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Cover Page Footnote

I wish to thank Judge Robert Bork of the United States Court of Appeals for the District of Columbia and Professor Leopold Pospisil of Yale University, for their comments during the preparation of this article.

DEMOCRACY AND DEMOGRAPHICS: THE INEVITABILITY OF A CLASS-BOUND INTERPRETATION

*Dan Rosen**

I. INTRODUCTION

"[T]he values judges are likely to single out as fundamental, to the extent that the selections do not simply reflect the political and ethical predispositions of the individuals concerned, are likely to have the smell of the lamp about them."[1]

John Hart Ely and other commentators have turned up their noses at the smell of the lamp in various theories of judicial review. The institution of review is not what offends them. That much is accepted 181 years after *Marbury v. Madison*.[2] Rather, what worries the critics of noninterpretivism is the set of values judges bring to the task.[3]

Ultimately, nine persons—until recently nine men—impose their judgment of the Constitution on the public, often contradicting the conclusions of a popularly elected Congress. Without some objective criterion of constitutionality, critics say, the justices are left with little to rely on but their own intuition. That intuition is based on socialization, and the socialization of the justices is for the most part that of the elite.

To counter this class-bound interpretation, commentators have devised a plethora of approaches. J. B. Thayer promoted the clear mistake doctrine.[4] Herbert Wechsler advanced a theory of neutral principles.[5] Raoul Berger argues for fidelity to the text.[6] Robert Bork looks to

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1. J. ELY, DEMOCRACY AND DISTRUST 59 (1980).

2. 5 U.S. (1 Cranch) 137 (1803).

3. *See generally Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983). This article is primarily concerned with review by the Supreme Court, as it holds the ultimate judicial power. The arguments made herein, however, apply to all courts.

4. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). *See infra* notes 56–57 and accompanying text.

5. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961). *See infra* notes 98–104 and accompanying text.

6. R. BERGER, CONGRESS V. THE SUPREME COURT (1969) [hereinafter cited as CONGRESS];

the intention of the Framers.[7] John Hart Ely finds the procedural provisions of the Constitution elementary.[8]

Judicial activists, too, have participated in the search for justification. Ronald Dworkin[9] and Harry Wellington rely on principles of our society.[10] Alexander Bickel looked forward to principles that would gain general assent.[11] Paul Brest concludes that constitutional adjudication is based on furthering fundamental values.[12]

Across the spectrum, then, most commentators insist that Supreme Court justices have some external referent for reaching their conclusions. They generally deny the allegation that members of the Court will rely on their own values—those of highly educated, high status, often high income individuals—in overriding the will of the majority. The fear, says Robert Bork, is that the Constitution will become gentrified:

> The constitutional culture—those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media—is not composed of a cross-section of America, either politically, socially, or morally. If, as I have suggested, noninterpretivism leads a judge to find constitutional values within himself, or in the values of those with whom he is most intimately associated, then the values which might loosely be described as characteristic of the university-educated upper middle class will be those that are imposed.[13]

R. BERGER, GOVERNMENT BY JUDICIARY (1977) [hereinafter cited as GOVERNMENT]. *See infra* notes 69–82 and accompanying text.

7. Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 [hereinafter cited as *Welfare Rights*]; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) [hereinafter cited as *First Amendment*]. *See infra* notes 83–97 and accompanying text.

8. J. ELY, *supra* note 1, at 73–104. Those who enjoy the search for antecedents can find the seeds of Ely's book in a number of his earlier articles including Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); and Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). *See infra* notes 159–70 and accompanying text.

9. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 82–100 (1977).

10. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) [hereinafter cited as *Rules*]; Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982) [hereinafter cited as *Nature*]. *See infra* notes 105–24 and accompanying text.

11. A. BICKEL, THE LEAST DANGEROUS BRANCH 239 (1962). *See infra* notes 132–41 and accompanying text.

12. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter cited as *Quest*]. *See also* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) [hereinafter cited as *Rights*]. *See infra* notes 173–75 and accompanying text.

13. Bork, *The Struggle over the Role of the Court*, NAT'L REV. 1137–38 (1982).

Bork points the accusing finger at those who look outside the Constitution and the history of its time for their understanding, and it probably is the case that those who are willing to consider a broader range of evidence have more opportunity to inject their personal views into the analysis. Nevertheless, " '[s]trict' constructionism is today as dead as Cato the Elder,"[14] and any judge who engages in anything more than a mechanical jurisprudence is susceptible to the charge of self-assertion. Indeed, reflecting oneself in adjudication may be unavoidable.

The hypothesis of this article is first, that no matter what mode of analysis a judge uses, the substantive conclusion reached will tend to express the judge's predilections; and second, to the extent that members of the Supreme Court have similar backgrounds, their collective decisions will tend to support the views of the elite groups from which they come.

To date, the elitism hypothesis has been based on supposition. The purpose of this article is to examine it empirically. Using public opinion data collected by the National Opinion Research Center in its General Social Surveys,[15] a variety of controversial Court decisions will be compared to public attitudes toward those issues. If the elitism hypothesis is true, the decisions should mirror those of higher occupational status, education, class, and income. Initially, though, some psychological and sociological studies of attitude formation and expression will be reviewed, as will the theme of elitism in the literature on judicial review. If elitism is found in the actions of the Supreme Court, the justification of the Court's role will become that much more important.

II. THE SOCIAL SELF AND THE SUPREME COURT

Justices of the Supreme Court operate at the pinnacle of political

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14. Charles Black writes, though, that strict constructionism's "image is still carried in parades on ritual occasion." C. BLACK, THE PEOPLE AND THE COURT 71 (1960). *But cf.* Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 225 (1983) (Justice Robert's statement in United States v. Butler, 297 U.S. 1, 62 (1936), that the duty of the Court is to lay the Constitution beside the statute to see if they square may accurately capture the interest in accuracy most people would hope for from the Supreme Court). *See also* Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435 (1984).

15. The General Social Surveys have collected public opinion on a wide variety of issues since 1972. Each survey is an independently drawn sample of English-speaking persons, 18 years old or older, living in noninstitutional arrangements within the continental United States. Approximately 1,500 people were questioned in each of the surveys. The data are available on tape for computer analysis from National Opinion Research Center, 6030 S. Ellis Ave., Chicago, Ill. 60637. A codebook containing the questions and technical information is available from the same source.

power in America.[16] Nine persons preside over one coequal branch of government,[17] enjoying positions regarded as highly prestigious in the public mind.[18] They are truly members of the elite.

For most members of the Court, high status is nothing new. Socially, educationally, and occupationally, the justices, for the most part, have operated in similar circles for years prior to their appointment. They are recruited from a ladder of ever-increasing elitism. All are lawyers, which in itself places them in the upper echelon of society.[19] They are hardly run-of-the-mill attorneys, however.

A review of the current justices' careers illustrates the point. Justice Blackmun had served as counsel to the Mayo Clinic and on the bench of the Eighth Circuit Court of Appeals.[20] Chief Justice Burger was elevated from the United States Court of Appeals for the District of Columbia.[21] Justice Brennan came from the New Jersey Supreme Court.[22] Justice Marshall, the member with the least typical background, nevertheless operated at high levels before his appointment, both as a judge in the Second Circuit Court of Appeals and as solicitor general.[23] Justice O'Connor, a former appellate judge in Arizona, had also served as a state legislator and Republican party activist.[24] Justice Powell had been president of the American Bar Association and American College of Trial Lawyers.[25] Justice Rehnquist worked as a high

16. The Court, according to Harold Lasswell, is at the top of the "deference pyramid." H. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW 13–14 (1936).

17. Only the executive branch concentrates more power in the hands of fewer individuals, a fact that prompted debate at the constitutional convention over whether the executive should consist of more than one person. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 88, 97 (M. Farrand ed., rev. ed. 1937) (Madison's records of June 2 and June 4, 1787).

18. The number of people expressing great confidence in the Supreme Court significantly exceeds that expressing similar trust in Congress and the executive branch. In a 1982 survey, 30% of the people responded in this manner about the Supreme Court compared with 13% for Congress and 19% for the executive branch. GENERAL SOCIAL SURVEYS, 1972-1982: CUMULATIVE CODEBOOK 112, 114 (J. Davis principal investigator 1982) (question 126) [hereinafter cited as GSS]. Although somewhat dated now, a 1961 book found Supreme Court justices to be rated as having the highest prestige among government officials, excluding the president. A. REISS, OCCUPATIONS AND SOCIAL STATUS 73 (1961).

19. Only physicians and college teachers exceed lawyers and judges in prestige. *See* GSS, *supra* note 18, at 299–311 (appendix F). The method of computing the prestige scores is explained in P. Siegel, Prestige in the American Occupational Structure (March 1971) (unpublished dissertation in the Department of Sociology, University of Chicago). *See generally* A. REISS, *supra* note 18; Hope, *A Liberal Theory of Prestige*, 87 AM. J. SOC. 1011 (1982).

20. GUIDE TO THE U.S. SUPREME COURT 864 (1979).

21. *Id.* at 71.

22. *Id.* at 859.

23. *Id.* at 863.

24. WHO'S WHO IN AMERICAN LAW 521 (1983).

25. GUIDE TO THE U.S. SUPREME COURT, *supra* note 20, at 865.

official in the Justice Department.[26] Justice Stevens was elevated from the Seventh Circuit Court of Appeals.[27] Justice White, too, had served at high levels of the Justice Department and had been active in John Kennedy's presidential campaign.[28] Educationally, the most elite schools—Yale, Harvard, and Stanford—dominate the dossiers of the justices.[29]

Politically, too, members of the Supreme Court tend to have operated within the inner circles. They were not simply people licking envelopes at campaign headquarters. Judge Edward Devitt of the United States District Court in Minnesota once confessed that in order to become a federal judge, "you've got to know a senator."[30] Through their previous careers, members of the Supreme Court became acquainted with senators and presidents.

The selection process, doubtless, is aimed at recruiting the best, wisest, and most experienced legal minds. Thus, it is elitist by definition. Senator Roman Hruska may have done as much as anyone to kill the confirmation of G. Harrold Carswell by his defense of the judge: "There are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they?"[31] The nation wants the best and the brightest, but what it wants them to do is another question.

C. Wright Mills, in *The Power Elite*, described the effect of class socialization on attitude formation. Mills wrote that people's morality and psychology are determined by the values they experience and the institutional roles they are allowed, and expected, to play. The values and experiences of the upper class, he said, are formed by relationships with other similar persons in small groups.[32] The higher they rise, the more they tend to maintain connections with others in the upper class.[33] Moreover, they are much more unified and thus more powerful than those at the bottom of the socioeconomic hierarchy.[34]

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26. *Id.*

27. *Id.* at 866.

28. *Id.* at 861.

29. *Id.* at 859–66.

30. Speech by Judge Edward J. Devitt, Southern Methodist University School of Law (Nov. 11, 1981).

31. B. WOODWARD & S. ARMSTRONG, THE BRETHREN 75 (1979).

32. C.W. MILLS, THE POWER ELITE 15 (1956).

33. *Id.* at 279. Indeed, their very rising quite likely depends on having been socialized by the previous generation of leaders and selected because of their acceptance of this socialization. *See* A. STINCHOMBE, CONSTRUCTING SOCIAL THEORIES 109–10 (1968).

34. C.W. MILLS, *supra* note 32, at 29. "[T]he bottom [of the American system of power]," Mills wrote, "is much more fragmented, and in truth, impotent, than is generally supposed by those who are distracted by the middling units of power which neither express such will as exists at the bottom nor determine the decisions at the top." *Id. See also* G. DOMHOFF, THE HIGHER

One can barely fantasize about, let alone expect to see, any member of the Court heading toward Bedford-Stuyvesant or South Boston to discuss the economy. Some may be significantly more sympathetic than others to the concerns of the people who live there, but they cannot be empathetic because they are not a part of that culture. A justice's working hours are spent with the other justices and law clerks, who themselves tend to be products of elite society. The social life of a justice likely centers on official Washington and people known before coming to the Court—generally other members of the elite. The justices are insulated by appointment from political pressure; thus even if they were to expand their circle of acquaintances, it would be unrealistic to expect a change in the predispositions built up over a lifetime,[35] especially at the time of life in which most people are appointed to the Court.

The idea of the social self is not new. If anything, it is one of the most widely accepted concepts in sociology and psychology. William James wrote about it as early as 1890.[36] George Herbert Mead elaborated on the concept in the 1930's,[37] and Charles Cooley continued the line of inquiry in the mid-sixties.[38] Theorists such as Carl Hovland and Muzafer Sherif found the influence of group identification to be a powerful determinant of an individual's attitudes.[39] Even historians such as Isaiah Berlin have affirmed the role of the social environment in shaping action.[40] Accordingly, while nothing in social science is certain, very little disagreement exists about the proposition that "[i]n moving from one group to another an individual generally brings with him certain inclinations, sentiments, [and] attitudes that he has acquired in the group from which he comes."[41]

CIRCLES: THE GOVERNING CLASS IN AMERICA (1970); G. DOMHOFF, WHO RULES AMERICA? (1967). *But see* R. DAHL, WHO GOVERNS? (1961); Dahl, *A Critique of the Ruling Elite Model*, 52 AM. POL. SCI. REV. 463 (1958).

35. C.W. MILLS, *supra* note 32, at 284. Stanley Coppersmith has written that once the idea of self has been established, "it apparently provides a sense of personal continuity over space and time, and is defended against alteration, diminution, and insult." S. COPPERSMITH, THE ANTECEDENTS OF SELF-ESTEEM 21 (1967).

36. W. JAMES, PRINCIPLES OF PSYCHOLOGY (1890).

37. G. MEAD, MIND, SELF, AND SOCIETY (1934). *See also* H. DUNCAN, COMMUNICATION AND SOCIAL ORDER 73 (1962).

38. C. COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1964). The work of James, Mead, Cooley, and Coppersmith on this subject is summarized in J. CARDWELL, SOCIAL PSYCHOLOGY 77–95 (1971).

39. *See, e.g.*, C. HOVLAND, I. JANIS & H. KELLEY, COMMUNICATION AND PERSUASION (1953); M. SHERIF & C. HOVLAND, SOCIAL JUDGMENT (1961). *See generally* A. COHEN, ATTITUDE CHANGE AND SOCIAL INFLUENCE 106–07 (1964).

40. I. BERLIN, HISTORICAL INEVITABILITY 35–36 (1954), *quoted in* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 670 (1960).

41. V. PARETO, THE MIND & SOCIETY § 2041 (A. Bongiorno & A. Livingston trans., A.

The social self, then, is formed by the interaction of persons with others around them. One who attended prep school, an Ivy League college, and an elite law school, one who worked for a large law firm or in the upper echelons of the government, one who served as a judge in a federal court of appeals, is thus molded in a highly compact crucible. The attitudes of these groups will influence such persons throughout the rest of their lives. Placed in situations requiring a decision, they necessarily consider how these groups would respond to various options, for they know themselves primarily through the reactions of others to them.[42] The more important the group to them, the more persuasive its perceived reaction will be. The more homogeneous the groups in their backgrounds, the less likely they are to diverge from their preconceived attitudes.

Language, too, is a reflection of the social self. Words take on meaning by virtue of their use. Through trial and error, individuals settle upon some meaning for the symbols they use to represent reality.[43] As a result, the symbols may be laden with different meanings to different people. For the most part, disagreement over meaning is reduced as specificity increases. That is, the meaning of "carbon dioxide" is relatively stable, but less agreement is likely about the meaning of a more abstract term such as "unreasonable" in the fourth amendment.

Whether determining the meaning of language or fundamental principles of justice:

Livingston ed. 1935). *See also* R. LANE & D. SEARS, PUBLIC OPINION 41 (1964).

42. J. CARDWELL, *supra* note 38, at 81. Members of the Court may well share many values of legal academics, as it is that group that reacts to judicial decisions in law reviews and other publications the justices are likely to read or at least consult. Academics, on the whole, have a particular left-of-center political orientation, one that is so pronounced that Andrew Greeley was moved to describe them as a distinct ethnic group or subculture in society. Greeley, *Intellectuals as an Ethnic Group*, N.Y. Times, July 12, 1970, § 6 (Magazine), at 22. Seymour Martin Lipset has spent a good part of his career documenting the political values of professors and is convinced of the breadth and depth of their "liberal" orientation. *See, e.g.*, Lipset, *The Academic Mind at the Top: The Political Behavior and Values of Faculty Elites*, 46 PUB. OPINION Q. 143 (1982); Lipset, *American Intellectuals: Their Politics and Status*, 88 DAEDALUS 460 (1959); Lipset & Dobson, *The Intellectual as Critic and Rebel: With Special Reference to the United States and Soviet Union*, DAEDALUS, Summer 1972, at 137; Lipset & Ladd, *The Politics of American Sociologists*, 78 AM. J. SOC. 67 (July 1972). *But see* S. LANG, THE FILE (1981) (questioning the methodology of Lipset's faculty surveys).

43. *See* J. DEWEY, EXPERIENCE AND NATURE 181 (1922); H. DUNCAN, *supra* note 37, at 59. The special case of the language of the law is discussed in Stone, *From a Language Perspective*, 90 YALE L.J. 1149 (1981), as well as in two accompanying comments: Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193 (1981); Shapiro, *On The Regrettable Decline of Law French: Or Shapiro Jettet Le Brickbat*, 90 YALE L.J. 1198 (1981). The use of literary criticism methods in constitutional analysis has fostered a lively debate. *See generally Law and Literature*, 60 TEXAS L. REV. 373–586 (1982), in which a multitude of commentators argues about the propriety of such techniques.

> [A]ll of us face new stimulus situations with certain modes or standards or frames of reference which have been built up within the context of a social group. And, in fact, such established social norms as stereotypes, fashions, fads, and customs are all partly the product of shared frames of references built up through contact between individuals. Once such norms are established, they determine the way in which people will face subsequent situations—social and nonsocial alike.[44]

All this is not to say that Supreme Court justices are held prisoner in a small ideological cell built by their life's associations. In fact, upon assuming the bench they assume a new role which carries its own definition.[45] They may well conclude that the role of a Supreme Court justice is to cast off all vestiges of predisposition, and decide each case on a detached rational basis. In effect, they may determine that the expectation of influential people in their lives is that they should not allow their personal views to interfere with their judgments. They may, in fact, achieve some success in separating their overt personal views from the case at hand. Ultimately, however, their process of rationalization will reflect their socialization.

It would be too crude to say that the justices will decide what is an unreasonable search based on the views of the constitutional law faculty at their alma mater or of their classmates whose dorm room was searched in college. Eventually, though, the self will be expressed—perhaps as they begin to think of other examples of unreasonableness. They are, after all, lawyers, and lawyers attach a much different meaning to that term than does the lay public. Perhaps it will arise when they try to decide what the Framers meant by unreasonable. What method of analysis should be used? Should only official statements be considered or secondary material as well? What importance should be placed on documents such as the Federalist Papers? How should relevance or irrelevance be decided? Why use the historical method? Perhaps a psychological profile of the authors would be more revealing. Do they decide not to pursue a particular avenue of inquiry because they lack the appropriate research skills? Is such a method of analysis the way most judges approach the material? Do they think that psychology is not able to reveal that kind of truth? Why do they have that attitude? No, the justices are not confined to a small cell, but they do live in houses constructed with the help of others. They may roam from room to room, but they rarely leave home.

Numerous empirical studies have demonstrated the relationship of higher status and class to attitudes, many of the studies using data

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44. A. COHEN, *supra* note 39, at 108.

45. J. Culbertson, *supra* note 38, at 88-94.

from the General Social Surveys (GSS). Davis, the principal investigator for the GSS, found a persistent correlation between education and opinion.[46] Glenn and Weaver discovered that people with greater education have more permissive attitudes toward sex.[47] Grabb concluded that workers were less willing to tolerate the expression of unpopular views because of lower education and income as well as greater anomie.[48] Sengstock found that those with higher status and income were more supportive of decriminalizing pornography, allowing homosexuals to teach in colleges, and legalizing abortion.[49] Section IV of this article will examine similar data to determine the extent to which the justices' decisions mirror the attitudes of the elite, and diverge from those of the general public.

The difference between the justices' backgrounds and those of the general public would not be significant except that the attitudes produced by those backgrounds affect everyone. Unlike most citizens, the views of the justices have society-wide importance. As C. Wright Mills wrote, "The ends of men are often merely hopes, but means are facts within some men's control."[50] So it is with the Supreme Court. If the goals of the Court are out of step with those of society, serious consequences can result. The consequences may be justified, and indeed in the long run society may come to accept the justices' decisions. Nevertheless, the danger is that of public alienation, disrespect,[51] and disobedience. Cardozo wrote that judges are the living oracles, who must de-

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46. Davis, *Background Variables and Opinions in the 1972–1977 NORC General Social Surveys: Ten Generalizations about Age, Education, Occupational Prestige, Race, Religion, and Sex, and Forty-Nine Opinion Items* (General Social Survey Technical Report No. 18, Aug. 1978, obtainable from NORC, 6030 S. Ellis Ave., Chicago, Ill. 60637).

47. Glenn & Weaver, *Attitudes toward Premarital, Extra-Marital, and Homosexual Relations in the United States in the 1970's*, 15 J. SEX RESEARCH 108 (1979).

48. Grabb, *Working-Class Authoritarianism and Tolerance of Outgroups: A Reassessment*, 43 PUB. OPINION Q. 36 (1979).

49. Sengstock, Traditional Versus Zero-Base Morality as a Basis for Law (Aug. 1979) (presented to the American Sociological Ass'n, Boston, Mass.).

50. C.W. MILLS, *supra* note 32, at 23.

51. Finley Peter Dunne popularized a form of this disrespect for courts in the early part of the twentieth century through the personality of Mr. Dooley, a fictional bartender about whom he wrote in a long series of essays. In one typical barb at the appellate process, Dooley said, "Th' on'y wan that bows to th' decision is th' fellow that won, an' pretty soon he sees he's made a mistake, f'r wan day th' other coort comes out an declares that th' decision iv th' lower coort is another argymint in favor iv abolishing night law schools." F. DUNNE, MR. DOOLEY SAYS 158–67 (1910) (essay entitled "The Big Fine"). *See* E. BANDER, MR. DOOLEY AND MR. DUNNE: THE LITERARY LIFE OF A CHICAGO CATHOLIC 252–53 (1981); Sloane, Book Review, 130 U. PA. L. REV. 748 (1982).

Mr. Dooley is perhaps best known for his contention that "no matter whether th' constitution follows th' flag or not, th' Supreme Coort follows th' election returns." F. DUNNE, MR. DOOLEY'S OPINIONS 21–26 (1901) (essay entitled "The Supreme Court Decisions"). *See* E. BANDER, *supra*, at 201. The empirical response may well be that it depends on who voted.

cide in all cases of doubt.[52] That may be so, but the Court should take care that it does not suffer the fate of the oracles of an earlier age, who died of desuetude.[53]

III. STATUS CONSCIOUSNESS IN THEORIES OF JUDICIAL REVIEW

Implicit in the debate over what is called the Madisonian dilemma—the appointed Supreme Court overturning laws passed by the elected Congress—is the notion that the values of the Court will be different from those of the people. As has been shown in section II of this article, that proposition is quite likely to be true. Moreover, the justices are quite likely to inject the values of their backgrounds into their decisions, try as they may to avoid doing so.

For this reason, a variety of theories have been proposed to limit the effect of this elitism. The line commonly is drawn between interpretivists and noninterpretivists,[54] yet for the purpose of this discussion that is not the crucial distinction. Although the two groups differ in the sources on which they rely for constitutional decisions, most agree that some constraints ought to be placed on the justices. The main disagreement concerns the proper constraints.

In this regard the commentators on judicial review are more profitably viewed along a continuum rather than in two distinct categories. Raoul Berger and Alexander Bickel may disagree over whether the justices should be bound to the original intention of the Framers, but they share the idea that members of the Court should not base their decisions simply on their own values.[55] Some may disagree over the proper

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52. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19 (1921).

53. *See* J. JAYNES, THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND 321–31 (1976).

54. Michael Perry explains the difference as follows:

> The Supreme Court engages in interpretive review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution. . . . [T]he effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the Framers constitutionalized at some point in the past. The Court engages in noninterpretive review when it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the Framers.

Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 279 (1981) (footnote omitted). *But cf.* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022–23 (1984) (constitutional law involves rare periods of constitutional politics, in which appeals to common good are made, and normal politics, in which factions manipulate political life to serve their own interests). For still another different, and most elegant description of the tension, see Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (constitutionalism legitimizes communities and movements in context of a normative world of right and wrong).

55. John Hart Ely notes that few people forthrightly argue that judges should impose their own values as a source of constitutional judgment. "Instead," he says, "the search purports to be

placement of each of these commentators, but I view them across a spectrum: Thayer > Berger > Hand > Bork > Ely > Wechsler > Dworkin > Wellington > Perry > Bickel > Cox > Tribe > Black > Brest. A critique of the views of most of these scholars follows, detailing the role of the justice in their respective theories.

J. B. Thayer could rightfully be considered the progenitor of the scholarly debate over judicial review. In 1893 he published *The Origin and Scope of the American Doctrine of Constitutional Law*,[56] setting out the case for extreme restraint by the Court. The "clear mistake" doctrine is Thayer's contribution to the jargon. Courts must respect the function of the elected branches of government, Thayer argued. Thus, he said, the Court should stay its hand when Congress has made a simple mistake. Only when the mistake was "very clear . . . so clear that it is not open to rational question"[57] should the Court strike it down as unconstitutional.

Thayer's approach was to remove as much subjectivity as possible from the Court's decision making, thus allowing the national legislature as much latitude as possible. Nevertheless, on its own terms, Thayer's test involves the justices' subjective judgment of rationality. One person's simple mistake is another person's irrational error. Presumably, justices would view as most egregious those mistakes that interfere most severely with the rights which they consider fundamental. Thayer does not give the justices any objective criterion for making this decision.

Even Ely, who would allow a wider scope of judicial discretion, attacks "reason," in a different context, as being undeniably class-based:

> The danger that upper-middle-class judges and commentators will find upper-middle-class-values fundamental . . . [is] exacerbated when 'reason' is the supposed value source . . . partly because the values . . . are the values of the 'reasoning class,' and partly because 'reason,' being inherently an empty source, may lend itself unusually well to being filled in

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objective and value-neutral; the reference is to something 'out there' waiting to be discovered, whether it be natural law or some supposed value consensus of historical America, today's America, or the America that is yet to be." J. ELY, *supra* note 1, at 48. *Cf.* Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 496 (1984) (constraint on judges is not outside governance, *e.g.*, original intention of constitutional framers, but rather the internal process of engaging in decision making in the judicial environment).

56. Thayer, *supra* note 4.

57. *Id.* at 144. Thayer based this approach on the rule of administration adopted by many states and referred to approvingly as early as 1796 by Justice Chase of the United States Supreme Court. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) (Chase, J.).

by the values of one's own kind.[58]

Similarly, Felix Cohen criticized Thayer's clear mistake doctrine as transforming the courts into "lunacy commissions sitting in judgment upon the mental capacity of legislators."[59]

Nevertheless, the rationality approach has persisted in constitutional law, at least insofar as footnote four of *Carolene Products*[60] did not anticipate a more searching review. Some statutes are judged on a rationality basis.[61] Others are subjected to strict scrutiny, and the Court has spent much of its time deciding which cases will be governed by which test.[62] The answer turns on the justices' concept of fundamental rights. As a result, the application of "rational" judicial review only changes the point at which subjectivity enters the decision-making calculus.

Judge Learned Hand appreciated the pure version of Thayer's jurisprudence. Hand believed constitutional adjudication was a matter of preserving the separation of powers. The Court, he cautioned, should not act as a third legislative chamber, although he conceded that it had

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58. J. ELY, *supra* note 1, at 59 n.**.

59. THE LEGAL CONSCIENCE—SELECTED PAPERS OF FELIX S. COHEN 44 (L. Cohen ed. 1960).

60. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted) reads as follows:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts these political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

61. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement age); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (grandfather clause for vendors); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (regulation of opticians).

62. One of the most controversial areas in which the Court has engaged in simple rationality review is that of Sunday closing legislation. Although religion, a first amendment right, is involved, the Court has sustained local closing laws on the ground that they advance the valid secular purpose of a uniform day of rest. *See* Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961). *See generally* Kushner, *Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited*, 35 S.W.L.J. 351 (1981).

done so.[63]

Hand acknowledged that judges were likely to express the views of their social class rather than those of the whole community.[64] Yet he publicly deplored the specter of an elite group of highly educated and intelligent justices overriding the popular will expressed by the legislature. Hand wrote:

> For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[65]

As Bickel points out, Hand's prescription of restraint is tantamount to abstinence.[66] The more telling criticism, however, is that in denying the judge a subjective role he has assumed one himself. Based on history, Hand distinguished frontier separation of powers sections of the Constitution from the Bill of Rights.[67] The former was to be the proper domain of the Court. The latter, if balanced against a statute by the Court, only served to second-guess the Congress. Most others, even those of an interpretivist bent, read history differently and find an important judicial role in enforcing the Bill of Rights.[68]

More recently, Raoul Berger has carried the standard for severe judicial restraint, practicing what Brest describes as strict intentionalism.[69] In *Government by Judiciary*,[70] Berger assembles his case against

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63. Hand wrote:

> I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority. Nevertheless, I am quite clear that it has not abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a *coup de main.*

L. HAND, THE BILL OF RIGHTS 55 (1958).

64. L. HAND, THE SPIRIT OF LIBERTY 203 (I. Dillard ed. 1952).

65. L. HAND, *supra* note 63, at 73–74. To this, Ronald Dworkin replies, "hyperbole." The Court has a role in the balance of government, and "[a]cademic lawyers do no service by trying to disguise the political decisions this balance assigns to judges. Rule by academic priests guarding the myth of some canonical original intention is no better than the rule by Platonic guardians in different robes." Dworkin, *supra* note 9, at 518.

66. A. BICKEL, *supra* note 11, at 48.

67. L. HAND, *supra* note 63, at 66–67.

68. The argument generally is over the breadth of the right protected. *Compare* Bork, *First Amendment, supra* note 7 (political speech is principal value protected by first amendment) *with* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (first amendment protects self-realization).

69. Brest, *Common Sense, supra* note 12, at 222–24.

judicial activism by showing that it may destroy values as easily as it creates them. In a chapter entitled "The Turnabout of the Libertarians,"[71] Berger traces the change of sentiment of those who berated the Court for imposing its own laissez-faire economic attitudes[72] on the nation in the 1930's and 1940's, and later defended it for pursuing the same course with "libertarian" values during the Warren era.[73]

What had changed, according to Berger, was not the approach of the justices but their values. To support this proposition, he offered the testimony of Archibald Cox, a witness who was hostile to his beliefs:

> By the 1950's the political atmosphere had changed. The legislative process, even at its best, became resistant to libertarian, humanitarian, and egalitarian impulse[s]. . . . [T]hese impulses were not shared so strongly and widely as to realize themselves through legislation. They came to be felt after the early 1950's by a majority of the Supreme Court Justices, . . . perhaps because the impulses were felt more strongly in the world of the highly educated.[74]

The world of the highly educated is a good one. It is the one to which Raoul Berger belongs, but it is not the one he wishes to control the Constitution. Like Hand, who decried "Platonic Guardians,"[75] and others,[76] Berger insists upon majority rule. Majoritarianism is funda-

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70. R. BERGER, GOVERNMENT, *supra* note 6.

71. *Id.* at 312.

72. *See generally* B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942).

73. R. BERGER, GOVERNMENT, *supra* note 6, at 312. Paul Freund disputes the contention that the Warren Court was nothing more than a Taft Court of the left. "[T]he comparison is unfair," he says, "because a concern with the framework of participation, with structure and process, is a judicial function far more legitimate than the Taft Court's disagreement with the legislative outcomes of that process, whether they be minimum-wage or price-control or child-labor laws." Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L.F. 493, 497.

74. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 35 (1976).

75. *See supra* text accompanying note 65.

76. Berger quotes McDougal and Lans: "Government by a self-designated elite—like that of a benevolent despotism or [of] Plato's philosopher kings—may be a good form of government for some [peoples], but it is not the American way." R. BERGER, GOVERNMENT, *supra* note 6, at 314. The citation Berger provides is McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 577–78 (1945). The quotation actually appears in the second part of the article, which appeared in a later issue of the journal. The correct citation is McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534, 578 (1945).

The more serious problem is that Berger takes McDougal and Lans out of context, giving the impression that they might prefer a restrictive approach to judicial review. In fact, they do not. In the passage Berger quotes, they are discussing the blocking of treaties by one-third of the Senate. A quotation from the first part of their article shows that their opinion on judicial review hardly resembles the opinion of Raoul Berger:

> Each generation of citizens must in a very real sense interpret the words of the Framers to create its own constitution. The more conscious the interpreters are that this is what they

mental to Berger, even though the majority often contradicts the highly educated class to which he belongs. No intellectual, he says, can help but be disappointed by the *vox populi* from time to time.[77] Nevertheless, he places his trust, as did Lincoln, in "the ultimate good sense of the people."[78]

Berger, then, bases his theory on majoritarianism, yet in choosing his majority he displayed his own subjectivity. The Framers of the Constitution certainly can be said to have expressed the will of the majority at that time; however, can the same be said for their expression of the will of today's majority? This is the critique John Ely applies against Berger, Bork, and others of their ilk.[79] By looking backward for guidance, they shun contemporary conceptions of the Constitution.[80] If democracy is their principal concern, why the democracy of the eighteenth century? Is that not antimajoritarian in itself?

A likely explanation for Berger's intentionalism is subjective—his preference for stability. Moreover, his search for the original intention is destined to involve subjective interpretation. Like the rationality approach, it simply puts the subjective evaluation at a different place. Instead of deciding whether a right exists, Berger asks whether the Framers thought it existed and uses his own faculties to evaluate the historical data. Others, such as Brest, criticize him for ignoring the possibility that the authors may not have wished future generations to be bound by their understanding.[81] The likely result of Berger's approach, according to Brest, is more subjectivity though "arbitrary manipulation of sources and outcomes."[82]

> are doing the more likely it is that their interpretations will embody the best long-term interests of the nation. In truth, our very survival as a nation has been made possible only because the ultimate interpreters of the Constitution . . . have repeatedly transcended the restrictive interpretations of their predecessors.

McDougal & Lans: *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 215 (1945).

77. Berger offers the election of Richard Nixon as president as an example. R. BERGER, GOVERNMENT, *supra* note 6, at 314.

78. *Id.*

79. J. ELY, *supra* note 1, at 11. Ely notes that both Noah Webster and Thomas Jefferson worried about this "dead hand" control. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 379 (1969); 5 THE WRITINGS OF THOMAS JEFFERSON 116, 121 (P. Ford ed. 1895).

80. Henry Monaghan's response to this criticism is, in effect, tell it to Congress. The Constitution and the original intent surrounding it are the proper guides for constitutional meaning, he says. Those with other interests can advance them before their elected representatives. The Constitution, he says, does not guarantee perfect government, only representative democracy. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

81. Brest, *Rights*, *supra* note 12, at 1090.

82. *Id.*; *see also* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). *But see* Berger, *Mark Tushnet's Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532 (1983).

Some of the criticisms aimed at Berger also apply to Robert Bork, particularly Ely's point concerning historic versus contemporary majoritarianism. Bork, like Berger, looks to the text of the Constitution and its authors for understanding, but he also requires the values he finds to be expressed through neutral principles.[83] Bork differs from Wechsler, however, in that he has defined the source of those principles.

For Bork, the theory is all important. The Court's power, he says,

> is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.[84]

Among the dangers that Bork sees in noninterpretivism are expanding judicial power to the detriment of democratic choice, judicial balancing of created rights akin to lawmaking, nationalization of moral values, and gentrification of the Constitution.[85]

In application, how does Bork's neutral principles of interpretivism work? He has provided several examples, including the first amendment[86] and welfare rights.[87] The former, according to Bork, is limited to political discourse[88] under the Constitution, and the latter do not exist in the Constitution at all.[89] He reaches these results by first examining the text. As to the first amendment, it is exceedingly broad on its face.[90] However, by looking next to the history and structure of the

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83. *See* Bork, *First Amendment*, *supra* note 7, at 14–15.

84. *Id.* at 3.

85. Bork, *supra* note 13, at 1138.

86. Bork, *First Amendment*, *supra* note 7.

87. Bork, *Welfare Rights*, *supra* note 7.

88. Bork, *First Amendment*, *supra* note 7, at 24–26. Bork says the right to political discourse could be inferred from the rest of the Constitution, even if the first amendment were absent. *Id.* at 23. Thus, Bork's theory renders the first amendment at best redundant. Arguably, though, the comment undercuts the theory, for if the Framers were concerned only with what was obvious, they need not have specified it as the first amendment in a Bill of Rights. Moreover, if all they were concerned about was political speech, they certainly did a terrible job of limiting their language.

89. Bork expressed this view in response to Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. REV. 659.

90. On the off chance that some reader may reach for his dog-eared copy of the Constitution to remind himself of the exact language of the first amendment, it states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Bork's approach to constitutional interpretation envisions a dichotomy between what he calls specified rights—those discerned from the text and from history—and individual rights, which he

document, he concludes that the Framers did not mean *no* law. Their concern, rather, was with facilitating self-government, not self-expression.[91] Consequently, speech about politics is protected, but nude dancing is not.[92]

The argument does not end there, however. Bork goes on to restrict even political speech. The government, he says, may prohibit and punish exhortations aimed at its destruction.[93] Bork finds the justification for this restriction in the existence and structure of the Constitution. The nation has no duty, he insists, to tolerate the musings of those who would destroy its very tolerance.[94] The assertion is debatable on its merits—where is the tolerance to which Bork alludes if the speech is not to be tolerated? What is more important for this discussion, though, is the process by which he reached his conclusion.

The language of the first amendment is all-encompassing: "no law." It is perhaps the least qualified exposition in the entire document.

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calls secondary. The latter, he says, result from governmental processes established by the Constitution. They are not for the benefit of individuals, he says, but rather for the benefit of the governmental process that the Constitution outlines. Thus, one would suppose, when such a right appears to be dysfunctional, it can be abridged in Bork's system. This theory, though, must rely on a restrictive reading of the ninth amendment, a reading that not all commentators share. *See, e.g.*, C. BLACK, DECISION ACCORDING TO LAW (1981).

91. Bork, *First Amendment, supra* note 7, at 24–26. Bork disputes Justice Brandeis' concurrence in Whitney v. California, 274 U.S. 357, 375 (1927), which stated that speech has four benefits protected by the Constitution: (1) developing an individual's faculties; (2) deriving happiness from engaging in the activity; (3) providing a safety valve; and (4) aiding the discovery and spread of political truth. Bork, *First Amendment, supra* note 7, at 24–25. Suffice it to say that Bork is in the minority on this point. Thomas Emerson identifies four protected values: (1) assuring self-fulfillment; (2) advancing knowledge and discovering truth; (3) providing for participation in decision making by all members of society; and (4) achieving a more adaptable and a more stable community while maintaining the balance between healthy cleavage and necessary consensus. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970). Vincent Blasi finds another feature of the first amendment: a checking value. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521. Martin Redish reduces the amendment's function to one "true value"—"individual self-realization." All the others, he believes, are subsumed under this rubric. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982). Redish admits, however, that his argument is based on "reasoning from what I take to be widely held premises." *Id.* at 595 n.27.

92. Bork, *First Amendment, supra* note 7, at 20. *See* New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981). The Court concluded that the state could ban nude and seminude entertainment, but it justified this restraint on the basis of the state's power to regulate places where alcohol is sold. *But see* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), in which the Court ruled that nude dancing is not without some first amendment protection and that a zoning ordinance regulating such live entertainment was not a reasonable time, place, and manner regulation.

93. Bork, *First Amendment, supra* note 7, at 25–26, 29–30.

94. *Id.* at 31. Bork says that such speech does not qualify as political speech because it is about a minority seizing power when it cannot gain power by speech and political activity. Thus, he says, it breaks the premise of our system as to how truth is defined. *Id.*

Yet, Bork cannot accept Hugo Black absolutism.[95] He "knows" that the Framers meant something less encompassing. He "knows" this through a lifetime of study of the law and constitutional history. He rejects mechanical jurisprudence because he "knows" better. At this point, however, he allows subjectivity. The only question is at what level will it be expressed?

Bork has chosen to look backward to the historical intention of the Framers. If he were concerned about pure majoritarianism, he might better look at current concepts of the first amendment. Doubtless his academic career affects his appreciation for the historical method of defining law. A less-schooled individual might be more inclined toward a current consensus approach. Moreover, his preference for stability underscores his reliance on history. One whose social stature in society is not so high might well be less impressed with the existing order. Bork's anarchy distinction is particularly revealing. He imputes a qualification on political speech to the authors despite the fact that they had formed their nation by revolution.[96] Using the neutral principles approach, one finds that Bork has defined the principle in a less than neutral manner. He has explained his abridgment, but his adherence to objectivity seems wounded.

Bork's search is for the core of the constitutional idea. Yet, the core is not the whole apple. Political speech undoubtedly was paramount in the thoughts of the Framers, but they also had other matters on their minds. Subjectivity enters his system at what Brest calls the level of abstraction.[97] What is the proper principle: total freedom of

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95. In Konigsberg v. State Bar, 366 U.S. 36 (1961), Justice Black expressed his idea of the scope of the first amendment: "I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* at 61 (Black, J., dissenting). Justice Black often was joined by Justice Douglas in this contention; however, both often found themselves concurring or dissenting.

96. The Declaration of Independence, although admittedly a document of emotion rather than law, nonetheless provides some insight into the Framers' attitudes toward antigovernment speech and activity. Having just given birth to a nation by revolution, the Framers did not rule out the possibility that revolution would be required once again. After stating their fundamental rights of equality, life, liberty, and the pursuit of happiness, they said:

> [W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; . . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The Declaration of Independence, para. 1 (U.S. 1776).

97. Brest, *Rights*, *supra* note 12, at 1091.

speech, freedom of nonobscene speech (laying aside the inherently subjective problem of defining obscenity), freedom of political speech, freedom of nonseditious political speech, freedom of nonrevolutionary political speech? The choice inevitably requires judges to act upon their own values. How they look for the answer may provide sufficient subjectivity to determine the outcome. Bork's ideal is a noble one, but it also is one that cannot achieve the goals he has set for it.

As has been stated, Bork relied on Herbert Wechsler's theory of neutral principles to form part of his own approach to judicial review. Wechsler devised the theory in the 1950's, yet he did not apply it as rigidly as Bork would.[98] Wechsler was willing to allow the justices to consider their own value judgments.[99] However, he was not willing to allow them to do so for expediency.[100] Louis Pollak and others sounded a similar theme.[101] Whatever the nomenclature, the central idea was designed to prevent ad hoc decision making. Judges would be compelled to apply the principle to all species of cases, and "[i]f it sometimes hurts," as Bickel explained the theory, "nothing is better proof of its validity."[102]

Wechsler's proposal proved useful, as far as it went, but it did not go far enough. Neutral principles described how the principles should be applied, but did not tell how they should be derived. As Greenwalt has pointed out, neutral principles does not mean "that judges can be neutral among values, either in the obviously wrong sense that they can avoid value choices, or in the debatable sense that they should strive neutrally to draw all their value judgments from the legal materials."[103] While Wechsler would not allow judges simply to impose their own values in place of those of the Constitution, he would allow, indeed would expect, judges to use their wits to identify such constitutional principles. Greenwalt has written that judges may even act on intuition and remain in harmony with Wechsler's theory, as long as their intuition is confirmed by neutral principles.[104]

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98. *See* H. WECHSLER, *supra* note 5.

99. *See* Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 991 (1978).

100. Under Wechsler's system, justices could act upon their own strongly held principles, so long as they acted consistently. Greenwalt writes that judges need not even treat all relevant groups similarly. For example, they may decide that the fourteenth amendment's equal protection clause applies only to discrimination against blacks. As a result, their reading of the clause would favor one group but would be perfectly consistent with neutrality in Wechsler's sense. *Id.* at 992.

101. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). *See also* Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (principles should be impersonal and durable).

102. A. BICKEL, *supra* note 11, at 59.

103. Greenwalt, *supra* note 99, at 992.

104. *Id.* at 991. *See also* Greenwalt, *Discretion and Judicial Decision: The Elusive Quest*

The "principles" theory has provided the fodder for much of the subsequent literature on judicial review, although many theorists place less importance on the neutrality aspect that was so important to Wechsler. Harry Wellington, for example, grounds his theory of review on principles derived from conventional morality,[105] which is an objective inquiry to Wellington. As if to reassure his readers, he underscores his belief that the Court must assert *our* moral views, rather than *its* moral views.[106] Thus, judicial review proceeds in the same manner as judicial interpretation of documents.[107]

Wellington's thesis, of course, depends on the existence of some common notion of morality, and he insists that it does exist, despite the diversity of American society. What he calls the "subculture problem," tends to be a difference of policies rather than principles.[108] Policies in his system are utilitarian choices of lesser stature than principles.[109] They are in the realm of politics rather than morality. Conventional morality, on the other hand, is found in the American people's "history and tradition which interact with their common problems to fashion attitudes, values, and aspirations that tend toward a dynamic, but nevertheless relatively cohesive, society."[110]

Wellington may be correct when stating that some consensus does exist on broad morality. Whether a consensus that broad can contrib-

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for the Fetters that Bind Judges, 75 COLUM. L. REV. 359 (1975).

105. Wellington, *Rules, supra* note 10, at 243. Ronald Dworkin espouses a related, albeit more complex, theory of judicial review. It is a theory that shares attributes of Wellington's principle jurisprudence, Ely's representation reinforcing approach, and fundamental rights assertions. Dworkin believes that the Court should make decisions of principle rather than policy, just as Wellington does. Principles in Dworkin's system, however, are derived from a root principle that government must treat people as equals. *See* Dworkin, *supra* note 9, at 516. Based on the existence of this "equal concern and respect," disadvantaged citizens have a claim of right against the government when the challenged law embodies "external preferences"—preferences about the allocation of resources to others—as opposed to "personal preferences"—allocation of resources to oneself. *See* R. DWORKIN, *supra* note 9, at 272–78 (1977).

106. Wellington, *Rules, supra* note 10, at 244. Wellington's argument is based on the thesis that a moral point of view does exist and that by reasoning from it, one can discern principles of justice. Later in the article, Wellington suggests that the view of the American Law Institute is some evidence of society's moral position on abortion, *id.* at 311, which is rather like saying the Aspen Institute provides some evidence of society's political position. The model codes produced by the American Law Institute are not restatements; they are recommendations of elite groups of thinkers. Undoubtedly, the contributors are highly intelligent and their ideas are well-intended, but they hardly can be said to represent a cross section of American society.

107. *Id.* Wellington devotes the first half of his article to developing a distinction between principles and policies for common-law adjudication. *Id.* at 222–64. Then, he adapts this same mode of decision making to Supreme Court review. *Id.* at 265–311.

108. *Id.* at 245.

109. As examples, Wellington says the contract duty to perform or pay damages is based on a policy of efficiency. The rule of tort law making intentional infliction of physical harm illegal, in contrast, is based on a principle of a strong duty. *Id.* at 231–32.

110. *Id.* at 245.

ute to judicial interpretation of the Constitution, however, is another matter. Assume that a principle of equality exists in this country. Would that principle help decide whether the state must subsidize poor school districts to eliminate the disparity in per capita student expenditures between those poor districts and rich districts?[111] Does it tell the Court whether school districts must educate children of undocumented alien workers?[112] Because of its breadth, Wellington's concept says almost nothing about how problems should be decided. The value-neutral search eventually becomes value-laden, for in order to discover "principles" sufficiently precise to decide cases, judges are led to finding principles based on their personal backgrounds. Except in the easiest cases, the principles are not " 'out there' waiting to be discovered."[113] They exist in the expectation of the one looking for them.

For the moment, though, let us give Wellington the benefit of the doubt and assume that such principles do exist "out there."[114] Does he have an objective, indeed a scientific, means of discovering them? Wellington's method calls for the judge to live in society, to "become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play."[115] This "method of philosophy"[116] is not the method of most judges, and it hardly is free from value judgments.

The propensity of judges to experience widely tends to be tempered by the necessity to spend their working hours in the courthouse. Judges, judicial clerks, and lawyers do not exhaust the variations of human beings that society has produced. Nor do they represent the spectrum of socioeconomic statuses. Even if justices were disposed toward experiencing widely, they would likely experience with other judges of their acquaintance. Justice Brandeis once tried to convince Justice Holmes at least to develop a greater appreciation for the facts of a case. Brandeis suggested that reading "books could carry him only

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111. See San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 35–37 (1973), in which the Court ruled that equal education is not a fundamental right.

112. See Plyler v. Doe, 457 U.S. 202 (1982), in which the Court ruled that school districts must enroll such students. *See generally* Comment, *Equal Protection and the Education of Undocumented Children*, 34 Sw. L.J. 1229 (1981).

113. *See* J. ELY, *supra* note 1, at 48.

114. Wellington, *Rules*, *supra* note 10, at 246. *But see* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921):

> The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by. We like to figure ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter.

115. Wellington, *Rules*, *supra* note 10, at 246.

116. *Id.*

so far" and that Holmes might, for example, acquire some exposure to the textile industry during his vacation.[117] Brandeis, while a glutton for facts, still recognized that his vision was impeded by his position. As Bickel observed, justices are restrained from normal consultation. They are restrained to reading.[118] Reading may be a window to the world, but it remains the tool of an outsider looking in. By relying on judges to read and experience widely, Wellington is overestimating their time and intentions and unwittingly encouraging a class-bound jurisprudence.

Moreover, a judge's reading and experiencing is colored by what is known as selective perception.[119] Krech and Crutchfield provide an example of Americans and Mexicans watching a bullfight. The Americans, because of their cultural background, may focus on the cruelty inflicted on the bull. The Mexicans, in contrast, concentrate on the skill of the bullfighters and perhaps the spirit of the bull in continuing the fight.[120] In the case of conventional morality, an upper-class justice of the Supreme Court may see certain societal activities as indicative of a principle while the justice's secretary may view the evidence quite differently. What you see depends on what you have seen before.

Courts do not need empirical research to ferret out the principles of American society, according to Wellington. Their insulation and reason make them better suited to the task.[121] In so stating, Wellington confuses his theory. One is uncertain whether Wellington is a "principles" theorist or a "reason" theorist, or both. He is most likely both. His approach seems to be that principles are to be discovered by means of rational investigation and reflection. Yet, both of these methods are highly susceptible to injection of the judge's own principles.

Wellington acknowledges the inevitability of mistake, but discounts its importance, relying upon feedback from the community to tell the justices when they are wrong.[122] "Remember," he counsels, "it is the moral ideals of the community and not of the wise philosopher that concern the Court. And it is a wise court that pays attention to the community—not out of fear, but out of obligation."[123] Having eschewed empirical research as a means of finding the community's

117. A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 230 (1957).

118. *Id.* at xviii.

119. *See* Krech & Crutchfield, *Perceiving the World*, in PROCESS & EFFECTS OF MASS COMMUNICATION 235, 248 (W. Schramm & D. Roberts eds. 1971); Katz & Feldman, *The Debates in the Light of Research: A Survey of Surveys*, in PROCESS & EFFECTS OF MASS COMMUNICATION, *id.* at 701, 730–31.

120. Krech & Crutchfield, *supra* note 119, at 248.

121. *See* Wellington, *Rules*, *supra* note 10, at 247.

122. Wellington, *Nature*, *supra* note 10, at 514–16, 519.

123. *Id.* at 516.

moral consensus (and isn't this a value judgment in itself?), Wellington then is left with the idea that the justices of the Supreme Court are able to discern public opinion better than the pollsters. The pollsters certainly are not perfect, but at least their methods are less value-laden.[124] Feedback eventually may convince the Court it read the public's morality wrong, depending on which feedback the justices pay attention to and how they read it, but it does not overturn the wrong decision. For that, society must wait for another case or controversy. In the meantime, the law remains in effect.

Benjamin Cardozo may well be considered the intellectual progenitor of Wellington, at least insofar as judicial review is concerned. Cardozo, however, wrestled openly with the class-bound self. Objective standards, he says, are an ideal that is never attained. "We cannot transcend the limitations of the *ego*," he wrote, "and see anything as it really is."[125] "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[126]

Having said that, Cardozo proceeded to interject a subjective element in the very definition of the objective process. The judge's search, he said, is for "the customary morality of right-minded men and women . . . ."[127] Yet, who is right-minded? If a majority opposes capital punishment as a species of cruel and unusual punishment, how is the judge to decide whether this morality is right-minded? The search for consensus becomes hopelessly subjective when it becomes a quest for the opinions of the right-minded majority. Cardozo admitted as much, quoting James Harvey Robinson:

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124. Sociologist Louis Wirth acknowledges that social scientists, despite their best efforts, allow their predispositions to color their work by their hypotheses and conclusions, their organization of materials, their methods of investigation, and their selection of data. Wirth, *Preface* to K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE xx (L. Wirth & E. Shils trans. 1936). One hundred and fifty years ago, Story cautioned against courts attempting to intuit the public's opinion.

> It is one thing to believe a doctrine universally admitted, because we ourselves think it clear; and quite another thing to establish the fact. . . . If public opinion is to decide constitutional questions, instead of the public functionaries of the government in their deliberate discussions and judgments, (a course quite novel in the annals of jurisprudence), it would be desirable to have some mode of ascertaining it in a satisfactory, and conclusive form; and some uniform test of it, independent of mere private conjectures. . . . Human nature never yet presented the extraordinary spectacle of all minds, agreeing in all things; nay not in all truths, moral, political, civil, or religious.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1289, at 167–68 n.2 (1833), *quoted in* J. ELY, *supra* note 1, at 216 n.100.

125. B. CARDOZO, *supra* note 52, at 106.

126. *Id.* at 167.

127. *Id.* at 106.

> Our beliefs and opinions . . . like our standards of conduct come to us insensibly as products of our companionship with our fellow men, not as results of our personal experience and the inferences we individually make from our own observations. We are constantly misled by our extraordinary faculty of 'rationalizing'—that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong.[128]

Nonetheless, the job must be done, and Cardozo, like Wellington, considered the judge the right person to do it. Wellington expresses confidence in the insulation of the position from pressure.[129] Cardozo based his confidence on judicial training and temperament.[130] Mistakes will be made, both Cardozo and Wellington admit, but both would likely agree with Zechariah Chafee, who wrote that although law may become the "will of the justices," it is "the will of the justices trying to do that which is right."[131]

Alexander Bickel resembled Cardozo in the sense that both men expressed a deep faith in some special ability of judges to discern society's morality. "Judges have, or should have," Bickel wrote, "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."[132] The remark is pregnant with self-revelation. Bickel patently assumed that the scholarly approach would lead to the information he sought, an assumption grounded in his career as an academic. Moreover, he suggested that judges have hours upon hours to reflect upon the questions of our time, while in fact, long delays because of crowded dockets are the reality.[133] Additionally, he

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128. Robinson, *The Still Small Voice of the Herd*, 32 POL. SCI. Q. 312, 315 (1917), *quoted in* B. CARDOZO, *supra* note 52, at 175.

129. Wellington insists that courts are better suited to this task than legislatures because of their insulation from political pressure and interest group politics. "Reason, not Power" is the slogan he says he would hang over the door of the institution charged with finding society's moral principles. Wellington, *Rules*, *supra* note 10, at 246–47.

130. B. CARDOZO, *supra* note 52, at 176.

131. Chafee, *Do Judges Make or Discover Law?*, 91 PROC. AM. PHIL. SOC'Y 405, 420 (1947), *quoted in* A. BICKEL, *supra* note 11, at 236.

132. A. BICKEL, *supra* note 11, at 25–26.

133. For many years, Chief Justice Burger has been concerned about the number of cases filed in the Supreme Court. Burger has predicted that without drastic changes, the American system of justice "may literally break down before the end of this century." *Burger Says Growing Caseloads May Break Down the U.S. System of Justice*, N.Y. Times, Nov. 19, 1982, at B1, col. 1. Burger noted that the number of cases before the Court has more than tripled in the past 29 years to more than 4,400, and the number of written opinions has more than doubled. *Id.* In the 1983–84 term the Court disposed of 180 cases by signed and per curiam opinions. *Statistical Recap of Supreme Court's Workload during Last Three Terms*, 53 U.S.L.W. 3028 (1984).

The Chief Justice is not the only member of the Court to call for a remedy to the crowded docket. Several of the justices now support the creation of a National Court of Appeals, a proposal that was made in 1975 but which received little support at the time. *See* Cutler, *Help for High Court*, N.Y. Times, Nov. 11, 1982, at A19, col. 1.

professed faith in judicial training, but if anything, such training separates judges from the common currents of society. They are undoubtedly insulated, but does that really help them discover the country's moral consensus or does it simply insulate them from attack for unpopular decisions?

Bickel's approach to judicial review diverges from those of Cardozo, Wellington, Dworkin, and other "principle" theorists in a remarkable way. He not only believed that judges should seek out fundamental principles, he believed they should also look backward and forward. The judge in Bickel's system is a sort of soothsayer, declaring as law "those principles as will—in time, but in a rather immediate foreseeable future—gain general assent."[134] Upon closer inspection one finds that Bickel was not looking for a current consensus at all. The Court, he said, is an educator of public opinion, a leader rather than a mere register.[135]

Thus, Bickel envisioned a Court creating a consensus by its decisions, creating in effect a self-fulfilling prophecy. He offered a paradoxical explanation: "The Court," he said, "must lead opinion, not merely impose its own."[136] The clause is enticing poetry, but it is not a state-

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134. A. BICKEL, *supra* note 11, at 239. Bickel, however, admitted that "the most fundamental of one man's fundamental presuppositions, most ideally arrived at, will not always be another's." *Id.* at 238. The problem was resolved to his satisfaction, though, by the existence of a nine-member Court. To the extent that the nine share similar backgrounds, however, nine is not much better than one. Besides that, why nine? If a larger number renders better results, why not 535—the number of Congressmen and Senators?

135. *Id.* at 26, 239. Raoul Berger disputes the notion that society should look to the courts for leadership in resolving problems Congress has failed to solve. During the time of the constitutional convention, he says, the Court's role was considered a defensive one: preventing Congress from absorbing all power. R. BERGER, CONGRESS, *supra* note 6, at 339. Charles Black retorts that the preponderance of the evidence indicates that a majority of delegates at the convention understood that courts would review legislation on constitutional grounds. To support his argument, he cites § 25 of the Judiciary Act of 1789, 1 Stat. 73, 87, which expressly provides for review of state court decisions by the Supreme Court.

136. A. BICKEL, *supra* note 11, at 239. Leopold Pospisil, a professor of anthropology, calls this acceptance the process of internalization. L. POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 192–232 (1974). Decisions of courts, he says, may begin as authoritarian laws, those simply decreed without widespread support in society, but a variety of social pressures push to transform them into customary laws, those that are internalized by a majority. Private internalization (psychological) over time eventually leads to societal internalization. The process is not inevitable, but the momentum is strong. *Id.* at 193–97. Pospisil observes that people can be convinced to internalize even the most hated ideas. He cites as an example Bruno Bettelheim's study of Nazi concentration camp inmates, who internalized the attitudes of their captors and began to imitate them. *Id.* at 199. Some of the prisoners, when put in charge of the others, behaved even worse than their captors. *Id.* at 204. Pospisil corroborates Bettelheim's account with the recollections of his (Pospisil's) father, who saw for himself how some prisoners changed their appearance to resemble the SS jailers and even sewed uniforms for themselves that looked like those of the guards. *Id.*

The conclusion Pospisil draws is that "authority can break down 'entrenched' customs and

ment that can aid the justices in finding some external manifestation of morality. If the justices are not to implement existing sentiment on morality, but are to lead it, and if the Court is obligated to succeed, then it has no choice but to impose its own opinion of what it can convince people to accept. The image of a Court peering into the future is an attractive one, but Bickel revealed the true nature of his system with the last part of his description—the obligation to succeed. If the future were predetermined, the obligation to succeed would be a non sequitur; it would be akin to saying that a physicist has an obligation to succeed in making an object fall to earth. Therefore, Bickel's insistence on success displays the real consequence of his Court: imposition of principles that the justices think ought to be fundamental.

Indeed, the Court does have the ability to change public opinion by the fact of its reaching a particular decision.[137] After *Roe v. Wade*,[138] for example, attitudes toward abortion became more liberal.[139] Bickel attempted to use his system to justify a Supreme Court decision outlawing capital punishment even though the public has historically supported the death penalty and continues to do so.[140] If the Court were to impose a ban on capital punishment, it would not be

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cultural norms and replace them by new laws and values, given enough time, inducement (rewards and punishment), and isolation of the subjects from contrary influences." *Id.* Obviously, complete isolation is impossible in the United States. Nonetheless, if victims of Nazi oppression can come to accept the ideas of their tormentors, surely the American people can be moved to accept most of the decisions of the Supreme Court. *See also* Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 J. ABNORMAL & SOC. PSYCHOLOGY 417, 447–48 (1943).

137. Bickel acknowledged that the Court may well control public opinion over time by reducing the question and "rendering the answer familiar if not obvious." A. BICKEL, *supra* note 11, at 240. The outcome, he said, results in great part from a colloquy between the Court and social institutions, especially the practicing and teaching members of the bar. *Id.* In so stating, Bickel unwittingly underscored the argument of Ely, Bork, and other critics that decision making by judges tends to emphasize values that the status group finds important. Bork spoke of this contention in a 1982 meeting of the Federalist Society at Yale:

> The Court responds to the press and law school faculties. The personnel of the media are heavily left-liberal. Their values are quite egalitarian and permissive. Law school faculties tend to have the same politics and values. So if there are new constitutional values they will be the values of that class.

Federal Judge Assails Supreme Court Rulings, N.Y. Times, Apr. 27, 1982, at A17, col. 6.

138. 410 U.S. 113 (1973).

139. *See* Arney & Treacher, *Trends in Attitudes Toward Abortion, 1972-1975*, 8 FAM. PLAN. PERSP. 117 (1976). *See also* T. SMITH, A COMPENDIUM OF TRENDS ON GENERAL SOCIAL SURVEY QUESTIONS 1–5 (1979) (GSS Technical Report No. 15) [hereinafter cited as GSS 15].

140. In 1982, 74% of a representative sample of American adults expressed support for the death penalty for persons convicted of murder. GSS, *supra* note 18, at 87 (1982) (variable 79). As early as 1953, the number in favor amounted to 64%. In fact since 1953, the only time in which less than a majority supported capital punishment was the mid-1960's, the period during which Bickel's book appeared, and in 1971. Forty-five percent favored it in 1965; 42% in 1966. By 1967, however, the figure had risen again to 55%. From 1973 on, support has never dropped below 60%. GSS 15, *supra* note 139, at 18–19.

because of widely shared principles, but rather because of a minority view of morality. In time the public might come to accept that view, but the acceptance would result from the authoritativeness of the decision of the Court, not from a wellspring of public sentiment. Abolishing the death penalty might be the right thing to do, but disguising the reason for the ruling hardly is. The Court may be the "shaper and prophet of the opinion that will prevail and endure,"[141] but its prophecy is based on its confidence in its shaping ability.

Archibald Cox holds a view similar to that of Bickel. "The Court," he says, "must know us better than we know ourselves."[142] Thus he alludes to heeding the will of the people in some sense, but like Bickel, Cardozo, and Wellington, he principally posits a system in which the justices' values are destined to be expressed. Cox, however, is somewhat more honest about this. While he indulges in a certain amount of poetry about Supreme Court opinions being the "voice of the spirit, reminding us of our better selves,"[143] he confesses that the Court need not always heed the will of the majority. In fact, he provides an example in which it clearly did not: abortion.[144] The laws of at least forty states were swept away by *Roe v. Wade*, he writes, along with century-old majority American moral themes. Substituted for this common notion of morality was "what seven justices took to be the wiser view of an actively debated question."[145]

Cox is willing to defend the decision. The opinions of the Court, he says, need not reflect the dominant public opinion of the moment; they need only be rooted in ideas having some support in the nation, ideas that the community eventually will avow and live by.[146] One is led to wonder whether this formula imposes any restraint at all, for Americans can be found who support everything from abolition of all laws to imposition of a fascist state. It would be a quixotic Court that could not find some support for its opinion in society.

As for predicting the future consensus, Cox acknowledges the tautology: the Court must decide what the people will accept, but the Court largely determines what the people accept by what it decides.[147] Nevertheless, he writes that such judicial legislation is acceptable, at

141. A. BICKEL, *supra* note 11, at 239.
142. A. COX, *supra* note 74, at 117.
143. *Id.*
144. *Id.* at 102.
145. *Id.*
146. *Id.* at 117–18.
147. Like Bickel, Cox admits that the Court plays an important role in shaping public opinion. This function is a matter of legitimacy to Cox, a legitimacy that rests upon the Court's ability to discern what the community will live by and to influence that consensus by the decisions it renders. *Id.*

least for now. "[M]odern government is simply too large and too remote, and too few issues are fought out in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial."[148] That being the case, he does not lament the activist intervention of the Supreme Court, for it does not lessen his sense of being involved in a common adventure.[149]

Of course, Cox himself has not been left out of the adventure. To the contrary, he has been one of the guides as an advocate before the Court and as an academician. The Court responds to entreaties coming from people like him. The justices read what he has to say. Archibald Cox does indeed have more influence with the Supreme Court than he does by voting. Yet that is not the case with most Americans. For them, elections are the means of making their views known and codified into law. The Supreme Court may well be justified in overturning the will of the people in many instances, but the increasing remoteness of the other two branches can scarcely be said to be the reason why, at least not for those with less stature than Archibald Cox.

Unlike Wellington, Cardozo, Bickel, Dworkin, Cox, and Michael Perry,[150] Laurence Tribe is not at all concerned about the public's morality. In his system, the Court is bound to enforce rights of selfhood. These rights exist apart from and regardless of any community consensus about them. Thus, Tribe gives broad meaning of self-expression to the first amendment.[151] For example, he believes in constitutional protection for homosexual activity.[152] What worries Tribe is not judicial activism in defining rights of selfhood but rather public resistance to judicial creativity. The mission of the Court is not to protect its credi-

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148. *Id.* at 116.

149. *Id.* Cox is reacting to Learned Hand's comments reproduced at *supra* text accompanying note 65.

150. Perry has been a principles theorist somewhat like Wellington except for the fact that the benchmark for Perry is moral ideals, whereas for Wellington moral principles are the standard. *See* Perry, *Substantive Due Process Revisited: Reflections on (and beyond) Recent Cases*, 71 NW. U.L. REV. 417 (1977). See the critique of Perry's view in Brest, *Rights, supra* note 12, at 1071–73. Perry recently has modified his position to resemble that of Charles Black. He now believes that congressional power over the Court's jurisdiction is a sufficient majoritarian check to justify judicial review. Perry, *supra* note 54, at 331. *See generally* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

151. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576–79 (1978). Tribe approvingly quotes the concurrence of Justice Brandeis in Whitney v. California, 274 U.S. 357, 375 (1927):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty . . . .

L. TRIBE, *supra*, at 578.

152. Tribe places homosexuality under the rubric of "Rights of Privacy and Personhood." L. TRIBE, *supra* note 151, at 941–46.

bility, he says, but rather " 'to form a more perfect Union' between right and rights within [the Constitution's] necessarily evolutionary design."[153] "I prefer postulates honestly expressed," he writes, "to analyses whose underlying assumptions are obscured by the jargon of neutral principles and the language of 'objective' legal description."[154]

Full disclosure also is the recommendation of Miller and Howell in an article entitled *The Myth of Neutrality in Constitutional Adjudication.*[155] Choices among values are unavoidable, they contend.[156] When the choices are made, they emanate from the biography and heredity of a particular judge. They believe the Supreme Court should boldly become an active participant in government, furthering the democratic ideal and disclosing the bases of its decisions.[157]

The importance of an individual justice's values in the rights theories is undisputable. Tribe, Miller and Howell, and others like them do not hide that fact. Tribe confesses to liking the Burger Court's activism far less than that of the Warren Court; nonetheless, he does not seek a return to restraint.[158] If they are not worried about elitism in their systems, though, John Hart Ely certainly is.

Ely devotes a full chapter of his book *Democracy and Distrust*[159] to deflating the modes of noninterpretivist judicial review, finding them all hopelessly tethered to judges' elitist ideals and high status. For example, he regards "reason" as an unreasonable source of constitutional values. Either it is as empty as "neutral principles" or it is "flagrantly elitist."[160] "Our society did not make the constitutional decision to move to near-universal suffrage only to turn around and have superimposed on popular decisions the values of first-rate lawyers," Ely states.[161]

Fundamental values of society suffer similar criticism at Ely's hands. They are infinitely manipulable, Ely believes, by those charged with finding them. He writes:

[T]he list of values the Court and the commentators have tended to en-

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153. *Id.* at iv.

154. *Id.* at v.

155. Miller & Howell, *supra* note 40, at 691. *See also* Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 594 (1948).

156. Miller & Howell, *supra* note 40, at 671.

157. *Id.* at 689–91.

158. L. TRIBE, *supra* note 151, at v.

159. J. ELY, *supra* note 1, at 43–72.

160. *Id.* at 59.

161. *Id.* Ely quotes Robert Dahl as saying that "[a]fter nearly twenty-five centuries, almost the only people who seem to be convinced of the advantages of being ruled by philosopher-kings are . . . a few philosophers." R. DAHL, DEMOCRACY IN THE UNITED STATES 24 (3d ed. 1976), *quoted in* J. ELY, *supra* note 1, at 206 n.75.

> shrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right not to be locked in a stereotypically female sex role and supported by one's husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental.*[162]

Consensus theories also fail to pass muster according to Ely. First, he attacks the elementary assumption that a consensus exists. A growing body of literature, he says, indicates that it does not, or that if it may seem to exist, it is simply a function of the domination of some groups by others.[163] Then, he questions the mode of assessment. How can one determine whether the public deems a particular right to be fundamental or simply important? Finally, he notes, if consensus is the goal, the legislature is better suited to scoring it.[164] The features that Bickel and others extol, insulation and isolation, make the courts much less suited to reflecting majority will. Legislatures may not be wholly democratic, he argues, but courts certainly are not more democratic than legislatures.[165] What is more likely to happen, Ely says, is that judges—either consciously or subconsciously—will find their own values in the majority and thus consider themselves justified in imposing them on society.[166]

Having rebuked others for injecting their own value preferences, Ely proceeds to present a theory that injects his own. It is a theory of process orientation. Ely bases this selection on the theme of the Constitution, but the music is as much his theme as that of the document. Reviewing Ely's book, Samuel Estreicher observed that the Constitution contains many other values. What Ely has done, he says, is simply pick his favorite. Other options, such as preferred status of state and local decision making, are equally plausible, Estreicher writes.[167] Indeed, he notes Bork's view that if one were looking for an implicit prin-

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162. J. ELY, *supra* note 1, at 59. *But see* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973) and Plyler v. Doe, 457 U.S. 202 (1982), in which the Court held that education is not a fundamental right, although it is something more than a mere privilege. *See generally* Levin, *Commentary—Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much Is Enough*, 1979 WASH. U.L.Q. 703.

163. J. ELY, *supra* note 1, at 63.

164. *Id.* at 67.

165. *Id.* Wellington argues that these countermajoritarian aspects of the legislature and other elements of government have value precisely because of their countermajoritarianism. Thus, he says, judicial review is not at all anomalous in the American system of government. Wellington, *Nature, supra* note 10, at 488–92.

166. J. ELY, *supra* note 1, at 67.

167. Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitutional Order*, 56 N.Y.U. L. REV. 547, 569 (1981).

ciple of the Constitution, separation of powers and judicial restraint would be a likely candidate.[168]

In spite of all this, Ely calls himself an interpretivist, albeit not one of the clause-bound persuasion. He does agree with Berger, Bork, and the others that the language of the Constitution is the most important factor in discerning its meaning.[169] Nonetheless, he says, the inquiry cannot stop there because the intent of the Framers exists not clause by clause, but rather within the document as a whole.[170] That is the genesis of his exegesis of process reinforcement as the general theme of the Constitution. In that sense, it may be interpretivism, but by enshrining that particular aspect of the Constitution in a paramount position, Ely moves toward the fundamental rights camp. His theory may not exhibit the smell of the lamp, but it at least exudes the fragrance of a liberal.

Two more commentators merit attention at the end of this discussion, not because their views are any less telling than the others, but rather because they believe the entire debate to be misplaced. Paul Brest argues that all theories of judicial review self-destruct.[171] Charles Black asserts that the people knowingly created and continue to support a judicial check on themselves.[172]

Brest's position is that the tension between majority and minority, between legislature and court, merely mirrors the "essential and irreconcilable tension between self and other, between self and *self*"[173]—in other words—the human predicament. Continuing the debate in the usual terms, he says, deflects attention from the more important endeavor: working "toward a genuine reconstitution of society—perhaps one in which the concept of freedom includes citizen participation in the community's public discourse and responsibility to shape its values and structure."[174] Thus, he writes, the proper measure of constitutional decision making should be how well the practice (1) fosters democratic government, (2) protects the individual from arbitrary and intrusive government action, (3) encourages stable political order while remaining responsive to changed conditions, (4) discourages abuse and arbitrariness, and (5) endears itself to the populace.[175] Obviously, Brest's concepts do almost nothing to limit judges from translating their values into law. Indeed, they seem to invite judges to do just that.

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168. Bork, *Welfare Rights, supra* note 7, at 699.
169. J. ELY, *supra* note 1, at 16.
170. *Id.* at 12.
171. Brest, *Rights, supra* note 12, at 1096.
172. C. BLACK, *supra* note 14, at 105.
173. Brest, *Rights, supra* note 12, at 1108.
174. *Id.* at 1109.
175. Brest, *Quest, supra* note 12, at 226. Original intent, in Brest's theory, is relevant to resolving constitutional questions, but it is not determinative. *Id.* at 225.

Charles Black provides a structural justification for judicial activism. The people, he says, have themselves created an institution designed to check their own excesses and guard rights that might be lost in the sometimes rowdy world of representational politics.[176] Far from denying the role of the subjective judge, Black shudders at the thought of a Court which is compelled to follow an act of Congress that obliged it to sentence a man to death, even though the judge solemnly believed the statute to be unconstitutional.[177] This judicial self-assertiveness, he writes, not only is acceptable, it is what the people want, for if they wished to bridle the Court they could vote for representatives who would restrict its jurisdiction. Black writes:

> I think that the people have said to the Court, through history, "We have placed you where you sit not to decide whether your job is one that ought to have been given you, but to do that one job. In worrying about us, you badly mistake the position. If we really do not want you where you are any more, we will take care of the matter; you need not trouble your head about it. Meanwhile, we have put you there because we want you to check our other representatives in certain ways; why else in the world do you suppose we put up with you. Play this part with firmness and courage."[178]

The writers reviewed herein provide an array of defenses of various forms of judicial review. Some believe that the background of the judge inevitably will be expressed, and that the judge should act honestly with that knowledge. Others purport to restrain the judiciary by grounding their inquiry in public consensus or prediction of public consensus. These theories, however, have been shown in fact to involve judgments substantially colored by the judge's self. Even the theories of the interpretivists, who actively fight against activism, have been shown to involve subjective judgments. The conclusion is that self-involvement is unavoidable in all the systems. To the extent that the selves involved are products of elite social strata, their decisions are likely to reflect the

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176. C. BLACK, *supra* note 14, at 105.

177. *Id.* at 21–22. Black does not deny the influence of the judge's background in resolving a constitutional case. To the contrary:

> [T]he very nature of the material we call "law," of the material we look to when we look for "law," and of the methods we use in this search for right "law," are such that they very often make it not merely *possible* but *inevitable* that the beliefs and even the feelings of the judge go into the making of judgment. This is true because the whole body of "law," separate from those beliefs and feelings—even if fully known and handled with the highest expertness—very often does not suffice to lead the mind, by scientific or logical manipulations, to an unequivocally established right result, and must in the nature of things fail to do this.

C. BLACK, DECISION ACCORDING TO LAW 20 (1981) (emphasis in original).

178. C. Black, *supra* note 14, at 107.

beliefs of those groups. That is the proposition to be tested in the next part of this article.

IV. Empirical Data and Analysis

A. *Methodology*

The hypothesis of this study is that Supreme Court opinions will tend to reflect the views of high-status members of society. To test that assertion, I have analyzed public opinion data collected by the National Opinion Research Center in its General Social Surveys.[179] The surveys included a number of questions on issues that subsequently were decided by the Court in addition to some that the Court had already ruled upon. Using the Statistical Package for the Social Sciences computer program,[180] I have cross-tabulated answers to the questions with various indices of status, specifically: occupational prestige,[181] education, income, and subjective estimation of class. The issues to be discussed are: confidence in the Supreme Court, removal of books from libraries, abortion, capital punishment, busing, and obscenity.[182] Several other issues will be discussed in a summary fashion.

B. *Confidence in the Court*

If the Supreme Court tends to reflect the opinion of those with high status, it would be logical to predict that such people would express greater confidence in the Court. The data from the General Social Surveys confirm that prediction. The question was asked: "As far as the *people running* these institutions [several were asked about, including the Supreme Court] are concerned, would you say that you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?" In 1976, 52% of those with the highest prestige occupations expressed a great deal of confidence in the Court. In all other prestige categories, only about 36% were so supportive. In contrast, 14.1% of the lowest occupational prestige group said they had hardly any confidence in the Court while only 7.9% of the highest group responded with this negative view. In 1978, the responses clus-

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179. J. Davis, General Social Surveys, 1972–1982 (machine readable data file). Principal investigator, James A. Davis; senior study director, Tom W. Smith; research assistant, C. Bruce Stephenson. NORC ed. Chicago: National Opinion Research center producer, 1982; Storrs, CT: Roper Public Opinion Research Center, University of Connecticut distributor. One data file (13626 logical records and one codebook (398 pages)). All data reported herein were generated from these surveys.

180. *See* N. Hie, C. Hull, J. Jenkins, K. Steinbrenner & D. Brent, Statistical Package for the Social Sciences (2d ed. 1975).

181. The lowest prestige rating encountered was a nine; the highest was 82 (a list of many occupations and their ratings is on file with University of Dayton Law Review).

182. The questions are reproduced in the Appendix.

tered closer together with greater numbers choosing the middle response—only some confidence; however, differences remained.

Table 1 Confidence in Supreme Court by Occupational Prestige, 1976

Prestige Score	Confidence			
	Great deal	Only some	Hardly any	ROW TOTAL
9–19	95 37.1%	125 48.8%	36 14.1%	256 18.2%
20–39	193 35.2%	255 46.5%	100 18.2%	548 38.9%
40–59	174 36.6%	219 46%	83 17.4%	476 33.8%
60–82	66 52%	51 40.2%	10 7.9%	127 9%
COLUMN TOTAL	528 37.5%	650 46.2%	229 16.3%	1407 100%

(NOTE: Prestige increases as score increases)

$x^2 = 17.35406$ df=6 p=.0081
Missing observations (unemployed, retired, no answer, don't know)=92

A correlation between education and support for the Court also is borne out by the data. Both the 1976 and the 1978 studies revealed a strong relationship. In 1978, confidence in the Court increased as each category of education increased. Thus, only 24.5% of those with less than a high school education said they had great confidence in the Court. Among high school graduates, the number increased to 27.7%. Thirty-nine percent of the persons with junior college educations reported great confidence in the Court, as did 42.7% of those with bachelor's degrees, and 45.9% of respondents with graduate degrees. Negative responses were in the opposite direction. Only 8.2% of the graduate school-educated individuals said they had almost no confidence in the Court. This percentage rose among those with less than a high school education.

Table 2 Confidence in Supreme Court by Educational Degree, 1978

Degree	Confidence			
	Great deal	Only some	Hardly any	ROW TOTAL
< High School	103 24.5%	237 56.3%	81 19.2%	421 28.9%
High School	217 27.7%	447 57.2%	118 15.1%	782 53.7%
Jr. College	16 39%	20 48.8%	5 12.2%	41 2.8%
Bachelor	64 42.7%	73 48.7%	13 8.7%	150 10.3%
Graduate	28 45.9%	28 45.9%	5 8.2%	61 4.2%
COLUMN TOTAL	428 29.4%	805 55.3%	222 15.3%	1455 100%

$x^2 = 34.07454$ df=8 $p < .0001$
Missing observations=77

None of the data on income proved to be statistically significant with regard to confidence in the Supreme Court; however, people's subjective impression of their social class proved to be a fair predictor. In 1978, as class status increased, the number expressing great confidence in the Court tended to increase and the number expressing almost no confidence decreased. The data from 1976 shows a similar relationship among those who have great confidence in the Court; however, the pattern in the negative responses is not at all clear. One quarter of the upper class said they had hardly any confidence in the Court—the largest negative rating in any class category. Indeed, the middle class proved to be the least critical and most supportive in 1976. Unfortunately, the 1980 results were not statistically significant, so it is difficult to say whether the negative ratings of 1976 were the norm or an aberration. In any event, positive evaluations of the justices appear to be generally correlated with class. Additionally, it is correct to say that since 1976, the trend has been toward the center—some support—and away from the extremes.

Table 3 Confidence in Supreme Court by Subjective Class, 1976

Class	Confidence			
	Great deal	Only some	Hardly any	ROW TOTAL
Lower	17	35	10	62
	27.4%	56.5%	16.1%	4.4%
Working	212	305	122	639
	33.2%	47.7%	19.1%	45.6%
Middle	289	301	91	681
	42.4%	44.2%	13.4%	48.6%
Upper	8	7	5	20
	40%	35%	25%	1.4%
COLUMN TOTAL	526	648	228	1402
	37.5%	46.2%	16.3%	100%

$x^2 = 19.79428$ df=6 p=.003
Missing observations=97

Table 4 Confidence in Supreme Court by Subjective Class, 1978

Class	Confidence			
	Great deal	Only some	Hardly any	ROW TOTAL
Lower	19	42	13	74
	25.7%	56.8%	17.6%	5.1%
Working	174	397	115	686
	25.4%	57.9%	16.8%	47.2%
Middle	223	346	89	658
	33.9%	52.6%	13.5%	45.3%
Upper	13	19	4	36
	36.1%	52.8%	11.1%	2.5%
COLUMN TOTAL	429	804	221	1454
	29.5%	55.3%	15.2%	100%

$x^2 = 13.93009$ df=6 p=.0304
Missing observations=78

Table 5 Confidence in Supreme Court

Confidence	Year			
	1976	1978	1980	1982
Great deal	528	429	361	459
	38%	29%	26%	32%
Only some	650	806	734	798
	46%	56%	53%	55%
Hardly any	229	223	286	187
	16%	15%	21%	13%

While subjective notions of class are not perfect predictors of support for the Court, subjective notions of one's political power are quite reliable. The 1978 General Social Survey included two questions on alienation. The first called for a response to the statement "The people running the country don't really care what happens to you." The second sought a response to the statement that "people in Washington, D.C. are out of touch with the rest of the country." More than 21% of those who agreed with the first statement expressed hardly any confidence in the justices as compared with only 8.5% who disagreed. Curiously, the number of alienated people who rated the Court negatively was almost exactly balanced with alienated people who gave it a great deal of support—21.5%. Those who thought their leaders did care, however, were much more likely to have confidence in the Court—39%. Additionally, those people who believed that their national leaders were in touch with the rest of the country were more confident in the Court.

Table 6 Confidence in Supreme Court by "People Running Country Don't Care," 1978

Yes or no	Confidence			
	Great deal	Only some	Hardly any	ROW TOTAL
Yes, feel don't care	160 21.5%	424 57.1%	159 21.4%	743 53.1%
No	256 39%	345 52.5%	56 8.5%	657 46.9%
COLUMN TOTAL	416 29.7%	769 54.9%	215 15.4%	1400 100%

$x^2=74.61241$ df=2 $p<.0001$
Missing observations=132

Table 7 Confidence in Supreme Court by "People in D.C. out of Touch," 1978

Yes or no	Confidence			
	Great deal	Only some	Hardly any	ROW TOTAL
Yes, feel out of touch	181 22%	470 57.2%	171 20.8%	822 60%
No	223 40.6%	286 52.1%	40 7.3%	549 40%
COLUMN TOTAL	404 29.5%	756 55.1%	211 15.4%	1371 100%

$x^2=79.26289$ df=2 $p<.0001$
Missing observations=161

C. Libraries

In *Board of Education v. Pico*[183] a plurality of the Supreme Court recently held that "local school boards may not remove books from library shelves simply because they dislike the ideas contained in those books."[184] By so deciding, the Court overturned a summary judgment in favor of a board that had purged " '[a]nti-American, anti-Christian, anti-Semitic, and just plain filthy' "[185] books from a high school and junior high school. School boards certainly retain some powers of selectivity, the Court said, but the justification for the selection must not interfere with the first amendment rights of the students.

One might expect better-educated individuals to support diversity of libraries. It is undoubtedly the sort of value associated with "the smell of the lamp."[186] Responses to questions on the General Social Surveys reveal that that is precisely the case: the greater the education, occupational prestige, social status, and income, the greater the support for "open stacks." The Supreme Court's decision was consonant with public opinion, but it was the public opinion of society's elites.

In 1980, interviewers asked whether the books of someone against all churches and religion ought to be removed from the public library. The differences in answers of occupational prestige groups was dramatic. More than 84% of those in the highest category opposed the removal of the books. In contrast, more than half of the people in the lowest category wanted the books taken off the shelves. The number favoring removal varied inversely with prestige, while opposition to removal increased directly with prestige.

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183. 457 U.S. 853 (1982).

184. *Id.* at 872. Four justices agreed on that proposition. A fifth, Justice White, concurred on the ground that a summary judgment had been issued improperly in the case because a genuine issue of material fact—why the books were removed—remained unresolved. Thus, he saw no reason to "issue a dissertation" on the first amendment. *Id.* at 883. (White, J., concurring).

185. *Id.* at 857. A recent survey of librarians in 860 school systems revealed that *Go Ask Alice*, a diary of a teenager who committed suicide after a period of drug abuse, is the most frequently censored book in high school libraries. Researchers also found that the percentage of communities in which challenges occurred had increased since 1977, and in more than half of those cases, some form of censorship ultimately resulted. *See Librarians Say 'Go Ask Alice' Is Censored Most in Schools*, N.Y. Times, Nov. 28, 1982, § 1, at 73, col. 2.

186. *See supra* text accompanying note 1.

Table 8 Removal of Atheist's Book in Library by Occupational Prestige, 1980

Prestige Score	Removal or not		
	Remove	Not remove	ROW TOTAL
9–19	117 51.8%	109 48.2%	226 15.8%
20–39	225 42.1%	309 57.9%	534 37.3%
40–59	160 29.1%	390 70.9%	550 38.5%
60–82	19 15.8%	101 84.2%	120 8.4%
COLUMN TOTAL	521 36.4%	909 63.6%	1430 100%

$x^2 = 65.23911$ df=3 $p < .0001$
Missing observations=38

Similarly, the level of one's education has proven to be an important predictor of tolerance of atheistic literature. More than 97% of those with graduate school degrees, 89% of those with bachelors degrees, and 81% of those with junior college degrees opposed removing the books. Among people with less than a high school education, however, 62% favored removing the books.

Interestingly, high school appeared to inspire a pronounced increase in tolerance. The percentage opposing removal increased by more than 30% in the jump from the group with less than a high school education to that with a high school diploma. Thus, every educational group, except for that composed of people who did not finish high school, opposed the removal of an atheist's book from the public library. Nonetheless, opposition was significantly stronger in the college-educated sector.

Table 9 Removal of Atheist's Book in Library by Educational Degree, 1980

Degree	Remove or not		
	Remove	Not remove	ROW TOTAL
< High School	270 62.5%	162 37.5%	432 30.3%
High School	222 30.7%	501 69.3%	723 50.7%
Jr. College	8 18.2%	36 81.8%	44 3.1%
Bachelor	17 10.8%	141 89.2%	158 11.1%
Graduate	2 2.9%	67 97.1%	69 4.8%
COLUMN TOTAL	519 36.4%	907 63.6%	1426 100%

$x^2 = 221.88629$ df=4 $p < .0001$
Missing observations=42

Tolerance also varied with income: the greater the income, the more likely one was to oppose removal of the atheistic book. The same held true for personal subjective identification of class, although it is important to note that as with education, the breakpoint in the removal versus nonremoval dichotomy came rather early. A majority of the working class opposed book banning, yet even more of the middle and upper class opposed it. Hence, the value of libraries open to antireligious viewpoints is not rigidly class-bound. Except for the very lowest groups, it is class-bound only in degree.

Table 10 Removal of Atheist's Book in Library by Family Income, 1980

Income	Remove or not		
	Remove	Not remove	ROW TOTAL
$0–3,999	63 51.6%	59 48.4%	122 9.2%
$4,000– 5,999	59 60.2%	39 39.8%	98 7.4%
$6,000– 7,999	47 45.6%	56 54.4%	103 7.8%
$8,000– 14,999	114 40.7%	166 59.3%	280 21.1%
$15,000– 19,999	68 32.2%	143 67.8%	211 15.9%
$20,000– 24,999	53 27.9%	137 72.1%	190 14.3%
$25,000+	67 20.8%	255 79.2%	322 24.3%
COLUMN TOTAL	471 35.5%	855 64.5%	1326 100%

$x^2 = 84.06194$ df=6 $p < .0001$
Missing observations=142

Table 11 Removal of Atheist's Book in Library by Subjective Class, 1980

Class	Remove or not		
	Remove	Not remove	ROW TOTAL
Lower	37 51.4%	35 48.6%	72 5.1%
Working	261 39.6%	398 60.4%	659 46.3%
Middle	206 32%	438 68%	644 45.2%
Upper	14 28.6%	35 71.4%	49 3.4%
COLUMN TOTAL	518 36.4%	906 63.6%	1424 100%

$x^2 = 16.62971$ df=3 $p = .0008$
Missing observations=44

A question about banning the books of a self-avowed Communist from the public library resulted in similar responses along the elitism continuum in 1980. Only those in the lowest occupational prestige group favored removing the book. The difference between that segment and the highest one was striking: more than 80% of the latter opposed the removal. Even in the two middle groups, the responses from cate-

gory to category changed by about 10%. Occupational prestige, therefore, made a definite difference in attitudes on this question.

Table 12 Removal of Communist's Book in Library by Occupational Prestige, 1980

Prestige Score	Remove or not		
	Remove	Not remove	ROW TOTAL
9–19	116 55%	95 45%	211 15%
20–39	237 44.9%	291 55.1%	528 37.4%
40–59	195 35.3%	358 64.7%	553 39.2%
60–82	23 19.5%	95 80.5%	118 8.4%
COLUMN TOTAL	571 40.5%	839 59.5%	1410 100%

$x^2 = 50.47466$ df=3 $p < .0001$
Missing observations=58

Tolerance of Communist literature also proved to be highly correlated with education, but again, high school emerged as the great liberalizer. About 65% of those who did not finish high school favored banning the book; about the same percentage of those who did complete high school opposed such a ban. From that point on, more education made a significant difference, but people with the least education were left alone in favoring the removal of the book.

Table 13 Removal of Communist's Book in Library by Educational Degree, 1980

Degree	Remove or not		
	Remove	Not remove	ROW TOTAL
< High School	268 65.2%	143 34.8%	411 29.2%
High School	259 35.9%	462 64.1%	721 51.3%
Jr. College	13 28.9%	32 71.1%	45 3.2%
Bachelor	24 15.2%	134 84.8%	158 11.2%
Graduate	5 7%	66 93%	71 5%
COLUMN TOTAL	569 40.5%	837 59.5%	1406 100%

$x^2 = 187.92929$ df=4 $p < .0001$
Missing observations=62

Income and class also turned out to be useful predictors of attitudes on political book banning; however, once family income reached $6,000 a year (hardly a huge sum), people were unlikely to support the ban. Moreover, a majority of no class, not even the lowest, favored removal of the book. The differences were in degree.

Table 14 Communist's Book in Library by Family Income, 1980

Income	Remove or not		
	Remove	Not remove	ROW TOTAL
$0–3,999	66	46	110
	60%	40%	8.4%
$4,000–5,999	56	38	94
	59.6%	40.4%	7.2%
$6,000–7,999	44	55	99
	44.4%	55.6%	7.6%
$8,000–14,999	121	156	277
	43.7%	56.3%	21.2%
$15,000–19,999	75	135	210
	35.7%	64.3%	16.1%
$20,000–24,999	70	121	191
	36.6%	63.4%	14.6%
$25,000+	87	239	326
	26.7%	73.3%	24.9%
COLUMN TOTAL	519	788	1307
	39.7%	60.3%	100%

$x^2 = 62.40231$ df=6 $p < .0001$
Missing observations=161

Table 15 Communist's Book in Library by Subjective Class, 1980

Class	Remove or not		
	Remove	Not remove	ROW TOTAL
Lower	29	33	62
	46.8%	53.2%	4.4%
Working	288	362	650
	44.3%	55.7%	46.3%
Middle	237	406	643
	36.9%	63.1%	45.8%
Upper	15	34	49
	30.6%	69.4%	3.5%
COLUMN TOTAL	569	835	1404
	40.5%	59.5%	100%

$x^2 = 10.44737$ df=3 $p < .02$
Missing observations=64

In summary, then, the value of open libraries supported by the recent Supreme Court decision is correlated with occupational prestige, education, income, and subjective sense of class. However, support for this value is widespread, and increases on the elitism scale serve primarily to accentuate this attitude. In that sense, the decision is class-bound, but the distinction primarily exists between those in the lowest groups and everyone else. It should be noted, however, that the Court's decision involved a school library while the survey questions asked about a public library. Undoubtedly, they are quite similar; however, responses to other questions suggest that the public as a whole is less tolerant of diversity in the schools, even colleges and universities.

On the question of whether a Communist should be allowed to teach in a college or university, the breakpoint was reached much later. Only the most prestigious occupational group opposed firing such a person. In terms of education, not until the junior college level did respondents favor keeping such a person on, and then only by a slim majority. The bachelor and graduate degree holders are the ones who gave the idea strong support. Among income groups, only the very top one—those making $20,000 or more—opposed firing a Communist college teacher, and then only by a small margin. One would expect attitudes toward instruction in high school and junior high school to be even less tolerant. Thus, the Supreme Court's decision in *Board of Education v. Pico* reflects the views of America's elites and, perhaps, diverges significantly from those in the middle of the spectrum.[187]

D. Abortion

The furor over the Supreme Court's decision in *Roe v. Wade*[188] still has not abated, even eleven years after the fact. If anything, the debate has intensified as the "pro life" and the "pro choice" rhetoric revolves around a proposed human life amendment. In 1973, when the Court handed down its decision in *Roe*, the right to receive an abortion on demand during the first trimester and the somewhat minimal re-

187. The findings are reminiscent of a previous study of public support for broad guarantees of free speech compared with Supreme Court decisions. In that research, the author concluded that the Court was more in tune with highly educated people. Such a correlation was not surprising, though, he said, because members of the Court are more likely to interact with highly educated people, both professionally and personally. Gaziano, *Relationship between Public Opinion and Supreme Court Decisions: Was Mr. Dooley Right?*, 5 COM. RESEARCH 131, 147 (1978).

188. 410 U.S. 113 (1973). The Court simultaneously struck down a number of procedural impediments to abortion in Doe v. Bolton, 410 U.S. 179 (1973). Later cases included Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down a statute requiring consent of the father); Bellotti v. Baird, 428 U.S. 132 (1976) (involving consent of a minor girl's parents); and H.L. v. Matheson, 450 U.S. 398 (1981) (upholding a statute that required the physician of a minor girl to notify, if possible, her parents if an abortion is to be performed).

strictions on abortion in the second trimester were very much the values of the upper socioeconomic and educational class.

The 1972 General Social Survey included a number of questions about the circumstances under which a woman should be allowed to obtain a legal abortion. Across the various categories of status, a majority supported abortion when a strong chance existed that the baby would be born with a serious defect or when the mother's health was seriously endangered. In other circumstances, however, status differences were quite apparent.

Only those in the highest prestige group were willing to allow an abortion to a married woman who simply wanted no more children. Educationally, only those with bachelors and graduate degrees endorsed abortion in this instance. Insofar as income was concerned, support for abortion by preference did not arise until about the top 20 percentile. And only those who considered themselves in the upper class—less than 3% of the respondents—said they would allow a legal abortion under these circumstances. The results were similar, although slightly more supportive, when the question was whether an unmarried woman who did not want to marry the father would be allowed to obtain an abortion.

Table 16 Abortion for No More Children by Occupational Prestige, 1972

Prestige Score	Yes or no		
	Yes	No	ROW TOTAL
9–19	90	226	316
	28.5%	71.5%	20.7%
20–39	213	345	558
	38.2%	61.8%	36.5%
40–59	229	293	522
	43.9%	56.1%	34.2%
60–82	75	57	132
	56.8%	43.2%	8.6%
COLUMN TOTAL	607	921	1528
	39.7%	60.3%	100%

$x^2 = 37.09918$ df=3 $p < .0001$

Missing observations = 85

Table 17 Abortion for No More Children by Educational Degree, 1972

Degree	Yes or no		
	Yes	No	ROW TOTAL
< High School	157 26.1%	445 73.9%	602 39.9%
High School	321 44.5%	400 55.5%	721 47.8%
Jr. College	8 47.1%	9 52.9%	17 1.1%
Bachelor	72 61.5%	45 38.5%	117 7.8%
Graduate	38 74.5%	13 25.5%	51 3.4%
COLUMN TOTAL	596 39.5%	912 60.5%	1508 100%

$x^2 = 103.29961$ df=4 $p < .0001$
Missing observations=105

Table 18 Abortion for No More Children by Family Income, 1972

Income	Yes or no		
	Yes	No	ROW TOTAL
$0–3,999	73 26.8%	199 73.2%	272 19.4%
$4,000–5,999	52 33.8%	102 66.2%	154 11%
$6,000–7,999	58 38.2%	94 61.8%	152 10.8%
$8,000–14,999	204 37.8%	335 62.2%	539 38.4%
$15,000–19,999	84 52.8%	75 47.2%	159 11.3%
$20,000–24,999	37 57.8%	27 42.2%	64 4.6%
$25,000+	40 62.5%	24 37.5%	64 4.6%
COLUMN TOTAL	548 39%	856 61%	1404 100%

$x^2 = 56.17458$ df=6 $p < .0001$
Missing observations=209

Table 19 Abortion for Single Woman by Educational Degree, 1972

Degree	Yes or no		
	Yes	No	ROW TOTAL
< High School	174	412	586
	29.7%	70.3%	39.5%
High School	350	366	716
	48.9%	51.1%	48.2%
Jr. College	8	8	16
	50%	50%	1.1%
Bachelor	75	40	115
	65.2%	34.8%	7.7%
Graduate	38	13	51
	74.5%	25.5%	3.4%
COLUMN TOTAL	645	839	1484
	43.5%	56.5%	100%

$x^2 = 96.20978$ df=4 $p < .0001$
Missing observations=129

Table 20 Abortion for Single Woman by Subjective Class, 1972

Class	Yes or no		
	Yes	No	ROW TOTAL
Lower	18	76	94
	19.1%	80.9%	6.3%
Working	279	429	708
	39.4%	60.6%	47.3%
Middle	334	325	659
	50.7%	49.3%	44%
Upper	22	14	36
	61.1%	38.9%	2.4%
COLUMN TOTAL	653	844	1497
	43.6%	56.4%	100%

$x^2 = 45.84438$ df=3 $p < .0001$
Missing observations=116

Some fascinating insights result from the question of whether a woman from a low-income family that cannot afford any more children should be able to obtain an abortion. The people with lowest incomes were the least willing to allow an abortion in this case, even though they would be the very people affected, and the people with the highest incomes were the most supportive of abortion on these facts. Again, the breakpoint occurred at about the top 20 percentile. Occupationally, educationally, and by class, the lowest groups were the least likely to support abortion for the poor, although the breakpoint for majority support came near the middle of the spectrums rather than at the top. None-

theless, support for abortions for the poor increased as occupational prestige, education and social class increased.

Table 21 Abortion for Poor Woman by Family Income, 1972

Income	Yes or no		
	Yes	No	ROW TOTAL
$0–3,999	88	169	257
	34.2%	65.8%	18.6%
$4,000–5,999	62	85	147
	42.2%	57.8%	10.6%
$6,000–7,999	73	79	152
	48%	52%	11%
$8,000–14,999	272	273	545
	49.9%	50.1%	39.4%
$15,000–19,999	92	66	158
	58.2%	41.8%	11.4%
$20,000–24,999	42	22	64
	65.6%	34.4%	4.6%
$25,000+	41	21	62
	66.1%	33.9%	4.5%
COLUMN TOTAL	670	715	1385
	48.4%	51.6%	100%

$x^2=44.93188$ df=6 $p<.0001$
Missing observations=228

Although the controversy is far from over, one researcher studying later GSS data found a dramatic increase in support for abortion after the Supreme Court's decision in *Roe v. Wade*.[189] In 1973's survey, 86% said they had heard of the Court's abortion decision. Taken together, these facts may well bear witness to the veracity of the view of Alexander Bickel and Archibald Cox: by making a decision, the Court not only responds to public opinion and anticipates it, but also leads it, in this case, in the direction of society's elites. It should have come as no surprise, then, that the Court recently reaffirmed its commitment to *Roe* and struck down most impediments to abortions within the *Roe* guidelines.[190]

189. *See* Arney & Treacher, *supra* note 139.

190. In City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983), the Court struck down local rules requiring a 24-hour waiting period after the patient consented to the abortion, the presentation of extensive information about alternatives to abortion as well as physical and emotional complications that might arise, and a ban on abortions for minors without regard to their maturity. Similarly, in Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517 (1983), the Court struck down a requirement that second trimester abortions be performed in hospitals, although it upheld such a rule in Simopoulos v. Virginia, 103 S. Ct. 2532 (1983), when "hospital" was defined to include licensed outpatient clinics.

E. Capital Punishment

In *The Least Dangerous Branch*, Alexander Bickel built a theory of judicial review and applied it to capital punishment. The time was right, he said, for the Court to begin whittling away at the death penalty until nothing was left of it but historical recollection.[191] As noted earlier, support for capital punishment reached its perigee around the time Bickel's book was published.[192] That lowpoint, however, turned out to be very much an anomaly.

In the 1972 case of *Furman v. Georgia*,[193] the Supreme Court struck down the totally discretionary imposition of the death penalty. The penalty was not intrinsically unconstitutional, however, because four years later the Court upheld it when discretion was guided by objective standards.[194]

The Court's decision to allow states to retain the death penalty was grounded in approval cutting across all segments of society. In 1974, the year between *Furman* and the subsequent cases that upheld capital punishment, attitudes toward the death penalty for persons convicted of murder were quite uniform. About 62% of the lowest occupational prestige group favored it, as did slightly more than 60% of the highest group. Just over 60% of the lowest income group supported the death penalty, and about 63% of the highest group did also.

191. A. BICKEL, *supra* note 11, at 240–43.

192. *See supra* note 140.

193. 408 U.S. 238 (1972).

194. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976). *See* Black, *Due Process for Death:* Jurek v. Texas *and Companion Cases*, 26 CATH. U.L. REV. 1 (1976). In the 1981 term, the Court struck down the use of the death penalty for felony murder when the defendant was not the person who caused or sought to cause the killing. Enmund v. Florida, 458 U.S. 782 (1982).

Table 22 Death Penalty by Occupational Prestige, 1974

Prestige Score	Favor or oppose		
	Favor	Oppose	ROW TOTAL
9–19	149	89	238
	62.6%	37.4%	17%
20–39	348	178	526
	66.2%	33.8%	37.5%
40–59	341	141	482
	70.7%	29.3%	34.3%
60–82	95	63	158
	60.1%	39.9%	11.3%
COLUMN TOTAL	933	471	1404
	66.5%	33.5%	100%

$x^2 = 8.42412$ df=3 $p < .04$
Missing observations=80

Table 23 Death Penalty by Family Income, 1974

Income	Favor or oppose		
	Favor	Oppose	ROW TOTAL
$0–3,999	123	81	204
	60.3%	39.7%	15.8%
$4,000–5,999	78	43	121
	64.5%	35.5%	9.4%
$6,000–7,999	84	54	138
	60.9%	39.1%	10.7%
$8,000–14,999	281	138	419
	67.1%	32.9%	32.4%
$15,000–19,999	152	53	205
	74.1%	25.9%	15.8%
$20,000–24,999	74	23	97
	76.3%	23.7%	7.5%
$25,000+	69	41	110
	62.7%	37.3%	8.5%
COLUMN TOTAL	861	433	1294
	66.5%	33.5%	100%

$x^2 = 16.03906$ df=6 $p < .02$
Missing observations=190

Nevertheless, at least one revealing statistic remains and reinforces the criticism of the Court as bound by the values of its own class. Blacks did not support capital punishment, which should not be surpris-

ing since they have been among the principal victims of it.[195] In 1974, less than 40% of the black people surveyed said they were in favor of the death penalty while almost 70% of the whites said they were. The difference remained in the 1980 survey. Perhaps it should come as no surprise that Justice Marshall consistently has stood opposed to the death penalty but has been unable to convince more than a few other members of the Court to join him at any time.[196] As John Hart Ely said, what is fundamental to one class may not be so to another.[197] Other indices of status may not reveal a distinction, but the race dichotomy seems to support the view that the Supreme Court remains tied to a particular segment of society.

Table 24 Death Penalty by Race, 1974

Race	Favor or oppose		
	Favor	Oppose	ROW TOTAL
White	865	375	1240
	69.8%	30.2%	88.3%
Black	63	95	158
	39.9%	60.1%	11.3%
Other	5	1	6
	83.3%	16.7%	0.4%
COLUMN	933	471	1404
TOTAL	66.5%	33.5%	100%

$x^2 = 56.91360$ df=2 $p < .0001$
Missing observations=80

F. Busing

In contrast to capital punishment, the Supreme Court has endorsed the preference of blacks for busing of school children over the strong objection of whites. The Court's stand on busing has defied the elitism model, which would have predicted that the Court would have accepted the Reagan administration's argument against busing in the

195. In the period between 1930 and 1981, 53% of the victims of the death penalty were black, but no blacks were executed between 1977 and 1981. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1981, at 9 (1982).

196. For example, in Woodson v. North Carolina, 428 U.S. 280 (1976), the Court struck down a statute that made capital punishment mandatory, but only Justices Marshall and Brennan based their decision on the belief that the death penalty violates the eighth amendment. *Id.* at 305–06 (Brennan, J., concurring); *Id.* at 306 (Marshall, J., concurring). Marshall and Brennan stood alone again during the 1982 term in opposing capital punishment on eighth amendment grounds. *See, e.g.*, Ford v. Arkansas, 276 Ark. 98, 633 S.W.2d 3 (1982), *cert. denied*, 459 U.S. 1022 (1982) (Marshall, J., dissenting).

197. See J. ELY, *supra* note 1, at 59.

Nashville school case instead of denying certiorari.[198]

Having diverged from public opinion on this issue, the Court has refused to retreat. The Court defied widespread opposition of everyone but blacks in 1971 when it endorsed busing as a remedy for segregated schools in *Swann v. Charlotte-Mecklenburg Board of Education*,[199] and it did so again in 1977 by reiterating its support in *Dayton Board of Education v. Brinkman*.[200] In 1972, just after the Court's decision in *Swann*, 55.2% of blacks favored racial busing, while 86.5% of the whites opposed it. Opposition cut across all categories of occupational prestige, education, income, and subjective notions of class both in 1972 and in 1976, the year before *Brinkman*. Consequently, busing has been a major exception to the Court's favor for elitist views. In this instance, the Court tried to lead, but few followed who were not already in line.

Table 25 Racial Busing by Race, 1972

Race	Favor or oppose		
	Favor	Oppose	ROW TOTAL
White	174	1116	1290
	13.5%	86.5%	83.5%
Black	138	112	250
	55.2%	44.8%	16.2%
Other	1	3	4
	25%	75%	0.3%
COLUMN	313	1231	1544
TOTAL	20.3%	79.7%	100%

x^2=225.48738 df=2 p<.0001

Missing observations=69

198. Metropolitan County Bd. of Educ. v. Kelley, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 834 (1983). The Reagan administration had filed an amicus brief with the Court that called for the abandonment of court-ordered busing when its "educational, social, and economic social costs" are unacceptably high. *See Administration Joins Busing Appeal*, Philadelphia Inquirer, Nov. 16, 1982, § A, at 6, col. 2.

199. 402 U.S. 1 (1971).

200. 443 U.S. 526 (1979); *see also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

Table 26 Racial Busing by Occupational Prestige, 1972

Prestige Score	Favor or oppose		
	Favor	Oppose	ROW TOTAL
9–19	111 35.5%	202 64.5%	313 20.3%
20–39	106 18.6%	464 81.4%	570 36.9%
40–59	73 13.9%	452 86.1%	525 34%
60–82	23 16.9%	113 83.1%	136 8.8%
COLUMN TOTAL	313 20.3%	1231 79.7%	1544 100%

$x^2 = 59.80055$ df=3 $p < .0001$
Missing observations=69

Table 27 Racial Busing by Educational Degree, 1976

Degree	Favor or oppose		
	Favor	Oppose	ROW TOTAL
< High School	101 19.7%	411 80.3%	512 35.2%
High School	94 13.3%	612 86.7%	706 48.6%
Jr. College	1 4.2%	23 95.8%	24 1.7%
Bachelor	18 12%	132 88%	150 10.3%
Graduate	20 32.8%	41 67.2%	61 4.2%
COLUMN TOTAL	234 16.1%	1219 83.9%	1453 100%

$x^2 = 26.00586$ df=4 $p < .0001$
Missing observations=46

Table 28 Racial Busing by Subjective Class, 1976

Class	Favor or oppose		
	Favor	Oppose	ROW TOTAL
Lower	20	43	63
	31.7%	68.3%	4.3%
Working	120	550	670
	17.9%	82.1%	46.2%
Middle	93	604	697
	13.3%	86.7%	48%
Upper	2	19	21
	9.5%	90.5%	1.4%
COLUMN TOTAL	235	1216	1451
	16.2%	83.8%	100%

$x^2 = 17.54367$ df=3 p=.0005
Missing observations=48

G. *Obscenity*

In 1973, the Supreme Court retreated from a laissez-faire approach to obscenity[201] and adopted a tougher community standards approach in *Miller v. California*.[202] Other decisions shielding minors reflected a true consensus of society.[203] Public opinion on adult regulation, however, is enigmatic.

In 1973, the year of the *Miller* decision, the General Social Survey included the question of whether "pornography" should be subject to laws restricting distribution to people of any age, to people under age 18, or not forbidden at all. On the educational scale, those with graduate degrees were the most tolerant of open distribution, yet only about 18% of them held that position. Among income groups, the greatest support for full legality came from those in the next to the lowest category, and that only amounted to approximately 14%. The data from 1980's survey are similar.

At first glance, the surveys seem to indicate a broad consensus for regulation; however, closer inspection casts doubt on that position. In 1973, for example, 43% of the respondents favored making obscenity

201. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966).

202. 413 U.S. 15 (1973).

203. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968). In New York v. Ferber, 458 U.S. 747 (1982), the Court upheld a criminal statue prohibiting the promotion of materials depicting sexual performances by children. *See generally* Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809 (1978). For a discussion of a statute similar to the one at issue in *Ferber*, see Comment, *Changing Standards of Obscenity to Teach*, 34 SW. L.J. 1221–24 (1981).

illegal to all; 48% said they would keep it away from teenagers, and only 9% thought it ought to be available to all. The figures look as though 91% favor regulation, but can be read another way.

The respondents were asked to choose the statement that most accurately described their point of view. Thus, it can reasonably be inferred that the largest group—the 48% that wanted to keep obscenity away from children—did not want to keep it away from adults. If they did, they would have chosen the first alternative—laws prohibiting its distribution to all. Seen in this light, the 48% combined with the 9% who wanted no laws at all to form a 57% majority against rigid obscenity regulation.

If such is the case, then the *Miller* decision contradicted public opinion across the board. For example, on the education scale, more than 52% of those who did not finish high school could be said to oppose regulation on adults, combining the two categories. By this means of calculation, 71% of the people with graduate degrees opposed adult regulation. A majority of the respondents in each income group also opposed adult regulation.

Other questions both supported and undercut this interpretation. For example, 66% agreed that looking at or reading "pornography" provided information about sex. Sixty-one percent said that such sexual materials provided an outlet for bottled-up impulses. On the other hand, 56% thought sexual materials led to a breakdown of morals, and 54% thought they led people to commit rape. The 1980 survey revealed similar contradictions. As a result, the one thing that can be said about the Supreme Court's obscenity opinions is that insofar as they prevent children from seeing sexual materials, they had the support of almost all of society.

Table 29 "Pornography" Laws by Educational Degree, 1973

Degree	Preferred law			
	Illegal to all	Illegal < 18	Legal	ROW TOTAL
< High School	254 47.7%	236 44.4%	42 7.9%	532 36.6%
High School	298 41.9%	344 48.4%	69 9.7%	711 48.9%
Jr. College	5 25%	12 60%	3 15%	20 1.4%
Bachelor	46 35.4%	73 56.2%	11 8.5%	130 8.9%
Graduate	18 29%	33 53.2%	11 17.7%	62 4.3%
COLUMN TOTAL	621 42.7%	698 48%	136 9.3%	1455 100%

$x^2 = 20.09676$ df=8 p=.01
Missing observations=49

Table 30 "Pornography" Laws by Family Income, 1973

Income	Preferred law			
	Illegal to all	Illegal < 18	Legal	ROW TOTAL
$0–3,999	93 42.1%	101 45.7%	27 12.2%	221 16.1%
$4,000–5,999	71 48.3%	56 38.1%	20 13.6%	147 10.7%
$6,000–7,999	58 40.8%	66 46.5%	18 12.7%	142 10.4%
$8,000–14,999	222 45%	238 48.3%	33 6.7%	493 36%
$15,000–19,999	67 38.3%	91 52%	17 9.7%	175 12.8%
$20,000–24,999	34 33%	60 58.3%	9 8.7%	103 7.5%
$25,000+	31 34.8%	50 56.2%	8 9%	89 6.5%
COLUMN TOTAL	576 42%	662 48.3%	132 9.6%	1370 100%

$x^2 = 23.32588$ df=12 p<.03
Missing observations=134

Table 31 "Pornography" Laws by Educational Degree, 1980

Degree	Preferred law			
	Illegal to all	Illegal < 18	Legal	ROW TOTAL
< High School	235	172	20	427
	55%	40.3%	4.7%	29.8%
High School	269	425	42	736
	36.5%	57.7%	5.7%	51.4%
Jr. College	17	25	2	44
	38.6%	56.8%	4.5%	3.1%
Bachelor	43	92	20	155
	27.7%	59.4%	12.9%	10.8%
Graduate	24	40	6	70
	34.3%	57.1%	8.6%	4.9%
COLUMN TOTAL	588	754	90	1432
	41.1%	52.7%	6.3%	100%

x^2=62.99989 df=8 p<.0001
Missing observations=36

V. CONCLUSION

Justices of the Supreme Court are products of their environment just as all men and women are. As a result, the way they think about problems, the concepts they bring to decision making, and the conclusions they reach are all shaped by their experiences. Expecting anything other than that is to expect human beings to shed their humanity when they don their judicial robes. In fact, the robes merely cover the man or woman justice. As a result, no theory of judicial review can prevent a member of the Court from acting upon his or her own predilections. No matter which theory a justice adopts, substantive beliefs are likely to be expressed in the end.

It is true that the Court, by and large, has consisted of people with similar backgrounds, and recent empirical evidence seems to indicate that the justices have transformed at least some of the preferences of society's elites into law. Nonetheless, they have broken the bounds of their backgrounds from time to time and rendered unexpected decisions—most notably on busing.

Thus, the hypothesis of class-bound determinism on the Supreme Court is not one of strict determinism. On a particular issue of constitutionality, justices may be persuaded to vote against their subjective views of the preferable policy. As a general matter, though, one should expect members of the Court to act in conformity with the beliefs they have formed over a lifetime. Such a course is a matter of direction, not predestination. The resulting difference is neither uniformly liberal nor conservative. In some cases, the high-status mentality secures rights for

those of lower status that the lower-status groups do not support themselves. In other cases, the high-status justices are blind to rights others consider fundamental.

Having said all this, I have not said whether I believe judicial self-assertedness is good or bad, whether it is justified or not. What I do think is that it is inevitable, and that being the case the question of justification becomes a non sequitur. A fully reasoned defense of searching judicial review is beyond the scope of this article, although I note in closing that I cast my vote for Charles Black's platform. Full disclosure having been made, I ask only that members of the Supreme Court do the same and do their best.

APPENDIX

ATTITUDE QUESTIONS INCLUDED IN THIS ANALYSIS

Social Class "If you were to use one of the four names for your social class, which would you say you belong in: the lower class, the working class, the middle class, or the upper class?"

Confidence in Supreme Court "I am going to name some institutions in this country. As far as the *people running* these institutions are concerned, would you say that you have a great deal of confidence, only some confidence, or hardly any confidence at all in them? . . . U.S. Supreme Court."

Alienation "Now I want to read you some things some people have told us they have felt from time to time. Do you tend to feel or not . . . the people running the country don't really care what happens to you. . . . the people in Washington, D.C. are out of touch with the rest of the country."

Atheist's Book "There are always some people whose ideas are considered bad or dangerous by other people. For instance, somebody who is against all churches and religion. If some people in your community suggested that a book he wrote against churches and religion should be taken out of your public library, would you favor removing the book, or not?"

Atheist Teacher "Should such a person be allowed to teach in a college or university, or not?"

Communist's Book "Now, I should like to ask you some questions about a man who admits he is a Communist. Suppose he wrote a book which is in your public library. Somebody in your community suggests that the book should be removed from the library. Would you favor removing it, or not?"

Communist Teacher "Suppose he is teaching in a college. Should he be fired, or not?"

Abortion "Please tell me whether or not *you* think it should be possible for a pregnant woman to obtain a *legal* abortion if . . . there is a strong chance of serious defect in the baby? . . . she is married and does not want any more children? . . . the woman's own health is seriously endangered by the pregnancy? . . . the family has a very low income and cannot afford any more children? . . . she became pregnant as a result of rape? . . . she is not married and does not want to marry the man?"

Capital Punishment (1972–1973) "Are you in favor of the death penalty for persons convicted of murder?"

(1974–1982) "Do you favor or oppose the death penalty for persons convicted of murder?"

Busing "In general, do you favor or oppose the busing of (Negro/

Black) and white school children from one district to another?"

"Pornography" Laws "Which of these statements comes closest to your feelings about pornography laws?

There should be laws against the distribution of pornography whatever the age.

There should be laws against the distribution of pornography to persons under 18.

There should be no laws forbidding the distribution of pornography."