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Banquet of University
of Chicago Alumni Assoc.
International Club
Washington, D.C.
May 7, 1976
7:00 p.m.

What SG does
Gand - Grinnell
Saluton
What AG does
Richard Wagner - Der Meistersinger
Shyter

A WHIG VIEW OF THE REPUBLIC

The title of this talk exists only because John Long insisted that the program had to show one. He didn't know what it meant and he said none of you would either but that University of Chicago audiences were used to titles whose meanings are murky or perhaps nonexistent. I would like to reassure you that I know what the title means and what I am going to talk about. I would like to, but I can't. To take a line from Browning, when I wrote that title, only God and I knew what it meant. Now only God knows. Twenty minutes from now, He may not know.

It is a particular pleasure to be with an audience of University of Chicago alumni. I don't know why, but there it is. There is something distinctive about graduates of the University of Chicago, though it seems to me also indefinable. Not long ago a reporter from Time came by. He wanted to do an article on the Chicago influence that was waxing in Washington. I told him he didn't have a story, that there is no characteristic common to Chicago graduates, and when the piece appeared in the magazine I was convinced he didn't have a story. And yet there seems to be one if ~~somebody~~ could write it. Chicago graduates have something in common, some elusive but significant trait, just as Harvard graduates and Yale graduates have theirs. Perhaps it is no more than this.

In the time when most of us went to the University, and presumably this is still true -- at least, I met John Wilson, the new President for the first time the other night, and he overheard me saying this

A Whig View of the Republic
Univ. of Chicago Alumni Ass'n
Washington, D.C. - May 7, 1976

Drawn by
Hutchinson
AT building
Greatest collection
of juveniles
since the
childhood
crusade

and insisted it was still true -- in that time the University of Chicago had the most insistently intellectual atmosphere of any university or community I have ever known. There are powerful minds at other universities, perhaps some other faculties have as impressive a collection of star-quality intellects, but nowhere else have I seen and felt the insistent pressure of a community devotion to intellectuality. Both the college and the law school were like that. In two years of dormitory life I do not recall a single bull session about girls or sports, though there was considerable interest in the one category and at least an awareness that the other existed. Instead, we were continually tugging on some subject like free will versus predetermination, and the resident Marxist -- the housing office appeared to have assigned a Marxist to every corridor, as a facility, like a bathroom -- was continually trying to show that Lenin had solved the problem. The proof on that particular issue, I recall, was a line from Lenin that resolved the apparent dilemma by pointing out that freedom consisted in the recognition of necessity.

And that I think is what binds us -- not Lenin ^{and} ~~or~~ the recognition of ^{historical} necessity, ^(perhaps not Robert McCannick used to think) -- and to some degree sets us apart from graduates of other schools who had the experience in lesser degree: a shared memory of an intellectual awakening of unmatched intensity and of joy in the experience.

The other thing that binds us is that fact that Edward Levi keeps reappearing in our lives. That means ^{a great deal} ~~something~~ to all Chicago graduates but it is a particularly poignant thought for its law school alumni. In those days I sometimes thought that Edward Levi was not so much a person as an experience -- a complex, often

unsettling, and occasionally searing experience. I remember the night when an Assistant Attorney General who was privy to half the secrets on the Hill came into my office and said, "You must know this guy who is going to be the new Attorney General; somebody named Ed Levi." Yes, I knew the guy. My mind went back at once to the first class on the first day in law school. Elements of the Law. Levi, ^{in whom I did not then see an incipient Attorney General,} looked at us, ranged before him in ranks of innocence, and said: "I won't keep you long today. I won't keep you long because I don't have anything to say to you. I don't have anything to say to you because you are too ignorant to talk to." After that he got personal.

You can imagine the heightened expectations that I carried into the first staff meeting with the new Attorney General. Fortunately, he seemed to think the intervening years had at least made conversation possible.

He has also brought stability to a turbulent Department. In a period of less than a year and a half I worked with four Attorneys General and four Deputy Attorneys General, and sometimes it hardly seemed worth making the effort to scrape up an acquaintance. The new Attorney General would arrive in a cab and ask it to wait. The situation reminded me of the old war movie, "Dawn Patrol." When the White House announced it was sending over a fresh Attorney General I wanted to say "You can't send a kid up in this thing."

But Ed Levi has changed all that. There is even a rumor he is sitting for an oil portrait instead of a Polaroid snap.

And now that things have settled down at the Department of Justice and the end of my own tenure is in sight, and I begin to

contemplate leaving to enjoy once more what some genius has called the leisure of the theory class, I have naturally asked myself

whether my experience here provokes any thoughts about the country

Now, at this point, if the answer is no, we can all get home early. But it was assumed there would be some thoughts.
and its direction. ^{movement in the society.} Oddly enough, the office of Solicitor General

is not too bad a vantage point for assessing ~~the direction of the~~

~~Republic.~~ The flow of issues in litigation, the types of laws that are being considered and enacted, the nature of the disputes between the President and the Congress, all of these go past and all of them suggest something about what we are becoming.

We will be discussing trends that seem ^{to me} ominous, but they are only trends, and Adam Smith reminds us that there is a lot of ruin in a great nation. For that reason, I stress at the outset that this is not a forecast, delivered with glum relish, of the demise of the Republic. It is an attempt, necessarily in summary form, to name a danger than can be averted.

My dominant impression of the peril of our time, and the time that stretches ten or twenty or thirty years ahead of us, is that expressed by Walter Bagehot:

The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created.

We seem to be courting that danger. The dominant strains of opinion at the moment appear to be egalitarian and legalistic, joined, rather ominously, to a simplistic view of the society and its possibilities for improvement.

These are not qualities that bode well for a society that thrives because of an enormously complicated interaction of forces

and institutions. Powerful ideas tend to be simple ideas. Unfortunately, but inevitably, our constitutional system, the institutions of capitalism, the desirability of social and economic hierarchy, and the limits of the law's effectiveness in achieving a better society, these require sophistication and a complex understanding.

It is not at all paradoxical that support for institutions that require, for their full appreciation, a sophisticated understanding should be declining even as education is prolonged and spread more widely than ever before in our society. The complexity of the institutions and relationships that constitute our society was never well understood. Their strength and freedom instead rested in no small measure on an ignorant, unreasoned, awed acceptance. The extension of the suffrage and the spread of education, particularly university education, has served drastically to reduce that awe and acceptance without increasing, in anything like the same proportions, the reality of understanding. We are left unhappily in between, without either the stability of respect rooted in ignorance or the support of respect shored up by sophistication.

I have a number of ideas on this subject
It is this condition -- the somewhat simple-minded cynicism of what we think of as the intellectual classes -- that permits the major forces of our time to produce what Robert Nisbet calls the twilight of authority. I think no one can successfully dispute the existence of a decline in authority. It is customary, almost obligatory in Washington, to lay that decline to Watergate and Vietnam, but it clearly began before either of those events

had any substantial impact upon public opinion. The argument could in fact be made that the decline of authority had more to do with causing Watergate and Vietnam than ~~they had to do with causing it~~ ^{to the very extent.}

Those two agonies, in any event, would account only for the decline in the power of the Presidency, hardly for the general disrepute of government, including the Congress which did so much to end each of them. But one has only to look over the American scene, which in this resembles the western world generally, to perceive that institutional and societal authority has declined in all of its aspects, and that this decline can have nothing to do with Vietnam and Watergate. The total importance placed on those events may be nothing more than a symptom of Washington's absorption in its own affairs and its consequent belief that its scandals and disasters and triumphs are the cause of everything else in the country.

But look at all of the other major institutions of the society. Have the universities gained or lost in authority in the last decade? Have the major corporations gained or lost in authority? Have political parties gained or lost? The answer is clear for all of them. They have lost authority, they have lost prestige and power, and they have done so precipitously. Not long ago -- when most of us were students in fact -- the university turbulence and destruction of both property and standards of performance during the late 1960's would have been unthinkable. And do not imagine that the standards have been completely restored. A very short time ago it would have been politically unimaginable that a bill to break up the major oil companies would be more than a ^{zealot's} ~~fanatic's~~

dream; now it has a chance of becoming law. Within recent memory political parties commanded strong allegiance and their leaders could make or break candidates. However recent that was, it is certainly now only a memory.

Social authority, too, which consists of the community's confidence in its values and a willingness to enforce them, is in decline. It takes self-confidence to punish for crime, but punishment rates in the United States and all of the western world decline at the same time as crime rates soar. It takes self-assurance to enforce community standards of behavior, yet, though most of us do not like it, pornography in its ugliest forms has become what a national magazine calls a plague.

It is though the American institutional landscape has been flattened. And that is precisely what has happened and is happening. Many people welcome the flattening. They think it means greater freedom for the individual, greater power for him or her through participation. They are quite wrong. For reasons I will address in a moment, the decline of power centers is an ominous development for the safety, comfort, and freedom of the individual.

The decline of authority is in large measure caused by an upsurge within the last decade or so of egalitarianism, particularly in intellectual circles, or circles that assume intellectual mannerisms and attitudes, and that upsurge reinforces a native populism that distrusts all centers of power, governmental and private. My point is not that egalitarianism as an ideal is sterile, nor even that equality of condition can never be achieved --

though I would be happy to argue some other time that both of those propositions are true. In fact, it does not matter to my argument whether the phenomenon described is thought of ~~as~~ pejoratively as egalitarianism or favorably as compassion ^{and} social justice. I will use the word I prefer but you may, if you wish, substitute one of the others for it.

My thesis is that we misunderstand our institutions of government if we believe they can accommodate an increasingly egalitarian morality. The sense that something is going wrong with government, that it has become overly intrusive and meddlesome, accounts, I think for much of the anti-Washington sentiment that has become such a popular theme in the primaries. All of the strong candidates left in the field are, to some degree, capitalizing on an antipathy to Washington. But the interesting thing is that the public does not connect the things it dislikes about Washington with the things it wants Washington to do.

According to the Wall Street Journal a group of voters in the Pennsylvania primary told its reporter that taxes and government spending are outrageously high but the government has an obligation to pay more to old people, provide improved health care to everybody, and guarantee a job to anyone who wants to work. Moreover, government bureaucrats are interfering in too many things but Washington should begin to hold down utility bills and medical costs, break up the oil companies, and limit imports.

The prospect, then, is for increasing dislike of government coupled with insistence that there be more government. Some trends long evident in this town are, therefore, likely to get worse no

matter which party is power. The prospect is that government will become less democratic, that it will become increasingly less effective, and that it will become increasingly disliked. That is not a description of a stable society and we do well to be concerned about the outcome of these processes.

Under the pressures of egalitarianism -- compassion, fair play, call it what you will -- we, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state, which means that the tasks government undertakes grow steadily more numerous and always more complex. That raises a severe problem of institutional overload. I won't pause to establish so obvious a truth but some notion of its magnitude may be grasped from the fact, ^{which is} primarily due to the proliferation of programs and regulations, that government litigation in the Supreme Court during a ten-year period increased two and one-half times.

There are economies of scale in governmental institutions, as in all others. Elected representatives cannot begin to make all of even the major decisions that pervasive government continually requires. Since we can hardly have a dozen Congresses and Presidents simultaneously at work, the only alternative is the increasing bureaucratization of those institutions. It is a common observation that the ~~the~~ **staffs** of elected officials often possess an ideological slant of their own and have become forces to be reckoned with even by the officials. Also inevitable is greater delegation of both executive and legislative powers to semi-independent and increasingly independent bureaucracies.

Congress can alter the decisions made by bureaucracies but so much law is made by them that no legislature can focus on more than a small fraction of the choices made. Sometimes a subcommittee can but a subcommittee or its staff is not the Congress. Moreover, the bureaucracies develop small but intense constituencies who often have more political influence than a vaguely and generally aggrieved electorate.

The upshot is that democratic processes become increasingly irrelevant. They are simply less and less the processes by which we are actually governed.

It is also apparent that government will become increasingly incompetent and hence less respected. The first reason is that overloaded institutions do not perform well. Though it is not widely recognized, we are now facing just such a crisis in the federal courts. As caseloads rise, for example, courts of appeals are cutting back time for oral argument, eliminating it altogether in many cases, handing down decisions without written opinions, cutting back on conferences. They are being converted from deliberative institutions to paper-processing institutions by the workload we thoughtlessly thrust upon them, and there are those who think it observable that their performance has begun to deteriorate.

That is unfortunate for a variety of reasons. One is that with the decline in authority of other institutions that create and sustain social norms and ethical values, law is asked to take over more of that indispensable role. But as law proliferates and is made up faster and faster, and is often not justified by opinions, it tends to become intellectually incoherent and inconsistent within itself.

It loses its integrity. Law in that condition cannot command respect and cannot succeed as a generator or a bulwark of moral consensus.

What is true of overloaded, increasingly bureaucratized courts is true of Congress and the Presidency. The level of their performance must necessarily decline, they must necessarily take positions that are soon retracted or reversed, because both institutions necessarily operate in large measure through staffs that contain within themselves competing interests and varying judgments.

Matters become worse when one turns to the various Executive Branch departments and agencies and the independent agencies. These are organized as fragmented bureaucracies with specialized functions and single goals. None of them is authorized or equipped to consider all of the relevant factors in a situation. Thus, Murray Weidenbaum points out that federal food standards press for easy-to-clean surfaces in meat-packing plants, which usually means tile or stainless steel, and that raises problems for occupational safety and health because of the decibel level.

A businessman I know says he is having trouble getting a plant in operation because one federal agency requires round toilet seats and another demands split toilet seats. Tales of this sort are endless. It is no wonder that the public dislikes the officious intermeddling that it also demands. The public policies we support in principle are deformed, occasionally reversed, in the process of their application. The prospects, then, are for the continued *failure* and growing unpopularity of government.

*Reality proves unexpectedly resistant to policy - Econ - hold prices down
more so in social processes - begins demand for greater pay - which will fail*

That unpopularity, combined with the levelling impulses of egalitarianism and populism, leads to moves to reduce the power of the Presidency, to cut the authority of committee chairmen in Congress, to open both executive and legislative committee decisional processes to scrutiny. Indeed, our current distrust of authority is so great that we seek to hedge the powers not only of government and not only of large corporations but of private institutions such as universities. Authority is deeply resented and feared in any form, and not only legislatures and agencies but courts are willing as never before to scrutinize every exercise of discretion. One incessantly sued college president reports that his mother now refers to him as "my son, the defendant."

where private institutions are made to perform poorly by public policy
We are creating conditions, in sum, ^{where private institutions are made to perform poorly by public policy} where public policy ^{itself} cannot be rationally made and seems bound to fail and to be seen to fail.

We are all too likely to damage our institutions permanently by assigning them tasks they cannot possibly fulfill under conditions that guarantee ineffectiveness, demanding of them a Utopia they are powerless to create, and then despising them for their failure.

Under those conditions the institutions will lose their morale, their virtue, and their integrity. This may be what Martin Mayer meant when he wrote: "In our time, in public and private organizations both, it is not power but incompetence that tends to corrupt; and absolute incompetence corrupts absolutely." I leave you to choose your own favorite example.

I suggested earlier that a situation of this sort is unlikely to prove stable, but so long as we are unaware that our demands create our unhappiness, any change is unlikely to be for the

better. A public that knows its frustration but is unable to analyze its cause is in a peculiar political mood. In The Lonely Crowd David Riesman observed that as audiences lose confidence in their ability to judge the technical merits of public performers, they are likely to begin judging qualities such as sincerity which, often quite erroneously, they imagine themselves able to detect. That may be happening in our politics. Again, I leave you to chose your own example.

if we continue to demand more of work-
while, for that very reason,
If it is happening, if the public does feel frustrated, [^] the authority and effectiveness of public and private institutions continues to decline, then the only effective mode of competing for leadership is likely to be populist demagoguery, perhaps joined to mass movements. I need not dwell on the bleakness of that outcome.

Whether or not this has been a Whig view of the Republic I leave you to judge. But I shall close with the reminder that no political trend is inexorable. Many of the ends we now seek through direct bureaucratic manipulation of people and social processes can be achieved through automatic and market mechanisms if we understand our institutions better. But the truth remains, and must not be blinded ^K, that much that government seeks to do cannot be done without courting the dangers I have described. We shall have to choose. Adam Smith did say that there was a lot of ruin in a great nation but he did not say the supply was inexhaustible.

Our institutions were designed upon an assumption of limited government. They cannot carry the burdens we are placing upon them and remain vital.



National Council of Jewish Women

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news

For Release: IMMEDIATE RELEASE

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Bork

NCJW EXPRESSES OPPOSITION TO BORK'S APPOINTMENT TO SUPREME COURT

New York, NY-- The National Council of Jewish Women (NCJW) today expressed its opposition to the appointment of Judge Robert H. Bork to the United States Supreme Court. NCJW National President Lenore Feldman said, "The National Council of Jewish Women is deeply concerned by the nomination of Judge Bork because of his public positions on critical issues affecting minorities, women and the constitutional rights of all Americans. We believe that the Supreme Court requires a balanced rather than an extremist view of our society; therefore, Judge Bork is a poor candidate for a seat on the highest court of the land."

"NCJW, which has a long history of advocacy for affirmative action and civil rights, is deeply troubled that Judge Bork has not been supportive of programs and opportunities for minorities. In addition, we find his strong stand against reproductive choice and other women's rights untenable. We believe that women and minorities in the U.S. are not prepared to relinquish the progress they have made because of Judge Bork's opinions."

"Finally, Judge Bork's position on public funding of religious schools would erode the Constitution's intent on separation of church and state--ironically, in a year when we are celebrating the bicentennial of that historic document."

Established in 1893, the National Council of Jewish Women is the oldest Jewish women's volunteer organization in America. NCJW's more than 100,000 members in 200 Sections nationwide are active in the organization's priority areas of women's issues, Jewish life, aging, children and youth, Israel and Constitutional rights.

#

#

#

I was
 in my
 office
 re
 pure
 under
 at
 1982

Dear Radlich - remarks about lawless!
 abroad - integrity of the federal courts - long w/ the
 Constitution - based on our history - under eras -
 In the last time I said - newspapers. "Federal judges
 criticizing Supreme Court" - Seemed astonished that I
 had not changed the minute I became a judge

Preordained result - me in mind of justice
 Besides would never criticize justice - Not so long - cert power
 I am going to argue with professors - not with judges - don't want to argue
 with judges. Remember that.

Actually, want to talk about a growing problem in the
 culture of the elite groups that make constitutional law -
 federal judges, the law schools + partic' the professors, the
 press, and segments of practicing bar.

lived in that
 culture -
 initial
 no sense of
 in law -
 federal judge
 at application
 counter
 initial
 intellectual
 - later I
 professor

This is an elite culture - most segments of our
 population are excluded from it and are not represented in it.
 Yet groups that compose it make con law for the entire
 nation

NYU Law
 Review Banquet

Center of controversy right now - a peer that are
 linked
 Within - debate about I and non-I -
 you are familiar with that. Non-I used to be
 called ~~intertextualism~~ but difficulty of pronunciation

Non-I
 Add to Court is moral philosophy, conventional
 morality FN 4 of CP - vast academic industry -
 Bickel, Ely, Wellington, Perry, Dworkin

I - Only that which is not the Court

Without
 Perceiving that courts are not interj but
 imposing new values - attacks - focus in the
 move to use Exc Cl of Art III to remove jdm of Sup CT

Perhaps the outcome of this intellectual debate will

I made no
claim that the
are gone beyond
to Court.
But the
suits
funders do
that is what
the scholars
treatise
pouring from
law schools
attempting
to justify.

Con Law
Non-I review continually creates new ~~ones~~
of individual freedom. from govt

Conventional way to put this is that individual freedom
appears and governmental coercion contracts. That is
a defective view

2nd way - goods of the nation are redistributed -
zero sum game - what a court gives to one, it takes

3rd way - area of judicial governance steadily
expands and area of democratic choice steadily shrinks

Illustration - 5th Cir (written notes stat)

All
Non-I review is defective in a variety of ways

First place - Does not enlarge freedom - merely
redistributes it from a larger number of people to a
smaller - Subtracts from freedom guaranteed
by the Court

Point may benefit from explanation
All these young clerks objected to it. After discussion, 2
agreed that this is seeking gainful employment.

The Court as framed granted powers to the federal
govt and left powers w/ the States. If no specific
prohibition stood in the way, the Court then guaranteed
a right in persons to govern themselves ^{their communities} democratically
- not judicial review which was regarded as of secondary importance
Representative
was the great
concern of the
Framers

When a court creates a new prohibition it
destroys a constitutionally guaranteed freedom

This is precisely what the Non-I promised
they would not do - but they are - they would take away
constitutional guarantees that are actually in the
Constitution - the court guarantee of popular sovereignty.

K. Chesterton might have been addressing this very point when he wrote

"What is the good of telling a community it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people."

It is that liberty which the non-interpretivist theorists would diminish.

I want to draw your attention to two other features of Non-I judicial review — the nationalization of a single set of moral values and what I call the gentrification of the Constitution.

Roe v. Wade is the classic case of each

The dramatic expansion of const rights under EP Clause, substantive version of DP Cl, 1st Amendment — nationalize moral and social values although there is no national consensus.

the judiciary which struggles to preserve federalism
elsewhere in, by Non-I interpretation, itself damaging
federalism in this area — nationalizing where
uniformity is not required and is often affirmatively
undesirable.

Some points
Bill
Buckley

Gentrification — Class attitudes —

judges, ^{major} law school faculties, media —

Very skewed on any national basis — not like
the spectrum of American political, social, and
moral opinion. — Public Opinion Mag study of media

Law school faculties and the media are the prime
audience for and critics of the courts — Bound
→ to have some effect. Reinforcing Professor's opinion.

And that is imposition, ^{in society} as Can Law of
intellectual upper middle class moral values. Ask
yourself if that is not what is happening and if does
not explain the places from which the political
responses to the courts is coming.

I would like to close with a word about
that political response and how the legal
intellectual ought to view it.

Move to take away Sup Ct job under
Exc Cl of Art III

~~Why I think it was~~ Not designed as
a democratic check on judicial usurpation,

^{they were designed to be checked by the legislature but they are not}
Power goes back not to legislature but to judges -
state judges

Courts are used in most important cases - Explain -
Franklin would not design a check that cannot be used.

There is no institutional mechanism for
checking the judiciary should it overstep its constitutional
bounds.

But the form of argument being used to defend
the courts is worrisome - worrisome because it is
not candid

Prof. Paul Bator —

Monday

Tuesday

The Non-I professors and the leaders of
the bar ought to display more candor than that.

a problem
very serious for
a nation that values
popular
sovereignty
where the Court
does not speak

I said where I began. I think there is a
serious problem about the thinking and the rhetoric
of the elite groups that, in effect, have the care and
development of the Court in their keeping.

That problem has its root in the failure to stick
to the interpretation of the actual Court and it will
not go away until courts, press, and scholars
return to that theory and that discipline.

Of these groups, the most important is the law
schools, for there the intellectual battle will be
determined and upon the outcome rests the future
of the Constitution and the courts.

July 10, 1987

Judge Bork and the Democrats

SHOULD JUDGE Robert Bork be elevated to the Supreme Court? To answer the question intelligently you need to know a lot of things. Aside from the basic questions of what standards the Senate ought to apply in judging nominees and how Judge Bork's constitutional philosophy will play out on the court, there is a mountain of published work and court opinions to be read. It also usually helps to pose questions to the nominee in a public hearing and take account of his responses. Apparently this is too much to ask of the chairman of the committee that will consider the nomination. While claiming that Judge Bork will have a full and fair hearing, Sen. Joseph Biden this week has pledged to civil rights groups that he will lead the opposition to confirmation. As the Queen of Hearts said to Alice, "Sentence first—verdict afterward."

Sen. Biden's vehement opposition may surprise those who recall his statement of last November in a Philadelphia Inquirer interview: "Say the administration sends up Bork and, after our investigation, he looks a lot like Scalia. I'd have to vote for him, and if the [special-interest] groups tear me apart, that's the medicine I'll have to take."

That may have been a rash statement, but to swing reflexively to the other side of the question at the first hint of pressure, claiming the leadership of the opposition, doesn't do a whole lot for the senator's claim to be fit for higher office. Sen. Biden's snap position doesn't do much either to justify the committee's excessive delay of the start of hearings until Sept. 15. If minds are already made up, why wait?

A whole string of contenders for the Democratic presidential nomination have reacted in the same extravagant way. Maybe Judge Bork should not be confirmed. But nothing in their overstated positions would persuade you of that. These Democrats have managed to convey the impression in their initial reaction *not* that Judge Bork is unqualified to be on the Supreme Court, but rather that they are out to get him whether he is or not. Judge Bork deserves a fair and thorough hearing. How can he possibly get one from Sen. Biden, who has already cast himself in the role of a prosecutor instead of a juror in the Judiciary Committee? If there is a strong, serious case to be argued against Judge Bork, why do so many Democrats seem unwilling to make it and afraid to listen to the other side?

Edwin M. Yoder Jr.

The Real Robert Bork

Leading the charge of the lightweight brigade against the Bork nomination, Sen. Edward Kennedy conjures up nightmarish visions of an America "in which women would be forced into back-alley abortions," blacks "sit at segregated lunch counters" and "rogue police . . . break down citizens' doors in midnight raids." This twaddle is what Aulu Stevenson used to call white-collar McCarthyism.

Robert Bork is an upright and scholarly judge of uncommonly serious and coherent views about the appropriate constitutional role of the judiciary. He has laid out those views for all to read and consider in many elegant and witty essays and lectures. And those writings reveal that Bork is not a right-wing bogeyman but a temperate and intelligent Jeffersonian.

If Kennedy and others of his petulant

sion cared enough to look closely at the views of their party's patron saint, they would be logically constrained to vote for Bork or explain why Jeffersonian principles are no longer acceptable—or, more probably, fashionable among conventional liberals.

What does it mean, in 1987, to be a judicial Jeffersonian? It means that with certain qualifications, usually ignored by demagoguing critics, you believe that in a democracy people are best governed by the officials they elect, free of overweening judicial supervision. If, for instance, a majority in a state legislature wants to ban the use of contraceptives or abortion, and if no clear constitutional impediment to that policy is discoverable, then they are entitled to exercise a degree of coercion that we enlightened few, including Bork, might deplore.

Bork believes, and has forthrightly

argued, that many constitutional "rights" discerned by judges—especially the right of privacy used to overturn recent laws restricting contraception and abortion—are without constitutional warrant, and therefore no more than judge-imposed "wish lists."

Bork's problem, in other words, is that like Jefferson he finds judiciary—recently the favored mode of enlightened change in our society—hard to square with any theory of democratic government, even one with a substratum of natural law.

Bork's view, though unusually austere, is neither novel nor exotic. Many great judges—Holmes, Frankfurter, Black and the second Harlan, to name four—have embraced it in various forms. What is not to be denied is that so restrictive a view of the judicial function can have real political conse-

quences. Those consequences are a legitimate source of inquiry in any confirmation process.

You could say to Judge Bork, for instance: "This touching faith in legislative government is all very well, but legislators often do dumb and despotic things and I prefer to take my chances with judicial supremacy." Bork's large deference to a judicially underregulated democracy might, indeed, be a reputable basis for opposing his confirmation. Any court he influences is going to jerk constantly at the leashes of overambitious or adventurous judges.

In fairness, it must be added that Bork's ultra-majoritarianism is not unqualified. He would not, for instance, resegregate America, because he believes the 14th Amendment "secures against government action some large measure of racial equality." And Kenned-

dy's charge that in "Bork's America" rogue police would be unleashed to come crashing through your door is pure moonshine, and especially inappropriate coming from a senator who voted for a federal "preventive detention" provision.

If I were president, Judge Bork—when I like and admire—would probably not be on my short list. If he is confirmed, I fully expect rulings of him that I will enjoy roasting.

The favoring deference is—to borrow a Churchillian phrase—that Bork has "the root of the matter in him." He understands that constitutional government is mainly about principled limits on the exercise of power. He has the will and intellect to seek and enforce those limits—to referee the game of democracy—no matter whose wish list must be temporarily sidetracked.

THE HUMAN LIFE BILL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 158

A BILL TO PROVIDE THAT HUMAN LIFE SHALL BE DEEMED TO
EXIST FROM CONCEPTION

APRIL 23, 24; MAY 20, 21; JUNE 1, 10, 12, AND 18

Serial No. J-97-16

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B'nai B'rith Women

1640 Rhode Island Avenue, NW/Washington, DC 20036

news

FOR IMMEDIATE RELEASE

X Bork

Contact: Betsy Bilanow
(202) 857-4963

CORRECTION

B'nai B'rith Women President Irma Gertler was misquoted in a press release we issued on July 2 opposing the appointment of Judge Robert H. Bork to the Supreme Court. Her correct statement in its entirety was:

"The appointment of Judge Bork would seriously jeopardize important gains made by women in recent years. He has spoken out publicly against abortion rights and laws against sexual harassment of women.

"His position on public funding of religious schools threatens the separation of church and state, a matter of deep concern to our 120,000 members throughout the United States.

"Because of certain opinions Judge Bork has expressed in the past, we do not think that he would be entering the court with an open mind on affirmative action and other civil rights matters."

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NOMINATIONS OF JOSEPH T. SNEED TO BE
DEPUTY ATTORNEY GENERAL AND
ROBERT H. BORK TO BE SOLICITOR GENERAL

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS

FIRST SESSION

ON

NOMINATIONS OF JOSEPH T. SNEED, OF NORTH CAROLINA, TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK, OF CONNECTICUT, TO BE SOLICITOR GENERAL

JANUARY 17, 1973

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SENATOR TUNNEY. You would have advised the court against it or—

MR. BORK. I would have—it is a little hard to speak without putting it in an institutional context. If it were that kind of an important case I am sure the Solicitor General would confer with other members of the Justice Department about it. In that kind of conference I would have advised against urging a "one man, one vote" position. I would also have wished, whether my advice were accepted or not, to explain to the court that there were the following options, kinds of roads the court might take, and try to explain to the best of my ability what I considered to be the benefits or costs or detriments to each such option.

SENATOR TUNNEY. And that despite the fact that the Attorney General requested you to argue in favor of "one man, one vote?"

MR. BORK. I think I would say to the Attorney General at that time, "I will do so." I also would advise that we explain to the court, since we have an obligation to the court that a private litigant does not always have, that we explain to the court what some of the problems with that approach may be and what alternative approaches there might be.

SENATOR TUNNEY. Well, if a "one man, one vote" case should arise while you are the Solicitor General, would you file an amicus brief attempting to limit the doctrine of "one man, one vote" as enunciated by the court?

MR. BORK. I have not made any decision about it, Senator, in fact had not even thought about it. I do not think it is likely to come up because the court has on its docket this term reapportionment cases from all over the country, and I think it is a good guess that they intend to review that entire field. Whether they will confirm "one man, one vote" or move to some other position, I do not know.

SENATOR TUNNEY. Do you think that you could sign a brief that was inconsistent with your personal views?

MR. BORK. I think I can, Senator, and I know that I have.

SENATOR TUNNEY. I have other questions but I do not want to take the time if there are others who have questions.

SENATOR HRUSKA. Go ahead.

SENATOR TUNNEY. In an August 1963 New Republic article you opposed the enactment of the then proposed Interstate Public Accommodations Act. In a subsequent letter, you stated:

The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

In light of this statement of your beliefs, I would like to ask you a few questions about enforcement of the Civil Rights Act.

MR. BORK. Senator, may I—

SENATOR TUNNEY. Yes.

MR. BORK. I should say that I no longer agree with that article and I have some other articles that I no longer agree with. That happens to be one of them. The reason I do not agree with that article, it seems to me I was on the wrong tack altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and

I do not see any problem with the statute, and were that to be proposed today I would support it.

Senator MATHIAS. Would the Senator from California yield for just a minute in the light of his previous generous offer.

Senator TUNNEY. Yes.

Senator MATHIAS. I, unfortunately, have to leave the committee in a few minutes and I have just two or three very brief questions.

Let me say, first of all, that I was considerably encouraged and pleased by the colloquy between you and Senator Hart in which you stated your conviction, which is a conviction I share, that the Congress is still the repository of the power to decide the issue of war and peace. It is an important statement on your part and one that I welcome and applaud.

You said that this was just a general constitutional conviction on your part, not one that you had thought out in its tactical aspects and how it would be implemented. I would like to offer one possible means of implementing it, one that I certainly hope we will never resort to, one that I hope that the lubricant of goodwill that has kept the Government working for so long will prevent us from ever resorting to, but it is the simple act of one Chamber of the Congress, either the House or the Senate, failing to concur in an appropriation bill to supply the funds to continue hostilities.

It would seem to me, and I would like to ask you what your attitude would be, that this would simply be the end of it, if either the House or Senate did not approve an appropriation bill or did not act on it one way or the other.

Mr. BORK. Senator, I must say I really have not studied this aspect of the question at all. What we have, what the Senator had there, is that I was a discussant on a panel, and the panel was about the Cambodian incursion, and I was merely suggesting the range of powers that I thought the Constitution suggested were appropriate to the President, on the one hand, and the Congress, on the other, and I am afraid that is about as far into that field I have gone. Ultimately, I think, war or peace is for the Congress. I have not really thought about how, in varying situations, the Congress makes its will known if it wishes to.

Senator MATHIAS. I feel that as you enter the field you are on the right path and I walk with you.

I have only one other question to ask and it is are you currently of counsel in any active litigation?

Mr. BORK. I am currently an attorney for two plaintiffs in anti-trust cases in New Haven. I intend, if confirmed, to wind up my participation in those cases altogether very shortly.

Senator MATHIAS. Either to resign as counselor or—

Mr. BORK. In fact, I have filed a motion in one case to withdraw as counsel. The judge asked that I stay in for a while longer, and I thought it was proper to do so until confirmation or something of that sort occurred, because it is a case I started and had been the prime mover in it.

Senator MATHIAS. It would seem to me that it might be helpful to you for your protection as well as being of help to the committee to give us some official notice of the title of those cases, not at this point, but to supply it for the committee at some point.

Civil Rights—A Challenge

by Robert Bork

Passions are running so high over racial discrimination that the various proposals to legislate its manifestations out of existence seem likely to become textbook examples of the maxim that great and urgent issues are rarely discussed in terms of the principles they necessarily involve. In this case, the danger is that justifiable abhorrence of racial discrimination will result in legis-

lation by which the morals of the majority are self-righteously imposed upon a minority. That has happened before in the United States—Prohibition being the most notorious instance—but whenever it happens it is likely to be subversive of free institutions.

Instead of a discussion of the merits of legislation, of which the proposed Interstate Public Accommodations

Act outlawing discrimination in business facilities serving the public may be taken as the prototype, we are treated to debate whether it is more or less cynical to pass the law under the commerce power or the Fourteenth. An interesting and whether the Supreme Court is more likely to find a constitutional one way or the other. Here, then, there may sound to the constitutionally minded that the Constitution not the Supreme Court is the source of the principle. The discussion we court to hear is of the end in freedom that must be paid for such legislation, the morality of enforcing moral, the law, and the likely consequences for an enforcement of trying to do so.

Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified. Attorney General Kennedy appears to recognize but to wish to avoid these questions, for, in speaking on behalf of the bill before a congressional committee, he went so far as to state that the law would create no precedent. That of course is nothing less than an admission that he does not care to defend the bill on general principles.

There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. In part the willingness to overlook that loss of freedom arises from the feeling that it is irrational to choose associates on the basis of racial characteristics. Behind that judgment, however, lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a minority its scale of preferences. The fact that the coerced scale of preferences is said to be rooted in a moral order does not alter the impact upon freedom. In a society that purports to value freedom as an end in itself, the simple argument from morality to law can be a dangerous non sequitur. Professor Mark DeWolf Howe, in supporting the proposed legislation, describes southern opposition to "the nation's objective" as an effort "to preserve ugly customs of a stubborn people." So it is. Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are will-

ing to deal with them and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

Freedom is a value of very high priority and the occasions upon which it is sacrificed ought to be kept to a minimum. It is necessary that the police protect a man from assault or theft but it is a long leap from that to protection from the insult implied by the refusal of another individual to associate or deal with him. The latter involves a principle whose logical reach is difficult to limit. If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate. Indeed, it would be unfair discrimination to leave anybody engaged in any commercial activity with that right. Nor does it seem fair or rational, given the basic premise, to confine the principle to equal treatment of Negroes as customers. Why should the law not require not merely fair hiring of Negroes in subordinate positions but the choice of partners or associates in a variety of business and professional endeavors without regard to race or creed? Though such a law might presently be unenforceable, there is no distinction in principle between it and what is proposed. It is difficult to see an end to the principle of enforcing fair treatment by private individuals. It certainly need not be confined to racial or commercial matters. The best way to demonstrate the expansiveness of the principle behind the proposed legislation is to examine the arguments which are used to justify it.

Perhaps the most common popular justification of such a law is based on a crude notion of waivers: insistence that barbers, lunch counter operators, and similar businessmen serve all comers does not infringe their freedom because they "hold themselves out to serve the public." The statement is so obviously a fiction that it scarcely survives articulation. The very reason for the proposed legislation is precisely that some individuals have made it as clear as they can that they do not hold themselves out to serve the public.

A second popular argument, usually heard in connection with laws proposed to be laid under the Fourteenth Amendment, is that the rationale which required the voiding of laws enforcing segregation also requires the prohibition of racial discrimination by business licensed by any governmental unit because "state action" is involved. The only legitimate thrust of the

state action characterization, however, is to enable courts to see through governmental use of private organizations to enforce an official policy of segregation. There is a fundamental difference between saying that the state cannot turn out in primary election process, which is actually the case, to election that matters, to the private and all-white Democratic Party and saying that a state board has evened him and certified his certificate. The state action concept must be confined to disavowance of enforcement of policy through a nominally private agency or else it becomes possible to desert the hand of the state in every private action.

One of the shabbiest terms of "argument" is that endorsed by James Reston when he described the contest over the public accommodations bill as one between human rights and property rights. Presumably no one of liberal views has any difficulty deciding the question when so concisely put. One wishes nonetheless that Mr. Reston would explain just who has rights with respect to property other than humans. If A demands to deal with B and B insists that for reasons sufficient to himself he wants nothing to do with A, I suppose even Reston would agree that both are claiming "human rights" and that this is in no way changed if one of the humans is colored and the other white. How does the situation change if we stipulate that they are standing on opposite sides of a barber chair and that B owns it?

A number of people seem to draw a distinction between commercial relationships and all others. They feel justified, somehow, in compelling a rooming house owner or the proprietor of a lunch counter to deal with all comers without regard to race but would not legislate acceptance of Negroes into private clubs or homes. The rationale appears to be that one relationship is highly personal and the other is just business. Under any system which allows the individual to determine his own values that distinction is unsound. It is, moreover, patently fallacious as a description of reality. The very bitterness of the resistance to the demand for enforced integration arises because owners of many places of business do in fact care a great deal about whom they serve. The real meaning of the distinction is simply that some people do not think others ought to care that much about that particular aspect of their freedom.

One of the Kennedy administration's arguments for the bill is that it is necessary to provide legal redress in order to get the demonstrators out of the streets. That cannot be taken seriously as an independent argument. If southern white racists — or northern ones, for that matter — were thronging the streets, demanding complete segregation of commercial facilities, it is to be hoped that no responsible politician would suggest passing a law to enable them to enforce their demands



in court. In this connection, it is possible to be somewhat less than enthusiastic about the part played by "moral leaders" in participating in demonstrations against private persons who discriminate in choice of their patrons. It feeds the danger of the violence which they are the first to deplore. That might nevertheless be tolerable if they were demonstrating against a law that coerced discrimination. They are actually part of a mob coercing and distributing other private individuals in the exercise of their freedom. Their moral position is about the same as Carrie Nation's when she and her followers invaded saloons.

Though the basic objection is to the law's impact upon individual liberty, it is also appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country. Of what value is a law which compels service to Negroes without close surveillance to make sure the service is on the same terms given to whites? It is not difficult to imagine many ways in which barbers, landlords, lunch counter operators, and the like can nominally comply with the law but effectively discourage Negro patrons. Must federal law enforcement agencies become in effect public utility commissions charged with the supervision of the nation's business establishments or will the law become an unenforceable symbol of hypocritical righteousness?

It is sad to have to defend the principle of freedom in this context, but the task ought not to be left to those

southern politicians who only a short while ago were defending laws that enforced racial segregation. There seem to be few who favor racial equality who also persist or are willing to give primacy to the value of freedom in this struggle. A short while back the majority of the nation's moral and intellectual leaders opposed the manifestations of "McCarthyism" and did so correctly, advised the nation that the issue was not whether communism was good or evil but whether men ought to be free to think and talk as they pleased. Those same leaders seem to be running with the other pack this time. Yet the issue is the same. It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal

and associate with whom they please for whatever reasons appeal to them. This time "stubborn people" with "ugly customs" are under attack rather than intellectuals and academicians, but that sort of personal comparison surely ought not to make the difference.

The trouble with freedom is that it will be used in ways we abhor. It then takes great self-restraint to avoid sacrificing it, just this once, to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If, every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it.

Civil Rights—A Reply

The *New Republic's* commentary on civil rights over the years should make it obvious that the editors disagree emphatically with Mr. Bork's thesis. Yet his fears about the proposed legislation are shared by many Americans, including many readers of the *New Republic*, so they deserve both a forum and an answer.

In discussing the law we share Justice Holmes' preference for appeals to experience rather than logic. In the light of recent American experience Mr. Bork's argument seems to have several defects.

First, Mr. Bork speaks about the "freedom of the individual" as if the owners of hotels, motels, restaurants and other public accommodations were today legally free to serve whomever they please. This, as everyone knows, is seldom the case. For centuries English common law obligated innkeepers to accommodate any well-behaved traveller, and his horses. Most states have today embodied this tradition in public accommodation statutes. In the North, these statutes generally require a restaurant, hotel or motel to accept all sober and orderly comers, regardless of race. In the South, Jim Crow legislation enacted at the end of the nineteenth century until recently required the owners of public establishments to segregate their facilities. The Supreme Court has now declared the Jim Crow statutes unconstitutional, but even today the owner who wants to serve both Negroes and whites is likely to have difficulty exercising his newly acquired "right" in many areas. Mr. Bork would presumably deplore the whole tradition that "public accommodations" must provide public service as well as private profit. But he cannot maintain that new legislation in this field would mean a sudden increase of government intervention in private affairs. The Administration's civil rights bill would simply extend to the national level principles and practices

long employed locally.

Experience also argues against Bork's equation between the distress caused by having to serve a Negro and the distress caused by refusing to serve him. Both exist, and both deserve consideration, but no amount of rhetoric about freedom can give them equal weight. Despite what Mr. Bork says, the "loss of freedom" caused by having to serve Negroes is in most cases pecuniary, not personal. If personal freedom were to be protected we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. The fact is, however, that such people must serve whomever their employer tells them to serve, and refuse whomever he tells them to refuse. The right to segregate is, as everyone but Mr. Bork admits, a right deriving solely from title to property. It is neither more nor less sacrosanct than other economic privileges. It can be regulated in the same way that the right to build a restaurant on one's residential property is regulated.

There are, of course, some owners of public establishments who have personal contact with the clients—the much debated case of Mrs. Murphy's boarding house. Perhaps such establishments should be exempt from the proposed public accommodations law. But even here the claims of private freedom must be weighed against the claims of public convenience.

Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness. Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified. But to apply this principle in disregard of all others would today require the repeal of the industrial revolution. Perhaps, however, that is what Mr. Bork wants.

THE EDITORS

THE NEW REPUBLIC

old. For example, Albers, the Dutchman, is a man who, like a true American, has not been able to pursue the ecclesiastical path of the church, but simply has been a man of the world. We Americans, with our "freedom of expression," with our "freedom of thought," have not some of the same freedom of expression as regards to the church as Albers. The approach is not toward the church, but toward Nature, not toward a church to increase our perception of Nature.

In the old days, when classical logic was taken as a preparation for Aristotelian philosophy, there was a stock instance of the apprentice logician going home to dazzle his younger siblings with the baffling behavior of the logical paradox. More than any artist or any teacher, Josef Albers has explored and come to command the analogous field of visual paradox, and has used that command to teach color. The apprentices are dazzling the youngsters with the tools the master has made.

Despite its farcical reductions to a whole series of absurdities, the Bauhaus remains one of the great achievements of our time. Its greatness is affirmed not

by the lakeside apartments in Chicago, but by one's sudden exposure to such a mind as that of Albers. The old academic title, Doctor of Humane Letters, often misused, retains still something of the aspiration of those who devised it. In that sense Josef Albers has been a doctor of humane colors. As with many of his colleagues, we have been enriched by the master that brought him to us.

FRANK GETLEIN

Correspondence

Civil Rights - A Reminder

Sirs:

Your editorial reply to my article on the public accommodations bill ("Civil Rights - A Challenge," August 31) does not reveal whether you perceive in this case a principle which takes precedence over that of individual liberty, what it is, or why it should prevail. I gather that you feel strongly, but that is not enough. Until one is shown a competing principle, he may be excused his reluctance to sacrifice freedom.

A principle is required because a society which values freedom as well as democracy must face the task of defining those aspects of life in which the majority may properly coerce the individual through law and those in which it may not. Though your reply would indicate it, I find it hard to believe that you are really among those who require no license for coercion other than their own preferences (read "intense moral convictions," if you like). That would make numbers and strength of passion the sole principles of legislation. I think some better standard is both required and attainable. Its precise statement may be beyond our present capabilities, but I suggest that the proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

Your reply on the basis of "experience"

also seems deficient. The historical existence of common law, duties and local statutes paralleling the proposed federal law does not in any way demonstrate their wisdom, or that their principle ought to be extended. Even wider of the mark is your suggestion that personal freedom is not really involved because, if it were, we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. In fact, such persons have precisely that freedom. Your suggestion that they do not can only be supported by equating the individual employer, for whom the waitress need not work, with the government, which no citizen can escape. To employ such an equation is to confess inability to see the difference between a contract and a statute.

Insistence that title to property is involved in the right to discriminate with respect to its use advances the argument not one whit. One must certainly own a barber chair in order to refuse to let another man sit in it. But the discovery of something called "property" in the situation does not of itself render the desires of the titleholder inferior to those of every person lacking title. A question of personal freedom is inescapably involved and cannot be excused by calling it an "economic privilege" - not even if you say it three times.

Robert H. Bork
Yale Law School

Dropouts and the Draft

Sirs:

On August 17 you published a note, "Dropouts and the Draft." Let me start by analyzing some of the more dubious statements therein:

"Unlike schools, the Army is organized on the assumption that its recruits are dimwits."

Well, I don't know how long it has been since whoever dreamed that sentence up has been subjected to Army training but as of now the Army is organized for training on the basis that its average recruit has the intellectual level of a median high school sophomore or junior. Now while those are admittedly not Olympian heights, they are somewhat

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Bickel Professorship

On April 27, 1979, Robert H. Bork was inaugurated as the first Alexander M. Bickel Professor of Public Law. This professorship was created in memory of the late Sterling Professor of Law, a member of the faculty from 1936 to 1974. Following are Dean Wellington's introductory remarks preceding Professor Bork's Inaugural Address.

Introduction of Robert H. Bork

Harry H. Wellington

Alexander Bickel wrote *The Least Dangerous Branch* in the late nineteen fifties and early sixties when constitutional scholarship was—as every so often it is—concerned rather more with itself than with the Supreme Court of the United States. Besides working a major change in American society, the school desegregation case had forced students of the Court back to the fundamental questions of constitutional law: the justification for and scope of judicial review.

When scholarship turns to judicial review it is apt to turn quickly to prior scholarship, for Marshall's opinion in *Marbury v. Madison* raises more questions than it begins to answer. Shortly before Alex published, Judge Learned Hand had recorded his dissent to Marshall's opinion. Professor Herbert Wechsler had filed a concurrence rejecting the negativism of Hand and affirming the concept of the principled decision, and Professor Charles Black had written an affirmation of judicial review that today stands as the most compelling theoretical justification for the later work of the Warren Court.

Alex joined Wechsler in finding unpersuasive Hand's arguments against judicial review. For Alex, as for Charles Black, a functional analysis of American government was the most significant reason for subscribing to judicial review. The two diverged, however, on its scope. Bickel found Black's position dangerous: it gave the sovereign prerogative to the Court where the Court could not use it well. And he found fault with Wechsler, whose insistence upon neutral principles would force the Court to use its power when it could not use it well.

Recognizing that the Court is a court of law and accepting the thesis that when a court reaches the merits of a case it must decide in accordance with neutral principles, Alex wrote of the passive virtues, of the techniques for not deciding, when a decision would be improvident for the nation. His was a search for the flexibility necessary to make the enterprise work. Timing is important and so too is the dialogue between the Court and the more

democratic institutions of government.

What the Court holds, he maintained (following Lincoln), is not final in any important national sense until it is accepted by the political institutions and politicians over whom the people exercise control. We can profit from judicial review in a democracy, Alex believed, so long as we understand the limits of decisional law and have a Court composed of practical lawyer-scholars rather than wise philosopher-kings.

The Least Dangerous Branch was the first of several books (and there were many articles) in the main and high tradition of American legal scholarship. The corpus that is Bickel's presents a distinctive view of constitutional law. Make no mistake about it, no one can work in the field without taking account of this view, not even a beginning is possible, not a toe in the water.

It is plain to me that if one can say this about an academic's work, and also (as in Alex's case) that he was a superb teacher, one has given a full answer to the question that those thinking about law teaching for themselves should ask: What will satisfy me about what I have done professionally when it is over?

Of course, this magnificent achievement alone could never have satisfied Alex professionally. And, of course, there was much, much more in the way of professional accomplishments. Alex was the finest legal journalist of his day. There are hundreds of his pieces in the *New Republic*, signed, unsigned, long, short, trivial, and profound. For eighteen or so years he helped us to understand the day-to-day legal and political activity of our country. He wrote regularly for *Commentary*. There, he was generally more reflective and comprehensive. There, he wrote for the layman about the law with a degree of sophistication and clarity that no one I know has surpassed. It should be noted that Alex's article on Burke in the *New Republic* is perhaps the best short account of that great man's thought and that his First Amendment article in *Commentary* is among the truly important recent discussions of free expression.

Alex practiced his profession in the courts, writing briefs and arguing cases. His successful defense of the *New York Times* in the *Pentagon Papers* case is the best known example. He advised Congressmen and Presidents, drafted legislation, campaigned for Bobby Kennedy, helped write rules for the Democratic party, gave opinions to a press that had him on the phone for hours every week, and with it all he practiced still another learned and distinct profession. Alex was an historian, who did orig-

as well as in his teaching and conversation. This does not mean that his approach was not consistent over time. It was. But because he was not frozen into a system, because he believed in the central importance of circumstance, the limited range of principles, the complexity of reality, he learned and evolved. It is impossible to give a snapshot of his philosophy. It was moving, deepening, to the end of his life.

I have said enough of the difficulties of summing up Bickel's intellectual legacy. Now, having assured you of the futility of the attempt, I will undertake it.

I should say at the outset that, though Alex Bickel has no greater admirer, I will occasionally disagree with him. It would be no compliment to the memory of an intellectually honest and alive man to treat his work as a shrine. Alex is not a monument; he is a living intellectual force and he must be dealt with in those terms. That is what he would have demanded.

Political morality and governance were the central subject of all of Alex's thought and writing, and central to that, or at least the beginning point for that, was the role of the federal judiciary, most particularly the role of the Supreme Court of the United States.

The problem, of course, the problem with which all constitutional lawyers must grapple, is the legitimacy of judicial review—the power of the Court to set aside and nullify the choices of elected representatives—and the proper use of that power. The problem is created by the fact that our political ethos has been, and largely remains, majoritarian, but the Court is countermajoritarian, not democratic, not elected, and not representative, yet purporting to have the final say in our governance. The problem becomes acute when the Court undertakes to impose principles that are not fairly to be found in the Constitution. These are currently called trans-textual principles, a concept the least of whose difficulties is that it requires careful pronunciation.

Bickel addressed that problem repeatedly, and, if I do not think he achieved an entirely successful resolution of it, his effort was a triumph in many ways. He stated the problem with a clarity that has not been achieved elsewhere. In the course of his argument he provided a series of dazzling insights that are a major and lasting contribution to our understanding of a variety of legal doctrines. This may be viewed as his technical legacy, and that alone is sufficient to ensure his place in legal thought. But the significant thing is that Alex's scholarship, while it was magnificent about technical law, was never merely technical. He

enlarged our understanding by relating what seems to be law only a lawyer could love to much larger themes, the role of courts in a democracy or the egalitarian trend of western political thought. The essence of his genius, or the aspect that most impressed me, was his ability to see connections between ideas that everyone else thought separate and discrete.

It is to be said, moreover, that Alex laid down the lines of the arguments that defenders of a Court that assumes broad extra constitutional powers find it wise to adopt today. But we must not be misled by that. Alex was no friend of what has become known as judicial activism or imperialism. He relied upon a tradition of restraint and modesty to curb the judicial appetite for power. Many of those who adopt his other arguments today leave that element out and thus welcome far more judicial activism than Bickel thought we ought to tolerate.

Consistently with what he later called the Whig political tradition, Bickel placed steady and heavy weight upon the importance of political democracy, and, at the outset, rejected a common line of defense of an activist Court. This defense proceeds by arguing that our majoritarian processes are in reality not very majoritarian, that we are governed by evanescent coalitions of minorities, so that the anti-democratic aspects of judicial rule are not that important.

It remains true, nevertheless, he said, that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command a vote of a majority of individuals in the electorate. [N]othing can finally deprecate the central function that is assigned in democratic theory and practice to the electoral process, nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."

He justified judicial review on the ground that courts could introduce into our political processes something of great value that the legislature and the executive could not. The formulation and application of enduring principles. Judges are uniquely fitted for this function, he wrote, because they "have, or should have, the leisure, the training, and the inclination to follow the ways of the scholar in pursuing the ends of government."

(We need not pause to remember what we know of the ways of scholars when called upon to engage in governance of institutions far smaller and simpler than the United States.)

The mix of judicial principle and democratic expediency were important, for, as Bickel said, "No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise; it it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden."

The Court must, therefore, live in a constant tension between the equally legitimate demands of principle and of expediency. And it is here, on this subject, that Bickel's technical work is most subtle, most exciting, and most provocative. The Court can maintain itself in this tension, avoiding both ruinous confrontation with the political branches and abdication in their favor, by techniques of not deciding cases, techniques he called "the passive virtues." He analogized the Court's position to Lincoln's. Lincoln knew that slavery was wrong, that it must ultimately be ended, but he also wanted the Union preserved, and so, while he refused to attack the institution head on, he also refused to accept principles or compromises that ratified it. So the Court, according to Bickel, can temporize, as Lincoln had, by masterful use of doctrines such as standing, ripeness, political question, and, of course, the power to deny certiorari, until the time came to announce the principle to which it has been helping to lead us.

A problem arises here. If the Court is leading us toward a principle that it honestly believes located in the Constitution, these techniques are entirely legitimate. But if it is leading us toward something else, toward principles that do not in some real sense come out of the Constitution, the problem of legitimate authority has not been solved. I think Alex. at least in his early writing, meant both things. *Brown v. Board of Education* could, of course, be said to come out of the Constitution. The Court could legitimately work toward a flat rule of non-discrimination without announcing it until the society could be brought to accept it. Judicial abolition of the death penalty, on the other hand, a penalty whose legitimacy the document explicitly assumes, cannot be reconciled with the Constitution. In 1962, at least, Bickel thought both decisions proper ones for the Court to work toward. And there I disagree.

He tried to tame the anti-democratic thrust of this position with a series of qualifications. The Justices of the Court are not to derive principles from their own sympathies or politics; rather they are to discover and enforce the "fundamental presuppositions of our society" from the "evolving morality of our tradition." Moreover, they must not anticipate that

evolution too much, but must declare as supreme law only that which "will—in time, but a rather immediate foreseeable future—gain general assent."

This is a modest, pragmatic role, and the process is further saved from being hopelessly counter-majoritarian because the Court is not ultimately allpowerful. "The Supreme Courts law . . ." Bickel said, "could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only."

It is a powerful argument delivered with great erudition and persuasiveness, and I am fortified in my conclusion that it does not ultimately persuade by the fact that in later work Bickel seemed to concede its limitations.

The argument leaves it unclear why democratic institutions must accept from the Court, even provisionally, more principle of different kinds of principle than the democratic process generates—including in that the principles that have been placed in the Constitution itself by super-majorities.

No reason appears why the Court should lead the society at all, certainly not to the point where it is safe to announce as law that which society will come to accept. We may say much that we would not freely choose simply because the Court tells us it is, in truth, to be found in the basic document of our nation, or because there are strong political constituencies that support the outcome, though they could not attain it democratically themselves, or because we have few ways to fight back that would not damage the Court in ways we do not wish. Its vulnerability is the Court's protection and hence a source of its power.

One may doubt as well that there are "fundamental presuppositions of our society" that are not already located in the Constitution but must be placed there by the Court. These presuppositions are likely, in practice, to turn out to be the highly debatable political positions of the intellectual classes. What kind of a "fundamental presupposition of our society" is it that cannot command a legislative majority?

The Court has, in fact, turned out to be final in many more instances than Bickel thought it should. Effective political opposition has not been mustered to its most unpopular

This undated note was
tipped to Irving Kristol
by Alex Bickel at a
conference: "What this
man said reminds me
of a proud moment.
Bob Bork said the other
week in a class we give
together that my judi-
cial philosophy is a
combination in unequal
parts of Edmund Burke
and Fidler on the
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This approach, this habit of mind, which Bickel calls conservative, is apparent in him from first to last, from the time when his political views can only be called liberal to the time when they can appropriately be called conservative. There is a distinction between a conservative process of thought and the location on the spectrum of one's substantive views, and the question whether one tends to produce the other is too complex and too far from my subject to be pursued.

But, to use Bickel's terminology, he thought, and I agree with him, that the Whig-conservative way of thinking is essential to good politics, hence to good law, hence to good lawyers, hence to good law schools. If one were to look for a model of such thought, it is to be found, for example, in *The Federalist Papers*. If one were to look for the antithesis of it, it would be in much of the highly abstract, philosophic writing and thinking now enjoying something of a vogue in some major law schools.

Here, I think, we are close to the central legacy of Alex Bickel. He left us an example, in print and in person, of what it is not merely to be a great lawyer, nor again merely to be a great constitutional lawyer, but to be a great constitutionalist. He taught us to see the marvelous complexity of our law and our society and their innumerable relations. He taught us how to engage in reform and change, how to decide what to keep and what to discard.

That is one reason he tended to be hostile to structural reform such as one man-one vote, the abolition of the electoral college, and all

tinkerings with structural features of government. "The institutions of a secular, democratic government," he wrote, "do not generally advertise themselves as mysteries. But they are. What they do, how they do it, or why it is necessary to do what they do is not always outwardly apparent. Their actual operation must be assessed often in sheer wonder, before they are tinkered with, lest great expectations be not only defeated, but mocked by the achievement of their antithesis."

Before he died he began to worry that revulsion to the complex events summed up in the word "Watergate" would lead to a wave of reform that could do enormous damage to political institutions. He was right to worry. The Federal Election Campaign Act, the spread of presidential primaries, the involvement of the judiciary in foreign intelligence, the diminution of the Presidency, already a weak office, and many other "reforms" have been accomplished with a light-headedness that amounts almost to triviality. They will have and are having totally unanticipated and undesirable results. The same willingness to tinker with structure in order to achieve minor or even symbolic ends accounts for the movements to amend the Constitution. Thus, ERA, the amendment to give the District of Columbia the status of a state in Congress, and the movement to abolish the electoral college all rest on inadequate constitutional thought.

Alex's insight flowed from his organic view of society. The nostrums of ignorant physicians have unintended and potentially disas-

trous consequences. It is no accident that one of Alex's favorite sayings was, "Unless it is necessary to change, it is necessary not to change." He often spoke for reform but only after thinking long, and thinking a second and a third time. He left us far more sophisticated about, and respectful of, established ways and institutions than he found us.

But he did more than that. He taught us again a style, an angle of attack, a temper and mode of thought which is, I believe, essential to the health of representative government and its institutions.

Alex contrasted his own mode of thought with that of the social contractarians. In truth, the contrast may be more properly with thinkers who love systems and transcendental principles. He had the greatest aversion to them, and not merely because he thought, in my view rightly, that they were impossible to construct logically, but also because he thought them ultimately inhuman and therefore pernicious. The ultimate principles will never be found by the legal philosophers because they do not exist, and the attempt to frame them must necessarily become so abstract that much which is valuable and human is left out.

This might be all right if system-building were only an academic exercise. But it never is, and particularly not when it is engaged in by lawyers. It is meant to guide decision, which means that real men and women must be bent or trimmed to fit the abstractions, not the other way around. The morality or comprehensive systems tends to be manipulative and destructive because it must reduce life to its own terms or admit intellectual error, which, to a person who has committed everything to a speculative enterprise, is to admit ultimate failure. That is something intellectuals rarely do.

This habit of thought infects the courts and encourages them to think that law is unimportant. Alex was content with what he called "principles in the middle distance," principles that incorporate the values we have now, which are of limited range, which will change over time, which collide with and contradict one another and which must be adjusted, compromised, and refined in their application, and all this must be done in the full knowledge that the result is impermanent and all is to be done again. To know that and nevertheless to devote one's life and full energies to the task is intellectual and moral valor. It is to accept mortality in a way that the seekers of abstract systems do not.

Some of this is what Alex meant when, in speaking on the question "what is happening to morality today?" he answered, "It threatens

to engulf us." He meant that abstractions and moral imperatives as guides to action would make life intolerable. The politics of compromise and adjustment makes everything else possible. "Without it," he wrote, "in the stark universe of imperatives, in the politics of ideal promises and inevitable betrayals, justice is not merely imperfect . . . but soon becomes injustice."

The institutions and the secular religion of the American republic are our best chance for happiness and safety. And it is precisely these that are weakened and placed in jeopardy by the habit of abstract philosophizing about the rights of men or the just society. Our institutions are built for humans, they incorporate and perpetuate compromise. They slow change, tame it, deflect and modify principles as well as popular simplicities. And in doing that they provide safety and the mechanism for a morality of process. It follows that real institutions can never be as pure as abstract philosophers demand, and their philosophy must always teach the young a lesson in derogation of institutions for that reason. That is a dangerous lesson for a republic.

Alex was appalled by the first manifestations of the abstract, philosophical style in legal scholarship. Had he lived to see its proliferation in the law schools today, he would have attacked it with a ferocity it gives me pleasure to contemplate even hypothetically.

In one of his last articles, "Watergate and the Legal Order," he wrote: "The Watergate scandal is a challenge to the institutional imperatives and transcendental moralities. There is danger in the way we are moving. Walter Bagehot wrote:

The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created.

It was Alex's constant attempt to understand and to make us understand the great institutions of constitutional government we have created. Whether or not we will remains to be seen. Alex's death, perhaps, makes it less likely that we will.

George F. Will wrote a column shortly after Alex died:

Hell, Hobbes said, is truly seen too late. Republics—at least finite republics—can be saved from annihilation by a few constitutionalists like Bickel. But threats to republics are many and constant. Great institu-

Note on Judge Bork's 1963 New Republic Article,
"Civil Rights--A Challenge"

In 1963 Judge Bork, then a new member of the Yale Law School faculty, wrote an article in the New Republic criticizing proposed public accommodations legislation that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior. This twenty-five year old article cannot legitimately be cited as a reason not to confirm Judge Bork.

Ten years later, at his confirmation hearings for the position of Solicitor General, Judge Bork acknowledged that his position had been wrong:

I should say that I no longer agree with that article....It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it.

The article was not even raised during his unanimous confirmation to the D.C. Circuit ten years later, in 1982.

Judge Bork's article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument...."

Civil Rights—A Challenge

by Robert Bork

Passions are running so high over racial discrimination that the various proposals to legislate its manifestations out of existence seem likely to become textbook examples of the maxim that great and urgent issues are rarely discussed in terms of the principles they necessarily involve. In this case, the danger is that justifiable abhorrence of racial discrimination will result in legis-

lation by which the morals of the majority are self-righteously imposed upon a minority. That has happened before in the United States—Prohibition being the most notorious instance—but whenever it happens it is likely to be subversive of free institutions.

Instead of a discussion of the merits of legislation, of which the proposed Interstate Public Accommodations

in outlawing discrimination in business facilities seems to me to put it more to be taken as the prototype, we are treated to debate whether it is more or less cynical than the law under the commerce power or the Fourteenth Amendment, and whether the Supreme Court is more likely to find a constitutional one way or the other. Hence, the question may round to the constitutionality of the legislation not the Supreme Court but the basic principle. The discussion we have just had is of the freedom that must be maintained by legislation, the morality of enforcing racial segregation laws, and the likely consequences for the enforcement of trying to do so.

Few proponents of legislation such as the Interstate Commerce Accommodations Act seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified. Attorney General Kennedy appears to recognize but to wish to avoid these questions, for, in speaking on behalf of the bill before a congressional committee, he went so far as to state that the law would create no precedent. That of course is nothing less than an admission that he does not care to defend the bill on general principles.

There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. In part the willingness to overlook that loss of freedom arises from the feeling that it is irrational to choose associates on the basis of racial characteristics. Behind that judgment, however, lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a minority its scale of preferences. The fact that the coerced scale of preferences is said to be rooted in a moral order does not alter the impact upon freedom. In a society that purports to value freedom as an end in itself, the simple argument from morality to law can be a dangerous non sequitur. Professor Mark DeWolf Howe, in supporting the proposed legislation, describes southern opposition to "the nation's objective" as an effort "to preserve ugly customs of a stubborn people." So it is. Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are will-

ing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

Freedom is a value of very high priority and the occasions upon which it is sacrificed ought to be kept to a minimum. It is necessary that the police protect a man from assault or theft but it is a long leap from that to protection from the insult implied by the refusal of another individual to associate or deal with him. The latter involves a principle whose logical reach is difficult to limit. If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate. Indeed, it would be unfair discrimination to leave anybody engaged in any commercial activity with that right. Nor does it seem fair or rational, given the basic premise, to confine the principle to equal treatment of Negroes as customers. Why should the law not require not merely fair hiring of Negroes in subordinate positions but the choice of partners or associates in a variety of business and professional endeavors without regard to race or creed? Though such a law might presently be unenforceable, there is no distinction in principle between it and what is proposed. It is difficult to see an end to the principle of enforcing fair treatment by private individuals. It certainly need not be confined to racial or commercial matters. The best way to demonstrate the expansiveness of the principle behind the proposed legislation is to examine the arguments which are used to justify it.

Perhaps the most common popular justification of such a law is based on a crude notion of waivers: insistence that barbers, lunch counter operators, and similar businessmen serve all comers does not infringe their freedom because they "hold themselves out to serve the public." The statement is so obviously a fiction that it scarcely survives articulation. The very reason for the proposed legislation is precisely that some individuals have made it as clear as they can that they do not hold themselves out to serve the public.

A second popular argument, usually heard in connection with laws proposed to be laid under the Fourteenth Amendment, is that the rationale which required the voiding of laws enforcing segregation also requires the prohibition of racial discrimination by business licensed by any governmental unit because "state action" is involved. The only legitimate thrust of the

state action characteristic, however, is to enable courts to see through governmental use of private organizations to enforce an official policy of segregation. There is a fundamental difference between saying that the state cannot turn over its primary election process, which is crucial to the election of state matters, to the private and lawless Democratic Party and saying that a state board refuse a Negro patient because a state board has examined him and certified his competence. The state action concept must be confined to governmental enforcement of policy through a nominally private agency or else it becomes possible to deliver the hand of the state in every private action.

One of the shabbiest forms of "argument" is that endorsed by James Reston when he described the contest over the public accommodations bill as one between "human rights" and "property rights." Presumably no one of "liberal" views has any difficulty deciding the question when so concisely put. One wishes nonetheless that Mr. Reston would explain just who has rights with respect to property other than humans. If A demands to deal with B and B insists that for reasons sufficient to himself he wants nothing to do with A, I suppose even Reston would agree that both are claiming "human rights" and that this is in no way changed if one of the humans is colored and the other white. How does the situation change if we stipulate that they are standing on opposite sides of a barber chair and that B owns it?

A number of people seem to draw a distinction between commercial relationships and all others. They feel justified, somehow, in compelling a rooming house owner or the proprietor of a lunch counter to deal with all comers without regard to race but would not legislate acceptance of Negroes into private clubs or homes. The rationale appears to be that one relationship is highly personal and the other is just business. Under any system which allows the individual to determine his own values that distinction is unsound. It is, moreover, patently fallacious as a description of reality. The very bitterness of the resistance to the demand for enforced integration arises because owners of many places of business do in fact care a great deal about whom they serve. The real meaning of the distinction is simply that some people do not think others ought to care that much about that particular aspect of their freedom.

One of the Kennedy administration's arguments for the bill is that it is necessary to provide legal redress in order to get the demonstrators out of the streets. That cannot be taken seriously as an independent argument. If southern white racists - or northern ones, for that matter - were thronging the streets, demanding complete segregation of commercial facilities, it is to be hoped that no responsible politician would suggest passing a law to enable them to enforce their demands



in court. In this connection, it is possible to be somewhat less than enthusiastic about the part played by "moral leaders" in participating in demonstrations against private persons who discriminate in choice of their patrons. It feeds the danger of the violence which they are the first to deplore. That might nevertheless be tolerable if they were demonstrating against a law that coerced discrimination. They are actually part of a mob coercing and distributing other private individuals in the exercise of their freedom. Their moral position is about the same as Carrie Nation's when she and her followers invaded saloons.

Though the basic objection is to the law's impact upon individual liberty, it is also appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country. Of what value is a law which compels service to Negroes without close surveillance to make sure the service is on the same terms given to whites? It is not difficult to imagine many ways in which barbers, landlords, lunch counter operators, and the like can nominally comply with the law but effectively discourage Negro patrons. Must federal law enforcement agencies become in effect public utility commissions charged with the supervision of the nation's business establishments or will the law become an unenforceable symbol of hypocritical righteousness?

It is sad to have to defend the principle of freedom in this context, but the task ought not to be left to those

southern politicians who only a short while ago were defending laws that enforced racial segregation. There seem to be few who favor racial equality who also persist or are willing to give primacy to the value of freedom in this struggle. A short while back the majority of the nation's moral and intellectual leaders opposed the "moral crusade" of "McCarthyism" and did not hesitate to tell the nation that the issue was not whether our nation was good or evil but whether men ought to be free to think and to act as they pleased. These same leaders seem to be running with the other pack this time. Yet the issue is the same. It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal

and associate with whom they please for whatever reasons appeal to them. This time "stubborn people" with "ugly customs" are under attack rather than intellectuals and academicians, but that sort of personal comparison surely ought not to make the difference.

The trouble with freedom is that it will be used in ways we abhor. It then takes great self-restraint to avoid sacrificing it just this once to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If, every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it.

Civil Rights—A Reply

The *New Republic's* commentary on civil rights over the years should make it obvious that the editors disagreed emphatically with Mr. Bork's thesis. Yet his fears about the proposed legislation are shared by many Americans, including many readers of the *New Republic*, so they deserve both a forum and an answer.

In discussing the law we share Justice Holmes' preference for appeals to experience rather than logic. In the light of recent American experience Mr. Bork's argument seems to have several defects.

First, Mr. Bork speaks about the "freedom of the individual" as if the owners of hotels, motels, restaurants and other public accommodations were today legally free to serve whomever they please. This, as everyone knows, is seldom the case. For centuries English common law obligated innkeepers to accommodate any well-behaved traveller, and his horses. Most states have today embodied this tradition in public accommodation statutes. In the North, these statutes generally require a restaurant, hotel or motel to accept all sober and orderly comers, regardless of race. In the South, Jim Crow legislation enacted at the end of the nineteenth century until recently required the owners of public establishments to segregate their facilities. The Supreme Court has now declared the Jim Crow statutes unconstitutional, but even today the owner who wants to serve both Negroes and whites is likely to have difficulty exercising his newly acquired "right" in many areas. Mr. Bork would presumably deplore the whole tradition that "public accommodations" must provide public service as well as private profit. But he cannot maintain that new legislation in this field would mean a sudden increase of government intervention in private affairs. The Administration's civil rights bill would simply extend to the national level principles and practices

long employed locally.

Experience also argues against Bork's equation between the distress caused by having to serve a Negro and the distress caused by refusing to serve him. Both exist, and both deserve consideration, but no amount of rhetoric about freedom can give them equal weight. Despite what Mr. Bork says, the "loss of freedom" caused by having to serve Negroes is in most cases pecuniary, not personal. If personal freedom were to be protected we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. The fact is, however, that such people must serve whomever their employer tells them to serve, and refuse whomever he tells them to refuse. The right to segregate is, as everyone but Mr. Bork admits, a right deriving solely from title to property. It is neither more nor less sacrosanct than other economic privileges. It can be regulated in the same way that the right to build a restaurant on one's residential property is regulated.

There are, of course, some owners of public establishments who have personal contact with the clients—the much debated case of Mrs. Murphy's boarding house. Perhaps such establishments should be exempt from the proposed public accommodations law. But even here the claims of private freedom must be weighed against the claims of public convenience.

Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness. Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified. But to apply this principle in disregard of all others would today require the repeal of the industrial revolution. Perhaps, however, that is what Mr. Bork wants.

THE EDITORS

THE NEW REPUBLIC

For example, suppose the European artist had been a native-born American, that he had grown up inside the electric and mechanical culture, but somehow he had been able to work with the same freedom as the European. He would have been able to put out some of the same work that we have seen in the past. The approach is not to be taken as a means to increase our perception of Nature.

In the old days, when classical logic was still a preparation for Aristotelian philosophy, there was a stock instance of the apprentice artisan going home to teach his younger siblings with the banking behavior of the logical paradox. More than any artist or any teacher, Josef Albers has explored and taught the command the analogous kind of paradox and has used that command to teach color. The apprentices are dazzling the youngsters with the stock the master has made.

Despite its farcical reductions to a whole series of absurdities, the Bauhaus remains one of the great achievements of our time. Its greatness is affirmed not

by the tower of apartments in Chicago but by the sudden exposure to such a mind as that of Albers. The old academic title, Doctor of Humane Letters, often misused, retains still something of the aspiration of those who devised it. In that sense Josef Albers has been a doctor of humane colors. As with many of the great masters, we have been enriched by the mastery that brought him to us.

FRANK GETLEIN

Correspondence

Civil Rights - A Reminder

Sirs:

Your editorial reply to my article on the public accommodations bill ("Civil Rights - A Challenge," August 31) does not reveal whether you perceive in this case a principle which takes precedence over that of individual liberty, what it is, or why it should prevail. I gather that you feel strongly, but that is not enough. Until one is shown a competing principle, he may be excused his reluctance to sacrifice freedom.

A principle is required because a society which values freedom as well as democracy must face the task of defining those aspects of life in which the majority may properly coerce the individual through law and those in which it may not. Though your reply would indicate it, I find it hard to believe that you are really among those who require no license for coercion other than their own preferences (read "intense moral convictions," if you like). That would make numbers and strength of passion the sole principles of legislation. I think some better standard is both required and attainable. Its precise statement may be beyond our present capabilities, but I suggest that the proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

Your reply on the basis of "experience"

also seems deficient. The historical existence of common law duties and local statutes paralleling the proposed federal law does not in any way demonstrate their wisdom, or that their principle ought to be extended. Even wider of the mark is your suggestion that personal freedom is not really involved because, if it were, we would need legislation allowing individual waitresses, hotel clerks, and charwomen to decide whom they would serve and whom they would not. In fact, such persons have precisely that freedom. Your suggestion that they do not can only be supported by equating the individual employer, for whom the waitress need not work, with the government, which no citizen can escape. To employ such an equation is to confess inability to see the difference between a contract and a statute.

Insistence that title to property is involved in the right to discriminate with respect to its use advances the argument not one whit. One must certainly own a barber chair in order to refuse to let another man sit in it. But the discovery of something called "property" in the situation does not of itself render the desires of the titleholder inferior to those of every person lacking title. A question of personal freedom is inescapably involved and cannot be exorcised by calling it an "economic privilege" - not even if you say it three times.

Robert H. Bork
Yale Law School

Dropouts and the Draft

Sirs:

On August 17 you published a note, "Dropouts and the Draft." Let me start by analyzing some of the more dubious statements therein:

"Unlike schools, the Army is organized on the assumption that its recruits are dimwits."

Well, I don't know how long it has been since whoever dreamed that sentence up has been subjected to Army training but as of now the Army is organized for training on the basis that its average recruit has the intellectual level of a median high school sophomore or junior. Now while those are admittedly not Olympian heights, they are somewhat

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