of appeals (and state supreme courts), and that these courts should also assume a greater role in maintaining a uniform federal law than in the past. If there is a "crisis" in the federal courts — certainly, a widespread perception of students of the federal judiciary — and we have said it is not at the Supreme Court, then surely it must be found in the courts of appeals, if we are not to be held guilty of an elaborate "shell" game.

On one level, the numbers portend a problem of crisis proportions. Much as with the literature on the Supreme Court's caseload, the focus is on the dramatic increase in case filings, which here acquires a

---

authors of the Constitution. Within that area, the judge must bring in his own values and preferences in order to make decisions." Pp. 206-07. This is an "open area of judging, where by definition a correct decision cannot be made without bringing in personal policy preferences." P. 207.

5. See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984). We have recast our study in book form intended for a wider audience, see S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (Yale Univ. Press, forthcoming).

particular urgency because we are dealing with courts of mandatory appellate jurisdiction. Whereas cases filed in the district courts more than tripled from 1960 to 1983, from 80,000 to 280,000, cases docketed at the appellate level during the same period increased eightfold, from 3,765 to 25,580 (pp. 63-65). If this trend continues — and the combined operation of population gain and new federal laws suggest that it will — the surge in filings at the district court level will produce a threefold (or, as the late Judge Henry Friendly predicted, a fourfold<sup>6</sup>) increase in the appellate caseload. Apparently, the declining likelihood of obtaining reversal will not dampen the rate of appeal, for appellate dockets have increased during this period despite declining reversal rates.<sup>7</sup> Given annual growth rates since 1960 of 5.6% in district court filings and 9.4% in appeals court filings, Posner projects<sup>8</sup> that by the year 2000 the district court docket will swell to 700,000 cases and the appellate docket to 136,236 cases (p. 93).<sup>9</sup>

The crisis, Posner tells us, is primarily at the appellate level, for while the number of district judges can be increased at tolerable cost, there is a limit to the system's ability to expand federal appellate capacity, if the courts of appeals are to remain collegial, reflective bodies capable of maintaining a fairly uniform body of law within each circuit. Without apparent empirical justification, he sets the optimal appeals court size at nine judges,<sup>10</sup> to ensure a credible incidence of supervision of panel rulings by the *en banc* court and, secondarily, to preserve an elite position sufficiently prestigious to attract outstanding members of the profession.

For Posner, the crisis is reflected not only in the rise in the average number of signed opinions per judge — from thirty-one in 1960 to

---

6. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 39 (1973).

7. Filings in the courts of appeals have risen from 3,765 in 1960 to 25,580 in 1983, despite a drop in the reversal rate during the same period from 24.5% to 15.9%. Pp. 68-69. Professor Howard's empirical work suggests that circuits with higher rates of appeal tend to exhibit lower rates of reversal. See J.W. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 38 (1981).

8. Posner does qualify this projection: "Of course, these are entirely mechanical extrapolations. Since we do not have a very clear idea of the causes of caseload growth, we cannot predict future growth with any confidence." P. 93. This qualification, does not, however, deter Judge Posner from continued reliance on the prediction of a caseload crisis in framing the arguments made in this book.

9. Increased filings do not necessarily indicate incremental additions to the appellate judge's workload, for the cases may be largely frivolous appeals not meriting extended consideration. See note 20 *infra* and accompanying text. What is needed is a measure of "a case's weighted average difficulty" and a corresponding tally of the rate of growth of difficult appeals. See Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 *UCLA L. REV.* 432, 436 (1976).

10. Granted, there has been no systematic analysis of the difference between a 9-man and an 11-man court (the objection to an even number is obvious), though there is an interesting literature on the psychology of small-group interaction that might be consulted. . . . But the fact that no one proposes to enlarge the Supreme Court beyond nine is pretty good evidence that a greater number is unwieldy for judicial deliberation.

P. 100 n.2 (citations omitted).

forty-two in 1983 (p. 71) — but more importantly in the increasing resort to case-management devices which threaten radically to transform the courts of appeals into relatively unaccountable bureaucracies. From judges who do their own work with an acute sense of accountability not only to their brethren on the court but to the readers of their opinions, we are inexorably moving to a world in which decisionmaking is delegated to others — visiting judges, law clerks, or circuit staff attorneys — and decisions either are bureaucratic efforts or take the form of unpublished memoranda or *per curiam* rulings not exposed to public scrutiny.

This portrait of crisis, while not inherently implausible, is certainly overdrawn and, in some places, entirely speculative. On the face of things, an average of forty-two signed opinions a year per judge seems quite manageable. This is about twice as many signed opinions as are produced on the average by a Supreme Court Justice, who is expected to produce fully elaborated pronouncements of national law. By contrast, the court of appeals judge decides cases within a more restricted domain of precedent (as she is not expected to overrule or reconsider Supreme Court law) and normally renders opinions relatively unencumbered by the expectations of solemnity and enduring significance that many attach to the ruminations of the High Court. Though a modest increase over the 1960 output, forty-two signed opinions a year, standing alone, offers no measure of overload unless it can be demonstrated that circuit judges were working at full capacity in the earlier period. And the examples of Judge Posner and his colleague on the Seventh Circuit, Frank Easterbrook, as well as those of Judges Jon Newman and Ralph Winter on the Second Circuit and Harry Edwards, Antonin Scalia, Ruth Ginsburg, Patricia Wald, and Robert Bork on the D.C. Circuit (a court that daily deals with quite complicated regulatory cases), suggest that time may be available for speeches, legal scholarship, and some part-time teaching.<sup>11</sup>

Judge Posner wisely premises the overload argument on other indicia: the increasing use of visiting judges and the accompanying prospect of inconsistent law within the same circuit; the expansion in the number of “elbow clerks” and other substitute decisionmakers; and the apparently surging propensity to dispose of ever-larger portions of the appellate docket by unpublished memoranda or *per curiam* opinions. These developments, Posner warns, portend a future in which appeals judges will not be able to supervise meaningfully the district courts while ensuring consistent law within the circuit and producing opinions with a high level of craftsmanship.

---

11. Certainly, if judges have the time they should be encouraged to engage in such activities, which provide intellectual replenishment and an important service to the legal community. Nevertheless, the fact that some of our most highly regarded judges do find the time for these worthwhile pursuits suggests that perhaps appellate dockets are not quite as pressing as Judge Posner suggests.

Posner has identified important problems that deserve further study, but the picture may not be as gloomy as the one he has painted. The literature he cites on the use of visiting judges<sup>12</sup> and intracircuit inconsistency<sup>13</sup> is largely impressionistic and spotty; one finds no conclusive demonstration that such inconsistency regularly occurs, or indeed that the situation has worsened over the last quarter of a century.

It is a characteristic of this book that Posner fails to explore in any serious way the possibility that incremental reforms might alleviate whatever problem is thought to exist. Apparently, some circuits have taken steps to review the selection of visiting judges as a means of maintaining quality control.<sup>14</sup> The infrequency of *en banc* consideration in most circuits does suggest that, to an undesirable extent, ad hoc three-member panels operate with little accountability to the circuit as a whole. Here, too, there are steps that can be taken short of major surgery. The practice followed in some circuits of circulating panel rulings before they are handed down should be required in all circuits. As John Sexton and I propose in our forthcoming book,<sup>15</sup> procedures could be developed to enable parties complaining of a panel ruling that has created a conflict within the circuit to seek rehearing not by the same panel but rather by a sitting motions panel or an entirely new panel. Lawyers in the office of the circuit executive might also be charged with the responsibility of screening such complaints for rehearing by the second panel. Whatever the merits of these ideas, it is plain that Posner assumes the existence of a problem of crisis proportions without convincing proof, and shows only passing interest in evaluating reforms that would not require radical restructuring of the system.

The same can be said about the use of law clerks and reliance on

---

12. As Posner acknowledges, the only empirical study cited on the use of visiting judges reports no decline in quality of decisionmaking. See p. 101 & nn.5-6 (discussing Green & Atkins, *Designated Judges: How Well Do They Perform?*, 61 JUDICATURE 358 (1978)). As for the extent of reliance on such judges, Posner found by sampling from reported decisions that visiting judges sat on 31% of the panels in 1983, compared to 22% in 1960. Emulating Posner's methodology, I looked at the reported decisions in volume 763 of the Federal Reporter, 2d (1985), and found that 52 of 145, or 35.8%, of the reported decisions involved the participation of judges sitting by designation; by contrast, less than five percent of the reported decisions in volume 342 of the Federal Reporter, 2d (1965), involved the use of such judges. In my 1985 sample, I found only five split decisions involving the participation of such judges, three of which were dissents from the panel decisions — a finding consistent with Green & Atkins, *supra*, at 369.

13. The only citation offered by Posner is Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979), which offers a few examples of inconsistency in the Ninth Circuit. This unwieldy court of appeals having 28 active judges may also be a special case. See note 23 *infra* and accompanying text.

14. Chief Judge Feinberg of the Second Circuit reports that he personally decides who may serve as a visiting judge, and that, under 28 U.S.C. §§ 291(a) & 292(d), he must present a "certificate of necessity" and secure the approval of the Chief Justice of the United States before he can utilize judges from outside the circuit. See Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 370, 380 (1984).

15. See S. ESTREICHER & J. SEXTON, *supra* note 5.



unpublished opinions. Discounting for any myopia to which I may have fallen prey as a law clerk, I find unpersuasive the "judicial bureaucracy" literature<sup>16</sup> to which Posner adverts, which equates the law clerk phenomenon with an emerging bureaucratic style of opinion writing. True, many opinions of federal judges suffer from a deadly style and surfeit of footnotes. Law clerks, typically unseasoned lawyers, are partially to blame; the availability of word processors and computerized legal research also may be culpable.

Before these stylistic problems can be ascribed to a presumably crushing workload, one must demonstrate that the situation was indeed better in earlier times, when appeals judges faced less demanding dockets. My impressionistic sense of the opinions in the Federal Reporter volumes of the 1950s and early 1960s is that, with relatively few exceptions, they were shorter in length but also perceptibly short of analysis and explication.

I suspect that given the usual criteria of judicial appointment, few chosen for article III status are consummate masters of the art of opinion writing. The likes of Learned Hand, Henry Friendly, and Harold Leventhal are few and far between in any era. Typically, appointees to the federal bench come from the ranks of senior partners in law firms or holders of important elective or appointive government positions, who long ago lost the knack or taste for writing first drafts and who find congenial the availability of bright, recent law graduates capable of generating editable, well-researched first drafts. Indeed, even if the federal appellate caseload were halved, one should expect no dramatic change in the style of opinions or the extent of footnoting.

The data on the extent to which cases are decided per curiam or by unpublished opinions appears somewhat more troubling.<sup>17</sup> Here, too, Judge Posner cannot say that the present situation is terribly different

---

16. See, e.g., J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981).

17. Judge Harry Edwards of the D.C. Circuit reports that in the twelve months preceding June 30, 1982, 46% of the 23,760 appeals terminated in the federal courts of appeals were disposed of without oral argument or submission of briefs; and in 54% of those cases, with no statement of reasons whatsoever. See Edwards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 894 (1983). His colleague, Judge Patricia Wald, similarly reports that in 1982, 51.2% of the D.C. Circuit's dispositions were by order or judgment accompanied by brief unpublished statements. See Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 782 n.38 (1983).

The literature on unpublished appellate opinions is extensive, critical, and largely unilluminating. See, e.g., Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) [hereinafter cited as *An Evaluation of Limited Publication*]; Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

from the "one-liner" practice of the past.<sup>18</sup> Certainly, the single right of appeal provided by the federal system must ring hollow to litigants who learn that their carefully wrought objections to the judgment below have been rejected without even the solace of a statement of reasons. It was in part the desire to give the parties some statement of reasons in cases previously disposed of by unilluminating one-liners that led many of the circuits to authorize disposition by unpublished memoranda that may not serve as precedent in future cases. Judge Posner is certainly correct that some undetermined number of these cases merits a full-fledged opinion that would benefit from the accountability inherent in openly announcing law of the circuit, and that requiring publication in all cases is impossible under current (and maybe past) caseloads.

One must question, however, Posner's apparent premise that universal publication is necessarily a good thing because it will add to the existing "stock of precedents."<sup>19</sup> Other than the specious allure of the market analogy, it is not clear that publishing opinions in the overwhelming percentage of cases presently disposed of by unpublished memorandum or one-liner would be a useful expenditure of anyone's time and energy. Appeals courts decide essentially two different types of cases: one calling simply for resolution of a narrow, often fact-specific dispute of little interest to anyone other than the immediate parties; the other requiring a ruling on some unsettled point of law. For the former, a statement of reasons in the form of an unpublished memorandum that is circulated to the full court and is available to the public suffices to ensure a responsible decision; there is no useful law-declaration, exegetical function in requiring publication. Full-blown opinions constituting binding precedent are necessary only for the latter category of cases, where the judge's role is not only to explain the exercise of power but also guide the development of the law. Yet, neither Posner nor the authorities he cites has shown that the courts of appeals are failing to meet their responsibilities in those cases. Based on my experience as a law clerk on the D.C. Circuit in 1975-1976, I suspect that aside from plainly frivolous appeals, the lion's share of summary dispositions occurs in cases in which the issue involves the application of settled circuit law to particular facts, or in which appeals court review is only one additional check on a decision that already has been exposed to extensive, possibly multi-tiered review, as would be true of administrative agency adjudicatory proceedings.<sup>20</sup>

---

18. Neither Posner nor Professors Reynolds and Richman, *supra* note 17, attempt such a comparison.

19. *See, e.g.*, pp. 125-26.

20. *See* Leventhal, *supra* note 9, at 441 ("Summary dispositions without printed opinions, which account for over half of our court's disposition after consideration, may be used wisely and properly. They expedite the process and help delay the swelling of law libraries. . . . It bears repetition that summary dispositions, preferably with some citation or indication of reasons, for

Moreover, it remains to be demonstrated that even if there were time to write published opinions in all cases, more decisional law in such cases would necessarily promote predictability or doctrinal coherence. Indeed, the converse may be true, for more opinions may create new points of divergence and yet additional pleas for harmonization. This may be a situation in which, contrary to Posner's usual microeconomic assumptions, there is a law of diminishing returns: more is not necessarily better.

The fifth chapter, entitled "Palliatives," rounds out the portrait of a system in crisis. Here, Judge Posner offers a number of interesting suggestions — experimentation with modest district court filing fees and imposing attorneys' fees on losing parties — as well as the old standby, abolition or limitation of diversity jurisdiction (by raising the amount-in-controversy requirement to \$50,000 and restricting federal-court access to nonresidents of the forum state).<sup>21</sup> But as these measures can at best provide only modest relief, he goes on to evaluate proposals for more fundamental change. Specialized federal courts of appeals offer the promise of diverting cases away from the circuit courts. Except for areas of limited public controversy such as tax law, Posner argues that they are distinctly less desirable than courts staffed by generalist judges, who are likely to be more faithful to the original spirit of the laws and less likely to be the captive of interest groups ascendant at a particular time. It would be better, he urges, to strengthen the appellate process within the agencies themselves.<sup>22</sup> As for proposals for a national court of appeals, which conceivably might

---

the bulk of cases iners that opinion time can be devoted to cases that really require extended reflection and analysis.").

Even Reynolds and Richman, though critics of limited publication, "discovered no widespread 'hiding' of law-declaring opinions": "Although nonpublication of law-declaring opinions does occur, our review of the opinions in our sample has convinced us that it is not a major problem with limited publication. The handful of examples we discovered constituted less than 1% of the nearly 900 opinions in our sample." See Reynolds & Richman, *An Evaluation of Limited Publication*, *supra* note 17, at 608, 609.

21. Apparently, diversity cases are relatively time-consuming and difficult to process on the district-court level, but they represent relatively easy cases to dispose of on appeal, usually without need of a published opinion. Hence, Posner suggests, eliminating diversity jurisdiction would cut 20% of the district courts' caseload, but "might have a smaller impact on the workload of the courts of appeals than is implied by the fact that 14 percent of the cases appealed to those courts in 1983 were diversity cases." P. 139.

22. Posner urges curtailment of federal appellate review of agency adjudications that already have been subject to internal agency review (pp. 161-62), a proposal difficult to square with his opposition to specialized federal courts of appeals (pp. 147-60) and his acknowledgment that agency review "very often is performed in so perfunctory and unconvincing a manner that the review has little credibility with many federal judges and has to be repeated by them." P. 161. The integrity of agency adjudications, in my view, depends on the existence of federal court oversight, even if this rarely results in published opinions. Judge Friendly's more limited 1973 proposal preserved "one judicial look at the action of a disinterested governmental agency." He recommended that where review of agency action lies in the district court and the district court has affirmed, further review by the court of appeals would be possible only by leave of that court. See H. FRIENDLY, *supra* note 6, at 176.

provide a means of supervising ad hoc circuit panels and promoting greater uniformity of federal law, we are told that this cure for inter-circuit conflicts would not itself stem the flood of appellate cases, and would, moreover, eliminate desirable competition among the circuits in the formulation of rules of national law (pp. 162-66).

## II. PROPOSALS FOR THE CIRCUITS IN CRISIS

Having demonstrated the crisis and exposed conventional reforms as "palliatives," Judge Posner opens his sixth chapter:

The difficulty of solving the federal courts' caseload problems by the measures considered in the last chapter invites a different kind of approach . . . — a more general reconsideration of the federal judicial process. Of course, such reconsideration may have value apart from its contribution to alleviating the caseload crisis; but the crisis gives this kind of fundamental analysis an urgency it would otherwise lack. [p. 169]

What unifies the proposals Posner is willing to take up as part of this "more general reconsideration" (apart from some useful suggestions in Chapter Eight for promoting a greater sense of institutional responsibility among circuit judges) is that they involve either reducing the role of federal courts in administering federal law or reducing the role of federal law.

Caseload reduction is a rather odd basis for a radical redistribution of the respective roles of federal and state courts or for major changes in federal substantive law. Such measures would seem weakly justified by caseload considerations alone. At the very least, one would require a more powerful demonstration of the existence of a crisis than Posner has ventured to offer. Even then, as Owen Fiss has asked, if the system is really in danger of overload, is it not the better course to add circuit judges (and, possibly, split up further the existing circuits in order to facilitate rehearing by the *en banc* court)?<sup>23</sup> Would, say, a doubling of the existing circuit judgeships so cheapen the coin<sup>24</sup> that men and women of distinction would not be attracted to the federal bench?

Even on its own terms, Judge Posner's "more general reconsideration" offers little, if any, caseload relief. In Chapter Six, he subjects virtually all of federal law to an "economic federalism" test. He finds

---

23. See Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1463-64 (1983) (increasing the number of judges may dilute institutional responsibility but preserves individual responsibility for decisionmaking); H. FRIENDLY, *supra* note 6, at 41 & n.131 (arguments against single-state circuits are not particularly compelling, for the chief virtue is political not geographic diversity).

24. This is Justice Rehnquist's metaphor. See Rehnquist, *Are the True Old Times Dead?* (Mac Swinford Lecture at the University of Kentucky, Sept. 23, 1982), cited in Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 10-11 (1983).

that federalization of the law has occurred — in areas such as bank fraud and civil rights — despite the absence of any danger of states discriminating against nonresidents or otherwise imposing not fully internalized costs on out-of-state actors — what Posner calls “interstate spillovers” or “externalities.” Applying a similar test for determining whether the federal courts have to be involved in the enforcement of federal law, he finds that state courts can be relied upon to enforce vigorously federal concerns having counterparts in familiar common law concepts (*e.g.*, federal fraud crimes), federal rules that seek to ferret out innocence in criminal prosecutions, and federal norms that protect the civil rights of individuals who enjoy competitive access to the state political system (*e.g.*, procedural due process claims by state employees and age discrimination suits). Yet, even “[i]f the theory were applied rigorously, perhaps 20 percent of the federal district courts’ cases, and 21 percent of the courts of appeals’ cases, would be reassigned to the state courts. The resulting relief of federal caseload pressures, though welcome, would only postpone the ultimate crisis a few years” (p. 189). Moreover, Posner acknowledges, a rigorous application of “economic federalism” might even argue for expansion of federal responsibility over certain areas now left wholly to the states, such as product liability suits against interstate manufacturers and distributors.

There are additional problems with the “economic federalism” approach. One is the obvious difficulty of any reform proposal that spells relief for the federal courts at the expense of state courts which face even more demanding dockets.<sup>25</sup> Posner’s answer is candidly elitist: any accretion to state dockets will not detract significantly from the quality of decisionmaking by state courts because (i) state systems are larger and can absorb these additional federal cases, and (ii) “attending to the quality of the federal court system is a more urgent priority than attending to the quality of the state systems — which anyway is something that only the states can do effectively” (pp. 134-35).

On the doubtful assumption that state courts would not be terribly burdened by the proposed reallocation of responsibility, Posner slights some of the other important reasons for making federal courts principally responsible for the enforcement of federal laws. Federal rights necessarily displace state regulation and, certainly with respect to the civil rights statutes which Posner identifies as prime candidates for diversion to the state courts, they impose norms that may be politically unpopular in the locality or that impose costs on actors — such as private businesses or state governments — who may be particularly

---

25. See, *e.g.*, Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 674-75 (1983) (abolition of federal diversity jurisdiction should be accompanied by corresponding tradeoff limiting state responsibility for enforcement of federal rights).

influential in the area. Federal courts staffed by individuals enjoying lifetime tenure are inevitably going to be more receptive to the assertion of claims based on such rights. Federal courts are also more likely to be familiar with federal law, conditioned to viewing federal law as a unitary system, and hence more attentive to pronouncements in other circuits. Indeed, adoption of Posner's approach would create considerable pressure on the Supreme Court to police actively the administration of federal law in state courts, diverting it from its more central lawmaking function — perhaps ultimately requiring a national court of appeals, which Posner opposes.

The coda to Chapter Six ("Federalism and Substantive Due Process") and all of Chapter Seven give us Posner's views on reducing the role of federal courts in constitutional adjudication. The theme here is "judicial self-restraint": in cases of "open texture," where the available decisional materials yield no "right answer," the judge who truly believes in self-restraint will defer to the decisions of the politically accountable branches. Posner never clearly comes out and says that judicial self-restraint, so understood, is always the right approach, and thus never really mounts a defense of it. Indeed, he seems somewhat ambivalent, arguing at times that "judicial self-restraint is a contingent, a time-and-place-bound, rather than an absolute good" (p. 211); arguments based on the undemocratic character of the judiciary do not justify deference; and, indeed, "restraint is only one factor in responsible judicial decision making" (p. 220), for truly great judges like Oliver Wendell Holmes showed greatness in their responsiveness to "the big ideas" of their time (p. 222).

It is difficult to come away with very much from this discussion, other than a definitional advance over more traditional views of "self-restraint" that were premised on respect for *stare decisis* and notions of strict constructionism. As a theory for what courts should do in hard cases, it is incomplete and, in its present form, unpersuasive. Posner concedes that the framers of the Constitution wanted "a nondemocratic branch" to police the democratic legislature (pp. 212-13), that the Constitution contains several openly textured provisions which require judges to exercise discretion rather than decide cases "simply by reference to the will of others" (pp. 206-07), and that other reasons conventionally given for deference, flowing from considerations of institutional competence, carry little weight. Yet, Posner never really tells us why self-restraint in his separation-of-powers sense is the preferred approach, save where judges are permitted to bring wayward legislatures and executives into conformity with the "big ideas" of the age. The reason cannot be political conservatism in the usual sense, for, as exemplified by the writings of his former colleague, Richard Epstein, a political agenda would argue for activist enforce-

ment of particular norms.<sup>26</sup>

I suspect — and it is only a suspicion, for Judge Posner does not come and say it in so many words — that the caseload crisis is being offered as an unstated yet powerful additional reason for self-restraint. An overburdened federal judiciary should not make more work for itself by overriding the actions of the politically accountable branches in “open texture” cases; restraint thus not only advances separation-of-powers values but also frees up the docket. If so, we are being offered a peculiarly weak argument for reading the fundamental text of our society in a particular way. We are also not likely to make much of a dent in the purported caseload crisis.

### III. POSNER’S MUSINGS ON THE FEDERAL JUDICIAL CRAFT: THE CASE OF STATUTORY INTERPRETATION

The remainder of the book has even less to do with relieving appellate dockets. Rather, these chapters present Judge Posner’s views on the proper way to read statutes and the Constitution. He assumes that his proposals have been adopted and the caseload crisis has subsided:

If the proposals advanced in Chapters 5 through 8 were adopted, we would be some way toward solving the federal court’s caseload crisis; it would then be possible to move on to those problems that would exist even if the caseload pressures were no greater today than they were 25 years ago. [p. 261]

Time and space do not permit a discussion of all that is interesting in these concluding chapters. My focus will be on Posner’s view of the judge in statutory cases.

On one level, Posner adopts an “interest-group” conception of the legislative process, similar to that of his colleague Frank Easterbrook.<sup>27</sup> He is quite skeptical of the ability or desire of legislators to promote the public interest, other than as a serendipitous by-product of political logrolling. Departing from the Pound-Landis school,<sup>28</sup> he states that courts are wise not to reason from one statute to another, “if a realistic view of the legislative process is taken” (p. 268); that resort to legislative history should go no further than statements of the sponsors’ intentions; and that generally private rights of action should not be judicially implied, for often the legislative compromise involves

---

26. See, e.g., R.A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); see also B.H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

27. See Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983). Easterbrook’s writings are much influenced by the work of George Stigler. See G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

28. See Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886 (1930); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

the deliberate creation of rights without effective enforcement mechanisms. In a particularly effective discussion, he urges disregard of many of the conventional canons of construction, because they impute an unrealistic rationality to the legislative process. Like Easterbrook's writings, this approach supports strict constructionism for statutes. As the product of legislatures is no more than compromises between competing interest groups, the job of the courts is simply to implement the deal that was struck and to go no further.

Posner's views, on further reflection, appear to be more textured, more sophisticated than Easterbrook's. In categorizing statutes, he is willing to find that statutes might be directed to the "public interest" not only in the economic sense but also "in terms of some widely-held conception of the just distribution of wealth" (p. 265), as in the case of progressive taxation; and some statutes of the "public sentiment" variety may ultimately be found in the public interest but cannot now "be justified on economic or conventional equity grounds, but perhaps only because not enough is known about [their] consequences" (p. 266).

More significantly, in offering his alternative to interpretation based on canons of construction, Posner seems to be suggesting something akin to the Hart-Sacks Legal Process school.<sup>29</sup> The first stage for Posner is "the method of imaginative reconstruction": "the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him" (pp. 286-87). If this method fails to yield a clear answer, the second stage asks the judge to come up with "the most reasonable result in the case at hand — always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge's, that should guide decision" (p. 287). Despite the "obvious affinities" between his methodology and the Hart-Sacks "attribution of purpose" approach (p. 288), Posner cautions that his point of departure is to recognize the role of "interest groups, popular ignorance and prejudice" and urge the judge to follow the lines of the legislative compromise, if discernible — in short, "to implement not the purposes of one group of legislators but the compromise itself" (pp. 288-89).

Judge Posner is certainly a more muted critic of the legislative process than Professor Posner.<sup>30</sup> His present views, though more appropriate to the judge's modest office, are difficult to square with the "interest group" model of legislation that he otherwise espouses. If statutes are no more than political logrolling, why should judges engage at all in "imaginative reconstruction"? And certainly when this

---

29. See H. Hart & A. Sacks, *The Legal Process* 1144-74 (1958) (unpublished).

30. Compare R.A. POSNER, *supra* note 1, at 408-17.



technique fails to provide an answer, should not the judge who takes a "realistic" view of the process simply declare that the case is beyond the "statute's domain," rather than attempt to come up with a "reasonable result," which presumably was no concern of the legislators in the first place?

There may be here the seeds of an interesting reconception of the legislative process — one that better reflects the fuzzy interplay of "interest group" pressures and "public interest" aspirations which informs most legislation, and one that assigns to judges a role that maximizes the influence of the latter.<sup>31</sup> But the discussion is too summary and too uncritical of "interest group" premises — ultimately, the reader is left in the dark.

Given the book's overall theme, it is also surprising that Posner does not explain how the caseload crisis should inform the process of statutory interpretation. This would seem an obvious place to have attempted a linkage between the two books he has written, yet we are left only with questions. For example, should the securities laws be construed to reach instances of fraud not directly affecting the operation of markets, where such a reading will create additional work for federal courts?<sup>32</sup> How should courts deal with claims for extending avowed "public interest" measures that delegate decisionmaking to, and measurably expand the business of, the federal courts, such as the Sherman Act<sup>33</sup> or 42 U.S.C. § 1983?<sup>34</sup> Are caseload considerations ever an appropriate basis for declining to extend a statute's reach?

In sum, Judge Posner does not deliver on the book's subtitle: the "crisis" in the courts of appeals is unproven, and the "reform" offered has little to do with ameliorating the crisis. Posner has written a probing work on the "federal courts," but one lacking a coherent thesis on the proper role of courts in federal constitutional, statutory, and common law cases.

---

31. For an interesting recent attempt, see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

32. See, e.g., *Yoder v. Orthomolecular Nutrition Inst.*, 751 F.2d 555 (2d Cir. 1985) (application of antifraud provisions of securities laws to employment disputes).

33. See, e.g., *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). See generally Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

34. See, e.g., *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

# STATE CONSTITUTIONAL LAW: FEDERALISM IN THE COMMON LAW TRADITION

*Ellen A. Peters\**

DEVELOPMENTS IN STATE CONSTITUTIONAL LAW. Edited by *Bradley D. McGraw*. St. Paul, Minn.: West Publishing Co. 1985. Pp. xx-iii, 335.

In *State v. Jewett*, decided last summer by the Supreme Court of Vermont, that court confronted a problem that has become all too familiar to state courts in recent years: “[A] state constitutional issue has been squarely raised, but neither party has presented any substantive analysis or argument on this issue.”<sup>1</sup> The absence of analysis or argument, the court held, constituted inadequate briefing and deprived the court of the record it needed to address the proper ambit of the applicable state constitutional provision. Perhaps because the case involved an appeal from a criminal conviction, the court did not simply decline to consider the issue but instead ordered supplemental briefs. Counsel were directed to inform themselves and the court about historical data, textual analysis, case law from other states, and economic, sociological, and ethical materials that might illuminate the relevant state constitutional provision. Among the resources to which the court directed counsel was *Developments in State Constitutional Law*.

*Developments in State Constitutional Law* is a collection of essays delivered at a conference held in March 1984 in Williamsburg, Virginia. The conference was organized by the Conference of Chief Justices, the National Center for State Courts, and the Marshall-Wythe School of Law of the College of William and Mary. Its purpose was to assist state courts in an area where the law has been, in the words of Chief Justice Edward Hennessey of the Supreme Judicial Court of Massachusetts, “disjointed, uncoordinated, and uncommunicated.”<sup>2</sup> The essays produced for the conference should indeed point state courts in the direction of a more sophisticated inquiry into the role properly to be assigned to state constitutions as they emerge from the

---

\* Chief Justice, Connecticut Supreme Court. B.A. 1951, Swarthmore College; LL.B. 1954, Yale Law School. Chief Justice Peters was a regular member of the faculty of the Yale Law School from 1956 to 1978 and an adjunct faculty member from 1978 to 1984. — Ed.

1. *State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985).
2. McGraw, *Preface* (p. vii).

long shadow cast, for the last sixty years, by the Constitution of the United States. Unavoidably, *Developments*, by its emphasis on the general, systemic consideration of the underlying issues and arguments, leaves unresolved many of the specific problems that an emergent state constitutional law poses for state courts. It is therefore especially noteworthy that the essays hold out promise for the preparation of additional resources in the future, since they signal a revival of interest in the subject of state constitutions by the scholarly community.<sup>3</sup> The dearth of scholarly analyses, due chiefly to the preoccupation of constitutional scholars with the work of the United States Supreme Court interpreting the United States Constitution,<sup>4</sup> has unquestionably increased the difficulties that state courts have encountered in their nascent efforts to take state constitutional rights seriously.

Because the principal objective of the conference was to heighten the consciousness of the bench and the bar about state constitutions, it is useful briefly to summarize the considerable light which the essays shed on the present state of state constitutional law.<sup>5</sup> As is typical when many contributors address the same overall topic, the essays tend to overlap. Following the lead of Professor A.E. Dick Howard's excellent introductory overview,<sup>6</sup> I shall therefore focus on the essayists' joint contributions rather than on each essay by itself.

An important item on the conference agenda was the identification of existing resources that serve to assist in the interpretation of state constitutions. Unanimously persuaded of the legitimacy of independent state constitutions and of the capacity of state supreme courts to implement their provisions, the essayists urged state judges to cast a wide net. In the words of Ronald Collins, "state law must be asserted, by bench and bar, as if it actually were *law* in the sense that it imposes limits on government [that are] independent of those mandated by the

---

3. The faculty essayists are Ronald K.L. Collins, Adjunct Professor of Law, Willamette University; A.E. Dick Howard, White Burkett Miller Professor of Law and Public Affairs, University of Virginia; William W. Greenhalgh, Professor of Law, Georgetown University Law Center; James C. Kirby, Jr., Professor of Law, University of Tennessee; Sanford Levinson, Professor, University of Texas School of Law; Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law; and Robert F. Williams, Associate Professor of Law, Rutgers University School of Law, Camden. The other essayists are distinguished state jurists: Justice Shirley A. Abrahamson, Wisconsin Supreme Court; Justice Hans A. Linde, Oregon Supreme Court; Justice Stanley Mosk, California Supreme Court; Justice Stewart G. Pollock, New Jersey Supreme Court; and Justice Robert F. Utter, Washington Supreme Court.

4. Collins, *Reliance on State Constitutions: Some Random Thoughts* (pp. 5-6).

5. To supplement the substantive analyses of the various essays, many of which are extensively footnoted, *Developments* includes a comprehensive bibliography entitled "State Constitutional Law Resources" (pp. 317-35). In addition, Professor Greenhalgh's essay concludes with a topic-by-topic list of state court cases that have interpreted state court constitutions to provide criminal defendants greater protection than they are currently afforded under the federal constitution. Greenhalgh, *Independent and Adequate State Grounds: The Long and the Short of It* (pp. 222-34).

6. Howard, *Introduction: A Frequent Recurrence to Fundamental Principles* (p. xi).

federal Constitution.”<sup>7</sup>

Analysis of a state constitutional provision, Justice Robert F. Utter suggests, involves a critical examination of text, an inquiry into intent, and an appraisal of current values.<sup>8</sup> With regard to textual analysis, a number of essayists caution against the ready assumption that state constitutions should be read as sharing an identity of design with the federal Constitution.<sup>9</sup> It unfortunately always bears repeating that close reading of particular language is essential to informed understanding.<sup>10</sup> Many state constitutions contain provisions, such as those conferring rights to public education,<sup>11</sup> to environmental protection,<sup>12</sup> and to equal protection of the laws without regard to “ancestry, national origin, sex or physical or mental disability,”<sup>13</sup> that have no federal counterparts. Other state constitutional provisions may bear a misleading linguistic similarity to federal provisions drafted for different purposes at a different time in history.<sup>14</sup> Even when the language of the state and federal constitutions is identical, state courts should not reflexively rely on federal precedents to the exclusion of considered inferences drawing on local historical, political, and social factors. Instead, state courts should consult the precedents of sister states construing similar state constitutional provisions, just as state courts have always looked to the law of other states for new common law developments in torts and contracts and property.

Given the indeterminacy of constitutional language, state courts will frequently want to inquire into the intent of those responsible for its drafting or adoption. State constitutional conventions have not regularly spawned state equivalents of *The Federalist*,<sup>15</sup> although tempo-

7. Collins, *supra* note 4 (p.3; emphasis in original); see also Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights* (pp. 239-45).

8. Utter, *supra* note 7 (pp. 250-61).

9. Collins, *supra* note 4 (p. 6); Linde, *E Pluribus — Constitutional Theory and State Courts* (pp. 278-81); Utter, *supra* note 7 (p. 248).

10. Collins, *supra* note 4 (pp. 5-7). The general aversion to the careful reading of statutes, and by extension of constitutions, is noted in Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 998-1000 (1982).

11. For a series of Connecticut cases seeking to define rights under Connecticut's constitutional guarantee of free public education, CONN. CONST. art. VIII, § 1, compare *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) (*Horton I*); *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982) (*Horton II*); and *Horton v. Meskill*, 195 Conn. 24, 486 A.2d 1099 (1985) (*Horton III*) (all illustrating an expansive view of art. 8, § 1), with *Campbell v. Board of Educ.*, 193 Conn. 93, 475 A.2d 289 (1984) (illustrating a more restrictive reading of art. 8, § 1, relying in part on analogies drawn from federal constitutional precedents). See generally Comment, *Academic or Disciplinary Decisions: When is Due Process Required?* *Campbell v. Board of Education*, 6 U. BRIDGEPORT L. REV. 391 (1985).

12. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright* (p. 146).

13. CONN. CONST. amends., art. XXI.

14. Some state constitutions in fact antedated the federal constitution. Howard, *supra* note 6 (pp. xii-xiii).

15. Linde, *supra* note 9 (p. 294).

rally proximate judicial opinions occasionally may reflect the contemporaneous understanding of recently adopted constitutional language. In the absence of useful precedents about the meaning of individual provisions, courts must look to the agenda of the constitution as a whole in the context of the historical and sociological issues that occupied center stage at the time of ratification. As Professor Robert Williams notes, some state constitutions contain constitutional guarantees that were intended as principles of government rather than as rights appropriate for judicial enforcement. Constitutions written during the Jacksonian era, designed to protect against legislative grants of special privileges to favored minorities, do not carry the same meaning as do constitutions concerned about governmental discrimination against minorities.<sup>16</sup> State constitutions thus exhibit much greater diversity in origin and in agenda — some were intended, for example, to facilitate acceptance into the union<sup>17</sup> — than we are accustomed to contemplate from a federal vantage point.

State constitutions must, furthermore, be construed to relate open-ended constitutional language to modern-day reality. The insights derived from historical analysis may be inconclusive or may be irrelevant to conditions that no longer resemble those that were contemplated when the constitution was promulgated. In such circumstances, state courts, operating within the proper, albeit indefinite, boundaries of judicial restraint, should interpret their constitutions to enable the state's constitutional law to reflect modern values. Although state constitutions are more readily amended than is the federal constitution,<sup>18</sup> state judges bear an independent responsibility for making state constitutions adaptable to current conditions.

Even this brief summary should make it clear that the *Developments* resource catalogue still requires a good deal of innovative research and thought for the supplemental briefs in *State v. Jewett*.<sup>19</sup> Recalling Connecticut's troublesome state constitutional cases of recent years, I must observe that the necessarily generalized instruction given by *Developments* would not have provided specific guidance for answers to such questions as competing local and state claims for funding of public school education or conflicting interests of political speech and private property at large shopping centers.<sup>20</sup> That is not

---

16. Williams, *Equality and State Constitutional Law* (pp. 76-77).

17. Utter, *supra* note 7 (p. 244) (describing the circumstances surrounding the state of Washington's Constitutional Convention of 1889).

18. The manner and the consequence of the state amendment process are discussed in Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?* (pp. 175-82), and in Linde, *supra* note 9 (p. 291).

19. 500 A.2d 233 (Vt. 1985); see text accompanying note 1 *supra*.

20. In *Horton III*, 195 Conn. 24, 486 A.2d 1099 (1985), the Connecticut Supreme Court struggled to devise a standard of review for legislative response to a state-created right to public education that would accommodate the vindication of a right that had been denominated fundamental in *Horton I*, 172 Conn. 615, 376 A.2d 359 (1977), and yet recognize the political realities

surprising because even in federal constitutional law, except for inquiries into the legitimacy of judicial review, the relevant point of reference is not constitutional law writ large but rather the law of the commerce clause or of the first amendment, or even the law of free exercise of religion or of free speech within the first amendment.<sup>21</sup> Because of generations of neglect — for which state courts undoubtedly bear a great deal of the responsibility — state constitutional law is still in its infancy. There are as yet few areas in which state constitutional learning has produced definitive legal models.<sup>22</sup>

In light of the relative sparsity of state constitutional law at the present time, the crucial question to me is the extent to which state courts can or should eschew all reliance on federal law in the development of relevant local precedents. That question should, I believe, be answered less doctrinally than many of the essayists in *Developments* would advocate.

In thinking about federalism as viewed from the state perspective, I believe it is useful to break down the question of state-federal constitutional overlap into three component parts, which bear varying degrees of separate attention. First, is a federal construction of a federal constitutional provision ever *binding* on a state court's construction of a state constitution? Second, can state courts ever *compel* state litigants to exhaust the remedies independently afforded to them under the state constitution before permitting them recourse to federal constitutional rights? Third, can federal construction of a federal consti-

---

with which the legislature had been confronted. In *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984), in which the court was asked to determine the extent to which the private owner of a shopping center was required, by the state constitution, to permit access for the exercise of rights of free speech, the court divided over appropriate standards of constitutional construction. Professor Levinson describes the state and federal history of such litigation and notes the significance of a potential conflict between the presumed "content-neutrality" of free speech guarantees and the countervailing right of the state, exercising its police power, to regulate a public forum. Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law* (p. 57). Professor Kay has analyzed the difficult questions of the scope of constitutional review that the case presented. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667 (1984). Professor Macgill notes that *Westfarms* required the court to confront, at one time, previously untested state constitutional principles of free speech and virtually unexplored doctrines of state action. Macgill, *Anomaly, Adequacy, and the Connecticut Constitution*, 16 CONN. L. REV. 681 (1984). State judges would welcome further elaboration of the problems identified by each of these articles.

21. See Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 680-82 (1984).

22. Two of the *Developments* essays begin to take on this challenging task. Professor Kirby notes that state courts under their due process or their equal protection clauses are scrutinizing the reasonableness of legislative regulation of business activities. "The most significant development," he notes, "is the trend under equal protection toward an intermediate standard of review that causes statutory classifications to be reviewed on the basis of actual instead of imagined and hypothetical factual bases." Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions* (pp. 109-10). Justice Pollock observes that common law principles such as the public trust doctrine may supplement state constitutional provisions in the area of land use regulation. Pollock, *supra* note 12 (pp. 154-57).

tutional provision ever be *relevant* to a state court's formulation of independent state constitutional principles?

As to the first question, I concur wholeheartedly with all of the essayists that every state has the independent authority to interpret its own constitution without being bound by federal precedents. It is indeed ironic that state court authority definitively to interpret state statutes is universally taken for granted while state court authority to interpret the state's organic document, its constitution, is deemed controversial. Under our federal system of dual sovereignty, state constitutions embody the reservation to the states of all residual power not expressly or impliedly conferred upon the federal government.<sup>23</sup> State courts therefore must be empowered to determine, in light of state interests and state history, what meaning to attribute to provisions contained in state constitutions. If such provisions are interpreted to provide rights less than those guaranteed by the federal Constitution, then in application, but not in interpretation, state law must give way to the supremacy of federal law under the federal Constitution. As Professor Greenhalgh reminds us, until 1914, the authority of the United States Supreme Court to review state court judgments "was limited to cases in which the state court either held against a federal claim while upholding a state law, or held a federal law invalid."<sup>24</sup> Although the United States Supreme Court now has the jurisdiction to review any state court interpretation of any federal claim, the authority thus bestowed does not extend to overturning state interpretations of state constitutions that confer independent state-based rights greater than those provided by federal law.

Although *Michigan v. Long*<sup>25</sup> imposes limitations of process upon the division of authority over state and federal constitutional rights, it does not fundamentally undermine the principles of dual sovereignty. State court judges may regret a shift that replaces the presumption that state constitutional decisions were independently based in state law, and hence unreviewable, with a presumption that such decisions were federally derived, and hence within the Supreme Court's jurisdiction. Along with Justice Stevens, we may wonder why an overburdened federal court needs to concern itself with matters within state court competence.<sup>26</sup> Nonetheless, state courts can learn to put

---

23. See THE FEDERALIST No. 51, at 339 (A. Hamilton or J. Madison) (Modern Library ed. 1937), quoted in Utter, *supra* note 7 (p. 241) (quoting Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 237, 635 P.2d 108, 113 (1981)).

24. Greenhalgh, *supra* note 5 (p. 213).

25. 463 U.S. 1032, 1040-41 (1983):

"[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

26. *Michigan v. Long*, 463 U.S. at 1065-72 (Stevens, J., dissenting); see also, e.g., California

on the record their intention that their decisions interpreting their state constitutions are independent of federal law. Only if the United States Supreme Court were to go behind such statements of intent, to interpolate ambiguity where none existed,<sup>27</sup> would state authority be in jeopardy.

The second question concerns the authority of state courts to insist on invocation of state constitutional remedies before a litigant may have recourse to his federal constitutional rights. The foremost spokesman for that position is Justice Hans A. Linde. Although his essay in *Developments* restates his view, it is most clearly articulated in an earlier article:

Every state supreme court, I suppose, has declared that it will not needlessly decide a case on a constitutional ground if other legal issues can dispose of the case. The identical principle applies when examining that part of the state's law which is in its own constitution. In my view, a state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time. The same court probably would not let itself be pushed into striking down a state law before considering that law's proper interpretation. The principle is the same.<sup>28</sup>

In Justice Linde's view, there is a hierarchical relationship between state and federal constitutions in which the position of first priority is assigned to the state constitutions. With all respect to a friend and a colleague whom I much admire, I wonder!

One logical inference from the Linde position assigning a first priority to the state constitution is that state constitutional rights may not be waived by litigants preferring to rely on the federal Constitution. Such an anti-waiver rule raises both practical and jurisprudential difficulties. Suppose, for example, that a defendant in a criminal prosecution maintains that his confession should have been suppressed

---

v. Carney, 105 S. Ct. 2066, 2071-74 (1985) (Stevens, J., dissenting); *South Dakota v. Neville*, 459 U.S. 553, 566-71 (1983) (Stevens, J., dissenting).

27. In *Michigan v. Long*, the Court purported to continue to recognize the independent authority of state construction of state constitutions: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." 463 U.S. at 1041. Several of the essayists view this representation with skepticism. See, e.g., Wilkes, *supra* note 18 (pp. 182-83); Greenhalgh, *supra* note 5 (pp. 216-17). I agree with Justice Mosk that, if state police officers can learn to master the prophylactic rules of *Miranda v. Arizona*, 384 U.S. 436 (1966), state supreme court justices can learn to articulate that "any federal precedents mentioned in the opinion — in the words of *Michigan v. Long* — 'are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.'" Mosk, *State Constitutionalism after Warren: Avoiding the Potomac's Ebb and Flow* (p. 207). Faced with such an articulation, the Supreme Court of the United States would be hard put to reconcile federal review of a state court's declaration of state constitutional rights with continued adherence to the principles of federalism. *Id.*

28. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980).



because local police continued his custodial interrogation despite his unequivocal request for the assistance of counsel. Under federal law, this is a fairly straightforward *Miranda*<sup>29</sup> case, simplified by the bright-line rule of *Edwards v. Arizona*<sup>30</sup> and *Smith v. Illinois*.<sup>31</sup> As a federal case, the dispositive issues are normally factual and limited in scope: Was the accused in custody during the interrogation? Did the accused invoke his right to counsel? Did the accused subsequently waive his right to counsel? There may well be no state constitutional guidelines whatsoever about implementation of a right against self-incrimination in a custodial setting.<sup>32</sup> If in such circumstances defense counsel elects to rely upon what is alleged to be a clear violation of federal law under *Miranda*, it is doubtful that a state court would be well-advised to require counsel, often a heavily overburdened public defender, to engage in time-consuming primary research in the state historical library. No reason of policy serves to distinguish state constitutional rights in this context from other constitutional rights that have generally been thought to be subject to knowing and intelligent relinquishment or abandonment.<sup>33</sup> Finally, the logic of federalism, in a system in which state courts are charged with the enforcement of federal as well as state law, counsels against the engrafting of state law conditions onto federally guaranteed rights.<sup>34</sup>

A less draconian inference from the Linde position would invoke its strictures only when a party has chosen to rely on both state and federal constitutional rights. It may of course be the case that counsel have extensively researched and forcefully argued the implications to be drawn from the language of the relevant state constitutional provisions. Let me postpone consideration of that case. More often, as was true in *State v. Jewett*,<sup>35</sup> counsel will have cited the state constitution without much if anything by way of exegesis. Since a court may always insist on adequate briefing of any issue, a fortiori a court may

---

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

30. 451 U.S. 477 (1981).

31. 105 S.Ct. 490 (1984).

32. This is a problem that is exacerbated by the fact that state courts, in Justice Linde's view, cannot selectively incorporate federal constitutional doctrine, but must instead ground their decisions in the letter and spirit of their own state constitutions.

33. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (right of an accused to counsel may be waived). Counsel should of course understand that victory in a state court on a federal issue leaves that victory subject to federal review and to the vagaries of unanticipated changes in federal law. For that reason, the short-run attraction of waiving a state claim must be weighed against the long-term advantage of a dispositive resolution in a state court. In that balance, waiver may well be difficult to justify. Nonetheless, it should not be precluded.

34. "Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); see *Henry v. Mississippi*, 379 U.S. 443, 447 (1965); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 120-29 (1978).

35. 500 A.2d 233 (Vt. 1985); see text accompanying note 1 *supra*.

reserve to itself the decision whether it is willing to undertake independent construction of relatively unexplored state constitutional provisions without the assistance of counsel. It is worth remembering that adequate consideration of a state constitutional provision, by bench or bar, is usually, in Justice Linde's view, a demanding undertaking. Neither federal cases, nor familiar, federally articulated statements of the underlying issue, are reliable guidelines for state constitutional law.<sup>36</sup> If, for any number of prudential reasons,<sup>37</sup> the court determines in the absence of an adequate supporting brief not to address the state constitutional issue, I believe the court would not, for that reason, be discharged of its duty to resolve any questions of federal constitutional law that had been properly presented. Similarly, if the supplemental briefs ordered in *State v. Jewett* prove to be disappointing, the Vermont court could not indefinitely postpone decision on whatever federal issues the case may concurrently have raised. Despite a court's fervent wish that counsel fully educate themselves and the judiciary about the language, intent, history, and values of the state constitution, a court cannot order a tie-in sale of state and federal constitutional rights.

The least controversial version of assigning a preferred position to state constitutional rights would be to look first to state constitutional rights when counsel have presented an adequate analytic record for both state and federal constitutional claims. In that situation, the current practice of state supreme courts apparently varies: some, like Oregon, consider state claims first, while others, like New Jersey, resolve federal claims initially, looking to the federal law to provide a backdrop for the construction of state constitutional rights.<sup>38</sup> My own

---

36. In his *Developments* essay, Justice Linde deplores the current association of individual rights and fair procedures with federal law,

even when they [are] also guaranteed in the state constitutions. . . . People do not claim rights against self-incrimination, they "take the fifth" and expect "*Miranda* warnings." Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.

Linde, *supra* note 9 (p. 279).

37. In advertent to prudential considerations, I do not mean to suggest that I subscribe to the view of those critics of the new federalism who fear, as Justice Abrahamson puts it, that "the state court cannot take the heat that comes from deciding the tough individual rights cases." Abrahamson, *Homegrown Justice: The State Constitutions* (p. 308). State court judges have always understood that they operate in closer proximity to the electorate than do their federal counterparts. Tough cases that may lead to unpopular results arise regularly in state court litigation that in no way implicates the state constitution. In recent Connecticut case law, for example, a statutory holding that a statute of limitations barred a prosecution for murder, *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (1983), was as inherently controversial as the constitutional holding, in another prosecution for murder, that egregious prosecutorial misconduct required a new trial. *State v. Couture*, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 105 S. Ct. 967 (1985). I refer instead to a philosophy of prudence that acknowledges the desirability of an accommodation between principles and reality, between abstract theories and practical wisdom. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985).

38. See Collins, *supra* note 4 (pp. 8-9 & n.74).

view is more eclectic. Although I agree with Justice Linde that reflexive state court deference to federal claims is unwarranted, I believe the question of what claims to consider, and in what sequence, is a matter of choice best decided in the context of the particular case before the court. Courts are fortunate when they have the freedom to select the vehicle for the enunciation or elaboration of doctrine. In exercising powers of judicial review, state courts act with appropriate prudence when they recognize that law, like politics, is the art of the possible, that judicial decisions that postpone final judgment may sometimes usefully permit principled consideration of an issue by other branches of government and the public, in short that such decisions may avoid needless confrontation.<sup>39</sup> The choice of the right case for the development of a new area in the law is an important part of the common law tradition that looks to incremental pragmatism and seasoned skepticism, to a search for a fit between the law that was and the law that will be.<sup>40</sup> State supreme court judges are generalists whose expertise is in the methodology of the common law. Whether our agenda is the reconsideration of common law cases, the contextual construction of statutes,<sup>41</sup> or the development of constitutional principles, we best serve the interests of justice if we build upon our common law strengths and make haste slowly.

Viewing state constitutional law from the relativist vantage point of the common law tradition, rather than from the absolutist vantage point of dual sovereignty, enables us also to define a proper answer to my third question, the role of federal precedents in the formulation of state constitutional law. At the outset, such a viewpoint is conducive to taking a more relaxed attitude than do some of the *Developments* essayists toward the prevalence of federally derived nomenclature for overlapping state and federal constitutional rights. For better or worse, the prophylactic rules of *Miranda*<sup>42</sup> are today firmly embedded in the legal landscape of the law of self-incrimination. Federally based rules relating to *Terry*<sup>43</sup> stops are engrained in our law of search and seizure. The fact that lawyers and judges unconsciously reach for such metaphors in thinking about all constitutional rights is undoubtedly a psychological impediment to independent construction of state constitutions. But aversion to inappropriate analogies should not overshadow the reality that some, nay most, federal constitutional law is worthy of serious consideration in the interpretation of state constitutions. Just as it is wrong to assume that state constitutions are mere

---

39. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 69-72 (1962).

40. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 92-101 (1981); Kronman, *supra* note 37.

41. See Peters, *supra* note 10, at 998-1005.

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

43. *Terry v. Ohio*, 392 U.S. 1 (1968).

mirror images of the Federal Constitution, so it is wrong to assume that independent state constitutions share no principles with their federal counterpart. The interstices of open-ended state constitutions remain to be filled, and many of them will best be filled by adopting into state law, on a case-by-case basis, persuasive constitutional doctrines from federal law and from sister states. Plausible candidates for incorporation, for reading federal law into state constitutions, are the doctrines establishing a preferred position for free speech in the hierarchy of individual rights and requiring special scrutiny of laws discriminating on the basis of race. Some of the barely unsuccessful dissenting opinions of United States Supreme Court Justices might usefully be incorporated into state constitutional doctrine as well.<sup>44</sup> In order to establish for state constitutional law the vital role to which state judges aspire, we cannot automatically abandon sources of insight, whatever their origin or their linguistic formulation. The teachings of the common law tradition, which emphasizes the value of gradual reform in preference to dramatic change, counsel the wisdom of searching for commonality rather than discontinuity in state and federal constitutions.

To say that the differences between federal and state constitutional law should not be overstated is not to subscribe to a view of state constitutional law that relegates the state constitution to the role of an interstitial supplement to the Federal Constitution. State courts must have the strength and the will to undertake the painstaking task of assigning independent meaning to independent state constitutions. In that painstaking task, let us welcome assistance whatever its auspices, confident that our traditional learning in the common law will enable us to meet the challenge.

---

44. In an area where state courts have a good deal of institutional competence — the review of criminal convictions — reliance on state constitutions has often taken the form of adapting some aspect of federal constitutional law to local needs for supervision of local police or prosecutorial authorities. Thus, in *State v. Kimbro*, 197 Conn. 219, 496 A.2d 498 (1985), the Connecticut Supreme Court recently decided to rely on *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964), rather than on *Illinois v. Gates*, 462 U.S. 213 (1983). Similarly, in *State v. Couture*, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 105 S. Ct. 967 (1985), the court distinguished the holding of *Smith v. Phillips*, 455 U.S. 209 (1982). The interpretation of the state constitution in these cases, and in similar decisions in other jurisdictions, was immeasurably facilitated by the doctrinal development of federal law under the fourth and fifth amendments to the United States Constitution. That law can be a useful model even when state courts determine to depart from it. See *Mosk*, *supra* note 27.

## JUDGE PICKING

*Abner J. Mikva\**

**GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY.** By *Laurence H. Tribe*. New York: Random House. 1985. Pp. xix, 171. \$17.95.

There are many pleasant surprises in Professor Tribe's new book, *God Save This Honorable Court*. First, it does not read like a book written by a law professor. There are no footnotes, no long, involved reconciliations of conflicting views on obscure points. There is only one table, and it is intelligible. While every participant in the law and justice business ought to read it, others can and should too. The style is easy, the substance, accessible; at 150 pages, it is a pleasant evening's read.

The next surprise is that the message — and the book does have a message — is not laid on with a heavy hand. You know from the Prologue (which reveals the author's well-known biases) what the text of the sermon will be, but there is no pontificating or chest-thumping over the simple message that Tribe seeks to deliver. Instead, he does what all good lawyers do: he lets the facts speak for themselves.

The message will be no surprise to Tribe's friends or detractors. He is deeply concerned that the electoral decisions of 1980 and 1984 will drastically alter some traditional notions about the High Court, both philosophically and institutionally. Tribe makes no secret of his belief that the current process of selecting Supreme Court Justices, which is heavily dominated by the President, has led to unfortunate results, and that this process needs to be reevaluated to reflect fact, not widely accepted myth. The heart of Tribe's message is that, contrary to popular belief, judge picking can be and should be more than a one-man show. He claims that history proves that the members of the first branch also have important roles that go beyond discovering whether nominees to the Court paid their income taxes and were honest with their clients. This message makes an important contribution to a critical public controversy — one particularly worth noting when it is advanced by the man many consider the most successful living private practitioner before the Court.

One of Professor Tribe's peeves (and a reason he gives for speeding up the book's publication) is a speech given by Justice William Rehnquist on October 19, 1984, shortly before the election (p. x). Justice

---

\* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. — Ed.

Rehnquist stated that Presidents have had limited success in trying to pack a Supreme Court, but that there was no reason why a President should not make such an effort. Some commentators strongly disagree with both parts of Justice Rehnquist's opinion, although Tribe skirts the question of whether the President should be free to try. Some, for example, argue that who goes into the White House should not affect what comes out of the Court. Judge Irving Kaufman of the Second Circuit has insisted that elections really do not affect the judge-picking process, or at least they shouldn't. In a December 9, 1984, article in the *New York Times Magazine*, he insisted that Presidents must resist the temptation to appoint like thinkers to the bench. He said:

Unless the public believes that issues of great moment are decided by reference to constitutional principles that transcend shifting political vicissitudes, the Court's stature as an independent body is in jeopardy.

. . . .

. . . [A] President must be steadfast in avoiding the temptation to treat the Court as an institution that is expected to hew to a particular ideological position.

. . . .

Grave dangers exist in formulating a substantive talisman for admission to the judiciary. This insures a partisan confirmation battle on the floor of the Senate, which would be widely reported by the nation's news media. A public spectacle of this variety is certain to reinforce the perception of the judiciary as a politicized branch of government.

Tribe characterizes Judge Kaufman's views as "naive" (p. x); I think the description is charitable. Indeed, what colors the critical part of the argument — the role that the Senate and outside groups play in judge picking — is the naïve and mischievous notion that judges should come to the bench with naught in hand or head but their robes and the Ten Commandments. If that is the desideratum, then Senators (and outside participants) should not seek to despoil the pristine process by asking questions about whether the judicial nominee thinks about political questions, and if so, what he thinks about them. It is true, as Judge Kaufman says, that the independence of the judiciary is absolutely essential to its constitutional mission. But it cannot follow that judges must be without political beliefs or ideology when they approach the bench.

I believe it was the *Washington Post* that once ran an editorial deploring the view that a person with political beliefs is unfit to serve as a judge. The editorial suggested that if we really want to avoid judges who have been exposed to politics, we should breed a class of judges. These judges would be selected in early childhood, trained to make decisions as Little League umpires, and shielded from all pressing questions of our times except the infield fly rule. The editorial pointed out that this system might improve the quality of baseball umpires, but it would not do much for the judiciary.

We do not want judges who are devoid of political content, for that would mean they have spent no time in the mainstream of American life and have no understanding of the hopes and fears of the American people. Being detached from day-to-day partisan affairs is one thing; being divorced from the real world is something else. A jurist who has lost touch with our evolving expectations of privacy is poorly prepared to evaluate fourth amendment claims; a judge who is ignorant of politics or world affairs cannot make reasoned decisions on separation-of-powers or national security questions. In short, the legal system does more than tolerate informed judges; it relies on them. Justice Rehnquist recognized this when, in a memorandum explaining his refusal to withdraw from a case, he said, "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

I put aside the question of whether it is realistic to expect the President to forego political considerations in the nominating process. Even if it were a good idea, the President will be as political in his appointments — all his appointments — as he is allowed to be. Jack Kennedy appointed his brother to be Attorney General because he could. Dwight Eisenhower appointed Earl Warren to the Supreme Court because he had to. When Herbert Hoover showed one Senator a list of possible Supreme Court appointees in the order of Hoover's preference (Cardozo was listed tenth out of ten) the Senator replied, "your list is all right but you handed it to me upside down." Cardozo got the appointment, not because the Senator persuaded Hoover on the merits, but because the Senator was William Borah, Chairman of the Foreign Relations Committee (p. 81).

Maybe, in fact, we do not want the President to put aside his political preferences and opt for the best nominee, regardless of the nominee's political preference; perhaps this denigrates an important part of the legitimizing chain for a lifetime, appointed judiciary in a democracy. If the President were to set aside political considerations in the judge-picking process, and the Senate abjured its role to independently consider a candidate, then the people would have no input at all. It might have been wise for Tribe to spend a little more time explaining why presidential restraint is not as realistic, or even as desirable, as is sometimes believed.

On the other hand, Tribe certainly does not urge that the President should have a free hand in the appointment process. An ideal system will build a number of restraints around the appointer, but they must be external restraints, not simply exhortations and wishful thinking. Tribe correctly notes that these restraints should start with the Senate.

It is a good starting place because the Constitution starts there. Article II says that "[the President] shall nominate, and by and with

the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.” Because the appointment of Supreme Court Justices is lumped together with the general appointment powers of the President, the passion for symmetry (or simplism) compels some to insist that the role of the Senate is the same for a Justice as it is for a Cabinet Secretary. After all, the argument goes, the President is entitled to his own lieutenants — that’s what the people voted for. The obvious differences are the judge’s tenure and his role in the constitutional scheme. In the case of a Cabinet official, an Ambassador, or any other executive official for whom senatorial confirmation is required, the maximum term is either for the years that the President holds office or is fixed by statute. Only for judges does the Constitution spell out the “good-behavior,” lifetime term, and only they are entitled to coequal status with the executive and legislature. Tribe persuasively argues that this difference in tenure and function calls for a different reviewing process by the Senate.

What should the Senate look for? What standards should it use? It would be nice if we could spell out the do’s and don’ts of a Senator’s judicial confirmation prerogatives. Even the good Doctor Tribe is not as precise as he would like to be. After spending a whole chapter explaining why the Senate should be fully involved in the selection process, he offers the following: “For the Senate must serve as a fierce and tenacious guardian over access to these nine important chairs. Only a broadly based, aggressively contested, scrupulously considered choice now can ensure that the Supreme Court’s constitutional vision will be a bright one” (p. 137).

How to put meat on those bones is another matter. One obvious question is whether the Senate’s “aggressiveness” should include proposing nominees to the President. In the case of the lower court judges, there has been a long-standing tradition that the bulk of the nominees are proposed by the Senators from the affected states. That tradition has been jeopardized during the current administration, and has often been criticized by both political parties as bringing “politics” into judicial selection. This practice usually does not extend, however, to the Supreme Court.

The question of Senate prerogative brings us back to what kind of judges we want. If the model is the baseball umpire, obviously Senate input (or any kind of political input) is not helpful. Senators are collectively no better at keeping politics out of the process than the President is. But if we agree that judges not only may but *should* bring to the bench ideological notions about law and society, then senatorial input is indispensable. It fulfills a neglected part of the constitutional command to *advise* as well as consent. It is useful because it helps to bring pluralism to the process that selects members of the least accountable branch of government.



These broad principles do not offer any clues on whether or what kind of people the Senators should recommend, any more than Tribe's book does — but they do establish some reasons for precluding the President from having the sole initiative. One reason for pluralism in the selection process is to cut down on what Tribe calls the “cronies and mediocrities” (p. 81), those who are nominated primarily because they have earned presidential favor. The most recent case of this is Richard Nixon's nomination of Harold Carswell, which is described by Tribe as follows:

Carswell, also a Southern federal judge, was a lawyer most memorable for being eminently forgettable. During his tenure as a federal judge, Carswell compiled an almost unequaled record for being reversed by higher courts, and earned a solid reputation for shallow and dubious rulings. Even Carswell's supporters in the Senate had difficulty finding good things to say about the nomination. Senator Roman Hruska defended Judge Carswell on the floor of the Senate by saying, “Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they?” With such friends, Carswell needed few enemies. A bipartisan coalition of Senators answered the Hruska query when they defeated the nomination by a vote of 51 to 45. [p. 82]

Perhaps because of cases such as Carswell's, Professor Tribe gives short shrift to the notion that there are or should be many limits to the Senate's review of the nominees once they are submitted for scrutiny. He begins his history of the confirmation process under the heading of “The Myth of the Spineless Senate” (p. 77). The book describes how, especially in the early days of the Republic, the Senate frequently rejected the President's nominee (pp. 77-92). Tribe goes on to debunk (quite properly) the idea that the Senate should roll over like an obedient dog every time the President sends up a name (pp. 93-124). Tribe misses the mark, though, when he debunks the notion that the Senate can also affect the balance of power — and the independence of the judiciary — if the “advise and consent” function overwhelms the appointment function (pp. 125-37). The founding fathers intended that both branches lay their hands on in the picking of judges. If the Senate cuts away at the executive initiative, this also distorts the process.

For example, while it is easy to defend the Senate's role in shooting down Carswell's nomination, it is less easy to defend the shooting down of a Clement Haynsworth. And it is very hard to defend the prime example of Tribe's history of the activist Senate, the refusal to confirm John Rutledge as Chief Justice. Rutledge had been selected by President Washington to succeed John Jay. His credentials as a jurist and as one of the country's founders were impeccable. Tribe describes the opposition to Rutledge:

A few weeks after his nomination, Rutledge attacked the Jay Treaty — a conciliatory treaty negotiated by the Washington administration to

ease tensions with Great Britain. The treaty was ardently supported by the Federalists, Washington's Senate allies, as an integral part of party policy; it was opposed by Democratic Republicans as an affront to the nation's former ally, France. To the minds of many Senators, Rutledge's opposition to the treaty called into question his views on foreign policy and his judgment in taking so strident a position on an issue that polarized the nation. Rutledge's behavior even fueled rumors that he suffered from mental instability.

....

The debate over Rutledge raged in the country, the press, and the Senate for five months while he continued to preside over the Court by virtue of the interim appointment Washington had made while the Senate was not in session. Rutledge was ultimately rejected by a vote of 14; to 10, as much by his own party as by the Senators of the opposition. Even the insistence of the Father of our Country himself was insufficient to overcome the Senate's decision to exercise independently its power of confirmation. [pp. 79-80]

The problem, of course, is that the lines of authority between President and Senate are not clearly drawn, so that we do not know when the Senate is simply protecting its own turf, and when it is treading on executive land. But the fact remains that a hyperactive Senate can cause some of the very problems that Tribe hopes to avoid by getting the Senate to participate in judge picking. Litmus tests administered by Senators can create as imbalanced a Court as presidential litmus tests. And if Senators get judges to commit themselves on specific issues just to get confirmed, the damage to judicial independence is even greater than if those commitments are made in private to the President, where they are easier to fudge or forget.

That is why the Senate, as a reflector of popular will, must be circumscribed in its inquiries. What the Senate should not do is try to determine a nominee's views on emerging constitutional doctrine, or on issues likely to face courts in the near future. Why? Because these questions are really a signal to a nominee that he or she will become a judge only upon promising to be obsequious, to be a yes-person to the powers that be.

The Constitution does not permit the judiciary to be a subdivision of the Senate, nor judges to serve as inferior officers to the President. Just as the President must not seek to affect the independent and frequently unpopular judgments of the judges, the Senate also cannot use its confirmation power to create judicial I.O.U.'s. Justice Rehnquist has said that

[f]or [a nominee] to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

*Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972).

There is another, equally disturbing side effect of these judicial I.O.U.'s. When we ask prospective judges their views on an issue likely to arise in the future, we are locking them into a position. Today's litmus tests tell nominees that when the question is abortion, the answer is no, and when the question is prayer, the answer is yes. Do we want judges who have decided the outcome of a case even before looking at its facts? Do we want judges who are willing to disregard statutes and regulations to reach a predetermined result? The constitutional prohibition on advisory opinions tells us that justice is achieved by well-informed, concrete decisions, rather than by speculation.

There is still another defect to the litmus test approach to picking and confirming judges, as Tribe notes. The test is always about a single issue, a single cause. It *diverts* attention from the rest of the corpus and from other critical ingredients, such as intellect, temperament, and integrity. What must be avoided is the selection of a nominee based solely on how he or she would decide a particular issue. Judges are appointed for life. No one can predict what issues will be important in ten or twenty years. But a judge selected today will still be making decisions then.

For example, Professor Tribe describes the irony of the Roger Taney appointment. President Andrew Jackson wanted to appoint a Justice who would vote to eliminate the national bank — Jackson's ogre. Taney was clearly that man, but, Tribe says,

[t]wenty years after President Jackson left office, there were no Bank cases left to decide, but Chief Justice Taney was still around to author the infamous opinion in *Dred Scott v. Sandford*, which sanctified the status of blacks as property and made the Civil War all but inevitable. The plaudits that some legal scholars have accorded to Taney's tenure as Chief Justice cannot erase his leading role in the case that must rank as the greatest disaster — and greatest obscenity — in the history of the Court. [p. 98]

Taney was a presidential litmus baby, but the point is true whichever branch of government focuses too narrowly on one issue.

Some scholars insist that all of this handwringing about the ways and means of judicial selection and confirmation is irrelevant. Once a Justice is appointed, he or she is going to march to the Court's drummer, and the influence of the appointing drummer will wane to insignificance. Tribe classifies these observers as believers in the "Myth of the Surprised President" (p. 50). His review of the Court's history persuades him that most of the time the President — and the Senate — get who they want. For every "surprise" there are many more norms: the fact that the actions of William Brennan or Felix Frankfurter may not have been accurately predicted by their appointers is overwhelmed by the number of Justices who usually line up the way the President expected when he appointed them. Richard Nixon

found this out — to his dismay — when the justices he appointed to bring “law and order” to the country voted to compel the President to comply with a court order to turn over the White House tapes (pp. 70-74).

That is why the Senate must engage in strong oversight, even under the constraints suggested above. That is also why the input of outside groups is essential. One group that has had historical input has been the members of the Court itself. In some eras, the Chief Justice (Taft, for example) or some of his associates have had inordinate influence in suggesting successors or colleagues. The American Bar Association has played a technical role, seeking to measure the nominee’s previous experiences and judicial temperament. The ABA has been less concerned with the philosophy of judges than it has with making sure candidates meet certain baseline standards.

The most important nay-sayers, however, have been ad hoc coalitions of interest groups. These coalitions have sometimes centered around a single issue, whether it be civil rights, abortion, or the Bank of the United States. These groups often use the same techniques to “defeat” a judge as they would to defeat a person running for elected office. Sometimes, for example, they have enrolled the media to carry the message; when such a coalition failed to block Hugo Black’s appointment, it was not because the newspapers did not make the effort. The *New York Herald Tribune* called it a “nomination as menacing as it is unfit.” The *Chicago Tribune* called it “the worst” President Roosevelt could have found.

These outside groups’ opposition is usually very narrow in scope. Just as the Senate itself should not impose litmus tests, it is a bad idea to allow nongovernment groups to demand ideological purity in judicial nominees. The Senate must be as careful about avoiding excessive pressures from its constituents as it is in avoiding pressure from the President to acquiesce in a nomination. But the objective of pluralism is helped along when as many outside forces as possible, pro and con, are encouraged to state their views in a responsible fashion. Aside from an occasional Holmes or Brandeis (or Learned Hand), there are not too many instances in which there is only one right candidate for the job. If the objective is to find out whether the President has found one of the right ones, then the more inquiry the better.

Professor Tribe’s book is timely not only because of what he calls the “greying” of the current Supreme Court (p. xv). The political branches of government are so busy doing temporal work — like balancing budgets and reforming tax laws — that they and their watchers tend to slough over some of the less frequently used powers ordained to them by the Constitution. There is something awesome about appointing judges for life. The tenure frees up judges to perform their antimajoritarian role in our society. But the consequences can remind

a President — and the confirming Senators — that the judicial appointment process is one of the most important pieces of political power in our democracy. It needs to be wielded carefully, and it must be shared by all the players.

# RELIGION AND THE BURGER COURT

*Rex E. Lee\**

RELIGION, STATE AND THE BURGER COURT. By *Leo Pfeffer*. Buffalo: Prometheus Books. 1984. Pp. xiv, 310. \$22.95.

There is, I think, no area of constitutional law more in need of solid, creative examination and fresh ideas by the courts, scholars, and practitioners than the issue of what constitutes an establishment of religion. Leo Pfeffer is uniquely qualified to contribute to that effort. In the number and importance of establishment clause cases that he has personally litigated, he probably stands first among living American lawyers. His book, *Religion, State and the Burger Court*, provides a wealth of information concerning the religion cases that have been decided during Chief Justice Burger's tenure on the Supreme Court. As a source of information concerning the details of those cases, the book is all that one would expect from someone of Mr. Pfeffer's competence and experience. I doubt, however, that the book will do much to change the views of very many people, or even cause many people to think about religion issues in different ways.

I had expected to disagree with Mr. Pfeffer's substantive views, and in this regard his book fulfilled my expectations. I had also hoped, however, that this book would inspire — or at least provoke — a debate that might contribute to more solid doctrinal moorings for the establishment and free exercise clauses. My disappointment in this respect probably reveals more about the nature of my expectations than it does about the quality of Mr. Pfeffer's book.

*Religion, State and the Burger Court* is a complete, probably exhaustive review of Supreme Court decisions dealing either directly or indirectly with establishment clause issues during Chief Justice Burger's tenure. The ten chapters categorize these cases under the following headings: Tax Exemption; Aid to Religious Schools; Religion in Public Schools; Religion in Public Places; Religion in Military, Penal and Legislative Service; Religion in Labor Law; The Free Exercise of Disfavored Religions; Religion in the Family; Inter- and Intra-Church Disputes; and Religion and the Welfare of the Community. His treatment is literally, so far as I can tell, exhaustive. If he missed a case, I am not aware of it.

This book provides an amazing amount of detail about many of the key cases, as well as about others that are not so key. Mr. Pfeffer

---

\* Partner, Sidley & Austin, Washington, D.C.; George Sutherland Professor of Law, Brigham Young University, J. Reuben Clark Law School. The author served as Solicitor General of the United States from 1981 to 1985. — Ed.

reveals the historical and other background facts, as well as the strategic and tactical considerations that affected the litigating judgments. He knows the players, and he describes them. The descriptions include not only individuals, but also organizations, complete with their genealogical derivations.

I found Chapter Three (Religion in Public Schools) (pp. 59-111) the most interesting; the reason may be that the subject of that chapter is an area of particular interest to me. I found Chapter Four (Religion in Public Places) (pp. 113-39) the most provocative; and the reason, quite clearly, is that it *is* the most provocative. The author asserts, for example, that *Lynch v. Donnelly*,<sup>1</sup> which upheld the constitutionality of a crèche as part of a city's observance of Christmas, belongs in the same category as *Dred Scott v. Sanford*.<sup>2</sup> The reason is that, in his view, "[b]oth are predicated upon the same basic concept: the inherent inferiority of ethnic groups, either because of color of skin or religious commitment" (p. 124). That statement is not only provocative; it is just plain wrong. There is no hint anywhere in the *Lynch* opinion nor in the briefs or argument that the constitutionality of Pawtucket's crèche turned on such categorical assumptions. The assumptions belong to a bygone era and do not deserve to be taken seriously. They are as abhorrent to those who joined the Court's opinion in *Lynch* as they are to all fair-minded people.

My own view is that *Lynch* is correct for a rather simple reason. I start from the premise that the Constitution does not prohibit the federal government from declaring Christmas a national holiday. No one among the parties or amici who participated in *Lynch* disagreed with that premise. It follows from that premise, I believe, that the Constitution does not prohibit a city from announcing that holiday in a way that compels no profession of belief or conduct of any kind on the part of any individual. I would not expect Mr. Pfeffer to subscribe to that enlightened view of *Lynch*. Nevertheless, the proposition that *Lynch* belongs in the same class as *Dred Scott* is too extreme a view to be taken seriously.

One of the great strengths of this book is its extensive, near encyclopedic detail. For many readers, it will also be a shortcoming. One of the highest compliments for any book is that the reader "can hardly lay it down." This one is easy to lay down. Any book dealing with the Supreme Court's establishment of religion cases is destined to be something less than a broad-based captivator. But Mr. Pfeffer has managed to take a subject that is interesting to only a few and shrink its audience even further.<sup>3</sup> Time after time I found myself wishing he would

---

1. 465 U.S. 668 (1984).

2. 60 U.S. (19 How.) 393 (1857).

3. In the introduction, Mr. Pfeffer describes his intended audience as follows: The book is not written for constitutional lawyers, or at least not for those alone. It is

get to the point — and then often wondering if he really had one other than a generalized wish for more rigidity in the religion clauses. Reading this book was like having a conversation with a person who talks too much and whose conversation seems to wander.

*Religion, State and the Burger Court* may accurately be described as encyclopedic not only because of its extensive detail, but also because of its straight-line treatment of every case, every chapter, and every subject. From beginning to end there are no real crescendos or diminuendos — no building to a climax nor clustering of supports for a central and overriding thesis. The book is largely a discussion of one case after another, with no theme other than that the wall of separation between church and state should be higher and tighter. The whole work ends, just like every chapter ends, with a thorough discussion of one more case — *Larkin v. Grendel's Den*<sup>4</sup> (pp. 286-89).

Leo Pfeffer is obviously a person who understands the Supreme Court as an institution. There is a rather widely held view that the Chief Justice occupies a position of importance and influence vis-à-vis other members of the Supreme Court comparable to the relationship between a congressional committee chairman and other members of the committee. The author recognizes, correctly, that the only real power enjoyed by the Chief Justice of the Supreme Court *qua* Chief Justice is the power to decide who will write the Court's opinion when he is in the majority. Accordingly, Pfeffer's use of the label "Burger Court" in his title is a knowledgeable one and is merely a convenient shorthand means of identifying the period of time he has selected to consider the Court's work in a particular area (p. ix).

Still, as is apparent from this book, Chief Justice Burger has been one of the real leaders in the development of the Court's religion doctrines. And there are optimistic signs that the Chief Justice may be a leader in future reforms. For example, he was the author of the Court's opinion in *Lemon v. Kurtzman*,<sup>5</sup> which for the first time formally stated the three-part test for establishment clause cases, and he also authored the Court's 5-4 opinion in *Lynch v. Donnelly*,<sup>6</sup> which contains the best-developed suggestion to date that the three factors may be only helpful guideposts, rather than the ultimate inquiry, in determining whether a particular practice constitutes an establishment

---

written for a much wider audience, encompassing those whose interests lie in, among other fields, politics, sociology, religion, and journalism. Or, to put it another way, it is written for those who, on occasion, read the text of a Supreme Court opinion as it appears, necessarily abridged, in the *New York Times* and other newspapers or unabridged in periodicals.

P. x. The "wider audience" the author envisions would be far better served by a less exhaustive treatment of cases and a more focused discussion of the doctrinal issues raised in religion clause litigation.

4. 459 U.S. 116 (1982).

5. 403 U.S. 602 (1971).

6. 465 U.S. 668 (1984). See text at note 1 *supra*.



of religion. There is every reason to anticipate, therefore, that the Chief Justice, as the author of these two opinions and a member of the five-person majority in *Lynch*, will play a key role if there is to be any significant change in the rigidity of the three-part test.

This book shows an understanding not only of the Supreme Court as an institution, but also of the institutional litigators who frequently appear before the Court. Mr. Pfeffer's own Supreme Court work has involved him with several of those institutional litigators; he would be expected to understand them, and he does. With regard to the work of the Solicitor General's office, he quite correctly and sensitively distinguishes between the considerations that are implicated when the government participates as *amicus curiae* in cases involving traditional federal interests, and cases in which such interests are lacking. Mr. Pfeffer apparently takes the view (pp. 113-15) that it is never proper for the Solicitor General to participate in the latter category of cases. While I understand and respect that view, I disagree. The Solicitor General is a presidential appointee and part of the executive branch team. And the President — whose objectives may not be limited to the enforcement of existing statutes — is one of his clients. One of the reasons we elect Presidents is to achieve changes in existing laws, and among the most important of our laws are judge-made decisions construing the Constitution. Certainly the President, in fulfilling his article II obligation to see that the laws are faithfully executed, is entitled to present his views concerning the Constitution to the highest court that interprets the Constitution. The Constitution itself is, after all, among the laws the President is charged with faithfully executing. And the President speaks to the Supreme Court only through the Solicitor General.

I wonder whether Mr. Pfeffer's point is really that the Solicitor General should never participate in cases not "having a direct or substantial effect on the government's interest" (p. 114), or whether his argument is more selective. Would he, for example, have approved of Archibald Cox's *amicus* participation in *Baker v. Carr*?<sup>7</sup> There was no statement of federal interest in the federal government's *amicus* brief in that case (as there usually is) and the only apparent interest of the federal government was an interest in a sound body of constitutional law dealing with federal courts' jurisdiction to decide whether apportionment schemes violate the equal protection clause of the fourteenth amendment.

While Mr. Pfeffer and I necessarily disagree on whether the federal government should have participated in *Lynch v. Donnelly*, Mr. Pfeffer's more important point — with which I am in complete agreement — is that both the Court and the Solicitor General traditionally have

---

7. 369 U.S. 186 (1962) (holding state legislative reapportionment disputes justiciable). The Court granted special leave for Solicitor General Cox to participate. 365 U.S. 864 (1961).

distinguished between amicus participation in cases that directly affect the federal government's ability to enforce existing law and such participation in cases that do not. The distinction helps to conserve the federal government's most important litigating advantage: the special stature that the Solicitor General enjoys with the Supreme Court. I believe that one of the reasons the Court treats the Solicitor General differently from other amici is that over the years the holders of that office have behaved differently. It is important that the governmental officer whose task requires him frequently to advocate judicial restraint also be restrained in his own dealings with the Court. Accordingly, while it is proper for the Solicitor General to express the Administration's views as amicus curiae where there is no direct statutory enforcement interest, this must be done with discretion and selectivity, lest the force of his views be disregarded not only in those cases, but more generally as well.

More than a decade has passed since the three-part test for establishment clause cases was formally stated in *Lemon v. Kurtzman*,<sup>8</sup> and freedom of religion doctrine is at an important stage of its development. The Supreme Court is now struggling with the important question of whether failure to satisfy any of the three parts is always tantamount to an establishment clause violation, or whether the three parts of the test (or maybe only two of them) are simply useful guides to ascertaining whether there has been an establishment of religion. Other important doctrinal issues concern the extent to which free exercise values should influence establishment values and whether the relationship between the two clauses need be one of tension or whether we should search for greater harmony between the two.

I had hoped to find discussion of these kinds of issues in Mr. Pfeffer's book, and I did not. He cannot be criticized, however, for writing a book for his purposes, rather than for mine.

---

8. 403 U.S. 602 (1971).

# 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*.<sup>1</sup> 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?"<sup>2</sup>

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.<sup>3</sup> Political trends seem to be adverse to the protection of

---

\* Professor of Law, University of Illinois. — Ed.

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*<sup>4</sup> should not be overruled.<sup>5</sup> 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.<sup>6</sup>

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)<sup>7</sup> 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."<sup>8</sup>

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.<sup>9</sup> After the Civil War, the Supreme Court invalidated civil rights acts, endorsed racial segregation, and condoned unequal public education opportunities for black children.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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,<sup>13</sup> 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.<sup>14</sup> 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 Perry<sup>15</sup> and Yale Kamisar.<sup>16</sup> 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).<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

Bickel would not pass off a simplistic view of history for constitutional analysis.<sup>23</sup> 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.<sup>24</sup>

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" theorists<sup>25</sup> or advocates of "interpretivist" constitutional theories<sup>26</sup>) 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."<sup>27</sup>

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.<sup>28</sup> 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.”<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> These laws were incorporated during the era of *Palko*,<sup>32</sup> 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.<sup>33</sup> 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*<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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).<sup>37</sup> 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."<sup>38</sup> 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*,<sup>39</sup> *Swann v. Charlotte-Mecklenburg Board of Education*<sup>40</sup> and *Keyes v. School District No. 1*<sup>41</sup> 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.<sup>42</sup>

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,<sup>43</sup> 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.<sup>44</sup>

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 students<sup>45</sup> and allowed schools to dispense with the constitutionally required hearing before suspending a student.<sup>46</sup> 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.<sup>47</sup>

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*<sup>48</sup> ruling, simply because I doubt that it does much good for anyone.<sup>49</sup> 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.”<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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,<sup>53</sup> Paul Dimond,<sup>54</sup> Arthur Leff,<sup>55</sup> and Laurence Tribe<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup> Justice Harlan wrote the decision in *Cohen v. California*,<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> 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 Act<sup>63</sup> to invalidate an affirmative action plan voluntarily undertaken by an employer and union (p. 150).<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup>

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;<sup>67</sup> 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*,<sup>68</sup> 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.<sup>69</sup>

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.

## HYPERSPACE†

*Girardeau A. Spann\**

THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY. By *John Agresto*. Ithaca: Cornell University Press. 1984. Pp. 182. \$25.

In the latter half of the twentieth century, the United States was preoccupied with the quest for governmental legitimacy. Although the intensity of that preoccupation never matched the nation's fervor for scientific advancement, the two pursuits did share a common feature. The range of permissible postulates governing the development of both political and scientific theories was artificially constrained by a certain conceptual rigidity that seemed generally to characterize the intellectual thought of the period. As strange as it may seem from our twenty-fifth century perspective, where contradictory coexistence is as common as time travel itself, throughout most of the twentieth century, political and scientific theorists considered themselves bound by the assertedly logical implications of the premises that they chose to adopt.

By the end of the century, the physicists were able to take the first steps necessary to overcome this fixation. They realized that significant scientific progress was being impeded by their inability to transcend the light barrier, but they also realized that exceeding the speed of light was a physical impossibility. However, acquainted with ancient Zen texts, mindful of the mathematicians' insights into the shortcomings of dichotomous logical systems, and emboldened by the rational implausibility of their own work with quantum mechanics, the physicists imagined a way out of their dilemma. Following the clues contained in the era's more prescient works of science fiction, they developed an elementary model of hyperspace that in fact continues to serve as the basis for our time-space conceptualization today. In hyperspace, of course, superluminal travel becomes possible over nearly infinite distances through the constructive interaction of higher level time and space dimensions. But significantly, hyperspace does nothing to overrule or even suspend the laws that govern physical interactions; time travel notwithstanding, it is still true that no velocity can analytically exceed the speed of light. Hyperspace is, instead, a

---

† Copyright 1986 by Girardeau A. Spann.

\* Associate Professor of Law, Georgetown University Law Center. — Ed. I would like to thank Barry Friedman, Deirdre Golash, Steve Goldberg, Mitt Regan, Mike Seidman, Mark Tushnet, and Trish White for their help in the preparation of this review. Research for this review was supported by a grant from the Georgetown University Law Center.

place where counterproductive rules of order simply pose less of a problem — a place where logical impossibility is permitted to flourish rather than being suppressed.

Unlike the physicists, the political theoreticians clung tenaciously to the myth of rationality. Because of their almost mystical attraction to the binary modes of analysis, twentieth century political theorists were unable to replicate the physicists' escape from logical constraint. As a result, they were forced to theorize in terms of imagined polar opposites, and they remained largely insensitive to the unitary nature of dichotomous relationships that is now conceded to be a mainstay of all civilized conceptualization. The work of John Agresto, a political scientist who published during the 1980s, is illustrative. His book, *The Supreme Court and Constitutional Democracy*, for example, is noteworthy not for any virtues or vices contained in its thesis, but rather for the precision with which the author captured the analytical predispositions of his time.

## I. THESIS

The thesis of *The Supreme Court and Constitutional Democracy* was that a misconceived understanding of judicial review had created a danger of judicial supremacy that threatened the principles of liberty, equality, and representative democracy on which the American republic had been founded. Because the elected branches of government mistakenly believed in the finality of Supreme Court constitutional interpretations, they refrained from imposing on judicial activity the political constraints that were required by the theory of checks and balances built into the American system of separated governmental powers. As a result, the politically unaccountable Court was free to formulate antimajoritarian social policy without sufficient participation by the representative branches of government.

Agresto asserted that the principle of judicial review, when properly understood, did not authorize the Court to pronounce constitutional meaning with any significant degree of finality. Instead, it authorized the Court merely to offer reasoned interpretations of constitutional provisions for consideration by the representative branches as part of a continuing process of political interaction. It was through the give and take of the ongoing political process, rather than through the process of judicial exposition alone, that the organic American Constitution acquired meaning over time and changing social circumstances.

Agresto's thesis was constructed around three component hypotheses, each of which merits attention for what it shows about the analytical tendencies of the time. First, as his inquiry into constitutional history was designed to reveal, judicial review was conceived of by the framers as a component of constitutionalism whose function in the



governmental process was not simply to check but to be checked as well. Second, this system of mutual checks worked best when the objective of judicial review was viewed as promoting interbranch political interaction rather than providing for judicial finality in constitutional interpretation. The way that the elected branches were to engage in political conversation with the court was through a process of re-presentation that forced the Court to reconsider constitutional rulings with which the elected branches disagreed. Third, although the theory of judicial review did not imply judicial finality, it did imply special judicial competence to ascertain the core meaning of fundamental principles, which was entitled to deference by a nation wishing to temper its majoritarianism through adherence to such principles. Agresto's apparent objective was not to provide a specific strategy for implementing his thesis, but more subtly, to produce a change in prevailing attitudes that would make his thesis self-executing.

### A

Agresto relied heavily on constitutional history to establish his theory of judicial review, devoting four of the book's six chapters to his historical inquiry (chs. 1-4). This curiosity becomes more understandable when the prevailing attitudes of the twentieth century are recalled. At the time of the book's publication, it was widely believed that diligent research into dusty documents could produce an account of past events that corresponded to actual, objective occurrences. Although a few theorists emphasized the interpretive aspects of all historical accounts, in accordance with a briefly popular science known as hermeneutics,<sup>1</sup> belief in the concept of historical accuracy nevertheless remained so prevalent that Agresto's strategy of vesting his hypotheses with the framers' imprimatur was a common and often effective method of attracting adherents.<sup>2</sup>

In Chapter One, Agresto began by rejecting the customary justifications for judicial review that were based upon the Supreme Court's competence to enforce the Constitution, the Court's obligation to protect individual rights, and the Court's ability to promote sober second thoughts.<sup>3</sup> Chapters One, Two and Four laid the groundwork for

---

1. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

2. Twentieth-century dependence on historical validation was so strong that Agresto amusingly concluded an argument favoring de-emphasis of the framers' intent with the assurance that "[the framers] would have wanted it no other way." P. 20; cf. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the framers did not believe that their personal intentions should play a role in constitutional interpretation).

3. He argued that judicial review could not be justified, as John Marshall had tried to justify it in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), by asserting that judges had a special ability and obligation to enforce the Constitution; judges were people, with prejudices and self-interests, whose constitutional interpretations did not always turn out to be correct. Pp. 20-24. Nor could judicial review be justified by the need for judicial protection of individual rights —

Agresto's own justification by tracing the historical development of judicial review.<sup>4</sup> From this constitutional history, Agresto extracted a crucial strand for his theory of judicial review. Consistent with the development of American constitutionalism, judicial review was desirable as a check on the activities of the other branches of government, helping to ensure that they operated within the confines of the Constitution. But constitutionalism also demanded that the Court remain within constitutional limitations on its own authority. Moreover, the theory of separation of powers required those limitations to be enforced through external checks exercisable by the other branches of government. Accordingly, any acceptable theory of judicial review

---

another justification relied on in *Marbury*: historically, courts had not been viewed as the primary guardians of individual rights, and empirically, courts had tended to invalidate rather than uphold congressional efforts to protect such rights. Pp. 24-31. Nor could judicial review be justified on the grounds that it merely slowed implementation of the popular will long enough to permit sober second thoughts that could improve the quality of democratic decisionmaking; historically the judicial decision rather than the popular decision it reviewed often turned out to be the imprudent decision, and moreover, no such justification could be used to support the increasingly prevalent expansion of judicial activism into more affirmative, legislative policymaking. Pp. 31-38.

4. According to Agresto, British common law had rhetorically recognized the authority of courts to invalidate acts of Parliament as inconsistent with "common right and reason," but general exercise of that authority was politically unacceptable. Pp. 40-42. Eighteenth-century American colonists, however, seized upon the idea of judicial review as a means of constraining parliamentary rule of the colonies, and colonial courts began to invalidate acts of Parliament viewed as overly intrusive. Pp. 42-44. However, after the advent of self-rule following independence, the American idea of judicial review fell into disuse, without a sound theoretical justification for it ever having been developed. P. 45.

Although state courts invalidated legislative enactments only sporadically during the period of confederation, pp. 56-58, American statesmen did, during that period, evolve a theory of constitutionalism that subordinated ordinary laws to principles of higher law that could be incorporated into written constitutions. Pp. 45-52. By 1787, the principle of judicial review as a check on legislative power had become so widely accepted by the delegates to the constitutional convention that there was little need even to discuss it during the course of the constitutional debates. (This lack of discussion is subject to a rather obvious alternative interpretation.) As a result, the limits of judicial review were never established by the framers. Pp. 59-64. In addition, theoretical justifications for judicial review, such as those offered by Hamilton in the *Federalist* papers and by Marshall in *Marbury*, focused on the need for the judiciary to serve as a check on the activities of the other branches of government without considering how the other branches were to check the activities of the judiciary. Pp. 64-76.

During the period after ratification of the Constitution, the danger of judicial supremacy posed by unchecked judicial review became more evident, and theorists began to look for ways to contain judicial activism. Jefferson lost faith in the judiciary as the guardian of individual rights when the judiciary failed to invalidate the Alien and Sedition Acts of 1798. Then, after initially being attracted to nullification and coordinate departmental interpretation, Jefferson ended up advocating congressional finality in constitutional interpretation as preferable to vesting finality in the politically unaccountable Supreme Court. Pp. 78-86. In addition, following the *Dred Scott* decision in 1857, 60 U.S. (19 How.) 393 (1857), Lincoln realized that the Supreme Court might sometimes be wrong in its interpretation of the Constitution. Accordingly, while conceding the finality of Court decisions for the cases in which they had been rendered, Lincoln argued that controversial decisions should be accorded only limited precedential effect until they came to be popularly accepted. Pp. 86-95. The problem of judicial supremacy became more severe as time went on, and increased significantly during the twentieth century when the Supreme Court abandoned its reactive role in favor of more affirmative involvement in legislative policymaking. Pp. 154-55, 158, 160-61.

had to provide a mechanism by which the Court could simultaneously check and be checked, thereby increasing the likelihood that the actions of government as a whole would remain within the bounds of the Constitution. Because the other branches of government operated politically, a sound theory of judicial review had to involve the Court in the political process (pp. 96-102).

## B

Agresto believed that the Supreme Court had improperly been immunized from effective political checks by a misplaced belief in the finality of the Court's constitutional interpretations. Although *Marbury v. Madison*<sup>5</sup> implied, and *Cooper v. Aaron*<sup>6</sup> stated, that Supreme Court constitutional exposition was final and authoritative, such a view was hard to square with the framers' desire to limit the power of each branch of government. Accordingly, in Chapter Five, Agresto explained how it was belief in judicial finality, rather than judicial review itself, that created the danger of judicial supremacy (pp. 102-07).

Agresto found the mechanisms most frequently cited as means for exerting political leverage over the Court inadequate to overcome the problem of judicial finality. These included constitutional amendment, judicial self-restraint, impeachment, congressional regulation of jurisdiction, and "court packing."<sup>7</sup> According to Agresto, the perfect solution to the problem of judicial finality would have been for the

---

5. 5 U.S. (1 Cranch) 137 (1803).

6. 358 U.S. 1, 18 (1958).

7. Agresto found the constitutional amendment process to provide an unsatisfactory method for overruling Supreme Court decisions because of the difficulties involved in amassing the needed supermajorities. Moreover, the amendment process itself gave veto power to the minorities who favored an unpopular decision, thereby institutionalizing the very type of minority rule that the framers had attempted to prevent. In addition, even if an amendment were enacted, its meaning would still be determined by the Court whose constitutional decision was being amended. This could frustrate implementation of the policies embodied in an amendment, as the Supreme Court initially frustrated implementation of the Civil War amendments, the eleventh amendment, and the sixteenth amendment. Pp. 107-11.

Because a need for judicial independence was widely recognized, judicial self-restraint was often advocated as a safeguard against unwarranted judicial policymaking. Self-restraint, however, was an inadequate substitute for an effective political check. Not only had it failed to work well in the past, despite frequent scholarly and judicial endorsement, but self-restraint was also inconsistent with the framers' desire to have each branch of government operate vigorously within its own sphere of power, secure in the knowledge that external checks would prevent usurpations of power properly belonging to another branch. Pp. 112-16.

Although the Constitution itself appeared to authorize some political checks on the judiciary, Agresto also found those checks to be inadequate. Impeachment was an unsatisfactory check on judicial activity because it verged on being politically impossible and because impeachment seemed to be a morally inappropriate response to the exercise of judicial judgment in construing a constitutional provision. Pp. 119-20. Although the Constitution gave Congress the power to regulate Supreme Court jurisdiction, congressional regulation of jurisdiction reintroduced the danger of legislative supremacy, and the scope of congressional power over the Court's jurisdiction was uncertain. Pp. 120-22. Neither congressional power to regulate the size of the Supreme Court nor presidential power to appoint new justices provided an adequate political check, because court packing no longer seemed viable, and new appointees to the Court often failed to vote

framers to have prescribed a method for overriding judicial decisions that was similar to the two-thirds vote of Congress required to override presidential vetoes (pp. 134-35). Although the framers failed to provide such a mechanism, the representative branches could nevertheless use political pressure to prod the Court into reconsidering unpopular constitutional rulings. This could be done simply by reenacting legislation invalidated by the Court, either in a modified form presenting a stronger case for constitutionality or, more confrontationally, by reenacting legislation in the same form in which it had initially been invalidated, thereby sending the Court an unambiguous message of popular dissatisfaction with its ruling. Over time, this process of re-presentation could cause the court to modify its interpretation of the Constitution (pp. 125-30).<sup>8</sup> Borrowing from Lincoln's theory that unsettled Supreme Court decisions, although binding in the cases that they decided, did not finally fix the meaning of the constitutional provisions that they expounded (pp. 128-29),<sup>9</sup> Agresto found the re-presentation strategy for involving the Court in the political process to be constitutionally legitimate (p. 130).<sup>10</sup>

Agresto identified two variants of his re-presentation strategy that could also be used to combat judicial finality. First, Congress could enact legislation to contain the impact of unpopular Supreme Court decisions, as it did when it limited the availability of government funds for abortions and abortion-related activities in response to the Court's abortion decisions. Although the validity of such legislation would ultimately be subject to Supreme Court constitutional interpretation, the legislation's enactment would precipitate healthy political dialogue between Congress and the Court (pp. 130-31). Second, Congress might be able to enact legislation that was especially resistant to Supreme Court invalidation by enacting that legislation pursuant to its special enforcement powers under section 5 of the fourteenth amendment. In

---

as expected. In addition, such strategies were overbroad responses to particular Court decisions that gave offense. Pp. 122-25.

8. Agresto believed that, historically, the Court had responded favorably to this strategy on several occasions, including upholding twentieth-century civil rights legislation despite its 1883 decision invalidating similar legislation in the Civil Rights Cases, 109 U.S. 3 (1883); upholding the second Agricultural Adjustment Act despite its decision in *United States v. Butler*, 297 U.S. 1 (1936), invalidating the first Act; and upholding the 1938 child labor law (presumably the Fair Labor Standards Act) despite its 1905 decision invalidating a constitutionally indistinguishable earlier law. P. 127. (It is unclear what earlier decision Agresto had in mind, and no case is cited. Historical time travel techniques suggest that *Hammer v. Dagenhart*, 247 U.S. 251 (1918), is the most likely candidate, but it was decided in 1918 rather than 1905.)

9. See note 4 *supra*.

10. An interesting theory of justiciability could have been developed around the extent to which the article III case-or-controversy requirement necessarily limited the precedential impact that could be accorded judicial decisions. The issue also arose in the twentieth-century administrative law debates concerning the propriety of agency nonacquiescence in lower court decisions beyond the facts of the case decided. See R. PIERCE, JR., S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 413-17 (1985).

fact, the expansive powers of Congress under the fourteenth amendment might provide the best congressional response to all judicial overextension (pp. 132-33).<sup>11</sup> Although the suggested strategies could be useful means of involving the Court in the political process and subjecting judicial decisions to a political check, the utility of those strategies would be limited by the extent to which Congress was willing to implement them rather than abdicate its responsibility to undertake independent constitutional interpretation (pp. 136-38).

### C

In Chapter Six, Agresto shifted ground. Although judicial interpretations of constitutional provisions were not to be viewed as final, Agresto did believe that they had a unique value. The framers envisioned a government that would simultaneously advance the objectives of equal liberty and representative democracy, but those two objectives were potentially divergent. Because the majority might on occasion be tempted to interfere with the liberty of the minority, realization of the framers' dual objectives required the majority to bind itself to the principles of equal liberty embodied in the Constitution. Consistent with the doctrine of separation of powers, therefore, the "supreme role" of the Supreme Court was to sound a warning when the majority was in danger of violating its own principles. The primary justification for judicial review was "as a guide to the democracy in its desire to live a principled life" (pp. 53-54, 139-43).

The task of ascertaining constitutional meaning was complicated by the fact that the meaning of constitutional principles was not fixed but developed over time. Accordingly, it was the function of the Supreme Court, as the nation's "institutionalized theoretician," to help evolve and apply the political, moral, philosophical, and theoretical principles embodied in the Constitution. Agresto believed that the Court was able to do this by using the power of reason (pp. 143-45). In charting the growth of constitutional principles, however, the Court was not itself to revise those principles. Rather, it was to help work out the implications of the original principles as they paradoxically grew and yet remained the same (pp. 145-48).<sup>12</sup> According to Agresto,

---

11. There was at least a potential inconsistency in this suggestion. If congressional enactments under section 5 of the fourteenth amendment were beyond the reach of judicial reversal, such enactments were unlikely to foster the political interaction between Congress and the Court that Agresto deemed desirable; Congress would simply, and unilaterally, have done whatever it wished.

12. According to Agresto, principles could grow in two ways. First, their coverage could be expanded, just as the scope of the power of Congress to regulate interstate commerce expanded to encompass the growth of commerce itself. Second, and more valuably, a principle could grow through judicial unfolding of new implications that revealed its most profound meaning. It was through this second type of growth, for example, that the "inner logic" of the equal protection principle was eventually seen to prohibit segregated schools even though the same principle was not so viewed at the time that the fourteenth amendment was enacted. The fact that constitu-

the great paradox regarding judicial review was that the power to elucidate principles was also the power to substitute judicial preferences for the true meaning of those principles. Moreover, the paradox could not be avoided simply by asserting that there was no difference between objective constitutional meaning and Supreme Court interpretation of the Constitution; if that were true, it would undermine the very rationale of judicial review. Not only did the Constitution have an objective meaning, but the Supreme Court had, in the past, made serious mistakes in the interpretation of constitutional principles. These included the Court's mistakes in deciding the racial cases of the 1880s, the economic decisions of the early twentieth century, and "the crisis of constitutional adjudication in the first years of the New Deal" (p. 157). In addition, the 1973 abortion decision in *Roe v. Wade*<sup>13</sup> was "a transparent attempt to impose a constitutionally unfounded policy preference on the unwilling words of the Constitution" (*id.*). Further, "insofar as the Court's affirmative action decisions [had] reestablished race as a legitimate criterion for preference or reward, the Court [had] not expanded [the nation's] highest constitutional principles but twisted them" (*id.*). There was also a danger that the Court would mistake the practical application of a principle it was called upon to construe, as if, for example, it were to order busing as a school desegregation remedy in a neighborhood where "white flight" would result in resegregation rather than desegregation (p. 159).

As envisioned by the framers, the principle of liberty required little more than freedom from governmental intervention in private matters. By the middle of the twentieth century, however, the principle of liberty had grown to require affirmative governmental intervention to prevent private acts of oppression. This increase in judicial activism, along with its conferral of powers and rights, its establishment of new public programs, its initiation of new privileges and procedures, and its expenditure of large sums of money, was more difficult to restrict than earlier forms of judicial activity focusing simply on the prevention of governmental overreaching. Moreover, the special function of the Supreme Court as the custodian of the nation's organic principles made the danger of judicial supremacy especially grave. An institution with the power to elucidate and nourish national ideals was in a position to be uniquely powerful. To the extent that the judiciary had become able to formulate its own legislative policy, while avoiding

---

tional principles could grow, however, did not mean that the Constitution was merely a malleable document that could be shaped to meet the needs of a given era; it was a document whose principles had genuine meaning and solid purpose. Pp. 148-52.

Other twentieth-century commentators had postulated a similar special role for the Supreme Court in the development of constitutional principles. See, e.g., Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L. J. 1363 (1971).

13. 410 U.S. 113 (1973).

political checks under the guise of finality, the situation had become more intolerably inconsistent with republican government and constitutionalism — the very ideas that gave judicial review its birth (pp. 152-61). Agresto's suggested solution to the problem of judicial imperialism was to preserve rather than resolve the tension between democracy and constitutionalism, and to realize that the Court was merely one of the participants in the political formulation of policy, not the final expositor of constitutional principles (pp. 165-67).

## II. ANTITHESIS

Agresto and his contemporaries relied heavily on logic in conducting their analytical activities. More specifically, they structured their arguments to suggest that the conclusions they reached followed naturally from the application of neutral rules of logical analysis to unobjectionable initial premises. Because of its binary nature, logical analysis is helpful only when the initial premise can be shown to be either true or false, or at least generally accepted as valid. When the truth value of a premise is indeterminate, application of the rules of logic to that premise cannot generate reliable conclusions. Although twentieth-century theorists realized that the soundness of a logical conclusion depended upon the validity of the premise from which it was derived, they did not appreciate the nondichotomous nature of the premises with which they dealt. Despite the efforts of earlier philosophers, such as Hegel, theorists of the era were not yet committed to the principle that every thesis tends to establish its antithesis; they treated indeterminate premises as if they were proper subjects for logical analysis. As a result, twentieth-century theorists did little more than make normative assertions, but they vested those assertions with the then-legitimizing mystique of logical rigor. These analytical tendencies, as well as the futility of engaging in them, can be illustrated by examining the three component hypotheses in Agresto's thesis.

### A

Agresto's first hypothesis was that judicial review, as an integral component of the system of separated governmental powers, was an activity whose function was not only to check, but to be checked as well. This presupposes the existence of a concept of judicial review that needs checking — that is analytically distinct from the absence of judicial review. Without breaking any logical rules, however, the presence and absence of judicial review can be shown to be as much the same as they are different — something that is impermissible within the confines of a logical dichotomy. Because the truth value of the unstated initial premise — that the Supreme Court engaged in judicial review — cannot be determined, logical analysis incorporating that premise cannot lead to reliable conclusions. Even if one were to argue

that logic was, nevertheless, useful in cases where the truth value of the judicial review premise happened to be known — for example, where everyone agreed that the premise was acceptable — the qualification would be of little value because such cases are unlikely to exist; the nature of judicial review is such that its exercise or nonexercise in a particular case can never be determined in a way that is sufficient to make logical analysis useful. All of this rendered Agresto's subsequent discussion about the desirability of imposing a check on the activity of judicial review largely inconsequential. Moreover, to the extent that judicial review existed even as a hypothetical construct, it may well have checked itself.

As a purely theoretical matter, it is possible for judicial review to negate itself. That is, it is possible for judicial review to produce no judicial review. This could occur quite simply if, in the exercise of judicial review, a reviewing court determined that the Constitution or some legal doctrine precluded the court from exercising judicial review. In that event, the truth value of the judicial review premise would be indeterminate. By today's standards the problem may seem wholly unimportant, but by the standards of twentieth-century theorists committed to binary logical dichotomies, the problem was necessarily troublesome.

In cases in which the Court declined to address the merits, it is difficult to conceive of the Court's action as an exercise of the power of judicial review. At most, the Court's action amounts to a tacit affirmance or invalidation of the challenged enactment, depending upon which way the lower court ruled, and a judicial review characterization can be no more satisfying than it is in the case of an explicit affirmance or invalidation.

In cases in which the Court explicitly affirmed the validity of a legislative enactment, the propriety of a judicial-review characterization is stronger, but far from self-evident. Because the effect of judicial review is precisely the same as the effect of nonreview, it is difficult to view the characterization as consequential. Even though an explicit affirmance could conceivably lend an air of legitimacy to legislative enactments that they would not possess in the absence of Supreme Court validation, such legitimation would not seem to trigger the anti-majoritarian or checking concerns for which Agresto postulated the existence of judicial review.

The strongest case for the existence of judicial review is exemplified by *Marbury* itself, where the Supreme Court actually invalidated the action of a coordinate branch. But there, too, characterization of such judicial activity as judicial review remains problematic. On one level, *Marbury* showed how confused things could get. The President ultimately won in *Marbury*; the Court declined to exercise judicial review over the President's actions. But the reason that the President



won was because the Court invalidated an act of Congress. Accordingly, by engaging in judicial review, the Court was able to refrain from engaging in judicial review. And it is difficult to know which characterization captures the essence of what the Court did.<sup>14</sup>

On a deeper level, the concept of judicial review is even more perplexing. In twentieth-century terms, judicial review connoted anti-majoritarianism. In fact, it was that very connotation of antimajoritarianism that caused Agresto to call for a check on judicial activity. The twentieth-century majority, however, must have approved of judicial invalidation, even in cases in which the Court invalidated an enactment with great popular support, because the majority continued to adhere to a constitutional system of government in which the Court's determination of validity was deemed to supersede popular will. Stated differently, the will of the majority was to have its own will negated whenever required by the long-term or structural concerns that the Court was asked to oversee — concerns that Agresto referred to collectively as "principle" (ch. 6). Although a constitutional amendment modifying that governmental structure could not have been enacted without supermajority support, there is no indication that anything approaching even a bare majority favored across-the-board termination of the power of invalidation.

The problem of proper characterization was more than just theoretical, as is evident from the vast difference between present and historical characterizations of twentieth-century judicial activity. Contemporaries of the twentieth-century Supreme Court, regardless of their political persuasion, tended to view the Court as activist.<sup>15</sup> Today, of course, we view that historical period as one in which the Court was remarkably passive, declining to exercise judicial review on almost every occasion that the opportunity presented itself. Our present concern with what Agresto and his colleagues would have called "the merits" makes it difficult for us to understand the twentieth-century Court's preoccupation with ceremonial procedure and distracting technicality. But the twentieth-century Supreme Court, building on the work of its predecessors, had managed to erect an array of devices for avoiding judicial review that was truly elaborate.

Assuming that a case fell unambiguously within the jurisdiction of the Supreme Court, it was nevertheless unlikely that the Court would ever review the merits of the case. Supreme Court consideration of

---

14. According to the traditional *Marbury* myth, Justice Marshall conceded to President Jefferson a political battle over the appointment of certain new judges in order to win a political war by establishing a nominal principle of judicial review that would preserve power for judges, who tended to share Marshall's political views. See, e.g., G. GUNTHER, CONSTITUTIONAL LAW 10-12 (11th ed. 1985).

15. See Seidman, *ABSCAM and the Constitution* (Book Review), 83 MICH. L. REV. 1199, 1204-07 (1985) (reviewing ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT (G. Caplan ed. 1983)).

most cases was discretionary and seldom granted, and even when an appeal existed as of right, the Court almost always invoked one of a variety of doctrines that it had developed to avoid meaningful consideration of the merits.<sup>16</sup> When the Court did agree to give a case plenary consideration, justiciability rules,<sup>17</sup> rules of construction and avoidance,<sup>18</sup> or rules of Supreme Court procedure<sup>19</sup> often prevented the Court from resolving the merits. If the Court reached the merits, the deferential standards of review often accorded legislative enactments<sup>20</sup> tended to preclude probing judicial inquiry. Moreover, when the Court chose to undertake an extensive constitutional examination of a case, it often decided as a matter of substantive constitutional law that the meaning of the provision at issue was to be determined by a branch of government other than the Court.<sup>21</sup> Empirically, if invalidation of congressional enactments is taken to be an appropriate measure,<sup>22</sup> the frequency with which the Supreme Court actually exercised its nominal power of judicial review was quite low.<sup>23</sup> As late as 1983, the Supreme Court was able, in a single decision, to more than double the number of federal statutes invalidated in the nation's entire

---

16. These doctrines, which permitted summary disposition or outright dismissal where the questions raised were deemed to be insubstantial, were discussed in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 643-62 (2d ed. 1973).

17. Rules relating to standing, mootness, ripeness, political question, and other doctrines that could preclude consideration of the merits were discussed in H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 205-28, 276-397 (1984).

18. The Court generally decided cases in a way that would avoid unnecessary resolution of constitutional questions. *See* *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring).

19. *See, e.g.*, rules relating to adequate and independent state grounds, discussed in H. FINK & M. TUSHNET, *supra* note 17, at 819-67.

20. For example, in the absence of special circumstances, such as the implication of a fundamental right or a suspect classification, legislative enactments needed to have only a rational basis to survive constitutional scrutiny under the equal protection clause. *See, e.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

21. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court essentially held that the necessary and proper clause of article I, section 8, authorized Congress, rather than the Court, to determine what were appropriate means of legislating, at least in the absence of a specific constitutional restriction on congressional power. Similarly, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court essentially held that the scope of congressional power to regulate interstate commerce was to be determined by Congress itself, rather than the Court. Likewise, in *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1016-21 (1985), the Court held that the scope of tenth amendment, federalism-based restrictions on congressional power, was to be determined by Congress rather than the Court. Moreover, whenever the Court deemed something a political question, it was essentially holding that one of the representative branches, rather than the Court, was to resolve the issue.

22. To the extent that scrutinizing and upholding the validity of an enactment is viewed as an exercise of judicial review, actual invalidation is an inappropriate measure of the Court's exercise of the power of judicial review.

23. After the Supreme Court invalidated a congressional enactment in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it was 54 years before the Court invalidated its next congressional enactment, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

history.<sup>24</sup>

Agresto and his contemporaries must have proceeded from a perspective that we can no longer fully appreciate in characterizing such a Court as one that was actively engaged in judicial review. Undoubtedly, those theorists had acceptable reasons for their characterization, but they can hardly be said to have adopted a characterization that was consistently accurate across all perspectives, or even within their own. To the extent that judicial review existed even as a hypothetical construct, the historical data suggest that it would have been viewed as perfectly capable of restraining itself. As a result, Agresto's distrust of judicial self-restraint (pp. 37-38, 112-16) seems incongruous. To us, the Supreme Court of Agresto's era evaded the merits so frequently that it appears to have become a master of self-restraint. Yet Agresto deemed self-restraint to be an inadequate safeguard against judicial activism. It may be that he viewed even the low frequency of judicial invalidation occurring in the twentieth century as excessive, but such a conclusion cannot be shown to follow logically from his premise that the Supreme Court engaged in judicial review, because his premise is too indeterminate to qualify for use in a logical evaluation.

Both as a theoretical and an empirical matter, the truth value of Agresto's judicial review premise cannot be determined. The mutually exclusive, dichotomous relationship between the presence and absence of judicial review required for proper recourse to logical rigor does not exist. As a result, inferences drawn through the application of logical rules to the premise of judicial review are unreliable.

Like dividing by zero under the rules of twentieth-century mathematics, adherence to logic could produce only haphazard results when applied to premises with indeterminate truth values. Nevertheless, Agresto and his contemporaries persisted in their use of highly contingent, definitional premises without sufficient regard for their inescapable contingency. Such persistence tended to be fatal to twentieth-century adventures in logic. Agresto's conception of judicial review as something distinct from majoritarian politics, for example, must have seemed artificial to those who already conceived of the Court as a political body. And to them, his suggested solution to the perceived problem of judicial review — subjecting the Court to a political check — must have seemed little more than trite. Agresto's second hypothesis further illustrates the point.

## B

Agresto's second hypothesis was that, because judicial review was properly part of the process of interbranch political interaction, judi-

---

24. *See* *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting).

cial exposition should be subject to the political check of re-presentation rather than being treated as final. Implicit in this hypothesis is the premise that political interaction exists in a way that is distinct from the absence of political interaction, which Agresto termed "judicial finality" (pp. 102-07). Once again, however, the dichotomy fails to hold. Just as judicial review could be shown to negate itself by producing no judicial review, political interaction can be shown to negate itself by producing no political interaction. Moreover, Agresto's development of this hypothesis illustrates a second misuse of logic, stemming from a confusion between logical assertion and normative preference, that is also evident in much twentieth-century theory.

As Agresto readily admitted, twentieth-century Congresses possessed an arsenal of political weapons, ranging from court packing to impeachment, that could have been used to express dissatisfaction with Court decisions and to serve as a political check on judicial activity.<sup>25</sup> To the extent that Congress chose not to exploit those sources of political leverage, it must have been because there were insufficient votes to secure the necessary congressional approval. Congressional inability to enact measures that would have served as political checks on the Court, therefore, translated into political power that was possessed by the Court, and that was potent enough to defeat the political forces favoring the imposition of a check. Accordingly, it was political interaction itself that produced the judicial finality that Agresto viewed as the absence of political interaction, thereby rendering illusory the supposed dichotomy between political interaction and noninteraction.

What Agresto must have meant by his assertion that Congress had improperly accorded finality to judicial decisions was that he disapproved of the low level of political pressure that Congress was willing to exert on the Court. But that, of course, was a normative assertion that logical analysis could neither negate nor establish. Moreover, Agresto offered little basis for determining what the proper degree of political interaction should have been. While he favored the re-presentation technique as a means of increasing the level of political interaction, it was unclear when, how often, or how vigorously he believed that the technique should be used. At times he seems to have contemplated slow and deliberate use of the technique as part of a process that could, like the functional overruling of the *Civil Rights Cases*,<sup>26</sup> take nearly one hundred years (pp. 126-27). At other times, however, he seems to have contemplated congressional pressure so vigorous that it would virtually negate any judicial role, such as when he argued in favor of congressional reliance on the powers granted by section 5 of the fourteenth amendment as a means for avoiding judicial invalida-

---

25. See note 7 *supra*.

26. See note 8 *supra*.

tion (pp. 131-33).<sup>27</sup>

Agresto also disapproved of particular Supreme Court decisions relating to abortion, affirmative action, and busing (pp. 156-59), but he failed to explain why those decisions were objectionable. He apparently considered them to manifest self-evident judicial overreaching, but from our present perspective it is difficult to detect any pertinent distinction between those cases and, say, the school desegregation cases with which Agresto did agree (pp. 149-50). It is, perhaps, this suggestion of self-evidence, more than any other feature of Agresto's book, that caused some twentieth-century commentators to consider the work more a neo-conservative political tract than a serious effort at political theory.<sup>28</sup> Agresto has even been accused of awkwardly imitating John Marshall's *Marbury* performance by trying to advance a camouflaged political agenda through a nominal discussion of political theory.<sup>29</sup>

Once again, Agresto was representative of his era in treating normative preferences as if they were supported by logical analysis. Frequent failure to honor the distinction between content-neutral logical method and content-laden substantive assertion is likely to have artificially enhanced many twentieth-century normative assertions by giving them an undeserved air of legitimacy. Moreover, failure to honor the distinction is also likely to have prolonged the attractiveness of logical modes of analysis by permitting them to appear more useful than we now believe them to be. When added to the danger of unwarranted dichotomous thinking, confusion about substantive neutrality illustrates a second problem posed by twentieth-century fascination with logical rigor. Agresto's final hypothesis illustrates a third.

### C

Agresto's third hypothesis was that, although Supreme Court constitutional interpretations were not entitled to finality, they were nevertheless entitled to a high degree of deference because of the Court's special competence to ascertain the meaning of the nation's fundamental principles. This hypothesis rests upon the premise that there is a distinction between accurate and inaccurate interpretations of principle that would make the Court's special competence material. But like the other suggested dichotomies, this one also fails to hold. Moreover, to the extent that the hypothesis can have meaning, that meaning can be acquired only through recourse to normative assertions that are not

---

27. See note 11 *supra* and accompanying text.

28. See, e.g., Spann, *Hyperspace*, 84 MICH. L. REV. 628, 642 (1986) (reviewing J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984)); cf. Leland, Book Review, CAL. LAW., Feb. 1985, at 60 (reviewing J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984)) (suggesting that Agresto's thesis was politically motivated).

29. See Spann, *supra* note 28, at 642.

properly subject to logical evaluation. Finally, the nature of the hypothesis reveals what was perhaps the most insidious aspect of twentieth-century logical analysis — its capacity for self-preservation.

Like his other two hypotheses, Agresto's special competence hypothesis suffers from the failure of the dichotomy on which it is based. Special competence in the exposition of principle would be relevant only if there existed accurate and inaccurate interpretations of principle. But a principle has no existence independent of its interpretation.<sup>30</sup> Indeed, any effort to pronounce a given interpretation inaccurate would amount to nothing more than a second interpretation, which would itself be subject to pronouncements of inaccuracy by the initial interpreter. Because Agresto's conclusion that the Supreme Court should be the guardian of fundamental principles rests on an indeterminate premise, the argument cannot properly be said to be the reliable product of sound logical analysis.

We now realize that, because principles have no existence independent of their interpretations, the only way that one interpretation of principle can be favored over another is through recourse to the interpreter's preferences. Accordingly, Agresto's special competence hypothesis, like his political interaction hypothesis, also amounts to a mere normative assertion. Agresto believed the Supreme Court to be more competent than the representative branches to oversee the development of fundamental principles because of its greater capacity for reason (p. 144). By "reason" he presumably meant freedom from potentially distorting political considerations thought to be advanced by judicial independence. Agresto never explained what reason-free-from-politics would consist of, although one might well fear that logical analysis is what he had in mind. But given the irrelevance of accuracy in the interpretation of principle, there is no apparent reason why nonpolitical interpretations should be preferable to political ones. On the contrary, because political interpretations of principle reflect some degree of popular approval and nonpolitical interpretations reflect what can only be called judicial preference, a proponent of democratic government could easily have been expected to favor political interpretations. Although not necessarily inconsistent with his hypothesis that the Court should be more actively involved in the political process, Agresto's sometime preference for reason over politics seems no more compelling than the distinction upon which it is based.<sup>31</sup>

---

30. Agresto insisted that there was a distinction between principle and interpretation; otherwise there would have been no justification for judicial review. P. 157. The circularity of this argument becomes apparent, however, when one remembers that it was being offered as a justification for judicial review.

31. The two were not inconsistent if one assumed that the proper mode of judicial participation in the political process was through the presentation of principled arguments entitled to nondispositive deference from the representative branches, but that view depended upon the existence of a distinction between politics and principle that is difficult to accept.

The resilience of logical analysis in twentieth-century thought was remarkable. In retrospect, for example, the flaws in Agresto's third hypothesis seem so obvious that even twentieth-century theorists must have realized that the hypothesis rested on a distinction between objective meaning and subjective interpretation that was highly suspect. Such realization would presumably have prompted an extrapolation to other supposed dichotomies, which in turn would have produced a dramatic de-emphasis of logical modes of analysis. But it did not happen that way. By all accounts, twentieth-century theorists appear to have gone out of their way to suppress, or at least to marginalize, any perceptions that would disserve the endurance of logical thought. All closed systems have some capacity to deflect outside attack, but a culture's fascination with any particular system is generally short-lived. Although American culture had little difficulty transcending its brief attachments to things like rights theory, free-market economics, and nihilistic denial, it was inexplicably drawn to logical analysis for an extended period of its history. Such was the seductive nature of logic. It appears to have had a remarkable instinct for self-preservation. And a remarkable ability to retard the growth of American intellectual thought. In fact, twentieth-century misapprehension of logical limitations was so profound that, ironically, theorists of the period almost stumbled into making a major conceptual advance.

### III. HYPERSPACE

In hyperspace there are no logical limitations. In fact, the ability to conceptualize hyperspace was materially advanced by the perception that logical premises could always be viewed as indeterminate rather than dichotomous. Because this deprived logical thought of most of its value, the physicists began to de-emphasize it and to evolve nonbinary modes of analysis that could subsist on indeterminacy. By breaking the logic barrier, they were able to break the light barrier and move to modern levels of conceptual sophistication. But the political theorists put up more resistance.

Like most political theorists of his era, Agresto had all of the perceptions necessary to make the conceptual leap to hyperspace. He was sufficiently aware of the frailties inherent in his dichotomies to label the conception of judicial review that was based upon them a paradox (pp. 145-46, 156-57). Moreover, he believed that the solution to the supposed problem of judicial review lay not in choosing between majoritarian democracy and judicially enforced constitutionalism, but rather, in somehow preserving the tension between the two (pp. 84-85, 167). Agresto's instincts, like the instincts of many of his contemporaries, were trying to liberate him from the confines of binary logic, but they were not strong enough to let him break free.

Rather than question the continued utility of their logical commit-

ment, twentieth-century theorists devised various strategies for domesticating their subliminal appreciation of logical disutility. The three most common strategies were polar domination, continuum compromise, and dialectical mediation. Polar domination, the most elementary of the three techniques, consisted of viewing one pole of a dichotomy as superseding the other, as when one decided that the Supreme Court rather than Congress should have the final say as to the meaning of the Constitution. This not only dissipated the tensions produced through simultaneous pursuit of inconsistent objectives but, more significantly, avoided the need to confront the significance of simultaneously possessing contradictory desires. Agresto was sophisticated enough to resist this technique (pp. 84-85), but only in favor of the other two.

Continuum compromise posited the presence of a continuum between two dichotomous polar extremes and then focused on the continuum rather than the extremes in order to reduce dissonance. Proper resolution of the conflict generated by the competing polar objectives lay at some midpoint along the continuum corresponding to an appropriate compromise. The bulk of Agresto's thesis embodied this strategy. For Agresto, proper resolution of a social problem was determined by where the problem fell along the continuum between the dichotomous poles of principle and policy. If, like Agresto's view of school desegregation, the problem related primarily to principle, proper resolution corresponded to what the Court deemed best (pp. 149-50). But if, like Agresto's view of abortion, the problem related primarily to policy, proper resolution corresponded to what the politically accountable legislature preferred (p. 157). Neither pole properly determined the outcome in all cases.

Dialectical mediation was the most sophisticated of the three techniques. It posited continuous societal vacillation between the mutually exclusive polar extremes in a way that allowed both poles to be occupied at once. Just as the twentieth-century process of animation could show a cartoon character appearing simultaneously in two places at once by alternating frames in which she appeared in one place with frames in which she appeared in the other, contradictory ideas could be simultaneously held through a similar process of conceptual vacillation. Proponents of this technique tended to advocate such vacillation through procedural rather than substantive approaches to conflict resolution. To the extent that Agresto called for increased political interaction between the representative branches and the Court as the solution to the problem of judicial review, he can be seen as having adopted a dialectical mediation strategy. Issues of social policy were to be constantly shuttled back and forth between Congress and the Court, with the actions of each continually being



corrected through the political checks of the other.<sup>32</sup> Viewed in the proper time frame,<sup>33</sup> this permitted societal decisionmaking that was simultaneously majoritarian yet principled. All three techniques were primitive, but they were effective enough to prevent the twentieth-century mentality from having to confront the incoherence of dichotomy itself.

The solution to the twentieth-century conceptual problem now seems so obvious that it is hard to imagine theoreticians of the period having missed it. Even in the twentieth-century they were familiar with nonlogical modes of conception and, in fact, relied heavily upon nonlogical conceptualization in their art, music, and literature. Moreover, they revered the physical sciences, which increasingly repudiated the validity of binary paradigms. And the emotional determinants on which they blamed everything from procreation to nuclear destruction often must have seemed to defy all twentieth-century precepts of logical order. So much in their culture pointed to the viability of contradictory coexistence that they certainly seemed ready to conceive it. But they resisted, and their attachment to logic persisted.

### CONCLUSION

As Agresto's work illustrates, twentieth-century political theorists failed to recognize the disutility of logical analysis because they were unaware of the indeterminate truth values of the premises on which they relied. Because such indeterminacy precluded reliable use of logical analysis, twentieth-century logical conclusions tended to be nothing more than normative assertions. Although theorists of the period perceived the self-contradiction inherent in dichotomous thinking, they repressed rather than nourished that contradiction, and were unable to escape the grip of binary thought.

It is tempting to imagine that we are back in their time and to imagine ways in which we might have shown them how close they were to conceptual maturation. But, of course, we could not have shown them. Neither hyperspace nor the epistemology out of which it was conceived could have been understood by twentieth-century political theorists — not even those who might have strained to understand.<sup>34</sup> Logic being what it was, they could never have comprehended analytical thought without it until they were able to engage in analytical thought without it. Even if they had been able to

---

32. Agresto's focus on a procedural solution to the problem of judicial review was arguably inconsistent with his disapproval on substantive grounds of particular Supreme Court decisions. Pp. 157-59; see text at note 13 *supra*. It is unclear why inadequate political interaction tainted those decisions but not others.

33. Time frame is as important to conceptualization as it is to animation. In this regard see Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

34. See, e.g., Spann, *supra* note 28.

read the present historical review, it would have made little difference. Most theorists would have perceived nothing more than the irony of offering a dichotomous logical argument as the basis for rejecting dichotomous logical argument. Completely unaware of what was about to unfold, and completely unable to do anything else, they would simply have subjected the review to logical evaluation and incorporated it into one of their existing conceptual paradigms.

But despite themselves, of course, they eventually did make the leap.

INTERPRETATIONS OF THE FIRST AMENDMENT. By *William W. Van Alstyne*. Durham, N.C.: Duke University Press. 1984. Pp. x, 136. \$24.75.

It is not entirely clear why so many people write about the first amendment. Granted, the freedoms contained therein are significant bulwarks of the American way, and, certainly, there is much to be said in terms of legal theory and ethical philosophy about these freedoms. Nonetheless — and this observation really applies only to the speech and press clauses of the first amendment<sup>1</sup> — there appears to be a powerful force of analytic reduction at work in most first amendment scholarship. Everyone agrees, though often for different reasons, that the freedoms of speech and press are good things; everyone agrees, though often with different problems in mind, that these freedoms are not absolutes, but can be limited by certain public interests (even Hugo Black would have approved of laws against perjury); and everyone agrees, though often not explicitly, that at some point in the analysis a balance must be struck between the freedom in question and the countervailing public interest.<sup>2</sup> This analytic reduction (to a balancing test) does leave much work to be done in the trenches. The ferreting out of reasons why we protect the freedoms of speech and press, the elucidation of how the exercise of these freedoms may on occasion collide with the interests of others, and the assigning of weights to the opposing freedoms and interests so that one side may be granted the protection of the law and the other side left to lick its wounds, are all socially (and academically) productive enterprises. But at a metatheoretical level (“How do we think about the first amendment?”) and at a subtheoretical level (“What’s really going on when people think about the first amendment?”), the analytic reduction appears unavoidable. The problem for the reader then becomes one of determining what each new piece adds to the overcultivated field. Upon encountering so much that seems familiar in a first amendment essay, the reader may wonder, “What is it that *this* work has to say?”

In his book *Interpretations of the First Amendment*, Professor William W. Van Alstyne of Duke Law School has three, perhaps four,

---

1. The observation may also apply to some extent to the religion clauses, but because these clauses generally pose additional, different sorts of problems, and because Professor Van Alstyne does not discuss them, they are not included here.

2. See, e.g., F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 132 (1982) (“There is no way around the difficult task of evaluating the strength of the free speech interest, the strength of the opposing interests, and the balance between the two.”); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 583 (1978) (“it is impossible to escape the task of weighing the competing considerations”); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1283 (1983) (arguing that general theories of the first amendment abstract from the delicate balancing considerations that must take place).

things to say about the freedoms of speech and press.<sup>3</sup> First, he provides a general formulation of the free speech clause, in the manner of a test:

The question in each case is whether the circumstances were sufficiently compelling to justify the degree of infringement resulting from the law, given the relationship of the speech abridged to the presuppositions of the first amendment, and the relationship of the law to the responsibilities of the level of government that has presumed to act. [p. 48]

Second, he contends that the press should not be given a preferred first amendment position. He suggests that “[s]hould newspapers succeed in creating special first amendment . . . privileges that set them uniquely apart, they may thereafter discover that they have also paved the way for the loss of some of their own editorial freedom and for the escalation of their legal liabilities” (p. 65). Finally, he argues against regulating the electronic media:

[I]sn't it possible to convert airwave-frequency scarcity essentially to an ordinary problem of mere economic scarcity, pursuant to which . . . the fact of economic scarcity per se is not a sufficient justification for requiring a private party to use his speech-property (whether a newspaper or a broadcast station) as an unwilling carrier of other people's messages? [p. 86]

He notes, however, that “it is not obvious that *the* freedom of speech would be appropriately enhanced by exclusive reliance upon a private property system that would literally drive out all those unable to compete effectively with dollars” (p. 88).

The first chapter, “A Graphic Review of the Free Speech Clause,” presents a series of arguments accompanied by a series of graphic depictions of what the first amendment might and might not protect. “Might and might not” rather than “ought and ought not” is descriptive of Van Alstyne's rather carefully non-normative method of presentation. Even when he states his general formulation of the free speech clause (quoted above), Van Alstyne is merely recounting how the Court has behaved. His descriptive conclusion — there are certain categories of speech (*e.g.*, criminal solicitation, perjury) that never receive first amendment protection (“definitional balancing”), and there are certain instances of otherwise protected speech that sometimes lose first amendment protection (*e.g.*, clear, present, and serious danger; “ad hoc balancing”) — is indeed nothing new. His task here appears

---

3. The book is comprised of an introduction called “Interpreting *This* Constitution,” which essentially argues against noninterpretivist theories of judicial review, and three chapters. Chapter 1 is an adaptation of an article previously appearing in 70 CALIF. L. REV. 107 (1982) as *A Graphic Review of the Free Speech Clause*. Chapter 2 is not an adaptation from a previous article, but is derived from some related works that appeared in 9 HOFSTRA L. REV. 1 (1980) as *The First Amendment and the Free Press: New Trends and Old Theories*, and in 28 HASTINGS L.J. 761 (1977) as *The Hazards to the Press of Claiming a “Preferred” Position*. Chapter 3 originally appeared in different form in 29 S.C. L. REV. 539 (1978) as *The Möbius Strip of the First Amendment: Perspectives on Red Lion*.

to be one of synthesis and restatement, not one of “original” affirmative argument. As such, the first chapter is a cogent review of the free speech clause.

The second chapter, “The Controverted Uses of the Press Clause,” presents the arguments for and against a preferred first amendment position for the press. Agency theory is central here; the argument in favor of a preferred position is that the press acts as the public’s agent, as the “fourth estate,” against the government. But Van Alstyne finds two arguments against a preferred position more persuasive. First, the preferred position’s factual predicate is false — the press acts often out of a profit motive and not from a sense of fiduciary duty. Second, and significantly, if the press wants to be treated specially *because* it acts as the public’s agent, then the press must also bear the heavy accountability of a fiduciary, thereby losing editorial autonomy and gaining legal liability.

But Van Alstyne fails to consider that what’s special about the press may be a constitutional grant of rights *without* duties, that is, that the first amendment’s separate phrase “or of the press” was meant to secure to the press a broader scope of legal protection, both as a sword (*e.g.*, access rights) and as a shield (*e.g.*, libel defense), and that the only way to secure such protection is by not burdening the press with a commensurate set of duties to match its rights. The press may, in the end, serve a stronger public agency function by being permitted to roam free.

In his third and most provocative chapter, “Scarcity, Property, and Government Policy: The First Amendment as a Möbius Strip,” Van Alstyne details the arguments for and against treating electronic media differently from print media. The basic argument in favor of different treatment is the familiar one of spectrum scarcity and public trust: There is more demand for broadcast frequencies than there are frequencies, the government “owns” the airwaves, and therefore with the rights of a license come the duties of regulation. Van Alstyne neatly sidesteps the problem of unconstitutional conditions, that is, the argument that the government can’t impede constitutional rights (here, freedom of the press) by granting a privilege (here, a broadcast license) conditioned on the relinquishment of those rights (here, by the imposition of the various Federal Communications Act regulations<sup>4</sup>). In a footnote, Van Alstyne points out that the doctrine of unconstitutional conditions does not invalidate *all* conditions on governmental privileges; rather,

it imposes upon government the burden to demonstrate a constitution-

---

4. These regulations include the duty to devote broadcast time to relevant public issues, the duty to provide equal time to the opposition when a partisan perspective on a controversial public issue is broadcast, and the duty to permit local programming during a portion of prime time. The Federal Communications Act appears at 47 U.S.C. §§ 151-609 (1982) (originally enacted as the Communications Act of 1934, ch. 652, 48 Stat. 1064).

ally significant difference sufficient to account for a condition (namely, the duty to carry other people's messages) distinguishably relevant to this context. Here, of course, the "distinguishably relevant" fact is the exclusivity of use-rights granted the successful applicant, and the justification of mitigating the excluded use-rights of others [who were denied, or lack, a license]. [p. 123 n.65]

But, as in Chapter Two, both a factual and a theoretical flaw exist in the argument supporting different treatment (here, of electronic media from print media; there, of the press from other free speech agents), and Van Alstyne finds these flaws irreparable. The factual problem is that as a result of technological developments there may not actually be more demand for broadcast frequencies than there are frequencies. The theoretical problem is that, even with spectrum scarcity, the government could allocate broadcast frequencies as it does real property — by selling on the open market. For the reader who is concerned about wealth distribution problems in this free market scenario, Van Alstyne adds a few pages of distressed acknowledgment that people without money will, indeed, have trouble competing under this new, deregulated regime. He admits that *some* airwave use might be best set aside from the open market auction.

Van Alstyne frames this last chapter with the image of a Möbius strip, defined as "Topology, a one-sided surface that can be formed from a rectangular strip by rotating one end 180° and attaching it to the other end" (p. 68). Van Alstyne quotes approvingly from a student's paper: "Deriving a consistent theory of the First Amendment from the myriad opinions of the Supreme Court represents a task similar to the problem of defining the inside and outside of a Möbius strip; that which appears logical at one point evaporates from another perspective" (p. 68). First amendment jurisprudence is, on this view, paradoxical, endorsing at various moments seemingly contradictory values.

Regarding electronic media, Van Alstyne's point is that the first amendment can be invoked to argue both for and against regulation. But surely this is not news; Rawls, for example, made quite clear that one's ability to speak — which is influenced by one's wealth — affects the value of the otherwise abstract "freedom of speech."<sup>5</sup> Furthermore, that the derivation of a consistent first amendment theory leads to a paradox because neoclassical and Keynesian economics can both be invoked in defense of a reasonable interpretation of the amendment does not appear to distinguish the problematic nature of first amendment theory from that of other constitutional provisions, or from other areas of law. Wealth is often necessary for the exercise of freedom; regulation of one person's freedom is often necessary for another's to flourish. This is so with speech and press — and beyond.

---

5. J. RAWLS, A THEORY OF JUSTICE 221-28 (1971).

Perhaps Van Alstyne would agree. But *Interpretations of the First Amendment* remains a work limited by its place within the analytic reduction of free speech and free press scholarship. At a metatheoretical level, there is nothing very paradoxical going on at all, merely an acknowledgment (albeit often tacit) that interests must be balanced. One wishes that the image of the elusive Möbius strip would appear at this level; as it is, the topology is rather flat.

— Abner S. Greene

JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (2d edition). By Henry J. Abraham. New York: Oxford University Press. 1985. Pp. xi, 430. \$24.95.

The judicial nominating process has always been inexact, as many presidents have discovered to their chagrin. For example, after Oliver Wendell Holmes failed to support him in a major antitrust case, Theodore Roosevelt declared that "I could carve out of a banana a Judge with more backbone than that!" (p. 69). And when a biographer asked Dwight D. Eisenhower if he had made any mistakes while president, he replied, "Yes, two, and they are both sitting on the Supreme Court" (p. 263). Eisenhower was referring to Chief Justice Earl Warren and Justice William Brennan. Yet a great deal of consideration preceded each of the above nominations, apparently to no avail.

On crucial issues, Justices and their appointing presidents have often disagreed. Why is this so? What are the decisional criteria surrounding Supreme Court appointments? What should they be? Can presidents know in advance how their nominees will respond to the questions before them, and to those not yet before them? These are the questions which Henry J. Abraham<sup>1</sup> poses, and they merit answers. Unfortunately, he never answers them.

In *Justices and Presidents: A Political History of Appointments to the Supreme Court*, Professor Abraham surveys nearly two hundred years of presidential nominations of Supreme Court Justices and corresponding judicial performance. The result is a highly accessible compendium of the process by which 37 presidents have nominated 139 Justices, of whom 102 actually served. But while Abraham stresses the personal nature of the nomination process, his work is short on illustrative anecdotes. And while he purports to be writing a history, Abraham never manages to place this multifaceted process within the context of a unitary theory of history. The omissions are

---

1. James Hart Professor of Government and Foreign Affairs at the University of Virginia.

keenly felt. Like Chinese food, *Justices and Presidents* is momentarily filling, but leaves one hungry for more soon afterwards.

Structurally, *Justices and Presidents* is divided into three parts. First, the author devotes several chapters to the hows and whys of the appointment process, reflecting upon the process generally. Abraham then devotes the bulk of his work to a brief, informal analysis of each nomination to the Supreme Court, including unsuccessful ones. Finally, Abraham appends the results of several surveys attempting to assess the performance of Justices and presidents. Among these surveys is a 1970 study wherein 65 prominent academics, including Abraham, rated the Justices in categories ranging from "great" to "failure."<sup>2</sup> The author refers to this survey throughout as a benchmark of judicial competence.

In Abraham's estimation, four considerations dominate the nomination process: objective merit, personal relationships, balancing representation on the Court, and "real" political and ideological compatibility with the President. Not surprisingly, the four overlap somewhat, and more than one may be relevant to a single nomination. However, Abraham hypothesizes that *most* nominations are attributable primarily to one of these criteria. For example, Republican President Herbert Hoover's nomination of Democrat Benjamin Cardozo is deemed a "classic" merit-based appointment, and "the finest act of his career as President" (p. 5). In contrast, President Johnson's selection of Thurgood Marshall and President Reagan's selection of Sandra Day O'Connor reflect the perceived need for black and female representation, respectively (p. 6). Political and ideological compatibility has been a threshold consideration in a large majority of appointments (p. 6).

Although recognizing the legitimacy of numerous decisional criteria, Abraham questions the importance accorded factors other than objective merit in the appointment process. His primary concern is that these factors not deprive the Court of Justices "professionally, intellectually, and morally qualified to serve," whatever their other characteristics (p. 341). Citing near consensus among "qualified observers of the judicial function at its apex," Abraham argues that objective merit can be identified and anticipated in potential nominees (p. 11). The author's meaning is clear; since merit can be measured, it ought not be transcended by other decisional criteria. As examples of the risk of using other criteria, Abraham notes the failure to appoint the obviously meritorious Learned Hand and the long service of the bigoted James McReynolds, whom Abraham terms "a disgrace" (p. 176).

---

2. The complete results of this survey were published in book form in 1978. A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* (1978).



In defining objective merit, the author refers to a speech he gave before the Supreme Court Historical Society in 1982. There he listed six factors which he deemed "de minimis qualification guidelines" for Supreme Court Justices: "One, demonstrated judicial temperament. Two, professional expertise and competence. Three, absolute personal as well as professional integrity. Four, an able, agile, lucid mind. Five, appropriate professional educational background or training. Six, the ability to communicate clearly, both orally and in writing, especially the latter."<sup>3</sup> Certainly Abraham's list is appealing. All the qualities he lists are objectively desirable. The question is whether they can actually be objectively defined.

Therefore, the first problem with Abraham's analysis is that he never sufficiently develops his concept of what objective merit entails. What exactly is "an able, agile, lucid mind"? Does the answer reflect a way of thinking or a type of thinking? What is an "appropriate professional educational background"? Is it a degree from the University of Virginia, where Abraham teaches; or is it a degree from Bob Jones University, recently maligned for its policy of segregation? Thus Abraham ignores the probability that any definition of objective merit necessarily would take account of just those subjective factors which he seeks to exclude. After all, the reference point from which one judges excellence is inevitably one's own analysis. Jerry Falwell and Jesse Jackson are unlikely to overlap much in their definitions of "objective" merit. But even if it were possible to define merit objectively, other considerations have a legitimate place in the process.

Indeed, despite the author's rather dubious assertion that the Founding Fathers expected merit alone to determine Supreme Court appointments (p. 25), any modern observer would be astounded by a president's failure to consider personal relationships and political ideology in making nominations. Supreme Court appointments are for life. Naturally, presidents take the opportunity to fill the Court with Justices in their own images. To expect otherwise is both unreasonable and unrealistic.

Abraham sets out to chronicle "the motivations that underlie the process of presidential selection and appointment, the degree and kind of fulfillment of presidential hopes or expectations, and the professional performance of those entrusted with the responsibilities of the business of judging" (p. 12). He proceeds chronologically, after inexplicably starting with a case study of President Nixon's appointments to the Supreme Court. Presumably, Abraham sees the Nixon era as a microcosm of the appointment process generally. Certainly, Nixon's nominees ran the gamut from highly qualified to wholly undeserving,

---

3. P. 4. An adapted version of the address was published as Abraham, "A Bench Happily Filled:" *Some Historical Reflections on the Supreme Court Appointment Process*, 66 JUDICATURE 282 (1983).

from judicially experienced to wholly inexperienced, and from readily confirmed to summarily rejected.

Nixon's first opportunity to appoint a Justice came swiftly, with the retirement of Chief Justice Earl Warren. Immediately, Nixon turned to Warren Burger of the District of Columbia Circuit, a "prototype" Nixon jurist known for his tough law and order views. To Abraham, Burger represents an ideal combination of ideological compatibility with the President and objective merit, evidenced by his 13 years on the federal bench.<sup>4</sup> To Nixon, however, objective merit seems to have been beside the point (pp. 13-14).

Next, Abraham begins to develop his notion that presidents ignore objective merit at their peril. He does so by tracing Nixon's unsuccessful efforts to place Clement Haynesworth, Jr., and later G. Harold Carswell in the seat vacated by Abe Fortas' retirement. To Abraham, the ease with which Burger gained confirmation reinforced Nixon's fundamental misunderstanding of the appointment process, and precipitated an ongoing battle, during which the Senate repeatedly constrained the President from making unqualified appointments (pp. 14-21).

The controversy raged until Nixon completed his four appointments to the Court, nominating Eighth Circuit Judge Harry Blackmun, former American Bar Association President Lewis Powell, and Assistant Attorney General (and former Supreme Court clerk) William Rehnquist. And had it not been for the potential damage to the Court's prestige, "one might have regarded these struggles as a salutary educational experience for America's citizenry" (p. 23). Apparently, the lesson is the danger of mediocrity.

Few American presidents have misunderstood the appointment process as fundamentally as Richard Nixon, according to the author. Some, like Franklin Roosevelt, focused on a nominee's support for the President's immediate goals. Others, like George Washington, emphasized a nominee's basic philosophy of government. But essentially all presidents at least considered merit, despite relying on other criteria in the final analysis.

However, even more than merit, presidents tend to emphasize factors related to significant contemporary political problems. Abraham's narrative demonstrates the multiplicity of influences to which presidents have responded. By and large, these influences are pressing and immediate. Rarely do they leave room for the kind of purity of process which Abraham seeks.

For example, George Washington limited his appointments to out-

---

4. Abraham's high esteem for the Burger nomination is surprising in light of his generally low opinion of President Nixon. Pp. 13-23. For a decidedly different assessment of the Burger nomination and tenure, see B. WOODWARD & S. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

spoken advocates of the Constitution, a new and unexplained document. In fact, seven of Washington's ten appointees had participated in the Constitutional Convention of 1787 (p. 72). Chief Justice John Jay did not participate, but he played an active role in gaining New York's ratification. More typical was James Wilson, an initial appointee who later became the nation's first law professor.<sup>5</sup> Wilson not only signed the Declaration of Independence and took part in the Constitutional Convention, but is widely regarded as the architect of judicial independence (p. 73). In nominating men like Jay and Wilson, Washington sought to invigorate the Constitution, and to establish the judiciary as a viable and effective branch of government.

John Adams appointed only three men to the Court, but among them was Chief Justice John Marshall, the only Justice unanimously ranked "great" in the 1970 survey (p. 81). A lame duck at the time of the vacancy, Adams saw his Secretary of State as a Federalist counterweight to the incoming Thomas Jefferson. Presumably, Adams delighted at saddling his rival with a man to whom Jefferson liked to refer as "that gloomy malignity" (p. 82). Later, Adams would call Marshall's appointment "the proudest act of my life" (p. 82). Abraham would certainly agree, despite Adams' apparent failure to consider the "objective" merit of his nominee.

The Civil War dominated Abraham Lincoln's presidency, and likewise dominated his Supreme Court appointments. Thus Lincoln concerned himself almost entirely with a nominee's possible impact on the conduct of the war. And this went beyond just constitutional outlook. For example, Noah Swayne and Samuel Miller were Southerners who opposed slavery, so Lincoln trusted their politics. But Lincoln's principal purpose in appointing a Virginian and Kentuckian was to induce the Border States and upper South to rejoin the Union (p. 116). Swayne and Miller had no effect on the duration of the Civil War, but they remain striking examples of necessity taking primacy over idealized notions of "objective" merit.

Amongst survey respondents, Woodrow Wilson is almost unanimously considered a "great" President. Moreover, Wilson's presidency is replete with examples of idealized concerns transcending practical ones, most notably during the League of Nations fiasco. Like his presidency, Wilson's nominations bred both triumph and failure. In fact, Wilson nominated what some consider both the best and worst justices of this century — Louis Brandeis and James McReynolds.

Abraham spends considerable time assessing the tenures of these two justices, ultimately blaming politics for McReynolds' nomination, while crediting principle for Brandeis'. This seems too pat an explanation. Nonetheless, the two were complete opposites. McReynolds led

---

5. Wilson taught at the University of Pennsylvania. P. 73.

the "Four Horsemen" who delayed the New Deal, and was notoriously conservative. Brandeis was a liberal whom some labeled radical. McReynolds was an anti-Semite; Brandeis was a Jew. McReynolds is rated a "failure"; Brandeis is rated "great" (pp. 377-79). That the same president, presumably using the same criteria, nominated both men, represents one of the more interesting aspects of Supreme Court history. Moreover, it raises serious questions as to the validity of Abraham's underlying belief in predictability.

No modern president has faced greater controversy in his dealings with the Court than did Franklin Roosevelt. Furious with the Court's rejection of several New Deal programs, Roosevelt hatched his infamous Court-packing plan. But before the plan could be voted on by Congress, the Court began to uphold central New Deal programs, including the National Labor Relations Act<sup>6</sup> and the Social Security Act.<sup>7</sup> Thus the logjam was broken and the Court-packing plan rendered moot (pp. 207-09).

Despite this inauspicious beginning, Roosevelt eventually played a greater role in shaping the Supreme Court than any president since Washington; his nine appointments were second only to Washington's ten. And according to Abraham, Roosevelt's nominees were excellent. Among his appointees were two "great" Justices, Hugo Black and Felix Frankfurter, and three "near great" Justices, William O. Douglas, Robert Jackson, and Wiley Rutledge (p. 210). Yet like most presidents, Roosevelt chose his nominees primarily for their support of his short term goals. For example, Senator Hugo Black sponsored the Fair Labor Standards Act, and was a long-time congressional advocate of the New Deal. Felix Frankfurter helped draft New Deal legislation. And on the eve of World War II, Roosevelt turned to his Attorney General, Robert Jackson.

As these brief summaries indicate, Supreme Court history is replete with stories with unexpected endings. The great strength of Abraham's work is the ease with which he relates those stories. Whatever its limitations, *Justices and Presidents* was a labor of love; one which demonstrates the author's deep respect for and understanding of its subjects. Abraham knows his subjects intimately; so much so that the narrative often resembles a personal recollection rather than collected research. Yet in the end, Abraham has done a better job of introducing the players than he has of explaining the game they play. One finishes with a familiarity with Justices and presidents, but with little understanding of their places in history. No unifying theme emerges to lend coherence to two hundred years of interesting but disjointed vignettes. Nor is there any demonstrated correlation between

---

6. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

7. See *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the tax and benefits provisions); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the unemployment provisions).

“merit”-based appointments and ultimate performance. One cannot help feeling that something is missing; that the author knows far more than he has told.

— James S. Portnoy

CLONING AND THE CONSTITUTION: AN INQUIRY INTO GOVERNMENTAL POLICYMAKING AND GENETIC EXPERIMENTATION. By *Ira H. Carmen*. Madison: University of Wisconsin Press. 1985. Pp. xv, 215. \$22.50.

The title of this book, *Cloning And the Constitution*, is somewhat deceptive in that neither “cloning” nor “Constitution” refers to the customary usages of these words. The word “cloning” generally conjures up images of twenty-six Adolf Hitlers roaming the countryside in Ira Levin’s *Boys From Brazil*. The cloning referred to in this book is, for the most part, the relatively innocuous scientific research tool of gene splicing via recombinant DNA techniques. The “Constitution” in the title refers to Professor Ira Carmen’s<sup>1</sup> conceptualization of the “Living Constitution.”<sup>2</sup> He undertakes an in-depth constitutional analysis of the cloning controversy that arose in the early 1970s. Carmen believes that “the opinions of leading decisionmakers, key groups, and citizens generally regarding the value to be accorded provisions in our governmental rule structure may themselves be aspects of the Constitution . . . ” (p. 3).

Given this belief, Carmen pursues two separate inquiries. He first analyzes local and national governmental policymaking decisions that have an impact on cloning research. He then surveys a group of scientists engaged in “cloning research” and their appointed “watchdogs.” From these discussions and survey results, Carmen hopes to demonstrate that cloning research is protected free speech, not in the traditional legal sense, but in terms of Carmen’s extremely expansive “Living Constitution”:

For the Living Constitution is law, is custom, is usage; moreover, it is an institution, a corpus of behavior patterns energized by deep-seated beliefs regarding the role of statecraft and the bounds of constitutionally sheltered freedoms. It is not enough, then, to know the law or to know the rule; one must also know why people live the law and how they live it. And so the manner in which salient persons and publics have conceived

---

1. Ira H. Carmen is a professor in the Department of Political Science at the University of Illinois.

2. Carmen explains that he developed the full analytical concept of the “Living Constitution” in I. CARMEN, *POWER AND BALANCE* (1978).

relationships between science and the fundamental law could well be the essence of constitutional history . . . [pp. 3-4]

The cloning debate was spawned in the early 1970s when gene-splicing and recombinant DNA techniques — cloning — were developed. These techniques allow scientists to isolate and mass produce a specific genome<sup>3</sup> by grafting desirable portions of DNA within the genetic material of host organisms.<sup>4</sup> By subsequently reproducing the altered host, the scientists are able to obtain large quantities of either the genome or the product which it expresses.<sup>5</sup>

The pioneers of this research perceived a potential safety hazard arising from this work. They feared that a lethal genome could be grafted into a host organism and a biological time bomb would be created. The fears were accentuated by the fact that the most successful host organisms were common bacteria that lived in humans. When these scientists brought this potential hazard<sup>6</sup> to the attention of the general public, the cloning controversy began. Carmen hopes that a "Living Constitution" analysis, based on the two separate inquiries, will reveal that the cloner's research is protected free speech.

*Cloning and the Constitution* begins with introductory chapters that discuss the significance placed upon science by the authors of the Constitution, principally analyzing the scientific attitudes of Thomas Jefferson and Benjamin Franklin. Carmen then reviews the dominating role the government has taken in funding scientific research in this country, detailing the myriad means and bureaucratic systems involved in supplying financial support to scientists. Carmen points out that these systems have mushroomed with no central agency or authority responsible for assuring the development of a consistent national policy on scientific research (pp. 30-31).

Next Carmen describes the evolving constitutional theories that equate the expanding concept of protected "quasi-speech" with scientific investigation. Although scientific research can be fairly categorized as conduct rather than speech, traditional legal thought could classify research as a "pursuit of knowledge" which should be afforded first amendment protection (pp. 35-41). Unfortunately, these legal concepts of constitutional rights are of apparently little interest to Carmen who does little more than adopt the thesis that the government's

---

3. DNA and RNA are basically codes which are "read" by the cells that contain them to produce specific sequences of amino acids. The amino acids are combined to form proteins. A genome is a specific portion of a cell's nucleic material which acts as a template for the production of a specific protein.

4. A portion of the nucleic material of an organism is "spliced" into the DNA of the host material; thus the name "gene-splicing."

5. An example of this process would be the recent successful efforts to isolate and reproduce the genome which is transcribed to produce Interferon.

6. It belatedly came to the attention of the gene-splicers that microbiologists had safely dealt with highly experimental forms of these common bacteria for over a hundred years.

involvement in restricting cloning research violates the scientists' first amendment rights.

In Chapter Three, Carmen begins his elusive search for "living constitutional" vindication of his thesis by tracing the history of gene-splicing research and the development of restrictions placed upon these scientific experiments. The origin of the government's role in genetic experimentation, aside from supplying the funds for the research, began when genetic scientists Paul Berg and Stanley Cohen independently developed techniques for performing recombinant DNA experiments.<sup>7</sup> Instead of going ahead with these experiments, the scientists, motivated by genuine health and safety concerns, placed a temporary moratorium on further research and asked the National Academy of Science (NAS) to evaluate the potential hazards.

In 1975 the NAS organized a conference of top scientists that met in Ansilomar, California. The NAS scientists developed guidelines to allow those conducting recombinant DNA research to proceed with little risk of danger. These guidelines became mandatory when adopted soon after by the National Institutes of Health (NIH), the primary governmental funding agency. The cloning debate was also carried out in Congress when legislation to restrict cloning research was introduced and in city council meetings in Cambridge, Massachusetts, and Ann Arbor, Michigan, where local restrictions were considered.

Despite this exhaustive survey of policymaking decisions in these various forums, Carmen was unable to uncover any deepseated beliefs among participants in these debates that cloners are protected by the Constitution (living or otherwise). The most generous conclusion attributable to these results is that Carmen's thesis concerning the first amendment protection of scientists is incorrect. Instead of illuminating core constitutional values, the review of these decisions emphasizes the antithesis of Carmen's "Living Constitution" theory — the highly pragmatic nature of the policymaking process.

In the next chapter, Carmen turns to the group of people most likely to vindicate his thesis — the scientists actually engaged in cloning research. Carmen describes the results of a survey given to nineteen geneticists active in cloning research and seven administrators who were responsible for overseeing cloning research at different academic institutions.<sup>8</sup> Carmen asked the participants to respond to a number of questions regarding the government's attempts to regulate the cloning research projects. The geneticists, by a small majority,

---

7. Professor Berg described his research in his Nobel Prize acceptance speech, Berg, *Dissections and Reconstructions of Genes and Chromosomes*, 213 *SCIENCE* 296 (1981). Sanger and Gilbert shared the Nobel Prize with Berg for this work.

8. Part of the NIH guidelines required every institution receiving recombinant DNA funds to establish an Institutional Biosafety Committee. The "watchdogs" surveyed by Carmen were chairmen of these committees.

agreed with the author that when their research is classified as pure scientific investigation they are protected by the first amendment. However, nearly all felt that the regulatory scheme then in effect was constitutional. The results obtained from the administrators generally reflected the same trends as the responses given by the geneticists (pp. 148-49).

Carmen is unable to find a great deal of support for his thesis even among the people most likely to be searching for a constitutional right. Carmen's response to these less-than-enthusiastic results was to "surmise that the consensus hospitable to recombinant DNA investigations as constitutionally protected phenomena has not, as yet, been converted into a viable systematic expectation respecting statutory standards. Fluidity and watchful waiting are the bywords" (p. 147). Basing any conclusions on such a small sampling of clearly biased respondents suggests that "irrelevant" may be another applicable byword.

The author's attempt to contribute an additional dimension to the debate over recombinant DNA is largely unsuccessful. Neither the results of his analysis of the historical "debate" regarding recombinant DNA or his survey of cloners and their watchdogs provides support for his thesis that cloning research is protected free speech. It is not clear why the author is willing to publish this material when neither of his efforts to establish his thesis are successful and the relevance of his underlying constitutional theory is called into question.

The flavor of Professor Carmen's writing style should be clear from the small samples quoted. His verbose and often convoluted writing style deters any attempt to clarify his questionable theoretical and methodological approaches. Carmen apparently suggests that constitutional rights evolve from a people's feelings about *their own* behavior. Taken to its logical conclusion, this would inevitably result in constitutional anarchy with each person defining his or her own constitutional rights. If this is what the "Living Constitution" means to the author, his conception of constitutional rights is quite far removed from the realm of traditional constitutional values.

One observation of value that can be gained from this work is the surprising extent to which scientists are willing to cooperate with different factions in order to further their research pursuits. Unfortunately, Carmen contributes little to the interesting debate<sup>9</sup> on the freedom of scientists to perform their research without government intervention.

— *Barry J. Swanson*

---

9. See, e.g., Delgado & Miller, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349 (1978).